U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-L-F-, PLLC

DATE: FEB. 4, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an agent, seeks to classify the Beneficiary as an internationally recognized athlete. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(P)(i), 8 U.S.C. § 1101(a)(15)(P)(i). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Petitioner filed the Form I-129, Petition for Nonimmigrant Worker, seeking employment of the Beneficiary as a professional tennis player for a period of five years.[1] At the time of filing, the Petitioner asserted that the Beneficiary satisfies at least five of the seven evidentiary criteria for internationally recognized athletes or athletic teams pursuant to the regulations at 8 C.F.R. § 214.2(p)(4)(ii)(B)(*2*).

The Director denied the petition based on two separate grounds, concluding that the Petitioner: (1) did not 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, pursuant to section 214(c)(4)(A)(ii)(I) of the Act, 8 C.F.R. § 214.2(p)(1)(ii)(A)(1); and (2) did not demonstrate that the Beneficiary would be coming to the United States to compete in athletic competition(s) which require participation of an athlete who has an international reputation. *See* 8 C.F.R. § 214.2(p)(4)(ii). The Petitioner does not address this second concern on appeal.

On appeal, the Petitioner requests approval of the petition and submits a brief and additional material. For the reasons discussed below, we agree that the record does not establish either 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, or that the events in which the Beneficiary will compete require participation of an athlete who has an international reputation.

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[1] Employment-based nonimmigrant visa petitions are filed on Form I-129. The Petitioner notates the requested classification by checking a box on the O and P Classifications Supplement to Form I-129. In part 3 of the supplement, the Petitioner selected Box d for P-1 Major League Sports. However, because the letter accompanying the Form I-129 indicated that the petition should be considered under the classification for a P-1 Athlete not affiliated with Major League Sports (Part 3, Box e of Form I-129), the Director adjudicated the case under this classification. The Petitioner does not contest the classification the Director analyzed and the record contains no evidence that the Beneficiary, a tennis player, is affiliated with a major league.

I. PERTINENT LAW AND REGULATIONS

Under section 101(a)(15)(P)(i) of the Act, a foreign national 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 a foreign national who:

> (I) performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance;
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> (II) is a professional athlete, as defined in section 204(i)(2);
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> (III) 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 [certain conditions apply, or]
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> (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 provides that the foreign national 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*) states that a P-1 classification applies to a foreign national 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)(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. Such activity could include short vacations, promotional appearances for the petitioning employer relating to the competition, event or performance, and stopovers which are incidental and/or related to the activity. An athletic competition or entertainment event could include an entire season of performances. A group of related activities will also be considered an event.

The regulation at 8 C.F.R. § 214.2(p)(4)(i)(A) allows classification for those who are internationally recognized athletes based on their own reputation and achievements as an individual.

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.

The regulation at 8 C.F.R. § 214.2(p)(4)(ii) sets forth the documentary requirements for P-1 athletes as:

> (A) *General.* A P-1 athlete must have an internationally recognized reputation as an international athlete or he or she must be a member of a foreign team that is internationally recognized. The athlete or team must 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.
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> (B) *Evidentiary requirements for an internationally recognized athlete or athletic team.* A petition for an athletic team must be accompanied by evidence that the team as a unit has achieved international recognition in the sport. Each member of the team is accorded P-1 classification based on the international reputation of the team. A petition for an athlete who will compete individually or as a member of a U.S. team must be accompanied by evidence that the athlete has achieved international recognition in the sport based on his or her reputation. A petition for a P-1 athlete or athletic team shall include:
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> > (*1*) A tendered contract with a major United States sports league or team, or a tendered contract in an individual sport commensurate with international recognition in that sport, if such contracts are normally executed in the sport, and
> >
> > (*2*) Documentation of at least two of the [criteria at subparagraphs (i) through (vii)].

