

Visas After Graduation – For Artists

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This article developed out of a presentation prepared for graduate students at the Yale Schools of Art, Music, Sacred Music and Drama.

Most foreign students plan to follow a fairly standard progression of steps towards permanent residence upon graduation: a year of Optional Practical Training (OPT), followed by an H-1B nonimmigrant work visa, followed by Labor Certification and permanent residence based on an employer-sponsored Immigrant Worker petition. The reality is that each of these steps can be complicated. For students who plan to work in the arts, whether as performers, musicians, visual artists or technical/creative personnel, the progression of steps is less clear and there may be additional complexities.

This article is a summary of some key points that every international student should know about temporary and permanent visas, with a special emphasis on options for those working in the arts. It is not possible to describe every option in detail, and there are many generalizations presented in the interest of space. However, a clear understanding of the issues (and the right questions to ask!) will help make the process as smooth as possible.

General points about immigration

If you remember nothing else from this article, keep in mind the following general points about immigration processing:

1. Small violations of immigration law can cause major problems.
2. Plan ahead because processing times are getting longer. It is not uncommon for temporary visas to take many months, and permanent residence to take several years.
3. If you need to get a lawyer, get a referral. There are many lawyers who claim to practice immigration law because they think it is easy. Your foreign student office can be a good source of referrals in the area.
4. Keep in mind that the company lawyer represents the company. Your employer's attorney will not always take the time to explore different temporary visa categories, or to suggest permanent residence options. It is advisable to get a second opinion from a lawyer outside the company if you have any questions.
5. Always prepare in advance before traveling abroad. Each time you re-enter the United States, you are technically applying for readmission, and the inspecting officer can question your current visa and review your immigration history. Check with your foreign student advisor or an immigration lawyer to see what documents you may need, and when it may not be advisable to travel (such as while a petition for a new visa is pending.)
6. Remember that the USCIS (US Citizenship and Immigration Services) controls immigration matters in the United States, but the State Department issues visas outside the country. Each U.S. consulate abroad run by the State Department has its own local rules and procedures. It may help to use a local agent, such as a travel agent, visa courier service or attorney, to process a visa abroad. This can save time, especially given that there is almost no appeal from a visa denial at a consulate.

The big picture - Are you an immigrant, or a non-immigrant?

Everyone in the United States who is not a U.S. citizen needs some kind of visa to be here legally.

Visas are divided into two categories: temporary (nonimmigrant) and permanent (immigrant). The goal of anyone seeking permanent residence is to maintain a series of valid temporary visas while in the U.S. until he or she becomes eligible to apply for a permanent visa. Interestingly, some people may qualify for a temporary visa and not permanent residence, while others may be able to get a permanent visa, but are not eligible for any temporary visa.

Temporary visas are lettered from A-V with numerous subcategories, and the list is growing. The F-1 and H-1B are well-known, but many other options may exist for the college graduate. J-1 exchange visas may be available for work with universities or affiliated institutions. The L-1 is a highly desirable visa for those who work abroad for a year and then are transferred back to the United States to a position at an affiliated company. And the E visa is for investors or certain employees of companies (large and small) engaged in international trade. There are also visas for diplomats, representatives of NGOs, journalists, religious workers, fiances, government informants, athletes, and aliens of "extraordinary ability" in any field. Each visa has its own time limitations, processing times, rules on temporary intent and maintaining a foreign residence, restrictions on work authorization, and provisions for dependents.

Optional Practical Training (OPT)

Most F-1 students are eligible for 12 months of employment authorization after successful completion of their degree program to allow them to apply their newly acquired knowledge in the workforce. This period of time is known as F-1 Optional Practical Training or OPT. To be eligible for OPT, an F student must have been taking a full-course of study for at least one full academic year in the United States. For OPT, your sponsoring institution will provide an I-20 for the OPT period, and you must apply for a work authorization card. Plan ahead, as it can take up to 90 days for USCIS to process this card. Applications can be filed up to 90 days in advance of graduation. F-1 status comes with a 60 day grace for students to wrap up their affairs in the U.S. This can be used before your OPT, or after your OPT, or you can use part of the 60 days before your OPT and save the rest for when your OPT is finished.

While you are in OPT status, your school continues to be your sponsor. This is because USCIS views your work on OPT as a continuation of your education. The school is responsible for making sure you comply with all of the requirements of the OPT program and must terminate your status in SEVIS if this does not happen. One requirement is that your employment is related to your field of study. Another is that you are not unemployed for more than 90 days. Part-time work and unpaid work are both acceptable on OPT.

