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THE PRIVATE BRIEF · ENTERTAINMENT

The Evidence an O-1B Petition Is Built From

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IN BRIEF

- ◆ An O-1B petition for an artist must show a nomination for or win of a significant national or international award, or at least three of six kinds of evidence set out in the regulation.
 - ◆ Meeting three is only the first step: USCIS then looks at all the evidence together to decide whether you have sustained national or international acclaim and distinction in the arts.
 - ◆ A written opinion from a peer group, union or management organization must be filed with the petition, and some evidence (like letters offered for lead roles) does not count where people expect it to.
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You have sent your lawyer a shared folder. Inside: reviews in three languages, a handful of contracts, two festival programs, a spreadsheet of streaming numbers, and twelve warm letters from people you have worked with. It feels like a lot, and it may well be enough. But an O-1B petition is not judged by the weight of the folder. It is judged by whether each piece of paper answers a specific question the regulation asks.

The O-1B is the U.S. work visa for artists who can show “distinction,” which the regulation defines as a level of skill and recognition substantially above what is ordinarily encountered in the arts. Here is what the evidence has to prove, and what U.S. Citizenship and Immigration Services (USCIS, the agency that decides these petitions) has said it will and will not count.

The first question: an award, or three of six

The federal regulation that governs the O-1 (8 CFR 214.2(o), in Title 8 of the Code of Federal Regulations) gives you two ways to meet the evidence requirement. The first is a nomination for, or a win of, a significant national or international award or prize in your field. The regulation’s own examples are an Academy Award, an Emmy, a Grammy and a Director’s Guild Award.

Most working artists do not have one of those, and they do not need one. The second way is to document at least three of six kinds of evidence.

The six kinds of evidence, in plain words

1. **Lead or starring roles** in productions or events with a distinguished reputation, shown by critical reviews, advertisements, publicity releases, publications, contracts or endorsements.
2. **National or international recognition** for your achievements, shown by critical reviews or other published material by or about you in major newspapers, trade journals, magazines or other publications.
3. **A lead, starring or critical role for organizations with a distinguished reputation**, shown by articles in newspapers, trade journals or publications, or by testimonials.

4. **A record of major commercial or critically acclaimed successes**, shown by indicators such as title, rating, standing in the field, box office receipts, and other achievements reported in trade journals, major newspapers or other publications.
5. **Significant recognition from organizations, critics, government agencies, or other recognized experts in your field**. The regulation adds that these testimonials must clearly show the author's authority, expertise and knowledge of your achievements.
6. **High pay**, meaning a high salary or other substantial payment for your services compared with others in the field, shown by contracts or other reliable evidence.

Notice how many of those are written in two tenses. Criteria 1 and 3 ask what you have performed and will perform. Criterion 6 asks what you have commanded or will command. A file built only from past credits is answering half of each question, so the U.S. engagements you are coming for belong in the evidence too.

Meeting three is where the case starts, not where it ends

This is the part the checklist never mentions. USCIS's Policy Manual (the agency's official guidance to its officers) says the evidence requirements "are not the standard for the classification, but are instead the mechanism for establishing whether the standard is met." Producing evidence that satisfies three criteria does not by itself make you eligible.

The review has two steps. First, the officer checks whether you have met the minimum: a qualifying award or nomination, or three of the six criteria. If you have, the officer then looks at all the evidence together to decide whether it shows that you have sustained national or international acclaim and have achieved distinction in the arts. At that second step, the officer may consider any potentially relevant evidence, even evidence that does not fit one of the six categories.

That is the difference between a petition that is assembled and one that is argued. Three criteria get you to the second question. The second question is answered by coherence: whether the reviews, the contracts, the billing and the pay all describe the same artist at the same level.

What counts, and what does not

Some of the most useful guidance in the Policy Manual is about what USCIS will not count.