Additionally, the regulation at 8 C.F.R. § 214.2(p)(2)(ii) states that all petitions for P classification shall be accompanied by contracts, an explanation of the nature of the events (including dates) and a written consultation from a labor organization.

Finally, we have held that truth is to be determined not by the quantity of exhibits alone but by its quality. Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, we must examine each document for relevance, probative value, and credibility, both individually and within the context of the totality of the record, to determine whether the fact to be proven is probably true. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

II. FACTUAL AND PROCEDURAL HISTORY

The Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on February 2, 2015, seeking to have the Beneficiary compete as a professional tennis player at various professional tennis events throughout the United States for a period of five years. The record shows that the Beneficiary is a 26-year-old tennis player who has participated in amateur tennis competitions in the United States between 2008 and 2013, predominantly collegiate tournaments, and at various tennis tournaments in Uzbekistan, his native country, and other countries between 2005 and 2012.

The Petitioner asserted that the Beneficiary satisfies the evidentiary requirements pertaining to athletes who perform at an internationally recognized level of performance.[2] The Director issued a request for evidence (RFE) on February 20, 2015, specifically requesting that the Petitioner submit, *inter alia*, documentation 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, pursuant to section 214(c)(4)(A)(ii)(I) of the Act, 8 C.F.R. § 214.2(p)(1)(ii)(A)(1), and that the Beneficiary is coming to the United States to compete in athletic competition(s) requiring participation of an athlete that has an international reputation, pursuant to 8 C.F.R. § 214.2(p)(4)(ii)(A) The Director's decision dated April 2, 2015, ultimately addressed only those two issues, finding them to be dispositive, and did not address the issue of the Beneficiary's eligibility as an athlete who performs at an internationally recognized level of performance.

III. ANALYSIS

A. Purpose for Coming to the United States

The first issue the Director addressed 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).

As previously stated, 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. Such activity could include short vacations, promotional appearances for the petitioning employer relating to the competition, event or performance, and stopovers which are incidental and/or related to the activity. An athletic competition or

[2] Although the Petitioner also refers to the Beneficiary as a "professional athlete," it neither articulated a basis for this characterization nor presented evidence that the Beneficiary qualifies as a professional athlete as that term is defined in section 204(i)(2) of the Act. *See also* sections and 101(a)(15)(p)(i)(a) and 214(c)(4)(A)(i)(II) of the Act.

> entertainment event could include an entire season of performances. A group of related activities will also be considered an event.

The Petitioner stated on Form I-129 that the Beneficiary will receive an annual salary of $45,000 and "other compensation" in the form of "[t]ournament winnings, prize money and future endorsements." On the Form I-129 petition, the Petitioner also indicated that in 2014 it had filed two petitions on the Beneficiary's behalf requesting the same classification, which were denied. The Petitioner explained on the O and P Classifications Supplement to Form I-129 that the nature of the Beneficiary's event will be to "train for and compete in professional tennis tournaments across the [United States]," and that his duties will be to "[m]aintain [a] world class level of fitness, and compete in professional tennis tournaments across the [United States]."

The Petitioner's initial evidence contained its Agent Contract with the Beneficiary dated and signed by the parties December 9, 2014, which advised the Beneficiary that the Petitioner's representation involves "serving as a link to your direct employers and sponsors." The Petitioner also submitted the Beneficiary's proposed Daily Practice Schedule indicating that the Beneficiary's standard weekday schedule of eleven and a half hours included an average of four and a half hours of tennis practice, in addition to seven hours of fitness training. The Petitioner provided a Tournament Schedule listing proposed events, sponsored by the and the in which the Beneficiary will compete between February 2015 and December 2020, and confirmation of the Beneficiary's registration for the in February 2015.

