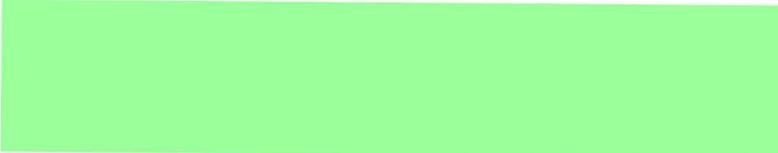


(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

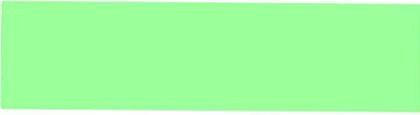


DATE: **OCT 30 2013** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(P)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(P)(i)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the nonimmigrant petition seeking to classify the beneficiary as an internationally-recognized athlete under section 101(a)(15)(P)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(P)(i). The petitioner, a private golf club, seeks to employ the beneficiary as a competitive athlete and golf instructor for a period of five years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary seeks to enter the United States solely for the purpose of performing as an athlete with respect to a specific athletic competition. The director observed that the petitioner seeks to employ the beneficiary as a golf coach in addition to a competitive athlete. The director noted that P-1 classification is not available to aliens seeking employment as coaches or instructors at an academy or school devoted to the sport.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel asserts that "CFR regulations and long-standing practice" permit the granting of P-1 status to "competing athletes who also provide coaching services incidental and/or related to their activity" as long as the competing athlete is "not solely and not primarily acting as a coach." Counsel further asserts that the director erred by failing to request evidence with respect to this issue prior to denying the petition. Counsel submits a brief in support of the appeal. Counsel has not submitted further evidence in support of the appeal.

I. The Law

Under section 101(a)(15)(P)(i) of the Act, an alien having a foreign residence which he or she has no intention of abandoning may be authorized to come to the United States temporarily to perform services for an employer or sponsor. Section 214(c)(4)(A)(i) of the Act, 8 U.S.C. § 1184(c)(4)(A)(i), provides that section 101(a)(15)(P)(i)(a) of the Act applies to an alien who:

- (I) performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance;
- (II) is a professional athlete, as defined in section 204(i)(2);
- (II) performs as an athlete, or as a coach, as part of a team or franchise that is located in the United States and a member of a foreign league or association of 15 or more amateur sports teams, if
 - (aa) the foreign league or association is the highest level of amateur performance of that sport in the relevant country;
 - (bb) participation in such league or association renders players ineligible, whether on a temporary or permanent basis, to earn a scholarship in, or participate in, that sport at a college or university in the United States under the rules of the

- National Collegiate Athletic Association; and
- (cc) a significant number of the individuals who play in such league or association are drafted by a major sports league or a minor league affiliate of such a sports league; or
 - (IV) is a professional athlete or amateur athlete who performs individually or as part of a group in a theatrical ice skating production . . .[.]

Section 214(c)(4)(A)(ii)(I) of the Act, 8 U.S.C. § 1184(c)(4)(A)(ii)(I), provides that the alien must seek to enter the United States temporarily and solely for the purpose of performing as such an athlete with respect to a specific athletic competition. The regulation at 8 C.F.R. § 214.2(p)(1)(ii)(A)(1) provides that a P-1 classification applies to an alien who is coming temporarily to the United States to perform at specific athletic competition as an athlete, individually or as part of a group or team, at an internationally recognized level of performance.

The regulation at 8 C.F.R. § 214.2(p)(4)(i)(A) states:

P-1 classification as an athlete in an individual capacity. A P-1 classification may be granted to an alien who is an internationally recognized athlete based on his or her own reputation and achievements as an individual. The alien must be coming to the United States to perform services which require an internationally recognized athlete.

The regulation at 8 C.F.R. § 214.2(p)(3) further states, in pertinent part:

Internationally recognized means having a high level of achievement in a field evidenced by a degree of skill and recognition substantially above that ordinarily encountered, to the extent that such achievement is renowned, leading, or well-known in more than one country.

Finally, the regulation at 8 C.F.R. § 214.2(p)(2)(ii) states that all petitions for P classification shall be accompanied by:

- (A) The evidence specified in the specific section of this part 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(s) 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 consultation from a labor organization

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary is coming to

the United States solely for the purpose of competing in an athletic competition or competitions which require participation of an athlete that has an international reputation. See section 214(c)(4)(A)(ii)(I) of the Act ; 8 C.F.R. 214.2(p)(1)(ii)(A)(1).

