

Visa Arts for Visual Artists

By Michael Maggio and Jasmine Chehrazi*

“It is a certain burden, this American-ness,” declared Willem de Kooning.¹ De Kooning explained that he felt he was among a group of painters who were given the burden and blessing of “writing American history.”³ De Kooning, like many other “American” artists, was not born an American citizen. This celebrated, Dutch-born, abstract expressionist painter naturalized after entering the United States as an illegal stowaway.² Professor Erika Doss, in her book, *Twentieth-Century American Art*, confirms the importance of de Kooning’s and other immigrant artists’ contributions to American history. She identifies “immigration as one of the general themes and impulses of twentieth-century American culture.”⁴ A visit to any American museum with a substantial modern and contemporary art collection shows too that immigrants, most certainly, have played a defining role in modern American painting, photography, printmaking, video and other visual arts.

It is equally true that American immigration law is highly restrictive, counterintuitive, and dauntingly complex. As a result, historically and presently, countless artists, like de Kooning, have lived here illegally and, too often, unnecessarily so. Frequently, they chance entering the United States under potentially false pretenses, claiming to be mere tourists when in fact they will participate fully in America’s vibrant and alluring contemporary art world. Experience says that many artists truly believe a tourist visa is appropriate to make and sell their art in the U.S.A., when in fact the opposite is true. Others come as semi-faux students, simply remaining illegally and hoping to not get “caught,” as common a phenomenon as artists waiting tables. How many foreign artists work in the U.S. unlawfully cannot be accurately said. But it is well-established that the list of twentieth century immigrant artists who, in addition to de Kooning, have helped define modern and contemporary American visual art is vast, and includes Joseph Stella, Mark Rothko, Yves Tanguy, Alfred Stieglitz, Louise Bourgeois, Sean Scully, Ben Shahn, Joseph Albers, Gaston Lachaise, and many others. But whoever they may be, all immigrant artists are better off working and living in the U.S. legally, rather than facing the constant threat of deportation and banishment from the world’s visual arts center.

Immigration Law is Artist Friendly

Surprisingly and refreshingly, immigration law is artist-friendly, at least relatively speaking, given that immigration law is anything but immigrant friendly. Immigration law is especially welcoming to visual artists who are nationally or internationally renowned, even though the most

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¹ Fulford, Robert. "Robert Fulford's Appreciation of Willem de Kooning." *Globe and Mail* (22 March 1997): Phillip Crawley 3 January 2006 < <http://www.robertfulford.com/Dekoonin.html> >.

³ *Id.*

² *Id.*

⁴ Doss, Erika. *Twentieth-Century American Art* (25 April 2002): Oxford University Press.

widely-used visa category, H-1B status,⁵ usually is not a favorable option for artists. H-1B visas may be appropriate for some professionals in the art world, but not visual artists. After all, visual artists do not customarily establish an employer-employee relationship as required for H-1B status,⁶ at least not when practicing their craft. H-1B status not only requires a sponsoring employer, but the job offered must normally require a bachelor's degree or equivalent in a field related to the job's duties, and the foreign national must have either such a degree, or a combination of education and experience equal to that degree.⁷ At the same time, the job offered must reflect wages and working conditions that mirror those of similarly situated U.S. workers.⁸ H-1B applications also require supplemental anti-fraud and other fees that total well over a thousand U.S. dollars. And there is a restrictive limit on the number of new H-1B visas that can be granted each year.⁹

The visa needs of many visual artists who wish to live and work in the U.S. can be better addressed by the O-1 visa category. Indeed, the O-1 visa category contains a niche for less than world-famous artists to obtain the right to live and work in the U.S. initially for up to three years, with extensions available indefinitely,¹⁰ and all without the H-1B education, prevailing wage and working conditions, and supplemental filing fee requirements. Also unlike H-1B status, there is no annual limit on the number of O-1 visas.

