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| **From:** | Amy Maldonado |
| **To:** | ETA, OFLC Forms - ETA |
| **Cc:** | Pasternak, Brian - ETA; Jeannette Mirabal; Donald Mooers; Robert Charles Hill |
| **Subject:** | Response to Requests for Public Comment, OMB Control Numbers 1205-0451 and 1205-0515. |
| **Date:** | Friday, September 18, 2020 3:17:39 PM |
| **Attachments:** | Final DOL ETA-9089 Comment.pdf<br>Matter of CCBC.pdf |

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Good afternoon,

Attached please find:

(1) A letter in PDF format from immigration attorneys Robert Charles Hill, Jeannette Mirabal, Donald Mooers and me submitted in response to the requests for public comment OMB Control Numbers 1205-0451 and 1205-0515; and
(2) A decision in PDF format by the USCIS Administrative Appeals Office relevant to consideration of our response.

We attempted to fax this to your attention, but it appears that the transmission was interrupted. Thank you for attention to this matter.

Thank you,

Amy Maldonado

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September 18, 2020

**VIA EMAIL AND FACSIMILE (202) 513-7395**

U.S. Department of Labor
Employment and Training Administration
Attn: Brian Pasternak
Director of Program Services
Office of Foreign Labor Certification
200 Constitution Avenue NW
Washington, DC 20210

**RE: Response to Request for Public Comment**
**OMB Control Numbers 1205-0515 and 1205-0451**

Dear Mr. Pasternak:

This letter is submitted in response to the Department of Labor's (DOL) request for public comment regarding proposed changes to the Permanent (PERM) Employment Certification Program, specifically in regard to its proposal to revise the ETA-9089 form to allow employers seeking to employ professional athletes or coaches to use the proposed form and discontinue the collection of information on Forms ETA-750A, Application for Alien Employment Certification—Offer of Employment and ETA-750B, Application for Alien Employment Certification—Statement of Qualifications of Alien.

The undersigned immigration attorneys have all filed labor certifications on behalf of Professional sports teams under the DOL's rules and procedures for Special Handling for Professional Athletes. Our concerns in light of these proposed changes are outlined as follows:

## I. Introduction

Professional sports are an essential industry in the United States. Jointly, Major League Baseball, Major League Soccer, the National Hockey League, the National Basketball Association, and the National Football League create a multitude of jobs, generate billions of dollars in revenue, offer a unifying entertainment platform for millions of Americans and represent the highest level of sports enjoyed by fans in the United States. Players and coaches serve as positive role models in communities throughout our nation. Indeed, professional players and coaches are integral to the industry; without exceptional players and the coaches that train, guide and prepare players for competition, there would be no sports industry.

Professional sports teams file approximately 100 cases annually under DOL's Special Handling procedures for professional athletes and coaches. Under the current process, as noted in the request for comment, Form ETA 750 Parts A and B are filed with supporting documentation. The Prevailing Wage is determined by 20 CFR §655.10 (e) which states, "when the job opportunity is covered by a professional sports league rules and regulations, the wage set forth in those rules

and regulations is considered the prevailing wage (see sec. 212(p)(2) of the INA)." It is not necessary to obtain a formal Prevailing wage on Form 9141. The paper filing is submitted to an Athlete Special Handling Certifying Officer at the Atlanta Processing Center and certification is expeditious. Certifying officers graciously communicate via email and overall the process reflects the special place that professional sports holds in our great nation.

We recognize that DOL plans to reorganize and eliminate paper employment certifications. After careful review of DOL's proposed changes we have identified issues related to Special Handling for Professional Athletes and submit these for your consideration:

## II. Issues of Concern

A. Special Handling for Professional Athletes should not be subject to a Prevailing Wage Determination on Form 9141

The regulation at 20 CFR §655.10 (e) states, "when the job opportunity is covered by a professional sports league rules and regulations, the wage set forth in those rules and regulations is considered the prevailing wage (see sec. 212(p)(2) of the INA)." Essentially, the wage for a professional athlete or coach is dictated by a paper contract submitted to DOL. The paper contract is submitted as part of a packet sent to the Athlete Special Handling Certifying Officers at the Atlanta Processing Center.

