



# Visa Options for Artists and Professional Workers: A Presentation for Rhode Island School of Design

Presented by:

Attorney Eileen Morrison  
Law Office of Eileen Morrison  
288 Walnut St, Suite 500  
Newton, MA 02460  
617-219-9687  
[emorrison@morrisonlaw.us](mailto:emorrison@morrisonlaw.us)

# F-1 Students

## Optional Practical Training

- Pre- and post-completion and CPT
- Up to 12 months per progressively higher degree **but** 24 months more possible for S.T.E.M. graduates

## **Lots to Love About OPT:**

- It is very **flexible**
- **You can quit** a job you don't like, be self-employed or hold multiple jobs
- OPT students **don't pay Social Security or Medicare tax**
- May not accrue more than 90 days of unemployment on OPT

# J-1 Exchange Visitors

- Academic training available for 18 months after completing a degree
- J-2 spouses may continue to apply to USCIS for employment authorization for the duration of the J-1 principal's status

# Once I Finish Academic Training/OPT, What Visa Do I Need?

Most commonly, RISD graduates seek either:

- 1. **H-1B visa** for professional occupations requiring a degree to do the job OR
- 2. **O-1 visa** for occupations in the arts, or film and television (also available in the sciences, business, education and athletics)

# The H-1B Visa

- Employee must have a bachelor's degree (or equivalent) in the field that the job requires; and that the job requires the employee have at least a bachelor's degree in a specific field (or equivalent).
- Requires US employer to sponsor employee for full- or part-time work.
- Must have an employer/employee relationship and taxes must be withheld. **No** self-employment, freelance or contract work. Must have **separate H-1B for each employer.**
- 65,000 new visas available annually in this category for *bachelor's degree* (or equivalent).
- 20,000 more H-1B visas available to those with *advanced degrees* from *U.S. educational institutions.*

# The H-1B Visa

- Cap-exempt H-1Bs (such as universities and certain research institutions).
- Full or part-time employment in H-1B is allowed. If the work is part-time, be prepared to explain how you are going to support yourself without resorting to unlawful employment.  
(Examples: spouse's earnings, savings, funds from abroad)

# **H-1B Cap-Subject Pre-registration**

- **Starting in 2020, pre-registration and pre-selection is required to apply for H-1B. FY 2022 pre-registration takes place between 3/9/2021-3/25/2021. \$10 fee.**
- **Notification of selection is 3/31/2021 for cases to be filed starting 04/01/2021 to commence 10/1/2021.**

# The LCA

- Before filing the H-1B petition, the employer must obtain a certified Labor Condition Application (LCA) from the DOL. The employer must certify that the employer is:
  - Paying the prevailing wage or higher;
  - The wages and working conditions of others at the place of employment will not be negatively impacted by employing the H-1B worker;

# The Labor Condition Application

- Proper notice has been given at the place of employment or to the labor union if applicable;
- The employee has been provided with a copy of the certified, signed LCA;
- Strict punishment for employers willfully failing to meet a condition or for misrepresenting a material fact in the Labor Condition application.

# Who Qualifies as a U.S. Employer?

An employer is a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship and may hire, pay, fire, supervise, and control the employee's work;
- (3) Has an Internal Revenue Service Tax Identification Number.

# Will I Qualify for H-1B Status?

The Beneficiary must at time of filing:

- (1) Have at least a US (or a foreign equivalent) bachelor's or higher degree from an accredited college or university or have completed all degree requirements;
- (2) Hold any necessary state license, registration or certification;
- (3) If no degree, must meet the 3:1 rule, having 3 years of progressively responsible work experience for each year of college/university study lacking.

