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

PUBLIC COPY

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 28 2008

EAC-06-113-50589

IN RE: Petitioner: [redacted]
Beneficiary:

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.

Kevan S. Ponton for
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and now is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an international hotel & hospitality operation company. It seeks to employ the beneficiary permanently in the United States as a hotel assistant food and beverage director. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification application),[1] approved by the DOL, accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a four-year bachelor's degree as required on the ETA Form 9089 and that the record did not include evidence of the beneficiary's two years of work experience as of the priority date. Accordingly, the director denied the petition on July 3, 2006.

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.

On appeal counsel asserts that the proffered position is a professional position, the beneficiary qualifies for the proffered position because he is currently employed in the proffered position pursuant to an H-1B nonimmigrant classification in the professional specialty occupation and the beneficiary meets the minimum educational requirements of a "Bachelor's Degree or its equivalent" as required by the petitioner in its recruitment efforts.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] On appeal, counsel submits a brief, copies of *Matter of Essex Cryogenics Industries, Inc.*, 14 I&N Dec. 196 (1972), *Matter of General Atomic Company*, 17 I&N Dec. 532 (1980), and *Matter of Sun*, 12 I&N Dec. 535 (1966), and recruitment materials conducted relevant to the underlying ETA Form 9089, including a prevailing wage determination (PWD) from New York State Department of Labor (NYSDL), notice of job opportunity posted for the instant

[1] The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Since the instant labor certification application was filed after March 28, 2005, it is governed by the PERM regulations.

[2] 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

proffered position, and drafted advertisement to be run in newspapers. Other relevant evidence in the record includes the beneficiary's certificates of completion from the Applied Hotel Studies Certificate Programme in Hospitality Management and the Hotel Studies Certificate Programme in October 1996 from Marmara University College of Further Education Vocational Studies and Swissotel Training Center, the professional employment history of the beneficiary and an evaluation report from [redacted]r, Ph.D. of International Education Council (IED). The record does not contain other evidence pertinent to the beneficiary's qualifications.

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

The ETA Form 9089 was accepted on December 30, 2005 and certified on January 9, 2006. The approved labor certification in the instant case requires a Bachelor's Degree or a foreign educational equivalent in hotel and restaurant management or in hospitality management and twenty-four (24) months of experience in the job offered or in hotel food and beverage management. DOL assigned the occupational code of 11-9051.00, food service manager, the closest type of occupation as the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at http://online.onetcenter.org/find/result?s=11-9051.00&g=Go (accessed April 21, 2008) and its extensive description of the position and requirements for the position most analogous to advertising sales agent position, the position falls within Job Zone Three requiring "medium preparation" for the occupation type closest to advertising sales agent position. According to DOL, previous work-related skill, knowledge or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 6-7 to the occupation, which means "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. **Some may require a bachelor's degree."** *See* http://online.onetcenter.org/link/summary/11-9051.00#JobZone (accessed April 21, 2008). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

> Previous work-related skill, knowledge, or experience is required for these occupations. For example, an electrician must have completed three or four years of apprenticeship or several years of vocational training, and often must have passed a licensing exam, in order to perform the job.
> Employees in these occupations usually need one or two years of training involving both on-the-job experience and informal training with experienced workers.

See id.

Therefore, generally a food service manager position could be properly analyzed either as a professional,[3] skilled or unskilled worker. However, in the instant case, the approved labor certification requires a bachelor's degree and two years of experience, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(C). Further, although the petitioner checked the box "e" in Part 2 of the I-140 form, which is for either a professional or a skilled worker, the petitioner expressly and consistently indicated that the instant petition for the proffered position of hotel assistant food and beverage director was filed to seek classification under the professional category pursuant to section 203(b)(3)(A)(ii) of the Act.[4] In addition, the director evaluated and denied the petition under the professional category. On appeal, counsel consistently argues that the beneficiary qualifies for the professional position. The AAO finds that the professional category is the most appropriate category for the proffered position based on its educational and experience requirements, and that the director properly evaluated the petition under the professional category. Accordingly, the AAO will examine the instant appeal and the petition under the professional category and determine whether or not the petitioner established the beneficiary's qualifications for the professional proffered position.

For the professional category, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

> 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. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is December 30, 2005. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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[3] A professional occupation is statutorily defined at Section 101(a)(32) of the Act as including but not limited to "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." It is noted that food service manager or hotel assistant food and beverage director positions are not included in this section.

[4] In the letter of recommendation on behalf of the beneficiary submitted with the initial filing, Steven Conte states that the beneficiary currently serves the petitioner "in the professional position of Hotel Assistant Food and Beverage Director;" in the supporting letter, he also states that: "I, [redacted], Director of Human Resources for [the petitioner] in New York, New York, hereby make the following Statement in Support of [the beneficiary] for employment-based Third Preference Classification as a Professional Worker [sic]. Petitioner submits this Statement to confirm its intention to employ [the beneficiary] in the United States in the professional and managerial position of Hotel Assistant Food and Beverage Director."

