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US IMMIGRATION & NATIONALITY LAW

CAN A RENAISSANCE PERSON EVER QUALIFY FOR A US VISA CLASSIFICATION?

Posted on May 7, 2024 by Cyrus Mehta

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Surely, USCIS would be hard-pressed to find that any one of the men who contributed to the founding of our great nation did not possess "extraordinary ability," but would it draw the same conclusion about each of our Founding Fathers in the early days of their careers when their extraordinary abilities were spread across various fields? In that regard, does the U.S. employment visa system as it currently stands, propel the old saying that a "jack of all trades is a master of none" and rewards only those foreign nationals who are "masters" of a single field of endeavor? The "extraordinary ability" immigrant (EB-1A) and nonimmigrant (O-1) visas both require showing extraordinary ability in a specific field whether it's the sciences, arts, education, business, or athletics. USCIS likely would not be quick to approve the petition of a "Renaissance person" type of applicant whose acclaim is scattered among disparate fields, on the ground that the applicant can only be extraordinary in one field. Such a rigid view as to one's abilities, however, is at complete odds with the very founding of the U.S. and the multifaceted individuals who had a finger in every pie and were artistic virtuosos in their own right when they weren't doing things like drafting our founding document.

Apart from being the primary author of the Declaration of Independence, a president, political leader, diplomat, lawyer, architect, and philosopher, Thomas Jefferson was also a skilled violinist. Born on American soil, Thomas Jefferson did not have to try to persuade USCIS that he qualified for an extraordinary ability visa. However, suppose Thomas Jefferson had been a foreign national that came to the U.S. from the United Kingdom a few years ago as a nonimmigrant in H-1B status to work as a banking and finance lawyer for a

Virginia law firm. In addition to his U.S. law degree which allows him to practice law in the U.S., Thomas had also previously earned a Bachelor of Arts in Philosophy and English Literature with Shakespeare Studies. After meeting his billable hours and logging off for the day, he continued his hobby of playing the violin, sometimes even performing as a volunteer and posting performances on social media, eventually garnering some media coverage and a sizable online following. A volunteer gig as a violin performer at Virginia's Renaissance Faire also opened the door to the world of acting for Thomas who found the portrayal of Shakesperean characters to be just as interesting as learning about Shakespeare's literary works in the classroom. Thomas even decided to start his own LLC to serve as an expression of who he is and that would further his violin playing and acting but has yet to make it active. Never taking a dime from any of his musical or acting endeavors, Thomas continued his work at the Virginia law firm but was eventually let go after receiving a scathing performance review that tore apart his "17th century style of writing" and "seeming deep rooted animus towards large bank clients and the banking industry in general."

Thomas does not mourn the loss of his job, nor does he look for a similar position at another banking and finance law firm. He never liked big banks anyway, and wants to embark on his own pursuit of happiness by way of his other talents. Thomas already has an LLC in place and wishes to go full steam ahead into launching his musical and acting career. Though Thomas lives by the proposition that "nothing can stop the man with the right mental attitude from achieving his goal," he'll first need to figure out if the rigid U.S. immigration system will be the thing that stops him from putting all his skills to use and forces him into a straitjacket.

The situation that our 21st century Thomas Jefferson has found himself in raises the question of whether the U.S. visa system allows foreign nationals to pursue interests outside the narrow purpose of their entry without jeopardizing their visa status?

Temporary nonimmigrant workers who come to the U.S. to work for a specific employer in a specific occupation may not be prevented from pursuing activities that are permissible under a tourist visa, such as playing amateur violin gigs or acting on a volunteer basis. There is nothing in the Immigration and Nationality Act (INA) that prevents one from engaging in activities in a

"phantom" status, provided such activities do not constitute unauthorized unemployment. This is recognized in the State Department's Foreign Affairs Manual (FAM) at 9 FAM § 402.1-3, which states that an "applicant desiring to come to the United States for one principal purpose, and one or more incidental purposes, must be classified in accordance with the principal purpose." The FAM note provides the example of a student who prior to entering an approved school wishes to first make a tourist trip of not more than 30 days. The FAM instructs that the person should receive an F-1 or M-1 student visa rather than a B-2 tourist visa.

8 C.F.R. § 214.1(e) clearly prohibits unauthorized unemployment, providing that:

> *A nonimmigrant in the United States in a class defined in section 101(a)(15)(B) of the Act as a temporary visitor for pleasure, or section 101(a)(15)(C) of the Act as an alien in transit through this country, may not engage in any employment. Any other nonimmigrant in the United States may not engage in any employment unless he has been accorded a nonimmigrant classification which authorizes employment or he has been granted permission to engage in employment in accordance with the provisions of this chapter. A nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.*

An employee is "an individual who provides services or labor for an employer for wages or other remuneration," an employer is "a person or entity . . . who engages the services or labor of an employee to be performed in the United States for wages or other remuneration," and employment is "any service or labor performed by an employee for an employer within the United States." 8 C.F.R. § 274a.1(f)–(h).

Furthermore, under 9 FAM § 402.2-4, an amateur who performs in the U.S. without compensation will not be in violation of their status. On the other hand, one who is a professional performer, or even one who is normally compensated for performing, will be in violation of their status if they perform in the U.S. without compensation and do not have the appropriate visa to do

so.

