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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

82



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 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:

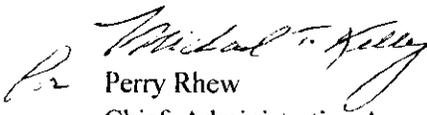


INSTRUCTIONS:

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition the petitioner stated that it is a “Child Development Center (Day Care)” firm. To employ the beneficiary in what it designates as a school director position, the petitioner endeavors to classify her 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. The director also found that the petitioner had failed to demonstrate that it would abide by the terms and conditions of H-B employment. On appeal, counsel asserted that the director’s bases for denial were erroneous, and contended that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner’s Form I-129 and the supporting documentation filed with it; (2) the service center’s request for additional evidence (RFE); (3) the response to the RFE; (4) the director’s denial letter; and (5) the Form I-290B and counsel’s brief and other submissions in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which (1) requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health,

education, business specialties, accounting, law, theology, and the arts, and which (2) requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry

requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

With the visa petition counsel submitted no evidence to support the assertion that the proffered position qualifies as a specialty occupation in that it requires a minimum of a bachelor's degree or the equivalent in a specific specialty. Because the evidence did not demonstrate that the visa petition was approvable, the service center issued an RFE in this matter. Pertinent to whether the proffered position qualifies as a position in a specialty occupation, the service center requested (1) a detailed description of the duties of the proffered position, and (2) an explanation of why those duties require the services of a person with a minimum of a bachelor's degree or the equivalent in the occupational field.

The service center also requested evidence pertinent to the petitioner's previous employment of the beneficiary and its other employees. Specifically, the service center requested (1) the petitioner's 2007 and 2008 quarterly wage reports, (2) the petitioner's 2007 and 2008 Forms Form W-2 Wage and Tax Statements, (3) the petitioner's 2006 and 2007 Federal income tax returns, (4) copies of the beneficiary's pay records for the three months prior to the filing of the instant visa petition, and (5) copies of the beneficiary's 2007 Federal tax return.

In response to the RFE, counsel provided (1) the joint 2006 and 2007 Form 1040 U.S. Individual Income Tax Returns of [REDACTED] (2) the joint 2007 Form 1040EZ income tax return of the beneficiary and her husband, and (3) a description of the duties of the proffered position.

The AAO notes that USCIS computer records show that the petitioner's predecessor, [REDACTED] Child Development Center previously filed a Form I-129 visa petition for the instant beneficiary. That petition was granted, and the beneficiary was accorded H-1B status from January 2, 2007 to March 1, 2009. The annual wage proffered in that petition was \$32,000. The 2007 joint tax return of the beneficiary and her husband shows that they had total wages, salaries, and tips of \$13,216.40 during that year. That amount is not even close to the prorated share of the \$32,000 annual proffered wage due for employment beginning on January 2, 2007 and continuing throughout the year.

Although it was not requested, counsel also provided a photocopy of a portion of a pamphlet issued by the District of Columbia government. The AAO observes that the petitioner is located in the District of Columbia. That section of that pamphlet contains the government-mandated requirements for the center director of a child development center in that jurisdiction. In a letter dated April 13, 2009 counsel observed that 29 DCMR 332.1 states the qualifications requirements for center directors, and specifically mentions a bachelor's degree.

Counsel did not provide (1) the requested 2007 and 2008 quarterly wage reports or (2) the requested W-2 forms.

Counsel is correct that the section cited, 29 DCMR 332.1, states the qualifications requirements for center directors and specifically mentions a bachelor's degree. It makes clear, however, that such a

degree is *not* a minimum requirement imposed by the government on the proffered position. It states that one may qualify for a center director job at a child development center with any of the following: (1) a bachelor's or master's degree in early childhood education or early childhood development, (2) a bachelor's or higher degree in another subject and at least 15 credit hours of early childhood education and/or early childhood development classes, (3) an associate's degree in early childhood education or early childhood development and three years of relevant experience, (4) at least 48 college credit hours including at least 15 credit hours in early childhood education or early childhood development, (5) a Director Credential issued by the District of Columbia government or by the government of another jurisdiction and five years of relevant experience, or (6) employment as a Center Director in a licensed Child Development Center in the District of Columbia on the effective date of those rules provided that the center director achieves compliance with one of the other requirements within five years.

