



# Artists *from* Abroad

Complete guide to immigration  
and tax requirements

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League  
of American  
Orchestras



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**ARTISTS FROM ABROAD**  
*Complete Guide to Immigration & Tax Requirements for Foreign Guest Artists*

**Immigration Procedures for Foreign Guest Artists**

by Jonathan Ginsburg, Esq.

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# ARTISTS FROM ABROAD

## Immigration Procedures for Foreign Guest Artists

by Jonathan Ginsburg, Esq.

### I. Essentials and Basics

This is a practical guide to U.S. immigration law and procedures governing the principal nonimmigrant work-related visa categories artists from abroad must use when entering the U.S. to work. We begin, though, with notes of caution:

1. **This guide covers much but it cannot cover everything! The information below is not legal advice. For specific advice on a specific matter, contact a qualified immigration attorney.**
2. To make best use of this guide, at least read it once through, thoroughly. The subject matter, not especially complex from a legal perspective, is highly interdependent. A rudimentary understanding of the basic concepts is essential as following the checklists alone will not provide all the information you need.
3. Check the Appendix for additional information and details on many topics.
4. Even under normal circumstances, USCIS petition and consular visa application policies and procedures are prone to change, and fees to increase, with little warning. It pays to check the USCIS and consular websites regularly.
5. In addition to much practical information in the main text, we include useful information, including contact information, tips, and blank and sample forms in the appendix. Feel free to photocopy or scan the blank forms, all of which are also available in PDF format from the websites of [U.S. Citizenship and Immigration Services](#) and [U.S. Department of State Bureau of Consular Affairs](#) websites.

#### A. Definitions and Acronyms

- **Alien**: An alien can be a beneficiary of a petition filed by a petitioner with U.S. Citizenship and Immigration Services (USCIS) for an immigration benefit or an applicant to USCIS for related benefits. An alien can also be an applicant to a U.S. consulate for a visa, and an applicant to U.S. Customs and Border Protection (CBP) for entry.
- **AFM**: American Federation of Musicians
- **AGMA**: American Guild of Musical Artists
- **AGVA**: American Guild of Variety Artists

- **CBP:** U.S. Customs and Border Protection, part of the Department of Homeland Security (DHS). CBP conducts inspections at all U.S. POEs and PFIs and determines whether to admit aliens and, if so, in what status and for how long.
- **Classification:** A nonimmigrant visa classification or status such as O or P, meaning a particular statutory category that permits an alien temporarily to engage in defined activities in the U.S. per USCIS regulations, as disclosed in an underlying petition to USCIS for classification in a particular status.
- **Consular Section, Consular Post or Consulate:** Each U.S. embassy abroad has an independent consular section responsible for issuing visas, among other things. Consular posts, or consulates, perform the same functions but are located elsewhere than the Embassy. Collectively, it is simpler to refer to these as “posts.”
- **CPT:** Curricular Practical Training
- **CSC:** California Service Center, one of two [U.S. Citizenship and Immigration Services \(USCIS\) Service Centers](#) that process I-129 petitions and I-539 applications.
- **DOS:** U.S. Department of State
- **DSO:** Designated School Official
- **EAD:** Employment Authorization Document, issued by USCIS service centers
- **ESTA:** Electronic System of Travel Authorization. Registration in ESTA is required before nationals of 36 countries may participate in the Visa Waiver Program.
- **I-129 Petition:** used to apply for the O and P work-related nonimmigrant classifications, among others.
- **I-539 Application:** used to extend the stay and/or change the status of spouses and dependents (unmarried children under age 21) of aliens already in the U.S. in a nonimmigrant status (such as O or P).
- **I-797:** The document USCIS generates when it acts on a petition or application, such as by issuing a filing receipt, a Request for Evidence (RFE) or an approval or denial notice.
- **I-94:** If CBP admits an alien through an airport, it will stamp the alien's passport with the visa classification and length of time for which the alien is admitted. The CBP online database will be updated with the information in an I-94 record of admission. As of April 30, 2013, CBP will no longer issue paper I-94 cards, and instead makes the I-94 record available online at [www.cbp.gov/I94](http://www.cbp.gov/I94). Once in the U.S., the I-94 record is far more important to the alien than visa or I-797. Even if the I-797 classification period is longer than the departure date on the I-94, the I-94 governs. Even if the visa expires while the alien is in the U.S., the I-94 governs! CBP inspectors at POEs and PFIs have discretion to ignore a prior approval by USCIS of a petition or issuance of a visa by a post if they suspect error, fraud, or misrepresentation. They must refuse entry unless the alien has a valid passport and an appropriate visa (except for [Canadians](#), cases involving waivers of one or another of the requirements, and other rare instances).
- **IATSE:** International Alliance of Theatrical Stage Employees

- **KCC:** Kentucky Consular Center, part of the DOS Visa Office to which USCIS service centers send their I-129 petition approvals and associated files for scanning and entry into PIMS.
- **Nonimmigrant:** An alien admitted to the U.S. temporarily, in either a work-related or non-work-related visa classification, or by way of the Visa Waiver Program, who does not intend to remain permanently. “Nonimmigrant intent” is an important consideration for all aliens seeking O-2 and any P status, and their dependents.
- **NCSC:** National Call Service Center (part of USCIS), the toll-free number for most forms of assistance from USCIS, 1-800-375-5283. As of March 22, 2013 the NCSC is no longer open on Saturdays, and beginning April 1, the NCSC will be open from 8 a.m. to 6 p.m., Monday through Friday, in all four time zones in the contiguous United States.
- **Petitioner:** The individual (U.S. citizen or permanent resident), entity, employer, presenter, agent, sponsor or other party that files a petition on behalf of an alien for a particular nonimmigrant classification.
- **PFI:** Pre-Flight Inspection facility, where aliens undergo inspection by CBP personnel prior to boarding flights to the U.S.
- **PIMS:** The Petition Information Management Service is the secure intranet KCC uses to make petition and application approval data available to consular posts abroad.
- **POE:** Port of Entry (air, land or sea)
- **RFE:** Request for Evidence (see definition of I-797 above)
- **USCIS:** [U.S. Citizenship and Immigration Services](#), part of the Department of Homeland Security.
- **Visa:** A physical item embossed in a passport that contains a biometric photo embedded with fingerprint and other data, including the nonimmigrant classification involved. Of itself, a visa does not impart status of any kind; rather, it simply is a travel document that enables the alien to present himself/herself at a POE or PFI for admission in a certain status. An alien can apply for entry at any point during the visa's validity. That the visa may expire while the alien is in the U.S. is irrelevant. What matters is the expiration date on the I-94 CBP issued to the alien on entry. That departure date *should* be on, or no more than 10 days after, the expiration date of the underlying classification period, as it is to that date, not the visa expiration date, that CBP is supposed to admit the alien. In general, all aliens require visas to enter the U.S. The visa requirement is waived for certain aliens, including those entering in Visa Waiver Program and Canadian citizens.

*Visas can last for varying periods of time, depending on a variety of factors.* Work-related visas, such as Os and Ps, generally expire at the end of the approved classification period. However, the visa might be for a shorter period if, for instance, the alien chooses to pay a lower fee for a visa of shorter duration (in Russia) or if the alien is from a country that unduly limits the stays of U.S. nationals coming to that country for a similar purpose. In such cases, the U.S. reciprocates by issuing much shorter U.S. visas to the nationals of those countries. Indeed, nationals of some countries not only receive visas for shorter periods than normal, they can also be limited to as little as a single entry. For

instance, O and P visas for Mexican nationals last for no more than six months, but with no limit on the number of entries for which the visa can be used. Those for nationals of the People's Republic of China are valid only for a single entry within a three-month period, while those for Brazilian nationals are valid for multiple entries during a three-month period. The "reciprocity schedule" for particular countries changes every so often.

- **VO:** Visa Office of the Department of State
- **VSC:** Vermont Service Center is one of two [U.S. Citizenship and Immigration Services \(USCIS\) Service Centers](#) that process I-129 petitions and I-539 applications.
- **VWP:** [Visa Waiver Program](#), now in effect for nationals of 36 countries, whereby, by virtue of reciprocal agreements, citizens of the countries involved may travel by commercial air carrier to the other country as a tourist or business visitor without a visa, for up to 90 days.
- **Work-related:** The category in question permits the alien to work in the U.S. Aliens in the U.S. on B visas or in VWP status cannot work in the U.S., except in very narrow circumstances. If authorized, those in F-1, M-1, and J-1 status may do so for any employer. Aliens in "employer-specific" classifications such as O and P (and H-3 and Q-1) may work only in accordance with the itinerary or activities specified in the petition though, in certain circumstances, they may render similar services not previously disclosed.

## **B. Key Concepts and Overview**

Nonimmigrants are subject to multiple sets of rules governing what they can do in the U.S. and for how long. These sets of rules consist of nonimmigrant visa categories, denoted by letter, that now range from A through V. All of these main categories have at least one sub-category, and some have several. The O and P categories are among the few work-related classifications, and to acquire O or P classification, a U.S. petitioner must first file a petition with USCIS to qualify the alien (not the dependents, who are dealt with later in the process).

Our [Filing Timeline](#) outlines the many steps involved in the visa petition process. Aliens seeking permission to work in the U.S. in O or P classification must first obtain USCIS approval of a petition filed with one of the two [USCIS service centers](#). **Obtaining petition approval takes time and planning.** The petitioner - who cannot be the alien - must select the appropriate nonimmigrant classification, prepare the necessary forms, and gather the required evidence, including a union consultation if needed. The petitioner must know which of the two USCIS regional service centers to use, provide the correct filing fee, complete the forms properly, submit the correct number of copies, and file sufficiently far in advance of the required entry date to account for processing times, visa application times, and the unexpected. Following the rules carefully should yield an I-797 Approval Notice.

Once USCIS approves the petition, the alien then [applies for a visa at a U.S. consular post](#) abroad, unless no visa is required, as in the case of [Canadian citizens](#). The alien completes a visa application form, pays any necessary fees, and applies for a visa in the category selected. With the visa, the alien will be able to appear for inspection at a U.S. preflight inspection facility

(PFI) or port of entry (POE) (an airport or a land border post) to be admitted in the appropriate status, for the required length of time. Once in the U.S., the alien might seek an [extension of stay](#) or a [change of status](#) by filing a petition or application.

### C. Cautions

- ***Do not circumvent the visa process!*** Must an alien go through such a complicated process just to work for a short time in the U.S.? Yes. Even if no compensation is involved? Yes. In other words, just because a beneficiary will be performing in the U.S. for no compensation (or just for expenses) does NOT mean that an O or P visa is not required. O and P beneficiaries are not required to be paid at all, but, to undertake the activities described in their petitions, they must in fact have the appropriate work-related visa classification. O and P petitioners and beneficiaries who fail to comply with the rules take risks that can limit short-term options and impose long-term consequences on all parties involved.
- **Carefully review the detailed instructions for compliance with visa requirements.** U.S. immigration law is complex and can be confusing. Each scenario for engaging an international artist will require a tailored approach to the visa process, particularly those complicated cases requiring unusual procedures and additional effort. This website is an arts-specific supplement to the USCIS publication entitled “Instructions for Completing Petition for a Nonimmigrant Worker Form I-129”, and its instructions for O and P petitions. The [News section](#) of our site is a good point of reference to review recent policy developments, fee increases, and visa processing details related to artist visas. Always check this website and the [USCIS website](#) for updates on instructions and fee schedules.
- **H-1B visas are not for performing artists.** By law, the H-1B nonimmigrant classification is not for artists coming to perform in the U.S., even though at least one USCIS service center still approves H-1B petitions for performers. Do not be tempted to apply for an H-1B visa for a performer.
- **Post-9/11, USCIS and U.S. consulates alike may conduct multiple layers of [security checks](#) before approving petitions, issuing visas, or admitting aliens.** In some cases, the delays required to conduct these checks can be substantial, so be sure to review that page and learn which rules might apply to alien beneficiaries..

## II. When to File an O or P Petition

File petitions as early as possible to be spared the [Premium Processing fee](#), to build in time to address possible complications, [RFEs](#), or denials that may lead to re-filing, and to allow ample time for [consular processing](#) to be completed. Visa petitioners may submit I-129 applications for O or P visas **up to a maximum of one year in advance of their need for the foreign artist’s services.**

*Indeed, filing well in advance is critical. Always file absolutely as early as possible, and at least six months in advance unless [premium processing](#). No service center sympathizes with those who, with proper planning, could have filed sufficiently in advance but did not, only later to seek an expedite!*

While USCIS has promised to speed up and improve the quality of regular O and P artist visa processing, striving to do so within an average of 14 days, do not rely on 14-day processing for regularly filed petitions. Petitioners can [view average processing times](#) for USCIS service centers online.

### **III. Selecting Who Will File the Petition**

U.S.-based employers, agents, managers, sponsors, presenters, organizers, and U.S. agents appointed for the purpose by the alien(s) all may file I-129 petitions. The principal burden these individuals or entities assume in so doing is representing to USCIS, under oath, that the contents of the petition are, to the best of their knowledge, true. (Note that non-U.S.-based individuals or entities specifically are barred from filing O/P petitions.)

Whether a petition is filed on behalf of a single employer or [multiple employers](#), there is no requirement that the petitioner and beneficiary have an employment or other specific type of relationship. The regulations state generally that a U.S. employer, U.S. sponsoring organization, U.S. agent or foreign employer through a U.S. agent may file a petition. The regulations, 8 CFR § 214.2(p)(2)(iv)(E), further state:

A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States 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.

See our section on [Multiple Venue Petitions](#) for more information.

### **IV. Choosing the Right Visa Category**

Foreign guest artists will typically obtain approval in the O or P visa classifications, but special exceptions and procedures may apply for students, Canadians, and spouses and dependents of foreign guest artists.

## **A. O and P Visa Classifications**

Foreign guest artists normally must obtain one of the following:

- [O-1B](#) classification for aliens of extraordinary ability in the arts;
- [O-2](#) classification for personnel accompanying an O-1B alien;
- [P-1B](#) classification for internationally renowned performing groups and essential support personnel; and, for individual foreign artists performing as a member of a U.S.-based internationally renowned performing group;
- [P-2](#) classification for reciprocal exchange program;
- [P-3](#) classification for culturally unique performers or groups, teachers and coaches, and
- [P support personnel](#)

We discuss these classifications and related procedures in depth on the respective linked pages.

## **B. Canadians**

Canadian citizens do not require O or P visas to enter the U.S., but do require approval from the USCIS. Canadian permanent residents (landed immigrants) DO require visas, as do all third-country nationals (those not from the U.S. or Canada) entering the U.S. from Canada. Canadian citizens need simply present themselves at a port of entry or pre-flight inspection location with proof that USCIS has approved their O or P classification. If the petition has been approved, the computer system will contain a full record of that approval, but the best proof remains an [I-797 Approval Notice](#). An alternative is a USCIS fax. As with consulates, however, for various reasons faxes do not always find their mark. As a precaution, always provide the alien with a full copy of the underlying petition. Otherwise, though, there are no applications as such or visa fees if visas are not required. Note that all U.S. Customs and Border Protection (CBP) personnel can quickly access approval information once entered into the system, so it is inexcusable for a CBP inspector to refuse to admit an alien who does not require a visa simply because s/he lacks the original, or even a copy, of the I-797 approval notice because the inspector cannot find the fax or, worse yet, refuses to look for it.

Canadian nationals or permanent residents applying through land ports of entry receive I-94s only if they pay a \$6 fee. If not, the CBP is supposed to stamp their passports with the entry date and classification in which admitted. It is then up to the alien to avoid staying beyond the authorized period of stay. In the present climate, Canadians should obtain some proof of the time, manner, and status awarded at time of admission. For this reason, we recommend paying the \$6 fee or at least ensuring that CBP stamps the passport.

## **C. Other Nonimmigrant Categories**

The following guidance provides information about visa categories beyond the O and P classifications typically used by foreign guest artists. Please note that some of these categories permit work to take place, while others do not!

## **1. B-1 Business Visitors, B-2 Tourists and Visa Waiver Program**

### **B-1 Business Visitors and B-2 Tourists**

However tempting it may be to permit an alien to render services in the U.S. in B-1 or B-2 status, it is a violation of status to do so. All members of the entertainment profession seeking to enter the U.S. to render services must have the [appropriate visa classification](#). Given the risks under current immigration law, particularly from the alien's perspective, it is unwise to succumb to the temptation to look the other way while the alien enters on a B visa pretending he/she is here simply for meetings or to see the sights.

The exceptions to this rule are narrow indeed. Performers may still be classified as B-1 business visitors if coming to the U.S. to participate only in a cultural program sponsored by the sending country, before a nonpaying audience, all expenses paid by the sending government. Performers may similarly be classified B-1 if entering to participate in a competition for which there is no remuneration other than a prize (monetary or otherwise) and expenses. Finally, musicians may enter the U.S. in B-1 status to use recording facilities here, for recording purposes only, provided the recording will be distributed and sold only outside the U.S., and no public performances will be given.

Violations of B, or any other, nonimmigrant status, if detected, can lead to deportation proceedings and inadmissibility to the U.S. for a protracted period of time.

It is possible to change someone present in B-1 or B-2 status to O or P status. However, doing so immediately upon arrival may raise some difficult issues about the alien's intent — and resulting representations — when entering initially. Be careful: Do not play with Bs!

### **Visa Waiver Program**

Nationals from the following countries may enter the U.S. without a visa for up to 90 days: Andorra, Austria, Australia, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, and The United Kingdom (citizens with the unrestricted right of permanent abode in England, Scotland, Wales, Northern Ireland, the Channel Islands, and the Isle of Man). The general requirements for participation include no prior overstays in the U.S., and a prepaid round-trip ticket to a non-contiguous country within 90 days of arrival. **Aliens entering under the Visa Waiver Program (VWP) are subject to the same rules as those admitted in B-1 or B-2 status - meaning they cannot work!**

Nationals who wish to travel to the U.S. on the VWP program must first register with the Electronic System for Travel Authorization (ESTA). ESTA is a brief questionnaire that prescreens applicants for inadmissibility issues. ESTA registration costs \$14 and must be renewed every two years or on the expiration date of the passport used to register, whichever comes first. Successful ESTA registration does not guarantee admission and

should be done at least 72 hours prior to the planned departure date. More information regarding [ESTA](#) can be found online.

There are disadvantages to using the VWP program. Aliens cannot extend their stay in the U.S. if they entered on the VWP, nor can they change to another status in the U.S. Accordingly, they must depart the U.S. and re-enter in another work-related nonimmigrant status before working. Moreover, if there are any questions on entry, they **MUST** return to their originating country on the next flight out, with no ability to resolve those issues at the USCIS district office with jurisdiction or an immigration judge.

## **2. H-3 Trainees**

The H-3 classification is available to aliens coming to the U.S. as trainees in virtually any field of endeavor. There are many restrictions. The training must not be available in the alien's own country. The alien can only engage in productive employment if incidental and necessary to the training. The training must benefit the alien's career outside the U.S. There are substantial documentary requirements. H-3 classification can last for a maximum of two years.

H-3 training programs are often most valuable to larger institutions that can afford to maintain well-regimented and documented training programs, with regular evaluations, and that can use the trainees in performances as part of their training.

## **3. F-1 and M-1 Students**

F-1 students are those enrolled full-time in an accredited academic school with appropriate USCIS authorization. You may employ them off campus during the validity period of their Employment Authorization Document (EAD) or in accordance with the terms of the endorsement on the back of a currently valid Form I-20 for part- or full-time curricular practical training (CPT). Determining whether students are authorized to work and, if so, for how long, can be a headache. A good source of information about the student's ability to work is the school's Designated School Official (DSO), the individual authorized by USCIS to handle student-related immigration matters on campus. No EAD will last for more than a year in this context (though it might be renewed).

M-1 students are those enrolled full-time in an accredited non-academic school with appropriate USCIS authorization. M-1 students must have an EAD to work and the EAD will last for no longer than six months.

It is crucial these days that F-1 and M-1 students obtain and maintain valid, currently endorsed I-20s or I-20Ms. These are the documents issued by the school that enable the student to qualify for the F-1 or M-1 visa, and that provide evidence of their continued valid status. Further, the endorsements respecting work authorization on these forms will let a potential employer know whether the student is employable without an employment authorization document or only with one.

It can be a challenge for students to change directly to O-1B status, because it is hard to show that they meet the O-1B standards. However, exceptionally gifted students, those

who were already performing at a high level and those who win prestigious non-academic competitions, for instance, stand a good chance. The process for filing a [change of status](#) from F-1 or M-1 to O-1B status is no different than filing a change of status from any other non-immigrant classification.

A [May 2018 USCIS Policy Memorandum](#) states that, effective August 9, 2018, if any student in F, M, or J status who was admitted to the U.S. for "Duration of Status" ("D/S") and files a petition for a different visa (such as an O or P), USCIS adjudicators are to investigate thoroughly whether or not the student is or ever was a "status violator" or has an "overstay" on record. This new policy means students should expect far more attention to be paid to possible infringements. Be absolutely certain not to engage in any work (paid or unpaid) that is not expressly permitted by current visa status, and to take care not to remain in the U.S. past the period of authorized study or activity. If filing for a change of status, petitioners should do so far enough in advance so that in event of a denial, the student will not risk overstaying.

#### **4. J-1 Exchange Visitors and J-2 Dependents**

J-1 exchange visitors are present in the U.S. under the auspices of various programs sanctioned by the State Department. If authorized to intern or work, they will have a currently valid Form DS-2019 Certificate of Eligibility and written permission from a Responsible Officer affiliated with the 'sponsor' institution that is conducting the particular exchange program. A J-2 dependent of a J-1 is eligible to work if in possession of a valid Employment Authorization Document. There are few J-1 exchange programs remaining in the arts, with the exception of universities, that can use these programs in conjunction with cultural exchanges, residencies and the like. [International Arts & Artists' Internship in the USA](#) is a sponsor institution for the J-1 trainee, intern, and short-term scholar visa categories. It is essential that the J exchange visitor be in possession of a currently endorsed DS-2019.

A [May 2018 USCIS Policy Memorandum](#) states that, effective August 9, 2018, if any student in F, M, or J status who was admitted to the U.S. for "Duration of Status" ("D/S") and files a petition for a different visa (such as an O or P), USCIS adjudicators are to investigate thoroughly whether or not the student is or ever was a "status violator" or has an "overstay" on record. This new policy means students should expect far more attention to be paid to possible infringements. Be absolutely certain not to engage in any work (paid or unpaid) that is not expressly permitted by current visa status, and to take care not to remain in the U.S. past the period of authorized study or activity. If filing for a change of status, petitioners should do so far enough in advance so that in event of a denial, the J visitor will not risk overstaying.

#### **5. Q-1 International Cultural Exchange Visitors**

This category, purportedly bought and paid for by the Disney folks, and still heavily used by them, enables aliens age eighteen and above to work in the U.S. for up to fifteen months, plus 30 days, after which the alien cannot be readmitted in Q-1 status until the alien has been outside of the U.S. for one year. There are two components to the program.

