U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-B- LLC

DATE: SEPT. 21, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an operator of a minor-league baseball team, seeks to employ the Beneficiary as a professional baseball player. It requests his classification under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status in a job requiring at least two years of training or experience.

The Acting Director of the Nebraska Service Center denied the petition. The Director concluded that the petition lacks an accompanying certification from the U.S. Department of Labor (DOL) on the proper application form.

On appeal, the Petitioner contends that, although the DOL required it to file the labor certification application on a different form than used for most occupations, the labor certification is valid.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, a prospective employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. VALIDITY OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for a skilled worker must include a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i). Here, the petition includes a Form ETA 750, Application for Alien Employment Certification, for the offered position of professional baseball player, certified on October 4, 2017.[1] The labor certification states that the position requires at least five years of experience in the job offered and "exceptional athletic abilities in the sport of baseball such that the individual can perform and compete at a professional level."

Citing 8 C.F.R. § 204.5(l)(3)(i), the Director concluded that the petition required a labor certification on ETA Form 9089, Application for Permanent Employment Certification, not on Form ETA 750. The Director found that a petition for a foreign national with "exceptional ability in the sciences, arts, or business" under section 203(b)(2)(A) of the Act may include a labor certification on Form ETA 750. But the Director found that a skilled-worker petition requires a labor certification on an ETA Form 9089.

As the Petitioner argues, however, 8 C.F.R. § 204.5(l)(3)(i) does not require a labor certification on ETA Form 9089. Rather, the regulation indicates that a skilled-worker petition must include "an individual labor certification from the Department of Labor." Thus, contrary to the Director's finding, the regulation does not specify that a skilled-worker petition include a labor certification on ETA Form 9089.

For decades, the DOL has adjudicated labor certification applications for professional athletes under special procedures using Forms ETA 750. The DOL introduced ETA Form 9089 when it revamped labor certification procedures under the Program Electronic Review Management (PERM) in 2005. The PERM rules, however, did not modify the labor certification procedures for professional athletes. Upon issuing the final rules, the DOL stated: "Employers filing applications on behalf of aliens to be employed in professional team sports will continue to use the existing special procedures and will continue to file their applications using the Application for Alien Employment Certification (ETA 750)." Final PERM Rules, 69 Fed. Reg. 77326, 77328 (Dec. 27, 2004).

Also, contrary to the Director's findings, the appropriate labor certification application form does not depend on the requested immigrant classification. Rather, the nature of the offered position determines the appropriate form. The DOL requires labor certification applications for professional athletes on Forms ETA 750. The record therefore establishes the validity of this petition's accompanying labor certification on Form ETA 750. Pursuant to 8 C.F.R. § 204.5(l)(3)(i), the petition includes a valid, individual labor certification. We will therefore withdraw the Director's contrary decision.

[1] The record identifies the Beneficiary's specific position as shortstop.

III. ABILITY TO PAY THE PROFFERED WAGE

The appeal overcomes the denial ground, but the petition is not approvable. Although unaddressed by the Director, the record does not establish the Petitioner's ability to pay the proffered wage.

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

Here, the labor certification states the proffered wage of the offered position of professional baseball player as $1,800 a month. The petition's priority date is September 1, 2017, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The Petitioner submitted a copy of its federal income tax return for 2016. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacks required evidence of the Petitioner's ability to pay in 2017, the year of the petition's priority date. The Petitioner therefore has not demonstrated its ability to pay the proffered wage from the petition's priority date onward.

The Director did not notify the Petitioner of this evidentiary defect. We will therefore remand this matter for further proceedings. On remand, the Director should notify the Petitioner that it must submit copies of an annual report, federal income tax returns, or audited financial statements for 2017. The Petitioner may also submit additional evidence of its ability to pay, including documentation of any payments it made to the Beneficiary in 2017 and in support of the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

IV. CONCLUSION

The petition includes a valid labor certification for the offered position of professional baseball player. The Petitioner, however, did not demonstrate its ability to pay the proffered wage. The Director should provide the Petitioner with a reasonable period in which to respond to this issue. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of F-B- LLC*, ID# 1797020 (AAO Sept. 21, 2018)