The beneficiary set forth his credentials on ETA Form 9089. In Part J, the beneficiary indicated that he obtained a bachelor's degree in hotel and restaurant management in 1997 from Marmara University in Istanbul, Turkey. He provides no further information concerning his educational background on this form, which is signed by the beneficiary under penalty of perjury that the information was true and correct.

In corroboration of the beneficiary's educational background, the petitioner provided a copy of the beneficiary's certificates of completion from the Applied Hotel Studies Certificate Programme in Hospitality Management and the Hotel Studies Certificate Programme in October 1996 from Marmara University, and an evaluation report from IED.

The beneficiary's certificates were issued in October 1996 by Marmara University College of Further Education Vocational Studies and Swissotel Training Center. The certificates do not show that the beneficiary has obtained a bachelor's degree (Lisans Diplomasi or Mühendislik Diplomasi) in Turkey, nor do the certificates indicate the number of years of the beneficiary's studies at Marmara University. The record does not contain any transcripts from that university or any evidence showing that the Applied Hotel Studies Certificate Programme in Hospitality Management or the Hotel Studies Certificate Programme at Swissotel Training Center were college degree-leading programs in Turkey.

The evaluation report from IED concludes that the beneficiary obtained the equivalent to the educational level attained by an individual who holds a Bachelor of Arts Degree in Hotel and Restaurant Management issued by an accredited American college or university. The report evaluates the beneficiary's education as follows:

> [The beneficiary] has completed three years of post-secondary professional studies and training in hotel and restaurant management at the Swissotel Training Center, Marmara University, College of Further Education in Istanbul Turkey (1993-1996).
>
> Based on the number of instructor/student contact hours completed (2½ years of full-time studies. ½ year of practical training), the subjects of instruction (hotel and restaurant management), and the level of instruction (post-secondary professional program offered by an accredited Turkish university) [the beneficiary]'s two and one-half years of studies at the Swissotel training Center, Marmara University, College of Further Education in Istanbul, Turkey (1993-1996) may be considered equivalent to two years of lower-level and one-half year upper-level university-level studies in hotel and restaurant management toward a four-year bachelor degree at an accredited college or university in the United States (1st and 2nd year, and first one-half of 3rd year of four-year degree).

The evaluation report from IED continues to state that:

> [The beneficiary]'s four and one-half years of professional work experience in the positions Room Attendant, Floor Supervisor, Butler, Receptionist, Reservations Clerk, Restaurant Apprentice, and Waiter at the Swissotel The Bosphorus, Management Trainee at the Swissotel The Bosphorus, and Assistant Restaurant Manager at The Ankara Hotel & Tower (1992-1997) may be considered equivalent to one and one-half years of upper-level

> university-level studies, in hotel and restaurant management toward a four-year bachelor degree at an accredited college or university in the United States (second one-half of 3rd year and 4th year of four-year degree).

However, Citizenship and Immigration Services (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, the Service 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). The evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to nonimmigrant H-1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*).

Therefore, the record does not contain any evidence that the beneficiary holds a single United States baccalaureate degree or a single foreign equivalent degree to be qualified as a professional for third preference visa category purposes. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered professional position, and the director's ground denying the petition under professional category must be affirmed.

On appeal, counsel asserts that the petitioner had intended to accept a combination of education and experience for the proffered position by checking the answer yes to the question 8 in Part H of the ETA Form 9089 "Is there an alternate combination of education and experience that is acceptable?", however, solely due to a typographical error by counsel and the inability of the PERM system to accept changes to the ETA Form 9089 following submission, the petitioner's such intent could not have been indicated on the labor certification. Counsel also asserts that the petitioner maintained that a bachelor's degree or its equivalent was required for entry into the proffered position in its recruitment efforts.

Authority *to* Evaluate Whether the Alien is Eligible for the Classification Sought

As noted above, the ETA Form 9089 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) of the Act 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.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

> Under § 212(a)(5)(A) of the Act certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:
>
> > (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
> >
> > (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts.

> 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). 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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> * * *
>
> 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).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now CIS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree.

Authority to Evaluate Whether the Alien is Qualified for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit 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 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.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> 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.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

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), which finds 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, 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 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. *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 and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO (D. Ore. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at 11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at 14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that CIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at 17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated.

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, we are 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 judge'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 as it is inconsistent with the actual practice at DOL. The court in *Grace Korean* specifically noted that the skilled worker classification does not require an actual degree.

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.*

Specifically, as quoted above, 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 that 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 degree or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (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 that "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).
>
> 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.

Significantly, when DOL raises the issue of the alien's qualifications, it is to question whether the ETA Form 9089 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 ETA Form 9089, 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.

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by 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.