First, there must be an actual cultural exchange program approved by USCIS that involves employment or training of the alien, an essential element of which is the sharing with the American public, or a segment thereof, of the culture of the alien's home country. Thus, the essential elements of this component include public access, a cultural component, and related employment or training. In addition, USCIS must approve a Q-1 petition for a particular beneficiary(ies), filed by the employer. The two components can be combined in a single petition, after which additional participants may be approved via new petitions. Employers can, however, replace or substitute for participants already approved in a prior petition through a substitution letter to the consulate or port of entry/pre-flight inspection location (if the applicant is visa-exempt) containing specified information.

Given the nature of the constraints on the program, it is indeed best suited to Epcot Theme Park and the like, though larger hotel chains sometimes use the program temporarily to employ chefs.

#### **D. Spouses and Dependents**

The spouse and unmarried children under age 21 of an [O or P beneficiary](#) may qualify for O-3 or P-4 status respectively. If outside the U.S., they will use the related beneficiary's I-797 approval notice to obtain their visas directly from a U.S. consulate abroad. If already in the U.S., they may extend or change status by [filing an I-539 Application](#) with or after the I-129 petition is filed for the principal beneficiary. Either way, do *not* list them on the I-129 petition.

In addition, dependents of O and P principals who are not entitled to O-3 or P-4 status, such as parents, or unmarried significant others, may be able to obtain B visas to accompany the principal.

Aliens in the U.S. whose nonimmigrant status is dependent on someone else are prohibited from working without their own, independent work status.

##### **1. I-539 Applications to Extend/Change Status**

For now, all spouses and dependents requiring either a change to O or P status or an [extension of stay](#) must file an [I-539 application](#). I-539s are family-specific and thus include only the spouse and dependents of one principal alien. If the stays of multiple beneficiaries are being extended, and some have dependents, each set of dependents must file an I-539. I-539 applications should be filed together with the underlying petition for the principal alien; if not, proof of that filing must accompany the I-539. The documentation is as follows: I-539 application with attached [fee](#); copy of each dependent's [I-94](#) (front and back); proof of the prior filing of the underlying petition for the principal alien by means of the I-797 filing receipt or the new [I-797 approval notice](#), passport biographical data page(s), and a short letter explaining the basis of the requested action. Adding a copy of the marriage certificate or, in the case of children, birth certificate, can save time by documenting the relationship.

It is all too easy to deal with the principal alien's status and forget the spouse and dependents. However, given the current penalties for overstays and other omissions, it

is *critical* that someone pay attention to their status, lest they be relegated to their home country consulate for all future visas or, worse yet, barred from re-entry into the U.S. for three, or even ten, years. Remember, too, that the status of the spouse and dependents is, indeed, dependent on that of the principal. If the principal changes status and the others do not, they risk automatic loss of status and a consequent overstay.

**Important note:** All petitions to change status or simply extend stay must be filed before the alien's original stay expires, as noted on the I-94 card. That the visa and/or underlying approval classification period may last longer than the I-94 is irrelevant. Otherwise, the same rules that apply to the change of status or extension of stay of the principal alien apply to that alien's spouse and dependents, so please review carefully the information under the "Important Note" to both sections.

## 2. Completing the I-539 Application

Much of the [I-539 Application](#) is self-explanatory, but there are tricky patches:

- The spouse or a dependent of the principal alien must serve as the applicant. If the dependent is under-age, the principal alien can sign on his/her behalf.
- Part 2, Q.2b: If more than one applicant, use Supplement-1 for the additional applicants.
- Part 3, Q.1: Request the same expiration date as the principal alien under most circumstances.
- Part 3, Q.2: If the principal alien already has received an [extension](#) or [change of status](#), be sure to insert the VSC or WAC number of that filing. These initials relate back to the old names of the USCIS Service Centers, with EAC being Vermont Service Center and WAC being California Service Center.
- Part 3, Q.3: Do your best to submit the I-539 with the principal's I-129. However, do not await the results of the I-129 filing if doing so will mean that the spouse or dependents will overstay or lose their status.
- Part 4, Q.3: If the principal has O-1B status, it does not matter what the answer is to subparts a or b. Otherwise, though, a "yes" answer to any of these questions should prompt a call to an immigration attorney. On the support question under subpart 3g, insert "Spouse [or parent] in O-1B [or O-2, etc.] status is sole source of support."

## V. Determining Length of Stay

When determining the length of stay for a foreign guest artist, petitioners should carefully take into account the types of activities permissible in O and P visa status, and the allowable classification periods.

## **A. Permissible Activities in O and P Status**

An [O-1](#) alien may enter the U.S. for an approved event or events, meaning:

an activity, such as, but not limited to, a . . . conference, convention, lecture series, tour, exhibit . . . academic year, or engagement. Such activity may include short vacations, promotional appearances, and stopovers that are incidental and/or related to the event. A group of related activities may also be considered to be an event. . . .

In short, an event is whatever activities USCIS approves, ranging from a single performance, to a series of activities in an itinerary, to a multi-year contract. Note, however, that significant gaps between performances that are not explained in the petition may result in an [RFE](#) for explanation of the gap or a truncated classification period. In general, USCIS will not question gaps of less than about 45-60 days, and USCIS has issued an [official memorandum](#) clarifying that there is no policy limiting the allowable gap between engagements in an itinerary.

[P-1B](#) and [P-3](#) groups, and their [essential support personnel](#), may enter the U.S. solely in connection with the proposed group activities, and cannot perform services separate and apart from the group. Also, the regulations make it fairly clear that P-1B groups may perform only in their own name, or at least have a featured (and publicized) role. Otherwise, the permissible activities are the same as for the O-1B category.

Note that new performance dates may be added/subtracted within the classification period without a new petition in some circumstances. Please see our section on [Adding Activities Versus Petition Amendments](#) for more details.

## **B. Classification Periods**

All new O or P petitions, including those involving a [change of status](#), may be approved for the duration of the event (itinerary, contract, etc.) in question. The maximum initial approval period for O petitions is three years. The maximum for P petitions is one year. However, obtaining the maximum period of time is a function of the proposed event and how it is described. Gaps between performances that are not explained in the petition may raise concerns and it is best to limit gaps to no more than 60 days between performances whenever possible. While it is possible to obtain full classification periods with longer gaps of time between performances, some USCIS officers will insist that performances more than 60 days apart require separate filings, particularly if the petitioner does not provide an explanation of the artist's plans to depart the U.S. during the gap. USCIS has issued an [official memorandum](#) clarifying that there is no policy limiting the allowable gap between engagements in an itinerary.

Where possible, especially in the case of [P-3](#) itineraries with gaps of even as little as a few weeks, provide documentation, of the same type provided to support the requested itinerary, that the beneficiary(ies) will be performing outside the U.S. during the gap. This may allay the natural concern of USCIS that the beneficiary(ies) will have no means of support while in the U.S. during the gap and may thus be forced to work at other jobs, without authorization, to make ends meet.

USCIS permits O and P aliens to enter the U.S. up to ten days before the classification period starts and to remain in the U.S. for up to ten days after the classification period ends, provided they do not work during these times. As a practical matter, while visas are valid when issued by consulates, and thus constitute valid travel documents, CBP should NOT admit an alien in the desired status until ten days before the classification period begins. Moreover, if the alien intends to remain for up to ten days beyond the classification period, s/he must be sure CBP tacks the extra ten days onto the [I-94](#) on initial entry. Many CBP inspectors are unaware of this provision, so it may help if the alien understands that **no work will be permitted** and is prepared to request the extra ten days available under 8 CFR § 214.2(o)(10) or (p)(12). Consider passing this citation on to the alien with an explanation of its significance *before* the alien leaves for the U.S. Remind the alien who intends to request the extra ten days to check his/her I-94 before departing inspection on entry. Artists seeking to remain in the United States as a tourist for more than 10 days after the O or P visa work period ends must apply for a change in status to a B-2 visa after arriving in the U.S.

USCIS may grant extensions of stay, in the same status and filed by the same petitioner as before, in all O and P categories for up to one year at a time, subject to the same general considerations as above. Please see our [Extension of Stay](#) section for complete details.

## **VI. Where and How to File the Petition**

Knowing where and when to file a visa petition is critical. Choose the wrong processing center, and precious time will be lost. Wait too long to begin the process, and the foreign guest artist will miss a key performance date. Read on for all of the information needed for submitting a petition to the right place, at the right time, using the right petition method.

### **A. Service Center Jurisdiction**

Petitions should be sent to either the California Service Center or Vermont Service Center. If the artist is working/performing at a single address, file with the service center with jurisdiction over that address.

If the artist is working/performing at more than one address (no matter how close they are to one another!!), file with the service center with jurisdiction over the petitioner's address. [USCIS has clarified this](#) as follows:

#### **Filing for Temporary Employment or Training in More Than One Location**

When the temporary employment or training will be in different locations, the state where your company or organization's primary office is located will determine where you should send your Form I-129 package, regardless of where the various worksites are located in the United States. For example, if the beneficiary will work in Arizona and Texas, and your company's primary office is in New York, file Form I-129 with the VSC. If the beneficiary will work in New Jersey and New York, and your company's primary office is in California, file Form I-129 with the CSC.

When the temporary employment or training will be in different locations within the same state, the state where your company or organization's primary office is located will still be used to determine where you should send your Form I-129 package. For example, if the beneficiary will work in two or more different locations in the state of Arizona, and your company's primary office is in New York, you would file Form I-129 with the VSC.

### **Listing Your Organization's Primary Address**

Your company or organization's primary office should be listed in Part 1, Question 3. If you are listing a home office in Part 5, Question 3, we will consider this a separate and distinct worksite location.

**Petitions filed to the incorrect address will be rejected and returned to the petitioner.** Please see our [USCIS Service Center Tips and Contact Information](#) for complete information about the locations for filing petitions.

**The envelope must be clearly marked "Regular Processing" or "Premium Processing."**

### **B. Processing Times Generally**

USCIS processing times for petitions filed using the standard processing system can vary dramatically. Please note that the processing times discussed below are purely for initial approval of the visa classification by USCIS and do NOT take into account the time needed: for the service center to print and mail the approval notice after approval is entered into the computer; for the petitioner (*not* the artist) to receive that approval notice (especially if regular mail is used); for petitioner then to transmit the approval notice to the artist abroad; and, crucially, for the artist then to apply for and receive the visa through [consular processing](#).

Please see our [sample timeline](#) for complete details on the timing for each of these steps.

Since 2001, standard processing for O and P petitions has varied unpredictably from 30 days to more than 120 days, despite a requirement in law to process O and P petitions within 14 days. Following years of advocacy by major national performing arts organizations, a significant breakthrough occurred in July 2010 when the USCIS reported that both the California and Vermont visa processing centers were processing regularly filed O and P visa petitions (without the \$1,225 Premium Processing fee) within an average of 14 days. USCIS now says they will strive to honor the statutory 14-day requirement. While this is a highly encouraging development, petitioners should continue to file visa petitions as early as possible and carefully track the processing times for their petitions. Petitioners have recently reported that processing times continue to vary considerably, from two weeks to 45 days and beyond. The USCIS's own web site has reported that the Vermont processing center is more than 6 weeks beyond its own two-week goal.

An I-129 petition may be filed up to one year in advance of the artist's initial performance. Plan to submit your petition as early as possible to leave time for the unexpected delays, request for evidence, or denial.

### C. Premium Processing

Premium Processing, by which the U.S. Citizenship and Immigration Services (USCIS) promises processing within fifteen calendar days in exchange for more money, was introduced by USCIS on June 1, 2001. For those few who can afford it, Premium Processing represents a luxurious processing option. Imagine, if you will, being able to email, call, and fax a USCIS officer who responds almost immediately in kind! Luxury, as usual, is reserved for the rich, and so USCIS charges \$1225 *per petition*, in addition to the standard processing fee of \$460 *per petition*. In the case of an [O-1B](#) and [O-2](#) petition, or [P petitions for principals](#) and essential [support personnel](#), the fees would thus amount to \$3370 up front (not including consultation fees paid to unions).

In addition to the sheer access and flexibility of communications, in return for the additional fee, USCIS promises to take action on the petition within fifteen calendar days. The action can include: 1) [approval](#); 2) [denial](#) (rare); 3) a [Request for Evidence](#); or 4) a referral for a fraud investigation (rare). If it fails to take one of these actions within fifteen days, the petitioner should request a refund of the \$1225, yet USCIS promises to continue handling the matter as a Premium Processing case.

Our [USCIS Service Center Tips and Contact Information](#) contains all of the Premium Processing contact information, including the specific address to which to send Premium Processing requests. Basically, petitioners should prepare everything as they otherwise would, then prepare an [I-907 form](#), which USCIS uses to obtain all necessary contact information with the petitioner. The \$1225 fee should be attached by separate check to the left side of that form. If two petitions are involved, there should be two I-907s, two checks, etc.

Here are some considerations pertaining to Premium Processing:

- A few tips relating to the [form I-907 version released on 01/29/15](#): If your mailing address is different from your physical address, both need to be noted in the appropriate places in Part 1 (mailing address in Question 4, then if the physical address is different, check Yes for Question 5 and complete Question 6). In Part 1, Question 7, be sure to check the appropriate box – in most cases, unless an attorney is completing the petition on your behalf, you will be the petitioner requesting PPS, and thus you would check the first box. You will enter essentially the same information in Part 2, Question 4 and 6. Be sure to print out and submit all 6 pages of the new I-907, but you can leave the fields for Part 4 and 5 blank if you did not require the services of an interpreter or preparer. ([View our updated sample of the I-907](#)).
- There has typically been no need to Premium Process an [extension of stay](#) because USCIS regulations permitted aliens already in O and P status to remain employed in that status until it adjudicates the extension request. However, [a June 28, 2018 USCIS policy memorandum](#) instructs adjudicators who respond to a petition by issuing a denial to also issue a notice to appear before an immigration judge ("NTA") to all beneficiaries who are not lawfully present in the U.S.. Please see the [extension of stay](#) page for more details.
- Even within the confines of Premium Processing, petitioners may need faster processing than the normal fifteen days. (Often, by the way, the service center Premium Processing

units turn petitions around well within the fifteen days). If so, it is incumbent on the petitioner to make its needs known to the Premium Processing unit, preferably by email or in the original submission.

- Premium Processing should still be subject to the emergency consultation procedures discussed in the following section on [traditional expedites](#).
- Premium Processing should also be subject to the [special O-1B consultation procedures](#) discussed on this website under "Completing the Forms."
- At least for as long as the petition is pending in Premium Processing, the petitioner can make corrections to the spelling of names, birth dates and countries of birth. Once it has been granted, it is much more difficult to make changes without re-filing with new fees, though typos in the beneficiary list can still be addressed, at least for a few days.
- It is extremely difficult to make any material changes to the petition, once it is filed (i.e. add beneficiaries, change requested classification period, provide supplemental evidence, supply missing union consultation, etc.). To avoid delays, it is critical that the initial filing contain all of the necessary materials and information.
- Petitions already pending with USCIS can readily be converted to Premium Processing. If a petition filed through the regular filing process exceeds the [posted processing times](#), immediately call the [National Customer Service Center \(NCSC\)](#) at 800-375-5283 to initiate an inquiry into the status of your case. To upgrade the petition to Premium Processing, the petitioner need only send in the I-907 with the \$1225. On the I-907, the petitioner should provide the USCIS file number, if known, and attach a copy of the I-797 receipt. If the petitioner has not yet received this information, providing the balance of the information called for by the I-907 should enable USCIS quickly to locate the file.

Perhaps the biggest single issue respecting Premium Processing is when you have no choice but to use it. Suffice it to say that if you have not filed sufficiently far in advance and/or you are not a nonprofit, you may have no choice but to use Premium Processing. Otherwise, petitioners often will file through regular processing procedures, and wait until they can stand it no longer before converting the case to Premium Processing. The best way to calculate the need for Premium Processing is to work backwards in time. In doing so, consider when the artist must travel, how long it should take for the artist to obtain an appointment and then the visa at which consulate (of itself a challenging calculation), and how long it will take to get the approval notice to the artist. Add some time for the printing and shipping of the approval to the petitioner from USCIS, and then add at least 30 days to the currently available processing-time reports from the service centers. In doing so, do not forget to take into account how long it will take the petitioner to gather the necessary documentation and obtain the labor consultation. If already squirming, you're a Premium Processing candidate!

#### **D. Traditional Expedites**

***The first rule is to file long enough in advance to avoid having to request an expedite.*** However, the USCIS has the capacity to handle O and P petitions on an expedited basis, free of

additional charge, and it has special procedures for doing so. The USCIS has set a high bar for granting expedites, which disrupt the normal flow, and frowns on petitioners guilty of poor planning and ignorance.

Since the advent of [Premium Processing](#), *only* bona fide nonprofit organizations with a 501(c)(3) letter, or who can document that they qualify for exemption from taxation under Internal Revenue Code Section 501(c)(3), retain the ability to request traditional expedites. Such organizations must provide a copy of their nonprofit documentation when requesting an expedite. *All* others must resort to Premium Processing in an emergency. Not making money on the activities in question, or generally losing money, does not a bona fide nonprofit organization make! Moreover, petitioning on behalf of bona fide non-profits makes no difference if the petitioner lacks the appropriate tax status.

In theory, the service centers are bound by the expedite criteria promulgated by USCIS headquarters. A [USCIS November 30, 2001 memo](#) concerning traditional expedites, lists the following criteria:

- Severe financial loss to a company or an individual;
- Extreme emergencies;
- Extreme emergencies;
- Nonprofit entities seeking to further the cultural and social interests of the U.S.;
- Defense or national interest considerations (supported by the statement of a U.S. government official asserting that delay would be detrimental to the U.S.);
- USCIS error;
- Compelling interests of USCIS.

Even so, service center interpretation of these criteria varies from case-to-case.

In order to request a traditional expedite, you must first file the petition and contact NCSC upon receipt of the I-797 receipt notice. NCSC will transmit the expedite request to the Service Center and it will make its decision within 5 business days. In certain cases, though, the nature of the expedite requires faster consideration and, in these instances, petitioners are encouraged to follow up with the Service Centers via email. Each Service Center has a special email address for standard processing cases that require expedites, but petitioners must first initiate the expedite request through NCSC. Please refer to the [USCIS Contact Information](#) section for these email addresses. Petitioners should supply the service ID request number given to them by NCSC, the date of the call and the nature of the emergency.

In all cases, remember that the most compelling cases are those that involve a last-minute emergency such as illness, injury, etc., that the petitioner can somehow document, combined with significant potential financial harm. Expedites requested because the service center has gone well beyond the estimated processing times stated on their website are iffy. Expedites

justified on the grounds that it now is taking even longer to get visas issued at the consulates are iffier still. Try to address, if not document, every criterion possibly applicable to your case, including those in the November 30, 2001 USCIS memo and those on the respective service center web site.

Congressional offices may be of assistance. Petitioners should first contact the case worker for their respective congressional representative by phone, then follow up with a short fax explaining the nature of the emergency, authorizing that office to contact USCIS on the petitioner's behalf, and enclosing a copy of the I-129 form and any beneficiary list. *Use this option only when desperate!*

Finally, if USCIS agrees that an O or P petition merits expedited handling, it does have emergency procedures for obtaining the [labor consultation](#) if required. Even in a dire emergency, the petitioner should still try to obtain the labor certification first, to save USCIS processing time. Otherwise, though, the petitioner should make it clear in the accompanying letter and on the O/P Classification Supplement that it wishes to invoke these procedures, by asking USCIS to obtain the consultation under the emergency procedures, citing 8 CFR § 214.2(o)(5)(i)(E) for O petitions, and 8 CFR § 214.2(p)(&)(i)(E) for P petitions.

#### **E. Electronic Filing**

**As of September 20, 2015**, all petitioners must file the paper version of the [Form I-907](#) for Premium Processing Service (PPS). USCIS is discontinuing its legacy e-Filing system as part of a process to transition to a new Electronic Immigration System, which will reportedly be faster and more secure. The Form I-907 will eventually be part of the new system, but not in the immediate future, so petitioners should plan accordingly and build in extra time for paper filing PPS requests. Questions? Contact USCIS via their [online help form](#) or call customer service at [1-800-375-5283](tel:1-800-375-5283) (TDD for deaf or hard of hearing: [1-800-767-1833](tel:1-800-767-1833)).

Electronic filing of the I-907 had previously been an option if the original I-129 form and supporting evidence were received by USCIS but a petitioner was seeking to upgrade a petition to PPS. Petitioners submitting an original I-129 and simultaneously seeking PPS must do so by hard copy.

#### **F. Tracking Your Petition**

In response to each filing, USCIS provides an [I-797 filing receipt](#) that directs the petitioner to the USCIS website to determine average processing times and to track individual petitions. It is unclear how accurate or up-to-date the average processing time estimates are. Moreover, these processing time ranges do NOT take into account the time needed: for the service center to print and mail the approval notice after approval is entered into the computer; for the petitioner (*not* the artist) to receive that approval notice (especially if regular mail is used); for petitioner then to transmit the approval notice to the artist abroad; and, crucially, for the artist then to apply for and receive the visa through [consular processing](#).

Petitioners can check average USCIS processing times and [track the progress of individual cases online](#). It is even possible to create an account to request that USCIS automatically email any status updates. However, the only information about individual cases that is revealed online or by

email is whether the case is in process, approved, or denied. Scrolling down in the same site will enable you to check average processing times at each service center. However, note that USCIS can be months behind in updating the average processing times posted online, so the timeframes posted can be unreliable.

USCIS has promised to speed up and improve the quality of regular O and P artist visa processing, striving to do so within an average of 14 days. If a petition filed through the regular filing process exceeds 14 days in processing times, immediately call the [National Customer Service Center \(NCSC\)](#) at 800-375-5283 to initiate an inquiry into the status of your case. NCSC has live agents available Monday – Friday, 8 a.m. – 6 p.m. in each time zone. The 14-day goal, however, is not binding. Knowing the average service center processing times is crucial because NCSC operators are not permitted to provide additional support until the case is past due according to the currently quoted processing times. In short, what counts is the current processing time estimate by the service center for the particular type of petition or application. Make every effort to check average processing times online, but given how out of date those online reports are, do call NCSC even if your petition has not exceeded the processing times online, but has exceeded the 14 day goal. The operator may have more up to date processing information and may agree to help. Also, please note that the process outlined above will not prevent a qualified petitioner from immediately seeking a [traditional expedite](#) at any point in the petition process.

If more than **15 days have passed** since you contacted the NCSC and the issue has not been resolved or explained you can email the proper USCIS Service Center to check the status of your case: California Service Center: [csc-ncsc-followup@dhs.gov](mailto:csc-ncsc-followup@dhs.gov); or Vermont Service Center: [ysc.ncscfollowup@dhs.gov](mailto:ysc.ncscfollowup@dhs.gov). In your email, be sure to include the case type and classification in the subject line.

