U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 25 2006
WAC 04 013 53076

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an hotelier. It seeks to employ the beneficiary permanently in the United States as an executive assistant hotel manager -- rooms. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL) accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the college degree required by the preference classification for which the petitioner applied and denied the position accordingly.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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.

The regulation at 8 C.F.R. § 204.5(l)(2) states, in pertinent part:

"*Professional* means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions."

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in pertinent part:

> *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

If the petition is for a professional pursuant to 8 C.F.R.§204.5(l), then, the petitioner must demonstrate that the beneficiary received a United States baccalaureate degree or an equivalent foreign degree prior to the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. Here, the Form ETA 750 was accepted for processing on October 9, 2001.

The Form ETA 750 states that the proffered position requires "3-4" years of college leading to a "Bachelor's or the equivalent" in Hotel & Restaurant Management or related field." That form further specifies, "Foreign degree equivalent accepted."

With the petition, counsel submitted (1) a transcript and English translation from the State Vocational Trade School in Gastronomy and Catering in Hamburg, Germany, (2) a certificate from the Chamber of Commerce

for Munich and Upper Bavaria, and English translation, (3) an annual certificate from a two-year hotel management school in Altotting, Germany, and English translation, (4) an educational evaluation dated August 29, 1996, (5) evidence pertinent to the beneficiary's employment history, and (6) a brief.

The transcript from the school in Hamburg, Germany states that the beneficiary attended that institution from August 20, 1989 to July 31, 1991, training to be a cook. The subjects he studied were Technology, Profession-related Natural Sciences, Mathematics/Calculations, English, French, German, Political Science, and Sports.

The certificate from the Chamber of Commerce for Munich and Upper Bavaria, which is dated May 17, 1994, states that the beneficiary passed an examination pertinent to training as an apprentice on that date. The subject's tested were Fundamentals of Professional Education, Planning and Implementation of Apprenticeship, The Young Person in the Apprenticeship, Legal Foundations, and Practical Foundations.

The certificate from the school of hotel management in Altotting states that during the 1993 – 1994 school year the beneficiary studied Business Administration, Accounting, Hotel Management, Technology in the Hotel and Catering Sector, Exercises to Technology [Sic], Personnel Management/Work Relations, Economics, Data Processing including Accounting Machine, Social Studies, Advanced English, Intermediate French, Professional and Work Pedagogic, and Typewriting. That certificate appears to indicate that the beneficiary also studied Mathematics, Spanish, and Italian, though that is unclear. The certification contains no indication that the petitioner earned a college degree from that institution.

The educational evaluation states that the beneficiary's education is the equivalent of a Bachelor of Arts degree in hotel and restaurant management, that the proffered position typically requires a bachelor's degree in hotel and restaurant management, and that the beneficiary is a member of the profession of hotel and restaurant managers.

Because the evidence submitted was insufficient to demonstrate that the beneficiary has a baccalaureate degree, the California Service Center, on January 29, 2004, requested additional evidence pertinent to the beneficiary's education. The portion of that request pertinent to the beneficiary's education read as follows:

> Submit evidence to establish that the beneficiary possesses the education/training listed on the Form ETA 750 (Application for Alien Employment Certification). Evidence of education/training should be submitted on the institution's official letterhead or stationery indicating the courses taken and the credits received, and any conference of certificates or degrees. *If a baccalaureate degree is required,* ***submit a copy of the official college or university transcripts and provide a photocopy of the degree received.***

[Italics and emphasis in the original.]

In response, counsel submitted (1) an additional certificate from the State Vocational Trade School in Hamburg, Germany, (2) a certificate from the Rackow School in Hamburg, Germany, (3) a certificate, dated July 21, 1995, from the director of the Upper Bavaria School Board, (4) copies of documentation previously submitted, and (5) a letter, dated February 19, 2004.

The additional certificate from Hamburg Vocational Trade School appears to indicate that the beneficiary majored in Latin and Social Studies and also studied Mathematics, Biology, History, German, Chemistry, and English. Although the certificate was issued on November 26, 1986 it gives no other indication of the time period during which the beneficiary's studies there transpired.