The regulation at 8 C.F.R. § 214.2(p)(3) defines "competition" as follows:

Competition, event or performance means an activity such as an athletic competition, athletic season, tournament, tour, exhibit, project, entertainment event or engagement An athletic competition or entertainment event could include an entire season of performances.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on March 28, 2013. The petitioner, a private golf-club, stated on Form I-129 that it seeks to employ the beneficiary as an "Assistant Golf Professional." In question five on the Form I-129 Supplement the petitioner described the beneficiary's anticipated duties under the approved petition as being to "play in professional golf tournaments and instruct golf lessons." In support of the petition, the petitioner provided a summary of the terms of is oral agreement with the beneficiary pertaining to the beneficiary's duties under the approved petition as follows:

More than 50% of [the beneficiary's] time will be spent in professional tournament play on both at [sic] national and local level [sic], and in preparing for tournament play . . . [The beneficiary] will spend the remainder of his time (under 50% of his time) providing golf lessons and services at [the petitioning] club.

The petitioner stated that the various golf events listed in the "proposed itineraries" run from April 15, 2013 to October 25, 2013, with other events in future years. The petitioner submitted two "itineraries" for that period. The petition submitted as one itinerary a printout from the [redacted] website, which appears to list all [redacted]-sanctioned events from April 15, 2013 through October 28, 2013. As of the date the petition was filed, there were 23 events scheduled for the remainder of the year. The petitioner also submitted as an additional itinerary a list titled [redacted] listing three additional tournaments, in May, June and July 2013, respectively, including the [redacted]

The petitioner stated that when not participating in and preparing for golf tournaments, the beneficiary would be responsible for the following services at the petitioning club:

- playing with members;
- providing lessons and clinics to members (of which he would make 85% of the \$65 per hour - estimated between \$2,000 - \$12, 000 per season);
- running various member events; and
- providing exceptional service at all times to our members and their guests.

The director issued a request for additional evidence ("RFE") on April 9, 2013. In the RFE, the director noted, "Based on the cover letter submitted, it appears that the beneficiary is not seeking P-1 classification to enter the United States solely for the purpose of performing as an athlete." The director did not specifically request additional evidence to address whether the beneficiary would be performing solely as an athlete with respect to specific athletic competitions; however, the director did request evidence that is relevant to this

issue, including a more detailed explanation regarding the nature of the beneficiary's coaching duties, copies of any written contracts between the petitioner and beneficiary, an explanation regarding the nature of the events or activities and an itinerary for such events or activities.

In response, the petitioner again submitted a list of the upcoming tournaments or events in which the beneficiary would be competing, and documentation regarding the nature of the events. In a letter dated April 22, 2013, in response to the RFE, the petitioner stated as follows:

USCIS [U. S. Citizenship and Immigration Services] correctly noted that Beneficiary would be coming not solely for the purpose of competitions, but also to provide coaching services for Petitioner when he is not competing.

* * *

According to Petitioner, when not playing in professional golf events, Beneficiary will be responsible for coaching, teaching, and instructing golf to members of [the petitioning club.] The lessons Beneficiary will provide will include full swing, short game, and on-course instruction. Beneficiary will use the [redacted] video learning system at times for golf instruction . . . Beneficiary will evaluate the swing of the members of [the petitioning club.] He will note the particular strengths and weaknesses in the swing for the benefit of the members, and demonstrate how the member can improve his or her swing . . . Finally, when not coaching, instructing or teaching golf to members directly, Beneficiary will be responsible for providing excellent service to the members and for playing golf with the members. . .

The director denied the petition on May 6, 2013, concluding that the petitioner failed to establish that the beneficiary is coming to the United States *solely* for the purpose of performing as an athlete with respect to a specific athletic competition. The director determined that, based on the evidence submitted, the petitioner seeks to employ the beneficiary as a coach or instructor, in addition to the beneficiary's participation in athletic competition.

On appeal, counsel for the petitioner asserts that USCIS has a "long-standing practice" of granting P-1 status to "competing athletes who also provide coaching services incidental and/or related to their activity." Counsel relies on several AAO non-precedent decisions concurring with the denial of P-1 status to other beneficiaries coming to the U.S to serve as both a competitive athlete and a coach/instructor.¹ Counsel asserts that the facts of those cases are distinguishable from the present case.² Upon review, counsel's assertions are not persuasive.

¹ The AAO uses the term "non-precedent" instead of "unpublished" to avoid confusion regarding the status of non-precedent decisions that are discussed in immigration periodicals or available in electronic format on government and non-government websites.

² One of the AAO non-precedent decisions concerns the unrelated issue of whether an O-1 nonimmigrant is permitted to engage in practice events under an approved petition, and thus was not considered.

Counsel's suggestion that USCIS has inconsistently interpreted the applicable regulation is not supported by the record. First, counsel has not furnished evidence establishing that the facts of the instant petition are distinguishable from those in the non-precedent decisions. Additionally, to be inconsistent and actionable, it is well established that an agency "interpretation" that serves to modify a previous interpretation must be in the form of an actual precedent decision, regulation, or other published rulemaking. *See, e.g., SBC Inc. v. Federal Communications Com'n.*, 414 F.3d 486, 498 (3rd Cir., 2005) (citing *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C.Cir. 1997)). Rulemaking by "practice" does not exist. Only when the agency specifically designates a decision as precedent can it bind future decisions. 8 C.F.R. § 103.3(c). Unpublished, non-binding AAO decisions would not be enough to document an inconsistent agency interpretation. *See, e.g., R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp.2d 1014, 1024-25 (D.Hawai'i, 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001).

