



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF U- INC.

DATE: MAR. 22, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a cosmetics retailer, seeks classification for the Beneficiary as an individual of exceptional ability in business. *See* Immigration and Nationality Act (the Act) § 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.

The Director, Nebraska Service Center, denied the petition. The Director concluded that the offered position did not require a member of the professions holding an advanced degree.

The matter is now before us on appeal. In its appeal, the Petitioner notes that it requested classification of the Beneficiary as an individual of exceptional ability, not as a member of the professions holding an advanced degree.

Upon *de novo review*, we will withdraw the Director's decision and remand the matter to the Director for further proceedings.

I. LAW

Section 203(b)(2) of the Act provides classification to qualified individuals who are members of the professions holding advanced degrees or their equivalent, 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, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States. The implementing regulation at 8 C.F.R. § 204.5(k)(2) states: "Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business."

In explaining the evidentiary requirements, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria related to exceptional ability. Specifically, a petitioner must provide documentation that satisfies at least three of these criteria in order to meet the initial evidence requirements for this classification. The submission of sufficient initial evidence does not, however, in and of itself establish eligibility. If a petitioner satisfies these initial requirements, we then consider the entire

record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the “truth is to be determined not by the quantity of evidence alone but by its quality”); *see also Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination).

II. ANALYSIS

The Petitioner filed the instant petition seeking classification for the Beneficiary as an individual of exceptional ability. As the Petitioner notes on appeal, the Director’s denial stated: “Since no representations have been made that the [B]eneficiary has exceptional ability, consideration of this petition will be limited to the issue of whether the [B]eneficiary is a member of a profession holding an advanced degree.” The Petitioner then correctly points out that it submitted the instant petition seeking to classify the Beneficiary as an individual of exceptional ability. Section 203(b)(2)(A) of the Act creates a classification for both members of the professions holding advanced degrees, as well as individuals of exceptional ability. However, each of these groups has distinct definitions and initial evidence requirements. *See* 8 C.F.R. § 204.5(k)(2), (3). As the Director has not evaluated the Beneficiary’s qualification as an individual of exceptional ability, we remand this petition for such consideration.

In assessing the Beneficiary’s eligibility as an individual of exceptional ability, the Director shall consider the following:

- Whether the occupation title for the position for which the Petitioner presented a Labor Certification, Level I “Computer Software Engineer, Applications,” is the correct level and occupation title for the position in which it currently seeks to employ the Beneficiary;
- Whether a Labor Certification for an entity that, while related to the Petitioner, is not the Petitioner, and which is valid until September 21, 2010, satisfies the regulatory requirements for an employment based petition filed on February 6, 2015;¹
- Whether the Petitioner has demonstrated that the position in which it intends to hire the Beneficiary is one that requires an individual of exceptional ability; and
- Whether the Petitioner has shown the Beneficiary meets the remainder of the statutory and regulatory requirements for classification as an individual of exceptional ability.

¹ 20 C.F.R § 656.30(b)(1). We acknowledge that USCIS approved a prior Form I-140 the Petitioner’s parent company filed under the skilled worker classification described at section 203(b)(3) of the Act based on the same certification.

III. CONCLUSION

The Petitioner indicates that the Beneficiary is eligible for an immigrant visa on the basis of his exceptional ability in the field of business. The Director denied the petition; however, he did not address the Petitioner's evidence under the classification requested. The matter is remanded so that the Director may reevaluate the documentation in the record.

This matter will be remanded. The Director must issue a new decision, containing specific findings that will afford the Petitioner the opportunity to present a meaningful appeal. In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The decision of the Director, Nebraska Service Center is withdrawn. The matter is remanded to the Director, Nebraska Service Center for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us for review.

Cite as *Matter of U- Inc.*, ID# 15969 (AAO Mar. 22, 2016)