

9 FAM 41.55 Notes

(TL:VISA-436; 07-09-2002)

9 FAM 41.55 N1 Introduction

(TL:VISA-68; 10-20-1992)

The O classification was created by the Immigration Act of 1990, Pub. L. 101-649 of November 29, 1990, to provide specifically for the admission of persons with extraordinary ability in the sciences, arts, education, business, and athletics, or extraordinary achievement in motion picture and television production, and their essential support personnel. Many such aliens were previously classified as H-1B nonimmigrants. Since the H-1B classification was not originally designed to address these classes of activities, Congress determined that they should be separated from that classification and treated independently. An O-1 or O-2 alien must be the beneficiary of a petition approved by INS prior to visa issuance.

9 FAM 41.55 N2 Classification Standards for O Nonimmigrants

(TL:VISA-68; 10-20-1992)

The O classification is divided into three categories.

9 FAM 41.55 N2.1 O-1 Nonimmigrants

(TL:VISA-115; 06-19-1995)

a. The O-1 category applies to:

(1) An individual alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, and who is coming to the United States to continue work in the area of extraordinary ability; or

(2) An alien who has a demonstrated record of extraordinary achievement in motion picture and/or television productions, and who is coming to the United States to continue work in the area of extraordinary achievement.

(3) An alien who is coming to the United States to perform in the motion picture and television industry. 7 b. INS uses the following definitions in adjudicating O petitions:

(1) “Extraordinary ability” in the sciences, education, business, or athletics means a level of expertise indicating that the person is one of the small percentage who has risen to the very top of his or her field of endeavor.

(2) “ Extraordinary ability” in the field of arts and “extraordinary achievement” with respect to motion picture and television productions share an identical standard, i.e., a high level of achievement in the field which is evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that the person is recognized as outstanding, leading, or well-known in his or her field of endeavor.

[See 9 FAM 41.55 N4 below.]

9 FAM 41.55 N2.2 O-2 Nonimmigrants

(TL:VISA-68; 10-20-1992)

The O-2 category applies to an accompanying alien who is coming temporarily to the United States solely to assist in the artistic or athletic performance of an O-1 nonimmigrant. O-2 classification is not available to an alien accompanying an O-1 alien in the sciences, business, or education. An O-2 alien must be petitioned for in conjunction with the services of the O-1 alien to whom he or she provides support and is not entitled to work separate and apart from the O-1 alien. To qualify for status, O-2 aliens must:

(1) Be an integral part of the actual performances or events and possess critical skills and experience with the O-1 alien that are not of a general nature and cannot be performed by others; or

(2) In the case of a motion picture or television production, have skills and experience with the O-1 alien which are not of a general nature and which are critical, either based on a pre-existing and longstanding working relationship with the O-1 alien or, if in connection with a specific production, because significant production (including pre- and post-production) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production.

9 FAM 41.55 N2.3 O-3 Nonimmigrants

(TL:VISA-68; 10-20-1992)

The O-3 category applies to the spouse and children who are accompanying or following to join an alien classified O-1 or O-2.

9 FAM 41.55 N3 Criteria for Position Requiring O-1 Alien

(TL:VISA-115; 06-19-1995)

To establish that a position requires the services of an alien of extraordinary ability or achievement, the position to be filled must meet of the following criteria: The alien must be coming to the United States to perform services in his or her area of expertise.

9 FAM 41.55 N4 Extraordinary Achievement

(TL:VISA-115; 06-19-1995)

Extraordinary achievement with respect to motion picture and television productions, as commonly defined in the industry, means a very high level of accomplishment in the picture or television industry evidenced by a degree of skill and recognition significantly above that ordinarily encountered to the extent that the person is recognized as outstanding, notable, or leading in the motion picture or television field.