## **VII. Filing Fees**

Always ascertain the appropriate filing fee by checking the [U.S. Citizenship and Immigration Services \(USCIS\) fee charts](#), on the USCIS web site, not from the form instructions!

- The fee for the regular [I-129](#) petition for a nonimmigrant worker is **\$460**.
- The fee for the [I-907](#) premium processing form is **\$1225**.
- The fee for the [I-539](#) petition to extend/change status (used for spouses and dependents) is **\$370**.

**To avoid delays in processing, please note the fee change and plan accordingly.**

Payment should be made by business or personal check, money order or cashier's check, payable to "Department of Homeland Security." Separate checks should be used for each fee paid. It is best to make a notation of some sort on the check, such as "Acme Co. I-129/O-1B for J. Brown,"

to make it easier to reconnect with check with the filing should it become separated by accident. Do NOT pay fees in cash or stamps!

There is no rule about who must pay these or any other costs associated with the petition. That is a matter of contract between the petitioner, the beneficiary(ies), and the venues. USCIS will be happy to take payment from any source.

## VIII. Completing the Forms

Properly completing the visa petition forms is essential to success and even the tiniest of errors can result in a petition being slowed down or denied. Please read the sections regarding General Guidance for Filing and Completing and Filing the I-129 before jumping to the specific filing tips corresponding to the classification that is being sought.

### A. General Guidance for Filing

USCIS relies exclusively on plain old, printed documents. In fact, USCIS requires only original signatures on its forms, which can otherwise be downloaded, copied, etc. Any material not in English must be accompanied by an English translation or summary (word for word translations are not always necessary to prove your point), together with this certification:

I, [name], certify that I am fluent/conversant in the English and [language] languages, and that the above/attached document(s) is/are an accurate translation(s) of the original document.

Date: \_\_\_\_\_ Signature: \_\_\_\_\_

Any responsible person can sign the certification.

Picayune details abound, but attention to them will minimize mailroom errors, facilitate the U.S. Citizenship and Immigration Services (USCIS) examiner's life and rebound to your benefit.

- All [I-129 petitions](#) must be filed in duplicate. Include a cover sheet on the duplicate copy that reads "DUPLICATE I-129 PETITION. PLEASE FORWARD TO KCC UPON APPROVAL." [I-539 applications](#) are not filed in duplicate.
- Do *not* submit taped or other electronic media to USCIS because it has no means of viewing or listening to such items.
- USCIS will gladly take legible copies of all documents, even faxes, including labor consultations and other supporting documentation. Indeed, USCIS would just as soon receive 8-1/2 x 11 copies (fax copies are fine) of anything that in its original format - oversized documents, photos that don't fold, bulky brochures bound to one side - impedes the examiner's handling of the petition.
- Submit all required documentation at once. Once the petition/application is submitted, forget trying to send in any additional information, except in response to a USCIS request

for additional information. If you omitted something critical, consider re-filing (with new fee) to save time, and withdrawing the old petition.

- Separate voluminous exhibits by colored paper inserts (makes them easier to see) referenced as Exh. 1, 2, 3, etc., correlated to the petitioner letter. Supply an index for voluminous exhibits.
- Sign all forms in *blue ink* to eliminate any question whether the signature is an original.
- Mark the outside of the envelope of an initial filing "ORIGINAL SUBMISSION - I-129/O-1B[O-2, etc.]." If an extension of stay or change of status is involved, add "w/ES" or "w/COS."
- See the [USCIS Service Center Tips and Contact Information](#) for the address to send your regular or premium-processing visa petition. We encourage the use of air courier services because of the tracking ability.
- Send principal and support petitions in the same envelope. Clip them together with a binder clip, but attach *separate* checks to the petitions. Similarly, submit any accompanying I-539 applications at the same time, accompanied by separate checks.
- If you have any special requests or instructions, consider printing them on a red sheet and placing that sheet on top of your filing.

Always include a return air courier mailer at the time of your initial filing. USCIS is getting better at using them. USCIS prefers FedEx, but will use other prepaid envelopes. Include your valid account number, and be sure to indicate your own information as both the sender and recipient, noting that this information must match the contact information for the petitioner listed on the I-129. Note, also, that the mailer must be submitted either with a **pre-paid billable stamp** or a **pre-paid shipping label** affixed to the package; USCIS service centers will not accept return mailers that have a handwritten waybill or computer-generated waybill.

## **B. Completing and Filing the I-129**

In general, complete all blanks with the information requested or with either "N/A" or "none," as appropriate, trying as best you can not to confuse the two. "N/A" should be used where the concept at issue simply has no bearing on your matter, such as an "A number" for a nonimmigrant, while "none" should be used, for instance, in response to a request for a middle initial. Legible print is OK, typed forms are better. A number of commercial computerized forms programs are available. Remember to sign all USCIS forms in *blue ink*.

### **1. Completing the I-129 Petition**

PLEASE NOTE - Interpret all references to "employer" throughout the form to mean "petitioner." The new forms require an original signature in **two places** (the end of the I-129 and the end of the O & P Supplement). If you have not signed the form two times, it is not complete!

**Part 1, Q.5:** Include your federal employer identification number in question 5. It is not necessary to include a social security number or individual tax number. Leave those spaces blank or hand-write "N/A."

**Part 2, Q.2:** Check box "a" unless the beneficiary already has the classification requested. If so, check box "b" in conjunction with a) an [extension of stay](#) not involving a material change in employment (i.e., if the alien is going to continue to render essentially similar services under the aegis of the same petitioner). If the same petitioner is involved but the employment will change materially, check box "c." If the alien already has the classification requested based on someone else's petition and the classification period now sought overlaps with the earlier one, check box "d" unless the concurrent employment will extend beyond the prior classification period, in which case check box "a."

**Part 2, Q.3:** You must now provide the artist's most recent visa petition receipt number; if you are not requesting an extension of stay or change of status and don't have access to a number, enter "unknown". Provide the most recent receipt number, even if the Artist's prior visa was in a different classification than the one you are now pursuing. Report the file number from the most recent I-797 receipt or [approval notice](#) (upper left corner). This number begins with the initials "EAC" or "WAC," though the entire file number may not always be reproduced. These initials, by the way, relate back to the old names of the USCIS Service Centers, with EAC being Vermont Service Center and WAC being California Service Center.

**Part 2, Q.4:** If you select box "a" in Part 2, question 2, consider what action you would hope to invoke by referring to our section on [Communications between USCIS and Consulates](#).

**Part 3, Q. 1:** Enter the P-1B or P-3 group's name or enter "n/a." Either way, if multiple beneficiaries are involved, insert "see [beneficiary list](#) [or petitioner letter]." When entering individual information here, or when preparing a beneficiary list, it is critical that you use each beneficiary's full name as contained in the passport, and that you enter that name, the birth date, gender, and the country of nationality without typos. Typos can come back to haunt you. If petitioning for a group, leave the box for gender blank in Question 4. For the immediate following question requesting an A number, the beneficiary generally will not have one, which refers to a pre-existing USCIS file ordinarily set up in relation to a permanent residence petition. If one exists, provide it. Otherwise, leave the box blank or hand-write none" in the box and "none" in response to the request for a Social Security number, unless the beneficiary happens to have one.

**Part 4:** With regard to all of the questions in Part 4, if you answer "yes" to any question (prior denials, accompanying petitions, prior green card petitions, valid passports, etc.), you must now put your explanation on an official explanation page, which is part of the I-129 form. **This explanation page must also be signed by petitioner. Not using the official explanation page could result in the entire petition being rejected by the**

**mailroom and/or may give USCIS examiners an excuse to deny the petition outright, or issue a request for evidence.**

**Part 4, Q.1:** Be sure to enter the city and country of the consulate, port of entry (POE), or pre-flight inspection (PFI) location to be notified. At "the person's foreign address," enter a foreign address for a single beneficiary or, if possible, an address for a representative of the group. This may be left blank for groups. Refer to this site's section on [Communications between USCIS and Consulates](#) if more than one consulate will be involved in issuing visas relating to the petition.

**Part 4, Q.2:** If a beneficiary does not have a valid passport but is (or will be) applying for one, explain this in the petitioner letter and on Page 8, Part 9, write in "applied for" at this point, or enter "applied for" on the beneficiary list.

**Part 4, Q.3:** Enter the number and type (e.g., "one P-1S") of any accompanying, related petition(s).

**Part 4, Q.4:** Check "no" to this question.

**Part 4, Q.5:** If petitioning for a [change of status](#) and/or [extension of stay](#) and dependents simultaneously seek the same benefit, answer "yes" and state how many [I-539](#) petitions are involved.

**Part 4, Q.7:** If the petitioner has ever filed for permanent residence (a green card) on behalf of one or more of the beneficiaries, the answer is "yes." Even if "yes," the answer is irrelevant to O-1B beneficiaries (but answer anyway). However, if the answer is "yes" for any other beneficiary, consider contacting an immigration attorney in light of the nonimmigrant intent issues discussed in this site's section on [Nonimmigrant Intent](#).

**Part 4, Q.9:** If you have previously submitted a visa petition on behalf of the artist(s), on Page 8, Part 9 of the I-129 list the application dates, visa classification (i.e. O-2, P-3), and receipt numbers to the best of your ability.

**Part 4, Q.10:** If filing a P-1B petition, answer this. If "yes," check the appropriate box and on Page 8, Part 9 of the I-129 explain the compliance with, and requested exceptions to, the [75 percent rule](#).

**Part 4, Q. 11a and b:** Some "J" visa holders are required to return to their country of residence for two years following the end of their J-1 program. However, they can acquire O or P status before fulfilling this requirement if they depart the U.S. to obtain a new visa.

**Part 5, Q.1-6:** For multiple beneficiaries, insert "see beneficiary list" (or the petitioner letter) for the job title and duties. Insert "see itinerary" (or the petitioner letter) for the address of the services. The LCA and ETA case numbers do not apply to O and P visas. Complete the space with "N/A."

**Part 5, Q. 4:** Indicate whether or not an itinerary is included with the petition. (NOTE: Pending further clarification from USCIS, we are advising either to check “No or leave blank and write “N/A” in circumstances in which there are not multiple engagements and, hence, no itinerary exists.)

**Part 5, Q. 5:** Check “No” or leave blank and write “N/A” as this question only applies to H-1B petitioners.

**Part 5, Q. 6:** CNMI stands for Commonwealth of Northern Mariana Islands. Unless performing exclusively in CNMI either check “no” or leave blank and write “N/A.”

**Part 5, Q. 7-10:** Whether the position is full- or part-time makes no difference, but do provide some wage information, which can be per week, month, year or "event" or "total." For "other compensation," describe other costs the petitioner (or presenters) will bear, such as travel, room and board, and provide an estimated value.

**Part 5, Q. 11:** Be certain to complete the "dates of intended employment" box, leaving yourself sufficient time at the beginning and end of the requested [classification period](#) to account for contingencies. Please note that “dates of intended employment” must include the actual dates of the performances, the dates for rehearsals and any additional time needed for travel, load-in and public relations events. If this box is empty, USCIS will return the petition; if you make a typo, USCIS will rely on the typo though the results may be nonsensical (e.g., 7/4/98-8/4/97 will yield a one-day approval) and extraordinarily difficult and time-consuming to undo.

**Part 6:** This section does not apply to those filing for artists and performance groups.

**Part 7:** The petitioner, not the beneficiary, signs.

## **O & P CLASSIFICATION SUPPLEMENT TO FORM I-129:**

**Section 1, Q. 4 and 5:** Give a brief description of the nature of the event and duties to be performed and refer the examiner to the petitioner letter for additional information.

**Section 1, Q. 6:** Provide the dates of prior experience for O-2 or P personnel (or refer to the beneficiary list or petitioner's letter). P support personnel are not required to have prior experience with the principals.

**Section 1, Q. 8 and 9:** The consultation portion of the O/P Supplement can be confusing.

If you have the requisite consultation(s), check “yes” to questions 7 and 8 and leave the rest blank. Remember, if you check “yes”, but submit only a consultation from a peer group or service organization in place of the required labor consultation, this could result in a petition denial or an [RFE](#).

If the answer to number 8 requesting whether the [appropriate labor organization](#) exists is “No”, then you must provide an explanation on Page 8, Part 9.

For petitions that include positions that both are and are not covered by unions (i.e. P-1S with administrative worker not covered by a union and technical workers covered by IATSE), answer “No” to Question 8 and explain positions not covered by unions AND answer “Yes” to question 9 for positions covered by unions.

Petitioners relying on the [special O-1B forwarding procedure](#), in which USCIS is asked to seek the labor consultation letter should check "yes," to question 8 and check "no" to question 9. Do **not** complete the contact information for the labor organization, but insert "forward per 8 CFR 1214.2(o)(5)(i)(F)." Be sure to also address this request in your cover letter.

O and P petitioners that have requested a labor consultation with no response within 15 days should check “yes” to question 8, “no” to question 9, and complete the contact information for the labor organization.

O-1B petitioners using consultations obtained within the past two years should check "yes" to question 9 and insert "waiver requested - prior consultation attached.”

**Section 2:** While this is a relatively new signature requirement, the obligation to provide return transportation if a beneficiary is dismissed by the employer before the end of the period of authorized stay has always been in USCIS regulations.

## **2. Multiple Venue Petitions**

When an artist prepares to travel to the United States for an itinerary of engagements at multiple venues, one employer (one venue) traditionally has been able to file a single, comprehensive visa petition including all employers (venues) in the itinerary.

Contradicting nearly 20 years of established practice, on October 7, 2009, the USCIS announced a new policy revoking the ability of a U.S.-based employer to file a single petition for artists coming to the U.S. for an itinerary of events with multiple arts organizations – unless the petitioning employer is “in business as an agent.”

In response to concerns expressed by the national performing arts community, the USCIS has reinstated the ability of a petitioner to file a single petition for artists coming to the U.S. for an itinerary of events with multiple arts organizations. A [November 20, 2009 USCIS memo](#) offers some clarification for petitioners. While several questions remain unanswered, we offer the following guidance to immediately assist petitioners:

If an artist plans to travel to the U.S. for multiple engagements, and a single U.S. organization is submitting the visa petition, the petition must be carefully assembled to satisfy new USCIS requirements. The petitioner does not have to demonstrate that it normally serves as “an agent” outside of the petition process. Instead, per USCIS, a statement signed by the various venues included in the petition may establish that the petitioner is authorized to act as agent for the limited purpose of filing the petition with

USCIS. The artist will also need to complete a similar form for a petition that involves multiple employers. We have crafted sample forms that lead petitioners should consider including:

Form: [Appointment of Agent by Employer](#) (must be completed by each additional employer and must be a separate document, not part of a contract or other material)

Form: [Appointment of Agent by Foreign Artist/Group](#)

In addition, USCIS requests the following evidence:

- A complete itinerary of the event or events, specifying the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venues, or locations where the services will be performed.
- The contracts between the employers and the beneficiary.
- If a written contract does not exist, an explanation of the terms and conditions of the employment.

USCIS warns that multiple-employer petitions filed by any petitioner that does not establish that it has been appointed to file the petition will be approved only for the period of time covering the petitioner's direct employment of the artist.

The national performing arts community continues to press for clarity regarding the documentation required to accompany petitions. In the meantime, following the guidance above may prevent petition rejections or time-consuming re-filing for engagements not included in a truncated petition approval.

If an itinerary with multiple venues is involved, the itinerary should list confirmed dates (with or without contracts), dates under negotiation, dates in which presenters have expressed an interest, and even projected dates based on past experience and relationships. The attached documentation may include signed contracts, unsigned contracts, draft contracts, letters of intent, supporting emails, and any other means of documenting that a given date may occur. Many petitioners routinely add a few extra days to the end of the requested classification period to accommodate the unexpected or to enable the artist to wind down. The ability of any type of petitioner to proffer such an itinerary to USCIS is an additional incentive to cumulate all the information on a single petition, thus increasing the chances of a longer approval period. As noted in our section on [Classification Periods](#), gaps of more than 45 to 60 days raise concerns and it is best to avoid lengthy gaps when possible, or to fully document the activity that will take place outside of the U.S. during any lengthy gap.

When submitting an itinerary-based petition, be sure to use our [sample cover letter](#), which includes language clarifying that additional engagements may be added. Also, remember to check the [service center jurisdiction](#) guidance on employment in more than one location to determine whether to file at the California or Vermont Service Center.

## **C. O-1B Petitions: Individual Artists of Extraordinary Ability**

An O-1B petition can include only one alien of extraordinary ability in the arts entering the U.S. to work in his/her area of expertise. "Extraordinary ability" for purposes of the arts means "distinction" which, in turn, means a high level of achievement in the field, substantially above that ordinarily encountered. With a well-crafted petition, seasoned or accomplished artists, those who have achieved sudden success, and even students and child prodigies who function at a level appropriate to O-1B status should qualify. Although USCIS service centers vary in their interpretation of the extraordinary ability standard as applied to performing artists, nonetheless, if a USCIS service center questions whether the alien meets the standard of distinction, the petitioner first should look closely at how much effort went into the petition in the first place.

A U.S.-based entertainment group that engages a foreign individual to perform as a member can also opt to file for a [P-1B](#), based on the reputation of the U.S.-based group with which the artist will perform.

### **1. Definition of "Arts"**

For O-1B purposes, the definition of arts, and thus artists, is broad:

any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts. Aliens engaged in the field of arts include not only the principal creators and performers but other essential persons such as, but not limited to, directors, set designers, lighting designers, sound designers, choreographers, choreologists, conductors, orchestrators, coaches, arrangers, musical supervisors, costume designers, makeup artists, fight masters, stage technicians, and animal trainers.

"Arts" is thus a term of art that encompasses a full range of people, not necessarily principal creators or performers, but "above the line" in that they exercise creative judgment and apply imagination to the enhancement or preservation of a creative act. Under this definition, artistic administrators, music teachers, vocal coaches, and many others who contribute to the creative process may qualify for O-1B status. Even a highly skilled craftsman, such as a stage technician who contributes to the creative process, may do so.

### **2. Proving Extraordinary Ability**

The regulations offer three basic approaches to showing extraordinary ability.

*First*, petitioners can prove extraordinary ability by showing a one-time achievement, meaning the alien's nomination for or receipt of a "significant national or international" award or prize in the particular field, such as an Academy, Emmy, Grammy, or Director's Guild award.

*Second*, petitioners can qualify aliens lacking such a rare one-time achievement by documenting that the beneficiary meets *at least three* of the following suggested criteria:

- Performed/will perform as lead/starring participant in productions/events with distinguished reputations, shown by critical reviews, ads, PR releases, publications, contracts, endorsements;
- National/international recognition for achievements through critical reviews, other published materials by or about the alien in major papers, trade journals, etc.;
- Performed/will perform in lead/starring/critical role for organizations that have distinguished reputations, shown by media articles, testimonials, etc.;
- Record of major commercial/critically acclaimed success;
- Achieved significant recognition from organizations, critics, government agencies, recognized experts;
- Commanded/will command high salary/other remuneration relative to others in field.

The menu-driven approach is fine for those aliens squarely meeting the criteria; otherwise, though, the disadvantage of this approach is that it can tempt overburdened USCIS examiners to rely too heavily on canned criteria and, frankly, make it too easy for them to deny a petition for inappropriate reasons. Moreover, merely meeting three of the criteria may be insufficient, for USCIS reserves the right to step back from the petition and review it from a broader perspective.

*Third*, as a supplement or alternative to the menu-driven approach, the "comparable evidence" approach enables petitioners to supply other types of evidence for cases in which the suggested criteria don't quite fit. For the most part, "comparable evidence" means letters from experts in the same or an allied field of endeavor. There is no magic number of letters required, but for O-1B petitions otherwise thinly documented, consider at least five. The letters must set forth in detail the credentials of the author (an attached résumé or bio will do), establish how the author knows the beneficiary (by personal relationship or reputation), and give an opinion that addresses the standards set forth above. Experts can be academics, performers, diplomats, other governmental representatives or peers - from here or abroad - just about anyone whose credentials USCIS is likely to accept. USCIS recognizes the [national arts service organizations](#) as qualified peer groups for the purpose of providing non-labor pre-petition consultation letters.

### **3. O-1B Filing Specifics**

- If [Premium Processing](#), separate \$1225 filing fee by business or personal check, money order or cashier's check, payable to Department of Homeland Security, stapled to middle left side of form I-907;

- [Proper filing fee](#) by separate business or personal check, money order or cashier's check payable to Department of Homeland Security, stapled to middle left side of the I-129 petition;
- [Form I-129](#) Petition and O and P Classifications Supplement;
- [Labor consultation](#) (if any) (new or copy of one obtained within two years of proposed re-entry date);
- Copy of beneficiary's passport biographical data page;
- Petitioner's [cover letter](#), first addressing basis of any traditional expedite request and any special procedures desired. Otherwise, letter should specify benefit sought, list filing contents, provide brief background on petitioner, summarize evidence showing beneficiary meets O-1B standards, explain nature of event and services to be rendered, outline any oral contract(s) or specify payment/expense terms of any written contract(s), reiterate classification period start and ending dates, and raise any issues regarding consultation waivers;
- Index to supporting documentation (if voluminous)(Exh. 1, 2, 3, etc.);
- Supporting documentation, including evidence that beneficiary meets [substantive O-1B standards](#), such as copies of beneficiary's résumé, discography/CD jackets, other biographical materials, reviews, articles, PR materials; full itinerary, supported by all written contracts, agreements, deal memos, letters of intent, etc. If petitioner is either a management agent or an "appointed" agent, include a full itinerary specifying dates of each service or engagement, names and addresses of actual venues, and fees payable. Agents acting as employers must supply their contract with beneficiary as well. Appointed agents should include forms from the beneficiary and venues, designating them as agent for immigration purposes and authorizing them to file the I-129 petition. [Document itineraries](#) and address lengthy gaps within itineraries. *Because signed documents are more persuasive than unsigned ones, try to include signed contracts, letters of intent, etc., where they exist.*
- If on the [I-129 petition](#) you checked Part 2, Q.2a or b, submit the entire petition in duplicate.

#### **4. O-1B Consultation Procedures**

*Please first review the [Labor Consultation](#) page for universal guidance on labor consultations. The information below pertains to a special O-1B consultation procedure.*

In theory, U.S. Citizenship and Immigration Services (USCIS) will obtain the labor consultation for the petitioner *if* the petitioner includes with the petition a non-labor consultation. USCIS is supposed to forward a full copy of the petition to the appropriate labor organization within five days of receipt and, if the union fails to respond within

fifteen days, USCIS "must" adjudicate the petition without the union's input. The field of opera has relied most heavily on this process.

However, relying on USCIS to obtain the labor consultation risks slowing the process down, even assuming the USCIS examiner is familiar with what is now a little-used procedure, and also relinquishes control over the process. The American Guild of Musical Artists (AGMA), for instance, simply does not respond to USCIS requests for advisory opinions unless it receives its \$250 fee directly from the petitioner. If indeed speed is paramount, the petitioner should consider obtaining the labor consultation directly from the union. Note that where other evidence of distinction exists, a consultation from a non-labor source is optional. And, because a non-labor advisory opinion can come from an individual as well as an organization, there is no practical difference between such an opinion and the type of expert opinion used under the comparable evidence standard.