The H-1B visa: the most popular choice for graduates

After considering the range of temporary visas, many college graduates settle on the H-1B visa. The most obvious advantage of the H-1B is that it is intended for professional "specialty occupation" positions, which CIS has defined as one that requires at least a Bachelor's degree in a specialized field. This seems like the perfect fit for a college graduate who now holds a Bachelor's degree. However, keep in mind that your degree and the job requirements must line up in a logical way.

For example, a computer science major seeking a job as a computer programmer is a classic H-1B candidate. The job and the degree match nicely. Even a physics major might be able to qualify, with some courses or experience in computers, and a basic presumption that one cannot study physics without gaining a strong knowledge of computers. But, an English major who is a whiz at computers, but only has a couple of summers of experience, may not be eligible - even if she is a better

programmer than the computer science major.

Jobs outside the sciences tend to be even more complicated. Again, there are some obvious matches - an art history degree for an art museum curator job or an economics degree for a job in finance. However, many jobs that require a Bachelor's degree for entry often do not specify a particular major. Literature or history degrees with a strong liberal arts background may still lead to a position at a consulting firm, or even an investment bank. The CIS will look to the degrees held by others with similar jobs at the same company, and across the industry, to decide whether an H-1B is appropriate.

For an H-1B visa, the employer is the petitioner. Successive filings with the Department of Labor and the CIS are required. The employer must "attest" (promise) that it will pay the prevailing wage for that job in that geographic area, as well as the actual wage paid at that company for others in the same job. There are various other attestations regarding proper treatment of the H-1B worker and U.S. workers at the company, and union notification.

One advantage of the H-1B visa is that it does NOT require temporary intent. One can begin the permanent residence process without any effect on the H-1B visa. The H-1B is granted for up to three years at a time, for a maximum of six years. Generally, six years is enough time to apply for and receive permanent residence. However, it is possible to restart the six-year clock by leaving the U.S. for a year and returning. Also, if the permanent residence process is far enough along, you may be able to extend the H-1B visa beyond six years.

One of the major disadvantages of H-1B visas is that there is a cap on the number of visas issued each fiscal year (October 1- September 30). 65,000 visas are made available for "new" H-1B visas. Once you have been counted towards the cap you do not have to be counted again when you apply for an extension. Certain employers qualify as being "cap-exempt." These include institutions of higher education, non-profit organizations affiliated with these entities, and J-1 waiver physicians. Furthermore, there are an additional 20,000 H-1B visas available to people who have received Master's Degrees from institutions of higher education in the United States.

Some years the cap is filled very early, so it is necessary to plan ahead. In 2007, the entire cap for fiscal year 2008 was filled on April 1st, the first day they became available. The following list shows the date when the cap was filled for each fiscal year. As you can see, the economic situation in the United States plays a big role in how quickly the H-1Bs run out:

- FY 2006: August 10, 2005
- FY 2007: May 26, 2006
- FY 2008: April 1, 2007
- FY 2009: April 7, 2008
- FY 2010: December 21, 2009
- FY 2011: January 26, 2011
- FY 2012: November 22, 2011
- FY 2013: June 11, 2012
- FY 2014: April 5, 2013

At first, the timing of H-1B application period created a disadvantage for students, who tend to finish their OPT in May or June, several months before the next available H-1B period begins. Students would often have to leave their positions after their OPT ended and wait until October to return to

work. In 2008, Congress created “Cap-Gap” to solve this issue. “Cap-gap” allows students to continue working in the United States after their OPT expires if they have a pending or approved H-1B application to begin work in October. Travel is not permitted in the cap-gap period.

The main disadvantages with H-1B visas are the fees. Private employers must pay a training fee of \$1500 (\$750 for companies with 25 employees or less) that cannot be passed on to the individual, as well as a \$500 fraud prevention fee in addition to the filing fee of \$325. The H-1B ties the visa holder to a particular job in a particular location at a particular salary. The employer is also now required to pay all legal fees for the petition. Because of these costs, some employers are hesitant to sponsor employees for H-1B visas.

Dependents of the H-1B visa holder can receive an H-4 visa, which allows them to study but not work. Unmarried partners may be able to use the B visa category to join the H-1B visa holder in the United States.