9 FAM 41.55 N5 Temporariness of Stay

9 FAM 41.55 N5.1 O-1 Nonimmigrants

(TL:VISA-68; 10-20-1992)

The INA does not require an applicant for an O-1 visa to have a residence abroad which he or she does not intend to abandon, nor does it address the issue of temporariness of stay for O-1 nonimmigrants. As a consequence, consular officers shall not apply any standard of temporariness or immigrant intent, unless there are specific indications or evidence that the alien does not intend to comply with the terms of the petition approved on his or her behalf.

9 FAM 41.55 N5.2 O-2 Nonimmigrants

(TL:VISA-68; 10-20-1992)

Unlike the O-1 nonimmigrant, the O-2 visa applicant must satisfy the consular officer that he or she has a residence abroad and no intent to abandon that residence.

9 FAM 41.55 N5.3 O-3 Nonimmigrants

(TL:VISA-68; 10-20-1992)

The standards regarding residence abroad and temporariness of stay which pertain to O-1 and O-2 nonimmigrants apply equally to their O-3 dependents.

9 FAM 41.55 N6 Consultation Requirement

(TL:VISA-115; 06-19-1995)

Consultation with an appropriate U.S. peer group (which could include a person or persons with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for an O-1 or O-2 classification can be approved. Consultation shall be in the form of a written advisory opinion. The advisory opinion is usually obtained by the petitioner, although INS may obtain or waive it under certain circumstances. Consultations are advisory in nature and are not binding on INS.

9 FAM 41.55 N7 Effect of Labor Disputes

(TL:VISA-68; 10-20-1992)

a. INS will deny an O petition in the event that the Secretary of Labor certifies that a strike or labor dispute is in progress in the occupation at the place the alien will be employed, and the alien's employment would adversely affect the wages and working conditions of U.S. workers. If the petition has already been approved, but the alien has not yet entered the United States or commenced employment, the approval of the petition is automatically suspended and application for admission be denied.

b. Should a consular office receive notification from INS, the Department, or another official source that a previously approved petition has been suspended because of a strike or other labor dispute, it shall defer visa issuance and follow whatever instructions are given regarding the disposition of the suspended petition. If a post has any question regarding the validity of a particular petition, it should query the approving INS office directly.

9 FAM 41.55 N8 Significance of Approved Petition

9 FAM 41.55 N8.1 INS Responsible for Adjudicating O Petitions

(TL:VISA-68; 10-20-1992)

Every O-1 and O-2 alien must be the beneficiary of a petition, approved by INS, prior to visa issuance or, in the case of visa-exempt aliens, admission into the United States. By mandating a preliminary petition, Congress placed responsibility and authority with INS to determine whether the requirements for O status which are examined in the petition process have been met.

9 FAM 41.55 N8.2 Effect of Filing Immigrant Visa Petition

(TL:VISA-68; 10-20-1992)

INS has determined that the approval of a permanent labor certification or the filing of a preference petition for an alien shall not be a basis for denying an O petition, a request to extend such a petition, or the alien's application for admission, change of status, or extension of stay. The alien may legitimately come to the United States for a temporary period as an O nonimmigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States.

9 FAM 41.55 N8.3 INS Notification to Petitioner of Petition Approval

(TL:VISA-115; 06-19-1995)

Form I-797, Notice of Action, [see 9 FAM 41.55 Exhibit I], is used by the INS to notify the petitioner that the O petition filed has been approved or that the extension of stay in O status for the employee has been granted. The approval notice shall include the alien beneficiary's name, classification, and the petition's period of validity. The petitioner may furnish Form I-797 to the employee for the purpose of applying for his or her O visa, or to facilitate the employee's entry into the United States, either initially or after a temporary absence abroad during the employee's stay in O status.