# Other H-1B Facts

- Return transportation costs: The employer is liable for the reasonable costs of return transportation of the employee to the last foreign residence abroad if the H-1B employee is terminated before the end of the period of authorized admission – even for cause. Does not apply if the employee quits.
- Employee's spouse and unmarried children under 21: Dependent family members are granted H-4 status for as long as the H-1B employee is authorized to work here. They do not have their own employment authorization. They may, however, attend school or remain at home.
- Maximum stay in H-1B status: Six total years. Extension beyond six years possible if labor certification pending for at least one year. H-1B status granted in increments up to 3 years.

# Legal/Filing Fees

- The employer must pay the H-1B legal fees and filing fees.
- Employees may pay for premium processing, since it is not a required filing fee. Premium processing provides a response from USCIS in 15 days. PP not always available. PP fee went up to \$2,500 on top of the base filing fees.

# Must I Use an Attorney?

- **No**, but it is really hard to figure out how to prepare a case correctly.

# Supporting Evidence for an H-1B Petition

The employer must submit with an H-1B petition:

- The certified LCA;
- A statement that it will comply with the terms of the labor condition application for the duration of the beneficiary's authorized period of stay;

# Supporting Evidence for an H-1B Petition

- Copy of the Beneficiary's transcript and diploma or confirmation by the school of completion of all degree requirements;
- Copy of the Beneficiary's license to practice the profession (if applicable);
- Proof that the Beneficiary is in status (I-20, EAD, I-94, etc.);

# O-1B Artists of Extraordinary Ability

- A US employer or agent may file a petition for an employee with extraordinary ability in the sciences, arts, education, business, athletics, or extraordinary achievement for someone in motion picture or television industry.
- Need not be a job; can be independent contractor or a collection of projects.
- Guideline: No more than 45 days between activities.
- May file up to one year in advance of need.

# Eligibility for O-1

- The O-1 petition covers the event for which the O-1 beneficiary's services are needed: This means an activity such as, but not limited to, a project, conference, convention, lecture series, tour, exhibit, academic year, or engagement.
- May include short vacations, promotional appearances, and stopovers, incidental or related to the event. A group of related activities may also be considered to be an event.
- Granted in periods of up to 3 years.

# Eligibility for O-1

- The O-1 petition covers the event for which the O-1 employee's services are needed: This means an activity such as, but not limited to, a scientific project, conference, convention, lecture series, tour, exhibit, business project, academic year, or engagement.
- May include short vacations, promotional appearances, and stopovers, incidental or related to the event. A group of related activities may also be considered to be an event.
- Granted in periods of **up to 3 years**- petitioner's contract/agreement controls.

# Extraordinary ability, defined

- Extraordinary ability in the field of arts means **distinction**.

**Distinction** = a high level of achievement in the field of arts evidenced by a degree of skill and recognition “substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.”

# Extraordinary ability, defined

- What does extraordinary ability in the field of science, education, business, or athletics mean? This standard is defined as a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.
- Whenever you can, you want to make the field “arts”.

# Extraordinary Ability, Defined

- What does extraordinary achievement in the field of motion picture and television productions mean?  
This standard means a very high level of accomplishment in the motion picture or television industry evidenced by a degree of skill and recognition **significantly above that ordinarily encountered** to the extent that the person is recognized as outstanding, notable, or leading in the motion picture or television field.

# What Fields in the Arts are Covered?

- Any creative field including fine arts, visual arts, culinary arts, and performing arts. Principal creatives & 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, flight masters, stage technicians, and animal trainers.

# Evidentiary Standard For O-1B

- To qualify as an beneficiary of extraordinary ability in the field of arts, the beneficiary must be recognized as being prominent in his or her field as demonstrated by:
- (A) Evidence that the beneficiary has been **nominated for, or won**, significant national or international awards or prizes in the particular field (Academy Award, Emmy, Grammy, etc.); or

# At Least 3 of the Following:

- (1) Evidence that the beneficiary has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation (critical reviews, advertisements, publicity releases, publications contracts, or endorsements);
- (2) Evidence that the beneficiary achieved national or international recognition for achievements shown by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;
- (3) Evidence that the beneficiary has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation shown by articles in newspapers, trade journals, publications, or testimonials;

# At Least 3 of the Following:

- (4) Evidence that the beneficiary has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;
- (5) Evidence that the beneficiary has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the beneficiary is engaged; or
- (6) Evidence that the beneficiary has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field (contracts or other reliable evidence); or

# At Least 3 of the Following , continued:

- Other comparable evidence of the beneficiary's eligibility – this presents great opportunities for creativity to show what makes your work so great.