In the RFE, the Director noted that the record did not contain contracts between the Beneficiary and the employers or entities requiring the Beneficiary's services. The Director noted that the Petitioner's two previous petitions filed on behalf of the Beneficiary for P-1 classification, and were denied, "because it was found based on the provided that the [B]eneficiary would not be coming to the United States 'solely' for the purpose of performing with respect to a specific athletic competition." The Director's RFE set forth the relevant terms of the submitted as a supporting exhibit in indicating that the Beneficiary was to be employed by a company "to instruct guests interested in recreational tennis as well as coaching elite athletes who utilize the Company's facilities to play in events," and "provide tennis instruction to players at the junior through advanced levels" for the period between February 1, 2015, and January 31, 2020. Therefore the Director requested additional evidence to address whether the Beneficiary will be coming to the United States solely to compete in athletic competition/s, including corroboration that the supporting the prior petition was no longer valid.

In a response dated March 10, 2015, the Petitioner noted that it was attaching "an updated sponsorship agreement between and [the] Beneficiary," pursuant to the terms of which "[the] Beneficiary will train at state-of-the-art facilities to prepare for professional tennis tournaments in exchange for allowing to market [the] Beneficiary's internationally

recognized skills to train with its guests or other elite athletes." The Petitioner emphasized that the Beneficiary's training work was "incidental and related compared to his seven to eight hours of daily training in preparation for his rigorous competing schedule," that training is critical to competing, and that "[s]ponsorship that requires training with guests and other elite athletes in exchange for valuable training time and facilities complies with the incidental and related activities of [8 C.F.R. § 214.2(p)(3)]."

The Petitioner submitted the updated between and the Beneficiary dated February 15, 2015, after the date the present petition was filed on February 2, 2015. The new agreement indicated that the company wishes to sponsor and support the Beneficiary in professional competition in and tournaments across the United States and "to market the internationally recognized skills of [the Beneficiary] to train with its guests or other elite athletes at its facilities." The confirmed that the Beneficiary will "represent and train with players at the junior through advanced levels" and will earn $45,000 per year. The provided that the term of engagement is February 15, 2015, until February 14, 2020, and that the terms of the agreement supersede all prior agreements between the parties. The Petitioner also furnished a letter from Chief Executive Officer (CEO), stating that "to support [the Beneficiary's] participation in professional tennis we have agreed to grant him use of our facilities to train, in exchange for an ability to market our relationship." emphasized that "[h]aving a tennis professional at the facility is valuable to us as we can charge guests for the ability to train with [the Beneficiary] to increase their game while preparing him for competition."

The Director denied the petition on April 2, 2015, concluding that the Petitioner did not 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, seeks to have the Beneficiary provide tennis instruction, in addition to the Beneficiary's participation in athletic competition; therefore, the Beneficiary "will not be solely competing while in the United States." The Director emphasized that in the case of a P-1 athlete, the statute and regulations do not allow for "incidental" activities such as coaching.

On appeal, the Petitioner states that the above-cited definition of competition "clearly allows internationally competitive athletes to make promotional appearances for the sponsor relating to the competition" and that a "sponsor that desires an athlete [to] use its facilities for . . . training with its members is both incidental and ancillary to competition." The Petitioner asserts that the Beneficiary's duties would fall within the scope of permitted activities under the definition of "competition" in the regulations because his proposed training activities are promotional in nature. Specifically, the Beneficiary "would be utilizing his internationally-renowned abilities to train with guests in promotion of a sponsor." The Petitioner does not cite any authority for the proposition that the definition of competition set forth at 8 C.F.R. § 214.2(p)(3) includes activities such as coaching or instructing.

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 temporarily and solely 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). Upon review, the Petitioner has not established that the Beneficiary is coming to the United States solely to perform as such an athlete.

While the COMPETE Act opened the P-1 classification to 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 expressly 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.

The AAO acknowledges that the Beneficiary intends to compete in regional and national tennis competitions, as set forth in the Tournament Schedule. However, the in effect at the time the present petition was filed, submitted in support of the Beneficiary's prior petition reflected that the Beneficiary will also be a tennis instructor. Although, as noted by the Director, the updated has removed language indicating that the Beneficiary will be an instructor, the actual duties remain similar. The letter from CEO explained that the Beneficiary will be serving as a trainer for and the Daily Practice Schedule showed that the Beneficiary will spend a significant amount of each day as a trainer.

