THE O TO EB-1 TRANSITION: A LEAP OF FAITH

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One of the challenges of an O visa practice is identifying when an O-1 nonimmigrant worker [INA §101(a)(15)(O)(i)] has reached a level in his or her field that gives rise to an EB-1 immigrant petition, the approval which would classify the individual for an immigrant visa [INA §203(b)(1)(A)]. This is a desired outcome for myriad reasons, not the least of which is the elimination of any future need to extend visa status, the need to renew a visa, the ability to confer permanent residence on spouse and children, and the freedom to work independently rather than being tied to an employer or agent sponsor.

With the desirability of "upgrading" one's O-1 status to permanent residence, a client will often express interest in filing an EB-1 petition. The client, without the legal training or experience filing either type of petition, can be excused for viewing the transition as a seamless one. After all, both expressly require "extraordinary ability in the sciences, arts, education, business or athletics which has been demonstrated by sustained national or international acclaim." [*Compare* INA §101(a)(15)(o) with INA §203(b)(1)(A)(i)]. But the seasoned practitioner must be aware of the idiosyncrasies of and differences between O-1 and EB-1 status and the heightened evidentiary standards of EB-1 classification. Indeed, the illusion that the same level of "extraordinary ability" or "sustained national or international acclaim" is required for the O-1 or EB-1 is simply not the case. This becomes crystal clear when one considers carefully the regulations and, more significantly, USCIS interpretation and adjudication policies.

This article discusses the distinction between the successful O-1 nonimmigrant visa petition and its counterpart, the successful EB-1 immigrant visa petition. To provide a framework, we use the case of O-1A athletes. We use the field of athletics, in part, because the relevant statutory and regulatory standards are nearly identical, containing what many believe to be only semantic differences. For example, the EB-1 standard at INA §201(b)(1)(A)(iii) differs only from the O-1 standard at INA §101(a)(15)(O)(i) by the inclusion of the requirement that the EB-1 "substantially benefit prospectively the United States." As many practitioner well-know, the fact that the individual meets EB-1 criteria in and of itself demonstrates that the athlete (or any EB-1 beneficiary) will benefit the U.S. [*See* Letter from E. Skerret to K. Steinberg, May 13,1995, *reproduced in Interpreter Releases* at 445–46 (Mar. 27, 1995)] In the case of an EB-1 athlete, "substantially benefit prospectively" is simply addressed, most often, with a single line about the value of the individual's sport to domestic

culture, and is rarely challenged by the adjudicator. But do not be misled or mislead your client by the seemingly insignificant difference in the O-1 criteria and the EB-1 criteria.

Practice Pointer: Do not expect that "extraordinary" for O visa purposes equals "extraordinary" for attaining permanent residence. Even more importantly, make sure your client understands that from the start while you work towards bridging the gulf and identifying when the client has reached the "next level."

DISCUSSION OF EVIDENTIARY REQUIREMENTS IN THE ADJUDICATOR'S FIELD MANUAL ("AFM")

The first place a practitioner should look to determine whether an O-1 athlete has reached the level necessary for EB-1 is the USCIS *Adjudicator's Field Manual*. [http://www.uscis.gov]. A quick look at the O-1 visa adjudication guidelines [AFM Chapter 33.4] lays out the evidentiary standards in little more specificity than the regulation and without significant difference from either the O or EB-1 regs. But the description is brief, at best. The entire section on documentary requirements for a given category contains less than 300 words. Compare this to the EB-1 (or "E11" as referenced to in the AFM) section; the evidentiary discussion alone surpasses 4,400 words, including an entire, albeit brief, section on how an O-1 nonimmigrant does not automatically qualify for EB-1 approval.

Most illustrative, however, is how the AFM treats the enumerated regulatory criteria for both O-1 and EB-1. All eight items on the O-1 list are explicitly contained on the EB-1 list of 10 criteria. The two that are not on the O-1 list are inapplicable to athletes. However, whereas the AFM simply regurgitates the O-1 enumerated criteria, providing very little guidance to the adjudicator, the AFM discusses extensively the EB-1 criteria with qualitative analysis that practically demanding the adjudicator to evaluate all evidence with a critical, skeptical eye.

Let us consider the criterion on professional memberships. In the case of a Major League Baseball player, mere membership in the Major League Baseball Players' Association (MLBPA), a 1200 person organization consisting of the 40-man rosters of the 30 Major League Baseball clubs, has been used to satisfy the O-1 criterion found at 8 CFR §214.2(o)(3)(iii)(B)(2). This criterion calls for membership in associations "which require outstanding achievements of their members." [8 CFR §214(o)(3)(iii)(B)(2)]. After all, as a well prepared petition might outline, the United States alone has 12 million registered baseball players, indicating the foreign national has reached a level beyond 1/100th of one percent of American participants, easily satisfying the requirement that the person is "one of the small percentage who have arisen to the very top of the field of endeavor." [8 CFR §214(o)(3)(ii)].

