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Taking Control of Return Transportation for Os and Ps

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Who's Liable?

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~Taking Control of Return Transportation for Os and Ps~ ***Who's Liable?***

By: Linda Rose, Esq.¹ & Jane Ellen Kidwell²

The statute and regulations are clear, presumably. Petitioners and employers are liable for return transportation if O or P sponsorship is terminated prior to the petition expiration date. *See infra*. But in the performing arts context where there are typically multiple performance venues, it's not clear exactly when a given entity is deemed to be the employer. Is the petitioner that serves merely as an agent for the limited purpose of securing O or P status for the employing entities still liable? Is the publishing company that does not file the petition but serves as the impetus for O or P status the employer independently of the petitioner, or in concert with the petitioner? Is the one-time or intermittent venue that did not file the O or P petition a liable employer? Does it matter whether employment is memorialized by a written contract contingent upon a grant to work-authorized status, a deal memo, or an oral agreement?

There are no definitive regulations, statutes, or policy memos that answer these questions or define when an "employer" can be held liable for return transportation costs. This paper will analyze the relevant sources and offer case examples and "best practices" in an attempt to unravel the sticky notion of return transportation liability. We take the position that intermittent and incidental/related venues and one-time performance venues are unlikely to be liable for return transportation costs if the venues do not control the beneficiary's status. Conversely, any entity whose employment forms the basis of a petition or whose employment constitutes the majority of the itinerary, and therefore has some level of control of the beneficiary's status, will be liable for return transportation costs along with the petitioner.

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APPLICABLE LAW

The Immigration and Nationality Act requires that reasonable return transportation costs be provided to an artist who holds O or P status if the classification is involuntarily terminated. Specifically, the language reads as follows:

In the case of an alien who is admitted to the United States in nonimmigrant status under section 101(a)(15)(O) or 101(a)(15)(P) and whose employment terminates for reasons other than voluntary resignation, the employer whose offer of employment formed the basis of such nonimmigrant status and the petitioner are jointly and severally liable for the reasonable cost of return transportation of the alien abroad. The petitioner shall provide assurance satisfactory to the Attorney General that the reasonable cost of that transportation will be provided.

INA § 214(c)(5)(B) (emphasis added).

The accompanying federal regulations add little clarification as to who assumes liability for return transportation. The pertinent regulations for O and P nonimmigrant status read identically, as follows:

In the case of an alien who enters the United States under section 101(a)(15)(O) of the act and whose employment terminates for reasons other than voluntary resignation, the employer whose offer of employment formed the basis of such nonimmigrant status and the petitioner are jointly and severally liable for the reasonable cost of return transportation of the alien abroad.

8 CFR §214.2(o)(16) and 8 CFR §214.2(p)(18) (emphasis added).

The provisions concerning return transportation in the INA and regulations are almost identical. They all emphasize liability for the employer whose offer of employment formed the basis for status.³ The Department of State takes a slightly different stance, however. The Foreign Affairs Manual (FAM) states in part:

If an O nonimmigrant's employment terminates for reasons other than voluntary resignation, the employer and the petitioner who sought the alien's O status are responsible for providing the reasonable cost of transportation to his or her last place of residence prior to entry into the United States.

9 FAM 402.13-12 and 9 FAM 402.14-12 (emphasis added). Here, the emphasis is on the parties that sought or requested the status. Still, the question remains: Who's liable?

USCIS policy memoranda offer little clarification to the question of who's liable. *See infra*. The Service does, however, provide guidance on the relationships between petitioners and employers and the

³ Additionally, the O and P Supplement that must be filed with USCIS contains a certification that says an employer (if different from the petitioner) will be jointly and severally liable for return transportation costs. See pg. 28, Sec. 9 of Form 1-129, O and P Classification Supplement to Form 1-129.

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