But before an artist or anyone else in the art world seeks O-1 status, the first question to be answered is whether the more easily obtained tourist (B-2) or business visitor (B-1) status is appropriate. Foreign visitors, whether for business or pleasure, can be admitted in B-1/B-2 status for up to 90 days if they are from one of the countries¹¹ that are part of the so-called Visa Waiver Program (VWP),¹² or for up to six months if they have secured a B-1/B-2 visitor visa at a U.S. consulate.¹³ Whether admission as a B-1/B-2 visitor will be granted, and for how long, turns on the purpose and length of the proposed visit, and very importantly, whether "work" will be involved. Generally, foreign nationals who come to the U.S. to render services that will benefit a foreign employer and who will receive no compensation from a U.S. source are not working according to U.S. immigration law and may appropriately enter the U.S. in B-1/B-2 status.¹⁴ The self-employed have themselves as their employer. Thus, if an artist lives abroad, produces her or his work abroad, and will be paid abroad, B-1/B-2 status is appropriate, for example, to attend a showing of her or his work, and even to give an uncompensated talk at a gallery too. On the

⁵ Alexander, Jim. "Mapping the Immigration Labyrinth: Finding Your Way Through Nonimmigrant and Immigrant Work Authorization Options for Fiscal Year 2005." *Global Visa Program Communiqué* (December 2004): SIRVA 3 January 2006 < www.maggio-kattar.com/pdfs/Mapping-Immigration-Labyrinth.pdf >.

⁶ 8 CFR §214.2(h)(4)(ii)

⁷ 8 CFR §214.2(h)(4)(iii)

⁸ 20 CFR §655.731

⁹ INA §214(g)

¹⁰ 8 CFR §214.2(o)(12)(ii)

¹¹ Countries designated as VWP participants include Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Belgium, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, New Zealand, the Netherlands, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom, according to Gregg Rodgers' article, "The Visa Waiver Program", published in the 2004-2005 Edition of the American Immigration Lawyers Association *Immigration & Nationality Law Handbook*.

¹² INA §217(a)

¹³ 8 CFR §214.2(b)(1)

¹⁴ 9 FAM §41.31

other hand, if the artist produces work and sells work here, B-1/B-2 status is inappropriate. Also, foreign nationals simply cannot lawfully remain in the U.S. for more than six to twelve months in B-1/B-2 status, regardless of how wealthy they may be and regardless of whether they are working.¹⁵ Persons who overstay their valid visa status may accrue unlawful presence that can result in bars to their lawful entry to the U.S. for years, among other potential penalties. Persons deemed to be seeking admission in an inappropriate status are turned back at the airport or border, and those who work unlawfully may be subject to deportation. Deportation from or refused admission to the U.S. may forever mar one's immigration history and eligibility for future admissions.

With such potentially permanent consequences, O-1 status is the appropriate path for many foreign visual artists to work legally in the U.S. It can also be a convenient first step on the usually difficult road to permanent resident status and, if desired after five years, American citizenship.

Qualifying for O-1 Status

Any visual artist who has earned "distinction" can qualify for an O-1 visa.¹⁶ What exactly constitutes "distinction"? U.S. Citizenship and Immigration Services (CIS) defines distinction as "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 the person described as prominent is renowned, leading, or well-known in the field of arts."¹⁷ Given the vast number of unrecognized visual artists, proving that a particular artist is "substantially above that ordinarily encountered,"¹⁸ and that the artist is "well-known,"¹⁹ often can be achieved with the proper evidence. One must appreciate and explain to the CIS with appropriate evidence that the required level of recognition merely is substantially above average, and that this recognition can be either "national or international."²⁰ An artist who is sufficiently "well-known" in Belize, for example, but is entirely unknown elsewhere, can qualify for O-1 status, because she or he has earned national "distinction" in Belize. So, if the evidence establishes that a foreign artist is "leading" or "well-known," an O-1 work visa may be available. Making this critical point, however, never turns successfully on what the foreign artist or a lawyer says. Instead, objective, credible and extensive evidence must explain how and why the artist is well-known or leading.

Immigration law provides considerable flexibility in the definition of the "arts": "[...] any field of creative activity or endeavor such as but no limited to fine arts, visual arts, culinary arts, and performing arts. [Foreign nationals] engaged in the field of arts include not only the principal creators and performers but other essential persons."²¹ Clearly, curatorial personnel, printmakers, and others who are engaged in "creative activity" also can qualify for O-1 status.

¹⁵ 8 C.F.R. §214.2(b)(1). Exception for particular religious missionary workers permitted to file one-year extension requests is also noted at this section.

