



# Executive Summary

September 1, 2010

## Listening Session – O and P Nonimmigrant Visas

### Background

On July 20, 2010, the Service Center Operations Directorate and the Office of Public Engagement hosted a listening session on O and P nonimmigrant visas. The session provided a forum for stakeholders to:

- Raise concerns they had with USCIS processing and decision-making of these petitions and the impacts USCIS decisions have on their industries;
- Request policy guidance to clarify the adjudication process; and
- Suggest to USCIS revisions and clarification of existing guidance.

### Updates

Prior to the event, stakeholders provided input via email. As a result, USCIS shared the updates that follow.

#### **Clarifying Guidance on “O” Petition Validity Period (O-Gap memo):**

On July 20, 2010, USCIS posted to its website final policy memorandum that provides guidance for processing and adjudicating Form I-129, Petition for Nonimmigrant Worker, filed on behalf of O nonimmigrants. The guidance addresses how to determine the validity period of an approvable petition when a gap exists between two or more events reflected in the itinerary. USCIS provided stakeholders with an opportunity to review and provide comments on this memo from May 10-24, 2010. During this time, USCIS received 81 comments.

#### **Processing Times:**

Current processing times for O and P nonimmigrant visas are 14 days at both the California and Vermont service centers. If a case is beyond the 14-day processing time, stakeholders were encouraged to call the National Customer Service Center (NCSC) to inquire. The NCSC will generate a Service Request Management Tool (SRMT) that is routed to the site where the case is pending. The [Instructions for electronically Filing Form I-129](#) have been updated to inform stakeholders that processing time does not begin until the supporting documentation is received at the service center.

## **Memorandum on Determining Employer-Employee Relationship for Adjudication of H1-B Petitions, Including Third-Party Site Placements:<sup>1</sup>**

USCIS informed stakeholders that this memorandum is not used to adjudicate O and P nonimmigrant petitions. If stakeholders have examples of cases where the memorandum appears to have been used, please send an email to RFE Project at [scopsrfe@dhs.gov](mailto:scopsrfe@dhs.gov) or contact the Office of Public Engagement at [Public.Engagement@dhs.gov](mailto:Public.Engagement@dhs.gov).

### **Requests for Evidence (RFE) Templates:**

USCIS will soon publish RFE templates for O and P nonimmigrant classifications. Stakeholders will have an opportunity to provide input on these RFE templates during the comment period.

### **Working Group for O and P Classifications:**

Stakeholders were informed of the active internal working group that is currently meeting regularly to consider new policy memorandum, updates, and reviewing and analyzing stakeholder input to improve the adjudication and maximize customer service in this visa classification.

## **Principal Themes**

### **O-1 Evidentiary Requirements:**

- *Re-adjudication:* Concerns were expressed that adjudicator may be engaged in re-adjudication of petitions, and the perception that adjudicators take issue with some evidentiary requirements in the O classification. As a result, stakeholders shared their belief that many applications for extension of status (EOS) have been denied. Additionally, stakeholders said their perception is that adjudicators are re-adjudicating cases of the “O” caliber when a customer requests an extension of O nonimmigrant status, despite having previously established their O nonimmigrant eligibility. Stakeholders feel that this unpredictability in adjudication is a direct detriment to U.S. communities and industries.
- *Criteria:* Stakeholders indicated that it would be helpful for USCIS to establish clear criteria for specific evidentiary requests. For example, USCIS could provide instructions on what type of evidence demonstrates recognition, expertise, or essentiality. This could include specific guidance on venue size, income, and signed contracts. Stakeholders also suggested USCIS should specify whether it requires copies of signed contracts or if copies of unsigned contracts are sufficient.
- *Industry Awareness:* Stakeholders expressed concern that USCIS does not adjudicate petitions with a clear sense of the industry in which the petition is filed. Thus, requests for evidence (RFE) do not always align with the reality of the industry. This can include requests for consultation from the incorrect union; publications about an individual rather than research published by the individual; and recognizing that, in an electronic era, there are new forms of or “untraditional”: media forms that USCIS should find acceptable. Stakeholders also noted that USCIS should recognize that there may be different requirements for the

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<sup>1</sup> Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements, (January 8, 2010)

<http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20EmployerEmployee%20Memo010810.pdf>

various types of beneficiaries (team vs. individual sports), however requirements should not necessarily be lower for some industries than others.

**Consistency between the Service Centers:**

Stakeholders highlighted the need for USCIS to ensure consistency in the adjudication of immigrant benefits amongst the California and Vermont service centers. Specifically, stakeholders recommend consistency in interpretation of supporting evidence.

**Processing Times and Premium Processing:**

It was reported that historically, processing times have been erratic. While paying the \$1,000 premium processing fee is an option, stakeholders shared that the extra cost for this type of service has placed an unfair burden on the nonprofit and arts communities.

Further, stakeholders believe that premium service is expected when they pay the premium processing fee. This includes the expectation that USCIS would assist the petitioner in making any edits to the petition, like adding a beneficiary's name if inadvertently omitted at the time of filing.

Additionally, there were also questions about whether an additional petition, and thus an additional premium processing fee, needs to be filed if there was a preparer error in the number and/or names of beneficiaries on the petition. Finally, some stakeholders indicated that USCIS should make an expedite process available to all applicants. This should be similar to be the expedite process put in place by William Yates in 2001.