# Evidentiary Criteria for O-1 Visa in the Arts

- Define the field as narrowly as possible.
- Think big fish, small pond.

➤ Example:

Graphic Designer vs. Video Game Graphic Designer

# Consulting Organization/Union Opinion

- O-1s require a labor union (if there is one in the occupation) or a consulting organization opinion. Costs typically \$250-\$350. Film requires a management organization consult on top of that.
- File with the O-1 whenever possible.

# Evidentiary Criteria for Extraordinary Ability in Motion Pictures/Television

- (A) Evidence that the beneficiary has been nominated for, or has been the recipient of, major national or international awards (i.e., an Academy Award, an Emmy, a Grammy); or

(B) At least three of the following:

- (1) Evidence that the beneficiary has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation (critical reviews, advertisements, publicity releases, publications contracts, or endorsements);

- (2) Evidence that the beneficiary has achieved national or international recognition for achievements (critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications);

- (3) Evidence that the beneficiary has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation (articles in newspapers, trade journals, publications, or testimonials);

-

# Evidentiary Criteria for O-1 in Motion Pictures/Television

- (4) Evidence that the beneficiary has a record of major commercial or critically acclaimed successes (title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications).
- (5) Evidence that the beneficiary has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the beneficiary is engaged.
- (6) Evidence that the beneficiary has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence.

# Evidentiary Criteria for O-1 in Motion Pictures/Television

- No opportunity to submit other comparable evidence in this category.
- Must submit consultation opinions from 2 consulting organizations (i.e., IATSE and AMPTP for a film editing job).

# Items of Interest

- How long is the O-1 petition valid? Up to 3 years, with extensions granted in one year increments for same employer for same activity. No upper limit on O-1 stay.
- Can a spouse and unmarried children under 21 come with the O-1 employee? Yes. The spouse and children may remain in the US as long as the O-1 employee is authorized to work here. They do not have their own employment authorization. They may attend school or remain at home.

# Comparison of O-1B and H-1B

## **O-1B for the Arts**

- Granted for up to 3 years initially
- No upper limit on stay
- No degree required
- No PW
- Employer or employee may pay lawyer and filing fees
- No limit on visa #s
- Need consulting org opinion

## **H-1B Professional Work Visa**

- Granted for up to 3 years initially
- Max. stay of 6 years (some extensions possible if LPR process started timely.
- Degree related to job required
- Employer must pay lawyer and filing fees
- Limited to 65,000 + 20,000 for US masters degree grads

# Comparison of O-1B and H-1B

## **O-1B Visa in the Arts**

- Can include additional engagements with other employers without amending, if gigs require an artist of extraordinary ability
- Can have an ownership interest in the company, but must disclose it.

## **H-1B Professional Work Visa**

- No self-employment
- One H-1B for each company seeking to hire the Beneficiary

# Additional Visa Possibilities

- There are some other professional work visas specific to the beneficiary's nationality.
  - TN-1 for Canadians and Mexicans – restricted to TN occupations (includes college teacher, architect, industrial designer, interior designer, graphic designer). Specific minimum requirements are specified in the Free Trade agreement.