O-1: Special Category for Aliens of “Extraordinary Ability”

O-1 is a nonimmigrant visa category for individuals who have demonstrated extraordinary ability in their field. The O-1 is divided into O-1A, for scientists, athletes and business professionals, and O-1B for artists. CIS has defined the standard for extraordinary ability for artists as “distinction.” As a practical matter, showing distinction means proving that the individual has achieved a level of both skill and recognition (national or international) that is above that which is ordinarily encountered.¹ A successful O-1B petition will include evidence that the individual has earned a major one-time award such as an Academy Award, Emmy, Grammy or Director's Guild Award, or meets at least three of the criteria established by the CIS²:

- Performed or will perform services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts or endorsements
- Achieved national or international recognition for achievements, as shown by critical reviews or other published materials by or about you in major newspapers, trade journals, magazines, or other publications
- Performed or will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials
- A record of major commercial or critically acclaimed successes, as shown by such indicators as title, rating or 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
- Received significant recognition for achievements from organizations, critics, government agencies or other recognized experts in the field in which you are engaged, with the testimonials clearly indicating the author's authority, expertise and knowledge of the alien's achievements
- A high salary or other substantial remuneration for services in relation to others in the field, as shown by contracts or other reliable evidence

The petitioner for an O-1 visa may be an employer, organization or an agent. An individual may not

¹ 8 CFR §214(o)(3)(ii)

² 8 CFR §214(o)(3)(iv)

petition for an O-1 visa for him/herself. This can be a major advantage of this category for those in the arts – you can create an agent relationship with a US citizen, and then be able to earn money from a wide variety of sources through the agent. For this reason, the O-1B visa fits the artist/entertainer world better than the H-1B because getting one regular long-term employer in the arts is challenging. Note that there are special requirements when an O-1 petition is filed by an agent, not least of which is establishing that the petitioner is “in business as an agent” for all scheduled activities during the O-1 event.³

There are no specific rules about what sort of evidence is required to show that the petitioning agent is “in business as an agent,” but it is important to note that USCIS will only be looking at the agent's activity within the scope of the O-1 petition. There is no requirement that the O-1 agent normally acts as an agent in other contexts. And, while agreements must exist between the agent and the beneficiary, as well the agent and the other employers, the regulations do not dictate the terms of the agreement or how compensation is handled.

The initial O-1 visa may be for the length of the “event,” not to exceed three years. The event may be a residency, tour, individual performance or contract. The O-1 visa may be extended in one-year increments, and there is no limit to the number of years. There is no foreign residence requirement for O-1 individuals, and you may seek permanent residence without jeopardizing O-1 status.

P: Special Categories for Artists

There are three P sub-categories for artists. The P-1B category is for internationally (or in some cases, nationally) known entertainment groups, or individuals coming to the US to join such a group based in the US or abroad⁴. The P-2 category is for certain reciprocal exchange programs, such as the American Federation of Musicians Program for Canadians, and the Actor's Equity program for British nationals. The P-3 category is for artists who are “culturally unique,” which means that their specialty is specific to a particular country, region, society, ethnicity or other group. The P-3 is especially useful for culturally unique artists who are coming to the U.S. not only to perform, but also to teach or otherwise represent their specialty.

As with the O-1 visa, the petitioner for a P visa may be an employer, organization or agent, and individuals/groups may not self-petition. P visas are granted for the length of the “event,” not to exceed one year. Unlimited one-year extensions are available. The definition of event is again flexible, and may encompass an entire season of performances. There is a foreign residence requirement for P visa individuals, and high fraud consular posts are more likely to deny P visa applications based on this requirement.

Labor Union Consultation Requirements for O and P visas

Labor unions, such as the Actor's Equity Association and the American Guild of Musical Artists, have a strong interest in protecting the rights of U.S. artists and have played a role in shaping the legislation governing these visa categories. Both O and P visa petitions must be accompanied by a consultation from the appropriate labor union, if a union related to the specialty field exists. The consultation will consist of a simple no objection statement or the union's opinion regarding the culturally unique or

3 USCIS Memorandum, D. Neufeld on “Requirements for Agents and Sponsors Filing as Petitioners for the O and P Visa Classifications,” (Nov. 20, 2009), published on AILA InfoNet at Doc. No. 09113064 (*posted 11/30/2009*)

4 USCIS Policy Memorandum “Clarifying Guidance on Definition of Internationally Recognized for the P-1 Classification,” (Dec. 31, 2011), published on AILA InfoNet at Doc. No. 11011860 (*posted 01/18/2011*).

exceptional level of the individual's work. If no labor union exists (such as for visual artists), letters of recommendation may be substituted for the peer group consultation.

The Next Step - "green card" or permanent residence

Unlike the myriad different temporary visas, which do not fit neatly into broad categories, permanent visas fall into four basic groups: special programs of Congress, family sponsor, employer sponsor, and asylum. Be sure to consider all categories that may apply to you, and realize that you may be able to apply in more than one category at a time.

