



April 13, 2011

Executive Summary

“O” Nonimmigrant Visas - Agents as Petitioners Stakeholder Teleconference

Background

On March 24, 2011, the USCIS Service Center Operations Directorate (SCOPS) and the Office of Public Engagement (OPE) hosted a teleconference regarding the subject of agents performing the function of employer for the “O” nonimmigrant visa classification. The purpose of the session was to present an overview of the regulatory requirements for agents who are filing as petitioners, provide a description of the contracts and itineraries required, and address topics suggested by stakeholders in advance of the teleconference. The session was for USCIS to provide information and address questions from individual stakeholders.

Prior to the teleconference, USCIS updated the [O-1 Visa: Individuals with Extraordinary Ability or Achievement](#) page and the related [O Nonimmigrant Classifications Questions and Answers](#) document on its website. The latest Questions and Answers provide expanded information about evidentiary requirements for agents filing as petitioners.

Below is a summary of USCIS’ ongoing work in the O visa category during the past year:

- May/June 2010 – USCIS completed a Cross Center Review (CCR) on the O-1 Visa Classification. This CCR initiated a more detailed review of agents filing as petitioners in the O-1 visa classification.
- July 2010 – USCIS revised its O webpage to provide a more detailed description of contracts and itineraries and also the regulatory requirements for agents filing as petitioners. OPE shared this webpage update with stakeholders.
- Late summer/early fall 2010 – USCIS provided narrowly tailored Requests for Evidence (RFEs) and Notices of Intent to Deny (NOIDs) specifically addressing agents filing as petitioners and contract and itinerary requirements so that petitioners could meet the regulatory threshold requirements. In addition to other applicable deficiencies, the RFEs and NOIDs specifically request documentation to show that actual work exists and is not speculative. INA 101(a)(15)(O) states that the O-1 visa classification is for an alien who “seeks to enter the United States to continue work in the area of extraordinary ability”

and INA 214(c) indicates there must be an importing employer. The O-1 visa classification is not intended for speculative work. When USCIS has received documentation that is responsive to the RFE and/or NOID and establishes by a preponderance of the evidence eligibility for the O classification, USCIS has approved the petition.

Discussion Topics

Agents in General

The regulation at 8 CFR 214.2(o)(2)(iv)(E) allows agents to file as a petitioner in the following scenarios:

- A U.S. agent can file for traditionally self-employed workers, or workers who use agents to arrange short-term employment with numerous employers; or
- A U.S. agent can file on behalf of a foreign employer who authorizes the agent to act on his/her behalf.

A U.S. agent may be:

- The actual employer of the beneficiary;
- The representative of both the employer and the beneficiary; or
- A person or entity authorized by the employer to act for, or in place of, the employer as its agent.

A petition filed by an agent is subject to additional evidentiary requirements under 8 CFR 214.2(o)(2)(iv)(E). The evidentiary requirements depend on whether the agent is filing as an agent performing the function of an employer; as a person or company in business as an agent and filing for multiple employers; or as an agent for a foreign employer.

General Contract Requirement

The regulation at 8 CFR 214.2(o)(2)(ii), which applies to all O petitions, requires a copy of any written contract between the petitioner and the beneficiary or, if a written contract does not exist, a summary of the terms of the oral agreement under which the beneficiary will work.

USCIS will accept an oral agreement as evidenced by the summation of the elements of the oral agreement. This evidence may include but is not limited to:

- emails between the contractual parties;
- a written summation of the terms of the agreement; or
- any other evidence demonstrating that an oral agreement was entered into.

The summary of the terms of the oral agreement must contain:

- what was offered by the petitioner; and
- what was accepted by the beneficiary.

The summary does not need to be signed by both parties to establish the oral agreement. However, it must document the terms of which the beneficiary will be coming to United States to work and that the beneficiary has agreed to that offer.

General Itinerary Requirement

The regulation at 8 CFR 214.2(o)(2)(ii), which applies to all O petitions, states that an explanation of the nature of the events or activities, the beginning and ending dates for the events or activities, and a copy of any itinerary for the events or activities, if applicable, are required. The petitioner must establish that there are events or activities in the beneficiary's field of extraordinary ability for the validity period requested (e.g. an itinerary for a tour or a series of events). It is important to note that if services will be performed by the beneficiary in more than one location, an itinerary with the dates and locations of work must be included. In cases where an itinerary is required, under the general O provisions, or under those specific to agents, USCIS provides some flexibility in determining if the itinerary requirement has been satisfied.