# TN-1

- No self-employment allowed
- No upper limit on stay-may be a practical limit
- Approvable for up to 3 years at a time
- Spouses and children are admitted in TD status and are not permitted to work
- Immigrant intent not allowed

# Other Visa Possibilities:

- E-3 for Australians (like an H-1B but valid for 2 years at a time)
- H-1Bs for nationals of Singapore or Chile (special quotas)
- E-2 visas for investors from specific countries –
  - Investment varies depending on the business
  - Investor must be coming to develop and direct an active investment
  - Could be the employee of an E-2 company with same nationality as the E-2 company

# What's Next?

How long does the beneficiary want to stay in the U.S?

- a. A few years – stay on the NIV
- b. Permanently – need permanent residence

# Permanent Residence

Permanent residence, aka green card status:

The unlimited right to live and work in the U.S.

# Paths to Permanent Residence

- 1. Family-based
- 2. Employment-based

# Family-Based Categories:

- Marrying a U.S. citizen allows one to apply immediately for permanent residence. Unlimited numbers of visas are available annually. Cases are interviewed in the local district office.
- Marrying a U.S. permanent resident allows one to apply for classification as a spouse of a U.S. permanent resident, but not for an actual green card until the priority date is current. Limited number available annually. As of March 2021 , they are processing cases filed on or before February 1, 2021.

# Other Family-Based Categories:

- Unmarried sons and daughters of U.S. citizens (F-1)
- Married sons and daughters of U.S. citizens (F-3)
- Brothers or sisters of adult U.S. citizens (F-4)

These categories have long waiting lines-up to 22+ years.  
The longer queues for high-immigration countries (India, Mexico, the Philippines, China).

# Employment-Based First Preference:

- Evidence: EB-1 evidence is similar but not identical to the O-1B category.
- Allows for self-sponsorship without an actual job offer. Must show there are people or organizations who would hire you in the future.

# EB-1

- **Extraordinary ability:** a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field.
- The beneficiary must have sustained national or international acclaim and show that his or her achievements have been recognized in the field.

# EB-1 Evidence

## Evidence:

- Either a major internationally recognized award (Nobel Prize, Emmy, Grammy, etc.)

OR at least 3 of the following:

1. Proof of the beneficiary's receipt of lesser nationally/internationally recognized prizes/awards for excellence in the field;

# EB-1 criteria, continued

2. Documentation of the beneficiary's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields (ex: AAAS);
3. Published material about the beneficiary in professional or major trade publications or other major media, relating to the beneficiary's work in the field for which classification is sought (including the title, date and author of the material, and translation);
4. Evidence of the beneficiary's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;

# EB-1 criteria, continued.

5. Evidence of the beneficiary's original scientific, scholarly, artistic, athletic or business-related contributions of major significance in the field;

6. Evidence of the beneficiary's authorship of scholarly articles in the field, in professional or major trade publications or other major media;

7. Evidence of the display of the beneficiary's work in the field at artistic exhibitions or showcases (visual arts);

# EB-1 criteria, continued.

8. Evidence that the beneficiary has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

9. Evidence that the beneficiary has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

10. Evidence of commercial successes in the performing arts, as shown by box office receipts or records, cassette, CD, or video sales;

# EB-1 criteria, continued

- Other comparable evidence if the above standards do not apply.
- Successful applications provide **context** for the beneficiary's achievements. Assume USCIS has no subject matter expertise.

# Matter of Kazarian

- The case called Matter of Kazarian imposes additional requirements on top of meeting the 3 criteria. It adds a “final merits determination” considering the petition as a whole.

# Remember...

- The beneficiary must be maintaining a valid nonimmigrant status until the adjustment of status application is filed.

# Reasons to love this category

- Must show evidence in only 3 categories
- Opportunity to define the field narrowly
- May self-sponsor or have an employer

# More Reasons to Love This Category

- You may reuse much of the O-1 petition documents
- Shorter visa backlog in this category
- Employment and travel authorization approximately 7 months after applying for permanent residence. Expect not to travel internationally during the >7 months until authorization issued.

# PERM Labor Certification

- Most people must go through competitive recruitment and show that there are no US workers able and willing to do the job offered to the beneficiary.

