

Visas After Graduation – For Artists¹

Most foreign students plan to follow a fairly standard progression of steps towards permanent residence upon graduation. Most often this is 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. For students who plan to work in the arts, whether as performers, musicians, visual artists or technical/creative personnel, the path is less clear. This article is a summary of options for those working in the arts. It is not possible to describe every immigration category in detail. However, a clear understanding of the issues (and the right questions to ask!) will help choose an immigration path to meet an individual's goals and situation.

General points about immigration as background

1. Small violations can cause serious problems, especially as officers increasingly use internet searches to see what they may find. This can happen sometimes years later - such as a green card interview where the officer compares the employment history on the forms, the visas the person has held, and what shows up online.

¹ This writeup developed out of a presentation prepared for graduate students at the Yale Schools of Art, Music, Sacred Music and Drama. There are many thousands of foreign students in the US studying in the arts and entertainment fields. Many hope to stay to pursue their work. The author, Dan Berger, is a Partner at Curran Berger & Kludt in Northampton MA, and an Immigration Fellow/Visiting Scholar at Cornell Law School.

¹ For general information, this website is informative - artistsfromabroad.org.

2. Plan ahead. 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. Your foreign student office can be a good source.
4. Keep in mind that your employer's lawyer represents the employer. He or she will not always take the time to explore different categories, or to suggest permanent residence options. You may want to do a consultation with a lawyer to talk about your specific goals, and any family members.
5. Prepare for travel abroad. Each time you re-enter the United States, you are 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 USCIS controls immigration matters in the United States, but the State Department issues visas outside the country. Check the consular website for details about applying for a passport visa stamp, if needed, before traveling. 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?

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 not a temporary visa.

Temporary visas are lettered from A-V with many subcategories. The F-1 and H-1B are well known, but 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 applies to certain countries, for investors or 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 category has its own time limitations, processing times, rules on temporary intent and maintaining a foreign residence, restrictions on work authorization, and provisions for dependents.

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

[The H-1B](#) can be a good fit for someone who has a job as an employee, and the job requires a degree in a specific field. For example, a cellist with a music degree who has a job at a symphony orchestra, or a sculptor with a degree in studio arts working as a high school art teacher.

For an H-1B visa, the employer is the petitioner. Successive filings with the Department of Labor and USCIS 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.

The advantage of the H-1B is that it does NOT require temporary intent. One can begin the permanent residence process without any effect on H-1B status. The H-1B is granted for up to three years at a time, for a maximum of six years. 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.

H-1Bs generally require a lottery in March (about a 25% chance of success), and limit the employee to working for the sponsoring employer at that particular job. There is no limit for positions at universities or certain affiliated nonprofits. By law, the employer must pay the fees for the H-1B process, and not charge that back to the employee.

Dependents can receive an H-4 visa, which allows them to study but not work. Unmarried, long-term 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 Artists of “Extraordinary Ability”

[O-1](#) is a nonimmigrant visa category for individuals who have demonstrated extraordinary ability in their field. There is a lower standard for extraordinary ability for artists, requiring that individuals show “distinction.”² 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.²

A successful O-1 petition will include evidence that the individual meets at least three of the criteria established by the CIS, such as performing a lead or critical role in productions or for organizations with distinguished reputations in the field; recognition for achievements through reviews, letters of recommendation, or articles about the individual; major commercial/critical success; or other comparable evidence. Just meeting three criteria is not enough - the USCIS officer will then review the petition as a whole in a “final merits” analysis to determine whether the individual has met the overall threshold for distinction in the field.

The petitioner for an O-1 visa may be an employer, organization or an agent. This often fits the artist/entertainer world better than the H-1B.

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. To get a full three years, there must be an itinerary showing work during the time.³ Gaps are possible within certain guidelines.⁴ O-1 status holders may apply for permanent residence, but it is not quite as simple as for H-1B holders. The O-1 will have to plan ahead especially for international travel.

USCIS will “defer” to a previous adjudication, so in general, the first O-1B is the hardest, and extensions will be simpler to document.⁵

P: Special Categories for Artists

There are three P sub-categories for artists. The P-1 category is for internationally (or in some cases, nationally) known entertainment groups. 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

² See latest guidance from USCIS. <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230303-ExtraordinaryAbility.pdf>.

³ <https://cbkimmigration.com/wp-content/uploads/2021/09/Agents-and-Itineraries.pdf>.

⁴ https://www.uscis.gov/sites/default/files/document/memos/guidance-O-petition-gap_memo-07-20-10.pdf.

⁵ <https://www.uscis.gov/news/alerts/uscis-issues-policy-guidance-on-deference-to-previous-decisions>.

² 8 CFR §214(o)(3)(ii).

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. 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.⁶ The consultation will consist of a simple no-objection statement or the union's opinion regarding the culturally unique or exceptional level of the individual's work. If no labor union exists, letters of recommendation may be substituted for the peer group consultation.

The Next Step - "green card" or permanent residence

Unlike the myriad of 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.

First, there are **special programs of Congress that benefit a particular group**. 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, usually in October. 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 appear on the State Department's webpage (<https://dvprogram.state.gov/>). A winner does not automatically obtain a green card. Rather, winners then move to the final personal screening part of the green card process. Of the roughly 12 million entries last year, there were about 100,000 "winners," of whom only about 50,000 received permanent residence. It is free and relatively easy to apply.

⁶ <https://www.uscis.gov/working-in-the-united-states/temporary-workers/address-index-for-i-129-o-and-p-consultation-letters>.

Second, one can apply for **permanent residence through a family sponsor**. There are various categories of family relationships that range from the spouse of a U.S. citizen (the fastest) to sibling of a U.S. citizen (the slowest, now taking well over 12 years and getting worse). 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 States Department Visa Bulletin, available on the State Department website, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html>.

Third, an **employer may sponsor an alien worker for permanent residence**. In general, the employer must show that it cannot find qualified U.S. workers for the position. Usually, this is done by advertising the job in a newspaper or journal. This process is called Alien Labor Certification.⁷ For those without a full-time job and employer sponsor, there are more subjective self-petition categories such as Extraordinary Ability and National Interest Waiver.⁸

Fourth, an alien can seek **asylum in the United States if 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 [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 views, race, ethnicity, 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, there is no lower standard set aside for artists in this category. A successful petition in this category will

⁷ <https://cbkimmigration.com/employment-based-immigration/perm-labor-certification/>.

⁸ <https://cbkimmigration.com/achievement-based/>.

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

Case Studies

Alice was a jazz musician who studied at the Sherwin College of Music. She built an 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 a 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 doing teaching and 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 for 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 immigration service does not want students to be distracted from their studies by working too much.

In order to take advantage of these opportunities, many students consider switching to a work visa - aliens are permitted to "study on the side" on a work visa. The H-1B requires a 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 does need 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 - he will try to get opportunities through his professors to review the work of others for example. This is something he might not have done if we had not discussed the O-1 standard. 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.

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. The one year of OPT after graduation is a great opportunity to "groom" for an O-1B, by actively seeking opportunities to judge a contest, write a blog, get interviewed, etc. If the one year is not enough, some people in the arts choose to return to their home country where they have full work authorization to build their resumes for a future O-1B.