The certificate from the Rackow School in Hamburg, Germany states that, from December 12, 1988 to February 7, 1989 the beneficiary successfully completed 32 hours of typewriting instruction.

The July 21, 1995 certificate from the Upper Bavaria School Board states that the beneficiary is a State-Examined Hotel Manager.

In his February 19, 2004 letter counsel argues that the educational evaluation submitted demonstrates that the beneficiary's education is the equivalent of a U.S. bachelor's degree in Hotel and Restaurant Management.

The director determined that the evidence submitted did not establish that the beneficiary has a United States baccalaureate degree or an equivalent foreign degree, and, on March 27, 2004, denied the petition.

On appeal, counsel submits a Form I-290B appeal and a brief. On the form appeal counsel states,

> [CIS] erred in its denial of the I-140 petition. Beneficiary meets the minimum requirements specified on the ETA 750 Application. In addition, [the petitioner] was not given sufficient information in the request for evidence to respond to the issue that served as the basis for denial.

Initially, this office notes that the request for evidence issued on January 29, 2004 in this matter requested that the petitioner:

> Submit evidence to establish that the beneficiary possesses the education/training listed on the Form ETA 750 (Application for Alien Employment Certification),

and stated that

> Evidence of education/training should be submitted on the institution's official letterhead or stationery indicating the courses taken and the credits received, and any conference of certificates or degrees. *If a baccalaureate degree is required,* ***submit a copy of the official college or university transcripts and provide a photocopy of the degree received.***

[Italics and emphasis in the original.]

That request made clear that the petitioner was obliged to demonstrate that the beneficiary has the minimum educational requirements for the proffered position as stated on the Form ETA 750. Further, even if the request for evidence had been impermissibly vague, counsel has since been informed of the specific basis pursuant to which the petition was denied and accorded an opportunity to respond with additional evidence or

argument. Even in the event that the request for evidence had been insufficiently specific, that would have been harmless error.

In his brief, counsel asserts, but provides no evidence to demonstrate, that the DOL determined that the beneficiary meets the minimum qualifications for the proffered position.

Counsel further asserts but, again, provides no evidence or citation to demonstrate, that the verbiage "foreign degree equivalent accepted" must be included on any Form ETA 750 pursuant to which the beneficiary's foreign education will be relied upon. Counsel states that the phrase "or the equivalent" was included to indicate that some other, unspecified, equivalent of a bachelor's degree was also acceptable. Counsel asserts that this additional phrase opened the proffered position to more U.S. citizens. Counsel argues that had the petitioner specified exactly what would be considered the equivalent of a bachelor's degree, in addition to a foreign equivalent degree, that would have been construed by DOL as tailoring the Form ETA 750 to beneficiary.

Counsel states that, therefore, CIS should not interpret the terms of the approved Form ETA 750 to mean that the only acceptable substitute for a bachelor's degree is a foreign equivalent degree, and implies that some other credentials might be substituted for a bachelor's degree.

Finally, counsel asserts, but provides no evidence to demonstrate, that "It was very clear in the recruitment efforts that [the petitioner] was willing to accept the equivalent of a degree as well as foreign education" and that "[CIS] simply needs to ensure that the foreign national meets the requirements as specified on the ETA forms . . . ."[1]

Counsel aptly defines the central issue in this case. The issue is whether the petitioner has demonstrated that the beneficiary meets the minimum qualifications for the job as stated on the Form ETA 750. This office will also address the argument that DOL has determined that the beneficiary is qualified for the proffered position.

Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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. While no degree is required for this classification, the regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, *and any other requirements of the individual labor certification.*" (Emphasis added.)

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Under the regulation at 8 C.F.R. § 204.5(l)(2), a "professional" is defined to be "a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions."

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[1] As counsel previously asserted that CIS is without authority to determine the beneficiary's eligibility for the proffered position, arguing that this determination had been made by DOL and is *res judicata*, counsel's argument that the beneficiary's eligibility is the sole determination to be made by CIS must have been intended as an argument in the alternative.