As noted previously, the certified ETA Form 9089 requires a bachelor's degree or a foreign educational equivalent in hotel and restaurant management or in hospitality management. The petitioner clearly required a bachelor's degree or a foreign education equivalent. On appeal counsel submits recruitment materials to assert that the petitioner required a bachelor's degree or equivalent in its prevailing wage request, notice of job opportunity and newspaper advertisements.[5] However, as discussed above, without being expressly and clearly further defined, the degree equivalent cannot be interpreted as the bachelor's degree requirement can be met through a combination of education and experience under the skilled worker category.

Additionally, the court in *Snapnames.com, Inc.* determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *See Snapnames.com, Inc.* at 11-13. In the instant case, the petitioner failed to submit any documentary evidence showing that the petitioner ever defined or specified that the bachelor's degree requirement might be met through a combination of education and quantifiable amount of work experience during any stage of the labor certification application processing. As previously discussed, the beneficiary holds the certificates of completion from the Applied Hotel Studies Certificate Programme in Hospitality Management and the Hotel Studies Certificate Programme in October 1996 from Marmara University College of Further Education Vocational Studies and Swissotel Training Center, which alone represents attainment of a level of education comparable to two and a half years of university study in the United States, but cannot be deemed as an equivalent of a U.S. bachelor's degree.

[5] It is noted that the PWD contains requirements not listed on the ETA Form 9089; that the notice of filing also contains these additional job requirements; and that the advertisement does not list specific experience required by the ETA Form 9089.

Furthermore, the underlying labor certification and its relevant recruitment efforts do not demonstrate that the petitioner would accept a combination of degrees that are individually all less than a U.S. bachelor's degree or its foreign equivalent and/or a quantifiable amount of work experience when it oversaw the petitioner's labor market test. The employer, now the petitioner, did not specify on the ETA Form 9089 that the minimum academic requirements of a bachelor's degree might be met through a combination of lesser degree(s), diploma(s), certificate(s) and/or a quantifiable amount of work experience. On appeal, counsel argues that the petitioner failed to specify the combination on the ETA Form 9089 solely due to a typographical error made while filling out the Part H Question 8 of the form. First, counsel did not submit any objective evidence to support his assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Second, the record does not support counsel's assertion. Under the PERM system, the petitioner must conduct its recruitment prior to the filing the labor certification application. All evidence submitted for prior recruitment and the instant petition submission documents show that the employer, now the petitioner, intended to seek classification of the proffered position under the professional category. There is no evidence that the petitioner had had intention to switch the professional position to a skilled worker position by setting forth an alternate combination of education and experience in Part H of the ETA Form 9089. Further, the record does not contain any evidence showing that the petitioner or its counsel took any action to amend or correct the ETA Form 9089 immediately after it was electronically filed but before approved by sending request for amendment or correction to DOL. The petitioner's actual minimum requirements could have been clarified or changed before the ETA Form 9089 was certified by DOL. Since that was not done, the director's decision to deny the petition must be affirmed. Further, on appeal, a petitioner cannot materially change a position's title, its level of authority within the organizational hierarchy, the associated job responsibilities or the qualifications. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Therefore, the AAO finds that the petitioner failed to demonstrate that the beneficiary met the minimum educational requirements for the proffered position prior to the priority date under the professional category or the skilled worker category. The director's July 3, 2006 decision is affirmed.

In addition, as noted previously, the labor certification requires two years of experience in the job offered or in hotel food and beverage management. The beneficiary set forth his credentials on the ETA Form 9089 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part H, Alien Work Experience, he represented that he has been working for the petitioner since January 1, 2005. Prior to that, he worked for Swissotel The Drake, New York as a Hotel Banquet Manager, Hotel Director of Banquet, Hotel Food & Beverage Manager, or Hotel Director of Food & Beverage from September 2, 2001 to December 30, 2005 respectively, and worked for Q56 Restaurant & Cocktails as an Assistant Restaurant Manager or Assistant General Manager from October 2, 1998 to September 1, 2001. The beneficiary did not explain how he managed two full-time positions at Swissotel The Drake, New York and the petitioner at the same time during the period from January 1, 2005 to December 30, 2005 or submit any independent objective evidence to resolve the inconsistency. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or

reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

However, the record does not contain any regulatory-prescribed evidence to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered or in hotel food and beverage management except the beneficiary's professional employment history. The beneficiary's employment history does not meet the requirement set forth at 8 C.F.R. § 204.5(g)(1). The director correctly found that the filing did not include evidence of the beneficiary's two years of work experience as of December 30, 2005 and denied the petition accordingly. On appeal, counsel does not address this issue in his brief, nor does he submit any experience letters from the beneficiary's former employers to demonstrate that the beneficiary possessed the requisite two years of experience prior to the priority date. The petitioner failed to establish the beneficiary's two years of prior management experience for the proffered position and thus, it could not overcome this ground of the director's denial.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

ORDER: The appeal is dismissed.