U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21549261

Date: SEP.30, 2022

Appeal of Vermont Service Center Decision

Form I-129, Petition for Nonimmigrant Worker (Extraordinary Ability – O)

The Petitioner, an athlete management business, seeks to continue to represent the Beneficiaries during their temporary employment in the United States as content creators and media strategists.[1] To do so, the petitioner seeks to extend the Beneficiaries' O-2 nonimmigrant visa classification as accompanying individuals to [redacted], a professional [redacted] player whose petition for O-1 classification was previously approved.[2] *See* Immigration and Nationality Act (the Act) section 101(a)(15)(O)(ii), 8 U.S.C. § 1101(a)(15)(O)(ii).

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiaries would be accompanying and assisting in the athletic performance of the O-1 athlete in the United States. The Director concluded the record contained unresolved inconsistencies regarding the summary of oral agreement and itinerary of proposed events or activities and showed the Beneficiaries would be assisting the Petitioner's management business in general, rather than accompanying and assisting in the athletic performance of the O-1 athlete. In addition, the Director determined that the Petitioner did not submit evidence sufficient to establish that the Beneficiaries have had a prior working relationship that is critical and essential to support the O-1's athletic performance as a [redacted] player; that they perform services that are an integral part of the O-1 athlete's actual performance; and that the Beneficiaries possess critical skills and experience with the O-1 athlete which are not of a general nature and which are not possessed by a U.S. worker.[3]

On appeal, the Petitioner provides copies of previously submitted documents and a brief and maintains that the Beneficiaries are eligible for O-2 classification. In these proceedings, it is the Petitioner's

[1] U.S. Citizenship and Immigration Services (USCIS) records indicate that the Beneficiaries' previous O-2 classification petition [redacted] was approved on March 2, 2021, with a validity period until June 1, 2023.

[2] USCIS records indicate that at the time when the present petition was filed on August 16, 2021, the O-1 athlete was the Beneficiary of two approved Form I-129, O-1 classification petitions filed by the Petitioner: [redacted] approved on November 8, 2019, with a validity period until October 15, 2022, and [redacted] approved on June 24, 2020, with a validity period until June 1, 2023.

[3] The Director also concluded that the Beneficiaries did not maintain their previous B-2 status. The issue of whether the Beneficiaries maintained their B-2 status lies outside our appellate jurisdiction. An application for extension of stay is concurrent with, but separate from, a request for an extension of petition validity. There is no appeal from the denial of an application for extension of stay filed on Form I-129, Petition for a Nonimmigrant Worker. 8 C.F.R. § 214.1(c)(5).

burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 101(a)(15)(O)(ii) of the Act provides classification to a qualified individual who:

(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events;

(II) is an integral part of such actual performance,

(III) (a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals . . . .

(IV) has a foreign residence which the alien has no intention of abandoning.

The regulations at 8 C.F.R. § 214.2(o)(4) provide in pertinent part the following requirements for an O-2 accompanying individual:

(i) General. An O-2 accompanying alien provides essential support to an O-1 artist or athlete. Such aliens may not accompany O-1 aliens in the fields of science, business or education. Although the O-2 alien must obtain his or her own classification, this classification does not entitle him or her to work separate and apart from the O-1 alien to whom he or she provides support. An O-2 alien must be petitioned for in conjunction with the services of the O-1 alien.

(ii) Evidentiary criteria for qualifying as an O-2 accompanying individual –

(A) Alien accompanying an O-1 artist or athlete of extraordinary ability. To qualify as an O-2 accompanying alien, the alien must be coming to the United States to assist in the performance of the O-1 alien, be an integral part of the actual performance, and have critical skills and experience with the O-1 alien which are not of a general nature and which are not possessed by a U.S. worker.

* * *

(C) The evidence shall establish the current essentiality, critical skills, and experience of the O-2 alien with the O-1 alien and that the alien has substantial experience performing the critical skills and essential support services for the O-1 alien.

Additionally, the regulation at 8 C.F.R. § 214.2(o)(2)(ii), provides that all petitions for O classification must be accompanied by:

(A) The evidence specified in the particular section for the classification;

(B) Copies of any written contracts between the petitioner and the alien beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the alien will be employed;

(C) An explanation of the nature of the events or activities, the beginning and ending dates for the events or activities, and a copy of any itinerary for the events or activities; and

(D) A written advisory opinion(s) from the appropriate consulting entity or entities.

