

AN OVERVIEW OF VISAS FOR ARTISTS AND ENTERTAINERS

by Robin L.H. Vermette, 1999

On a once-in-a-lifetime trip to Russia your client hears a chorus whose music stirs her soul. She vows to share her international experience by inviting the group to perform in her community. What kind of visas do the musicians need to enter the United States? Can they be paid for their performances? What about their manager and technical support people? Can their families come, too? How long can they stay?

While entertainment agents and managers usually handle the arrangements, including visas, for their clients' international tours, occasionally an unrepresented artist or group from a foreign country will be invited or seek to come to the United States for a single event or series of events. These materials provide a brief overview of U.S. immigration law and the visas available to artists and entertainers visiting this country on a temporary basis.

Immigration Terms and Concepts The Government Agencies Involved

The U.S. Citizenship and Immigration Service, a division of the U.S. Department of Homeland Security, is the government agency responsible for controlling immigration matters in the United States. In addition, in many situations, there are other governmental agencies involved in approving a foreign national's entry into and activities while in this country. These include:

- the U.S. Department of State or "foreign service," which controls U.S. embassies and consulates throughout the world;
- the U.S. Department of Labor or "DOL" which has district offices in major cities, including Boston;
- individual state labor departments, such as the N.H. Department of Employment Security.

Visa Classifications and Documentation

There are two basic classifications of visas: immigrant visas and nonimmigrant visas. An immigrant visa, popularly known as a "green card" (even though pink), permits permanent residence and employment in the United States. A nonimmigrant visa is a visa issued for a temporary period, the intent being that the foreign national will return to his/her country. There are a number of nonimmigrant visa categories, each of which is identified by an alphabet letter ranging from "A" to "T." The most commonly known temporary visas are those for visitors for business or pleasure ("B"), students ("F"), and for skilled (professional) workers ("H-1B"). While a particular artist or arts organization employee or representative might qualify for one of these categories, the visas described in detail below are those that are specifically for people involved in the arts.

It is important to understand not only the classifications but the documents used to authorize international travel.

- A **Passport** is a repatriation or "return home" document issued by a person's country of citizenship.
- A **Visa** is a travel document issued by the United States Embassy or Consulate abroad. In general, in order to enter the United States, a foreign national must qualify for and obtain an immigrant or nonimmigrant (temporary) visa. A visa is usually issued in the form of a stamp in the passport by an officer at the consular post. A visa permits a foreign national to *seek entry* into the United States; it is *not* a guarantee of admission. The USCIS officer at the point of entry has the ultimate discretion as to whether a foreign national is admitted. The officer may deny entry if the foreign national is found not eligible for admission in the category for which the visa was issued, or if he or she is "excludable" for one or more of 33 statutory grounds, including contagious disease and criminal, illegal or immoral conduct.
- An **Arrival/Departure Card** or "I-94 Card" is a small card issued at the point of entry into the United States (e.g., handed out by the flight attendant on the airplane, and reviewed and stamped by the USCIS officer at the airport). *It controls how long an individual may stay in the United States.* An individual who remains in the U.S. beyond the date indicated on the I-94 Card has *overstayed* his or her visit and is considered "out of status" or "illegally in the U.S." The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "New Law") imposes strict penalties on those who are out of status.

"Change of Status" from One Visa Category to Another

In the case of an individual who is lawfully admitted to the United States and is continuing to maintain valid status, the USCIS may authorize a change of status from one temporary visa category to another. This allows a nonimmigrant to avoid the expense and delay of leaving the country in order to obtain authorization to pursue a different goal from that which was intended at the time of entry. For example, a foreign student graduating from college may wish to remain in the U.S. to accept professional employment. Not every category of nonimmigrant can take advantage of this process, however. In some cases an "exchange visitor," for example, must return to his or her home country for two years before seeking another type of U.S. visa. (See "J Aliens" below).

Temporary Visas for Artists and Entertainers -- Commonly Used for Short Term Employment

O Aliens: Individuals of Extraordinary Ability or Achievement

The O-1 visa category is reserved for aliens of "extraordinary" ability in the sciences, arts, education, business, or athletics. The term "arts" is broadly defined and includes fine arts, visual arts, culinary arts, and performing arts. Independent O-1 status can be obtained not only for performers but other essential technical or creative personnel such as set designers,

choreographers, and music coaches. O visas are advantageous for highly talented foreign individuals who may not qualify in other work-related categories because, for example, the alien does not have a professional degree, or the employer is a non-profit or academic institution and cannot pay enough to meet prevailing wage requirements. O-2 aliens are those who will accompany and assist in the artistic or athletic performance of an O-1 alien. O-3 aliens are the family members of the principal alien. The period of time an applicant will be granted O status is established by the performance dates in the O-1's contract, up to a maximum of three years. An applicant for an O-1 visa must submit:

- evidence of the applicant's meeting the appropriate standard;
- evidence of written contracts for employment in the field;
- an itinerary of events planned, such as a tour;
- a written advisory opinion or "consultation" regarding the nature of the proposed work and the alien's qualifications from an appropriate peer group in the applicant's field, e.g. a labor union such as the American Federation of Musicians, or other group or individual with expertise in the entertainer's field. This is required except 1) in the case of an USCIS-expedited application or 2) where the employer proves there is no appropriate consulting entity.