# PERM Labor Certification Process

If you have an H-1B, this is generally the way you must proceed.

- Must have a specific job offer at a specific worksite
- Job duties, minimum requirements and salary must be specified
- All recruitment must be done pre-filing
- Filing is electronic and no supporting materials must be submitted with the Form ETA-9089
- High employer audit rate

# Required Recruitment

- All jobs require 2 print ads and posting with the state unemployment office
- 3 additional forms of recruitment required for professional jobs.
  1. Employer's website
  2. Job fairs
  3. Other recruitment website

# Required Recruitment

- 4. On-campus recruiting
- 5. Trade or professional organizations
- 6. Headhunters
- 7. Employee referral program
- 8. TV or radio ads
- 9. Local and ethnic newspapers
- 10. Campus placement office (for jobs requiring no experience)

# Required Recruitment

- 11. If the job requires a masters degree or higher, may use one professional journal ad in lieu of a Sunday newspaper ad

# Other Things about PERM

- If your priority date is current when the PERM labor certification is approved, you may file both the I-140 preference petition and the adjustment
- If your priority date is not current, you may file the preference petition as soon as the labor certification is approved and wait for the priority date to be current before filing the adjustment of status or proceeding with visa processing abroad

# Other Things to Know

- If the I-140 and the adjustment of status application may be filed concurrently, then the travel and work authorization may be filed simultaneously.
- Must maintain a valid nonimmigrant status until the adjustment is filed for applicants in the US.

# What about Spouse and Children?

- A beneficiary's spouse and children are entitled to apply as dependents with the beneficiary, or follow to join later.

# Schedule A Group II, Exceptional Ability

- Who may apply: Among others, artists, entertainers and athletes with a **full-time offer** of employment in their field of expertise.
- Must have “exceptional ability”- widespread acclaim and international recognition in the field.
- Must show that prior 12 months’ work experience required someone with exceptional ability and will continue to require exceptional ability.

# Schedule A, Group II

- Permanent job offer requiring exceptional ability;
- Prevailing wage determination;
- Form ETA 9089, Alien Labor Certification Form, in duplicate (do not submit it to PERM);
- Posting notices posted for 10 days between 30 and 180 days prior to filing; and
- Evidence of Schedule A Group 2 documentation in 2 categories.

# Schedule A Group 2 criteria – pick 2

- Internationally recognized prize or award;
- Membership in an international association requiring outstanding achievement of its members;
- Participation in a panel or individually judging others in the same or similar field;
- Original scholarly research of major significance;

# Schedule A Group 2 criteria – pick 2

- Displays at artistic exhibitions in more than one country.

# National Interest Waivers

- USCIS may waive the requirement of permanent job offer in cases involving the national interest.
- Quite difficult to get national interest waiver. More common in science and engineering.

# New Things

- **Public Charge-** New rules re: cash assistance for income maintenance (SSI, TANF, General Assistance, long-term care). We expect this will be lifted. Has decreased the rate of immigration because of fear.
- **International Travel:** Although the Muslim ban is lifted, there is a general ban on Schengen area travel to the US without a National Interest Exception Waiver, and most consulates remain closed except for emergencies. Avoid travel.

# Working with Lawyers

Lawyers are licensed state-by-state and in the District of Columbia.

Immigration lawyers in the US practice in a federal area of law and may practice across state lines.

# Working with Lawyers

## Suggestions:

- Make sure the lawyer has done this type of work before.
- Make sure the lawyer is a member of AILA ([www.aila.org](http://www.aila.org)).
- Lawyer should use written fee agreement outlining the scope of the work to be done (flat v. hourly fee)
- Make sure you get copies of all filings for your records.
- Disclose all the facts to your attorney. If you don't, there may be negative consequences you do not realize.

# In Conclusion...

- It may sound daunting, but there are actually some great opportunities for artists and professionals in the visa system.
- Plan early! Knowing what your path is likely to be will help you craft your approach to future visas.