9 FAM 41.55 NOTES

(CT:VISA-1679; 09-07-2011)
(Office of Origin: CA/VO/L/R)

9 FAM 41.55 N1 INTRODUCTION

(CT:VISA-1154; 02-17-2009)

The O classification was created by the Immigration Act of 1990, Public Law 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 the Department of Homeland Security (DHS) prior to visa issuance.

9 FAM 41.55 N2 CLASSIFICATION STANDARDS FOR O NONIMMIGRANTS

9 FAM 41.55 N2.1 O-1 Nonimmigrants

(CT:VISA-1679; 09-07-2011)

The O-1 category applies to any of the following:

(1) An O-1A holder is 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 temporarily to the United States to continue work in the area of extraordinary ability; or

(2) An O1-B holder is an alien who has a demonstrated record of extraordinary achievement in motion picture and/or television productions, and who is coming temporarily to the United States to

continue work in the area of extraordinary achievement.

9 FAM 41.55 N2.2 O-2 Nonimmigrants

(CT:VISA-1578; 10-04-2010)

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. 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 only, 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

(CT: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

(CT:VISA-1578; 10-04-2010)

The Department of Homeland Security interprets the statute to encompass “any field of endeavor” including craftsman and lecturers, as well as the culinary arts. The O-1 visa holder must seek to enter for the purpose of continuing the same type of work but there is no requirement that the position to be filled is one that would require a person of O-1 caliber.

9 FAM 41.55 N4 DEFINING "EXTRAORDINARY ACHIEVEMENT"

(CT:VISA-1578; 10-04-2010)

Extraordinary achievement in science, education, business or athletics is defined as "a level of expertise indicating that the person is one of the small percentage who have arisen to the very top field of endeavor." Extraordinary ability in the arts means "distinction." This category requires the petition to establish only that the artist is prominent in his or her field of endeavor. Extraordinary achievement in the motion picture and television industry means a very high level of accomplishment as evidenced by a degree of skill and recognition significantly above that ordinarily encountered. The person must be "outstanding or notable."

9 FAM 41.55 N5 APPLICATION OF INA 214(B) TO THE O VISA CLASSIFICATION

9 FAM 41.55 N5.1 O-1 Nonimmigrants

(CT:VISA-1578; 10-04-2010)

An applicant for an O-1 visa does not have to have a residence abroad which he or she does not intend to abandon; however, aside from the conditions set forth in 9 FAM 41.55 N8.2, there must be a temporary intent to remain on the part of the O-1 visa holder. (See 8 CFR 214.2(o)(13).) Thus, "dual intent" is permissible for O-1 visa holders.

9 FAM 41.55 N5.2 O-2 Nonimmigrants

(CT: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

(CT: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

(CT:VISA-1578;   10-04-2010)

Consultations with an appropriate United States 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 by the Department of Homeland Security. Consultations are normally in the form of a written advisory opinion. The advisory opinion is usually mandatory, although DHS may obtain or waive it under certain circumstances (for example, if no appropriate union exists). Consultations are advisory in nature and are not binding on DHS.

9 FAM 41.55 N7 EFFECT OF LABOR DISPUTES

(CT:VISA-1578;   10-04-2010)

a. DHS 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 shall be denied.

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

9 FAM 41.55 N8 SIGNIFICANCE OF APPROVED PETITION

9 FAM 41.55 N8.1 Department of Homeland Security (DHS) Responsible for Adjudicating O Petitions

(CT:VISA-1679; 09-07-2011)

a. Every O-1 and O-2 alien must be the beneficiary of a petition, approved by DHS, and verified *either* through *the* Petition Information Management Service (PIMS) *or through the Person Centric Query Service (PCQS), in the CCD under the Cross Applications tab,* 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 DHS to determine whether the requirements for O status which are examined in the petition process have been met.

b. Posts generally shall not request the Department to provide status reports on petitions filed with the Department of Homeland Security (DHS), nor shall they contact DHS directly for such reports. As an alternative, posts may suggest that the applicant communicate with his or her sponsor. Cases of public relations significance may be submitted to the Department (TAGS: CVIS). Justification for such action must be included with post's request.

