

Notes from USCIS Stakeholder Engagement

O Nonimmigrant Visa: Agents as Employers

March 24, 2011

USCIS posts on its [website](#) notes or “executive summaries” from engagement calls and meetings, so be sure to check those as well as these notes.

These notes were taken by NAFSA members and have not been reviewed by the government officials who provided this information. They are best used as general information concerning current agency processes and policies, and it is important to recognize that agency processes and policies are subject to change. NAFSA notes and liaison summaries do not constitute legal advice.

The agenda and links provided for the call are:

- [O-1 Visa: Individuals with Extraordinary Ability or Achievement](#)
- [Nonimmigrant Classifications Question and Answers](#)
- <http://www.aila.org/content/default.aspx?docid=34765>

The overall message of this call was that USCIS is trying to create consistency across the service centers and that petitioners need to follow the O-1 Visa regulations and Q&A. Service centers are tending to RFE more cases according to callers. The speakers noted that the best way to avoid an RFE is to be specific in the itinerary (as specific as possible) and contract agreements for employment if these apply. Also if there are any material changes (not 100% clear as to the definition but see below) the Agent /Petitioner must file an amended or new I-129. There was some confusion and they did not provide a clear answer as to what is considered a material change other than to say if there is new employment with a new petitioner one must file a new I-129. They noted that clarification would be provided in the executive summary. See below for detailed notes.

I. Overview: (Paula Rodriguez Hale) Agents filing as petitioners

- a. Service Center updates (Claudia Young) – see Q&A link basically read word for word
- b. Evidentiary requirements etc. - May and June of 2010 conducted a cross Service center review – Agents filing as petitioners (July 2010) revised webpage for regulatory requirements and contracts
- c. Late summer - RFE’s provided to allow petitioners to meet requirements (NOID’s) request docs that actual employment exists and not speculative INA 214(c) must be an importing employer O not intended for prospective employment
 - i. Preponderance of the evidence standard
 - ii. Talked about a case sent to AAO but wouldn’t elaborate on case as it is a live case – overturned Decision and approved but not binding precedent (March 15 reopened case)

II. Regulatory requirements

- a. Agents can file for self employed workers to arrange short term employment – 8 CFR 214.2
- b. Evidence required - 8 CFR 214.2 (o)(2)(4)(8) requirements

- i. Submit written K or summary of terms of oral agreement for employment (terms of employment) – does not have to be signed by both parties but need offer and acceptance
- ii. must document the terms of the employment offered and that the beneficiary has agreed to the offer. Such evidence may include but is not limited to:
 - E-mails between the contractual parties
 - A written summation of the terms of the agreement
 - Any other evidence which demonstrates that an oral agreement was created
- iii. 8 CFR 214.2 (o)(2)(2) – submit job activities, beginning and end date, must establish there are events in bene’s field of extraordinary activity for the period. If itinerary required – CIS provides flexibility in determining whether itinerary requirements satisfied.
- iv. Permits additional engagements if meet standards for O-1 without filing new petition – must be related to event (new employer would warrant new petition)
- v. Must include CONTRACT agreement between Agent and Bene (if no written CONTRACT – summary) must specify the wages offered and clearly lay out how bene will be paid (no PW requirement). Must provide a detailed description of wage offered and that it was agreed upon.
 - 1. Should establish the working relationship between Agent and Bene – if Agent controls work may establish that they are the employer. Must substantiate claim that you are Agent and not employer with a detailed CONTRACT.
 - 2. CONTRACT not required with other entities if Agent established that they are employer
- vi. Itinerary – must have dates and locations of work (required)
 - 1. Ensures Bene is coming to US for actual employment
 - 2. CIS determines whether Itinerary requirement met = minimum documentary requirements (*nature of events or activities, beginning and end date, type of work, when and where work will take place).
 - 3. Ex. Document indicating Model will be modeling for A designer March – September.
- c. Agent filing for multiple employers
 - i. U.S. Agent may be the actual employer and may file a petition on behalf of the beneficiary as his or her agent and on behalf of other employers of the beneficiary. In this scenario, the agent is required to provide:
 - 1. The contract between the petitioner (agent) and the beneficiary
 - 2. A complete itinerary which lists specific dates of each service or engagement
 - 3. The names and addresses of the establishments, venues, or locations where the services will be performed
 - 4. Contracts between the beneficiary and the employer(s) for the duration of the visa
 - ii. O worker cannot self petition
 - iii. CONTRACT must also demonstrate what offered by employer and accepted by Bene (written CONTRACT best)
 - 1. Emails and other evidence for Oral agreement okay
 - iv. Petitioner Employer (Agent)

1. May file petition as agent and for other employers if they establish they are authorized as an agent to other employers – otherwise may only be approved for the Agent’s employment of beneficiary only.
 2. Memo - In business as an Agent – must establish this in this scenario
 - a. Doesn’t need to show that they are an Agent outside the context of this petition (just for this purpose of filing petition is okay)
 3. If working concurrently – each employer must file a separate petition
 4. Only if the Agent files a petition on behalf of beneficiary and a representative of other Employers (regulation specific) – must show a CONTRACT between Employer and beneficiary and Agent
 5. Petition must be accompanied by a COMPLETE itinerary, names of venues, employers, dates of employment for each event.
- d. Agents for foreign Employers 8 CFR 214.2 (o)(2)(1)
- i. Employer must use the Services of US Agent to file the petition
 - ii. Must submit minimum O1 evidence (CONTRACT’s, summary of terms of oral agreement, employment data and itinerary and written advisory opinion from appropriate consulting entity)
- e. If there has been any **material change** in the terms and conditions of the beneficiary’s employment or the beneficiary’s eligibility, the petitioner must file an amended petition on Form I-129 with the Service Center where the original petition was filed.

