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Policy and Practice Changes Impact the O-1 Visa

November 07, 2018

During the Trump administration's 22 months in office, no new laws or regulations have been passed governing the O-1 nonimmigrant visa for foreign nationals with extraordinary ability in the arts, sciences, education, business, or athletics. Rather, the administration has made incremental changes to the review and standards used in the O-1 context, doing so through policy memorandum, delayed processing times, or changes in submission procedures. All of these changes are affecting the adjudication of the legally required O-1 petition forms at U.S. Citizenship and Immigration Services (USCIS) offices.

Further, additional vetting procedures at U.S. consulates overseas have caused undue delays in the issuance of the visa stamps needed to enter the United States under the O-1 visa to work or perform here. Additionally, increased scrutiny by U.S. Customs and Border Protection (USCBP) agents at airports and border crossings has made it harder for O-1 visa holders to enter the United States. O-1 visa holders must ensure they have their O-1 petition approval notices and can articulate their O-1 purpose for visiting the United States to ensure a seamless process at the time of USCBP inspection.

Who Can Qualify for the O-1?

O-1 visas are reserved for foreign nationals coming to the United States to either work in any of the fields listed above for a finite period of time, or for an event or series of events lasting no longer than three years. It is key that O-1 visa applicants articulate the field as narrowly as possible to meet the stringent criteria enunciated in the O-1 regulations. There are two O-1 visa classifications, O-1A and O-1B.

The O-1A visa is for foreign nationals with extraordinary ability in the sciences, education, business, or athletics (it does not include those in the arts, motion picture, or television industries). The O-1B visa is for foreign nationals with extraordinary ability in the arts or extraordinary achievement in the motion picture or television industry.

Both classifications require the individual to meet certain criteria, demonstrating sustained national or international acclaim (O-1A) or a record of extraordinary achievement (O-1B). USCIS rules include a list of criteria to meet the O-1 visa requirements using the "preponderance of the evidence" standard when reviewing the documentation.

How Has the O-1 Visa Petition Process Changed Under This Administration?

No More RFEs

While the application process, O-1 forms, and O-1 fees remain intact, USCIS has made subtle but impactful changes in the review of the O-1 petition. As of September 11, 2018, USCIS exercises its discretion as to whether to issue a request for further evidence (RFE) seeking clarification or additional documentation from the O-1 visa applicant, or to simply issue a denial if the O-1 criteria is not included on the initial O-1 petition (application form) submission to USCIS.

Direct Emailing of Negative Consultations

Beginning September 14, 2018, USCIS decided to accept copies of negative consultation letters directly from labor unions relating to current *or* future O-1 nonimmigrant visa petitions. A consultation letter from a U.S. peer group, labor organization, and/or management organization is generally required for petitions in the O-1 visa classification. Typically, the O-1 petition submission will include the consultation letter as part of the documentation packet submitted to USCIS offices for review.

Now, the labor union can address the negative consultation directly with USCIS without first providing it to the O-1 applicant to rebut. This reflects an effort to curb fraud suspected by O-1 applicants who may "edit" the negative consultation prior to the O-1 submission. USCIS allows labor unions to submit the negative consultation directly to a USCIS email address dedicated to that purpose.

Increased Premium Processing Fee

Effective October 1, 2018, USCIS increased the premium processing fee from $1,225 to $1,410, a 14.92 percent increase, and the first regarding this service since 2010. Premium processing, an optional service, can be paid by either the O-1 employer or agent, or the O-1 employee. The USCIS system allows for petitioners (the employers) to request 15-day processing versus regular processing, which can take as long as four or five months. This additional, optional fee is on top of the base filing fee and any other applicable fees, which cannot be waived.

Implementation of New Policy Memorandum on Notices to Appear

As of October 1, 2018, USCIS began implementing the June 28, 2018 Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens Policy Memorandum (PM). USCIS will incrementally implement this PM, and only refer denied status-impacting applications, such as applications to extend or change status, to the U.S. Customs and Immigration Enforcement (ICE) arm of the U.S. Department of Homeland Security (DHS) to issue NTAs to appear in immigration court. USCIS will send denial letters for status-impacting applications that ensure benefit seekers are provided adequate notice when an application for a benefit is denied. If applicants are no longer in a period of authorized stay, and do not depart the United States, USCIS may issue an NTA.

