

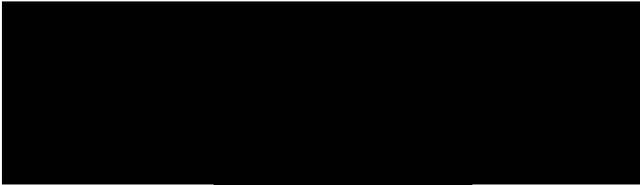
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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm 3000
Washington, DC 20529-2090



U.S. Citizenship
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Office: TEXAS SERVICE CENTER

Date: **MAY 07 2009**

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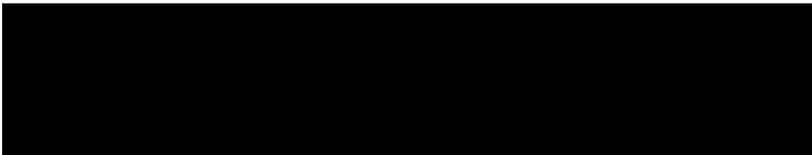
Petitioner:

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)

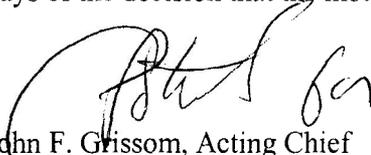
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as chef brigade. As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (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, on March 7, 2006, the director determined that the beneficiary did not possess a U.S. bachelor's degree or a foreign equivalent.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the beneficiary has the required educational credentials and meets the qualifications set forth in the approved labor certification.²

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).

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.

In a letter, dated December 7, 2005, the petitioner indicated that it considered the certified occupation as a chef brigade as a professional occupation. On appeal, through counsel, the petitioner indicated that the director had erred in denying the petition on the basis that the beneficiary did not qualify as a professional.³

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

² 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.

³ AAO noted in its request for evidence that the director had denied the petition based on the professional visa category under Section 203(b)(3)(A)(ii) of the Act, however, the director also cited Section 203(b)(3)(A)(i) of the Act under the skilled worker visa category.

all the education, training, and experience specified on the labor certification as of the petition's priority date. *See* 8 C.F.R. § 103.2(b)(1), (12). *See also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The priority date for the instant petition is August 1, 2003. The petitioner filed the Immigrant Petition for Alien Worker (Form I-140) on February 2, 2006.

The director's denial was based on his conclusion that the beneficiary's three-year diploma from the National Council for Hotel Management and Catering Technology was not a foreign equivalent degree to a four-year U.S. bachelor's degree in hospitality management as required by the labor certification. The director also noted that the evaluation submitted by the petitioner combined both the beneficiary's diplomas and professional experience to conclude that the beneficiary possessed the equivalent of a "U.S. Bachelor of Arts Degree in Hotel and Restaurant Management with Concentration in Culinary Arts."

The petitioner filed an appeal on April 7, 2006, asserting that the director erred in failing to acknowledge that the beneficiary qualified as a professional.

On July 17, 2008, the AAO issued a request for evidence from the petitioner asking for: 1) a complete grade transcript reflecting the beneficiary's attendance at the National Council for Hotel Management & Catering Technology; 2) a copy of the beneficiary's grade transcripts supporting his bachelor's degree from the University of New Delhi, claimed to be in economics and history; copies of the beneficiary's secondary school certificate and corresponding grade transcripts; and 3) copies of evidence of recruitment efforts, including correspondence, postings and advertisements that were submitted to the DOL in order to determine how the petitioner characterized the position to the DOL and potential U.S. applicants.

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

As noted above, the ETA 750 in this matter is certified by the DOL. Thus, at the outset, it is useful to discuss the 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 Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) 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, including the 9th Circuit that covers the jurisdiction for this matter.

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.

* * *

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 (the Service), 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).

Qualifications for 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 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.***

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, reached a similar decision in *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984).

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 decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d (D. Or. 2005), which found that United States Citizenship and Immigration Services (USCIS) "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." A judge in the same district subsequently held that the assertion that DOL certification precludes USCIS from considering whether the alien meets the educational requirements specified in the labor certification is wrong. *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 *5 (D. Ore Nov. 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 *Snapnames.com, Inc.* court concluded that that 'B.S. or foreign equivalent' relates solely to the alien's educational background and precludes consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at *14. However, in the context of a skilled worker classification, deference may be given to an employer's intent because the court termed the word 'equivalent' to be ambiguous. *Id.* at *14. If the classification sought is for a professional or advanced degree professional, the court found that USCIS properly required that a single foreign degree may be required. *But see Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree). It is noted that in this case, as stated by the director, that the evaluation submitted to the record did not claim that the beneficiary's education, standing alone, was equivalent to a U.S. bachelor's degree, but based its conclusion that the beneficiary had obtained a foreign equivalent of a U.S. bachelor's degree only when combined with his professional work experience.

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.

In this matter, at least two circuits, including the Ninth Circuit overseeing the Oregon District Court, has held that USCIS does have the authority and expertise to evaluate whether the alien is qualified for the job. Those Circuit decisions are binding on this office and will be followed in this matter.