Based on the record submitted, the Director appropriately concluded that the Beneficiary would not be 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. Rather, the evidence indicates that the Beneficiary will be a tennis instructor in addition to competing in any athletic tournaments. There is no provision that would allow a foreign national to come to the United States individually as a P-1 coach 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. Further, while may promote the Beneficiary's availability as a trainer, the Beneficiary's participation in those training sessions is not itself a promotional appearance as envisioned in 8 C.F.R § 214.2(p)(3)(definition of competition). For these reasons, the appeal will be dismissed.

Finally, on appeal the Petitioner asserts that denying the petition on the basis that the Beneficiary would not be coming to the United States solely to compete, "imposes an undue burden, unfairly impeding [the] [B]eneficiary's ability to compete in the United States." The Petitioner submits additional materials from the showing the average costs for a male to participate in professional tennis competitions. However, we cannot find that the Director erred by following the regulations. *See, e.g., Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission*, 613 F.2d

1120 (C.A.D.C. 1979) (holding that an agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.,* 781 F.2d 946, (C.A.D.C. 1986) (finding that an agency must adhere to its own rules and regulations; ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned). An agency is not entitled to deference if it fails to follow its own regulations. *U.S. v. Heffner*, 420 F.2d 809, (C.A. Md. 1969) (confirming that a government agency must scrupulously observe rules or procedures which it has established and when it fails to do so its action cannot stand and courts will strike it down). Ultimately, we are bound by our regulations. For all the reasons discussed above, the Petitioner has not shown that the Beneficiary is coming to the United States solely for the purpose of competing in an athletic competition.

B. Performing Services that Require Participation of an Athlete with an International Reputation

The second issue addressed by the Director is whether the Beneficiary is coming to the United States to participate in an athletic competition which has a distinguished reputation and which requires participation of an athlete who has an international reputation, pursuant to 8 C.F.R. § 214.2(p)(4)(ii)(A). As previously discussed, the Petitioner's initial evidence included a Tournament Schedule of and competitions and confirmation of the Beneficiary's registration for the Men's Open Prize money Tournament in 2015. The Director determined that the Petitioner did not demonstrate that the Beneficiary is coming to the United States to participate in an athletic competition which has a distinguished reputation and which requires participation of an athlete who has an international reputation, noting that may select unranked players to fill unused places by random draw. The Petitioner does not challenge that conclusion on appeal. Accordingly, the Petitioner has abandoned that issue. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005); *Hristov v. Roark*, No. 09-CV-2731, 2011 WL 4711885 at *9 (E.D. N.Y. Sept. 30, 2011).

The record does not resolve how the Circuit Regulations support a finding that their open tournaments require participation of an athlete with an international reputation. The record does not contain the regulations for the other competitions on the itinerary. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Based on the foregoing, the Petitioner has not demonstrated that the specific competitions in which the Beneficiary will compete are competitions which require participation of an athlete who has an international reputation, pursuant to 8 C.F.R. § 214.2(p)(4)(ii)(A).

IV. CONCLUSION

The Petitioner did not establish that the Beneficiary would be coming to the United States solely for the purpose of performing as an athlete with respect to a specific athletic competition, pursuant to section 214(c)(4)(A)(ii)(I) of the Act. In addition, the record does not confirm that the Beneficiary is coming to the United States to participate in an athletic competition which requires participation of an athlete who has an international reputation, pursuant to 8 C.F.R. § 214.2(p)(4)(ii)(A).

Consequently, the Petitioner has not shown that the Beneficiary is eligible for classification as an internationally recognized athlete.

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, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of V-L-F-, PLLC,* ID# 15223 (AAO Feb. 4, 2016)