The standard for most O-1's based on extraordinary ability in the arts is "distinction." Distinction means "a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading or well-known in the field of arts." In relation to applicants in the motion picture and television industry, "extraordinary achievement" means "a *very* high level of accomplishment (emphasis added)." In other words, the standard for any O visa is high, and for motion picture and television artists, even higher. Lacking evidence of receipt of or nomination for an Emmy, Grammy, Academy or Director's Guild Award, documentation of *at least three* of the following is *required*:

- lead or starring role in productions or events which have a distinguished reputation;
- national or international recognition for achievements;
- lead or starring role for organizations and establishments that have a distinguished reputation;
- record of major commercial or critically acclaimed successes;
- significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged; or
- a high salary or other substantial remuneration for services in the field.

P Aliens: Performing Entertainers and Athletes

While an O visa may be appropriate for a solo performing artist, the category for group artists (and even solo artists together with back-up singers or musicians with whom the solo usually

performs) is generally the P visa. P-1 status is for internationally known athletes and entertainment groups. P-2 status is for performing artists under the auspices of a reciprocal exchange program. P-3 aliens are culturally unique artists. All three categories include accompanying personnel. P-4 aliens are dependents of those in other P categories. An entertainment group seeking **P-1 visa** status must provide evidence of international recognition, such as nomination or receipt of significant international awards or prizes for outstanding achievement in its field, or show that it has achieved three of the following:

- performed or will perform as a starring or leading entertainment group in production or events which have a distinguished reputation,
- achieved international recognition and acclaim for outstanding achievements in its field as evidenced by reviews in major newspapers, trade journals, magazines, or other published material,
- performed and will perform services as a leading or starring group for organizations and establishments that have distinguished reputation,
- a record of major commercial or critically acclaimed successes,
- achieved significant recognition for achievements from organization, critics, government agencies, or other recognized experts in the field,
- commanded or now commands a high salary or other substantial remuneration for services.

In addition, the group must have been established and performing regularly for at least one year, and in most cases have been internationally recognized for a "sustained and substantial period" of time.

P-2 visas are only for artists and entertainers taking part in a reciprocal exchange program between a foreign-based and a U.S.-based organization providing for the temporary exchange of artists and entertainers. The documentation necessary for this type of visa includes:

- Copy of formal reciprocal exchange agreement between the U.S. organization which is sponsoring the aliens and an organization in a foreign country which will receive the U.S. artists or entertainers,
- A statement from the sponsoring organization describing the reciprocal exchange of U.S. artists or entertainers,
- Evidence that an appropriate labor organization in the U.S. was involved in negotiating or has concurred with the reciprocal exchange of U.S. and foreign artists, and
- Evidence that the P-2 aliens are experienced artists or entertainers and comparable to the U.S. artists or entertainers, and that the terms and conditions of employment are similar.

Somewhat surprisingly, this is a little-used visa category. Only a few P-2 programs have been established, notably those organized by Actors Equity with its British counterpart and the American Federation of Musicians with its Canadian counterpart.

P-3 visas are for artists or entertainers, individual or group, who will perform in a program that is culturally unique which will further the understanding or development of their art form, and be sponsored primarily by educational, cultural, or governmental organizations which promote such international cultural activities and exchanges. Applicants for this type of visa must show that the alien or group has:

- performed in, or was involved in, teaching or coaching productions or events involving the presentation of culturally unique performances for a substantial period of time,
- achieved national or international recognition or acclaim for excellence in the field, and
- received recognition for achievements from organizations, critics, government agencies, cultural agencies, or other recognized experts in the field.

In addition, as with O petitions, before any type of P petition can be approved, the petitioner must submit an advisory opinion from a labor organization with expertise in the alien's or group's specific field, or establish that a labor organization does not exist, in which case the USCIS will adjudicate the petition without an advisory opinion. Permissible petitioners (as opposed to the alien or group which is the beneficiary) include a U.S. employer, event or program sponsor, agent, or labor union, depending on the P category.

Q Cultural Exchange

The Q nonimmigrant visa category is for a cultural exchange visitor to engage in prearranged employment or training for the purpose of sharing the attitude, customs, history, heritage, philosophy, and/or traditions of their country of nationality with the American public for a period not to exceed 15 months. Designated employers must provide the same wages and working conditions as they would to U.S. workers in similar positions and must apply for approval of both the cultural exchange program and the admission of the Q nonimmigrant.