USCIS will provide details on how applicants can review information regarding their period of authorized stay, check travel compliance, or validate departure from the United States. USCIS will not implement this PM for O-1 petitions at this time. However, it is critical for both employers and employees to ensure they have strong and probative evidence of O-1 criteria at the time of the O-1 submission. This is especially critical given that USCIS may no longer issue RFEs to ensure that the O-1 petition is approvable upon USCIS' review so as to not risk a denial, and subsequently, an NTA.

USCIS to Apply Same Scrutiny to New and Extension of O-1 Petitions

As of October 23, 2017, USCIS no longer gives deference to prior O-1 petitions when adjudicating O-1 extensions and must apply the same level of scrutiny to an O-1 petition extension as it would to a brand new O-1 petition. The PM guidance provides that this same level of scrutiny will be applied even where the petitioner, beneficiary, and underlying facts are unchanged from a previously approved petition. While adjudicators may ultimately reach the same conclusion as in a prior decision, they are *not* compelled to do so as a default starting point. The burden of proof to establish eligibility for an immigration benefit always lies with the petitioner.

USCIS Interprets O-1 Criteria and Regulations More Literally

USCIS is reading O-1 criteria far more strictly and disallowing evidence often used in the past. For example, one criterion requires "published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field . . .." In the past, USCIS would accept media reports about the applicant's work, even if the applicant was not directly named. Now, USCIS requires the media report to discuss the applicant directly, *not* just his or her work.

Another example relates to the criterion, "authorship of *scholarly* articles in professional journals or other major media in the field. . .." (emphasis added). USCIS will now deem articles published in general media, rather than in media for the specific field, too broad and *not* scholarly. A recent decision illustrates this point. A soccer coach's teaching manual was considered an "athletic" contribution and failed to meet the criterion for original "scientific, scholarly, or business-related contributions."

USCIS is also requiring more detailed employment agreements, and reviewing them more carefully. High salary is one criterion used by USCIS to indicate extraordinary ability. Previously, USCIS readily accepted Bureau of Labor Statistics (BLS) data to demonstrate "average" and "high" salaries in an occupation. Today, USCIS views BLS data as too generalized and wants field-specific comparisons. USCIS regularly accepted employer or agent statements regarding compensation packages, including commissions, housing, and bonuses. However, recently, USCIS has required specific corroborating evidence to demonstrate both the value of the remuneration and that the specific type of non-salary remuneration is "high" in comparison.

Last, USCIS does allow "comparable evidence" to support O-1 petitions in cases where the occupations do not measure achievement/distinction in the manner USCIS O-1 criteria dictates. Unfortunately, USCIS is far more stringent on this standard. First, USCIS requires the applicant to address every single criterion and more thoroughly explain why each does not apply to the occupation. Second, USCIS now requires corroboration, negating testimonials and rejecting the explanations of demonstrated experts in the field. Finally, USCIS will take the time to surf the internet and use generalized terminology to conclude certain criteria could apply to the occupation.

Takeaways

- When preparing and submitting an O-1 visa case, it is essential to ensure the evidence squarely supports every word listed in the criteria, and to explain how the evidence meets the criteria (e.g., if the criteria is not worded for athletes, explain why the documentation submitted is acceptable to the athletic field).
- It is prudent to include any actual employment agreement and to ensure that the employer reviews such agreements carefully, so they are thoroughly consistent with all details and supporting documentation included in the O-1 visa petition. Discrepancies can arise when the visa petition provides more detail than the employment agreement.
- When preparing and submitting an O-1 visa petition, research the field on the internet to be able to rebut any internet research findings USCIS might use to deny the O-1 petition.
- Consult with an immigration attorney experienced in the preparation and submission of O-1 petitions prior to filing the petition.

Conclusion

Approval of O-1 petitions has become far more difficult under the Trump administration. Given the new USCIS policy of denying petitions where the criterion is not met without an RFE, it is critical to prepare a well-researched O-1 petition with a clear and concise discussion of the criteria and attached corroborating documentation for each criterion. Leave no questions unanswered and submit documentation that specifically addresses the criteria.

Related Practices

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