



**Homeland
Security**

RECOMMENDATION FROM THE CIS OMBUDSMAN TO THE DIRECTOR, USCIS

To: Dr. Emilio T. Gonzalez, Director, USCIS
Cc: Michael Jackson, Deputy Secretary
From: Prakash Khatri, CIS Ombudsman
Date: June 30, 2006
Re: Recommendation that USCIS amend O petition rules to facilitate “extraordinary ability” aliens’ employment in the United States by extending the maximum initial validity of O petitions from three to five years, and increasing the maximum extension length from one to five years.

I. RECOMMENDATION

The CIS Ombudsman recommends that USCIS amend O petition rules to facilitate “extraordinary ability” aliens’ employment in the United States by extending the maximum initial validity of O petitions from three to five years, and increasing the maximum extension length from one to five years.

II. BACKGROUND

Current rules¹ permit O petitions (*Extraordinary Ability*) to be issued initially for an amount of time up to three years necessary to complete work, renewable thereafter for individual one-year extensions without limit. Corresponding rules regarding P petitions (*Athlete, Entertainer, and Artist*) permit initial issuance for up to five years as needed to complete work,² renewable again as needed to complete work for up to five years, but subject to a 10 year maximum stay limit in this status. Consequently, an O beneficiary granted the maximum length work permit must seek annual extensions after three years, with seven extensions needed to work

¹ While INA §101(a)(15)(O) & (P) define the O and P classifications, USCIS regulations are at 8 CFR §214.2(o) & (p) and corresponding State Department rules are at 22 CFR §41.55-56. Guidance for USCIS and DOS adjudicators is found, respectively, in the *Adjudicator’s Field Manual* (AFM), ch. 33, and at 9 *Foreign Affairs Manual* (FAM), §41.55-56. Because the majority of workers in these categories receive a corresponding O or P visa permitting travel to the U.S. to start work, the visa category is sometimes stated rather than the petition classification, although the latter is more accurate.

² For *P-1* individual athletes *only*; P-2/P-3 artists and entertainers are limited to one-year work permits, whether initial or renewal—*see infra* FN3.

for 10 consecutive years; a comparable P-1 performer may conceivably work for up to 10 years on only one extension.³

During the Ombudsman's frequent travels, he often hears complaints about the time consuming, resource intensive process of extending an O petition. Some accounts report a problem of such magnitude that it interferes with the ability to attract the highest caliber intellects necessary to compete effectively in a global economy.⁴ Employers complain that renewals involve significant economic costs: work disruption, actual travel costs, and uncertainty of outcome. Complaints note that, where updated application packages (for extensions) are routinely screened as rigorously as original applications, they again are subject to adjudicators' discretion at both the USCIS petition approval stage and at the DOS visa issuance stage.

When the Department of State discontinued its domestic visa reissuance service for several categories of visa -- including O & P -- on July 16, 2004, problems associated with O petition extensions became particularly acute. Thereafter, O status holders seeking to renew their travel status⁵ had to make annual excursions abroad for a new O visa with which to reenter the country and resume their jobs.

Affected individuals included university professors, academic researchers, and other individuals acclaimed for extraordinary talent or ability. They, their employers, and their professional organizations lobbied effectively enough that DOS relaxed the requirement that applicants return to their *home* countries for visa renewal and publicly recognized the inconvenience caused by the policy change:

In order to mitigate the inconvenience to applicants, we will direct all visa adjudicating posts to accommodate on a priority basis applicants who would have benefited from our visa reissuance services.⁶

³ Although P-1 recipients would then have exhausted their P status entitlement, they are permitted to apply for any other applicable visa, including potentially an O visa. Importantly, however, workers with approved P-2 and P-3 petitions receive work permission only in one-year increments -- up to one-year initially with one-year extensions -- but are not subject to any total stay limit. Information herein about P status is provided for comparison purposes only, since as noted above, P petitions encompass several different validity regimes.

⁴ As the O & P visas together comprise the most common categories in which professional artists, intellectuals, academics, and performers come to the U.S. and work, the disparity between treatment of these highly-sought foreigners in the U.S. and in other countries has often been characterized as one involving global competition for "economic security." For two recent media examples, see "Brains and borders," *The Economist*, May 4, 2006, and "Uncle Sam doesn't want you," *The Christian Science Monitor*, May 11, 2006.

⁵ Although holders of petitions need not leave the country to revalidate USCIS-extended work permits, they do have to apply abroad for the corresponding O visa allowing travel from and re-entry to the United States during pendency of their O status. For these workers to maintain travel flexibility desired for personal or professional reasons, annual excursions abroad to obtain new O visas are a practical necessity.

⁶ See 69 Federal Register 35121 (June 23, 2004).

DOS cautioned, however, that while visa adjudicating posts in Mexico and Canada had some capacity to accept nonimmigrant visa applications from stateside applicants, visa seekers should still apply in their home countries, if possible, and, in all cases, obtain an interview appointment before traveling.

III. JUSTIFICATION

While INA Section 101(a)(15)(O) establishes the O category, it is silent as to details regarding issuance, validity, and renewability. USCIS is responsible for approving the Form I-129, *Petition for Nonimmigrant Worker*, that forms the basis for an alien's application to work temporarily in the United States, for determining the initial period of validity up to three years, and for approving extensions of stay in increments of up to one year. 9 FAM 41.55 N11 & N12. However, a 2004 DOS processing change has burdened O status holders desiring to renew their visas – whose validity approximates O petition validity -- with the need to depart the United States, obtain a new visa (based on a new I-129 petition), and reenter to resume working under the extension.