The issue before us is whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification. The regulations specifically require the submission of such evidence for this classification. 8 C.F.R. § 204.5(l)(3)(B) ("the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification"). As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process.

Section 212(a)(5)(A)(i) provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

DOL has promulgated regulations to implement these duties. 20 C.F.R. § 656. None of the inquiries assigned to DOL by those regulations, however, involve a determination as to whether or not the alien is qualified for the job offered. This fact has not gone unnoticed by the Federal Circuit Courts of Appeals:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14) [currently found at 212(a)(5)(A)(i)]. Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on this decision, the Ninth Circuit Court of Appeals, which has jurisdiction over this matter, stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified

> for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the . . . [Act] . . . is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

Id. at 1009 (emphasis added). The Ninth Circuit reached a similar decision one year later in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

736 F. 2d 1305, 1309 (9th Cir. 1984). *See also* Black Const. Corp. v. I.N.S., 746 F.2d 503 (9th Cir. (Guam) 1984) (rejecting argument that once employer's labor certifications had been approved by DOL it was error for INS to deny related immigrant petitions for failure to meet preference status requirements).

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005), in which the District Court found that CIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." In contrast to the broad precedential authority of the case law of a United States Circuit Court of Appeals, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a federal district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law, particularly, as in *Grace Korean*, where the case is unpublished. *Id.* at 719. **The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above.** Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at *8 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a). Moreover, at least two circuits, including the Ninth Circuit overseeing the Oregon District Court, have held that CIS does indeed have the authority and expertise to evaluate whether the alien is qualified for

the job. Those Circuit decisions, and not *Grace Korean*, are binding on this office and will be followed in this matter.

The key to determining the job qualifications specified in the labor certification is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification, as filled in by the petitioner, reflects the following requirements:

Block 14:

Education: College 3 – 4 [years]
College Degree Required: Bachelor's or the equivalent.
Major Field of Study: Hotel & Restaurant Management or related field

Experience: One year working for a luxury hotel.

Block 15:

Other Special Requirements:

Foreign degree equivalent accepted. Luxury hotel experience must have included . . . [the] . . . computer skills [listed in Block 13, above].

Block 15 ("Other Special Requirements") does not include any qualifications relating to education or further elaboration on the meaning of "Bachelor's or the equivalent." Moreover, to determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Once again, this office is cognizant of the recent holding in *Grace Korean*, which held that CIS is bound by the employer's definition of "bachelor or equivalent." In reaching this decision, the court concluded that the employer in that case tailored the job requirements to the employee and that DOL would have considered the beneficiary's credentials in evaluating the job requirements listed on the labor certification. As stated above, the reasoning underlying a district court's decision will be given due consideration when it is properly before the AAO, but the analysis does not have to be followed as a matter of law. *K-S-*, 20 I&N Dec. at 719. In this

matter, the court's reasoning cannot be followed because, as will become clear below, it is inconsistent with the actual practice at DOL, among other reasons.

As discussed above, the role of the DOL in the employment-based immigration process is to make two determinations: (i) that there are not sufficient U.S. workers who are able, willing, qualified and available to do the job in question at the time of application for labor certification and in the place where the alien is to perform the job, and (ii) that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act. Beyond this, Congress did not intend DOL to have primary authority to make any other determinations in the immigrant petition process. *Madany*, 696 F.2d at 1013. As discussed above, CIS, not DOL, has final authority with regard to determining an alien's qualifications for an immigrant preference status. *K.R.K Irvine*, 699 F.2d at 1009 FN5 (citing Madany, 696 F.2d at 1011-13). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by DOL. *Id.*

Additionally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, *e.g.*, by professional regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." Id. at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

CIS's authority, derived from the Act, regulations, and Circuit Court of Appeals precedent, to determine whether the alien is in fact qualified to fill the certified job offer, in combination with the judicial injunction to CIS to interpret the labor certification according to its exact and plain language, compels the conclusion that the issuance of a labor certification does not bind CIS to accept the employer's, or even the Department of Labor's, definition of the amount and kind of experience that should be considered the equivalent of a college degree.