Taken together, the FAM and regulations suggest that an employment-authorized-temporary worker can cross the line into unauthorized employment territory if they engage in a type of activity that is both (1) a form of employment (i.e., they provide services or labor to a person or entity in the U.S. for wages or other remuneration) and (2) a type of employment that was not contemplated when their nonimmigrant status was authorized. A visitor for business or pleasure is never employment authorized and would cross the line into unauthorized employment territory if they engaged in any kind of employment, i.e., by providing services or labor to a person or entity in the U.S. for wages or other remuneration. Therefore, both the amateur nonimmigrant worker who plays charitable gigs after work hours, and the B-2 visitor on a grand tour of the country's amateur strings clubs who joins the nonimmigrant worker on stage, would not be in violation of their respective statuses unless they received remuneration for their entertainment services.

What if Thomas now wants to change status to O-1B classification based on the acclaim he has received as a violinist? He has been approached by a talent agency that wants to represent him, find him paid gigs, and take a cut from the money that he is paid through these gigs. Can he meet the O-1B criteria based on his performance as an amateur? Would USCIS accuse him of violating his status while he was on an H-1B visa? What if he wanted to qualify for an O-1B as both a violinist and an actor? Can he still work as a contract lawyer for an entertainment law firm while being represented by the talent agency? Another option is for Thomas to create his own startup entertainment company that can utilize all of his talents as a violinist, actor, and a lawyer. His friend James Madison is very keen to invest in this startup and become a shareholder, and manage the company on Thomas's behalf as its CEO. James has great foresight in Thomas's potential who he thinks will go down in history as one of America's greatest iconic figures.

Thomas likely never violated his H-1B status when he played gigs without remuneration while he was employed by the Virginia law firm based on 8 C.F.R. § 214.1(e) and 9 FAM § 402.2-4. If Thomas wants to transfer his H-1B employment, his LLC can file an H-1B petition on Thomas' behalf, an avenue that we already touched on in an earlier blog, or it can file an O-1 petition.

As artistic director of his LLC, Thomas would utilize his law degree to negotiate

favorable contracts to secure acting and violinist jobs, and would also rely on the knowledge gained as part of his bachelor's degree program in English Literature with Shakespeare Studies when auditioning for acting roles. With respect to the H-1B visa, however, it is unlikely the specialty occupation criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A) contemplate the combination of two degrees in such a manner. Fortunately, the O-1B criteria at 8 C.F.R. § 214.2(o)(3)(iii) do not require a beneficiary to possess any degree, but they do pigeonhole the beneficiary into one "field of endeavor" of science, education, business, or athletics. For individuals in the arts, the regulations at 8 C.F.R. § 214.2(o)(3)(iv) require only "distinction" or "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." If Thomas wants to act in movies or in commercials, there is a separate O-1B category for extraordinary achievement in the motion pictures or TV industry under 8 C.F.R. § 214.2(0)(3)(v).

Having only previously performed as an amateur violinist, Thomas may find it difficult to demonstrate that he meets at least three out of the six O-1B regulatory criteria. For instance, performing gigs for free likely does not count as having "performed . . . services as a lead or starring participant in productions or events which have a distinguished reputation" under 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) by the very fact that Thomas did not perform "services" since he was not paid. Fortunately, the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3) does not require evidence of having performed services and only requires evidence of having performed "in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation." Assuming that USCIS would agree that an amateur performance by a violinist or actor who did not perform services for remuneration could satisfy this criterion, Thomas would still need to evidence his "lead, starring, or critical role" through articles in newspapers, trade journals, publications, or testimonials. 8 C.F.R. § 214.2(o)(3)(iv)(B)(4)–(5) require evidence of the foreign national's "record of major commercial or critically acclaimed successes " and receipt of "significant recognition for achievements from . . . recognized experts" which Thomas could argue is demonstrated through the media coverage he garnered and his sizable social media following.

The regulations make clear that an applicant possessing a number of talents in

various fields of endeavors may not qualify as an individual of “extraordinary ability.” Even if Thomas chooses to self-petition for permanent residency through the EB-1A category, we will need to demonstrate that he has extraordinary ability in one of the fields he is pursuing, either as a violinist or actor. Of course, when he obtains permanent residency, he could broaden his horizons and pursue all his other interests.

Finally, Thomas, being a national of the United Kingdom, may also consider making a substantial investment in a U.S. enterprise, his startup, which he owns at least 50% of. So long as the investment is deemed to be substantial and the startup will not be a marginal enterprise, Thomas can obtain an E-2 visa to develop and direct this enterprise, thereby potentially performing all the activities that he is so passionate about that will grow the startup and also create employment opportunities for others in the U.S. Thus, while most other visa categories require the foreign national to pursue specialized and narrow activities that are consistent within the scope of the visa, Thomas might be able to fulfill his potential as a Renaissance man through the E-2 visa category.

The inability of the INA and regulations to classify multitalented foreign nationals as individuals of extraordinary ability presents another shortfall of the current U.S. employment visa system. Certainly, individuals who are the top percent of their field are to be applauded but to regard only them as possessing extraordinary ability may cause us to miss out on the kind of creative minds that have historically propelled the U.S. forward. Ironically, these top percenters of a single field would have once been seen as quite ordinary in relation to their multitalented peers. After all, as the old saying concludes: “A jack of all trades is a master of none, but oftentimes better than a master of one.”

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