2006 and 2007 tax returns show that during those years operated the as a sole proprietorship.

The description of the duties of the proffered position states that those duties shall include, but not be limited to, the following:

1. Supervises and ensures the safety and well-being of the children and staff at all times by being alert to any problems that may occur.
2. Interviews and hires qualified staff applicants.
3. Assigns and designates teachers and teacher aides to specific classrooms.
4. Supervises the implementation of the daily lesson plan as well as the daily classroom routine and activities of the entire facility.
5. Prepare the annual curriculum.
6. Arrange meetings/trainings for parents and staff.
7. Evaluates staff performance once every month.
8. Makes sure that every child/staff/personnel submits updated health records.
9. Maintains a wholesome/positive relationship with parent/staff and children.
10. Enforces center's policies, rules and sanctions as deemed necessary.
11. Reports to proper agencies any cases of suspected child abuse and neglect.
12. Mediates in any conflict that may take place within the premises.
13. Attends a monthly administrator's meeting
14. Submits a monthly report to the coordinator and superiors.
15. Terminates undeserving staff/personnel.

The director denied the petition on May 7, 2009 finding, as was noted above, that the petitioner had not demonstrated that it would employ the beneficiary in a specialty occupation and had not demonstrated that it would abide by the terms and conditions of H-1B employment. In that decision, the director mistakenly referred to the proffered position as a position for a preschool teacher. The AAO therefore withdraws that finding. Nevertheless, as will be discussed in the remainder of this decision, the director's ultimate decision to deny the petition for failure to establish the proffered position as a specialty occupation was correct. Therefore, the appeal will be dismissed based on the specialty occupation issue.

On appeal, counsel again asserted that the proffered position is a position for a school director, and cited 29 DCMR 332.1 for the proposition that the proffered position requires a minimum of a bachelor's degree.

Counsel also submitted an affidavit, dated May 26, 2009, attested to by the petitioner's owner. In that affidavit, the petitioner's owner attested, under oath, that the petitioning child development center was previously his sole proprietorship before reorganizing to its present form as a limited liability company (LLC) during December 2007. He stated that during the reorganization the operation of the child development center was "irregular and limited." He attested that during April of 2006 he filed an I-129 H-1B visa petition for the beneficiary in the instant case, which visa petition was approved in December 2006 for a validity period from January 2, 2007 to March 1, 2009 with a proffered wage of \$32,000 annually. He stated that because of the pending reorganization the beneficiary's arrival was deferred until April 8, 2007, and that, although she was, after her April 8, 2007 arrival, present in the United States pursuant to her H-1B visa, no work was made available to her until June 4, 2007, when she began to work 30 hours per week. He stated that her annual wage was prorated not only for the period during which her arrival was deferred, and not only for the period during which his company failed to provide her any employment at all, but also prorated for the fact that she was working 30 hours per week, rather than 40, for a period after she was hired. The petitioner's owner further admits that, during 2007, the beneficiary was paid only \$13,216. In sum, the petitioner's owner admits that, even during the period when his sole proprietorship finally employed the beneficiary pursuant to her approved H-1B visa, but for 30 hours rather than 40, he did not pay her the full amount of the wage offered in the visa petition and required by the LCA.

Counsel asserted that the petitioner's owner's affidavit indicates that the beneficiary was paid the amount due to her pursuant to the certified LCA submitted and in accordance with the terms and conditions of the approved H-1B visa petition. With the appeal, also counsel submitted vacancy announcement printed from popular job search websites.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The *Handbook* describes the duties of preschool director positions, in the section entitled Education Administrators, as follows:

In preschools and child care centers, which are usually much smaller than other educational institutions, the *director* or *supervisor* of the school or center often serves as the sole administrator. The director's or supervisor's job is similar to that of other school administrators in that he or she oversees the school's daily activities and operation, hires and develops staff, and ensures that the school meets required regulations and educational standards.

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed January 31, 2011.

Based on a comparison of that passage and the description of the duties of the proffered position the AAO concurs with counsel that the proffered position is a preschool director position within the meaning of the *Handbook*.

