U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-C-B-C- LLC

DATE: AUG. 14, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a major league baseball club, seeks to classify the Beneficiary as an individual of exceptional ability in the sciences, arts, or business, or as a member of the professions holding an advanced degree, under the second-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This second preference classification makes immigrant visas available to foreign nationals with a degree of expertise significantly above that normally encountered in the sciences, arts, or business or an academic degree above that of baccalaureate.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that the position of baseball coach is eligible under the requested classification, and that the Beneficiary qualifies as an individual of exceptional ability.

On appeal, the Petitioner submits additional evidence and asserts that, as a baseball coach, the Beneficiary is eligible under the requested classification, and that the evidence submitted establishes the Beneficiary's qualification as an individual of exceptional ability.

Upon *de novo* review, we will remand the matter to the Director for further action and consideration.

I. LAW

Second preference immigrant visas are available for qualified individuals who are advanced-degree professionals or who, because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2) of the Act. Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2).

Every petition under this classification must include one of the following three documents: (1) an individual labor certification from the Department of Labor, (2) an application for Schedule A designation, or (3) documentation to establish that the beneficiary qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. 8 C.F.R. § 204.5(k)(4)(i).

II. ANALYSIS

The Petitioner indicated on Form ETA 750, Application for Alien Employment Certification, that it seeks to employ the Beneficiary as a major league assistant bullpen coach at an annual wage of $82,000. Parts 14 and 15 of the Form 750 indicate that the position requires a minimum of 10 years as a professional baseball coach and/or player.

In her decision, the Director refers to the special handling procedures for certain professional athletes under 20 C.F.R. § 656.40(f), and notes that under those procedures, the Department of Labor (DOL) accepts applications for permanent labor certification on Form 750.[1] That section defines "professional athlete" as follows:

> (f) *Professional athletes.* In computing the prevailing wage for a professional athlete (defined in Section 212(a)(5)(A)(iii)(II) of the Act) when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage (see Section 212(p)(2) of the Act). INA Section 212(a)(5)(A)(iii)(II), 8 U.S.C. 1182(a)(5)(A)(iii)(II) (1999), defines "professional athlete" as an individual who is employed as an athlete by –
>
> > (1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or
> >
> > (2) Any minor league team that is affiliated with such an association.

The Director also refers to policy guidance at section 22.2(j)(3) of the USCIS Adjudicator's Field Manual (AFM), which describes the DOL's special handling program for professional athletes, and concludes that since both the DOL's regulations and the AFM refer specifically to professional athletes, not coaches, the petition must be denied.

However, the DOL and USCIS have different roles in the employment-based immigrant visa process. The DOL certified the labor certification application in this matter, and its role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

[1] See DOL's 2005 PERM regulations, 69 FR 77328 (December 27, 2004) under which the ETA Form 9089 replaced the Form ETA 750 for the majority of permanent labor certification applications filed with DOL.

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.40(f) concerns determination of the prevailing wage for a professional athlete, a function which clearly falls under the DOL's purview as set forth above. Therefore, the DOL's decision to apply its own special handling procedures for athletes to a labor certification for a professional coach is separate from USCIS's role in determining the Petitioner's and Beneficiary's qualifications under the requested immigrant visa classification, and should not have been a factor in the Director's decision.

Although the Director states in her decision that "USCIS will not argue the regulations and determination of DOL," and that based upon USCIS regulations, a coach is not recognized as an athlete, the regulation at 8 C.F.R. § 204.5(k)(2) makes no such distinction. A beneficiary may qualify as an alien of exceptional ability in the sciences, arts or business, and as noted by the Petitioner on appeal, USCIS has long considered beneficiaries in the field of athletics, including athletes and coaches, to be eligible under this classification.[2] Accordingly, we withdraw the Director's decision on that ground and find that, as a baseball coach in the field of athletics, the Beneficiary is eligible for classification as an alien of exceptional ability.

As a second ground for denial of the petition, the Director stated that the Petitioner did not claim, or provide evidence to support, the Beneficiary's qualification as an individual of exceptional ability under any of the six evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(i)(A)-(F). However, in the evidence originally submitted with the petition, the Petitioner included an index specifying under which criteria the Beneficiary claimed qualification, and the evidence included to support those claims. Specifically, the Petitioner submitted evidence relating to the Beneficiary's ten years of full-time experience as a baseball coach, his membership in professional associations, and evidence of recognition for achievements and significant contributions to professional baseball. Since the Director did not consider this evidence in her decision, we will remand the matter for further action and consideration. When reviewing this evidence, the Director should particularly consider whether the evidence of the Beneficiary's membership in the [redacted] establishes that it is a qualifying professional association or rather a charitable organization, and request additional information if appropriate. If the Beneficiary meets the requisite three of the six evidentiary criteria, the Director should conduct a final merits analysis to determine whether the evidence establishes that the Beneficiary has a degree of expertise significantly above that ordinarily encountered in professional baseball.

---

[2] See *Matter of Masters*, 13 I&N Dec. 125 (D.D. 1969), which held that an alien with exceptional ability as an athlete could, if otherwise qualified, qualify as a person of exceptional ability in the arts.

III. CONCLUSION

The Petitioner submitted a valid labor certification as required under 8 C.F.R. § 204.5(k)(4)(i), and established that the Beneficiary is eligible for classification as an individual of exceptional ability as a professional baseball coach. However, we are remanding the petition for the Director to consider whether the evidence demonstrates the Beneficiary's qualification as an individual of exceptional ability.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of C-C-B-C- LLC*, ID# 1443645 (AAO Aug. 14, 2018)