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

(CT:VISA-667; 12-22-2004)

DHS 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 Department of Homeland Security (DHS) Notification to Petitioner of Petition Approval

(CT:VISA-1154; 02-17-2009)

Form I-797, Notice of Action, (see 9 FAM 41.55 Exhibit I), is used by the DHS 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 (although the petition must still be verifiable through PIMS) 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

(CT:VISA-1679; 09-07-2011)

a. You should no longer require that an approved Form I-129, Petition for a Nonimmigrant Worker, or evidence that the O petition has been approved (a Form I-797, Notice of Action; see also 9 FAM 41.55 Exhibit I), be presented by an applicant seeking an O visa. All petition approvals must be verified through the PIMS *or through the Person Centric Query Service (PCQS), in the CCD under the Cross Applications tab.* Once you have verified approval through PIMS *or PCQS*, consider this as prima facie evidence that the requirements for O classification, which are examined in the petition process, have been met. You may not question the approval of O petitions without specific evidence, unavailable to DHS at the time of petition approval, that the beneficiary may not be entitled to status. The large majority of approved O petitions are valid, and involve bona fide establishments, relationships, and individual qualifications that conform to the DHS regulations in effect at the time the O petition was filed.

b. On the other hand, the approval of a petition by DHS does not relieve the alien of the burden of establishing visa eligibility in the course of which questions may arise as to his or her eligibility to O classification. If you develop information during the visa interview (e.g., evidence which was not available to DHS) that gives you reason to believe that the beneficiary may not be entitled to status, you may request any additional evidence which bears a reasonable relationship to this issue. Disagreement with DHS interpretation of the law or the facts, however, is not sufficient reason to ask DHS to reconsider its approval of the petition.

9 FAM 41.55 N8.5 Referring Approved O Petition to Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) for

Reconsideration

(CT:VISA-1578;   10-04-2010)

You must 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 U.S. Citizenship and Immigration Services (USCIS) office for reconsideration. Refer cases to USCIS for reconsideration sparingly, to avoid inconveniencing bona fide petitioners and beneficiaries and causing duplication of effort by USCIS. You must have specific evidence of a requirement for automatic revocation, material misrepresentation in the petition process, lack of qualification on the part of the beneficiary, or of previously unknown material facts, which might alter USCIS's finding before requesting review of a Form I-129, Petition for a Nonimmigrant Worker, approval. When seeking reconsideration, the consular officer must, under cover of Form DS-3099, NIV Petition Revocation Request Cover Sheet – Kentucky Consular Center, forward the Form I-129 application, all pertinent documentation, and a written memorandum of the evidence supporting the request for reconsideration to the Kentucky Consular Center (KCC), which will then forward the request to the DHS Vermont Service Center. The KCC will maintain a copy of the request and all supporting documentation and will track all consular revocation requests. A copy of all material, including the approved Form I-129 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

(CT:VISA-1578;   10-04-2010)

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 DHS 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 United States location, the petition will have been 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

(CT:VISA-667;   12-22-2004)

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 DHS 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

(CT: VISA-667;   12-22-2004)

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 DHS 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

(CT:VISA-1328;   09-30-2009)

A petitioner shall file an amended petition on Form I-129, Petition for a Nonimmigrant Worker, with fee, with the DHS 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

(CT: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 on 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

(CT: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

(CT: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

(CT:VISA-1328;   09-30-2009)

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 are not permitted on O-2 petition cases.