- ◆ **Letters do not satisfy criterion 1.** The list of evidence for lead or starring roles is exhaustive, and the Policy Manual says it “does not include unpublished testimonial or recommendation letters.” A folder of warm letters from collaborators does not meet this criterion, however senior the people who signed them.
- ◆ **Letters can carry criterion 3.** Detailed letters from people with personal knowledge of the significance of your role “can be particularly helpful.” They should describe your role and the organization’s reputation in as much detail as possible, and give the author’s credentials and how the author knows about your role. The organization need not have employed you directly.
- ◆ **You need not be the only subject of the press.** For criterion 2, coverage of a broader production, exhibition or topic that includes a discussion of you and your work can count as material about you.
- ◆ **A review of the show can count for you,** under criterion 4, but the record has to show how the production’s success represents your success.
- ◆ **Pay comparisons are where files fail.** For criterion 6, the Policy Manual flags four problems with salary data: descriptions so broad they mix several occupations or industries, websites with user-reported figures that may not be reliable, pay earned outside the United States converted to dollars instead of compared with the market where you actually work, and hourly benchmarks applied to artists who are paid a day rate or a fee per project.

Three criteria get you to the second question.

When a category does not fit your work

If a criterion does not readily apply to your occupation, the regulation lets the petition use comparable evidence instead: proof that is not described in that criterion but does the same job. You do not have to show that all or most of the criteria are a poor fit. You do have to explain why the particular criterion does not readily apply, and why the substitute is comparable. Comparable evidence changes the form of proof, not the count: the petition still has to meet at least three separate criteria, and the standard itself does not move.

The consultation letter

Before USCIS can approve an O-1, it must have a consultation: a written advisory opinion from an appropriate peer group (which can include a person or persons with expertise in the field), labor organization or management organization with expertise in your specific field. The petitioner obtains the opinion, and it is filed with the petition, signed by an authorized official. If it is unfavorable, it must set out the specific facts behind its conclusion. The opinion is advisory; the regulation says consultations are not binding on USCIS.

A few details affect your calendar. If the opinion comes from a peer group that is not a labor organization, USCIS forwards the petition to the national office of the appropriate labor organization, which then has 15 days to respond. If no appropriate peer group exists at all, USCIS decides on the rest of the evidence. If you are coming back to perform similar services within two years of a previous consultation, the consultation is waived: file a copy of the earlier one and ask for the waiver. And if the letter carries a watermark or other mark of authenticity, USCIS asks for the marked version, because unmarked copies may raise doubts and cause delays.

A worked example

Take a womenswear designer coming to launch a label in New York (a composite, not a client). Her folder holds two seasons shown on a recognized international schedule with her name on the billing, a trade-press profile and three collection reviews, a creative director role at a house

with fifteen years of coverage, a stockist list with sales data, and a U.S. contract whose pay is well above the relevant benchmark.

On paper that touches criteria 1, 2, 3, 4 and 6. The real work is elsewhere. Each review has to be tied to the criterion it is offered for, not dropped in as a press kit. The creative director role needs a letter that explains what she actually decided and why the house is distinguished, with the author's credentials on the page. The pay comparison needs a benchmark for the right occupation in the right market. And every criterion written in two tenses needs its forward-looking half: the U.S. engagements that show she will keep doing this work. Even then, the decision is not hers or her lawyer's to make. USCIS decides.

Where to start

This week, go through your own folder and label each document with the one criterion it proves, by number. Anything that proves nothing specific goes in a separate pile. Anything in another language gets flagged for translation. Then look at criteria 1, 3 and 6 and ask what you can show about the work ahead, not only the work behind you. Keep adding to the folder after every engagement: evidence is easier to keep than to reconstruct.

This is general information about the evidence for an O-1B petition, not legal advice about your petition. Immigration rules and agency guidance change; confirm current details before relying on them.

WRITTEN BY

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Anthony is the Managing Partner of Clemenza Law Group and serves as general counsel to a wide range of companies and philanthropic organizations. Nearly every essay here began as a real question from a real client: the contract that landed at 4 p.m., the board that meets on Thursday. He writes them the way he would answer you across the table, plainly and with care.

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