The *Handbook* describes the educational requirements of preschool director positions as follows:

Educational requirements for administrators of preschools and child care centers vary with the setting of the program and the State of employment. Administrators who oversee preschool programs in public schools often are required to have at least a bachelor's degree. Child care directors who supervise private programs typically are not required to have a degree; however, most States require a preschool education credential, which often includes some postsecondary coursework.

The *Handbook* does not support the proposition that a preschool director position requires a minimum of a bachelor's degree or the equivalent in a specific specialty. Further, as was explained in detail above, and contrary to counsel's assertion, the section of District Columbia law cited by counsel makes clear that a bachelor's degree in early childhood education or early childhood development is a sufficient educational qualification for such a position, but that it is not necessary. It makes clear that a minimum of a bachelor's degree or the equivalent in a specific specialty is not the minimum qualification for a position as a preschool director. The petitioner has not, therefore, demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner submitted eight vacancy announcements on appeal.

One of those vacancy announcements was placed by [REDACTED] for an Education Coordinator. The size of that organization is unknown to the AAO. That announcement states that the position requires a bachelor's degree in early childhood education, special education, or human development.

Another announcement was placed by [REDACTED] of Falls Church, Virginia for a Child Care Center Coordinator. The size of that organization is unknown to the AAO. That announcement states that a bachelor's degree in early childhood education is preferred, but not that it is necessary. It further states that a bachelor's degree in a "related field" is required, but does not indicate the range of subjects that would be considered sufficiently closely related.

Another announcement was placed by [REDACTED] of Chantilly, Virginia for a child care center director. The size of that organization is unknown to the AAO. That announcement states that the position requires a "Bachelor's degree in Early Childhood Education or equivalent major," but not what range of specific specialties would be considered equivalent.

Another announcement was placed by [REDACTED] of Greenville, South Carolina, for a preschool director. The size of that organization is unknown to the AAO. That announcement states that the position requires a bachelor's degree in early childhood education or a related field, but does not stipulate what specific specialties would be considered sufficiently closely related.

Another announcement was placed by an unidentified organization in Sicklerville, New Jersey for a preschool director. That announcement states that the organization has "100+ children and staff of 15+," which indicates that it may be roughly the same size as the petitioner. The announcement further states that the position requires a bachelor's degree, but not that the degree must be in any specific specialty.

Another announcement was placed by the [REDACTED] [REDACTED] for a preschool education director. The size of that organization is unknown to the AAO. That announcement states that the position requires a bachelor's degree in education. Whether a bachelor's degree in education, rather than in early childhood education or early childhood development, should be considered to be a bachelor's degree in a specific specialty directly related to the proffered position is unclear, and counsel offered no argument on that point.

Another announcement was placed by the [REDACTED] [REDACTED] for a child care center director. The size of that organization is unknown to the AAO. That announcement states that the position requires a bachelor's degree, but not that the degree must be in any specific specialty.

The final vacancy announcement was placed by an unidentified preschool in Tallahassee, Florida, for a preschool director. That announcement states that the organization is attended by over 100 children, which may be roughly the same size as the petitioner. That announcement states that a bachelor's degree in "Early childhood" is preferred, but not that it is required.

That final announcement does not make clear that the position offered requires any college degree at all. Several of the others do not make clear that they require a minimum of a bachelor's degree in early childhood education, early childhood development, or any other specific specialty directly related to the position. Further, those organizations' requirements may be influenced by their size, and very few of those announcements contain any indication that the organizations that placed them are of the same, or roughly the same, size as the petitioner. Further still, those that require a minimum of a bachelor's degree or the equivalent in a specific specialty may be influenced by the requirements of the jurisdiction in which they are located, and may not reflect an industry standard that applies in the District of Columbia. Yet further, even if each of those vacancy announcements was placed by a preschool similar to the petitioner, governed by the same or similar laws, and was for a parallel position, and each required a minimum of a bachelor's degree or the equivalent in a specific specialty, the submission of eight vacancy announcement would still be insufficient to demonstrate an industry-wide requirement of a minimum of a bachelor's degree or the equivalent in a specific specialty.