9 FAM 41.55 N11 VALIDITY OF APPROVED O PETITIONS

9 FAM 41.55 N11.1 Initial Period of Validity

(CT:VISA-1578;   10-04-2010)

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

b. An approved petition for an alien classified O-2 will 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.

c. Posts are authorized to accept and issue visas to qualified applicants up to 90 days in advance of applicants' beginning of status as noted on the Form I-797. Post must inform applicants verbally and in writing that they can only use the visa to apply for entry to the United States starting ten days prior to the beginning of the approved status period noted on their Form I-797. (See 9 FAM 41.55 N11.3, below.) In addition, such visas must be annotated, "Not valid until (ten days prior to the petition validity date.)"

9 FAM 41.55 N11.2 Petition Extension

(CT:VISA-1328; 09-30-2009)

The petitioner must file a request to extend the validity of an O petition on Form I-129, Petition for a 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 DHS. 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

(CT:VISA-1578; 10-04-2010)

An O-1 or O-2 nonimmigrant may 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. There is not an overall time limit as to how long one may be present in the United States in total in an O-1 status, such as there is for the H1B and L1 visa classifications.

9 FAM 41.55 N12 EXTENSION OF STAY

9 FAM 41.55 N12.1 Extension Procedures

(CT:VISA-1578; 10-04-2010)

The petitioner must request the extension of an alien's stay in the United States on the same Form I-129, Petition for a 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 DHS 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

(CT: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.

9 FAM 41.55 N13 ISSUANCE OF O VISAS

9 FAM 41.55 N13.1 Petition Approval

(CT:VISA-1679; 09-07-2011)

a. The approval of a petition by the Department of Homeland Security (DHS) or by the Department of Labor does not establish that the alien is eligible to receive a nonimmigrant visa. You may not authorize a petition-based NIV without verification of petition approval *either* through the Petition Information Management Service (PIMS) *or through the Person Centric Query Service (PCQS), in the CCD under the Cross Applications tab.*

b. Verification in PIMS *or PCQS* is prima facie evidence of entitlement to O classification.

c. A consular officer must suspend action on an alien's application and submit a report to the approving DHS office if the consular officer knows or has reason to believe that an alien applying for a visa under INA 101(a)(15)(O) is not entitled to the classification as approved.

9 FAM 41.55 N13.2 Evidence Forming Basis for O Visa Issuance

(CT:VISA-1679; 09-07-2011)

a. The basis for O visa eligibility consists of an approved Form I-129, Petition for a Nonimmigrant Worker, that must be verified *either* through

PIMS *or PCQS* before issuing a visa. The Form I-797 is no longer required to be presented to a consular officer at the time of the applicant's interview.

b. Posts must use *either* the electronic PIMS record created by the KCC *or the record obtained through PCQS* to verify petition approval. Posts are able to access the details of approved NIV petitions through the Consular Consolidated Database (CCD), through the PIMS Petition Report *or through PCQS.*

c. A valid Form I-797 must include the date of the Notice, the name of the petitioner, the name of the beneficiary, the petition/receipt number, the expiration date of the petition, and the name, address, and telephone number of the approving DHS office. The paper Form I-797 is an unsigned computer-generated form, which contains the receipt number, and can be used only to make an O visa appointment.

d. If PIMS does not contain the petition approval, before sending an email to KCC, post has the option to look for petition approval in PCQS in the CCD under the Cross Applications tab. In PCQS, under Search Criteria, select Receipt Number; then enter the number from the Form I-797; e.g., EAC1234567890. First, search just CISCOR to find the petition, but if not found in CISCOR, you should also check CLAIMS 3. If post finds a petition approval in PCQS that was not in PIMS, the post should send an e-mail to PIMS@state.gov as follows: Petition with Receipt Number EAC1234567890 was found in PCQS but not in PIMS. You may not authorize a petition-based NIV without verification of petition approval either through PIMS or PCQS.