In its June 23, 2004 Federal Register Notice discontinuing domestic visa reissuance⁷ services, DOS based cessation of this accommodation to the international business community on “increased interview requirements and the requirement of Section 303 of the Enhanced Border Security and Visa Entry Reform Act (Pub. L. 107-173, 116 Stat. 543) that U.S. visas issued after October 26, 2004 include biometric identifiers.” *USCIS, as the immigration processing unit of DHS authorized to implement the INA through duration of stay regulations binding upon DOS,*⁸ *may mitigate the inconvenience imposed by the DOS processing change by modifying its regulations.*

Accordingly, USCIS should implement the following administrative changes to lessen the significant disruption caused by DOS's cessation of domestic visa revalidation and to continue to attract this important talent base:

- Extend the maximum initial validity of O petitions from three to five years;
- Increase the maximum extension length from one to five years.

These changes do not require or foresee any alteration in the criteria for petition approval and they bring the O visa closer to its cultural cousin, the P-1 visa. In addition, the validity period

⁷ What DOS referred to as visa “reissuance” has also been called “revalidation.” Both terms refer to issuing a new visa in light of USCIS's extension of the original petition whose initial validity period is about to expire.

⁸ DOS involvement is limited largely to verifying the evidence on which DHS relied to approve the petition and its discretion to return an approved petition or deny an applicant a visa is circumscribed by regulations found under 9 FAM 41.55 N8.

modifications bring U.S. processing closer to that in countries with which our system is often unfavorably compared: Canada, Australia, the U.K. and Switzerland.⁹

In the competition for foreign talent, the U.S. should heed the express policy of the Canadian government, *see supra* Note 9:

[...][O]fficers should issue work permits for a longer rather than shorter duration. Where there is no reason to limit duration, officers should issue a work permit for the complete expected duration of the employment. *It is in the Department's and the client's interest to lengthen the periods between times when clients require service, i.e. allowing a person to work, without having to submit renewal applications unnecessarily frequently, saves both the client's time and money, and the department's resources.* [emphasis added]

Adopting the recommended O petition validity modifications accomplishes these goals.

IV. BENEFITS

A. *Customer Service*

The benefits to applicants and employers include:

Minimizing inconvenience – Increasing validity periods reduces the number of application packages required of an applicant -- or the employer's HR and legal departments -- over the lifetime of the job. For example, over a ten-year period, the number of foreign trips needed to continue employment would drop from eight to two.

⁹ Rather than dictate maximum validity periods for visas comparable to U.S. O & P visas, the Canadian *Foreign Worker Manual* (FWM), at 65, states that the validity period imposed should be determined by factors such as the expected duration of employment and the maximum time allowed by any applicable agreement (e.g. NAFTA). "In general, the longer the duration of temporary stay, the greater the onus will be on the individual to provide evidence of temporary purpose at the time the application for a work permit or extension is made." Notably, a work permit cannot normally be issued for a validity period that exceeds validity of the individual's passport. Since April 2005, Canada has permitted foreign students to work for two years after graduation and given them and other skilled workers preference in qualifying for work status.

Likewise, in Australia, although work permit processing is not readily analogous to the U.S. system, preference is given to highly skilled workers, as well as to former foreign students seeking to remain or return. Information and communications technology workers and other highly-skilled professionals are given priority for both temporary work permits and permanent immigration and arbitrary limits do not exist. Switzerland has adopted a points-based immigration system with elements of both the Australian and Canadian systems.

The expanded European Union is still wrestling with a comprehensive system. Notably, the UK Highly Skilled Migrant Programme (HMSP) is a fast-track procedure for issuing work permits for certain occupations and individuals with exceptional personal skills and experience.

Lowering costs -- Besides minimizing inconvenience, reducing the number of system contacts – i.e., the number of times an individual must deal with the government through filing, interviewing, fingerprinting, etc. -- lowers business costs by eliminating travel expenses and associated time costs.

Reducing uncertainty – Each newly-approved petition is evaluated afresh by adjudicators who are often as overzealous as they are inexperienced at ferreting out fraud. Reducing applicants' system contacts diminishes the likelihood they will fall victim to processing procedures that many find demeaning or offensive in their redundancy, intrusiveness, and occasional arbitrariness.

Enhancing adjudicators' ability to process approvable cases – Removal of repeat cases from the system gives more time to handle other pending cases. This resource saving should yield individual applicants speedier processing.

B. USCIS Efficiency

The benefits to USCIS include:

Streamlining processing – Fewer cases in the queue translates to speedier processing that, in turn, advances USCIS backlog elimination goals. In addition, DOS also realizes time savings by having to consider repeat extension applications less frequently. Such cooperation is in keeping with the January 17, 2006 *Rice-Chertoff Joint Vision: Secure Borders and Open Doors in the Information Age*.

Improving use of labor resources – Speedier processing promotes backlog elimination goals both by allowing the system to stay current on its existing workload and by using efficiency gains to reduce the existing backlog.

Promoting consistency within USCIS – Fewer system contacts, both with USCIS and with DOS, reduces the possibility of inconsistent processing by different adjudicators.

C. National Security

The benefits to national security are indirect, but potentially significant:

Improved economic security -- U.S. economic security is enhanced by maintaining or retaining the ability to attract the labor of the “best and brightest” necessary to compete in a global economy.

Saving resources for priority security needs -- Fewer system contacts by once-vetted individuals frees up resources to address more pressing national security concerns than those posed by this class of approved temporary workers.

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Where effective national security screening must be accomplished the first time to be a reliable safeguard and deterrent, there is little or no security benefit in making holders of approved O petitions reapply yearly for new visas.