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As indicated in this decision's earlier discussion about the relevant information in the *Handbook*, the preschool-director occupational classification includes persons who hold neither a bachelor's degree, nor the equivalent, in a specific specialty closely related to the duties that they perform. In the present matter, the AAO finds that neither the generalized and generic descriptions of the proffered position and its duties nor any other evidence in the record of proceeding so develops the proffered position in terms of complexity or uniqueness as to elevate this position above those preschool director positions that are not so complex or unique as to require a person with at least a bachelor's degree, or the equivalent, in a specific specialty. In fact, the AAO finds, the record of proceeding does not focus on relative complexity or uniqueness as factors meriting approval of the petition. Accordingly, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the petitioner's particular position is so complex or unique that it can be performed only by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Next, the record contains no evidence pertinent to anyone the petitioner has ever previously hired to fill the proffered position, and the petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, as indicated in the *Handbook's* information about the wide scope of educational backgrounds of preschool directors, these workers do not comprise an occupational classification whose positions are categorically associated with at least a bachelor's degree, or the equivalent, in a specific specialty. With regard to the particular position that is the subject of this appeal, the AAO finds that the record of proceeding does not present the duties with sufficient specificity and explanation of relative complexity and specialization to establish whatever degree of specialization and complexity may reside in them. Therefore, the petitioner has also failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), as it did not develop the proposed duties to an extent establishing their nature as so specialized and complex that their performance would require knowledge usually associated with the attainment of at least a bachelor's degree, or the equivalent, in a specific specialty.

The AAO recognizes that this is an extension petition. The director's decision does not indicate whether she reviewed the prior approval of the previous nonimmigrant petition filed on behalf of the beneficiary. If the previous nonimmigrant petition was approved based on the same unsupported assertions and evidentiary deficiencies that are contained in the current record, that approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must

treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. See *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

The AAO will turn now to the issue of whether the petitioner has demonstrated that it would abide by the terms and conditions of H-1B employment. The primary rules governing an H-1B petitioner's wage obligations appear in the U.S. Department of Labor (DOL) regulations at 20 C.F.R. § 655.731 (What is the first LCA requirement, regarding wages?). The pertinent part of 20 C.F.R. § 655.731(c) reads:

(c) *Satisfaction of required wage obligation.* (1) The required wage must be paid to the employee, cash in hand, free and clear, when due. . . .

(2) "Cash wages paid," for purposes of satisfying the H-1B required wage, shall consist only of those payments that meet all the following criteria:

(i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;

(ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, et seq.);

(iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, et seq. (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid except that when the H-1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (i.e., an agreement establishing a totalization

arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.

(iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.

(v) Future bonuses and similar compensation (i.e., unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (i.e., they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (i.e., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

* * *

(4) For salaried employees, wages will be due in prorated installments (e.g., annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly except that, in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (e.g., a quarterly production bonus), the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period. . . .

(5) For hourly-wage employees, the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(7) of this section) at the end of the employee's ordinary pay period (e.g., weekly) but in no event less frequently than monthly.

The aspects of the record discussed above, and specifically the petitioner's owner's admissions pertinent to the beneficiary's employment and the payment of her wages, indicate that the petitioner's owner has not recognized the obligation to pay the beneficiary the full amount of the wage, as offered in the approved H-1B visa petition and specified on the LCA, without reduction, except in certain limited circumstances that do not appear in this record of proceeding. *See* 20 C.F.R. § 655.731(c) (Satisfaction of required wage obligation). For this reason, the AAO finds that the petitioner has not demonstrated that it is likely, in the future, to abide by the terms and conditions of H-1B employment. The appeal will be dismissed and the visa petition denied on this additional basis.

The record suggests an additional issue that was not discussed in the decision of denial. In the March 29, 2009 RFE, the service center requested that the petitioner provide its 2007 and 2008

quarterly wage reports and its 2007 and 2008 W-2 forms. Those documents are material to whether the petitioner has observed the terms and conditions of H-1B employment pertinent to any other H-1B employees.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The appeal will be dismissed and the visa petition will be denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

ORDER: The appeal is dismissed. The petition is denied.