9 FAM 41.55 N8.4 Approved Petition Is Prima Facie Evidence of Entitlement to O Classification

(TL:VISA-115; 06-19-1995)

a. An approved Form I-129, Petition for Nonimmigrant Worker, or evidence that the O petition has been approved an original Form I-797, Notice of Action, or telegraphic or telephonic notification from INS or the Department is, in itself, to be considered by consular officers as prima facie evidence that the requirements for O classification have been met. Other than instances involving obvious errors, consular officers do not have the authority to question the approval of O petitions without specific evidence, unavailable to INS at the time of petition approval, that the beneficiary may not be entitled to status. The large majority of petitions approved by INS are valid, and involve bona fide establishments, relationships, and individual qualifications which conform to regulations in effect at the time the petition was filed.

b. On the other hand, the approval of a petition by INS does not relieve the alien of the burden of establishing visa eligibility. If the consular officer has reason to believe, based upon information developed during the visa interview or other evidence which was not available to INS, that the beneficiary may not be entitled to status, the consular officer may request any additional evidence which bears a reasonable relationship to this issue. Disagreement with INS interpretation of the law or the facts, however, is not sufficient reason to ask INS to reconsider its approval of the petition.

9 FAM 41.55 N8.5 Referring Approved O Petition to INS for Reconsideration

(TL:VISA-436; 07-09-2002)

Posts shall consider all approved O petitions in light of these Notes, process with dispatch those cases which appear legitimate, and identify those which require local investigation or referral to the approving INS office for reconsideration. Posts should refer cases to INS for reconsideration sparingly, to avoid inconveniencing bona fide petitioners and beneficiaries and causing duplication of effort by INS. Consular officers must have specific evidence of either misrepresentation in the petition process or of previously unknown facts, which might alter INS's finding, before requesting

review of a Form I-129, Petition for Nonimmigrant Worker approval. When seeking reconsideration, the consular officer shall *under cover of Form DS-3096, Consular Return/Case Transfer Cover Sheet*, forward the petition, all pertinent documentation, and a written memorandum of the evidence supporting the request for reconsideration to the approving INS office. A copy of all material, including the visa petition and supporting documents, must be retained at post.

9 FAM 41.55 N9 Other Filing Situations

9 FAM 41.55 N9.1 Services in More Than One Location

(TL:VISA-115; 06-19-1995)

A petition which requires the alien to work in more than one location must include an itinerary with the dates and locations of the employment, and must be filed with the INS Service Center having jurisdiction in the area where the petitioner is located. The address which the petitioner specifies as its location on the petition shall be where the petitioner is considered to be located. If the petitioner is a foreign employer with no U.S. location, the petition shall be filed with the Service Center having jurisdiction over the area where the work will begin.

9 FAM 41.55 N9.2 Services for More Than One Employer

(TL:VISA-115; 06-19-1995)

If the beneficiary will work concurrently for more than one employer within the same time period, each employer must file a separate petition with the INS Service Center that has jurisdiction over the area where the alien will perform services, unless an established agent files the petition.

9 FAM 41.55 N9.3 Change of Employer

(TL:VISA-115; 06-19-1995)

If an O-1 or O-2 alien in the United States seeks to change employers, the new employer must file a petition with the jurisdictional INS Service Center. An O-2 alien may change employers only in conjunction with a change of employers by the principal O-1 alien. When an O-1 or O-2 petition is filed by an agent, an amended petition must be filed with evidence relating to the new employer. A request for an extension of stay must also be filed.

9 FAM 41.55 N9.4 Amended Petition

(TL:VISA-345; 01-09-2002)

A petitioner shall file an amended petition on Form I-129, Petition for Nonimmigrant Worker with fee, with the INS Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or the beneficiary's eligibility as specified in the original approved petition. In the case of a petition filed for an artist or entertainer, a petitioner may add additional performances or engagements during the validity period of the petition without filing an amended petition.

9 FAM 41.55 N9.5 Agents as Petitioners

(TL:VISA-115; 06-19-1995)

An established U.S. agent may file an O petition in cases involving an alien who is traditionally self-employed or who uses agents to arrange short-term employment in his or her behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act in its behalf. An agent may also file a petition on behalf of a foreign employer.

9 FAM 41.55 N10 Listing of Beneficiaries on Form I-797, Notice of Action

(TL:VISA-345; 01-09-2002)

Form I-797, Notice of Action has been altered so that it may contain the names of all approved beneficiaries.

