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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAR 01 2011**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved, valid until June 30, 2013.

The petitioner is a public charter school with approximately 35 employees and approximately 300 students in grades 9 to 12 that seeks to employ the beneficiary as a Science/Physics Teacher from October 1, 2010 to September 8, 2013. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because she found that the petitioner failed to demonstrate that there exists a reasonable and credible offer of employment and that the petitioner complied with the terms and conditions of H-1B employment. Specifically, the director found discrepancies regarding the year the petitioner was established, the number of the petitioner's employees, the number of the petitioner's students, and the petitioner's gross income. Additionally, the director found discrepancies in the petitioner's quarterly wage reports and Forms W-2 with respect to the wages paid by the petitioner to its H-1B employees.

Counsel timely filed an appeal on September 10, 2010. On appeal, counsel for the petitioner asserts that USCIS did not give the petitioner an opportunity to respond to the director's findings that there are discrepancies in the documentation submitted by the petitioner. Counsel includes a letter from the petitioner explaining the discrepancies along with supporting documentation. The petitioner explains the discrepancies found by the director as follows:

- There are no inconsistencies in the figures provided for the petitioner's gross income. The gross income amount of \$2,411,768.41 submitted in the Form I-129 was for the estimated gross income for the fiscal year period of July 1, 2009 to June 30, 2010. The amount of \$2,301,047 on the petitioner's tax return represents the actual gross income for the fiscal tax year of July 1, 2008 to June 30, 2009, which includes both operating and non-operating revenues. The amount of \$2,114,401 listed in the petitioner's Annual Report is the operational income only and, unlike the amount on the tax return, does not include non-operating revenues of \$186,646.
- There are no inconsistencies in the petitioner's statements regarding the number of its employees. The number in the Form I-129 is the number of full-time employees at the time the petition was filed. The federal tax return reports the number of employees reported on the Forms W-3, which includes part-time employees and those who worked any time during the calendar year, even if they only received one paycheck, such as a substitute teacher. However, there was a clerical error on the number of employees stated in the 2008 Annual Tax Return, though it was stated correctly in the petitioner's 2008 Form W-3. The Annual Report only indicated the number of teachers and administrators and did not include the petitioner's other employees.
- For the workers listed by the director in the denial as not being paid their respective proffered H-1B salaries, the director looked at part 1, "Wages, tips, other compensation" on the Form W-2 for the salaries paid when this amount only includes taxable wages. The director did not review the other sections on the Form W-2 indicating the employees' gross income amounts.

On appeal, the petitioner submitted copies of paystubs for three of the four H-1B workers listed in the director's decision, which indicate that these workers were paid the prevailing wage. The petitioner does not address the fourth H-1B worker, [REDACTED] which appears to be an inadvertent error. The AAO notes that the 2008 Form W-2 for [REDACTED] states that this H-1B worker earned \$20,373.36, even though the proffered wage was \$35,000. However, USCIS records indicate that another petitioner obtained an H-1B approved petition on [REDACTED] behalf in 2008 to work from August 25, 2008 to August 15, 2011 and so it is likely that [REDACTED] did not work for the petitioner for all of 2008. The petitioner argues that the wages the workers were paid, when annualized based on the date they started respectively working for the petitioner, meet or exceed the proffered wages.

The AAO finds the petitioner's explanations for any discrepancies and omissions found by the director to be reasonable in light of the corroborating evidence submitted. Consequently, the petitioner has demonstrated that there is a reasonable and credible offer of employment and the petitioner is likely to comply with the terms and conditions of employment. Therefore, the basis for the director's decision will be withdrawn.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. However, since the beneficiary's temporary license expires on June 30, 2013, the petition should be approved only through that date, rather than through September 8, 2013 as was requested in the petition. *See* 8 C.F.R. § 214.2(h)(4)(v)(E).

ORDER: The appeal is sustained. The director's decision denying the petition is withdrawn. The petition is approved, valid until June 30, 2013.