AGENTS AND ITINERARIES FOR O AND P PETITIONS

by Dan Berger and Brigid Fitzgerald[1*]

O and P petitions in which the beneficiary will work for more than one employer, or engage in multiple events, over the course of the validity period frequently require an agent or agent/employer who will act as an agent on behalf of both the beneficiary and the multiple employers. Presenting the correct agent documents and a clear, detailed itinerary can present a challenge when the O or P event contains many different jobs or engagements, but these documents are crucial to obtain a visa for the appropriate validity period and to avoid requests for evidence (RFEs).

ESTABLISHING THE AGENT-BENEFICIARY AND AGENT-EMPLOYER RELATIONSHIPS

Agent-petitioned Os and Ps are common for artists, entertainers, and athletes who have a traditional artist-agent relationship with their petitioner—someone who seeks out contracts with employers, teams, clients, galleries, or venues on behalf of the beneficiary. However, although the agent petitioner must show they are "in business as an agent," the petitioner is *not* required to show that they normally serve as a talent agency or athletic manager as their main occupation.[2]

Rather, the agent petitioner must show that they represent both the beneficiary and each employer "*for the purpose of filing the O or P petition.*"[3] Usually, this can be shown using (1) an agreement signed by the beneficiary and the petitioner establishing that the petitioner is authorized to act as the beneficiary's agent, as well as the terms of the agent-beneficiary relationship; and (2) an agreement signed by each employer that authorizes the petitioner to act as an agent on their behalf for the limited purpose of filing the petition.

Note that an agent filing on behalf of a foreign employer would not require agency agreements for each U.S. event. Use of an agent, or agent-employer (such as a U.S. company set up by the beneficiary), is a common strategy for O or P filing for fields where individuals are traditionally self-employed.

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[2] USCIS Memorandum, D. Neufeld, *Requirements for Agents and Sponsors Filing as Petitioners for the O and P Visa Classifications* (Nov. 20, 2009), AILA Doc. No. 09113064. See also the 2011 Executive Summary of this memo, which does not always comport with industry standards on how agents operate. https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/National%20Engagement%20Pages/2011%20Events/March%202011/Executive%20Summary_O.pdf, and the 2015 draft memorandum that was not finalized but is worth reviewing for insight into USCIS analysis.. https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/PED-2015-0609-O-P-Agent-PM.pdf.

[3] *Id*.

The agent may also be an employer of the beneficiary, i.e., "an agent serving the function of an employer."[4] An agent-employer O-1A petition may be a good option for a highly accomplished university coach who wants the flexibility to give private lessons or participate in competitions outside of their principal employer. A writer who has been hired by multiple media organizations in the United States may benefit from an agent-employer O-1B petition if one of their employers also serves as an agent for the limited purpose of filing the petition. Acting as an agent, in either an O or P-1 petition, can allow an employer to hire a desirable foreign national even when they are unable to employ them full time or meet the requirements of an H-1B petition—provided the foreign national or group can meet the high standard of the O-1 (extraordinary ability) or P-1 (international recognition).

AVOIDING "SPECULATIVE" EMPLOYMENT

All O petitions must include contracts between employers and the beneficiary,[5] and contracts may be required for P petitions "in questionable cases."[6] Keep in mind that neither the agent-beneficiary agreement nor the itinerary takes the place of a contract, job offer letter, or deal memo from each of the nonpetitioning employers. These documents should contain detailed information about the terms of each event (employment, performance, etc.) in order to avoid a request for evidence or denial if the adjudicating officer determines the employment is merely "speculative." A recent agent-employer O-1B filed on behalf of an Iranian dramaturg was denied because:

> A review of the employment offers … indicates that the compensation terms are subject to the projects and duties to be assigned at a later time. The evidence of record does not establish the terms and conditions of employment for these employers …. USCIS also observes that the offer letter and itinerary refer to unnamed projects, presently unassigned duties, as well as to be determined projects. The body of evidence indicates that these events are speculative and the itinerary lacks the dates of each service or engagement, nor appears to be representative of a "complete" itinerary, as required.