DOL's proposed changes to PERM seem to suggest that professional sports teams will now be required to obtain a Prevailing Wage Determination (PWD) from the National Prevailing Wage Center (NPWC) on Form 9141 via the DOL FLAG system. Wages for players and coaches are written on Form ETA 750 Part A verbatim as they appear in the contract. Often the description is long, the wage can vary according to the level of play, and a multitude of other pertinent information is included in the ETA 750 Part A. While a sports contract may be complex, DOL's Athlete Special Handling Certifying Officers at the Atlanta Processing Center have the necessary training and knowledge to spot issues, understand the language, and correctly certify the matter.

We are concerned that NPWC will not be able to process Form 9141 correctly and expeditiously for professional sports teams. We urge DOL to maintain adjudication of the PWD in the hands of the knowledgeable and trained Athlete Special Handling Certifying Officers at the Atlanta Processing Center.

Current NPWC published processing times for PERM labor certification PWDs are approximately five (5) months. Assuming professional sports teams are required to obtain a Form 9141 PWD, they will likely encounter unnecessary errors and delays. The Professional sports industry moves quickly, athletes are often traded to other teams, sports careers are glorious but brief. For decades, Special Handling for Professional Athletes has notoriously been a fast and friendly process. While certain changes may be beneficial and indeed, welcome, we urge DOL to be cognizant of the "need for speed" where it concerns Professional athletes.

For these reasons, we suggest that DOL carve out an exception and not require a Form 9141 PWD for professional sports teams. In the alternative, we urge DOL to modify Form 9141 processing to allow professional sports teams a quick and precise adjudication of their PWDs. For example, a designated code for Professional athletes and coaches may be entered in Form 9089, by-passing the need to obtain an actual Form 9141 PWD. The completed Form ETA 9089 can be submitted electronically, along with electronically filed supporting documents. With an electronic copy of the contract in hand, the Athlete Special Handling Certifying Officer at the Atlanta Processing Center can concurrently approve the PWD and ETA 9089, thereby retaining the expeditious nature of the process, avoiding errors and delays at NPWC, and maintaining the integrity DOL's evolution towards a paperless system.

B. Professional sports teams may seek Special Handling Labor Certifications for both athletes and coaches.

We applaud DOL's July 2020 Supporting Statement Application for Permanent Employment Certification OMB Control Number 1205-0451 (Supporting Statement), wherein DOL states, "[r]evision to the current form to allow employers seeking to employ professional athletes or coaches…" For years, DOL has certified both players and coaches under the program known as Special Handling for Professional Athletes. Contrary to DOL, United States Citizenship and Immigration Services (USCIS) has sometimes arbitrarily taken the indefensible position that DOL's Special Handling regulations do not encompass professional coaches. For example, the USCIS Administrative Appeals Office (AAO) issued a non-precedential decision *Matter of C-C-B-C-LLC*, ID# 1443645 (AAO Aug. 14, 2018) which overturned the denial of a Special Handling labor certification-based I-140, Immigrant Petition for Alien Worker filed by a Major League Baseball club on behalf of a coach. The AAO rightly recognized that although USCIS guidance and regulations refer only to athletes, the Department of Labor has long approved Special Handling labor certifications for professional sports *coaches*. A copy of the decision is attached for your review.

DOL's Supporting Statement provides much needed written clarification that DOL's Special Handling labor certifications encompass coaches as well as players. We suggest that DOL provide additional clarity for USCIS adjudicators by having Section H, item 1e. read as follows: "None of the above apply because this application is for a **professional athlete or coach."**

C. Some Form ETA-9089 attestations are not applicable to Special Handling Labor Certifications for athletes and coaches.

The proposed Form ETA-9089 requires employers check "yes" or "no" to the statement "I certify under penalty of perjury my knowledge of and compliance with the ten (10) Labor Condition Statements above covering the conditions of employment for the job opportunity and foreign worker covered by this application. 20 CFR 656.10(c)." *See* Draft ETA-9089, page 6, Section I "Employer Labor Condition Statements - *All must complete this section*."

Because professional sports teams are exempt from the normal PERM recruitment process, sports team employers should not be subject to the blank attestation on Form ETA 9089. Clearly,

in the particular case of professional athletes exceptional athletic skills and rigorous try-outs rule the day; as a result "the job opportunity has [not] been and is [not] clearly open to any U.S. worker" and "U.S. workers who tried-out for the job opportunity [may have been] rejected for lawful job-related reasons." Under Special Handling procedures for professional athletes and coaches, the professional sports team employers do not advertise, U.S. athletes openly compete for positions through try-outs and only the best athletes in the world occupy coveted roster positions. DOL recognizes that professional sports recruitment is driven by athletic ability–innate God-given talent that cannot be quantified in a resume.