¹⁶ 8 CFR §214.2 (o)(3)(ii)

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 8 CFR §214.2 (o)(1)(ii)(A)(1)

²¹ 8 CFR §214.2 (o)(3)(ii)

Although an artist cannot petition for her or his own O-1 visa, an O-1 petition can be filed for an artist by any designated U.S. agent, a foreign employer through a U.S. agent, or a U.S. employer;²² virtually anyone within reason can serve as a petitioning agent for a potential O-1 artist. O-1 petitions are filed with one of the four CIS Service Centers with jurisdiction over the petitioner's place of business.²³ Although the petitioner technically has potential liability for the cost of the O-1 artist's return transportation abroad if the O-1 employment or activities stop for reason other than voluntary resignation,²⁴ that rule lacks an enforcement mechanism and enforcement efforts are rarer than rare.

Satisfying the "Distinction" Standard

A foreign artist establishes the required level of distinction for O-1 status either by having received a significant national or international award or prize,²⁵ which is not particularly common in the visual arts, or by providing at least three of six specified forms of documentary evidence. This may include documentary evidence of an artist's:

- Appearance in a leading and/or critical role at events and/or establishments with distinguished reputations as shown by critical reviews, ads, publicity releases, publications, testimonials, contracts, etc.;²⁶
- Receipt of national or international recognition through critical reviews or other published material by or about the artist in major newspapers, trade journals, magazines, etc.;²⁷
- Record of major commercial or critically acclaimed success;²⁸
- Receipt of significant recognition from organizations, critics, government agencies, or recognized experts,²⁹ and
- Present or future command of a high salary or other remuneration in relation to others in the field.³⁰

"Comparable evidence" of an artist's national or international distinction can be offered if the documentary evidence suggested by CIS regulations does not readily apply.³¹ However, no matter how much evidence is offered, in the end, the evidence must demonstrate clearly that the artist has earned the required level of national or international recognition.³² Thus, providing all forms of CIS-recommend evidence listed above in no way guarantees approval; the national or international distinction standard³³ must still be satisfied. Certainly, less than three forms of

²² 8 CFR §214.2(o)(2)(i)

²³ 8CFR §214.2(o)(2)(i); 8 CFR § 214.2(o)(2)(iv)(A)

²⁴ 8 CFR §214.2(o)(16).

²⁵ 8 CFR §214.2(o)(3)(iv)(A)

²⁶ 8 CFR §214.2(o)(3)(iv)(B)(1); 8 CFR §214.2(o)(3)(iv)(B)(3)

²⁷ 8 CFR §214.2(o)(3)(iv)(B)(2)

²⁸ 8 CFR §214.2(o)(3)(iv)(B)(4)

²⁹ 8 CFR §214.2(o)(3)(iv)(B)(5)

³⁰ 8 CFR §214.2(o)(3)(iv)(B)(6)

³¹ 8 CFR §214.2(o)(3)(iv)(C)

³² 8 CFR §214.2 (o)(3)(ii)

³³ *Id.*

CIS-recommended evidence may be sufficient if that evidence and/or comparable evidence persuasively proves what must be proven.

Whether establishing that a particular artist is “well-known” nationally or internationally through specified documentary evidence or by proving receipt of a qualifying award or prize, it must be made clear that the artist is “recognized as prominent in her or his field.”³⁴ Thus, care must be taken to define the artist’s field with an eye towards establishing her or his distinction in that particular field. Sometimes it is advantageous to define an artist’s field broadly, e.g. contemporary painting, while on other occasions defining the field more narrowly, e.g. photo-realist painting, makes O-1 approval more likely. Either way, the quality rather than the quantity of the evidence is key. This usually turns on who says the foreign artist has achieved a degree of national or international recognition substantially above other artists,³⁵ as well as why this is so.