A reason to consider using the special O-1B consultation procedure despite the risk of delay is that, by law, unions have fifteen days to respond to USCIS consultation requests, after which USCIS is free to adjudicate the petition without the consultation. Petitioners resolved to use this O-1B procedure should state in their accompanying letter that they are enclosing a non-labor consultation and are relying on USCIS to obtain the labor consultation under the procedures set forth at 8 CFR § 214.2(o)(5)(i)(F). This is a citation to the actual provision in the applicable USCIS regulations, which includes a requirement that USCIS will adjudicate the petition if the union does not respond within fifteen days.

Also, in O-1B cases, [a new labor consultation is unnecessary if the alien is re-entering the U.S. to perform similar services within two years](#) of the date of a previous O-1B labor consultation. If you seek a consultation waiver, say so in your cover letter to USCIS, explain why, and write "waiver requested" in the consultation section of the [I-129 O/P Supplement](#). However, if the petitioner cannot supply a copy of the prior consultation (the prior petitioner's identity is immaterial), this exception is unavailable.

#### **D. O-2 Petitions: Personnel Accompanying O-1B Artists**

USCIS will permit an O-2 accompanying alien to enter the U.S. temporarily and solely to assist an O-1B alien in performing the work described in the O-1B petition. The O-2 alien must be an integral part of that work, and have critical skills and experience with the O-1B alien not of a general nature and that cannot be performed by other individuals. O-2 aliens must be separately petitioned for and cannot be included in an O-1B petition. The O-2 petition, however, can include multiple beneficiaries. It cannot be filed before the O-1B petition; rather, it should be filed with the O-1B petition unless unusual circumstances warrant filing it afterwards. In any case, absent an accompanying or preceding O-1B petition, O-2 classification is unavailable. In such a case, consider whether [O-1B classification](#) is a possibility.

Whenever more than one alien is coming to the U.S. for the same set of activities, and unless [P-1B](#) or [P-3](#) classification is more appropriate, consider filing one O-1B petition and including all other beneficiaries, irrespective of stature or nature of activity, on a single O-2 petition. Why? An O-2 petition involves far less paperwork. In the case of a singer and accompanist, for

instance, the accompanist probably can qualify for O-1B status. However, unless the accompanist will perform elsewhere in the U.S. without the singer, there is no need from the petitioner's perspective to bother filing an O-1B petition for the accompanist, with the attendant burden of proving the accompanist's extraordinary ability. To be sure, the accompanist may desire an O-1B visa for other reasons, ranging from ego to the need for an O-1B visa to perform separately at some point during the classification period.

The O-2 alien must render services essential to the O-1B principal's performance and have critical skills not general in nature. This does not mean that O-2 classification is available only if no U.S. worker can do the job, but it does mean that the O-2 alien must have special skills and prior experience with the O-1B alien that somehow make the O-2 alien unique. How much prior experience is a matter of USCIS discretion, but it should be enough to show that the O-1B and O-2 have a solid working relationship with one another. O-2 classification is available to a broad range of accompanying aliens, from personal assistants to makeup artists to performers. It will be more difficult to justify a chauffeur or a baggage handler.

## **1. O-2 Filing Specifics**

Prepare O-2 petitions similarly to [O-1B petitions](#), with these differences:

- If the petition includes more than one beneficiary, attach an alphabetized beneficiary list, using the USCIS Supplement-1 form or a column format (see "[Blank Beneficiary Chart](#)") that contains similar information. The list should go immediately after the O and P Classifications supplement, and before any consultations, and should be followed by copies of each beneficiary's passport biographical data page. USCIS examiners prefer the more accessible column format because they have to re-type the beneficiary information into their computer system. Be sure to supply a one- or two-word description of each beneficiary's job.
- The main supporting documentation should be a statement from the petitioner in the petitioner's letter or, even better, the O-1B principal, describing the O-2 alien's critical skills and experience with the O-1B beneficiary, the nature of the assistance to be rendered, and its essentiality.
- Other documentation should include [contracts](#), [résumés](#) (where feasible), and [itineraries](#).

## **2. O-2 Labor Consultation Details**

*Please first review the [Labor Consultation](#) page under the Required Evidence section for universal guidance on labor consultations.*

Note that the consultation requirement is waived for certain positions that have no direct input into the creative aspects of a production or performance, and also in cases where there is no appropriate union, as with interpreters, music librarians and even artistic administrators. It is best first to check with the unions to verify that they do not “cover” a

particular position. For further details and how to request a waiver, visit the [Labor Consultation](#) page.

## **E. P-1B Petitions: Group Performers**

The P-1B classification is available to foreign-based entertainment groups, or to foreign individuals performing as a member of a U.S.-based entertainment group. In the case of foreign-based groups, the group must consist of at least two beneficiaries entering solely to perform or entertain with the group. In general, the group (whether foreign-based or U.S.-based) must have been internationally recognized for a sustained period and 75 percent of its members must have been associated with the group for at least one year. P-1B petitions may also be used for individual group members in cases where the alien is coming to the U.S. to join a foreign group previously approved for P-1B classification.

On December 31, 2011, [USCIS revised its P-1B policies](#) to permit eligibility for foreign individuals performing as a member of U.S.-based groups. Previously, the P-1B was exclusively available to foreign-based groups of performers. This development provides an opportunity for individuals to apply for a visa based on the reputation of the U.S.-based group with which the performances will take place. Please note, however, that individuals coming to the United States on a P-1B visa will only be authorized for work that takes place as a member of the U.S.-based group. For individual artists planning an itinerary of activities that includes performances as a member of a group, plus solo or other endeavors, the O-1B will be the appropriate visa classification. The December 31, 2011 memo specifies:

*P-1B classification for entertainers applies to: (i) members of an internationally-recognized entertainment group coming to the United States; and (ii) an individual coming to the United States to join, as a member, an internationally-recognized group, which can be based in the United States or abroad. A member of an internationally-recognized entertainment group may be granted P-1B classification based on that relationship, but may not perform services separate and apart from the entertainment group. The P-1B nonimmigrant who is a member of an internationally recognized entertainment group must be coming to the United States to perform with the group as a unit. In addition, the entertainment group must be internationally recognized as outstanding for a sustained and substantial period of time, and 75% of the group must have had a sustained and substantial relationship with the group for at least one year. The P-1B nonimmigrant classification is not appropriate for an individual performing as a solo entertainer.*

### **1. Proving International Recognition and Exceptions**

“Internationally recognized” means:

having a high level of achievement in a field evidenced by a degree of skill and recognition substantially above that ordinarily encountered, to the extent that such achievement is renowned, leading, or well known in more than one country.

The definition is similar to that of O-1B extraordinary ability, but a bit more stringent. *What is important is the reputation of the group, not the individual achievements of its members, nor the acclaim of a particular production.*

To establish international recognition, a petitioner may rely either on documentation of a major, one-time achievement by the group, such as the nomination for or receipt of a significant international award or prize, or on **at least three** of the following:

- Has and will perform as leading/starring group in productions/events with distinguished reputations;
- International recognition/acclaim for outstanding achievements;
- Has and will perform as leading/starring group for organizations with distinguished reputations;
- Record of major commercial/critically acclaimed success;
- Significant recognition from organizations, critics, governments, other recognized experts;
- Commanded/will command high salary/other substantial remuneration relative to others similarly situated.

There is no “comparable evidence” provision as in the [O-1B category](#), but letters from experts meet at least one of the criteria and can be used to buttress efforts to document other criteria.

International recognition means recognition in more than one country. Thus, recognition in the group's home country coupled with recognition in the U.S. will suffice. Moreover, USCIS may waive the requirement of *international* recognition in favor of *national* recognition in special circumstances, such as a showing that the group could not attain recognition in more than one country for want of access to the news media or geographic isolation.

## **2. One-Year Relationship and Exceptions**

In general, at least 75 percent of the members of the group (not including support personnel) must have been associated with the group for at least one year. Logically, this means the group itself must have existed for at least one year, though USCIS might well be convinced not to insist on this in an otherwise compelling case. There is no guidance on how the 75 percent rule applies to duos and trios but, again, USCIS can, and should, show flexibility. The required association, by the way, does not mean full-time employment but, rather, regular or periodic employment with the group.

There are otherwise two exceptions to the 75 percent rule. First, USCIS can waive it for aliens who, for reasons of illness and "exigent circumstances," replace P-1B performers. Second, USCIS has discretion to waive the rule for aliens temporarily needed to augment

the group and who perform critical roles. In practice, petitioners generally can obtain either waiver with an adequate explanation.

### **3. P-1B Filing Specifics**

In the case of foreign-based groups, attach an alphabetized [beneficiary list](#) in the same place as the [O-2 petition](#), any consultations, then copies of each beneficiary's passport biographical data page. Because of the [75 percent rule](#) (and exceptions), the beneficiary list must include information on the date each beneficiary began his/her association with the group. The more specific the data, in terms of exact date, month or year, the better.

In the case of an internationally renowned U.S.-based group engaging a foreign individual to perform as a member of its group, remember to provide evidence proving the U.S. group's international reputation as well as a list of all the current members with the date each began his/her association with the group. Remember that the international reputation and the 75% rule fall on the U.S. group in [this utilization of the P-1B classification](#).

The petitioner's supporting letter should contain the same basic information as the O-1B, but remember to explain any desired exceptions to the 75 percent rule, based either on illness, exigency, or augmentation.

### **4. P-1B Labor Consultation Details**

*Please first review the [Labor Consultation](#) page under the Required Evidence section for universal guidance on labor consultations.*

Follow the [O-1B process](#), but remember that for labor consultations, there are no special forwarding procedures available from USCIS and no right to rely on a prior [labor consultation letter](#), even if a consultation was obtained for the group within the past two years.

Note that the consultation requirement is waived for certain positions that have no direct input into the creative aspects of a production or performance, and also in cases where there is no appropriate union, as with interpreters, music librarians and even artistic administrators. but it is best first to check with the unions to verify that they do not “cover” a particular position. For further details and how to request a waiver, visit the [Labor Consultation](#) page.

## **F. P-2 Petitions: Reciprocal Exchange Program**

The P-2 classification is for artists and entertainers, individually or as a group (including essential support personnel), performing under a bilateral, reciprocal exchange program between an entity in the U.S. and an entity in a given foreign country, which program seeks to maintain rough similarity in terms of the caliber of artists exchanged, their terms and conditions of

employment, and overall numbers. A labor organization must have been involved in negotiating the program, or at least have concurred in its establishment.

As a practical matter, the only publicly available P-2 programs at the moment are conducted under the auspices of the [American Federation of Musicians](#) (AFM), with its Canadian counterpart, and Actors' Equity, with British Equity, Canadian Actors' Equity Association, and the Media, Entertainment & Arts Alliance (for beneficiaries from Australia and New Zealand). The American Guild of Musical Artists (AGMA) abolished the P-2 program with its Canadian counterpart. In these cases, the union itself, with the active involvement of its foreign counterpart, can serve as petitioner. While AFM requires that it serve as petitioner for P-2 petitions, there is no barrier to a private petitioner filing a P-2 petition with the Actors' Equity's concurrence. Otherwise, the rules are pretty much the same as for other P petitions, in terms of separate petitions for support personnel, itineraries, and the maximum classification period of one year.

The P-2 process varies significantly between the AFM and Actors' Equity. In return for a small fee, AFM serves as petitioner, and prepares and files the petition. Contact Actors' Equity for complete details on their approach to P-2 petitions. In any case, be certain to leave ample time to familiarize yourself with the procedures and navigate the process.

### **G. P-3 Petition: Culturally Unique Performers, Teachers, or Coaches**

P-3 classification is available to individuals or groups coming to the U.S. to perform, teach, or coach in a commercial or noncommercial program that is culturally unique. "Culturally unique" means "a style of artistic expression, methodology, or medium unique to a particular country, nation, society, class, ethnicity, religion, tribe, or other group of persons." P-3 performers are not required to have been associated with their groups for any length of time.

Compensation is not a factor in P-3 cases. However, labor organizations may object to instances of low compensation and inadequate expense coverage in the course of their consultations.

#### **1. Proving Cultural Uniqueness**

The standards for demonstrating cultural uniqueness have to date been liberal. The petitioner must provide affidavits, testimonials, or letters from recognized experts respecting the authenticity of the individual's or group's skills. Such letters should, of course, establish the authors' own credentials and the basis of the authors' knowledge of the beneficiary(ies). At least two such letters, when combined with some other evidence, may suffice.

Alternatively, the petitioner may document that the alien's or group's performance is culturally unique by way of a broad range of possible evidence, including articles, reviews, other published materials, PR materials, prizes, ads, etc. Letters from interested foreign governments (via their embassy cultural attachés or otherwise) can be most helpful. Under either approach, petitioners selecting this alternative must also show that all the performances will be culturally unique, which can be established simply by providing an itinerary listing the various venues and a statement that the alien or group will be performing only the culturally unique services described in the petition.

## **2. P-3 Filing Specifics**

P-3 petitions may be organized in the same fashion as [O-1B petitions](#) in the case of a single beneficiary, or [O-2](#) or [P-1B petitions](#) for multiple beneficiaries. As with the P-1B, there are no special forwarding procedures and petitioners may not use prior [labor consultation letters](#). Remember to include in the appropriate spot an [alphabetized beneficiary list](#). The documentary requirements are simpler than for O-1B or P-1B petitions, but include contracts, itinerary, supporting affidavits, testimonials, or other materials respecting authenticity and cultural uniqueness.

## **3. P-3 Labor Consultation Details**

*Please first review the [Labor Consultation](#) page under the Required Evidence section for universal guidance on labor consultations.*

As with the P-1B, there are no special forwarding procedures and petitioners may not use prior labor consultation letters.

Note that the consultation requirement is waived for certain positions that have no direct input into the creative aspects of a production or performance, and also in cases where there is no appropriate union, as with interpreters, music librarians and even artistic administrators. but it is best first to check with the unions to verify that they do not “cover” a particular position. For further details and how to request a waiver, visit the [Labor Consultation](#) page.

## **H. P Support Personnel Petitions**

Essential support personnel may accompany P-1B foreign-based entertainment groups and P-3 culturally unique aliens or groups. USCIS informally denotes their classification as P-1S and P-3S respectively. Essential support personnel are supposed to be skilled persons whose services are integral and essential to the performance, though USCIS ordinarily does not demand much proof on this point. Nonetheless, it is advisable to eliminate unskilled personnel such as chauffeurs or personal servants coming simply for convenience. In practice, USCIS does not insist that support personnel have prior experience with the particular alien or group.

P support personnel may be grouped together in a single petition, but they must be petitioned for separately from the performers themselves. P support petitions may be filed with the main petition, which is preferable, or thereafter, but not before.

Please note that, at this time, the [USCIS policy that permits](#) P-1B status for foreign members of a U.S.-based group does not extend to the P-1S visa classification. That is, a P-1S petition for foreign support personnel may not be filed in conjunction with work for a U.S.-based group.

### **1. P-S Filing Specifics**

P petitions for essential support personnel are organized as other petitions, but with fewer documents. These include the [alphabetized beneficiary list](#), [itinerary](#), and any [contracts](#), together with at least the petitioner's statement in the accompanying letter *briefly* describing a) the position and skills of each beneficiary; b) the beneficiary's

past relationship, if any, to the group; and, c) stating why the beneficiary's services are essential. This can become somewhat burdensome if there are many such personnel.

## **2. P-S Labor Consultation Details**

Please first review the [Labor Consultation](#) page under the Required Evidence section for universal guidance on labor consultations.

As with the P-1B, there are no special forwarding procedures and petitioners may not use prior labor consultation letters.

Note that the consultation requirement is waived for certain positions that have no direct input into the creative aspects of a production or performance, and also in cases where there is no appropriate union, as with interpreters, music librarians and even artistic administrators. but it is best first to check with the unions to verify that they do not “cover” a particular position. For further details and how to request a waiver, visit the [Labor Consultation](#) page.

## **IX. Required Evidence**

In addition to the [I-129, O&P Supplement Form](#), and the [I-907](#) if a petitioner is utilizing the [Premium Process](#) option, further evidence is required to support a petition. Supporting evidence may vary, depending upon the visa classification pursued. In general, USCIS expects to see items which are described in the following pages: passports, labor consultation(s), artist background information, itineraries, contracts, and a cover letter. In light of a recent [change in policy](#) whereby, **effective September 11, 2018**, adjudicators at the service centers will have “full discretion” to deny visa petitions without first issuing a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID), petitioners will need to be even more careful when assembling all elements of a visa petition.

### **A. Passports**

To facilitate the USCIS security checks, petitioners should provide a copy of the passport biographical data page (usually the page containing the passport holder's photograph) for each beneficiary of any type of petition or application filed with USCIS, except for large groups (over 25). These pages have a way of becoming illegible when faxed, so petitioners should try to get good, legible hard copies instead, or at least have the sender enlarge the copy before faxing. Not all beneficiaries will have a passport at the time of filing, however, nor are they required to do so. If a beneficiary lacks a passport at time of filing, note that fact in the petitioner cover letter or on the [beneficiary list](#) and, if possible, include a copy of another government-issued ID instead, such as a driver's license.

A salutary effect of obtaining this documentation in all cases, even those involving large groups, is that it enables the petitioner to copy data, including names, birth dates, etc., straight from the source. It is critical to eliminate errors in beneficiary information, lest there be a discrepancy between the [I-797 approval notice](#) and any ensuing visa application.

## **B. Labor Consultation**

In a requirement unique to the [O and P classifications](#), petitioners ordinarily must obtain an advisory opinion from an appropriate labor organization to include with the filing of either a principal or a support petition with USCIS (*see* [8 CFR § 214.2\(o\)\(5\)\(i\)\(F\)](#)). The union most often will respond with a simple letter of no objection.

To obtain a consultation, prepare everything as you would for filing with USCIS but before filing, air courier a full copy of the materials (if the union won't accept a fax or scan via email) - or at least enough materials to make the case - to the appropriate union(s) (except as otherwise indicated on the [Labor Consultation Contact List](#)). Be sure to request a fax or email response if time is short. The union will reply directly to you. The turnaround time for union responses varies from 2 days to more than 2 weeks.

The labor consultation must come from the national headquarters of a union with appropriate expertise, meaning that the union generally occupies the field of endeavor or a related one, even if it is not a collective bargaining representative in the particular field. The consultation requirement is waived for purely administrative management positions, such as executive directors, and business administrators, financial officers, business representatives, and others with no direct input into the creative aspects of the production or performance, and also in cases where there is no appropriate union, as with interpreters, music librarians and even artistic administrators. To support a waiver request on grounds of lack of an appropriate labor organization, supply a statement by the petitioner, or someone else with knowledge of the field, to the effect that from personal knowledge based on long experience in the field, there is no relevant labor organization. It is best first to check with the unions to verify that they do not "cover" a particular position.

Actors' Equity strongly prefers that those who can participate in its [P-2 reciprocal exchange](#) programs with British Equity, Canadian Actors' Equity Association and the Media, Entertainment & Arts Alliance (for beneficiaries from Australia and New Zealand), do so.

A union's opinion, positive or negative, is merely advisory and not binding on USCIS. Consultations are supposed to address the nature of the work to be done and the beneficiary's qualifications to do that work, nothing more. Occasionally, though, unions will object on grounds of low wages, the availability of U.S. workers to do the job or simply that the beneficiary fails to meet the applicable standards. Do not panic when faced with a union objection. Carefully review the letter and, if possible, find an additional expert to support your case and rebut the union's position, then file the petition. If the alien in fact meets the applicable standards, chances are good that USCIS will approve the petition despite the union's objections.

It is important for petitioners to understand that petition approvals, with or without a no objection letter or positive advisory opinion, in no way relieve or obviate any obligations a petitioner may have incurred with respect to a union in the context of collective bargaining relationship or otherwise by contract. Only the parties to those relationships can alter them, by mutual consent. In other words, USCIS approval of a petition is irrelevant to a petitioner's other obligations to a union.

Here are some considerations common to more than one consultation category:

- Contact the **national** office of the union, not the local, and do not submit a peer organization letter in lieu of a labor union letter, if an appropriate labor organization exists;
- Send your request to the union via air courier, or online/by email if permitted;
- Avoid using the union's fax machine and avoid supplying the union with cumulative material;
- If you seek a consultation waiver, say so in your cover letter to USCIS, explain why, and write "waiver requested" in the consultation section of the [I-129 O/P Supplement](#);
- USCIS requires not only that each beneficiary be covered by a consultation (or waiver) but that **different activities be covered by different unions**. Thus, if an O-1B beneficiary will engage in two distinct activities, emphasize that one activity is primary or obtain two consultations. More to the point, beneficiaries of O-2 and P support petitions may engage in different activities covered by different unions, so it is entirely possible that several consultations will be required in conjunction with a single petition;
- Abide by the above rule even if one union purports to provide the consultation for all beneficiaries;
- In dire emergencies in which USCIS agrees to grant a "[traditional expedite](#)," USCIS can obtain the requisite advisory opinion by phone from the union, which has 24 hours to respond before USCIS will adjudicate the case. Send a request to the union anyway and do your absolute best to coax a direct response first; otherwise, to invoke this procedure, follow the traditional expedite procedures described below.

IATSE, AGVA, Actors' Equity, AFM, AGMA, and AMPTP charge \$250 per consultation. Many labor unions offer expedited service for an additional fee -- please refer to the [Labor Consultation Contact List](#) for details, rates, and contact information. The petitioner must pay the fee when requesting the consultation. There are exceptions to the charges, and restrictions on how they are payable, so it is best to contact the union in advance to confirm the amount and method of payment. Note the charge is per petition, so O-2 or P support petitions will also require a fee. Note that USCIS provides [this list of consultation groups](#) that provide labor and peer letters, but it may or may not be up to date.

Please see the section titled [O-1B Consultation Procedures](#) for further information specific to O-1B petitions.

### **C. Artist Background**

It is advisable to provide a detailed outline of the artist or group's history, emphasizing particular achievements (i.e. awards or honors, performances at particularly notable venues, etc.) and providing quotes from articles contained within the support materials. If support materials

contain testimonials, these should be specific, listing particular accomplishments and descriptive information, people writing a letter on behalf of the beneficiary should provide information that speaks to their own credentials. For any articles, USCIS advises that petitions provide detailed information about the publication such as circulation, a clear identification of the name, intended audience, and reputation of the publication, and for any online-only sources, any available information about web traffic numbers would be helpful. Remember that any material not in English must be accompanied by a [full translation with certification](#).

In general, be extremely thorough and provide evidence that speaks to the reputation of not only the artist, but of venues, previous employers, any awards or honors, etc. Do not assume USCIS adjudicators have any familiarity with the arts and publications, artists, or venues that may seem well-known. Most RFEs question prestige and reputation (of everything) – anticipate this before filing, in case you do not get the chance to respond to an RFE.