Diversity Visa Lottery and other special programs

There are a few special programs of Congress that benefit particular groups. These include periodic amnesty programs and registry (a path to a green card for those who have been in the United States since January 14, 1972). The most important program for students is the Diversity Lottery, which is held every year. The goal of the program is to encourage immigration from countries that are underrepresented in the United States. Therefore, natives of over-represented countries such as Mexico, China, the Philippines and India are not eligible.

Details of the lottery program are on the State Department's website (travel.state.gov). Although the application appears simple, be sure to follow the directions carefully. A winner does not automatically obtain a green card. Rather, winners then submit adjustment of status applications. Of the roughly 15 million entries last year, there were about 100,000 "winners," of whom only about 35,000 received permanent residence⁵.

Keep in mind that some foreign student advisers feel that lottery applications may jeopardize a person's ability to obtain an F or J visa abroad because the State Department DS-160 form (used for all temporary visa applications at a U.S. consulate abroad) specifically asks whether a lottery application has been filed. Many lawyers still advise filing lottery applications because of the obvious potential benefit. We have not heard of denials of temporary visas at consulates because a lottery application has been filed. However, it may be one factor in determining temporary intent overall. If you are considering filing a lottery application, check with your foreign student advisor or an immigration lawyer closer to the time to see how this situation is developing.

Family-Based Immigration

One can also apply for permanent residence through a family sponsor. There are various categories of family relationships that range from spouse of a U.S. citizen (the fastest) to sibling of a U.S. citizen (the slowest, now taking well over 10 years or sometimes longer). In between, there are several categories, including children and spouses of permanent residents. The specific groups, and the waiting times involved, are listed each month on the State Department Visa Bulletin, available on the State Department website, travel.state.gov.

Employment-Based Immigration

An employer may sponsor an alien worker for permanent residence. In general, the employer must show that it cannot find a qualified U.S. worker for the position. Usually, this is done by advertising the

⁵ Yearly data for DV Lottery available at http://travel.state.gov/visa/immigrants/types/types_1322.html

job in a newspaper or journal. This process is called Alien Labor Certification. If qualified U.S. citizens apply, then the Labor Certification cannot be granted at that time. This process is considerably more complicated than most graduates realize and, as with the H-1B visa, some jobs lend themselves to Labor Certification better than others.

In some regions of the country, certain jobs are considered shortage occupations and require minimal advertising. It is also possible to skip the Department of Labor in certain cases for high level researchers, those doing work that is "in the national interest" (such as medical or environmental research), doctors working in medically underserved areas, those with "extraordinary" or "exceptional" ability in almost any field, registered nurses, physical therapists, investors and religious workers.

Asylum

An alien can seek asylum in the United States if he or she has a "well-founded fear of persecution" in his or her home country. If you think you might qualify for asylum, seek the help of an immigration lawyer or USCIS approved nonprofit agency. Remember that fear of economic hardship or general criminal activity is not a basis for asylum - it must be fear of persecution by the government or a group that the government is unable or unwilling to control on account of one's political opinion, race, nationality, membership in a particular social group, or religion.

Permanent Residence for Artists – Special Considerations

Individuals who have achieved a particular level of success may self-petition for permanent residence in the Extraordinary Ability category. However, unlike the O-1 visa, there is no separate standard set aside for artists in this category. A successful petition in this category will show that the individual is among the top few percent in her specialized field and that she has received national or international acclaim for her work. The evidentiary requirements are identical to the O-1A visa category on paper – meaning that the criteria are not the same ones an artist may have used on a previous O-1B petition. While the standard for both the temporary and permanent visas is “extraordinary ability,” petitions for permanent residence receive higher scrutiny.

The extraordinary ability standard can be difficult for many artists to attain, and individuals may need to plan a more practical route to permanent residence. Teaching for several years may be one solution to attaining permanent residence, which then makes it possible to pursue one’s artistic endeavors without any restrictions.

While not as commonly used, the National Interest Waiver is another option worth considering for artists seeking permanent residence through a self-petition. The National Interest Waiver is for individuals whose work is of “substantial intrinsic merit” and has a proposed benefit that is “national in scope.” The artist petitioning for a National Interest Waiver must have “a past history of demonstrable achievement with some degree of influence on the field as a whole.”⁶ The National Interest Waiver is a much easier fit for a scientist doing cancer research, but the first two criteria for the visa are fairly flexible and could be a good fit for certain artists.

Case Studies

- Alice was a jazz musician who studied at the Sherwin College of Music. She built an

⁶ *Matter of New York State Department of Transportation (NYSDOT)*, I&N Dec. 215 (Acting Assoc. Comm’r 1998).

impressive resume during her years as an F-1 student, and the well-known ensemble that she joined during her year of OPT was able to successfully petition for an O-1 visa on her behalf. During the next five years she played at prestigious venues and received critical acclaim in reviews of CDs and live performances. She also developed professional relationships with a few big names in the field, who were then willing to support her extraordinary ability permanent residence petition with letters of recommendation.