Some stakeholders requested general clarification on whether it is necessary to submit an amended petition based on a change to an itinerary. The regulations provide that a petitioner may add additional performances, events, or competitions for an O petition without the requirement of filing an amended petition. The July 20, 2010 memo on "O Petition Validity" also explains that the regulations allow a petition to be approved to cover not only the actual event or events but also services and/or activities in connection with that event or events.

Agents Performing the Function of an Employer

Contract requirement: A Form I-129 filed by an agent performing the function of an employer must include the contractual agreement between the agent and the beneficiary. This contractual agreement must specify the wage offered and other terms and conditions under which the beneficiary will work. This can be a written contract or summary of the terms of the oral agreement if a written contract does not exist.

The petition must be submitted with evidence regarding the wage offered and it should clearly lay out how the beneficiary will be paid. It is important to note that the regulations do not contain a prevailing wage requirement and therefore no particular wage structure is required. A detailed description of the wage offered or fee structure and that the wage offered or fee structure was agreed upon may satisfy this requirement.

USCIS relies on the contractual agreement (whether written or a summary of the terms of the oral agreement) that must be provided with the petition to determine whether the agent is functioning as the employer of the beneficiary. As the petitioner, it is important to indicate that you are filing as an agent performing the function of an employer and substantiate that claim with a detailed description of the terms and conditions of the agreement. The contractual agreement should establish the type of working relationship between the agent and beneficiary. If the terms and conditions of the contractual agreement show a level of control over the beneficiary's work being relinquished to the agent, then the agent may establish that it is performing the function of an employer. This determination will be on a case by case basis. A

contract is not required between the beneficiary and the entities that will ultimately use the beneficiary's services when the petition is filed by an agent that has established that it is performing the function of an employer.

Itinerary requirement: A petition which requires the alien to work in more than one location must include an itinerary with the dates and locations of work. There is no exception to this regulatory requirement. When an itinerary is required by regulation, USCIS relies upon the itinerary, in addition to other evidence, to make a determination on whether actual work exists for a beneficiary that will be placed at multiple work sites and how much time is necessary for the beneficiary to complete the event(s).

Some stakeholders requested clarification on whether the submission of contracts, which contain specific information on an artist's performances and obligations, will satisfy the itinerary requirement. As discussed, the itinerary requirement helps to ensure that the beneficiary is coming to the United States for actual and not speculative work. USCIS will normally take into account industry standards when determining whether the itinerary requirement has been met; and while each determination is fact specific, an itinerary is not required to take on a specific form. The regulations contain minimum documentary evidence for all O-1 petitions – the petition must be submitted with an explanation of the nature of the events or activities, the beginning and end dates for the events or activities, and a copy of any itinerary. As such, the itinerary should at a minimum indicate what type of work the beneficiary will be engaged, where, and when this work will take place.

It is not expected that every engagement would be included in the itinerary but rather, each engagement with the outside entity that will ultimately use the beneficiary's service, would be provided with an estimated beginning and end date and general location indication. For example, in the modeling context, a document indicating that the model will be modeling on numerous occasions for a specific designer beginning in March and ending in September may suffice.

Agents for Multiple Employers

Contract requirement: These agents must submit the contract between the petitioner (agent) and the beneficiary and contracts between the beneficiary and the entities for which the beneficiary will work.

The contract between the "traditionally self-employed" beneficiary and those entities with which the beneficiary is contracted to work for provides USCIS with evidence that actual work exists and the O-1 alien is coming to the United States to continue to work in his or her field of extraordinary ability. This is important because an O worker cannot "self-petition" and the employment cannot be speculative.

USCIS will accept either a written contract or a summary of an oral agreement if a written contract does not exist. If an oral agreement was entered into, the summary does not have to be signed by both parties to establish that there is an oral agreement. However, it must document the terms under which the beneficiary will work and conditions of the agreement. Such evidence may include but is not limited to:

- E-mails between the contractual parties;
- A written summation of the terms of the agreement; or
- Any other evidence which demonstrates that an oral agreement was entered into.