9 FAM 41.55 N10.1 Multiple Beneficiaries on Petitions

(TL:VISA-115; 06-19-1995)

More than one O-2 accompanying alien may be included on a petition if they are assisting the same O-1 alien for the same event or performances, during the same period of time, and in the same location.

9 FAM 41.55 N10.2 Substituting Beneficiaries

(TL:VISA-115; 06-19-1995)

a. Since O-1 petitions relate to individual entertainers, substitutions in the case of O-1 beneficiaries will not be permitted. Thus, a new petition will be required in the case of a change of beneficiary.

b. Substitutions of beneficiaries is not permitted on O-2 petition cases.

9 FAM 41.55 N10.3 Filing of Petition for O-2 Alien

(TL:VISA-68; 10-20-1992)

An employer must petition for an O-2 alien in conjunction with the services of the O-1 principal alien. The O-2 classification does not entitle the alien to work separate and apart from the O-1 alien to whom he or she provides support.

9 FAM 41.55 N10.4 Form of Documentation

(TL:VISA-115 06-19-1995)

Documentary evidence submitted in support of an O petition need only to be endorsed by a responsible person at the organization, firm, institution, or establishment where the work was performed, not necessarily by the person in charge.

9 FAM 41.55 N11 Validity of Approved O Petitions

9 FAM 41.55 N11.1 Initial Period of Validity

(TL:VISA-68; 10-20-1992)

a. An approved petition for an alien classified O-1 shall be valid for a period of time determined by INS to be necessary to accomplish the event or activity, not to exceed three years.

b. An approved petition for an alien classified O-2 shall be valid for a period of time determined to be necessary for the O-1 artist or athlete to accomplish the event or activity, not to exceed three years.

9 FAM 41.55 N11.2 Petition Extension

(TL:VISA-345; 01-09-2002)

The petitioner must file a request to extend the validity of an O petition on Form I-129, Petition for Nonimmigrant Worker in order to continue or complete the same activity or event specified in the original petition. Supporting documents are not required unless requested by INS. A petition extension may be filed only if the validity of the original petition has not expired.

9 FAM 41.55 N11.3 Length of Stay

(TL:VISA-68; 10-20-1992)

An O-1 or O-2 nonimmigrant shall be admitted to the United States for the validity period of the petition, plus a period of up to ten days before the validity period of the petition begins and ten days after it ends. The alien may not work except during the validity period of the petition.

9 FAM 41.55 N12 Extension of Stay

9 FAM 41.55 N12.1 Extension Procedures

(TL:VISA-345; 01-09-2002)

The petitioner shall request the extension of an alien's stay in the United States on the same Form I-129, Petition for Nonimmigrant Worker used to file for the extension of the alien's petition. The effective dates of the petition extension and of the beneficiary's extension of stay shall be the same. The beneficiary must be physically present in the United States at the time the extension of stay petition is filed. If the alien is required to leave the United States for business or personal reasons while the extension requests are pending, the petitioner may ask INS to cable notification of the petition extension to the consular office abroad where the alien will apply for a visa.

9 FAM 41.55 N12.2 Extension Periods

(TL:VISA-68; 10-20-1992)

An extension of stay may be authorized in increments of up to one year for an O-1 or O-2 nonimmigrant to continue or complete the same event or activity for which he or she was admitted, plus an additional 10 days.

FAM 41.55 N13 Issuance of O Visas

9 FAM 41.55 N13.1 Evidence Forming Basis for Issuing O Visas

(TL:VISA-345; 01-09-2002)

The appropriate evidence forming the basis for O visa issuance consists of an approved Form I-129, Petition for Nonimmigrant Worker petition, or telegraphic or telephonic notification from INS or the Department of the approval of such a petition, or an original Form I-797, Notice of Action, presented by the visa applicant, which shows that the petition on his or her behalf has been approved or that his or her authorized stay in O status has

been extended. The Form I-797 [see 9 FAM 41.55 Exhibit I] is computer-generated and unsigned. To be valid it must contain the date of the notice, names of the petitioner, beneficiary/beneficiaries, petition/receipt number, expiration date of the petition, name, address and telephone number of the approving INS office. If a post has any question regarding the bona fides of a particular Form I-797, it should query the originating INS office directly.