If the agent or beneficiary cannot confirm events ahead of time due to the nature of the field, then provide information about whether this is common in the industry. For example, with a P-1A petition filed by a jockey agent on behalf of a jockey, the petitioner initially submitted a list of potential races instead of a traditional itinerary, and the director denied the petition. On appeal, the petitioner gave evidence that trainers select jockeys on the day of the race, including a blog and articles discussing how jockeys are selected. The AAO concluded, "Given these conditions, we are persuaded that a list of races where the agent intends to seek rides for the Beneficiary is a sufficient itinerary."[7]

THE ITINERARY

It is still necessary to submit an itinerary of some kind. For example, in a P-1A petition for multiple boxers, the petitioner (a boxing management business) asserted that it could not provide any

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[4] *Id*.

[5] 8 CFR §214.2(o)(2)(iv)(E)(2).

[6] 8 CFR §214.2(p)(2)(iv)(E)(2).

[7] *Matter of J–E–*, ID #928913 (AAO Mar. 23, 2018).

itinerary, since boxing bouts are scheduled on a last-minute basis. In this case the AAO did not agree:

> The Petitioner is seeking five-year P status for each Beneficiary on the basis of a single bout commitment …. While we recognize that boxing bouts may generally not be scheduled years in advance, the relevant regulation allows agents to file visa petitions for boxers for a period for which it has secured bouts and can produce an itinerary.[8]

A well-organized itinerary presents a single, easy-to-read document that the adjudicating officer can refer to when evaluating the agency agreements and contracts. It can even help tell a coherent story about the beneficiary's field and how engagements in the United States relate to past achievements.

The itinerary must include, at least, the dates and locations of each engagement and the name and address of each employer or venue. In a P-3 petition filed by a theatre company on behalf of performing artists, the petition was denied because the itinerary "did not provide details." On appeal, the AAO disagreed with the director's finding:

> Here, within its original submission the Petitioner offered an itinerary that identified the Beneficiaries' "event" as a tour with seven scheduled performances during the requested period, and listed the dates and locations of the performances. We conclude that the Petitioner has delivered the required explanation of the nature of the Beneficiaries' events or activities.[9]

It is common for artists' and athletes' itineraries to include outside people or entities that are not "employers" in the traditional sense. They may be venues or hosting organizations—such as when the engagements are performances or competitions. Do not assume, however, that the officer reviewing your case will be familiar with common practices of the beneficiary's specific field. If it is not immediately clear from the event contracts who is the responsible entity or how the beneficiary will be paid, the itinerary provides one opportunity to clarify these details. (A petitioner's support letter would provide another.)

A common difficulty is that employers are reluctant to commit to dates before the visa is secured. We have successfully filed petitions in which the employment contracts indicate the employment will begin on a specific date "or upon approval of your visa." USCIS has also approved petitions in which one or two items on the itinerary listed locations or exact dates as "to be determined"; in those cases, the engagements were otherwise thoroughly documented and the itinerary included several other engagements with complete information.

Best practice is also to include the beneficiary's job title or role in each engagement, a description of the engagement, and the compensation offered. These details can simply be copied or summarized from the contracts, offer letters, or deal memos. Including them in the itinerary can help avoid an RFE by making them easy to find.

A key function of the itinerary is demonstrating that the beneficiary has been contracted for work throughout the requested validity period. The entire itinerary can be considered a single "event" (requiring a single petition) even if all gaps between engagements are not filled. USCIS has

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[8] *Matter of I–F–M–, LLC*, ID# 677557 (AAO Nov. 13, 2017).

[9] *Matter of E–,* ID# 5099280 (AAO May 31, 2019).

clarified that the validity period of an O-1 or O-2 may include time spent conducting activities in connection with the itinerary engagements, or even periods in which the beneficiary will return abroad "to engage in activities which are incidental and/or related to the work performed in the United States."[10]

It may be helpful to note any gaps in the itinerary. Such gaps are allowed, as the regulatory definition of "event" includes a tour, series of appearances, or an athletic season, which would necessarily involve gaps. An RFE we received for an O-1B petition filed on behalf of a British dramaturg observed three periods of two to four months in the itinerary when the beneficiary had no engagements scheduled. The officer requested "a detailed explanation of what the beneficiary will be doing during the above named period(s) of time. If the activities are incidental and/or related to the initial event, please provide supporting documentation as evidence of the same." The petition was approved after an RFE response with an extended itinerary including details about the beneficiary's engagements scheduled overseas during the gaps. An O-1B for a musician was approved without RFE when the itinerary included a note: "In periods … during which no specific public events are scheduled, [the beneficiary] will continue to compose, rehearse, and record original music. We also expect to arrange additional performances and projects with a variety of venues and collaborators in the United States."