II. ANALYSIS

A. Eligibility Claims

The Petitioner's initial letter asserted that the O-1 athlete will be "participating in the [redacted] League[4] as a select contract player" and that the Beneficiaries are required in the United States to support him. Within its initial submission, the Petitioner provide an undated Itinerary, Acknowledgement and Consent to Oral Agreements, signed by the Petitioner, the O-1 athlete, and the Beneficiaries, for the Beneficiaries to act as Content Creator and Media Specialist for the O-1 athlete for a period of two years at a salary of $5,000 per month. The document indicates that their proposed positions and duties, to be performed at the Petitioner's office location in [redacted] Georgia, include the following:

- Content Logistical Services – Counsel, confer, represent and advise media content services to the athlete and negotiate marketing, logistics and other day-to-day business marketing strategy.
- Content Production – Beneficiaries shall create content from the training sessions of the [O-1 athlete] and serve as staff in every competition and exhibition the athlete competes in during this agreement.

In addition, the document indicated the O-1 athlete's proposed schedule of activities which the Beneficiaries will support includes "Training – P3 Sports Performance in [redacted] – 4/20–12/20, 4/21–10/21, 4/22–10.22" and "[redacted] League – select league competitions and activities." The Petitioner indicated that the O-1 athlete's schedule of activities "will repeat in a similar manner over the next three years unless the [O-1 athlete] signs a contract with a professional [redacted] league such as the [redacted] which the [P]etitioner is including as contemplated to be added to this petition."

The Petitioner also provided a letter from the O-1 athlete, who states that the Beneficiaries are his "lead for content creation and self-promotion activities." He provides that the Beneficiaries previously marketed their father [redacted], a former professional [redacted] player in the [redacted] He asserts that "[a]s a team, we have successfully risen from unknown to one of the premier [redacted] players on earth through competing at the highest level and marketing our accomplishments." He credits his success to the Beneficiaries' "[h]hands on time and effort with me that promoted my skills and opportunities to compete at this level . . . ." He claims that the Beneficiaries cannot be replaced by American Workers because "I need instructions in my language, so I know what I am . . . getting

[4] The record shows that the [redacted] League is the [redacted] official minor league [redacted] organization, comprised of approximately 30 teams.

into when it comes to . . . my content development." He states that the Beneficiaries are essential because they "have proven success marketing my career," and they "work with my coaches, direct my content distribution, and have done this at the highest level and continue to do so."

The Petitioner's initial submission provided letters from three individuals who indicate they are familiar with the Beneficiaries' credentials.[5] [redacted] founder of [redacted] an association of professional, collegiate, and amateur athletes, states that he is a client of the Beneficiaries, that they helped "to build the brand of [redacted]" and that "[i]n my background research before working with them, I got to know about the work [the Beneficiaries] did for [the O-1 athlete]" to elevate his profile. [redacted] COO of [redacted] praises the marketing content and media plan the Beneficiaries devised and implemented for her company. She also asserts that they have been "ensuring [the O-1 athlete] received premium coverage in the media here." [redacted] advisor to the president of [redacted] University in [redacted] and a prior college [redacted] coach, states that the Beneficiaries, as content creator and media strategist "have proven themselves to be highly talented marketing experts with the way [the O-1 athlete]'s profile has been built, through coverage in the premier media outlets in the [redacted] and all over the world."

The record also includes screenshots from the website of [redacted], a company focused on software development, digital marketing, and personnel outsourcing, which indicate that Beneficiary [redacted] is the company's "resident a UI/UX Design Expert." With respect to the O-1 athlete, [redacted] screenshots from the [redacted] League and ESPN5 websites dated [redacted] 2020 and [redacted] 2020, respectively, confirm that he was set to play for the [redacted] League team [redacted] for the 2020-2021 season.

The Director issued a request for additional evidence (RFE), advising the Petitioner that USCIS was not persuaded that the Beneficiaries would be accompanying and assisting in the athletic performance of the O-1 athlete in the United States, and not assisting the Petitioner's management business in general. The Director noted that the O-2 classification did not entitle the Beneficiaries to work separate and apart from the O-1 athlete to whom they will provide support. *See* 8 C.F.R. § 214.2(o)(4)(i). The Director advised that publicly available information contained in articles on several websites provided new material information that affects the Beneficiaries' eligibility for O-2 classification. Specifically, the articles provided that although the O-1 athlete joined the [redacted] League team [redacted] in approximately [redacted] 2020, the [redacted] League and the O-1 athlete mutually decided in [redacted] 2021 he would not continue to play for [redacted] Further, in approximately [redacted] 2021, the O-1 athlete signed a multi-year contract to play for the [redacted] and was playing for the team when the instant petition was filed in August 2021.[6] The Director noted that In USCIS records indicate the O-1 athlete has been outside the United States since May 30, 2021.[7] The Director

[5] We note that none of those letters in the initial submission included addresses or contact information for the authors.