9 FAM 41.55 N13.2 Validity of O Visas

(TL:VISA-68; 10-20-1992)

The validity of an O visa may not exceed the period of validity of a petition approved to accord O status or the period for which the alien's authorized stay in O status was extended. If the period of reciprocity shown in 9 FAM Appendix C is less than the validity period of the approved petition or extension of stay, it shall prevail.

9 FAM 41.55 N13.3 Annotating O Visas

(TL:VISA-68; 10-20-1992)

Posts shall enter the number of the alien's approved petition (or the number of the principal alien's petition in the case of O-3 dependents) immediately below the lower margin of the visa, followed by the name and location of the alien's employer. MRV posts should follow appropriate operating instructions for annotating visas.

9 FAM 41.55 N13.4 Issuing Single O Visa Based on More Than One Petition

(TL:VISA-68; 10-20-1992)

If the alien is the beneficiary of two or more O petitions and does not plan to depart from the United States between engagements, consular officers may issue a single O visa valid until the expiration date of the last expiring petition, reciprocity permitting. The required annotations [see 9 FAM 41.55 N13.3 above] from all petitions shall be placed below the visa.

9 FAM 41.55 N13.5 Limitation of O Visas

(TL:VISA-115; 06-16-1995)

Consular officers may restrict visa validity in some cases to less than the period of validity of the approved petition or authorized period of stay (for example, on the basis of reciprocity or the terms of an order waiving a ground of ineligibility). In any such case, in addition to the notations described in 9 FAM 41.55N13.3 above, posts shall insert the following:

“PETITION VALID TO (Date)”.

9 FAM 41.55 N13.6 Reissuing O Visas

(TL:VISA-68; 10-20-1992)

When an O visa is limited by reciprocity to a period of validity less than the validity of the petition or authorized period of stay, consular officers may issue the visa any number of times within the allowable period. If a fee is prescribed by 9 FAM Appendix C, posts must collect the fee for each reissuance of the O visa.

9 FAM 41.55 N14 Spouse and Children of O-1 or O-2 Aliens

(TL:VISA-68; 10-20-1992)

The spouse and children of an O-1 or O-2 alien, who are accompanying or following to join in the United States, are entitled to O-3 classification and are subject to the same visa validity, period of admission, and limitations as the O-1 or O-2 principal alien. For a general discussion of the classification of the spouse and children of a nonimmigrant, see section 9 FAM 41.11 Notes 4 and 9 FAM 41.11 N5.

9 FAM 41.55 N14.1 Employment in United States by O-3 Dependent Aliens Prohibited

(TL:VISA-68; 10-20-1992)

Aliens in O-3 status are not authorized to accept employment. The spouse and children of an O principal alien may not accept employment unless they qualify independently for a classification in which employment is, or can be, authorized. The consular officer shall take this into account in evaluating whether family members have furnished adequate evidence of their support while in the United States. O-3 aliens are permitted to study during their stay in the United States.

9 FAM 41.55 N14.2 Verification that Principal Alien is Maintaining Status

(TL:VISA-345; 01-09-2002)

When an alien applies for an O-3 visa to follow to join a principal alien already in the United States, the consular officer must be satisfied that the principal alien is maintaining O status before issuing the visa. If there are no readily available means of verification, the consular officer may suggest to the applicant that the principal alien in the United States submit a copy of his or her Form I-94, Nonimmigrant Visa Waiver Arrival /Departure Document (both sides) and a copy of his or her current visa for presentation to the consular officer.

9 FAM 41.55 N14.3 Return Transportation When Employment Involuntarily Terminated

(TL:VISA-68; 10-20-1992)

If an O nonimmigrant's employment terminates for reasons other than voluntary resignation, the employer and petitioner who sought the alien's O status are responsible for providing the reasonable cost of the alien's transportation to his or her last place of residence prior to entry into the United States.