As illustrated above, the itinerary presents an opportunity to state that the petitioner anticipates additional unconfirmed events, such as speaking engagements or performances that may come up during the validity period of the petition. O-1B petitioners "may add additional performances or engagements during the validity period of the petition without filing an amended petition, provided the additional performances or engagements require an alien of O-1 caliber."[11] The petition may not rely on such speculative employment, but mentioning potential engagements may be helpful to show activities through the full validity period.

There are recent reports on listserves that USCIS officers are contacting employers to confirm the events on the itinerary are happening, especially if an internet search shows cancellations due to COVID-19 or other reasons. Attorneys should advise petitioners that they may be emailed or called by USCIS. Also, given the uncertainty of the current pandemic, petitions and itineraries can include reference to this, such as: "Itinerary is subject to changes & cancellations due to coronavirus, but it is a good faith projection of the work offered to the artist. Some events currently cancelled will be rescheduled when venues are able to reopen."

O-1 extensions are granted in increments of up to one year "to continue or complete the same event or activity for which [the beneficiary] was admitted plus an additional 10 days to allow the beneficiary to get his or her personal affairs in order."[12] However, an O-1 petition may be granted for up to three years, even if the beneficiary is already in O-1 status. Subsequent agent petitions for artists and athletes can often be approved for a full three years when their itineraries contain new projects, employers, venues, or competitions, so long as the itinerary contains engagements for the duration.[13] To avoid having the validity period cut short, it is helpful to indicate on Form

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[10] USCIS Policy Memorandum, *Clarifying Guidance on "O" Petition Validity Period* (July 20, 2010), AILA Doc. No. 10072061.

[11] *Id*., citing 8 CFR §214.2(o)(2)(iv)(D).

[12] 8 CFR §214.2(o)(12)(ii).

[13] 8 CFR §214.2(o)(6)(iii)(A).

I-129 and cover letter that it is an "amended" or "new" petition rather than an extension, and emphasize new events in the cover letter and petitioner support letter.

OTHER CONSIDERATIONS

The agent documents should support—or at least not contradict—the standard of the O or P petition. For example, in an O-1B petition, the contracts should describe engagements in the beneficiary's area of extraordinary ability; in a P-3 petition, the itinerary should support the claim that the performances are culturally unique. Pay special attention to O-1 actors and other artists who may work in both theatre and the motion picture and television industry. If one or more engagements in the itinerary are in motion picture or television, it is best to treat the petition as an O-1B in motion picture and television, which requires a standard of "extraordinary achievement"[14] as well as consultation letters from both a management company *and* a labor organization (commonly AMPTP and SAG-AFTRA).[15]

Even when the agent documents are included and the itinerary is complete, the agent documents (evidence of being "in business as an agent," contracts, and itinerary) may be a source of confusion for the officer reviewing the petition. In an O-1B we filed for a talent agency on behalf of an actor, the RFE stated that "none of the contracts identify who the beneficiary will perform services for, who will pay the beneficiary for those services, or when and where the services will be performed." Our response included a table compiling this information, which had already been identified in the contracts provided in the initial petition; the petition was subsequently approved.

Where the relationships between agent, employers, and beneficiary, the details of employment, or the events' relevance would not be obvious to an officer unfamiliar with normal employment practices of the field, the cover letter or support letter from the agent petitioner can include an explanation of the proposed event in an easy-to-understand narrative or chart summarizing the evidence submitted.

[14] 8 CFR §214.2(o)(3)(ii).

[15] 8 CFR §214.2(o)(5)(iii).