In addition, counsel asserts that the director failed to raise in the RFE the issue of the beneficiary's eligibility as an athlete coming to the United States solely for the purpose of competing in an athletic competition or competitions.³ As stated previously, the director did request evidence that is relevant to this issue, including a more detailed explanation regarding the nature of the beneficiary's coaching duties, copies of any written contracts between the petitioner and beneficiary, an explanation regarding the nature of the events or activities and an itinerary for such events or activities. Regardless, the director is not required to issue a request for evidence in every potentially deniable case, nor is she required to address every possible ground for denial in the request for evidence.⁴ If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. As previously noted, the petitioner has not submitted further evidence for consideration in support of the appeal.

Section 214(c)(4)(A) specifically states that section 101(a)(15)(P)(i)(a) refers to an alien who "performs as an athlete" and "seeks to enter the United States. . . for the purpose of performing as . . . an athlete with respect to a specific athletic competition." Where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984).

While the Act provides for P-1 classification for certain coaches, the beneficiary does not meet the criteria set forth at section 214(c)(4)(A)(i)(III) of the Act, which limits P-1 classifications to coaches of teams or franchises that are located in the United States and members of a foreign league or association of 15 or more amateur sports teams. Regardless, the petitioner clearly seeks to classify the beneficiary as an athlete who performs at an internationally recognized level of performance, pursuant to section 214(c)(4)(A)(i)(I) of the Act.

³ In support of this claim, counsel cited to a USCIS policy memorandum pertaining to requests for further evidence and notices of intent to deny. William R. Yates, Associate Director, Operations, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)* (February 16, 2005).

⁴ USCIS may deny a petition without issuing a request for evidence where all required initial evidence has been submitted but the evidence submitted does not establish eligibility. 8 C.F.R. § 103.2(b)(8)(iii). While the director may request the required initial evidence for the requested classification, he or she is under no obligation to do so.

The AAO acknowledges that the beneficiary intends to compete in professional golf tournaments in the United States. However, the petitioner has also unequivocally indicated that the beneficiary will be serving as a coach and instructor for its organization. Therefore, it must be concluded that the beneficiary would not be coming to the United States *solely* to participate in athletic events that require an internationally recognized athlete. Rather, the evidence indicates that the beneficiary will be a golf instructor in addition to any athletic competitions in which he may compete. There is no provision that would allow an alien to come to the United States individually as a P-1 coach or instructor other than the above-referenced statutory provision allowing P-1 classification of coaches who participate in certain qualifying amateur sports leagues or associations, or as a P-1 essential support alien accompanying a P-1 athlete or athletes. *See* 8 C.F.R. § 214.2(p)(4)(iv). The statute and regulations do not provide for P-1 classification of an individual who will serve as both a competitive athlete and coach/instructor. For this reason, the petition cannot be approved.

Beyond the decision of the director, the AAO notes that even if the petitioner had established that the beneficiary is coming to the United States solely to compete in athletic competitions, the petitioner has not demonstrated that the beneficiary would be coming to the United States to participate in an athletic competition which has a distinguished reputation and which requires participation of an athlete or athletic team that has an international reputation. *See* 8 C.F.R. § 214.2(p)(4)(ii).

The itineraries submitted in support of the petition list PGA-sponsored tournaments, a [REDACTED] tournament, and two tournaments of unknown significance in the sport. These tournaments appear to be national tournaments that may reasonably require the participation of internationally-recognized athletes. However, the petitioner has not provided evidence of the entry requirements for such events or comparable evidence that would establish whether the events require the participation of internationally-recognized athletes. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003). The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)."

III. Request for Oral Argument

Finally, the AAO acknowledges counsel's request for oral argument on the basis that the case involves a unique issue of law. The regulations at 8 C.F.R. § 103.3(b) provide that the requesting party must explain in writing why oral argument is necessary. USCIS has the sole authority to grant or deny a request for oral argument and will grant oral argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. Upon review, the case does not require the resolution of a unique factor or issue of law. Moreover, the written record of proceeding fully represents the facts and the issue in this matter. Consequently, the request for oral argument will not be granted.

IV. Conclusion

In summary, as discussed above, the petitioner has failed to establish that the beneficiary would be coming to the United States solely for the purpose of competing in athletic competitions. *See* section 214(c)(4)(A)(ii)(I) of the Act ; 8 C.F.R. 214.2(p)(1)(ii)(A)(1). The petitioner has also not demonstrated that the beneficiary would be coming to the United States to participate in an athletic competition which has a distinguished reputation and which requires participation of an athlete or athletic team that has an international reputation. *See* 8 C.F.R. § 214.2(p)(4)(ii).

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden, therefore the appeal must be dismissed.

ORDER: The appeal is dismissed.