



Integrity of O-1B and O-2 Visa Issuances

June 14, 2016

Fiscal Year 2016 Report to Congress



Homeland
Security

*U.S. Citizenship and
Immigration Services*

Message from the Director

I am pleased to submit the following report, “Integrity of O-1B and O-2 Visa Issuances,” prepared by U.S. Citizenship and Immigration Services (USCIS).

This document has been compiled pursuant to the language set forth in House Report 114-215 and Senate Report 114-68 accompanying the *Fiscal Year (FY) 2016 Department of Homeland Security Appropriations Act (P.L. 114-113)*.

Pursuant to congressional requirements, this report is being provided to the following Members of Congress:

The Honorable John R. Carter
Chairman, House Appropriations Subcommittee on
Homeland Security

The Honorable Lucille Roybal-Allard
Ranking Member, House Appropriations Subcommittee on Homeland Security

The Honorable John Hoeven
Chairman, Senate Appropriations Subcommittee on Homeland Security

The Honorable Jeanne Shaheen
Ranking Member, Senate Appropriations Subcommittee on Homeland Security

I am pleased to respond to any questions you may have. Please do not hesitate to contact me at (202) 272-1000 or the Department’s Deputy Under Secretary for Management and Chief Financial Officer, Chip Fulghum, at (202) 447-5751.

Sincerely,



León Rodríguez
Director
U.S. Citizenship and Immigration Services



Executive Summary

The following report addresses the House and Senate Appropriations Committees concerns in regard to ensuring the integrity of the O-1B and O-2 visa petition process. The report outlines the O visa petition process including: establishing eligibility; the consultation process; and mechanisms that USCIS uses to detect and prevent fraud. The report includes fraud statistics from FY 2013 to FY 2015. USCIS has not identified any additional fraud identification and prevention measures that are needed with respect to the O nonimmigrant program.



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I. Legislative Language

This document has been compiled in response to language set forth in House Report 114-215 and Senate Report 114-68, which accompany the *Fiscal Year (FY) 2016 Department of Homeland Security (DHS) Appropriations Act* (P.L. 114-113).

House Report 114-215 includes the following requirement:

The Committee is aware of concerns that some O-1B and O-2 non-immigrant visas may have been granted to petitioners who do not meet appropriate eligibility criteria. Eligibility for O-1B visas is limited to individuals who can demonstrate extraordinary ability in the arts or achievement in the motion picture or television industry. Eligibility for O-2 visas is limited to support personnel for O-1B visa holders. Within 90 days of the date of enactment of this Act, USCIS shall update the Committee on its processes for identifying fraudulent O-1B and O-2 petitions, including data on the number of fraudulent petitions identified during the past three fiscal years and an assessment of whether additional fraud identification and prevention measures are needed.

Senate Report 114-68 includes the following requirement:

O-VISA FRAUD

The Committee is concerned that the process for approval of O-1B and O-2 visa petitions for artists working in motions pictures at USCIS lacks a robust mechanism to verify the authenticity and/or accuracy of petitions and may, therefore, be unintentionally open to instances of fraud and abuse on the part of petitioners. Specifically, the Committee has been informed that required written advisory opinions from peer groups or from organizations with expertise in the beneficiary's area of ability are not being weighed appropriately during the adjudication process. Therefore, USCIS is directed to report back to the Committee within 90 days of the date of enactment of this act, detailing how it will address these potential shortcomings to ensure the integrity of O-1B and O-2 visa issuances.

II. Background

Section 207 of Title II of the *Immigration Act of 1990* (IMMACT), P.L. 101-649, 104 Stat. 4978, amended the *Immigration and Nationality Act* (INA) to create, among other things, the O-1 nonimmigrant visa classification for temporary workers seeking admission to the United States as aliens with extraordinary ability in the sciences, arts, education, business, or athletics, or with a demonstrated record of extraordinary achievement in the motion picture or television industry and who have been recognized nationally or internationally for those achievements. See INA § 101(a)(15)(O)(i), 8 U.S.C. § 1101(a)(15)(O)(i).

The O-1 visa classification is divided into two subcategories: 1) individuals with an extraordinary ability in the sciences, education, business, or athletics (not including the arts, motion pictures, or television industry) are provided O-1A classification; and, 2) individuals with an extraordinary ability in the arts or extraordinary achievement in motion picture or television industry are provided O-1B classification.

8 CFR 214.2(o)(3)(ii) defines extraordinary ability for the arts as distinction.

“Distinction means 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.” *Id.* Whereas in the sciences, education, business, and athletics, extraordinary ability means “a level of expertise indicating that the person is one of the small percentage who has arisen to the very top of the field of endeavor.” *Id.* Extraordinary achievement in the motion picture and television industry means “a very high level of accomplishment 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.” *Id.*

Section 207 of IMMACT also amended the INA to create the O-2 classification for support personnel who have critical skills and experience working with the O-1 nonimmigrant and who are integral to the event or performance of an O-1 nonimmigrant artist or athlete or are essential to the successful completion of the production by an O-1 nonimmigrant in motion picture or television. See INA § 101(a)(15)(O)(ii)(II) and (III), 8 U.S.C. § 1101(a)(15)(O)(ii)(II) and (III).