A U.S. agent may file as the beneficiary's employer and on the same petition file on behalf of the beneficiary as his or her agent and on behalf of the entities for which the beneficiary will work. In this agent filing, the beneficiary will be working within the same time period for the petitioning employer and one or more entities that are ultimately arranging for the beneficiary's services. The petitioning employer must establish that it is in business as an agent by providing evidence that the petitioner is authorized to act as an agent for the other entities. If the petitioner does not establish that the petitioner is authorized to act as an agent for the other entities, but the petition is otherwise approvable, it may only be approved for the qualifying event for which the petitioner will be directly employing the beneficiary.

In Business as an Agent

In this context, it is important to clarify, as stakeholders requested, the definition of "a person or company in business as an agent". In the November 20, 2009 memo on "Requirements for Agents and Sponsors Filing as Petitioner for the O and P Visa Classifications", USCIS acknowledged that the regulations do not specify the evidence for establishing that a petitioner is "in business as an agent". The "in business as an agent" scenario typically arises when a petitioner files on behalf of the beneficiary as his or her agent and on behalf of other entities for which the beneficiary will work. In this scenario, USCIS focuses on whether the petitioner can establish that it is duly authorized to act as an agent for the purposes of filing the petition. This means that the petitioner does not have to demonstrate that it normally serves as an agent outside the context of this petition. This requirement may be satisfied, for example, if the petitioner/agent presents a document signed by the entities for which the beneficiary will work, which states that the petitioner is authorized to act as an agent for the limited purpose of filing the petition with USCIS.

This type of "agency" filing should not be confused with the concept of concurrent employment. If the beneficiary will be employed concurrently for more than one employer within the same time period, each employer must file a separate petition. The beneficiary can only work for multiple employers, without the need to file a separate petition for each employer, if a person or company in business as an agent files the petition on behalf of the beneficiary and as a representative of the other multiple employers. A contract between the employers and the beneficiary is required. The regulations for this type of "agency" filing are very specific. Supporting documentation must include a complete itinerary of the event or events, a contract between the employers and the beneficiary and the burden is on the agent to explain the terms and conditions of the employment.

Itinerary requirement: When the agent represents the beneficiary and multiple entities who have contracted with the beneficiary to use the beneficiary's services, the petition must be accompanied by a complete itinerary of the events or activities. The itinerary must specify the dates of each service or engagement, the names and addresses of the entities contracting for the services and the names and addresses of the establishments, venues, or locations where the

services will be performed. A petitioner may add additional performances for an O-1 artist or entertainer during the validity period of the petition without filing an amended petition.

Agents for Foreign Employers

The regulation at 8 CFR 214.2(o)(2)(i) states that a foreign employer may not directly petition for an O nonimmigrant alien but instead must use the services of a United States agent to file a petition. Agents filing I-129 petitions for foreign employers must submit the minimum general documentary evidence required for all O-1 petitions, which includes:

- Copies of any written contracts between the petitioner and the beneficiary or a summary of the terms of the oral agreement under which the beneficiary will be employed;
- An explanation of the nature of the events or activities, the beginning and ending dates for the events or activities, and a copy of any itinerary for the events or activities; and
- A written advisory opinion from the appropriate consulting entity or entities.

While the regulations do not require additional supporting documents for this type of agent filing, it is important to note that the foreign employer, who petitions for an O nonimmigrant using a U.S. agent, is responsible for complying with all applicable employer sanction provisions.

Follow Up Items

During the teleconference, USCIS indicated that it would provide additional clarification, through an executive summary, on certain points raised during the call. This section provides this information.

Amended Petitions

Stakeholders repeatedly raised concerns about when USCIS requires the filing of an amended petition. The regulations provide that a petitioner must file an amended petition where there has been a material change in the terms and conditions of employment or beneficiary's eligibility as specified in the original petition and also requires an amended petition where the beneficiary has changed employers. USCIS recognizes the public's concerns with how the regulations regarding amended petitions are interpreted and is currently determining how to provide the appropriate guidance that clarifies the standards in the various filing scenarios.

As discussed above, an amended petition is not required when the petitioner adds additional performances or engagements during the validity period of the petition.

Self-petitioning

Stakeholders have raised concerns with the interpretation of the O-1 regulation prohibiting self-petitioning and recent decisions issued by USCIS in this regard. USCIS is aware of these

concerns and is actively working on forthcoming guidance to clarify the regulatory prohibition and its applicability.