In any event, however, this office is satisfied that DOL's interpretation of "B.A. or equivalent" matches our own. The regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." BALCA has held that an employer cannot simply reject a U.S. worker who meets the minimum requirements specified on the Form ETA-750. *See American Café*, 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court's suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA 750, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor's degree or a foreign degree that is equivalent to a U.S. bachelor's degree.

In reaching the conclusion that DOL's interpretation of "B.A. or equivalent" matches our own, this office relies on the reasoning articulated in *Hong Video Technology*, 1998 INA 202, 2001 WL 1055170 (BALCA 2001). That case involved a labor certification that required a "B.S. or equivalent." The Certifying Officer

questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer's attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded "a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers." BALCA concluded:

> We have held in *Francis Kellogg,* et als., 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998) (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).
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> In as much as Employer's stated minimum requirement was a "B.S. or equivalent" degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor certification was properly denied.

Hong Video Technology, 2001 WL 1055170, at *4.

Significantly, when DOL raises the issue of the alien's qualifications in *Hong Video*, it is to question whether the Form ETA-750 properly represents the job qualifications for the position offered. DOL is not reaching a decision as to whether the alien is qualified for the job specified on the Form ETA 750, a determination reserved to CIS for the reasons discussed above. Thus, DOL's certification of an application for labor certification does not bind us in determinations of whether the alien is qualified for the job specified. As quoted above, DOL has conceded as much in an amicus brief filed with a federal court. If this office were to accept the employer's definition of "or equivalent," instead of the definition DOL uses, this office would allow the employer to unlawfully tailor the job requirements to the alien's credentials after DOL has already made a determination on this issue based on its own definitions. This office would also undermine the labor certification process. Specifically, the employer could have lawfully excluded a U.S. applicant that possesses experience and education equivalent to a degree at the recruitment stage as represented to DOL.

This office does not lightly reject the reasoning of a District Court. The District Court's unpublished decision, however, is not binding on us, runs counter to Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL. Thus, this office will maintain our consistent policy in this area of interpreting "or equivalent" as meaning a foreign equivalent degree.

In order to be eligible for classification as a professional, the beneficiary must have a completed four years of college and possess a baccalaureate degree or a foreign equivalent degree. 8 C.F.R. § 204.5(l)(2). While the beneficiary need not possess a degree to be classified as a skilled worker, the beneficiary must meet the requirements of the labor certification. 8 C.F.R. § 204.5(l)(3)(B).

Initially, the petitioner submitted documents showing classes taken at various institutions. None of those documents indicates that the beneficiary has a college degree. The petitioner also submitted an educational evaluation that concludes that the beneficiary's education is the equivalent of a Bachelor of Arts degree in hotel and restaurant management.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). Neither the statute nor the conforming regulations allow for alternatives to the requirement of the specific degree required on the Form ETA-750, whether the equivalency is based on work experience or a combination of lesser educational degrees and certifications, professional memberships or other training.

Even assuming that the requirements of a "bachelor's degree or the equivalent" and "Foreign degree equivalent accepted" are in the disjunctive,[2] would not render the instant petition approvable. Counsel does not contend that the beneficiary has a U.S. bachelor's degree. Counsel does not contend that the beneficiary has a foreign degree that is the equivalent of a U.S. bachelor's degree. Counsel's contention must stand or fall on the assertion that the beneficiary has, in some other sense, the equivalent of a bachelor's degree, and that this other type of equivalent should be recognized by this office.

The regulation at 8 C.F.R. § 204.5(k)(2) allows an alien to substitute a bachelor's degree plus five years of progressive experience for an advanced degree. The regulation at 8 C.F.R. § 214(h)(2)(iii)(D)(5) permits the substitution of three years of experience for one year of college for special occupation nonimmigrants. Clearly CIS' predecessor agency was capable of issuing regulations providing for the substitution of experience for education in a limited context. Despite this capability, no such provisions appear at 8 C.F.R. § 204.5(l) and its subparagraphs relating to professionals and skilled workers.