[6] Representative articles providing this information are: [redacted] *https://www.forbes.com/sites/* [redacted] (accessed September 29, 2022); [redacted] https://therookiewire.usatoday.com/ [redacted] / (accessed September 29, 2022); and [redacted] https://www.espn.com/ [redacted] (accessed September 29, 2022).

[7] We note that USCIS records indicate that since his May 2021 departure from the United States the O-1 athlete has had one visit to the country from May 3, 2022, until his latest departure on August 8, 2022.

requested that the Petitioner address the discrepancies between the new material information provided in the RFE and the information contained in the submitted Itinerary, Acknowledgement and Consent to Oral Agreements. The Director also requested evidence to establish that the Beneficiaries are coming to the United States to assist in the performance of the O-1 athlete as an integral part of the actual performance, and that they have critical skills and experience with the O-1 athlete which are not of a general nature and which are not possessed by a U.S. worker.

Within its response to the RFE dated November 2021, the Petitioner asserted that "[t]here is no material change in employment" as the O-1 athlete "is doing a short stint in [redacted] and returning to [redacted] and that he will be returning when "the season is over." However, as there were no statements or evidence to corroborate the Petitioner's assertions prior to the adjudication of the petition, and no supporting evidence has been submitted on appeal, the Petitioner has not established these facts with unsupported testimonial evidence alone. The Petitioner further provided that the Beneficiaries are "busy working on the marketing and content" for the O-1 athlete's [redacted] Sports Academy in [redacted] Ohio which is "well underway," and that "[t]he social media for [the O-1 athlete's] activities of playing [redacted] and organizing [redacted] camps is ongoing in the United States."

The Petitioner also submitted a revised Itinerary, Acknowledgement and Consent to Oral Agreements in which any reference to the O-1 athlete playing for the [redacted] League during the requested validity period has been removed.[8] As noted by the Director, the Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Accordingly, we need not consider the revised Itinerary, Acknowledgement and Consent to Oral Agreements. Regardless, upon review, the revised document does not address the Director's concerns regarding whether the O-1 athlete will be performing as an athlete in the United States during the requested validity period.

The Petitioner provided an additional undated letter from the O-1 athlete, in which he provides that the Beneficiaries duties include formulating "the marketing strategy, camp material, publicity, and content for my [redacted] academy and [redacted] related seminars." Updated letters from [redacted] and [redacted] are accompanied by contact information and screenshots from their organizations' websites.

Finally, the Petitioner provided a screenshot of an O-1 Candidate Evaluation form dated January 16, 2021, from the website www.oandpvisas.wufoo.com for Beneficiary [redacted] In response to the form's request to "list all activities, projects, jobs, and activities you plan to do in the next 12 month" she indicates "I will be in charge of managing the media content of [the Petitioner];" in

[8] We note that the revised Itinerary, Acknowledgement and Consent to Oral Agreements, while signed by the Petitioner and the O-1 athlete, is not signed by the Beneficiaries, and the record does not otherwise indicate that they have agreed to the terms of the document.

response to a request to list "Former Important Employers" she indicates [redacted] a social media news network.

B. Deference Policy

On appeal, citing the deference policy, the Petitioner maintains that the Director erred in denying the instant petition, because she had previously approved the Beneficiaries' petition for O-2 classification as essential support individuals for the O-1 athlete. We note that a previously favorable decision may not be relied on where there has been a material change in circumstances or eligibility requirements, there was a material error involved with previous approval, or there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. *See* USCIS Policy Alert, PA-2021-05, *Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity* (Apr. 27, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210427-Deference.pdf. *See also* 2 *USCIS Policy Manual* A.4(B)(1), https://www.uscis.gov/policymanual.

As mentioned above, an officer should not defer to a prior approval where new material information is available. This may include publicly available information that affects eligibility for a benefit. As previously discussed, O-2 classification is grant to qualified individuals who seek to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by the O-1 individual who is admitted for a specific event or events. In the present case, the facts relevant to the adjudication materially changed between the approval of the Beneficiaries' earlier petition and the instant adjudication, such that affording deference is not warranted.[9] The previous approval was based on a different set of facts, including that the O-1 athlete would be playing for the [redacted] team [redacted] - than those currently before us, and thus, we agree with the Director's determination that the previous approval does not warrant deference.

C. Substantial Experience Performing the Critical Skills Under 8 C.F.R. § 214.2(o)(4)(ii)(C)

For the reasons discussed below, the record supports the Director's conclusion that the record does not demonstrate that the Beneficiaries have substantial experience performing critical skills for the O-1 athlete. In order to establish the Beneficiaries' eligibility, the Petitioner must, in part, establish that the Beneficiaries have substantial experience performing critical skills and essential support services for the O-1 principal. 8 C.F.R. § 214.2(o)(4)(ii)(C).