- Carlos was an artist who had devoted his life to the art of Portuguese tile painting. He was not known at all outside of Portugal, but was considered one of the masters of the style in his home country. He was frequently commissioned to create pieces for government buildings, churches and private collections. We were able to show that he was paid substantially more than other tile painters. A U.S. company petitioned for an O-1 visa for Carlos, and later submitted the same documentation for an extraordinary ability permanent residence petition. In this case, the key was showing his sustained national recognition in Portugal.
- Thomas was Scottish actor who had created a one-man show based on the life of a historical Scottish hero. A non-profit arts organization in the U.S. petitioned for a P-3 visa for him, acting as the agent. The “event” for P-3 purposes was a tour of the show at many different venues. The Actor’s Equity Association was initially reluctant to issue a favorable consultation, but was persuaded by the fact that the event could not be played effectively by a non-Scottish actor. We included letters from Theater professors, and showed that Scottish actors were used even when the show played in London. The P-3 was a much simpler, cheaper and faster option than the O-1.
- Ayo was a Nigerian dancer in the US on a P-1 through an internationally recognized Nigerian dance troupe. Her specialty was traditional Nigerian dance. She wanted to be able to work on her own, teaching and doing shows at various locations in the US, and she found an agent through her work at a performing arts high school who petitioned for a P-3 visa on her behalf. Her petition included a labor union consultation from the American Guild of Performing Artists. If she decides to travel outside the US, she may have trouble with the temporary intent aspect of the P-3 because of the country she is from (see http://travel.state.gov/visa/frvi/denials/denials_1361.html for more details), but she can stay and work for a year. She can also consider an O-1 visa next.

Special Considerations While Still an F-1 Student

F-1 students in the arts and entertainment often have an opportunity to make money "on the side" by selling paintings, doing concerts, teaching, or acting in a play. The F-1 visa does not allow such off campus employment unless it is part of a for-credit course (CPT) or the student qualifies for additional employment based on economic hardship. The reason for this is that the immigration service does not want students to become distracted from their studies by working too much.

In order to take advantage of these opportunities, many students consider switching to a work visa, which allows them to "study on the side." The H-1B requires regular salary, and so it is usually not appropriate. The O-1, as discussed above, is a tough, subjective standard. If it works, the student will be able to take advantage of these opportunities. However, the decision to file the O-1 should be considered very carefully. If it does not work, the student may have trouble renewing the F-1 because of issues of temporary intent.

Consider the case of Ildar, a violin student from Azerbaijan studying at a conservatory in Hartford. He is a wonderful violinist, but only has the chance to make money by playing a concert every few months. He has 2 years left in his F-1 program. He needs the money, and does not want to miss chances to add performances to his resume. We discussed his case, and decided that the few opportunities he has to make money do not warrant switching off the F-1 visa. With the F-1, he can work on campus to support himself, and is guaranteed one year of full work authorization after graduation (OPT). Furthermore, although he is quite promising, he is simply too young to show the kind of distinction required for an O-1.

We did advise Ildar of the criteria for an O-1 so that he can prepare for the future. We also discussed the possibility of doing a future O-1 by showing his distinction in his home country - it will likely be easier to show he is a top violinist in a small country than in the US. Finally, he will try to offer to play concerts without pay so that he does not lose the opportunity for professional development.

Planning ahead for an O-1 or Extraordinary Ability visa petition

Now that you know what the “extraordinary ability” category requires, it's a good idea to keep this option in mind as you continue to build your career as an artist. Here are some examples of items you should save, either as physical or electronic copies, if you want to obtain one of these high-level visas in the future. This list can also serve as a guide for strengthening your future petition, if you can seek out opportunities to show your own work or judge the work of your peers:

- Playbills/programs/posters
- Press clippings
- Images of your artwork showcased
- Reviews
- Copies of original works (artwork, CDs or DVDs, scores...)
- Receipts or other evidence of sales (art sold, CDs or mp3s sold, tickets sold., etc.)
- Emails from prospective buyers, venues, agents, managers, etc.
- Evidence of reviewing or judging artistic works/competitions
- Anything else that shows the reaction of the artistic community to your work.

Conclusion

Those who work in the arts face particular challenges in securing appropriate nonimmigrant work authorization and permanent residence in the U.S. They should be aware of the specific categories that benefit artists and performers, and the opportunities and limitations inherent in each category. Individuals should plan ahead and think creatively about how best to pursue their goals.