The program must take place in a school, museum, business or other establishment where the American public, or a segment of the public sharing a common cultural interest, is exposed to aspects of a foreign culture as part of the program. The program must have a cultural component that is an essential and integral part of the Q visitor's employment or training, and the Q visitor's employment or training in the U.S. may not be independent of the cultural component of the program. In addition to maintaining such an international cultural exchange program, the employer must have been doing business in the U.S. for the past two years and employ at least 5 full-time U.S. workers, among other requirements.

Aliens who have been in the U.S. as a Q visitor must reside and be physically present outside of the U.S. for the immediate prior year before being admitted as a Q again. Q status does not bar the cultural exchange visitor from remaining in the U.S. longer than 15 months, or changing to another nonimmigrant classification. There is no provision for dependents under the Q visa

category, but family members may accompany or join a Q alien in the U.S. in any other visa classification for which they qualify.

J Aliens: Exchange Visitors

J-1 exchange visitors encompass a broad range of individuals who come temporarily to the United States as a participant in a program designated by the Director of the U.S. Information Agency (USIA) to teach, instruct or lecture, study, observe, conduct research, consult, demonstrate special skills or receive training. They may be students, short-term scholars, trainees, primary or secondary school teachers, professors or research scholars, experts in a specialized field of knowledge, graduates of foreign medical schools pursuing graduate training, camp counselors, au pairs, "international visitors" or "government visitors." There are specific qualifications, time limits and procedures for each exchange visitor category, but every J-1 visitor must have his or her residence in a foreign country and have no intention of abandoning it. In addition, J-1 aliens must have sufficient funds to cover their expenses and sufficient knowledge of English to undertake the program. The spouse and minor children of a J-1 may come with the exchange visitor to the United States as J-2s. Depending on the type of program, part- or full-time employment may be authorized for the J-1 and/or a dependent.

Each J-1 must be sponsored by an exchange visitor program sponsor designated by the USIA. A sponsor must be: a local, state or federal government agency; an international agency or organization of which the U.S. is a member and which has an office in the U.S.; or a reputable organization which is a "citizen of the United States." The designation process involves submission of a detailed application and supporting documents. Designation is usually effective for five years but may be shorter and may be extended. Once approved, the program sponsor is responsible for selecting exchange visitor participants; providing pre-arrival information; offering orientation; recordkeeping and otherwise ensuring compliance with U.S.I.A. regulations. One significant limitation on some J exchange visitors, including their spouses and dependents, is the requirement that the alien return to, and actually remain in, his or her home country for a period of two years before being able to acquire temporary worker or permanent resident status in the United States. This depends on the program, the profession and the country of nationality. Waivers of the two-year home country physical presence requirement may be possible, on a case-by-case basis.

Immigrant Visas or "Permanent Residence"

Most foreign artists and the people accompanying them come to the United States for a temporary stay. Others, however, for personal or professional reasons, seek to live in the United States on a permanent basis. And, invariably, some foreign nationals who come to this country on a temporary basis then decide that they wish to immigrate. Permanent residence can only be obtained in one of four ways: 1) sponsorship by an immediate relative who is a United States citizen or permanent resident; 2) an offer of permanent employment; 3) a request for political asylum; or 4) the Diversity Immigrant Visa Program (the "Visa Lottery").

A detailed discussion of the immigrant visa process is beyond the scope of these materials. A few brief comments provide some context, however. First, family reunification has traditionally been the foremost consideration in U.S. immigration laws. The majority of visa slots available in any given year are reserved for this category of immigrants. Nonetheless, strict new requirements concerning the financial support of new immigrants by family member sponsors are seriously affecting family-based immigration. Employment is the second most common vehicle for immigration, with 120,000 possible visas per year in this category. Employment-based immigration requires a strong showing that the foreign worker is one of the best in the field, or that there are no U.S. workers available to fill the position. Obviously, the latter depends in large part on the type of job and the economy in general. The number of political asylees allowed each year is controlled by Congress. Finally, the Diversity Immigrant Visa (DV) "Lottery" program, created by the Immigration and Nationality Act, establishes an annual limitation of 55,000 for diversity immigrants. It is an opportunity to obtain permanent residency for those who might not qualify for other immigrant visas.

From Here to There

As with other laws and legal systems, the rules governing the international movement of people vary from country to country. If your client is a U.S. citizen who wishes to perform or exhibit abroad, you will need to obtain advice specific to the country he or she wishes to visit. The place to start is the embassy or consulate of that country in Washington, D.C. or New York. Should your client need foreign legal advice, Orr & Reno is a member of Commercial Law Affiliates (Meritas), the world's largest organization of independent business and commercial litigation laws firms. Through Meritas, we can provide access to competent legal counsel in 60 countries on six continents.