9 FAM 41.55 N13.3 Consular Consolidated Database (CCD) Access to Approved NIV Petitions

(CT:VISA-1679; 09-07-2011)

a. *Either the* Petition Information Management Service (PIMS) *or the Person Centric Query Service (PCQS) provide* confirmation that a petition for a visa has been approved. Verification in PIMS *or PCQS* is prima facie evidence of entitlement to O classification.

b. Posts must use the electronic PIMS record created by the KCC *or the petition record found through the PCQS* to verify petition approval. Posts are able to access the details of approved NIV petitions through the CCD. All users with roles that allow access to the current NIV Petitioner Applicant report will be able to see this information. The Petition Information Management Service (PIMS) Petition Report is listed under a

sub-category of the NIV menu called "NIV Petitions." This change allows all information on a petitioner, petition, and/or beneficiary to be linked through a centrally managed CCD service.

c. *Either the* electronic PIMS record created by the KCC *or the petition record found through the PCQS* must be used to determine petition approval and visa eligibility. The PIMS Petition Report contains a record of all petitioners recorded by the KCC as having approved petitions since 2004. In addition, the KCC FPU has provided informational memos on a large percentage of these petitioners. Each new, approved petition is linked to a base petitioner record, allowing superior tracking of NIV petitioner and petition information. As a result of this change, the KCC has ceased e-mailing scanned copies of approved NIV petitions to posts.

d. If you are unable to immediately locate information on a specific petition, you must send an e-mail to PIMS@state.gov. KCC's FPU will research approval of the petition and, if able to confirm its approval, will make the details available through the CCD within 2 working days. You may submit your request to KCC only within five (5) working days of the scheduled interview date and you must have checked PIMS before submitting to KCC. KCC will check the USCIS CLAIMS database, and will upload the CLAIMS report into PIMS so that you can proceed with the scheduled interview. KCC will not process PIMS requests submitted by post prior to the five day window. Please be sure to conduct a PIMS query before sending in these special requests, in order to reduce KCC's workload.

e. Posts may use approved Forms I-129 and Forms I-797 presented at post as sufficient proof to schedule an appointment, or may schedule an appointment based on the applicant's confirmation that the petition has been approved, but only PIMS *or PCQS* is sufficient evidence for visa adjudication.

9 FAM 41.55 N13.4 Validity of O Visas

(CT:VISA-1578; 10-04-2010)

The validity of an O visa may not exceed the period of validity of a petition approved to accord O status. If the period of reciprocity shown in the reciprocity schedules is less than the validity period of the approved petition or extension of stay, the period of lesser validity should prevail.

9 FAM 41.55 N13.5 Annotating O Visas

(CT:VISA-1578; 10-04-2010)

Posts should annotate the number of the alien's approved petition (or the number of the principal alien's petition in the case of O-3 dependents) on the visa, followed by the name and location of the alien's employer. Posts should follow the standard operating instructions for annotating visas.

9 FAM 41.55 N13.6 Issuing a Single O Visa Based on More Than One Petition

(CT:VISA-1578; 10-04-2010)

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 N13.5 above) from all petitions must be placed on the visa.

9 FAM 41.55 N13.7 Limitation of O Visas

(CT:VISA-1578; 10-04-2010)

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 annotations described in 9 FAM 41.55 N13.5 above, posts should insert the following:

"PETITION VALID TO (Date)."

9 FAM 41.55 N13.8 Reissuing O Visas

(CT:VISA-1578; 10-04-2010)

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 use the same, still-valid petition in order to issue the applicant a new visa any number of times within the allowable period. If a fee is prescribed by the reciprocity schedules, 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

(CT:VISA-1154; 02-17-2009)

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 N4 and 9 FAM 41.11 N5.

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

(CT:VISA-1578; 10-04-2010)

Aliens in O-3 status are generally 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 should 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

(CT:VISA-1578; 10-04-2010)

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, Arrival and Departure Record, (both sides) and a copy of his or her current visa for presentation to the consular officer. Consular officers may also wish to check PIMS and ADIS, if available.

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

(CT: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.