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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
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Services

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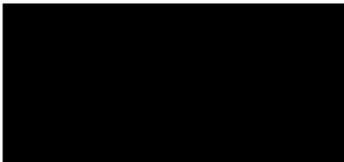
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Date: **MAY 31 2011** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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 non-profit educational institution/charter school with 17 employees and approximately 150 students in grades 6 to 8 that seeks to continue to employ the beneficiary as a mathematics teacher from October 1, 2010 to September 9, 2013.¹ 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 on August 10, 2010 because she found that the petitioner failed to demonstrate that there exists a reasonable and credible offer of employment and that the petitioner is in compliance with the terms and conditions of employment. The director based her decision on discrepancies in the petitioner's documentation with respect to the number of its employees, its annual income, and the amounts paid to other H-1B workers.

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 regarding 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:

- The Form I-129 asks for the number of employees at the time of filing whereas the federal tax return asks for the number of employees on the Form W-3. Therefore, the number of employees on the tax return represents the number of employees, part-time or full-time, who worked any time during the calendar year and received at least one paycheck. For example, this number on the tax return could include substitute teachers.
- The difference in amounts between the petitioner's gross annual income are because one amount represents the income for the petitioner's fiscal period of July 1, 2009 to June 30, 2010, one amount represents the income for the petitioner's fiscal period of July 1, 2007 to June 30, 2008, and one amount represents the unadjusted and unaudited figures for the fiscal period of July 1, 2008 through June 30, 2009.
- On appeal, the petitioner has submitted copies of the pay stubs for the three employees named by the director in the denial as not being paid their respective proffered H-1B wages. The petitioner notes that box 1: wages, tips, and other compensation on the Form W-2 does not include either tax deferred deductions or dates the employees did not report to work due to documented unpaid sick leave, for example. Additionally, one of the employees named by the director quit his job at the end of July 2008 and so did not work the full calendar year in 2008. The petitioner states that when the employees' actual dates of employment and lawful pre-tax deductions are taken into account, the wages its H-1B workers were paid meet or exceed the proffered wages.

¹ The AAO notes that the director also denied the corresponding I-539 application for extension of stay that had been filed on behalf of the beneficiary's wife. Although the AAO has no jurisdiction over the Form I-539, the application accompanies the appellate record and will be returned to the director for action consistent with this decision.

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 license expires on June 30, 2013, the petition should be approved only through that date, rather than through September 9, 2013 as was requested in the petition. See 8 C.F.R. § 214.2(h)(4)(v)(E).

ORDER: The appeal is sustained, valid until June 30, 2013.