Yet, membership in that same organization to satisfy the identically worded EB-1 criterion has been rejected routinely by USCIS. In defending such a rejection, the adjudicator will point to the AFM guidance that dismisses as unacceptable those association memberships that are "compulsory or otherwise, for employment in certain occupations, such as union membership." [AFM §22.2(i)(1)(a)]. It is without dispute that, as part of the collectively bargained agreement, contracted Major League baseball players of all ability levels must be members of the MLBPA. As a result, USCIS is on seemingly solid ground rejecting membership in the MLBPA as meeting the criterion requiring membership in an association "which require[s] outstanding achievement of their members." [8 CFR §204.5(h)(3)(ii)].

This example demonstrates a common pitfall in the O-1 to EB-1 transition. For an athlete, as with many other O-1 nonimmigrants, the possibilities of falling into such a trap are nearly endless. Consider the O-1 criterion on "lesser national and internationally–recognized awards" in the arts [8 CFR §214(o)(3)(iv)(A)], which requires only a *nomination*. Compare this to the EB-1 criterion [8 CFR §204.5(h)(3)(i)], which requires *receipt* of such an award. A thorough read and analysis of the AFM discussion of the EB-1 evidentiary criteria can guide the practitioner in presenting evidence that will provide the greatest chance at success.

THE EFFECT OF *KAZARIAN*

When O-1 practitioners finally thought that they had a firm grasp on the process of transitioning to a successful EB-1, along came the USCIS response to the Ninth Circuit decision in *Kazarian v. USCIS*. [*Kazarian* v. *USCIS*, 596 F.3d 1115 (9th Cir. 2010)] The *Kazarian* decision, which purported to open the door to EB-1

petitioners by curtailing some of the evidentiary scrutiny the USCIS had undertaken, was turned on its head by the subsequent USCIS policy memorandum, demanding adjudicators undertake a "final merits determination" after determining that the petitioner has satisfied at least three of the evidentiary criteria. ["Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the *Adjudicator's Field Manual* (*AFM*) Chapter 22.2, *AFM* Update AD11-14].

In its policy memorandum, USCIS engaged in precisely the type of behavior the Ninth Circuit sought to prevent when it chastised the agency for creating extra-regulatory evidentiary requirements. [*Kazarian*, 596 F.3d 1115]. The USCIS creation of its "final merits determination," a second test of "how extraordinary is extraordinary," mooted the easier path to EB-1 approval created by *Kazarian* and dashed the hopes of petitioners and practitioners for consistency in adjudication. Instead, USCIS replaced the standard with a haphazard "you know it when you see it" standard understood only by the adjudicator on the day of adjudication. In a recent Stakeholders Meeting, AILA committee members discussed with USCIS at length the viability, purpose, and potential regulatory violation of a subsequent "merits determination."

While no such express final merits determination exists for O-1 petitions, many O practitioners have raised concerns about its inevitability. This concern arises out of language in the AFM demanding that the adjudicator conduct an analysis of whether the "total evidence submitted establishes that the alien of extraordinary ability has sustained national or international acclaim and recognition in his field of endeavor." [AFM 33.4(d)]. For now, however, a full blown final merits determination such as is now required in EB-1 adjudications has not crossed into O-1 adjudications, permitting O practitioners to continue relying on satisfaction of three regulatory criteria.

The USCIS *Kazarian* policy memorandum, however, has significantly raised the bar. An athlete, for example, must now prove that the documentation demonstrates by a preponderance of the evidence: *(i)* a level of expertise indicating that the individual is "one of that small percentage who have risen to the very top of the field of endeavor" [8 CFR §204.5(h)(2)] and *(ii)* sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise. [8 CFR §204.5(h)(3)]. Presumably, practitioners representing O-1 athletes seeking an EB-1 classification might now need to present independent evidence that demonstrates "top of the field" and "national or international acclaim," rather than simply relying on the athlete having met at least three of the enumerated criteria.

Practice Pointer: The continued challenge for the practitioner is to explain to petitioners the new and inconsistent EB-1 adjudication standards. Practitioners should point to the report of the USCIS Ombudsman January Contreras. [Report of Citizenship and Immigration Services Ombudsman, December 29, 2011, Recommendations to Improve the Quality in Extraordinary Ability and Other Employment-Based Adjudications]

In its December 2011 report, the Ombudsman acknowledged that O-1 adjudications have maintained a serviceable level of consistency, but EB-1 adjudications have not. The Ombudsman made several recommendations, one of which was for USCIS to provide public guidance on the final merits determination. Surely, the report of its own Ombudsman should prompt USCIS to strive for better and more consistency, especially in cases involving the transition from O-1 to EB-1.

CONCLUSION

"Extraordinary ability" for O-1 eligibility might not necessarily translate into "extraordinary ability" for EB-1 classification. It is essential to counsel the aspiring EB-1 petitioner about the differences in required evidence, the activities within their profession that might satisfy a heightened EB-1 evidentiary requirement and/or a final merits determination, and the paramount importance of timing an EB-1 petition to capture the right combination of "being at the top of one's profession" while also "sustaining national or international acclaim." It is not an easy endeavor and, at the risk of taking a jab at USCIS, one does not always know it when one sees it. Until we have better guidance from USCIS or an amendment to or abandonment of recent USCIS policy statements, the O-1 to EB-1 transition will still require some form of leap of faith—and for the O-1 athlete, that might require an extra long vault pole.