Further, the veracity of an application submitted by a Professional sports team is easily corroborated via submitted news clippings and/or an internet search. This significantly reduces the likelihood of fraud. Most importantly, the attestations on Form 9089 would essentially disqualify any filing under Special Handling procedures. No Professional team sport can attest "yes" to all ten (10) attestations as written. Therefore, we suggest that DOL exempt Professional team sports from this requirement.

D. Professional athlete and coach cases should be reviewed exclusively by Athlete Special Handling Certifying Officers at the Atlanta Processing Center

We highly commend the Athlete Special Handling Certifying Officers at the Atlanta Processing Center for their professionalism, knowledge of the process, expeditious handling of cases, and exemplary manners. We urge DOL to retain these highly trained and experienced officers and implement a process such that the approximately 100 Special Handling for Professional Athlete cases filed annually be assigned exclusively to this team. Given that Professional sports team cases will be filed electronically, we urge DOL to devise a mechanism by which the electronic system diverts these cases only to Athlete Special Handling Certifying Officers.

E. Special Handling Professional Athlete cases require submission of substantial supporting documentation

Special Handling for Professional Athletes cases are supported by documents including: 1) a complete copy of the employment contract; 2) a No-Objection letter from the union, if applicable; 3) news clippings which confirm the career accomplishments of the player or coach; 4) evidence of awards or membership, if applicable; 5) the Off-season Letter of Intent to work 10 hours per week; and, 6) immigration documents such as the visa, I-94, and passport. We suggest that DOL develop a mechanism that allows the electronic submission of voluminous amounts of supporting documentation.

## III. Proposed Solutions

We recommend that the following changes be made to the ETA-9089 Form, Instructions and/or process.

A. Changes to the Form

One way to avoid many of the issues outlined above would be to move Section H, b. "Occupation Type" to the very beginning of the ETA-9089 Form as a standalone section. If "1e. None of the above apply because this application is for a **professional athlete or coach**" is selected, there could be a "yes" or "no" sub-question with regard to whether or not the wage is determined by the team's professional sports league rules and regulations. If the answer is "yes" then the Prevailing Wage section could be greyed out/not required. If the answer is "no" then the Prevailing Wage section would remain available for completion. Further, if "1e." were selected, all of the inapplicable "Additional Job Opportunity Information and Other Requirements," Recruitment and employer attestations could be greyed out. In the alternative, the subset of the attestations that apply to Special Handling labor certifications for professional athletes and coaches could appear, avoiding the requirement that professional sports teams attest to inapplicable statements.

B. Changes to the Instructions

We would recommend that at the top of page 9 of the instructions, "1e. Mark this box if this job opportunity is for a professional athlete" should be changed to "1e. Mark this box if this job opportunity is for a professional athlete or coach."

C. Changes to the Process

In the event that DOL does require professional sports leagues and teams to obtain a PWD from the NPWC and utilize electronic filing of the ETA-9089, we would recommend the following:

- Create a specialized PWD process for professional athletes and coaches similar to the Labor Condition Application (7-10 day turnaround).
- Channel adjudication of the electronic ETA-9089 Special Handling labor certifications for professional athletes and coaches to a specialized adjudication unit with experience and training on these petitions, and handle them as special labor certifications for processing in an expedited manner.
- Create a way within the electronic ETA-9089 submission process to upload supporting documentation (preferred); or alternatively, create an e-mail box for submission of supporting documentation via e-mail to the specialized adjudication unit within five (5) business days of filing the electronic ETA-9089.

## IV. Closing

In summary, we submit the above comments in response to the Department of Labor's (DOL) proposed changes to the Permanent (PERM) Employment Certification Program. While we are mindful that DOL's evolution toward a paperless process is positive, we hope to protect the streamlined nature of cases filed on behalf of gifted professional athletes and coaches. This program was crafted and implemented by DOL decades ago because DOL recognizes the immense value of professional sports in the United States. It is our hope that DOL consider and incorporate

our concerns into the final drafting of the revised Form ETA-9089 and Instructions. Should you have questions or wish to discuss further please feel free to reach out.

Thank you for your time, consideration, and attention to this matter.

Sincerely,

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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)