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.

The key to determining the job qualifications is found on Form ETA-750 Part A. Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education (number of years)

Grade school	8
High school	4
College	4
College Degree Required	Bachelors or Foreign equivalent
Major Field of Study	Hospitality Management

Experience:

Job Offered	2
Related Occupation	2 (Chef-de Partie/Restaurant Management)

Block 15:

Other Special Requirements (none stated)

As set forth above, relevant to formal education, the proffered position requires four years of college culminating in a bachelor's degree or foreign equivalent in hospitality management. Further, the job duties described on the ETA 750 state:

Coordinate daily restaurant operations and renew restaurant and inventory financials; monitor inventory, receipt (sic) standardization; quality control; oversee entire kitchen operations (sic) and kitchen equipment; budget and sanitation compliance.

As shown on the ETA 750, the DOL assigned the occupational code and title of 313.131-04, chef. DOL's occupational codes are assigned based on normalized occupational standards.

According to DOL's public online database⁴ most analogous to the certified position of chef brigade, the position falls within Job Zone Three requiring "medium preparation" for the occupation type closest to the proffered position. According to DOL, previous work-related skill, knowledge, or experience is required for these occupations. DOL assigns a standard vocational preparation (SVP) range of 6.0 to < 7.0 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."⁵ Additionally, relevant to the overall training and experience of these occupations, DOL states that the employees in these occupations usually need one or two years of training involving both on-the-job experience and informal training with experienced workers. DOL further states that an example may consist of an electrician who must have completed three or four years of apprenticeship or vocational training and often must acquire a license to perform the job. *See id.*

Based on both the stated minimum requirements described on the ETA 750 and the standardized occupational requirements as set forth above, the position will be considered under both the professional category and the skilled worker category. It is noted that while the skilled worker classification minimum requirements do not require that an applicant possess a baccalaureate degree to be classified as a skilled worker, the beneficiary must still meet the terms set forth on the labor certification. 8 C.F.R. § 204.5(l)(3)(B).

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.

(Emphasis added.)

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 from a college or university 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.

⁴ <http://online.onetcenter.org/link/summary/35-1011.00>(accessed December 23 , 2008).

⁵ <http://online.onetcenter.org/link/summary/35-1011.00> (accessed December 23, 2008).

As the record reflects, the beneficiary possesses a three-year diploma in Hotel Management from the National Council for Hotel Management and Catering Technology, New Delhi, awarded, as stated on the diploma for his studies completed from 1987 to 1990.⁶

As noted on the ETA 750B, the beneficiary also claims to have obtained a Bachelor's degree in economics and history in from the University of Delhi. Copies of this diploma and accompanying statement of marks indicate that the beneficiary passed the qualifying examination in 1995, and received the Bachelor of Arts degree in 1995. It represented a 1993, 1994 and 1995 enrollment with the school of correspondence and continuing education. The courses are shown by abbreviation, so it is unclear if his field of study was economics and history.

In support of the beneficiary's educational qualifications, as referenced in the director's decision, the petitioner also submitted a credential evaluation report, dated November 20, 1998, from [REDACTED] of the [REDACTED] International Education Council. As noted above, Dr. [REDACTED]'s evaluation concludes that the beneficiary's three-year diploma in hotel management "may be considered equivalent to two years of lower-level and one year 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. (1st and 2nd year, and 3rd year of four-year degree.)" He then states that the beneficiary's three years of professional work experience as a chef-in-charge, senior chef de partie and chef-in-charge at The Taj Mahal Hotel in New Delhi "may be considered equivalent to one year of upper-level university-level studies in hotel and restaurant management with concentration in culinary arts toward a four-year bachelor degree" in an accredited U.S. college or university. [REDACTED]'s evaluation concludes that based on the beneficiary's credentials as listed in "Appendix A," which includes a twelve-item list of the beneficiary's academic credentials, certificates of training and work history, as well as newspaper articles describing the beneficiary's accomplishments as a chef, that the beneficiary possesses a "U.S. Bachelor of Arts Degree in Hotel and Restaurant Management with Concentration in Culinary Arts." This evaluation relies on a combination of the beneficiary's education and work experience, which the Form ETA 750 did not specify was allowed.

As advised in the request for evidence issued to the petitioner by this office, we have reviewed the beneficiary's credentials in EDGE created by the AACRAO, which, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://accraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials." Authors for Edge are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An

⁶ The statement of marks represents grades received in 1988, 1989 and 1990.

Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at [www. Aacrao.org/publications/guide to creating international publications.pdf](http://www.Aacrao.org/publications/guide%20to%20creating%20international%20publications.pdf). If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

EDGE states that a Bachelor of Arts degree is awarded upon completion of two to three years of tertiary study beyond the Higher Secondary Certificate (or equivalent).