Although the regulations pertinent to nonimmigrant petitions explicitly permit the substitution of experience for education and a degree, the laws and regulations applicable to the visa category in the instant case sanction no such substitution of experience or education for a required degree and provide no formula pursuant to which such experience or education might be credited in lieu of the required degree.

The only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is 8 C.F.R. § 204.5(l)(1), which states that a "United States baccalaureate degree or a foreign equivalent degree" qualifies a beneficiary for a professional position pursuant to section 203(b)(3)(A)(ii) of the Act. That regulation makes clear that the only equivalent for a U.S. bachelor's degree, in that context, is an equivalent foreign degree. No such equivalent is available if the petition is analyzed as a petition for a skilled worker. No criterion exists pursuant to which the beneficiary's experience, or education, or experience coupled with education, absent the requisite bachelor's degree, may be analyzed to see whether it is equivalent to that requisite degree.

The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor's degree[3] but did not.[4] The Acting Director was therefore correct in treating the petition as one

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This office is unconvinced by counsel's assertion that the petitioner intended the requirements on the Form ETA 750 to mean (1) a bachelor's degree, (2) an equivalent foreign degree, or (3) some other undefined equivalent. Because even that construction would not render the petition approvable, however, it need not reach that issue.

[3] In that event the petition would be analyzed as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act. Because it would not, in that event, necessarily require a minimum of a bachelor's or equivalent foreign degree and would not, therefore, be a petition for a professional pursuant to section 203(b)(3)(A)(ii).

for a professional, and in using the criteria in the regulation at 8 C.F.R. § 204.5(l)(2) to evaluate the term "or equivalent" in the labor certification.

The discussion of 8 C.F.R. §204.5(l)(2) in the decision of denial is misleading in that it is not closely related to the reason the instant petition was denied. If the beneficiary is qualified for the proffered position but does not qualify as a professional, then the petition would properly be considered pursuant to the regulations pertinent to skilled workers. The petition was denied because the beneficiary does not have the degree required by the Form ETA 750. Demonstrating that the beneficiary qualifies as a professional pursuant to 8 C.F.R. §204.5(l)(2) would not have addressed this shortcoming.

If the instant petition is analyzed as a petition for a professional pursuant to section 203(b)(3)(A)(ii) of the Act it necessarily fails, as the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) makes clear that such a position requires a U.S. bachelor's degree or an equivalent foreign degree in computer science or a related subject, and the beneficiary does not have that required degree.

If that the instant petition is analyzed as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act the result is the same. If the petition were considered as a petition for a skilled worker, the requirement as stated on the ETA 750 for a bachelor's degree would be unaffected. The petitioner must demonstrate that the beneficiary is qualified for the proffered position pursuant to the requirements stated on the approved Form ETA 750 labor certification. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F2d 1 (1st Cir. 1981).

This office concludes that the beneficiary does not meet the job qualifications as presented to DOL. Specifically, the beneficiary has not demonstrated that he possesses a "foreign equivalent degree" that is the equivalent to a U.S. baccalaureate degree. The instant petition, submitted pursuant to 8 C.F.R.§204.5(l), may not be approved.

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 not met that burden.

ORDER: The appeal is dismissed.

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[4] Had the petitioner specified an acceptable substitute for the requisite bachelor's degree in this case, that would have opened the position to U.S. workers without degrees. Although those non-graduate workers may have been excluded from consideration for the proffered position, the petitioner now seeks to hire an alien worker without such a degree. The purpose of the instant visa category is to provide alien workers for U.S. positions, but only if qualified U.S. workers are unavailable. To permit the petitioner to alter the terms of the approved labor certification such that the beneficiary is eligible for the petition after the petitioner may have excluded U.S. workers with similar qualifications would frustrate the purpose of the visa category.