Assessing Your Audience and Painting the Picture

The CIS adjudicators who review O-1 petitions and supporting evidence toil at one of the four CIS regional Service Centers, either in St. Albans, Vermont; Orange County, California; Lincoln, Nebraska; or Dallas, Texas. They know no more about the arts and artists than the average American. Therefore, an O-1 visa applicant must assume nothing, and prove everything. For example, if the foreign artist’s work has been acquired by a museum, just saying that will not suffice. Instead, not only must the acquisition be confirmed by the museum, but also the museum’s significance must be independently established, even if the museum in question has the seemingly obvious stature of the Whitney or the Getty. The same approach to presenting evidence is necessary when an artist is being represented by, or has had her or his work displayed at an important gallery. Gagosian and Saatchi may be as known in the art world as Dylan and Sting are elsewhere but, nonetheless, without documentation of their stature, a show at these leading New York and London galleries could carry no weight with CIS. Critical reviews in the local press, and even in well-known publications such as *ArtForum*, *Art News*, and *Art in America*, must be accompanied by an explanation regarding the publication’s importance. If the artist’s work has been displayed at an art fair, such as Art Basel, include *The New York Times* description of Art Basel: “The Olympics of the Art World.”³⁶ These points must be explicated for CIS by letters from critics, academics, curators, gallery owners, and others qualified to address these issues. These support letters must likewise explain who the writer is and why her or his opinion matters.

Educating CIS examiners and casting facts favorably can be facilitated further by submitting an “advisory opinion”³⁷ with the O-1 visa petition. An advisory opinion can be a detailed letter from a “peer group,” or an individual with expertise in the artist’s field.³⁸ The more important and more credentialed this expert advisor, the better. The advisory opinion letter is an additional opportunity to thread the evidence together, confirm the foreign national’s abilities and

³⁴ 8 CFR §214.2(o)(3)(iv)(B)

³⁵ 8 CFR §214.2 (o)(3)(ii)

³⁶ Carol, Vogel. "An Out-of-the-Way City Turns Into an Art Capital For 10 Days Each March." (16 March 1996): *The New York Times* 3 January 2006

< <http://select.nytimes.com/gst/abstract.html?res=F30813FA3D5D0C758DDDAA0894DE494D81> >.

³⁷ 8 CFR §(o)(2)(ii)(D); 8 CFR §214.2(o)(5)(i)(B)

³⁸ 8 CFR §(o)(3)(ii); 8 CFR §214.2(o)(5)(i)(A)

achievements, and explain how and why the evidence shows that the requirements for O-1 status are satisfied.³⁹

Notably, unlike tourists, students, and many other temporary visa categories, O-1 visa applicants do not need to establish that they have sufficient ties to their home country to compel their return abroad upon the completion of their temporary stay in the U.S.⁴⁰ This is particularly important for artists who already have lived in the U.S. for many years, as well as for artists from developing countries, because immigration officials often suspect such artists will not return home. In fact, because an O-1 visa applicant's intention to stay or leave does not matter, once CIS approves an O-1 visa petition, visa issuance at a U.S. consulate is virtually assured so long as the foreign national is not inadmissible for such causes as crimes, past unlawful presence, and/or status violations. However, it is important to keep in mind that it can take many weeks to secure a consular visa appointment and that delays for security checks are common in Muslim countries. Delays may continue throughout a consulate's processing of a visa application, as consulates are sometimes overburdened and with limited resources.

Processing the Paper Work

An I-129 Petition for Nonimmigrant Worker Form, O/P Classification Supplement, and all supporting documentation must be filed with the appropriate CIS Service Center, together with the standard \$190 CIS processing fee. O-1 visa petitions can be subject to notorious visa processing delays. Therefore, unless a wait of 60 days to seven months is acceptable, most elect to pay an additional \$1,000 CIS "premium processing" fee. This guarantees a decision by CIS within 15 calendar days.⁴¹

Sometimes, a foreign national in the U.S. can change from one non-immigrant status, such as B-1/B-2 tourist, to another non-immigrant status, such as O-1. However, in most instances, once an O-1 petition is approved by CIS, the foreign national applies for an O-1 visa stamp at a U.S. consulate, usually the consulate in her or his country of citizenship or permanent residence.

Why Bother?

One hears often that it is easy to enter the U.S. claiming to be a tourist when one is not, so why bother to get the right visa? What one does not often hear, however, are the terrible consequences of getting caught in an immigration lie. And, yes, artists do get "caught" by the immigration authorities everyday, and usually at the airport. When they are caught, they almost always are detained without bond and deported promptly. They thereafter find it exceptionally difficult, if not impossible, to ever return to the U.S.