Finally, even when engaging an artist who has previously received visa approval, prepare future petitions as thoroughly as if this is a first-time filing. USCIS has made it clear that prior approval is no guarantee of future approval.

#### **D. Itineraries**

Itineraries should include the dates of travel, services (including load-in and rehearsals), the name and address of the employer(s) and the name and address of the venue(s). In many cases, the name and address of the employer and venue will be the same.

For those petitions in which [multiple venues](#) are involved, and there is a [significant gap between engagements](#), the itinerary should include information about the artist's planned activities during the gap. Also, for petitions involving multiple employers, a master itinerary compiling all activity into a single document during the proposed visa classification period is advised. Remember that the requested classification dates for the I-129 should match the beginning and end dates of all work, not just for the work to be done for the lead petitioner.

#### **E. Contracts**

Whenever possible, strive to include signed contracts. There is no requirement that contracts are fully-executed, however, it is not advisable to rely solely on unsigned contracts. At the very least, some of the contracts should be signed by one party. In lieu of contracts, it is perfectly acceptable to include letters of intent, deal memos or other written confirmation of dates listed on the itinerary. Remember that for [multiple venue petitions](#), agent appointment letters should be completed by [other employers](#) and by the beneficiary [artist/entertainment group](#).

#### **F. Cover Letter**

The quality of the cover letter is essential, as it is a roadmap to your petition and the place where the petitioner can provide narrative context for elements of the petition that may need explanation. Take care to go into detailed descriptions of what is included in your petition, and assume that the USCIS examiner does not have a comprehensive knowledge of the arts industry. In addition to providing an itemization of the contents of the petition, the [cover letter](#) should

provide brief background information on the petitioner, background information on the individual or group, and details regarding the proposed activities.

Remember that the cover letter is your opportunity to make your case for the individual or group's eligibility for O or P classification. The cover letter should ideally include excerpts of quotes from articles, background information on any awards and honors that will do not have obvious name recognition, thorough discussion of the events, etc.

Also note that for [multiple venue](#) (itinerary-based) petitions we recommend that petitioners adopt a format and language similar to our [sample itinerary-based cover letter](#).

## **X. Responses from USCIS**

Once the I-129 petition has been submitted to USCIS, the petitioner can anticipate one of three responses: an approval, request for further evidence, or a denial. Petitioners are able to [track the progress](#) of a petition by monitoring the case status online and may wish to create an account in order to receive updates about case progress.

### **A. Approvals**

Upon receipt of the approval notice, it is extremely important that you review the [I-797](#) for any mistakes regarding names, dates of birth and countries of birth. Also double-check the approved classification period. The best way to avoid mistakes on the approval notice is by reviewing the receipt notice and contacting USCIS while the petition is pending to request corrections. If the mistake is the result of a USCIS data entry error, then the corrections will be made quickly and should not result in any significant delays in obtaining the visas from the Consulate. However, if the mistake on the part of the petitioner, then USCIS will generally not make the correction, instead forcing the petitioner to file an amended petition.

### **B. Requests for Evidence**

Requests for Evidence (RFEs) - I-797 requests for additional information - are typically issued when an examiner is uncertain of the merits, or a desired piece of information is missing. When [Premium Processing](#) is involved the RFE usually is faxed. Follow the instructions on the form and respond within the designated time. Generally, the service centers move quickly once they receive an RFE response. Some RFEs simply seek additional information, information the petitioner might have done well to provide in the first place. Others will give the petitioner some insight into the thinking of the examiner in question. If the examiner seems adverse to the petition, consider retaining immigration counsel.

Note that when responding to the service center, petitioners should enclose a copy of the RFE that was issued on **top** of the information requested, and don't forget to send a duplicate copy of any new material you are submitting. Responses which do not include the RFE cover sheet could delay any subsequent review of the filing. In addition, any delay in getting information to the file could mean that a final decision or a no response denial may be issued in error.

In a [July 13, 2018 memorandum](#), USCIS announced a change in policy whereby, **effective September 11, 2018**, adjudicators at the service centers will have “full discretion” to deny visa petitions without first issuing an RFE or a Notice of Intent to Deny (NOID). Although previously adjudicators were required to first issue an RFE or NOID except in extreme cases in which a petition is clearly deniable or the petitioner has requested the wrong category without any possibility of approval, this is no longer going to be the case and it will be at an adjudicator’s discretion whether a petition it deems to be insufficient will result in an immediate denial or whether it will issue an RFE or NOID to allow the petitioner to respond.

The memorandum states:

*This policy is intended to discourage frivolous or substantially incomplete filings used as “placeholder” filings and encourage applicants, petitioners, and requestors to be diligent in collecting and submitting required evidence. It is not intended to penalize filers for innocent mistakes or misunderstandings of evidentiary requirements.*

However, it also includes the following as an example of a possible denial:

*Cases where the regulations, the statute, or form instructions require the submission of an official document or other form or evidence establishing eligibility at the time of filing and there is no submission.*

In light of this change in policy, petitioners will need to be even more careful when assembling the [required elements](#) of a visa petition.

### C. Denials

USCIS rarely denies an O or P petition outright. If it has concerns, it will typically send a [Request for Evidence](#). If it then decides to deny the case, it may issue a Notice of Intent to Deny (NOID), if the decision will be based on information not submitted by the petitioner, or simply a Notice of Denial that will inform you of certain rights of appeal. As a general rule, appeals take too long and are expensive. Instead, if you feel you have a meritorious case, consider re-filing the petition as a new case (though you should inform USCIS of the prior denial and file number).

At least with USCIS, an appeal is theoretically possible. Remember that no such appeal is available at the next stage of processing if a consulate issues a visa denial, except if the consulate has erred as a matter of law, which they rarely do. Nor is there an appeal from decisions to deny entry by U.S. Customs and Border Protection (CBP).

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In light of this change in policy, petitioners will need to be even more careful when assembling the [required elements](#) of a visa petition.

#### **D. Security Concerns**

In the aftermath of 9/11, USCIS now conducts International Border Inspection System (IBIS) checks on each beneficiary of every petition immediately after the petition is logged in the mailroom. It may well repeat those checks before issuing the [I-797 approval notice](#). On occasion, USCIS may also conduct a similar check on the individual signing the petition. Including the passport biographical data page enables USCIS to operate more efficiently.

In addition to the IBIS checks, USCIS appears in some cases to be running additional organized crime-related checks. When USCIS encounters the occasional "hit," meaning only that there is adverse information somewhere in the system, the result can be unexplained (often interminable) delays. In such cases, USCIS generally sends a [Request for Evidence](#) or other notice to the petitioner cryptically stating that the identified beneficiaries may be subject to additional processing delays, and that the petitioner may wish to authorize USCIS to drop the beneficiaries from the petition. In ALL such cases, the petitioner must recognize that failure to drop the beneficiaries at issue will, at least for the foreseeable future, stop adjudication of the petition in question in its tracks. In short, if you encounter this situation, drop the beneficiaries or face interminable delay.

### **XI. Communication from USCIS to Consulates**

An alien cannot enter the U.S. simply because USCIS issues an [I-797 approval notice](#). A beneficiary must first obtain a visa from a consulate based on the I-797, or be permitted to enter through a U.S. port of entry (POE) or preflight inspection facility (PFI) based on the I-797. For this to occur, USCIS must somehow communicate the approval to a consular post, POE or PFI.

With the implementation of the Petition Information Management Service, upon approval of the petition, USCIS forwards a copy of the approval and the duplicate petition to the Kentucky Consular Center, which uploads the approval and petition into PIMS. On the day of the

interview, the Consular officer accesses the approval and petition by entering the EAC or WAC number found in the upper left-hand corner of the I-797. In general, it takes approximately 72 business hours for PIMS to reflect the approval information. Note, though, that consular posts are prohibited from issuing visas if the approval information is not in PIMS, even if the applicant(s) is armed with the original approval notice. If the approval information is not in PIMS at the time of the interview, the consular post will contact KCC directly to update PIMS, but this may result in an additional two to three day delay.

Although the consular officer has access to a full copy of an approved petition in PIMS, it is usually beneficial for the beneficiary to bring a hard copy to the interview.

## **XII. Visa Processing Abroad**

The U.S. Department of State, not USCIS, is responsible for issuing visas through its consulates and consular sections (within embassies) abroad, though the Department of Homeland Security (DHS) now has overall control of visa policy and the right to veto decisions to issue visas. While each artist ultimately must be responsible for completing and filing his or her visa application, petitioners cannot afford to ignore this important process. The petitioner should encourage the visa applicant to [contact the consulate](#) in advance for up-to-date information on processing times. The petitioner itself can check the consular web site for added information. The point is to plan ahead and pay attention to this critical process before USCIS issues its [I-797 approval notice](#).

If there are questions beyond the information supplied on the consular website, make an inquiry directly to the consulate by email. Be sure to include the applicant's case number, name, date of birth, passport information, and city and country of birth. Public inquiries may also be made to the State Department's Washington, D.C. office at (202) 663-1225. This office fields more than 800,000 calls per year. Contact a consulate directly with questions, whenever possible.

Also, for practicing attorneys, legal questions may be addressed to [legalnet@state.gov](mailto:legalnet@state.gov). Questions must be accompanied by a completed G-28 Form establishing the individual as the attorney of record for the case. Legal questions are typically addressed within one week.

### **A. Basic Requirements and Forms**

For aliens requiring a visa, all consulates have core procedures in common, but the specific application process varies from consulate to consulate, and procedures are in constant flux due to security concerns. It is best to [check the consular website first](#), for additional information on application hours, turnaround times, special documentary requirements, applicable fees, and means of paying them.

Beneficiaries are technically no longer required to present original approval notices at the visa interviews, as clarified in an update to the [foreign affairs manual](#) issued in September 2011 (find the latest support for this policy for [O visas](#) here, and for [P visas](#) here). Although the consular officer has electronic access to a full copy of an approved petition, it is usually helpful for the beneficiary to bring a hard copy to the interview. As soon as the petitioner receives the original I-

797 approval notice from USCIS, a copy should be sent to the artist or group representative abroad. The petitioner should also send along a full copy of the underlying petition submitted to USCIS, to be available should the consulate have further questions. Also, if a Request for Evidence (RFE) was involved in the petition, send the artist a copy of the RFE and response.

In 2010, DOS implemented a new visa application form, the [DS-160](#). The DS-160 incorporates the prior application forms (the DS-156, DS-157 and DS-158) into one comprehensive form. Among other things, it asks for a list of all countries the applicant has visited in the past 10 years; the applicant's 2 prior employers not counting the present employer; all professional/social/charitable organizations, past and present, to which the applicant contributed or belong, or for which the applicant worked; and the name, address and telephone number of the applicant's secondary school. Applicants should [prepare for the DS-160](#) in advance of completing the form online.

In [May 2017](#), DOS adopted a new, [supplemental questionnaire](#) to further vet U.S. visa applicants during consular processing. This questionnaire, form DS-5535, seeks a visa applicant's prior passport numbers, five years of social media handles, all email addresses and phone numbers, names and dates of birth of all siblings, children, and spouses/domestic partners, as well as addresses, employment and travel history over the previous 15 years. According to the State Department, the questionnaire would not be administered routinely, but rather when a consular officer determines "that such information is required to confirm identity or conduct more rigorous national security vetting." The questionnaire was approved on May 23 for a period of 180 days, at which time it could be renewed.

The current application fee for O or P visas is \$190 per applicant, though this does not include any [reciprocity fees](#). The base application fee is paid prior to the appointment and it is critical to check the consular post's specific requirements regarding fee payment. Reciprocity fees, if applicable, are paid in cash on the day of the interview.

In general, each applicant *should* have a passport valid for at least six months beyond the end of the proposed classification period. Alternatively, the passport must at least be valid for six months beyond the applicant's anticipated initial period of stay in the U.S. in the status requested. How does the consulate know what the applicant anticipates in this regard? The applicant states when s/he next plans to depart the U.S. on the DS-160. Thus, while normally the applicant would put down the entire [classification period](#), if there is a passport validity problem, or if the applicant knows that s/he will be leaving the U.S. before the end of the classification period, the applicant can enter an earlier intended date of departure.

If the applicant previously has had a visa application refused or a visa canceled, consider contacting an immigration lawyer before proceeding, as you should if the applicant answers "yes" to any of the security related questions in Parts 13 and 14.

In this regard, do NOT be surprised how many applicants in fact do have an arrest, if not a conviction, in their backgrounds, which information is in fact already available to the consulate. *While obtaining waivers for aliens convicted of certain types of offenses can be difficult and time-consuming, those who lie on the application and then get caught by the computer system are almost automatically rendered inadmissible, for a long time.*

Every consulate has the capacity to “finger scan” the index fingerprints of visa applicants. The hardware is the same as that used by CBP in the US-Visit program at ports of entry and preflight inspection facilities. With finger scanning at consular posts and on entry to the U.S., posts are able to identify many more visa applicants with potential grounds of inadmissibility, and CBP is able to confirm that the same person who applied for the visa is the one using it. All data from posts are available to CBP inspectors in real time, so the system has the information long before the artist applies for entry.

## **B. Denials: Nonimmigrant Intent and Insufficient Evidence**

In general, U.S. consulates may issue visas only to applicants with the requisite "nonimmigrant intent," meaning intent to return to an unabandoned foreign residence abroad after their temporary stay in the U.S. [O-1B principals](#) need not prove ties to a residence abroad when establishing "nonimmigrant intent," while [P-1 visa applicants](#) are required to demonstrate that they have a residence abroad that will not be abandoned.

If nonimmigrant intent is not sufficiently established, the consulate may issue a 214(b) denial. To address a consulate's concerns on the issue of "nonimmigrant intent" - in consular parlance, the "214b" issue - be prepared to document the full range of the alien's ties to his/her home country, by way of residence, family, employment, stature, business, banking, etc. If a 214(b) denial is issued, a new consular application must be filed with the accompanying fee. Note that the DS-160 application should contain significantly new information if a better outcome is expected.

If insufficient evidence is available at the time of visa processing, the consulate may issue a 221(g) denial. This often occurs in cases in which additional information is needed, or the consulate requires additional processing time beyond what is available during the interview. The applicant can make a new visa appointment and supply additional information in response to a 221(g) denial.

All denials will be explained to applicants orally and in writing. Applicants can also tell if they have been refused visas by a notation stamped on the last page of the passport, stating "application received." Generally, the stamp is annotated either with "g" or "221g," meaning insufficient evidence to grant the visa, or "b" or "214b", meaning the visa was denied for want of the requisite nonimmigrant intent. There is no appeal process for consular denial. Consulates must now enter all visa denials into their computer system, to which CBP also has access.

## **C. Substitutions**

If, at the last moment, an [O-1B beneficiary](#) drops out and you need a substitute, you have no choice but to file another petition and seek an [expedite](#). You should do the same for [O-2 beneficiaries](#) as well. In October 2010, the State Department also revoked the ability to substitute P support personnel. On occasion, consulates will use a procedure for O-2 substitutions (particularly if there are multiple O-2 beneficiaries), and some posts still grant P-1S and P-3S substitutions. When faced with a need for a substitution, contact the consulate to see what might be possible. In addition to the standard visa application materials, the applicant must typically present a letter to the consulate, port of entry, or pre-flight inspection facility requesting the substitution and providing a copy of the original [I-797](#). The letter should include the beneficiary's

birth date, country of nationality, and position, and certify that the alien is equally qualified to fill the position described in the petition. The letter must be printed on petitioner's letterhead and signed by petitioner.

For reference, below is the guidance regarding the substitution process, directly from the [U.S. Department of State Foreign Affairs Manual](#):

**9 FAM 41.56 N8.8 Substituting Beneficiaries**  
(CT:VISA-1573; 10-04-2010)

*Beneficiaries may be substituted on P-1, P-2, and P-3 petitions for groups. It should be noted that all groups qualified for P status may benefit from the substitution procedures. The petitioner must submit a letter requesting the substitution, along with a copy of the petitioner's approval notice Form I-797, Notice of Action, to the consular office where the alien will apply for a visa or the port-of-entry (POE) where the visa-exempt alien will apply for admission. The petitioner must state the alien's date of birth, country of nationality, and position, and must certify that the alien is qualified to fill the position described in the approved petition... You should note that essential support personnel cannot be substituted. In order to add different essential support personnel to an existing P visa petition, a new I-129 must be filed at the appropriate DHS service center.*

**D. Reciprocity Considerations: Fees and Validity Period**

In addition to the standard \$190 machine readable visa (MRV) fee, there may be additional visa fees payable under the "reciprocity" schedule. The schedule essentially is a collection of bilateral rules that govern the validity period of visas, number of permissible entries, and fees charged for them. The U.S. charges nationals of other countries whatever fees their countries charge U.S. nationals for the same type of visa. It also, in reciprocal fashion, limits nationals of certain countries to visas of a duration as short as three months, and to visas valid for single entries only. In some cases, the reciprocity schedule provides a range of fees, depending on the length of visa and number of entries desired. The [Visa Office of the Department of State \(VO\) reciprocity tables](#), supply current information on all reciprocity issues.

The greatest challenge for the peripatetic artist can be the reciprocity schedule limitation on the validity period of the visa and the number of entries. People's Republic of China nationals, for instance, can only obtain O and P visas valid for three months at a time, and a single entry, while Brazilian artists can only obtain O and P visas valid for three months, but with multiple entries. Imagine the burden this imposes on an artist who travels frequently. To somewhat ameliorate this burden, the State Department's regulations in the Foreign Affairs Manual contain a provision, cited within [9 FAM 403.9-4\(D\)](#), that enables consular officers, in their discretion, to issue a two-entry visa to an alien otherwise entitled to a single-entry visa, upon payment of a double reciprocity fee (the MRV fee should remain at \$190). However, the alien must desire to make more than one entry during the "course of a single journey... on each occasion, ...seeking admission for the same principal purpose...."

## **E. Scheduling an Interview**

In most cases, an in-person interview is required. As soon as USCIS approves the petition, the artist should contact the consulate to schedule an interview appointment. Wait times can vary, and security issues can cause delays.

The U.S. Department of State is now posting online approximate wait times for [consular visa processing](#). The [Visa Wait Times Site](#) provides average wait times for appointments and predicts the amount of time it will take each consulate to issue a visa. The wait times for artists are found under the description "all other nonimmigrant visas." Please note: Wait times represent averages and do not take into consideration the time it takes to return the passport to the artist, which varies but is typically within a week of the interview. Note that consulates will not generally issue a visa more than 90 days in advance of the validity period.

In some cases, applicants may be eligible to mail in the application materials. In order to qualify for the mail-in process, the applicant must be applying in his or her home country, must be applying for the same visa type, the previous visa is either still valid or expired within 12 months and the applicant must have been fingerprinted at the previous interview. In addition, if the applicant has an arrest or conviction, a previous visa denial, was denied entry to the U.S. or answers yes to any of the security-related questions on the [DS-160](#), s/he is not eligible for the mail-in program (see our [Preparation for the DS-160](#) document to preview the questions). If the mail-in program is available, then the applicant should expect to wait at least 2 to 3 weeks to receive the passport back and, in some cases, the post may still require the applicant to appear in person.

## **F. Interviews**

Visa applicants to be interviewed should familiarize themselves with the contents of the petition copy the petitioner hopefully has sent along with the approval notice. Normally, interviews are to the point, lasting only a few minutes and seeking to confirm the accuracy of the information in the [DS-160](#), but occasionally, consular officers will query applicants on their whereabouts and schedule in the U.S. Interviewees should know what they are requesting, and what the petitioner said on their behalf to USCIS. They should make good eye contact, and treat the consular officer with respect. Except for O-1B applicants, they should also be prepared to address any questions of [nonimmigrant intent \(214b\)](#) that may arise. Again, check with the individual consulate for details on required documentation. Most interviews will require a passport-style photo, a current passport, and payment.

Artists are not supposed to be required to present original I-797 approval notices at the visa interviews, as clarified in an update to the [foreign affairs manual](#) issued in September 2011. Each consulate can now electronically verify that the I-797 approval notice was issued. If an artist encounters difficulty on this point, the artist can refer the consular official to the following support for this policy for [O visas](#) here, and for [P visas](#) here, but if time permits, it is a good idea to send the artist the original approval notice (or at least an electronic copy that can be printed out) and a copy of the original petition submitted to USCIS, just in case the consulate demands it.

In response to concerns expressed by the performing arts community, and as a result of meetings facilitated by the National Endowment for the Arts, the U.S. Department of State issued a 2005 memo to consulates encouraging policies favorable to foreign artists applying for a visa to perform in the United States. The policy memo encourages consulates to accommodate the time-sensitive nature of arts-related visas and to avoid delays in issuing artist visas. Also, in the case of P visas, the memo reminds consulates that individual artists that are part of a group are not legally required to undergo consular processing at the same time and place. (Note that some groups may find group interviews to be an efficiency, and some posts can accommodate this if contacted in advance.) Finally, the memo urges consulates to exercise restraint in questioning the performance abilities of artists applying for visas, and specifically discourages consular officers from asking artists to perform as part of the visa application process.

While the memo does not require consulates to change their interview or issuance rules, having a copy of the memo on hand may help artists encountering problems on a case-by-case basis. Please consider providing foreign artists with a copy of the [July 19th 2005 State Department Memo](#). While each consulate has the authority to determine its visa issuance policies in light of local conditions, the memo is a strong statement in support of reasonable visa processing for artists.

#### **G. Security-Related Issues**

On occasion, the processing time for a visa can be slowed considerably if security-related concerns come into play. Security clearance procedures can be invoked either as a result of responses on the [DS-160](#), or for other reasons. If “additional administrative processing” (also known as a Security Advisory Opinion, or SAO) is needed, the turnaround times can be unpredictable. In general, the vast majority of SAOs are turned around within 4-6 weeks. If you have a need to speed the process up, make any special circumstances, such as performance-related deadlines, known to the consular post at the time of application, or consider contacting your members of Congress to see if they are willing to help.

Security-related considerations can be invoked if there are typos on the USCIS-generated [I-797 approval notices](#), which contain an alphabetical list of the beneficiaries, their birth date and country of birth. In consequence, it is *essential* that the petitioner: a) not rely solely on the beneficiary or the group representative to provide individual data such as names, birthdates and the like; b) rather, to the extent possible, to take that data directly from the passport biographical data pages; c) take extreme care in entering all pertinent beneficiary data on the petition or [beneficiary list](#), and re-check it several times, making sure that the names used correspond exactly to those in the passports, and that the birthdates are accurate and not transposed from any other format; d) check the I-797 filing receipt, or the e-receipt in case of Premium Processing against the list submitted to USCIS, and notify USCIS (by fax or email if premium processing or by calling the National Call Service Center (NCSC) if regular processing, 1-800-375-5283) immediately if errors appear on the list; e) re-check the approval notice when received and respond similarly if need be. In short, implement a zero-typo rule for beneficiary information.