First, as has been stated, the Beneficiaries were previously granted O-2 status as accompanying individuals to the O-1 athlete on March 2, 2021, with a validity period until June 1, 2023, and [redacted] left the United States in May 2021. While it appears that the Beneficiaries were in the United States at the time the present petition was filed on August 16, 2021, the O-2 classification did not entitle them to work separate and apart from the O-1 athlete, [redacted] to whom they provided support. See 8 C.F.R. § 214.2(o)(4)(i). We do not find persuasive the Petitioner's assertion on appeal that "[t]here is no material change in employment" as the O-1 athlete "is doing a short stint in [redacted] and returning to [redacted] League." As the Director notes, the Petitioner also states that the O-1 athlete will not be returning until "the season is over" and the above publicly available evidence indicates that since May 2021 the O-1

[9] A change in fact is material if the changed circumstances would have a natural tendency to influence or are predictably capable of affecting the decision. *See Kungys v. United States*, 485 U.S. 759, 770-72 (1988).

athlete has been playing [redacted] in [redacted] for the [redacted] pursuant to a multi-year contract. This evidence suggests that [redacted] will not be performing as a [redacted] athlete in the United States during the requested validity period indicated in the submitted Itinerary, Acknowledgement and Consent to Oral Agreements. It is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Director found that the Petitioner's conflicting assertions undermined its credibility. *See Ho,* 19 I&N Dec. at 591. We agree that the Petitioner's omission of this highly significant and relevant information casts doubt on the credibility of its own assertions regarding the Beneficiaries' past and proposed relationship with the O-1 athlete.

Next, we find that the arguments presented on appeal do not overcome the Director's finding that the record did not include sufficiently detailed information or adequate corroborating evidence to establish that the Beneficiaries are an integral part of [redacted] performance as a [redacted] athlete, or that they have critical skills and experience with [redacted] that are not of a general nature, and which cannot be performed by a U.S. worker. The Beneficiaries' job description indicates that their Content Creator and Media Specialist positions provide the O-1 athlete business marketing strategies including content logistical services and content production. Although in the initial letter dated February 1, 2021, counsel for the Petitioner asserts that the Beneficiaries have supported the O-1 athlete "for over 3 years," the assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations.

Within the initial submission and the RFE response the O-1 athlete, [redacted] states that the Beneficiaries "work with my coaches, direct my content distribution, and have done this at the highest level and continue to do so." However, according to the above O-1 Candidate Evaluation form completed by Beneficiary [redacted] she would be supporting the petitioning organization and she did not list [redacted] as a "Former Important Employer." The Beneficiaries may have worked in support of [redacted] in some capacity during their authorized period of O-2 employment between March 2, 2021, and May 30, 2021. However, the Petitioner must establish that the Beneficiaries assist in the performance of the O-1 athlete; are an integral part of his actual athletic performance as an athlete; and have critical skills and experience which are not of a general nature and which are not possessed by a U.S. worker. 8 C.F.R. § 214.2(o)(4)(ii)(A). The Petitioner must also establish through evidence that the Beneficiaries have substantial experience performing critical skills and essential support services for [redacted] as required by 8 C.F.R. § 214.2(o)(4)(ii)(C). We agree with the Director's conclusion that this burden has not been met.

The Petitioner also initially described the Beneficiaries as having been "elite media content and strategist professional for many years." The Petitioner also emphasized the Beneficiaries' knowledge "of the upper echelons of marketing the [redacted] style [redacted] around the world." The Petitioner did not address these skills in relation to the Beneficiaries' support relationship with the O-1 athlete, explain why there are no available U.S. workers who possess similar knowledge and skills, or describe how these skills are essential to [redacted] performance as a [redacted] athletic. [redacted] emphasized the Beneficiaries' ability to speak to him in his language, but such attribute would reasonably be classified as general in nature, rather than a skill that is specific to and integral to the performance of the O-1 athlete.

In the submitted recommendation letters from three individuals with whom the Beneficiaries' have worked, the authors state their knowledge that the Beneficiaries have worked for [redacted], but they do not detail the basis of their knowledge or describe the Beneficiaries' essentiality to and working relationship with [redacted] The fact that the Beneficiaries' may have successfully worked for the O-1 athlete for several months during the Beneficiaries' authorized period of employment as support individuals does not establish the existence of the required essential support relationship between those individuals, without evidence that the Beneficiaries possess critical skills that are integral to the O-1's actual athletic performance.

III. CONCLUSION

The record supports the Director's determination that the record did not establish that the Beneficiaries qualify as O-2 accompanying individuals to an O-1 athlete. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.