Furthermore, section 207 of IMMACT amended the INA to mandate a consultation process that requires an advisory opinion from an appropriate peer group, labor organization, and/or a management organization prior to approval of a petition under INA 101(a)(15)(O). See INA § 214(c)(3) and (6), 8 U.S.C. § 1184(c)(3) and (6), as amended by Section 204 of the *Miscellaneous and Technical Immigration and Naturalization*

Amendments of 1991, P.L. 102-232, title II, § 204, 105 Stat. 1733. As amended, section 214(c)(6)(F) of the INA notes that these consultations are advisory only:

"No consultation required under this subsection by the Attorney General¹ with a nongovernmental entity shall be construed as permitting the Attorney General to delegate any authority under this subsection to such an entity. The Attorney General shall give such weight to advisory opinions provided under this section as the Attorney General determines, in his sole discretion, to be appropriate."

See INA § 214(c)(6)(F), 8 U.S.C. § 1184(c)(6)(F).

¹ As of March 1, 2003, in accordance with section 1517 of Title XV of the *Homeland Security Act of 2002* (HSA), P.L. 107-296, 116 Stat. 2135, any reference to the Attorney General in a provision of the INA describing functions which were transferred from the Attorney General or other Department of Justice official to DHS by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. See 6 U.S.C. § 557 (2003) (codifying HSA, Title XV, § 1517).

III. Eligibility and Integrity

Establishing Eligibility

The petitioner bears the burden of establishing eligibility for the classification sought.² The statutory and regulatory requirements for this classification require the petitioner to demonstrate that the foreign worker has extraordinary ability or achievement in his or her field, as applicable.³ USCIS reviews all of the evidence pertaining to the foreign worker's skills and experience, including the advisory opinion(s) from an appropriate peer group, labor organization, and/or management organization, as applicable, to determine if the evidence establishes by a preponderance that the foreign worker qualifies for an O-1 visa.

In the case of petitions for O-2 nonimmigrants, petitioners must submit evidence that establishes the foreign worker's current essentiality, critical skills, and experience in support of the O-1 artist or athlete, or in the case of an essential support worker for an O-1 nonimmigrant in motion picture or television, that significant production occurred outside the United States and the O-2 nonimmigrant's continued participation is essential to the successful completion of the production. The burden is on the petitioner to establish that the O-2 beneficiary meets the eligibility requirements for the O-2 visa. As with adjudicating petitions for O-1 nonimmigrants, USCIS reviews all of the evidence pertaining to the O-2 nonimmigrant's skills and experience, including the advisory opinion(s) from an appropriate peer group, labor organization, and/or management organization, as applicable, to determine if the evidence establishes by a preponderance that the foreign worker qualifies for an O-2 visa.

USCIS adjudicates each petition on its own merits, ensuring that all documentation is reviewed and any material discrepancies or deficiencies are properly addressed by the petitioner. To help ensure the integrity of the O nonimmigrant program, USCIS may verify the information submitted via a variety of verification methods, which may include, but are not limited to:

- Review of public records and information,
- Contact via correspondence,
- Unannounced physical site inspections of work locations (as described below), and
- Interviews of the beneficiary, petitioner or others.

² See 8 CFR 103.2(b)(1).

³ See 8 CFR 214.2(o)(1)(i).

Information obtained through verification may be used to assess compliance with the law and determine eligibility (or continued eligibility) for the classification sought.

Consultation Process

USCIS uses the consultation process to obtain information from expert sources, such as management organizations and labor organizations, concerning the nature of the offered position as well as the credentials of the beneficiary. Generally, the petitioner requests the advisory opinion from the consulting entity prior to filing the petition with USCIS. The advisory opinion then is included with the petition filed with USCIS. Such advisory opinion from the consulting entity may not necessarily be positive or show the requisite “extraordinary ability.” Normally, USCIS does not reach out to consulting entities as part of the adjudicative process. USCIS only reaches out to the consulting entities in cases that merit expedited processing or if the petitioner has submitted a peer letter in lieu of an advisory opinion from an appropriate labor organization. The advisory opinion is an important piece of evidence in the record on which the determination of eligibility is made. As such, advisory opinions are considered carefully by USCIS officers and supervisors during the adjudicative process. USCIS evaluates all evidence submitted with the petition in its totality and adjudicates each petition on its merits, ensuring that all documentation and inconsistencies identified are properly addressed on a case-by-case basis. However, the advisory opinions are only one piece of evidence reviewed in the totality of all the information provided during the course of the adjudication. Consistent with INA § 214(c)(6)(F), 8 U.S.C. § 1184(c)(6)(F), USCIS weighs the advisory opinions provided in support of an O nonimmigrant petition as USCIS deems appropriate given the particular facts and circumstances of each case. USCIS must make the final decision based on all of the evidence submitted and in compliance with all applicable laws and authorities. In instances where the petitioner received a negative advisory opinion from the consulting entity, the petitioner may submit rebuttal evidence as part of the initial filing and/or in response to a request by USCIS for additional evidence. Such additional evidence may overcome the negative findings contained in the advisory opinion and establish eligibility for the benefit sought. In other instances, USCIS may deny the petition, despite the submission of a favorable advisory opinion or letter of no-objection, if USCIS determines that the petitioner has failed to establish eligibility. In all instances, however, the advisory opinion plays an important role and helps to inform the final USCIS eligibility determination.