### **XIII. Entering and Staying in U.S.**

Upon arrival in the United States, foreign artists must pass through Customs and Border Protection to receive the final paperwork that permits them to legally work and stay in the United States. The following sections review that process in detail, as well as offering guidance for cases in which the artist's plans change once they arrive, and an extension or modification of the underlying visa is necessary.

#### **A. Inspection and Entry at POEs and PFIs**

Aliens seeking entry to the U.S. must have a classification consonant with their proposed activities. Each time they seek entry, they must undergo inspection by U.S. Customs and Border Protection (CBP). Often, CBP inspectors ask nothing at all, but they have enormous power and discretion to determine whom they will admit. If a CBP inspector decides that an alien is seeking entry in the wrong status, the inspector may detain the alien, deny him/her access to a phone, and put him/her on the next plane back. If the inspector suspects that the alien has committed a fraud or misrepresentation, the inspector has full, unreviewable discretion summarily to exclude that alien from the U.S. for five years. Aliens seeking entry through the [Visa Waiver Program \(VWP\)](#) are not subject to the five-year exclusion penalty, but refusals can create enormous problems down the road. Moreover, aliens who enter the U.S. with visas and then overstay, may, in certain circumstances, be relegated to forever obtaining their visas only from their home country consulate.

At the outset of the interview itself, the alien will be finger scanned per the US-Visit program. The considerations for the inspection interview are no different than those for consular interviews. Applicants for entry in O and P, or any status, should know the purpose of their entry, and their basic itinerary while in the U.S. Again, the issue of [home country ties \(214b\)](#) may arise. Applicants should have with them a copy of the underlying USCIS petition as well as a copy of the [I-797 approval notice](#), whether they have a visa or not. CBP, in addition to its immediate security-related mission, is always on the lookout for aliens at risk of overstaying or violating their proposed visa classification.

CBP has special registration procedures under the National Security Entry Exit Registration System (NSEERS) at all U.S. ports of entry and pre-flight inspection locations for all citizens and nationals of Iran, Iraq, Libya, Sudan and Syria, as well as anyone else identified by CBP or by a consular officer at time of visa application. NSEERS registration will entail a more detailed interview in “secondary inspection,” additional photos and fingerprints.

Assuming CBP chooses to admit the alien, it will stamp the alien's passport to indicate the visa classification and the date by which they must depart the U.S. As of April 30, 2013, paper I-94 cards will no longer be issued at airports, and I-94 information will instead be accessible via an online portal, [www.cbp.gov/I94](http://www.cbp.gov/I94). Those entering by land will continue to receive an I-94 card. We strongly recommend that all petitioners and aliens go online to print a hard copy of the I-94 card. CBP has posted [an FAQ](#) regarding the recent automation of I-94 cards.

The departure date on the I-94, or stamp, is all-important. Aliens desiring to take advantage of the [ten-day additional stay](#), for instance, may do so only if CBP grants that time on entry. They

must ask for it, and double-check that they received it. They should also be certain they can read the designated departure date and that they have in fact been admitted in the proper classification! Otherwise, they must abide by the I-94 departure date. By that date, they must depart, if present on the VWP, or either depart or file for an [extension of stay](#) (whether in conjunction with a change of status or not). Do not count on there being exceptions of any kind to this rule. Indeed, an overstay of even one day can render the alien subject to another rule, 222g, under which the alien must return to his or her home country consulate to obtain ALL future U.S. visas. For frequent travelers, this can be devastating. For overstays of 180 days or more, the consequences are far more drastic.

It is important to know the terms of the I-94, not only because it represents an immigration "registration" document, but because it represents the potential proof that the alien departed the U.S. on time. The carrier transmits I-94 information from departing aliens to the USCIS computer system. If timely departure data for a given alien is missing, the system will show that alien as a possible overstay. If so, CBP inspectors will at some point in the future, often years later, discover that that the arriving alien has a past overstay. In these cases, CBP has been known not just to put the alien into "secondary" inspection, which can cause hours of delay (and great stress), but to handcuff and ship them back immediately, if they cannot prove they did not overstay.

Finally, by agreement with the Department of State, aliens in the U.S. may travel to Canada and Mexico for 30 days or less, and, if they do not travel from those countries to a third country first, they may re-enter the U.S. solely on the basis of the remaining validity on their I-94. Their visa, if expired, will be considered revalidated to the date of entry. They must continue to have an unexpired, valid passport, however. Also, this exception does NOT apply if while in Canada or Mexico, the alien applies for another U.S. visa. In that case, the alien must await the outcome of the visa application.

## **B. Change of Status**

To change an alien from another nonimmigrant status to any O or P status (and request an [extension of stay](#) in the new status), the petitioner should submit an I-129 petition with supporting documentation organized for an original O or P petition. The only difference is that, because the alien(s) by definition already is in the U.S. in another status, the petitioner must establish that the alien(s) is lawfully in the U.S. in a status that permits a change of status. Accordingly, just behind any consultations, include a copy of the front and back of the [I-94](#) for each alien involved, a copy of the alien's current visa, and, if available, a copy of the prior [I-797 approval notice](#), as well as a copy of the passport biographical data page. Also, the petitioner's letter should explain the reasons for the requested change of status to make clear that the original entry in the current status was appropriate at the time but that circumstances now warrant a change of status.

USCIS permits O and P aliens to enter the U.S. up to ten days before the classification period starts and to remain in the U.S. for up to ten days after the classification period ends, provided they do not work during these times. Artists seeking to remain in the United States as a tourist for more than 10 days after the O or P visa work period ends must apply for a change in status to a [B-2 visa](#). To do this, after arriving in the U.S. the artist must complete and file an [I-539 petition](#)

before the period on the original I-94 card expires. Note that I-539 petitions may not be filed using the Premium Processing Service. Due to the lengthy processing times for I-539 petitions (up to six months), it is likely that the petition will not be processed until after the artist's planned departure date. The artist should keep a copy of the USCIS-issued I-797 receipt notice for the I-539 as proof of timely filing for a change in status.

**Important note:** All petitions to change status must be filed **before the alien's original status expires, as noted on the I-94**. That the visa and/or underlying approved classification period may last longer than the I-94 is irrelevant! If CIS approves the change of status, it will issue an I-797 that includes a substitute I-94, incorporated into a tear-off portion in the lower right corner, and update the information in the [online I-94 database](#). After making a copy of the entire document, the alien should staple this substitute I-94 to their passport and surrender it on departure, if requested. However, given the recent automation of the I-94 process, it is unlikely that the hard copy will be requested on departure.

Nonetheless, once the alien departs the U.S., the validity period of the I-94 is itself irrelevant! To re-enter the U.S. in the new status, the alien must first obtain a new visa (unless the alien is a [Canadian](#) citizen or seeks re-entry to the U.S. under the exception discussed in the past paragraph of [Inspections and Entry at POEs and PFIs](#)).

**Update:** In light of a [June 28, 2018 USCIS policy memorandum](#), there is now a risk that if the petition for a change in status with an extension of stay is denied and the artist is determined to be not lawfully present in the U.S, the beneficiary will be issued a notice to appear before an immigration judge and face possible deportation. It is essential that petitioners file any change of status with extension of stay request long before the beneficiary's current status is set to expire or otherwise advise the artist to depart the U.S. at the conclusion of the current visa period, then file a new petition for new work in the new status.

### **C. Extension of Stay**

USCIS may grant extensions of stay, in the same status and filed by the same petitioner as before, in all O and P categories for up to one year at a time.

The rules pertaining to extensions of stay are complex, :

- Extensions, by definition, may be filed only if the alien is in the U.S. at time of filing. If the alien is not in the U.S., simply file a new petition to obtain a new classification period.
- For performers and support personnel, use the [I-129 petition](#), checking off Box 5c at Part 2 of the form.
- For spouses and dependents of performers and support personnel, use the [I-539](#) application.
- **UPDATED:** Filing for an extension enables the beneficiary to remain lawfully in the U.S. beyond the initial I-94 date, until USCIS grants the extension. The beneficiary may continue to work while the petition is pending, but only if the extension is filed by the

same petitioner as before, and the services are similar to those described in the preceding petition and on behalf of that petitioner. Otherwise, while the beneficiary may remain lawfully in the U.S., s/he cannot work until USCIS grants the new petition. In light of a June 28, 2018 USCIS policy memorandum, there is now a risk that if the petition for extension is denied and the artist is determined to be not lawfully present in the U.S., the beneficiary will be issued a notice to appear (NTA) before an immigration judge and face possible deportation. It is essential that petitioners file any extension of stay request long before the beneficiary's current status is set to expire or otherwise advise the artist to depart the U.S. at the conclusion of the current visa period, then file a new petition for new work and undergo the usual process as if engaging the artist for the first time. Given the risk of being issued an NTA if an extension request is denied, it is not advisable for guest artists to engage in performance activities (regardless of compensation) in the U.S. after the original visa classification expires and new visa approval is still pending.

- If the beneficiary leaves the U.S. and seeks to return before USCIS grants the extension s/he must either have remaining validity on the existing visa or plan to get a new one.
- If the beneficiary re-enters on the strength of the existing visa before USCIS grants the extension, s/he will be admitted only until the old visa expires.
- If the beneficiary re-enters on the strength of the existing visa, but USCIS has granted the extension, generally speaking CBP will admit the beneficiary for the remaining validity of the preceding classification period plus the new validity period (it is best for the beneficiary to have the new original I-797 notice in this case, but should not be essential, given that CBP inspectors can readily check to see whether the extension is approved). Obviously, the beneficiary should try to obtain the new visa instead of relying on CBP to tack on the new classification period.
- An alien who, in desperation, re-enters the U.S. in a different classification than the one sought in the extension filing, has a problem. Even if USCIS grants the extension, it will be of NO benefit as such, because it will not confer a new status on that alien. Rather, it will be treated by law as any new petition pertaining to an alien abroad. Therefore, the alien will either have to depart the U.S., obtain the appropriate visa (if needed) and again re-enter, or the petitioner again will have to file, this time a petition to change the alien's status to the proper one, and to extend that alien's stay. Simply pretending that the new I-94 trumps the alien's admission in another status risks causing the alien to overstay, with all the attendant bad consequences.
- During the pendency of any petition to change status, the alien cannot work in the desired status.
- The I-797 approval notice for the extension petition and any accompanying I-539 will include, in the lower right-hand corner, a replacement I-94 showing the new classification period. As of April 30, 2013, I-94 cards will be available online. The I-797 will be mailed to the petitioner, so there is no need for the artist to visit a U.S. consulate to pick up new documentation. In practice, it is best for petitioners to print the new I-94, then give a copy to the artist.

Even if the artist is already in the U.S. in [O-1B status](#), you are not confined to filing a simple extension of stay for one year. While this approach is less work because less documentation normally is required, the O-1B petitioner can at least try to file a new, fully documented petition for a new three-year period, based on a new contract, a fresh itinerary, and the like. There are no express limits on how long an alien may remain in the U.S. in O or P status (with the proper extensions or re-filings), but USCIS at some point may raise the issue, particularly with respect to P status.

For extensions of stay involving O and P petitions, it is advisable to include a full petition package following a USCIS memorandum that [rescinded a prior policy that required officers to defer to prior determinations in petitions for extension of nonimmigrant status: I-129 and Supplement](#) with [proper fee](#), copy of front and back of all [I-94s](#), copy of the original [I-797 approval notice](#), copy of original labor consultation (no new one is needed), [beneficiary list](#) (if any), passport biographical data page(s), petitioner's letter explaining the basis for the request, and all supporting documentation from the original petition, with new material as available. The petitioner letter should state that the nature of the underlying activities and services are the same, but that additional dates (and venues) have been added. Any new contracts and a new [itinerary](#) should be included.

If a new petitioner is involved, the petition should be submitted in the form, order, and content (including labor consultations) of new petitions, though the action requested on the I-129 form will be different.

Artists who wish to extend their stay in the U.S. - purely as tourists - beyond the date listed on the I-94 card must apply for a [change in status](#) to the [B-2 visa classification](#).

**Important Note:** All petitions to extend stay must be filed well before the alien's original stay expires, as noted on the I-94 card. That the visa and/or underlying approved classification period may last longer than the I-94 is irrelevant! Also, if the alien leaves the U.S. before CIS grants the extension s/he may be readmitted in the same classification as before [provided](#) the old visa remains valid. Once that visa expires, however, the alien must obtain a new one before seeking to re-enter the U.S. in the desired classification, meaning the alien must await USCIS approval of the pending petition. The same concept applies to [Canadian](#) citizens, except that they do not require visas.

#### **D. Adding Activities Versus Petition Amendments**

While you should do your best to disclose in advance all the proposed activities, artists and entertainers may add or subtract performances involving similar services without filing a new petition, provided the new activities take place within the classification period and *on behalf of or in association with the same petitioner*. O-2 accompanying aliens are subject to the same restrictions.

To be clear, subject to the discussion of [Selecting Who Will File the Petition](#) and [Multiple Venue Petitions](#), if the newly added performance or event involves a new, direct employer of a beneficiary, USCIS must first approve a new petition by that employer to enable the beneficiary to work for that employer, though subcontracting arrangements might be possible. If, however,

the newly added performance or event is for the original petitioner, who is a "management agent" or an "appointed agent," and involves the same or similar services at venues other than those disclosed in the original petition, during the original classification period, then provided those activities occur through or under the auspices of the petitioner/agent, the beneficiary may undertake those activities without a new petition.

What constitutes "similar" services is a matter of USCIS discretion. An O-1B concert hall soloist can add engagements in concert hall venues without concern, and most likely dates in smaller, more commercial or academic venues as well. It would probably be acceptable to USCIS were the soloist to play different music, jazz instead of classical, for instance, on those added dates. The soloist would still be playing his or her instrument, before a live audience attracted because of the soloist's reputation with that instrument, even though the soloist's O-1B reputation was gained by performing classical music only. It is less clear whether that soloist could add dates to perform as a member of a jazz ensemble. And it is debatable whether that soloist could add studio recording dates without additional action.

Where the artist's or group's principal purpose for being in the U.S. has materially changed, the petitioner must file an amended petition. An amended petition in this case simply means that the petitioner will check off Box 2c ("Change in previously approved employment"), in Part 2 of the I-129 petition, and also request an [extension of stay](#) (Part 2, Box 4c). Otherwise, the petition substance and process would remain the same.

Note that if added or future engagements will take place in conjunction with another employer or agent altogether, that party must file a separate petition, unless the original petitioner filed an [itinerary-based petition](#), including a [cover letter that allowed for additional engagements](#) to be added. For example, if an artist changes management companies mid-stream, the new management will need to file its own petition. This, of course, would not be an amendment.

#### **XIV. Employer Responsibilities and Final Thoughts**

U.S. employers should try to verify that those they hire, in any capacity, are lawfully in the U.S. in a status consonant with the activities proposed, if only by checking their immigration papers. If the alien is an employee, there is a formal obligation to complete an [I-9 Employment Eligibility Verification Form](#) within three days of hire. If the alien is an independent contractor, no I-9 is required. While in theory this suggests that you do not have to worry about the work authorization of someone who will not be your employee, determining whether someone is an employee or an independent contractor is tricky, especially since USCIS, Internal Revenue Service, and Department of Labor have different definitions of the term.

Employers who fail to comply with the I-9 paperwork requirements when hiring *employees* can be subject to civil penalties of \$100 to \$1000 per violation. Employers who commit "document fraud" by, for instance, completing an I-9 knowing the employee is not authorized to work, can be subject to civil fines of \$250 to \$5000 per offense. Employers who knowingly hire or continue to employ aliens not authorized to work are subject to civil fines ranging from \$250 to

\$2000 per worker for the first offense, \$2000 to \$5000 per worker for the second offense, and \$3000 to \$10,000 per worker beyond that. Criminal penalties may be imposed.

Successfully navigating U.S. immigration law and procedures requires a combination of technical knowledge of the tools of the trade, a healthy dose of common sense, and a bit of luck. We hope that this guide has given you enough of the former, leaving you, the reader, responsible for the common sense, and kismet for the luck.

Indeed, the best of luck to you!

**ARTISTS FROM ABROAD**  
**Complete Guide to Immigration & Tax Requirements for Foreign Guest Artists**

**Appendix Index for Immigration Procedures**

**Contact Info and Useful Resources**

- [Filing Timeline](#)
- [USCIS Service Center Tips and Contact Information](#)
- [Filing Tips for Form I-129 by USCIS \(09/15/17\)](#)
- [Useful Web Links](#)
- [Consultation Contact List \(Labor and Non-Labor\)](#)
- [AFM Labor Consultation Frequently Asked Questions](#)

**Blank Forms**

- [Blank Form I-129 Petition for Nonimmigrant Worker, with O/P Supplement and Attachment-1](#)
- [Blank Form I-907 Request for Premium Processing](#)
- [Blank Form I-539 with Supplement](#)

**Sample Petitions and Forms**

- [Sample O-1B Petition](#)
- [Sample O-2 Petition \(Accompanying Personnel\)](#)
- [Sample P-1B Petition](#)
- [Sample P-3 Petition \(Group\)](#)
- [Sample P-3 Petition \(Individual\)](#)
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- [Sample Form I-907](#)
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**Sample Cover Letters and Templates**

- [Sample Cover Letter: General](#)
- [Sample Cover Letter: Itinerary-Based](#)
- [Sample Letter of Intent](#)
- [Agent Appointment Letter Template](#)
- [Blank Beneficiary Chart \(column format\)](#)

**Consular Processing**

- [DS-160: Online Nonimmigrant Visa Petition for consular processing](#)
- [DS-160 Preparation Form](#)

**Key Memos**

- [P-1 USCIS Policy Memo, December 2011](#)
- [USCIS Clarifying Guidance on “O” Petition Validity Period, July 2010](#)
- [USCIS \(formerly INS\) November 30, 2001 Memo re: Traditional Expedites](#)
- [State Department Artist Visa Policy Memo \(July 2005\)](#)

## **Immigration Procedures for Foreign Guest Artists**

### **About the Author**

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**ARTISTS FROM ABROAD**  
*Complete Guide to Immigration & Tax Requirements for Foreign Guest Artists*

**Tax and Withholding Procedures for Foreign Guest Artists**

**Third Edition, by Robyn Guilliams**

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**I. Introduction**

United States taxation and withholding of tax on foreign performing artists is a hot topic in the arts world today. The laws governing taxation and withholding are not new – they have been in place for many years. The general rule is that anyone working and earning compensation in the U.S. is required to pay U.S. income tax on those earnings.

Part of the buzz about taxation of foreign artists has been fueled by the IRS’s [October 2007 announcement](#) that it had launched a task force focused on “improving U.S. income reporting and tax payment compliance by foreign artists who work in the United States.” In effect, this translates to a crackdown on enforcement of the existing U.S. laws and regulations concerning taxation and withholding of tax on foreign artists. In early 2011, the IRS stepped up its enforcement efforts and began to send out “Directed Withholding Letters” to presenters, venues and other performing arts organizations, directing these entities to withhold 30% of the gross compensation to be paid to particular foreign performing artists.

The information in this website is intended to be a practical guide to U.S. tax law and regulations governing the taxation of foreign artists performing in the U.S. At the outset, however, a few words of caution:

- **This site includes much information, but it cannot address every specific scenario! In fact, the appropriate tax treatment for any particular artist is extremely fact-specific, depending on the artist’s country of residence, the amount of money earned by the artist in the U.S., and the artist’s status as an “individual” or “business” for tax purposes. The information included in this site is *not legal advice*. For advice on specific situations, contact a qualified tax attorney.**
- This site addresses primarily foreign artists who are earning income for performing services in the U.S. as “guest artists”, who are “nonresidents”<sup>1</sup> of the U.S. The tax and

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<sup>1</sup> Generally, a foreign individual will be considered a U.S. resident if he or she (1) has a green card, or (2) meets the “substantial presence” test – meaning he or she has been physically present in the U.S. for at least 31 days during the current year, and 183 days during the three-year period that includes the current year and the two years immediately before (to satisfy the 183 days requirement, count all of the days you were present in the current year, and one-third of the days you were present in the first year before the current year, and one-sixth of the days you were present in the second year before the current year.)

withholding requirements for those who are not nonresident performing artists, such as students and teachers, artists earning royalties, green-card holders and many others, may be very different from the requirements described in this site. Again, for advice on tax requirements for these individuals, consult with a qualified tax attorney.

## **II. Foreign Artist Taxation**

As a general rule, anyone performing services in the U.S. – including most (if not all) performing artists – must pay U.S. taxes on his or her U.S. income. It is important to note the distinction between *withholding* and *taxation*. Generally, *withholding* is required of anyone making a payment to a foreign artist for services performed in the U.S. Withholding is the mechanism by which the IRS ensures that it collects taxes owed by foreign artists. *Taxation* refers to the actual tax owed by an artist. Withholding may be required, even if an artist will end up owing no U.S. tax. Conversely, an artist may be exempt from withholding, but could still owe tax on the income earned. Generally, anyone making a payment to a foreign artist for services performed in the U.S. is required to *withhold* 30% of the artist’s gross income toward the artist’s U.S. tax liability. However, artists performing services in the U.S. are *taxed* at the same graduated rates that apply to U.S. citizens. Accordingly, the amount of the 30% withholding is almost always going to be more than the artist’s actual tax liability. The artist may recover the difference by filing a U.S. tax return.

In addition, foreign artists may also be subject to state and local income taxes for income earned within a particular state. **State income tax liability may exist even if there is no federal income tax liability; and, in the case of some states (e.g., California), even if the income is exempt from tax as a result of an income tax treaty.** A foreign artist should refer to specific state tax laws or seek the assistance of a tax professional to determine applicable state tax requirements, including the necessity to file a state income tax return. Generally, this information is available on the state’s web site.

## **III. Nonresident Alien (NRA) Withholding**

To ensure that foreign artists pay their U.S. taxes, the IRS requires anyone in the U.S. who is paying for services performed by a foreign artist to withhold 30% taxes on all U.S. income of that foreign artist. Anyone who pays a foreign artist for his/her services as a performer (the “withholding agent”) may be liable for the required withholding. The withholding agent may be a promoter, a venue, a presenter, a manager or an agent. It is important to note that if a foreign artist fails to [file a tax return](#) and pay his/her taxes, *and* the person or entity who paid the artist

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failed to withhold as required, each withholding agent will be held liable for the amount that should have been withheld (although the tax will be collected only once.)

### **A. Payments Subject to Withholding**

The 30% withholding applies to *gross income* – which includes fees, as well as certain expense reimbursements that are provided to an artist. *All* compensation provided to the artist is subject to withholding.<sup>[1]</sup>

For example – assume an artist’s fee for his U.S. performances is \$10,000. In addition, the presenter who is hiring the artist is providing a \$3,000 expense reimbursement to the artist for the performances. The total amount to be withheld from the artist’s fee is \$3,900 -- \$3,000 (30% of the \$10,000 fee) *plus* \$900 (30% of the \$3,000 expense reimbursement).