**Requests for Evidence (RFE) Templates:**

The stakeholder community identified areas of concern with RFEs that:

- *Request evidence that was submitted with the original petition.* An RFE that includes a request for evidence previously submitted creates the perception that not all supporting evidence submitted with the original petition was reviewed or considered in the adjudication.
- *Lack specificity and clarity in the types of evidence requested.* If initial evidence is not satisfactory, stakeholders suggest that adjudicators clearly cite the evidence reviewed and state why it is not sufficient. In addition, it would be helpful if RFEs included examples of documentation USCIS will accept.
- *Request evidence outside the scope of regulations.* An RFE that includes a request for letters from employers when the beneficiary is a self-employed artist is an example of evidence outside the scope of the work being done by the beneficiary.
- *Training:* Stakeholders suggested that adjudicators need more training to help adjudicators improve the quality of the RFEs issued in the adjudication of O and P visa petitions.

**Evidentiary Standards Used in Adjudication:**

Various stakeholders shared that USCIS does not have uniform standards in how it interprets the regulatory prongs of the O and P visa classification. Stakeholders believe that USCIS interpretation

of its own regulations is perceived as inconsistent, and sometimes unjust. Standards that raise concerns are:

- Requiring information about the beneficiary to determine how prominent s/he is rather than focusing on the importance or prominence of the individuals work / accomplishments. Further, with technology advancing quickly, not all written works are in hard copy form and yet USCIS is not giving full weight to electronic publications.

### **Mechanisms for Case/Problem Resolution:**

Stakeholders raised concerns regarding mechanisms for resolving problem cases, in particular when a case is outside the 14-day processing time. Stakeholders noted that if they contact the National Customer Service Center (NCSC), it may take up to 52 days to get a response, which departs from the 14-day processing timeframe. The point was also raised that the guidelines on the website state that a person needs to wait 30 days after contacting the NCSC before emailing the Service Center, which also falls outside the 14-day processing timeframe.

There was a question regarding errors on approval notices. USCIS stated that in instances where there has been a gross error, the Service Center that generated the notice should be notified via the email listed on our [Contact Us](#) webpage.

Stakeholders shared that the National Customer Service Center (NCSC) provides inconsistent responses and communication between the NCSC and non-premium processing emergencies.

### **Need for Policy Guidance:**

There was discussion surrounding the need for policy guidance in a number of areas. Policy guidance would be helpful in areas where the regulations are vague and where there is minimal guiding criterion, and inconsistency in the adjudication process. Stakeholders recommended policy guidance on the following:

- Specificity with regards to items that are not clearly defined in the regulations, such as salary amount, venue size, and internationally recognized artists;
- The P-1 category in general and clarification on who or what is considered “essential,” and take into account the differences between individual versus team sports;
- Who is considered a petitioner and who is an agent;
- Self-employment in the O-1 context;
- P classification guidance, similar to the recent guidance issued for O visas;
- International recognition standard;
- The value of a balance between domestic and international labor needs;
- P-1 athletes now coaching;
- Role of letters of no objection in the equestrian context;
- Extension of Status cases; and
- Who can sponsor / petition for a nonimmigrant (agent versus studio).

**Recommendations:** Stakeholders made the following recommendation for USCIS to consider: Update the Adjudicators Field Manual (AFM) to include a more current list of unions, so there is no confusion about which organization represents a particular profession.

## Next Steps

**Extension of Status:** In response to stakeholder input about perceived readjudication of previously approved petitions, USCIS is currently reviewing the memorandum on *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*,<sup>2</sup> in relation to extensions of stay (EOS) for the O and P classifications. Stakeholders are reminded that for an EOS, the regulations require that the petitioner explain the reasons for the extension.

**Service Request Management Tool (SRMT):** When an application or petition is outside of target processing times, a petitioner may contact the National Customer Service Center (NCSC) to request an inquiry into his or her case (SRMT). Given the USCIS goal to adjudicate O and P nonimmigrant petitions within 14 days, USCIS has taken steps to ensure the NCSC generates an SRMT when an O and P nonimmigrant petition has been pending for over 14 days. It should be noted that for e-filed cases, the processing time does not begin until the supporting documentation is received at the service center. This information was added to the “[Instructions for electronically Filing Form I-129](#)”.

**Added Information to USCIS.gov:** On August 20<sup>th</sup>, USCIS updated its webpage titled [O-1 Visa Individuals with Extraordinary Ability or Achievement](#), by adding the following informative points:

- General Eligibility Criteria;
- Application Process;
- Evidentiary Criteria;
- Extension of Stay;
- Changing Employers, and
- Material Change in Terms and Conditions of Employment

**Tools:** To facilitate filing and adjudication of O and P nonimmigrant visas, USCIS will:

- Develop and post to its website Questions and Answers;
- Review current policy and guidelines, and draft revisions to the Adjudicators Field Manual (AFM) as necessary; and
- Update the O and P web pages to facilitate adjudication of subsequent requests for petition extension(s).

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<sup>2</sup>USCIS Interoffice Memorandum *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, William R. Yates (April 23, 2004); [http://www.uscis.gov/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2004/readjud\\_042304.pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/readjud_042304.pdf)