In this case, the beneficiary's three-year diploma in hotel management from the National Council for Hotel Management and Catering Technology is described in the *P.I.E.R. World Education Series India: A Special Report on the Higher Education System and Guide to the Placement of Students in Educational Institutions in the United States*, 50 (1997). As with EDGE, this publication is sponsored by AACRAO and represents conclusions vetted by a team of experts. It indicates that the beneficiary's diploma is based on the completion of class/grade XII and gives access in India to employment. It also states that it "may be considered for undergraduate transfer credit determined through a course-by-course analysis," based on a careful review of the syllabus.

In this case, neither diploma, representing the beneficiary's three-year program of study in hotel management completed in 1990,⁷ or the subsequent three-year bachelor of arts degree in economics and history awarded in 1996, represents either alone or in combination, a Bachelor's degree or foreign equivalent in Hospitality or Management.

The AAO does not find [REDACTED] evaluation to be persuasive in this matter. Additionally, it is noted that he employed a formula of equating three years of experience for one year of education, which may be used pursuant to the regulations governing non-immigrant petitions,⁸ but is not permitted in the regulations governing the instant petition. For the purpose of qualifying as a professional under 8 C.F.R. § 204.5(l)(3)(ii)(C), evidence of a baccalaureate degree must be in the form of an official college or university record, not a combination of education and experience. USCIS 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).

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. More specifically, a three-year diploma in hotel management will not be considered to be 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," he may not

⁷ The record contains no evidence that the beneficiary's diploma in hotel management represents a post-graduate diploma such as referenced in the AAO's request for evidence that would be predicated on an admissions requirement of a two or three year bachelor's degree.

⁸ See 8.C.F.R. § 214.2(h)(4)(iii)(D)(5).

qualify as a professional 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.

The beneficiary is also not eligible for qualification as a skilled worker under section 203(b)(3)(A)(i) of the Act. For this qualification, a beneficiary must meet the petitioner's requirements as stated on the labor certification in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides that:

Skilled Workers. If the petition is for a skilled worker, 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, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In this case, even considering the petition under the skilled worker category, the beneficiary would not meet the requirements set forth on the ETA 750. The petitioner specified that four years of college culminating in a bachelor's or foreign equivalent in hospitality management is required. The equivalency is not defined on the ETA 750. As discussed above, the beneficiary's diploma in hotel management is concluded to represent at most, some unspecified amount of undergraduate transfer credit determined on a course-by-course basis. Additionally, his subsequent three-year unrelated Bachelor of Arts degree is considered by EDGE to be comparable to two or three years of university study in the United States with credit awarded on a course-by-course basis.

Moreover, the AAO's request for evidence asked for documentation of the petitioner's recruitment efforts conducted pursuant to the labor certification proceedings in order to determine whether its intent to accept some other defined equivalency may have been communicated to DOL and to other job applicants, including U.S. applicants. The copies of job advertisements included an internal posting which stated the job requirements as provided on the ETA 750 in requesting "Bachelor's Degree in Hospitality Management or Foreign Equivalent with two (2) years experience on the job or two (2) years of experience in the related occupation of Chef-de-Partie/Restaurant Management." In the Ft. Lauderdale, *FL Sun Sentinel*, *The Palm Beach Post* and *Wall Street Journal* newspapers, and the online website of "America's JobBank," the advertisement appears as "Bachelor's/foreign equivalent in Hospitality or substantial rel. exp." As presented, except for the internal job posting, the newspaper and online advertisements do not list the job's requirements consistent with the requirements set forth on the ETA 750 in providing an overall experiential alternative to the educational requirement rather than as specified on the ETA 750, as a bachelor's degree in hospitality management and two years of experience in the job offered or two years in a related occupation that was specifically defined as chef-de-partie/restaurant management. A defined educational equivalency to the petitioner's requirement of a four-year bachelor's degree in hospitality management. Further, the newspaper advertisements do not specify a two-year work experience requirement as set forth on the ETA 750, but merely require substantial experience. Therefore they do not address the

petitioner's complete education and experience requirements.

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS 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). USCIS'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). USCIS 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.

In this matter, the beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree in hospitality management pursuant to the terms of the labor certification. Taken together with the inconsistent language reflected on the petitioner's advertisements which advised that the educational requirements were either a bachelor's degree in hospitality management or foreign equivalent, or that it was bachelors/foreign equivalent in hospitality or substantial related experience, it may not be concluded that the beneficiary possesses the requisite four-year bachelor's degree in hospitality management or a foreign equivalent degree,⁹ or that a defined equivalency of the proffered position's educational requirements was communicated to other U.S. workers as part of the petitioner's recruitment efforts.

⁹ DOL has also provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as throughout all phase of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. From Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, this field guidance memoranda has not been rescinded.

The petitioner's actual minimum requirements could have been changed or clarified before the Form ETA 750 was certified by the DOL. Since that was not done, the director's decision to deny the petition is affirmed. Because the beneficiary does not meet the job requirements as stated on the ETA Form 750 labor certification, the petition may not be approved under either the professional or skilled worker category pursuant to section 203(b)(3) of the Act.

Based on the foregoing, the petitioner failed to demonstrate that the beneficiary met the qualifications of the labor certification. 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.