Mechanisms to Detect and Prevent Fraud

As part of USCIS’ efforts to help ensure the integrity of the O nonimmigrant program and to detect and prevent immigration fraud, every USCIS immigration services officer (ISO) goes through USCIS basic training at the USCIS Academy, which includes training on how to identify immigration fraud. USCIS Service Centers, which are the offices that adjudicate O nonimmigrant petitions, also provide a new employee onboarding program

that includes a full day of fraud training, including a section on O nonimmigrant visa fraud. In addition, USCIS personnel with expertise in fraud detection also regularly attend O-Visa related round tables, conduct follow-up fraud briefings on an as-needed basis, and provide fraud training specific to O nonimmigrant petitions to all ISOs who are assigned to work O petitions.

ISOs thoroughly review each file and continually look for fraud indicators in the evidence. If fraud is suspected, the ISO prepares a fraud referral sheet, which is sent to the Center Fraud Detection Operations (CFDO) unit and entered into the Fraud Detection and National Security Data System (FDNS-DS), the USCIS fraud and national security case management system, at intake. The USCIS Fraud Detection and National Security Directorate Immigration Officer (“FDNS” or “FDNS IO”) then will screen the referral and determine if the referral provides sufficient information to continue processing.

FDNS also conducts administrative investigations of various employment-based immigrant and nonimmigrant visa categories, including O nonimmigrant visas that are referred to FDNS by another government agency or by a member of the public. FDNS processes all referrals of suspected fraud similarly, irrespective of the source of referral. This process not only detects fraud but is also meant to act as a deterrent to the commission of fraud. The FDNS process typically begins with a referral to the FDNS IO from the USCIS adjudicator, who has determined that the petition has possible indicators of fraud. The FDNS IO then systematically assesses the facts of the case to determine if there is a reasonable suspicion of fraud that is clearly articulated and actionable, warranting further investigation. This assessment is guided by standardized FDNS fraud detection standard operating procedures; FDNS IOs also are instructed on fraud detection and investigation techniques through uniform training programs that include USCIS’ BASIC training course and specialized FDNS field officer basic and journeyman training courses.

An FDNS administrative investigation may include searches in government and commercial databases, file reviews, domestic or overseas site visits, overseas verification of documents, witness interviews, and verification of facts and events relevant to the case.

Upon an administrative investigation’s conclusion, the FDNS IO will document its results in the FDNS-DS to allow for tracking, collaboration, and information sharing across USCIS. FDNS also will provide USCIS adjudicators with a written statement of findings that summarize the results of the administrative investigation. USCIS adjudicators use these findings to guide their adjudication of the immigration applications.

USCIS Fraud Statistics

The numbers of petitions that were denied as fraudulent during the past 3 fiscal years are listed in the following tables.⁴ USCIS notes that while a petition may have indications of fraud, the petition may ultimately be denied on grounds other than fraud. For this reason, the data does not account for all instances where a petition may have an indication of fraud.

Table 1. O-1A and O-1B Petitions

FY	RECEIPTS	APPROVAL	DENIED - FRAUD	DENIED - OTHER	End of FY PENDING
2013	11,642	10,788	2	590	1,210
2014	12,823	11,819	3	969	1,239
2015	13,101	11,406	1	1,104	1,809

Table 2. O-2 Essential Support Petitions

FY	RECEIPTS	APPROVAL	DENIED - FRAUD	DENIED - OTHER	End of FY PENDING
2013	1,576	1,519	0	47	105
2014	1,667	1,589	0	82	99
2015	1,727	1,578	0	112	131

USCIS takes fraud identification and prevention measures very seriously and strives to improve the ability of officers to identify suspicious evidence or fact patterns. Service center operations conduct monthly roundtables that allow the centers to raise and discuss trends or scenarios that may indicate fraud. Officers also work closely with the CFDO on cases that may have fraud indicators and the results are shared with the centers to ensure that the information is disseminated uniformly. Advisory opinions that raise fraud concerns also may be reviewed by CFDO.

⁴ USCIS presently does not capture data pertaining to the number of cases that have an indication of fraud that can be extracted electronically.

IV. Conclusion

USCIS takes its responsibility to administer the O nonimmigrant program very seriously and does so in a manner that is fair, efficient, and consistent with applicable eligibility requirements as set forth in the INA and DHS's implementing regulations. USCIS will continue to train its officers to adjudicate each case based on its own merits and the totality of the evidence in the case, weighing the applicable advisory opinion(s) with the other evidence in the record, and using its investigative tools and resources to review cases where fraud is suspected.

USCIS has not identified at this time any additional fraud identification and prevention measures that are needed with respect to the O nonimmigrant program.