



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

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

MATTER OF G-T-R-&R-, INC.

DATE: DEC. 29, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an education business, seeks to permanently employ the Beneficiary in the United States as a science teacher. *See* Section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The decision of the Director is withdrawn. The matter is remanded to the Director, Texas Service Center for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

The Petitioner seeks to classify the Beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(2). The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is June 29, 2010. *See* 8 C.F.R. § 204.5(d).

The Director's decision denying the petition concludes that the Petitioner sought to permanently employ the Beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii). Section 203(b)(3)(A)(ii) of the Act grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. § 204.5(l)(2). The Director found that the labor certification did not meet the requirements for classification as a professional worker. The Director noted that the labor certification indicated that the Petitioner was willing to accept a combination of degrees, diplomas, professional credentials, training or experience in lieu of a bachelor's degree.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On appeal, the Petitioner does not contend that the labor certification meets the requirements for classification as a professional worker. The Petitioner asserts that the Director erred in not considering the petition for classification as a skilled worker. On Part 2.e. of the Form I-140, Immigrant Petition for Alien Worker, the Petitioner indicated that it was filing the petition for a professional worker. The Petitioner did not check Part 2.f. of the Form I-140 which is the box to request the skilled worker classification. The Petitioner asserts that it incorrectly filed the Form I-140 requesting classification as a professional worker. The Petitioner received a receipt notice indicating that it requested classification as skilled worker on the Form I-140. The Petitioner stated that it then realized it had mistakenly checked Part 2.e. of the Form I-140. The Petitioner asserts that, in December 2010, it contacted the USCIS customer Service number to inquire as to whether any further actions were needed to correct the classification requested to skilled worker. The Petitioner states that the customer service representative informed them that no further action was necessary. In support of its contentions, the Petitioner submits a copy of the receipt notice, reflecting the preference classification requested as skilled worker.

The record reflects that the Director issued a request for evidence (RFE) on May 24, 2011, requesting additional documentation regarding the Petitioner's ability to pay the proffered wage. The RFE does not reference the Form I-140's classification. The first reference to classification was made in the Director's May 20, 2015, notice of intent to deny (NOID). The NOID noted that the Petitioner's Form I-907, Request for Premium Processing Service, stated the petition's preference category as skilled worker and that such a post-filing alteration of the visa classification from professional to skilled worker constituted an unacceptable material change. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). In response to the NOID, the Petitioner submitted the information discussed above regarding the receipt notice and subsequent call to USCIS customer service. The Petitioner also submitted a copy of the receipt notice. USCIS records indicate that a data change was made on December 23, 2010. This data change occurred during the time frame the Petitioner claims it spoke to a representative confirming that the Form I-140 had been corrected to reflect a request for classification as a skilled worker.

The June 23, 2015, denial does not address the Petitioner's contention that it made the material change to the requested classification in December 2010, prior to the issuance of any correspondence which could be considered adjudicative in nature. The denial also did not adjudicate the petition under section 203(b)(3)(A)(i) of the Act.

Although the Petitioner has established that it requested classification of the Beneficiary under section 203(b)(3)(A)(i) of the Act, we find that the petition is not approvable. The Director did not

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

Matter of G-T-R-&R-, Inc.

consider whether the Petitioner had established eligibility for the benefit sought, including the Petitioner's ability to pay the proffered wage, whether the Beneficiary met the minimum requirements of the labor certification, whether a *bona fide* job offer exists, and whether the Petitioner will be the actual employer of the Beneficiary.

Therefore, the petition is remanded to the Director, Texas Service Center, for consideration under section 203(b)(3)(A)(i) of the Act.

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

Cite as *Matter of G-T-R-&R-, Inc.*, ID# 15509 (AAO Dec. 29, 2015)