It's an old joke: when the Berlin Wall fell, the American immigration authorities hired the East German border guards to work at American airports and borders. But it's no joke post-September 11. American immigration officers have virtually unfettered authority to immediately remove any non-immigrant applicant for admission deemed to have lied to obtain admission to

³⁹ 8 CFR §214.2(o)(5)(ii)(A)

⁴⁰ 8 CFR §214.2(o)(13)

⁴¹ 8 CFR §103.2(f)(1)

the U.S. They are the judge, jury, and executioner, and like in the long-gone German Democratic Republic, immigration lawyers usually are only decorative at borders and airports.

American immigration officers often make assumptions about those seeking admission to the U.S. For example, if an artist comes to the U.S. frequently and does not have a steady job in her or his home country, it may appear she or he is coming to the U. S. to live and work rather than visit. Visiting an American girlfriend? Immigration authorities may assume there are plans to marry and stay despite assertions otherwise. Detention and deportation often are the consequences of such assumptions by the immigration authorities. It's infinitely safer to leave little room for assumptions at the border and the consulate. It is also smarter to obtain the appropriate visa. And it is always essential to tell the truth when dealing with American immigration authorities given that permanent banishment is the probable consequence of lying. Thus, although acquiring an O-1 visa does take time and effort, it can enable well-known artists to enter the U.S. whenever and as often as they wish, and to lawfully work and live in the U.S. for up to three years initially, with indefinite extensions in one-year increments available thereafter.⁴²

In the Long Run

O-1 status can be indefinite, but it is not the same as permanent resident or “green card” status. Those artists who wish to pursue U.S. permanent resident status will find themselves on the same footing as other foreign nationals, as there is no immigrant visa classification dedicated to artists. Artists, too, must have a close U.S. citizen or permanent resident relative, such as a spouse, parent, or adult son or daughter petition for them, if they cannot obtain permanent resident status based upon either a permanent offer of employment, extraordinary professional achievements, or asylum.

Most employment-based applications for permanent resident status require an employer-employee relationship and a job offer for which there is a demonstrated shortage of qualified U.S. workers.⁴³ That option, for obvious reasons, is not available to most artists. On the other hand, foreign nationals, including artists, can qualify for permanent resident status by demonstrating their receipt of sustained national or international acclaim such that they “have risen to the very top of their field of endeavor,” or alternatively “international recognition,” which is defined as “far above average.”⁴⁴ These standards are substantially higher than the ones that must be satisfied to obtain O-1 status as an individual working in the arts. Nonetheless, many foreign artists become permanent residents in this fashion and, like Rothko and de Kooning, later become American citizens. However, the level of recognition and fame required for a grant of permanent resident status as an artist of extraordinary ability or with international recognition is nowhere near as high as the legendary status achieved by these two icons of American modern art. It is enough to have earned “sustained national or international acclaim” and to be “at the top” of one’s field.⁴⁵

⁴² 8 CFR §214.2(o)(12)(ii)

⁴³ 8 CFR §204.5

⁴⁴ 8 CFR §204.5(h); INA § 203(b)(1); 20 CFR §656.10(b)

⁴⁵ *Id.*; 8 CFR §214.2(o)(12)(ii)

For years, America has been and still is the world's visual arts epicenter. The emergence of London, Berlin, Beijing and other cities as major contemporary art centers is noteworthy, but America largely remains "where it's at." Consequently, it is home to countless visual artists from around the world. Many of these artists live and work here illegally, but unnecessarily so because a lawful immigration status is within reach. And as those immigration benefits are pursued, another often unspoken advantage artists have over other immigrants should be considered, both by artists and the lawyers who represent them: many artists have something better than money to offer in exchange for legal services.

Immigration law today enables many immigrant artists to continue the mission of de Kooning and his peers, "writing American history,"⁴⁶ while a few lucky legal professionals are able to enjoy images by artist clients; images that bring beauty and far more pleasure than money; images that continue to define the "themes and impulses"⁴⁷ of our nation, as immigrants always have, and still do.

⁴⁶ Fulford, Robert. "Robert Fulford's Appreciation of Willem de Kooning." Globe and Mail (22 March 1997); Phillip Crawley 3 January 2006 < <http://www.robertfulford.com/Dekoonin.html> >.

⁴⁷ Doss, Erika. Twentieth-Century American Art (25 April 2002): Oxford University Press.