One important exception to the 30% withholding rule is expense reimbursements that meet the requirements of the IRS's "Accountable Plan Rules." These requirements are:

1. The expenses must be reasonable and must be directly related to the engagement;
2. The expenses must be substantiated by the artist (i.e., artist must provide receipts);  
and
3. The expense reimbursement must not be more than the amount of the documented expenses.

If an expense reimbursement meets these three requirements, the reimbursement should not be included in gross compensation for withholding purposes. Expenses that generally are accepted by the IRS to qualify for this type of reimbursement are hotel, travel, and meal expenses.<sup>[2]</sup>

For a more detailed explanation of the accountable plan rules, see [this IRS webpage on nonresident aliens and the accountable plan rules](#).

According to IRS rules, commissions [paid to agents and artist managers](#) are also subject to withholding, even if the commission is paid by a U.S. presenting organization directly to an agent or manager. This applies regardless of whether the commission is paid together with or separate from the payment to the artist.

Note that the withholding requirement applies to foreign artists performing services within the U.S. – regardless of the payer’s place of residence, where the contract for services was made, or the place of payment. U.S. arts organizations engaging foreign artists for tours outside the U.S. should note that a foreign guest artist is *not* taxed on services performed outside the U.S.

### **B. Payments to Agents**

Contracts for personal services of foreign artists frequently require that the presenter or other payer make payments to a U.S. or foreign manager or agent. In considering whether or not withholding is required, the payer must determine who the “beneficial owner” of

the payment is. The beneficial owner is the person who is the owner of the income for tax purposes – the person who will benefit from owning the income. Thus, a person receiving income – such as an agent or manager – strictly to pass the payment on to another person (even if it is passing it on after deducting a commission) is not the beneficial owner of the income.

If the foreign artist is the beneficial owner of a payment made to an agent or manager, then the withholding must be handled similarly to a payment made directly to a foreign artist. **If payment is made to a U.S. agent or manager and the foreign artist is the beneficial owner**, the payer must still acquire the regular documentation from the foreign artist, that is, a [Form 8233](#), in the case of an individual, or [Form W-8BEN](#) or [W-8EXP](#) in the case of a foreign business. **If the payment is made to a foreign agent or manager and the foreign artist is the beneficial owner**, the payer should acquire a [Form W-8IMY](#), Certificate of Foreign Intermediary, from the foreign agent or manager, in addition to the documentation of the foreign artist (Form 8233, Form W-8BEN or W-8EXP).

Note that the 30% must be withheld only once. If a U.S. presenter pays a U.S. agent or manager for the services of a foreign artist, the presenter is required to withhold 30%. If the presenter withholds, the agent need not withhold. However, if the U.S. presenter fails to withhold, the U.S. agent is required to withhold 30% on its payment to the foreign artist. If no one in the U.S. withholds as required, both the U.S. presenter *and* the U.S. agent could be liable for the artist's taxes. (Of course, the artist will also be liable, but it is much easier for the IRS to recover the taxes from a presenter or agent in the U.S. than it is from an artist who lives in a foreign country.)

Remember that each withholding agent will be held liable for the amount that should be withheld. To illustrate, assume that a particular foreign artist has a U.S. booking agent, and a U.S. presenter engages the artist through the agent. The fee for the artist's services is \$10,000, to be paid by the presenter to the agent, who will then deduct his commission and pay the artist. Assume that the presenter does pay the agent, who then pays the artist. No taxes are withheld, and the artist does not file a U.S. [tax return](#) or pay U.S. taxes. In this scenario, the presenter and the agent, as well as the artist, would be liable for the taxes that were not withheld from the artist's fee – along with any interest or penalties that are due.

Many U.S. agents and managers have sought to reduce the amount withheld from their artists' fees by having presenters make one check payable to the agent or manager for the agent's or manager's commission, and another check payable to the foreign artist for the remainder of the fee. The presenters will then deduct the 30% withholding only from the artist's portion of the fee. Unfortunately, this arrangement does not comply with IRS withholding requirements. The agent's or manager's commission, even if paid to the agent or manager directly, is still subject to the 30% withholding requirement. This is because the commission is part of the fee that is earned by the foreign artist. The artist then pays the commission to the agent or manager from the fee (regardless of how many checks are cut and to whom they are payable). As with many other expenses, the value

of this commission may be deducted from the artist's taxable income when filing a tax return, and the artist will be reimbursed any tax that was withheld on the commission.

### **C. Payments to “Individuals” vs. Payments to “Businesses”**

Before considering the possible [exemptions to withholding](#) and the necessary forms required to claim the exemptions, it is important to determine if the foreign artist in question will be treated as a group of individuals or a business for tax purposes. A foreign individual or foreign performing arts group cannot simply set up a foreign or domestic corporation to qualify as a business for claiming a tax treaty exemption. As noted above, the IRS looks at who is the beneficial owner of the income.

In determining what exemptions are available, the IRS will look at whether or not the performers in a group “participate in the profits” of the U.S. performances. For instance, let's say that a French musical ensemble with five musicians incorporates itself in France. Payments for the ensemble's services in the U.S. are made payable to the French corporation, and the corporation pays all of the tour expenses for the ensemble. After expenses, the performers split whatever profit (or loss) is left over. Here, the performers are “participating in the profits” and are treated as individuals, not a business, for tax purposes. On the other hand, if the performers receive a set fee or salary from the ensemble for the performances, and this fee or salary is not affected by any profits or loss of the U.S. performances, the performers are not “participating in the profits,” and the musical ensemble is treated as a “business” for tax purposes.

Obviously, many cases are clear cut. If one solo artist is performing, and the contract for the performance engages only that artist, the artist is considered an individual. On the other hand, when a full orchestra performs in the U.S., it will be treated as a business if the musicians receive a salary and do not “participate in the profits.” However, many groups consist of a small number of performers that require a more detailed analysis.

## **IV. Exceptions to NRA Withholding Requirement**

There are several exceptions to the [30% withholding requirement](#) that may apply to foreign artists in certain circumstances. The exceptions to withholding which are relevant to the circumstances common to foreign artists are as follows:

- Compensation that is exempt from U.S. income tax by reason of a [tax treaty](#);
- Compensation that is exempt from U.S. income tax because it is earned by an organization that is [tax-exempt](#) in its home country;
- The foreign artist enters into a [Central Withholding Agreement](#) with the Internal Revenue Service; and

- Compensation that is subject to withholding under Section 3402 (“[graduated withholding](#)”) and the regulations under that section (this applies only if there is an employee/employer relationship).

## A. Tax Treaties

The United States has entered into income tax treaties with approximately 66 foreign countries. Under these treaties, foreign artists may be exempt from U.S. income taxes on the compensation they earn for services performed in the U.S. If a treaty exemption applies to a particular foreign artist, *and the proper documentation is presented to the presenter or other payer*, the 30% withholding requirement will not apply to that artist.

[IRS Publication 901](#), U.S. Tax Treaties, summarizes the treaty exemptions on a country-by-country basis. However, this publication includes only a summary of each treaty. Because each tax treaty varies from the others, and because the treaties are sometimes updated, anyone relying on a tax treaty exemption should check the relevant treaty itself before relying on the exemption. Each tax treaty is available for viewing or download on the IRS website at [www.irs.gov/businesses/international/article/0,,id=96739,00.html](http://www.irs.gov/businesses/international/article/0,,id=96739,00.html).

There are several types of exemptions in the tax treaties that may be applicable to foreign performers: [The Business Profits Exemption](#), [The Artists or Entertainers Exemption](#), and [The Independent Personal Services Exemption](#):

### 1. The Business Profits Exemption

Most (but not all) treaties include a “business profits” provision that exempts compensation paid to a foreign business from U.S. tax. If a performing group is [considered a business](#) by the IRS (as explained above), and the group has no “permanent establishment” in the U.S. (such as an office or other base of operations), then the entire amount paid is exempt from tax in the U.S.

It is important to note that although the payments made to a foreign business may be tax-exempt, the business is still required to withhold U.S. taxes on its payments to its foreign performers, whether it pays the performers as employees or as independent contractors. For example, if payments made to a Moroccan theater company for its performances in the U.S. are exempt from tax pursuant to the U.S./Morocco tax treaty, the theater company is nonetheless required to withhold U.S. taxes from its payments to its actors, whether they be employees of the theater company or independent contractors. The 30% withholding requirement applies to payments made by the foreign business to independent contractors (unless an exemption applies); withholding from payments to employees applies at [graduated rates](#), as discussed below.

### 2. The Artists or Entertainers Exemption

Most (but not all) tax treaties include a limited exemption for individual performing artists. This exemption is usually available when the artist has no “permanent establishment” or “fixed base” in the U.S., and spends fewer than a certain number of days in the U.S. during the year. Of the treaties that include this limited exemption, many

also put a cap on the amount an individual artist may earn tax-free in the U.S. For example, the U.S./U.K. tax treaty permits an artist who is a resident of the U.K. to earn up to \$20,000 tax free. However, if an artist earns more than \$20,000, the *entire* amount earned is subject to U.S. tax.

*For foreign individuals, use caution when deciding not to withhold:* Because the U.S. presenter or U.S. agent or manager cannot determine what other income the artist will receive in any given year, this exemption is usually inapplicable at the withholding stage – it would only apply to taxation. For example, assume that a pianist who resides in the United Kingdom performs one recital in the U.S. in April 2008. The total compensation is \$15,000. While this amount alone would not be taxable in the U.S., if the pianist earns additional compensation and exceeds the \$20,000 cap later in 2008, all of his compensation, including the \$15,000 earned in April 2008, would be subject to U.S. tax. For this reason, a U.S. presenter or U.S. agent/manager must withhold the 30%, even if the compensation for that particular engagement is under the cap. If the presenter or agent/manager does withhold and the artist's compensation does not exceed the cap, the artist may file a U.S. [tax return](#) (in fact – the artist is required to file a tax return) and recover the amount withheld.

### **3. The Independent Personal Services Exemption**

If a tax treaty exists between the U.S. and the artist's country of residence, and the treaty does *not* include a provision concerning artists or entertainers specifically, then the treaty's article on "Independent Personal Services" applies if the foreign artist is an independent contractor. Generally, under this article, income paid to an artist performing services in the U.S. as an independent contractor is not taxable in the U.S. if certain conditions apply – these conditions vary from treaty to treaty. The conditions sometimes include a requirement that the artist not have a "fixed base" in the U.S., or that the artist have limited presence in the U.S. during the tax year. Some treaties also impose a cap on non-taxable earnings within a tax year. As with the other exemptions, **it is imperative to examine the [specific treaty and provisions that apply to a particular artist](#)** to determine if the foreign artist's income is subject to taxation and thus, also subject to withholding.

#### **B. Compensation Earned by a Foreign Tax-Exempt Organization**

The "Tax-Exempt" exemption is quite limited. Even if a group has obtained tax-exempt status in their home country, they are not automatically qualified for this exemption. There are two ways to qualify:

- The organization must apply for and receive from the IRS a determination letter that their organization qualifies for 501(c)(3) status (i.e., tax-exempt status in the U.S.); *or*
- The organization must obtain a letter from a U.S. attorney certifying that the group *would* qualify for 501(c)(3) status with the IRS if they applied. This can be quite costly – the U.S. attorney technically is required to review the same documentation that the IRS

would review in making the determination of 501(c)(3) status – a time-consuming process.

While most (if not all) tax-exempt organizations would qualify for a tax treaty “[business profits](#)” exemption from taxation, this solution may not be a good fit for a group from a country with whom the U.S. does *not* have a tax treaty. The group could either apply to the IRS for a determination of 501(c)(3) status, or pay an attorney for the same determination. If the group performs frequently in the U.S., this may be a cost-effective measure to avoid both withholding and taxation.

Although most foreign nonprofit organizations are not automatically eligible for this exemption, the IRS has created a short-cut to obtaining 501(c)(3) status for Canadian organizations that have obtained "Registered Charity" status from the Canadian Revenue Agency. Detailed instructions for Canadian Registered Charities to obtain 501(c)(3) status from the IRS may be found on page 6 of the IRS Form 1023 instructions, which may be downloaded from the IRS website at <http://www.irs.gov/pub/irs-pdf/i1023.pdf>.

### **C. Central Withholding Agreements**

The Central Withholding Agreement (CWA) is a contract between the IRS, the foreign artist, and a designated “withholding agent.” The withholding agent may be the artist’s agent or manager, a presenter, an accountant, or anyone else who is independent of the artist and is acceptable both to the artist and the IRS. If the artist obtains a CWA, the IRS will estimate the *actual* tax that the artist will owe on the tour or series of events, and this is the amount withheld from the artist’s income – as opposed to withholding 30% of the artist’s gross income. As noted above, because an artist may deduct certain business expenses from his or her [taxable income](#), and because the artist will be taxed at graduated rates (which are often less than 30%), the CWA will likely reduce substantially the amount to be withheld from the artist’s payments.

**Starting October 1, 2018**, nonresident performers will only be able to qualify for a CWA if they individually earn \$10,000 or more in gross income within the calendar year. This threshold also applies to groups, in that each individual member applying for a CWA must accrue at least \$10,000 (including per diem payments). Anyone who does not qualify for a CWA is [subject to 30% withholding](#). The change is reflected in the [IRS Instructions for Form 13930](#), as well as on the [IRS webpage on CWAs](#)

Note that CWAs are available *only* to individuals, not to businesses.

**CWA requests must be received at least 45 days prior to the first event to be covered by the CWA. The IRS will not process any request it receives less than 45 days before the event, and therefore such event(s) will be subject to 30% withholding of the gross income.** Foreign artists who wish to obtain a CWA must submit specific information and documents concerning their U.S. performances to the IRS, including contracts for all engagements and a detailed budget for the U.S. performances. Using the information provided, the IRS estimates the artist’s actual tax liability for the U.S. income earned. There is one requirement that should be noted – if the foreign artist requesting a CWA has performed in the U.S. in previous years, the artist must have filed U.S. [tax returns](#) for those years reporting that income, regardless as to profit or loss. If the

artist has not filed the required returns, he or she must do so before being eligible to receive a CWA. Also, the artist must agree to timely file a U.S. tax return for the current tax year.

All requests for [Central Withholding Agreements](#) (CWAs) must be sent to the following address/fax number:

Central Withholding Agreement Program  
Mail Stop: 1441  
2001 Butterfield Road  
Downers Grove, IL 60515-1050  
Fax: (603) 493-5906

In 2011, the IRS imposed stricter requirements for obtaining a CWA. The IRS now requires the following information from artists requesting CWAs:

- Name, and countries of residence and citizenship for each individual (performers *and* non-performers) receiving compensation (including per diem) on the U.S. tour (note that the performing artists should be listed on the CWA application itself, and the non-performing personnel should be listed on an attached information sheet.) If any of the non-performing personnel are non-U.S. residents, 30% withholding will be required on the payments to these individuals UNLESS the individual a) resides in a country with which the U.S. has a tax treaty; and b) submits a valid IRS Form 8233 to the IRS to claim an exemption from withholding. NOTE: For the Form 8233 to be valid, it must include the individual's U.S. tax identification number. If the individual does not have a U.S. tax identification number (e.g., this is his or her first time working in the U.S.), there can be no exemption from withholding. If you are the withholding agent, the IRS will require you to show proof that taxes were withheld when you submit your final accounting;
- If there is a loss on the tour, a letter to the IRS *signed by the artists themselves*, stating who is absorbing the loss; and
- For artists who have performed in the U.S. earlier in the calendar year, the artist must provide each date and venue for the earlier performances, the gross revenues for each date, and any taxes that were withheld. The IRS will add the gross income from the earlier performances to the income on the upcoming U.S. tour - and also take into consideration any withholding from the earlier performances - to calculate the amount of withholding necessary to cover the artist's taxes.

The budget should include the following information:

- All U.S. Income: In addition to guaranteed performance fees, if any of the performance contracts provides for an overage (i.e., a bonus or percentage of the gross ticket sales after a certain number of tickets is sold), the IRS will expect some part of the overage to be included in the budget. Also, be sure to include figures for merchandising (e.g., t-shirt sales, CD/DVD sales, etc.) and also for sponsorship or tour support, if any;

- Hotel/Accommodations: In addition to including the budgeted number for accommodations, be sure to indicate how these costs are calculated (i.e., how many rooms, cost per room, for which dates);
- Travel Expenses: Provide as much detail as possible, including for each flight, the number of tickets to be purchased and the departure and destination city. If a tour bus is included in the budget, indicate on what legs of the tour the bus will be used, and how the cost is calculated (i.e., by the mile or by the day);
- Per Diems: The IRS will allow an artist to claim only 50% of his per diem as a deduction - the other 50% is considered income to the artist. Note that, for CWA purposes, the amount of allowable per diem is limited by the current government per diem rate, which varies from city to city, and may be found here: <http://www.gsa.gov/portal/category/21287>. For instance, the current meal per diem rate for Manhattan is \$71. Therefore, the most that you can deduct as a per diem expense per individual for performances in Manhattan is \$35.50. Anything above that amount will be considered income to the person receiving the per diem.
- Instrument Rental/Backline: Indicate specifically what rentals the cost will cover.
- Finally, note that if a performance contract provides that "house sound and lights will be provided," the IRS will not allow the artist to deduct any additional costs for sound and lights provided by the *artist*. If an artist is not going to use house sound and/or lights, be sure to strike this provision from the contract.

Note that in the past, third parties (such as agents, managers, promoters, and producers) could request a CWA on behalf of an artist, and submit an IRS Form 8821 authorizing the third party to communicate with the IRS on behalf of the artist. While this is still the case, the third party is no longer permitted to sign the cover letter accompanying the CWA request. The cover letter must be signed directly by each artist requesting a CWA. Note that the cover letter must include the language certifying "under penalties of perjury" that the information submitted in the request is true and accurate (see the instructions for requesting a CWA, IRS Form 13930).

More information about CWAs is available at the [IRS website](#). E-mail inquiries regarding CWAs may be sent to the IRS directly at [CWA.Program@irs.gov](mailto:CWA.Program@irs.gov).

#### **D. Compensation Subject to Graduated Withholding**

*Employers* paying *wages* to foreign artists are required to withhold tax at graduated rates as determined by specific tables and procedures, rather than withhold at the 30% rate. In general, *wages* are defined as all remuneration for services performed by an *employee* for his *employer*. **This excludes payments to an independent contractor.**

[Distinguishing an employee from an independent contractor](#) generally depends on the facts and circumstances surrounding the performance of the services. Labels do not determine an individual's classification. For example, status as an employee cannot be avoided merely by labeling an individual "independent contractor," "consultant," or other term designed to belie an

employment relationship. In general, an employer-employee relationship exists when the person for whom the services are performed has the right to control and direct the individual performing the services, not only as to the result to be accomplished by the work, but also as to the details and means by which the result is to be accomplished. Arts organizations unclear as to the status of a particular foreign artist should contact legal counsel for assistance with such determination.

In general, if the foreign artist is an employee, he should be treated as any other employee of the organization for tax purposes. It is likely that most foreign artists, especially those performing as “guest artists”, will *not* be considered employees, and the organization will *not* therefore be exempt from the NRA Withholding requirement under this category.

## **V. Taxpayer Identification Numbers**

A U.S.-issued identification number (generally, a Social Security Number for [individuals](#), or an Employer Identification Number for [businesses](#)) must be furnished on returns, statements, and other tax-related documents (including [Forms 8233](#), [W-8BEN](#) and [W-8EXP](#).) A foreign artist must have a tax identification number to file an income [tax return](#) or to claim [tax treaty benefits](#), including exemptions from withholding. It is the responsibility of the foreign artist to apply for a tax identification number. The type of number required depends on whether the performers are considered [individuals or a business](#) for tax purposes (see discussion above).

### **A. Businesses – Employer Identification Number**

Obtaining an Employer Identification Number (“EIN”) from the IRS is relatively quick and simple. A foreign business may apply for an EIN by completing and submitting IRS [Form SS-4](#). The form may be submitted to the IRS by fax or by mail. (Note that although U.S. businesses may apply online for an EIN, this option is *not* available to foreign businesses.) The IRS will usually respond with the EIN within several days.

### **B. Individuals – Social Security Number or Individual Tax Identification Number**

Foreign individuals may use either a Social Security Number (“SSN”) or an Individual Tax Identification Number (“ITIN”) when completing [tax returns](#) and other tax documents, including a [Central Withholding Agreement](#) or a [Form 8233](#). The ITIN *cannot* be obtained until the individual has applied for and been denied an SSN.

Applying for an SSN requires a personal visit to a [Social Security Administration \(SSA\) office](#) within the United States. Any artist who receives work authorization from the United States Citizenship and Immigration Services (such as an “O” or “P” visa) is eligible to receive an SSN. When the artist enters the country, Customs and Border Protection will update the artist's I-94 record at [www.cbp.gov/I94](#), which includes certain information related to the individual's visa and work-authorization status. Automation of the I-94 information began April 30, 2013. Previously, it has taken up to ten days for the I-94 information to be updated in the computer system. For this reason, the Social Security Administration requests that a foreign artist wait at least ten days after entering the U.S. before applying for the SSN. An applicant's request for an

SSN will be denied if his or her I-94 information is not accessible to the Social Security Administration. Furthermore, at the time the Social Security Administration makes the determination as to whether or not to issue the SSN, the foreign artist must have at least 14 days work authorization remaining on his or her visa. This means that an artist who is in the U.S. for less than 24 days may encounter difficulties in obtaining an SSN.<sup>[1]</sup> The artist needn't remain in the U.S. while the application for an SSN is pending, but will need to supply a U.S. address to which the card can be mailed.

If an artist is denied an SSN, he or she will receive a rejection letter from the Social Security Administration. The artist may then apply to the IRS for an ITIN. Note, however, that the IRS will issue ITINs only to individuals who have applied for and been denied an SSN – the rejection letter from the Social Security Administration must accompany the application for an ITIN. Along with the one-page [W-7 ITIN request form](#), the IRS requires a nonresident individual to submit proof of his or her identity and “foreign status” to obtain an ITIN. This proof can take the form of a certified copy of the individual’s passport alone, or copies of two of the following: 1) a current national ID card (that includes the individual’s name, address, photograph, date of birth and expiration date); 2) a foreign voter registration card; and 3) a civil birth certificate. As of June 22, 2012, only copies of documents certified by the agency that issued that document will be accepted with ITIN requests. The IRS will no longer accept passport or other copies that have been certified by U.S. or foreign notaries. So, for instance, if an individual wishes to submit a copy of his passport as proof of his identity and foreign status, the individual must obtain a copy of the passport certified by whatever government agency issued that passport.

Note that this new "strengthened" procedure is in place only until the end of 2012, when the IRS will issue further new guidelines for obtaining ITINs. The IRS has [posted additional information](#) on its website to address additional questions regarding the new procedure.

If all of this sounds like a bit of a headache, consider the following:

- To claim any [tax treaty exemptions](#), an SSN or ITIN is *required*
- Foreign artists are required by U.S. law to file a U.S. tax return to report any income earned in the U.S.; an SSN or ITIN is *required* to file this return
- Good news – once obtained, an SSN or ITIN is good indefinitely!