III. Questions included many complaints about inconsistencies and RFE’s that make no sense. Please see below for summary:

- a. Disney - adding performances and engagements without amending the petition. If agency has Sean Connery rather than having 5 different motion picture studios file the agent was then allowed to add the 6th without filing another petition- is this still the case?
 - i. Can add performances without amendment if with the same Petitioner – yes
 - ii. As long as person is still represented by Agency (Agent) can they then add other employment events with a different employer without filing an amended petition? (Answer -need to research this question)
 1. If you are adding NEW Employment and not additional events this is considered a material change and a new petition should be filed – but they will research this further.
 2. *Will provide Clarification in the executive summary*
 - iii. If engagements are under auspices of petitioner this should be fine (Not clear). If switch agents this would be a different situation than had the original petitioner handled the engagement.8 cfr 214.2(o)(2)(4)(o)d
- b. VSC case denial and reversal of AAO – what was the issue?
 1. Stakeholder inquiry related to case it is a live case so didn’t answer.
- c. RFE’s – Example of inappropriate RFE - where gallery is sponsoring an artist as an agent but the artist not an employee of the gallery – arrangement is gallery sells the work and takes a commission. How do you address this issue in the itinerary scenario?
 1. Provide a letter from the art gallery
 2. Scottsrfe@dhs.gov – (didn’t hear the address correctly – or not sure) provide examples of RFE’s you feel are appropriate (send an email to this address) – they may not respond but will read the information.
- d. Preamble to final regulations – Legacy CIS indicated long ago that we no longer need to show services require an alien of O1 caliber and now it is again required.
 - i. Public.engagement@dhs.gov – **if you have any comments to send to them**
- e. Can a self employed alien be a foreign employer under the regulations? Didn’t comment

- f. Research Center representative – Joint appointments between University and Center, clinical research position. Research and Clinical research each conducted for a different entity (partners). Itinerary dates for clinical rotations – cannot pin down dates. Single project but two different employers technically.
 - i. Be specific but can say will work between June 2011 to December 2012 (approximate dates) – they will review all evidence to include approximate dates to see if able to grant validity period.
 - ii. One portion of the partners can file single petition (this is possible if they can show Petitioner is acting in the business of an agent – submit a signed document from other employers allowing agency).
- g. O1 Beneficiary working has a contract for a TV series is itinerary needed?
 - i. Agent is functioning as employers agent – just one location – depends on the specifics of the case.
 - ii. Give an itinerary with a broader flexible basis (location, approximate dates and contract for work)
- h. Petitioner is agent for foreign employer – if the position is promotional tour and being only paid for room and board is this okay?
 - i. Itinerary may suffice
- i. Self incorporated Petitioners and Beneficiary – RFE’s that apply traditional employment rules.
 - i. O petition be filed by a U.S. employer, a U.S. agent, or a foreign employer through a U.S. agent. The regulations also state that an O-1 alien may not petition for himself or herself. INA requires that an O petition be filed by an importing employer. Documentation of ownership and control of the business may be requested to verify that the petitioning entity is a bona fide employer in the United States, that the petition is not based on speculative employment, and that the terms and conditions of actual employment qualify for O classification.
 - ii. Why are the RFE’s seeking proof for things that do not apply?– said it was outside scope
- j. Agency issue – why don’t we have a bright line answer.
 - 1. Sean Connery example again – MGM, Sony engagements listed in O petition with one agent but then Petitioner/agent adds another project from a third Production company does this require a new petition? (again doing further research and addressing in Executive Summary)
- k. Self employed O1 using an Agent – RFE’s for proof of employment and employment contract seem inappropriate. (No real answer)
 - 1. Argued about the term “employment” and the fact that it does not apply in many O-1 situations. This is a situation where there is an Agent representing a Self Employed Alien working with various galleries.
- l. If 3 year K – Itinerary has to cover all three years
- m. California vs. Vermont adjudication – identical petitions but results drastically different – how can you address this?
 - i. That is the point of this – to establish consistency – taking steps to ensure consistency.
- n. Petitioner Ballet Company and Beneficiary Dancer for Ballet company – the employment contract should suffice in this instance.
 - i. They were not sure why an RFE was issued and could not comment.
- o. Non-profit Arts organization – musicians, DJ’s, singer/songwriters (procedural concern due to inconsistencies in adjudication)
 - i. Officers at the same service center applying the regulations in terms of contractual requirements in different ways (comment on policy concern and on

educating officers – Vermont Service Center is applying regulations more and more narrowly)

- p. Self employment – O designed for self employed artists to obtain work authorization. Traditionally self employed artists find it challenging to provide the level of detail required including the specificity
 - i. OI owns their own company –hires an agent to petition but are paid by their own company when they are hired out to work in another location.
- q. US Agent filing for foreign employer – employment for beneficiary in the US (production company using Bene for event) is work in the US.
 - i. You still have to show that there will be actual employment in the US (freelancing is not aloud via statute or regulations), must still substantiate the work in the US.
- r. If beneficiary finds new dates to perform (i.e. employment at 5 new venues) and still have time left on O visa (within validity period) and Agent is not involved in finding the new dates or engagements – does an amended petition have to be filed?
 - i. Fact specific – would need to review the case.
- s. Nothing in regs say that Agent has to be paid by Employer and then to Beneficiary. Need only establish the terms and conditions clearly.
 - i. No requirement that payment comes from Agent
- t. Can they provide scenarios for the public?
 - i. Goal is consistency and that centers are adjudicating.