## **VI. Tax Returns**

A foreign individual artist who receives compensation for personal services performed in the U.S. is required to file a U.S. tax return to report the U.S. income. The correct return for nonresident individuals is [Form 1040NR or Form 1040NR-EZ](#).<sup>[1]</sup> The foreign artist is required to file a tax return even if the income is exempt from U.S. income tax. Furthermore, filing an income tax return is the only way that the foreign artist might acquire the benefits of any allowable deductions or credits – or claim the benefit of certain [tax treaty exemptions](#)<sup>[2]</sup> – and thus claim any refund of an overpaid withholding. Form 1040NR or Form 1040NR-EZ for any

given calendar year is due by April 15 for employees and June 15 for independent contractors of the next year.

There is one exception to the above filing requirement. If a foreign artist performs personal services as an *employee* in the United States and earns *wages* less than the personal exemption amount (\$3,400 in 2007 tax year), that employee need not file a U.S. tax return. Note, however, that this exception does not apply if the employee is seeking a refund of U.S. tax, has a U.S. income tax liability not satisfied by withholding, or has income either wholly or partially exempt for one of the reasons outlined above.

A foreign artist performing as an independent contractor would be allowed to deduct from his or her taxable income any ordinary and necessary business and travel expenses that were incurred in earning the U.S. income. These expenses would be claimed on a [Schedule C](#) (or [Schedule C-EZ](#)) as an attachment to the filed Form 1040NR tax return. Note also that a foreign artist who is an independent contractor, unlike a U.S. citizen or resident, is not subject to self-employment tax with respect to business income earned as an independent contractor.

For businesses, the proper tax return is [Form 1120-F](#). As with individual returns, expenses that are related to the U.S. performances (such as payments to employees or independent contractors, hotel, travel and per diem) are deductible for the purposes of calculating the businesses taxable income.

Aside from being in compliance with U.S. law, there are two added incentives for foreign artists to file their U.S. tax returns:

- If an individual fails to timely file a required return, he or she will lose any available deductions *and* any exemptions that may apply. This means that the artist would not be allowed to deduct ordinary and necessary business expenses from his or her income, and any tax treaty exemption that might otherwise have applied to the artist would no longer be available.
- Federal agencies are getting more sophisticated about sharing information and databases. At some point in the future, the IRS and U.S. Citizenship and Immigration Services could implement a policy where any individual applying for an “O” or “P” visa must be current on his or her tax returns to qualify for the visa. In other words, if an artist has been granted “O” or “P” visa status previously, and the artist did not file returns for the years that he or she worked in the U.S., the requested visa would not be granted until the delinquent returns were filed. While it’s doubtful that this policy will come to fruition any time in the very near future, it’s a good reason to begin filing required returns *now*!

## **VII. Withholding Procedures – Deposits**

If [withholding](#) is required of a U.S. presenter, agent, or manager (or anyone else in the U.S. making payments for the services of foreign artist), certain procedures must be followed with regard to depositing and remitting the tax withheld to the IRS. Withholding agents are required

to pay the tax withheld on an annual, monthly, or quarter-monthly basis, depending on the amount withheld. The tax must be deposited electronically through the [Electronic Federal Tax Payment System \(EFTPS\)](#) from a U.S. bank. The EFTPS system is fairly simple to use. To register for EFTPS, a withholding agent must provide its name and address, Employer Identification Number (EIN), and bank account information (account and routing numbers). After registering, the withholding agent must wait a week or so to receive a PIN number in the mail. So, if you are required to make a deposit, be sure to register with EFTPS several weeks in advance.

A quarter-monthly period means one of the following: (1) the first day of the month through the seventh day; (2) the eighth through the fifteenth; (3) the sixteenth through the twenty-second; or (4) the twenty-third through the end of the month. If at the end of any quarter-monthly period, the total amount of *accumulated* undeposited tax is greater than \$2,000, such tax must be paid within three (3) business days of the end of such quarter-monthly period. The quarter-monthly deposit requirement will be considered as having been satisfied if the withholding agent deposits 90 percent of the tax withheld during the period within three banking days after the close of the period. The remainder of the deposit must be made with the first deposit required after the fifteenth day of the following month.

Monthly deposits are required if, at the end of any month, the total amount of accumulated undeposited tax is more than \$200 but less than \$2,000. The aggregate amount of withheld tax is required to be deposited within fifteen days after the close of the calendar month.

Annual deposits are required if at the close of the calendar year the total amount of accumulated undeposited tax is less than \$200. The deposit of such amount may be remitted with Form 1042 or by the due date for the Form 1042.

## VIII. Forms

Below is a brief explanation of some of the forms that concern payments to foreign artists. We also provide an appendix with links to [all forms and instructions](#), or you can find the forms and instructions from the [IRS web site](#).

- **[Form 8233 – Exemption from Withholding on Compensation for Independent \(and Certain Dependent\) Personal Services of a Nonresident Alien Individual](#)**

Form 8233 must be completed by a foreign artist in order to claim an exemption from withholding pursuant to a tax treaty. The artist must also provide either an SSN or ITIN on Form 8233. The artist then submits the form to the U.S. presenter, or U.S. agent or manager (or whoever in the U.S. will be paying the artist.) The U.S. payer must review the form for accuracy and complete Part IV of the Form. For the form to be valid, **the U.S. payer must forward completed Form 8233 and its attachments to the IRS** within five (5) days of receipt.

Keep a careful watch on the timing for submitting the Form 8233! The payer should file Form 8233 with the IRS prior to making the first payment. The exemption from

withholding is effective for payments made beginning ten days *after* the form is *mailed* to the IRS. (Remember that any in-kind payments or third-party payments such as airfare, hotel accommodations, and other costs are also [considered compensation](#) paid to the foreign independent contractor artist.) Form 8233 is valid only for the calendar year in which it is filed and must be re-filed each year.

- **[Form W-8BEN – Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding](#)**

Form W-8BEN is used by a foreign business both to establish foreign status and beneficial ownership, and to claim income tax treaty benefits. The form is completed by the foreign business and submitted to the U.S. presenter or U.S. manager or agent (anyone who is making a payment to the foreign business). Unlike [Form 8233](#), Form W-8BEN is not submitted to the IRS. The form is retained by the payer, and is presented to the IRS only in the event that the IRS questions why taxes were not withheld by the payer at the time of payment.

- **[Form W-8EXP – Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding](#)**

Form W-8EXP is used by a [foreign organization that is tax-exempt](#) in its home country and has either (1) applied for and been granted 501(c)(3) status by the IRS, or (2) obtained an opinion letter from a U.S. attorney concluding that if the organization were to apply for 501(c)(3) status, such status would be granted by the IRS. Unlike [Form 8233](#), Form W-8EXP is not submitted to the IRS. The form is retained by the payer, and is presented to the IRS only in the event that the IRS questions why taxes were not withheld by the payer at the time of payment.

- **[Form W-8IMY – Certificate of Foreign Intermediary](#)**

Form W-8IMY is used if payment is made to a foreign agent or manager for the services of a foreign artist. The form is completed by the foreign agent or manager and submitted to the U.S. payer. (Note that this form would be in addition to the forms required for payments to the foreign artist – e.g., [Form 8233](#), [Form W-8BEN](#), or [Form W-8EXP](#).) Unlike [Form 8233](#), Form W-8IMY is not submitted to the IRS. The form is retained by the payer, and is presented to the IRS only in the event that the IRS questions why taxes were not withheld by the payer at the time of payment.

- **[Form SS-5 – Application for a Social Security Card](#)**

As noted above, an individual foreign artist who wishes to claim an exemption from withholding or taxation by reason of a [tax treaty](#) must acquire either a [Social Security Number \(SSN\)](#) or [Individual Tax Identification Number \(ITIN\)](#) as his or her tax identification number. The tax identification number is required to be included on [Form 8233](#) and the artist's U.S. [tax return](#).

Form SS-5 must be completed and presented by the artist in person at a [Social Security Administration](#) office in the U.S. The artist must also bring his or her passport and I-94 card (which is available online at [www.cbp.gov/194](http://www.cbp.gov/194)) as evidence of the artist's work authorization.

- **[Form W-7 – Application for IRS Individual Taxpayer Identification Number](#)**  
If the foreign artist is denied an SSN by the Social Security Administration, he or she may apply for an [Individual Tax Identification Number](#) (ITIN) from the IRS. In addition to submitting the completed Form W-7, the artist must also provide a copy of the denial letter from the Social Security Administration to the IRS to obtain an ITIN.
  
- **[Form SS-4 – Application for Employer Identification Number](#)**  
In order to obtain tax treaty benefits, a foreign business must obtain an Employer Identification Number (EIN) from the IRS. As noted above, the EIN is simple to obtain – the form may be submitted to the IRS by fax or by mail.
  
- **[Form 1042 – Annual Withholding Tax Return for U.S. Source Income of Foreign Persons](#)**  
This tax return must be completed by anyone making a payment for the services of a foreign artist (such as a U.S. presenter or a U.S. manager or agent.) The return summarizes the total amount of income paid to foreign artists, as well as all tax withheld, in the aggregate. **Form 1042 must be filed regardless of whether any tax was withheld on payments to foreign artists.** [Forms 1042-S](#) and if appropriate, [Form 8233](#) (required for tax treaty exemptions for individuals), must accompany Form 1042 when it is filed with the IRS. Form 1042 should be filed by March 15 of the year following the calendar year in which the payments were made.
  
- **[Form 1042-S – Foreign Person’s U.S. Source Income Subject to Withholding](#)**  
Form 1042-S is issued by anyone making a payment for the services of that foreign artist, and is similar in purpose to Forms W-2 and 1099 and serves to replace such forms for the reporting of most income paid to foreign artists. If the foreign artist is an independent contractor, the income paid to the performer should be reported on Form 1042-S. A separate Form 1042-S must be filed for each foreign artist to whom or on behalf of whom a payer makes payments. A foreign artist’s [taxpayer identification number](#) (SSN or ITIN) is required on Form 1042-S if the artist either seeks credit for the taxes withheld or a [tax treaty](#) tax exemption. By March 15 of the year following the calendar year in which the payments were made, the payer must give the foreign artist copies B through D of Form 1042-S, and file Copy A with [Form 1042](#).
  
- **[Forms 1040NR and 1040NR-EZ](#) – U.S. Nonresident Alien Income Tax Return**  
This tax return must be filed by foreign artists who are nonresidents of the U.S. who earn income for services performed in the U.S. The Form 1040NR-EZ is a somewhat simpler return than the 1040NR. However, the EZ form is NOT available to individuals who wish to itemize their deductions or claim tax credits. Therefore, it is not the best form for foreign artists to use if they perform as independent contractors in the U.S. and wish to deduct their ordinary and necessary business expenses from their taxable income.

## IX. Conclusion

The information on this website provides an overall summary of the taxation and withholding requirements and procedures for foreign artists, and is not intended to encompass every rule and procedure that may become applicable to a particular situation! Tax and withholding consequences will likely differ depending on the particular facts and circumstances applicable to a particular artist. Arts organizations and artists are encouraged to seek the advice of a U.S. attorney to ensure compliance with all withholding requirements and procedures. Good luck!

## X. Frequently Asked Questions

*The appropriate tax treatment for any particular artist is extremely fact-specific, depending on the artist's country of residence, the amount of money earned by the artist in the U.S., and the artist's status as an "individual" or "business" for tax purposes. The information included in this FAQ is not legal advice. For advice on specific situations, contact a qualified tax attorney.*

### Compensation Subject to Withholding

**Each year we conduct a competition for artists with a monetary prize. This year one of our prize winners is a nonresident alien. This is a prize, not compensation for services performed. Do we still withhold the 30%?**

Yes – awards are considered income, and are subject to [30% withholding](#).

**What is the withholding requirement if a payment is made to a foreign corporation? What about an individual who is incorporated in their home country?**

For tax purposes, the IRS looks at the “[beneficial owner](#)” of the income. If a nonresident alien "participates in the profits" of the corporation, the alien is considered an individual for taxation and withholding.

**The IRS seems to have given conflicting guidance in the past as to whether payments to third parties and expense reimbursements made under the “accountable plan” rules are subject to withholding. Can you explain?**

The IRS previously advised that expense reimbursements and third-party payments were subject to withholding because they were concerned that, by not withholding, payers were not reporting compensation that may be subject to taxation under many tax treaties. The IRS view was that if payers did not withhold, the IRS would be relying only on the artist to accurately report total compensation on a tax return, without confirmation on the Form 1042-S from the payer regarding expense compensation. The IRS has since confirmed that payers are not required to withhold on expense compensation if they meet the [accountable plan rules](#).

**If an artist does not provide full documentation for an expense reimbursement, are we required to withhold?**

Yes. If expense reimbursements do not meet the accountable plan rules, the reimbursements are considered income subject to withholding. **We provide answers to the questions below for cases in which a U.S. organization must withhold on expense reimbursements that do not meet the accountable plan rules.**

*· We have an agreement with an airline by which our organization only pays 25% of the full fare price of the ticket. We also get preferential rates at hotels. How do we calculate the value of the ticket and hotel stay? Is it sufficient to check an online travel site, such as Expedia?*

Expedia, Travelocity, and other similar sites are a great source for checking the fair market value of hotel and airline tickets.

*· We often have volunteers pick artists up at the airport, and we frequently make beverages and snacks available in the green room. What is considered compensation subject to withholding, versus incidental benefits?*

Anything that you are contractually obligated to provide to an artist is compensation subject to withholding. (Note, this does not mean, however, that big-ticket items that are not enumerated in the contract are exempt from withholding. You must still withhold on airfare, hotel, and other items.) On the other hand, if what you are providing is more in the nature of hospitality (e.g., beverages and snacks), it is not compensation and is not subject to withholding.

*· Artists need to be paid promptly upon completion of a performance. It can be difficult to gather the amount we've paid to third parties (such as hotels) until some time after the performance. Can we pay the artist's fee immediately, and then issue a separate, later check to reimburse expenses?*

Certainly.

*· If there are no reimbursable expenses, and all other compensation subject to withholding was made through third parties, should we estimate the value (of the hotel, for instance) and withhold that from the artist's fee?*

Yes.

*· If we estimate the expenses and withhold, how do we reconcile that after the actual numbers come in?*

If you are off only by a bit, it's probably not worth the trouble. If you have over- or underestimated an artist's withholding, this will be reconciled when the artist files his/her tax return and reports actual expenses.

· *If the 30% withholding from the fee and expenses exceeds the total amount of the fee, how do I withhold?*

Obviously, you cannot withhold more than you are actually paying to the artist. If the withholding exceeds the amount paid, you are liable only for withholding the amount to be paid.

### **Exemptions from Withholding**

Artists often submit a **Form 8233** to our organization to claim exemptions from withholding. I now understand that, since I can't verify the total amount the artist may earn in the course of a year, the Form 8233 will **not sufficiently exempt the artist** from withholding. Is there any circumstance in which I can accept the Form 8233 as proof of exemption from withholding?

There are only a few. Several countries are exempt from tax on all compensation paid for **independent personal services** (including the services of a performing artist). At present, these countries include Armenia, Azerbaijan, Belarus, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Moldova, Poland, Russia, Tajikistan, Turkmenistan, and Uzbekistan. If an artist resides in one of these countries, and meets the other requirements of the pertinent tax treaty to qualify for the exemption, then a presenter may accept a properly completed Form 8233 from an artist to exempt that artist from withholding.

### **Compensation Earned by a Foreign Tax-Exempt Organization**

**Can a foreign nonprofit organization have their nonprofit status recognized in the U.S. with the help of a foreign lawyer? Or can only a U.S.-based lawyer certify the organization?**

Only an attorney licensed to practice law in the United States may certify as to a foreign tax-exempt organization's tax status.

### **Central Withholding Agreement (CWA)**

**Does the IRS require artists to enter into CWAs? Is there any repercussion for not doing so, as long as the artist files a complete U.S. tax return?**

No – there is certainly no requirement that an artist obtain a CWA. The CWA program exists only as an option for individual artists to reduce their withholding rate.

### **Taxpayer Identification Numbers – Individuals**

**Must an individual apply for a Social Security Number (SSN) while in the U.S.? Is there no way to apply from abroad?**

While an individual used to be able to apply for and obtain an SSN abroad, this is no longer the case. An individual must apply in person in the U.S.

**Must an artist remain in the city in which they apply for an SSN, or may they travel in the U.S. while it is pending?**

An artist may travel through the U.S. after applying for an SSN.

**If an artist can't remain in the U.S. long enough to qualify for an SSN, what should they do to obtain a U.S. Individual Tax Identification Number (ITIN) from the IRS?**

Even if an artist does not have work authorization for a long enough period to qualify for an SSN, the artist should nonetheless make a formal application, and obtain a rejection letter. The IRS will not issue an ITIN to a performing artist without the letter of rejection from the Social Security Administration (SSA).

**What can be done if the SSA never responds to an application for an SSN? How can an artist file for an ITIN, if the SSA does not issue a formal letter of rejection?**

If the SSA fails to respond, follow up with them until they do issue a rejection letter. The IRS will not issue an ITIN without the letter of rejection from the SSA.

**If an artist does not have an SSN or ITIN, are we allowed to pay them?**

Yes. When reporting the income at the end of the year on forms [1042](#) and [1042-S](#), where it requests the individual's ID number, write “requested, not provided.”

**What form should a nonresident alien submit as proof of a U.S. tax identification number?**

If there is no applicable tax treaty [the IRS suggests using the [8233](#) (for individuals) and the [W-8BEN](#) (for businesses)] to obtain an artist's tax ID number. In this case, neither of these forms would actually be submitted to the IRS, since tax treaty benefits do not apply. However, if a U.S. arts organization presents one of these forms to an artist, the artist might expect that they will be exempt from taxes. Consider creating your own form for the artist to complete.

**Tax Returns**

**Does every individual have to file a U.S. tax return, regardless of whether they are an independent contractor for a U.S.-based organization, or an employee of a foreign organization?**

Generally, yes. There *is* an exemption for [artists who are performing as employees](#), if they make less than the amount of their personal exemption in a given year. The personal exemption amount for the 2007 tax year is \$3,400, but this amount is subject to change by the IRS every year. One can determine the current personal exemption amount by going to [www.irs.gov](http://www.irs.gov) and searching “personal exemption.”

**Our artists have found it difficult to obtain a [U.S. tax ID](#), although tax is invariably withheld from their pay. Since these artists are likely overpaying U.S. taxes, are there any**

**other risks being run by our artists in not submitting or being unable to submit a U.S. tax return through lack of a tax ID number?**

Artists who perform in the U.S. are required to file U.S. tax returns. However, the penalty for failure to file a return is based on the amount of tax owed. Therefore, if the amount withheld exceeds the amount of tax that would be owed, there is no actual risk in failing to file a tax return. Note, however, that if the artist intends to enter into a [Central Withholding Agreement](#) (CWA) at some point in the future, the failure to file a U.S. tax return will prevent him/her from qualifying for a CWA.

Another consideration is whether the amounts withheld are being correctly applied to the artist's tax debt. If the artist has no tax identification number, there is a greater chance that the withheld taxes will not be appropriately credited toward the artist's debt. The moral here is that, even if taxes are withheld at the source, it still behooves the artist to obtain a tax identification number!

**Will individuals that begin filing U.S. tax returns, but have not previously filed as required, be penalized because they are now showing up on the IRS "radar screen?"**

No. Just because an artist begins filing U.S. tax returns does not necessarily mean that he or she has been delinquent in filing in the past, or that the IRS will necessarily apply penalties. (It could mean simply that the artist has not previously earned any income in the U.S.) What is more likely to trigger the IRS's interest is if a presenter reports an amount paid to a nonresident artist, and that nonresident artist fails to file a tax return.

**If the foreign individual does not file a U.S. tax return, and an organization makes a payment through a [U.S. management agency](#), who would the IRS require to pay the penalty – the organization, or the agency? Is the original payer liable?**

If no one withholds and the artist does not file a U.S. return, [everyone is liable](#) – the organization, the agency, and the individual artist.

**I bring in artist groups from a European country with which there is a tax treaty and have helped them acquire a Federal Tax ID number. As the [W-8BEN](#) form has been filled in, signed by the artist group and shared with the presenting venue, no income tax has been withheld before monies have been paid to foreign based artist groups. Should each individual artist and member of these groups still file an individual U.S. tax return for their share of personal income they have each received from these monies, even though they may have filed an individual return on their side with the country in which they are legally based?**

If a group is exempt from tax and withholding pursuant to a tax treaty, the U.S. presenter's liability ends with obtaining a valid W-8BEN from the group. The group, however, is still required to withhold taxes on its payments to its performers. If individual artists are [employees who earn less than the "personal exemption" amount](#) in a tax year, the artists are not required to file U.S. tax returns. If, however, the performers are employees earning more than the personal

exemption amount, or if they are independent contractors (regardless of the amount earned), then each individual performer is required to file a U.S. tax return.

**For artists with limited English, completing a U.S. tax return can be very difficult. Where can they turn for help?**

The IRS has a Taxpayer Advocate Service that strives to assist those who need help in preparing tax returns and related documents. By completing IRS [Form 911](#), Request for Taxpayer Advocate Service Assistance, an individual may request assistance with any tax matter, and may request that the IRS contact him or her through an interpreter.

Also, the IRS offers publications that include glossaries of words and phrases used frequently in tax documents. The [glossaries](#) are currently available for the following languages: Spanish, Russian, Chinese, Korean and Vietnamese.

**ARTISTS FROM ABROAD**  
***Complete Guide to Immigration & Tax Requirements for Foreign Guest Artists***

**Appendix Index for Taxation & Withholding Requirements**

- [Form W-8 BEN](#) and separate [Instructions](#)
- [Form W-8 EXP](#) and separate [Instructions](#)
- [Form W-8 IMY](#) and separate [Instructions](#)
- [Form SS-5 and Instructions](#)
- [Form W-7 and Instructions](#)
- [Form SS-4](#) and separate [Instructions](#)
- [Form 8233](#) and separate [Instructions](#)
- [Form 1042 and Instructions](#)
- [Form 1042-S](#) and separate [Instructions](#)
- [Form 1040NR](#) and separate [Instructions](#)
- [Form 1040NR-EZ](#) and separate [Instructions](#)
- [IRS Publication 515 "Withholding of Tax on Nonresident Aliens and Foreign Entities"](#)
- [IRS Publication 519 "U.S. Tax Guide for Aliens"](#)
- [IRS Publication 901 "U.S. Tax Treaties"](#)
- [IRS Publication 1915 "Understanding Your IRS—Individual Taxpayer Identification Number ITIN"](#)
- [SSA Publication No. 05-10107 "Foreign Workers and Social Security Numbers"](#)
- [SSA Publication No. 05-10096 "Social Security Numbers for Noncitizens"](#)

## **Taxation and Withholding Requirements for Foreign Guest Artists**

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