identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 0 4 2011

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 manages luxury hotels. It seeks to employ the beneficiary permanently in the United States as a hotel manager. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

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.

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.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date of the petition is March 21, 2007, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).[2] The Immigrant Petition for Alien Worker (Form I-140) was filed on April 30, 2007.

---

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

[2] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, 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.

On the ETA Form 9089, the "job offer" position description for a hotel manager provides:

> Manage the day-to-day operations of the hotel. Attend and participate in all Planning Committee meetings and events. Monitor and review revenue, labor, and profit and loss reports; analyze results; and take action when necessary. Tour the hotel, make recommendations for changes, note deficiencies, and ensure corrective action is taken. Meet regularly with all managers, supervisors, and line employees. Monitor and enforce all standards. Control all capital expenditures, and ensure projects are completed on a timely basis. Conduct performance reviews of all Planning Committee. Meet with Director of Human Resources to review staffing requests, morale, disciplinary situations, etc. Aid the development of personnel and the recruitment of new personnel. Conduct a weekly Department Head meeting to discuss operational problems and opportunities and to improve or maintain an excellent communication flow. Control expenses by actively participating in all areas of the hotel operation. Review and sign all purchase requests, orders, and checks to ensure adherence to purchasing procedures. Develop and implement profit improvement ideas, policies, and procedures. Assume the authority of the General Manager in his/her absence.

Regarding the minimum level of education and experience required for the proffered position, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: Bachelor's.

4-A. States "if other indicated in question 4 [in relation to the minimum education], specify the education required."

[Blank]

4-B. Major Field Study: Hotel and restaurant management.

7. Is there an alternate field of study that is acceptable.

The petitioner checked "no" to this question.

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

6. Experience: 24 months in the position offered,

10. or 24 months (2 years) in a hotel management occupation.

14. Specific skills or other requirements: 24 months of experience in a hotel management occupation with budget oversight of at least $10 million with a luxury full-service hotel property.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS 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, 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 v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As set forth above, the proffered position requires a Bachelor's degree in hotel and restaurant management and two years of experience in the job offered or in a hotel management occupation.

On the ETA Form 9089, signed by the beneficiary, the beneficiary represented that the highest level of achieved education related to the requested occupation was "Bachelor's." He listed the institution of study where that education was obtained as the Hotel Management School Les Roches, and the year completed as 1990. The Form ETA 9089 also reflects the beneficiary's experience as follows:

Employer	Position	Dates of Employment
	Hotel Manager	June 27, 2005
	Director of Food and Beverage	July 27, 2002 – June 17, 2005
	Director of Food and Beverage	January 5, 2000 – July 26, 2007

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's International Baccalaureate diploma and diploma in Hotel Management from the Swiss Hotel Association Hotel Management School Les Roches. The petitioner additionally submitted a credentials evaluation, dated April 30, 2002, from the Foundation for International Services, Inc ("FIS evaluation"). The FIS evaluation states that the beneficiary's diploma from the Swiss Hotel Association Hotel Management School Les Roches "is equivalent to an associate's degree (two years of university-level credit) in hotel and restaurant management from an accredited community college in the United States." The evaluation goes on to conclude that the combination of the beneficiary's three-year Diploma in Hotel Management, the International Baccalaureate, and eight years of work experience are equivalent to a bachelor's degree in hotel and restaurant management from and accredited college or university in the United States.

Subsequently, in response to a Request for Evidence (RFE) issued by the director, the petitioner submitted two new evaluations – one by and the other by Both of these evaluations conclude that the beneficiary's three-year diploma in Hotel Management from the Swiss Hotel Association Hotel Management School Les Roches is equivalent to a U.S. bachelor's degree.

The director denied the petition on June 4, 2009. He determined that the beneficiary's diploma in hotel management could not be accepted as a foreign equivalent degree to a U.S. bachelor's degree in hotel and restaurant management.

On appeal, counsel asserts that the "thoroughness" of the FIS evaluation is "questionable" and that it should be given the least consideration of the three in the record. Counsel further asserts that "strong consideration" should be given to the Kersey and Danzig evaluations.

On November 18, 2010, the AAO issued a request for evidence and notice of derogatory information (RFE/NDI) to the petitioner. In this request, the AAO noted that there was no evidence in the record of proceeding that the beneficiary ever enrolled in classes beyond the academic studies at the Swiss Hotel Management School. The AAO also noted that the petitioner did not specify on the ETA Form 9089 that the minimum academic requirement of a bachelor's degree might be met through a combination of lesser degrees and/or a quantifiable amount of work experience. The AAO stated that the labor certification application, as certified, did not demonstrate that the petitioner would accept a combination of degrees that are individually less than a single-source U.S. bachelor's degree or its foreign equivalent and/or a quantifiable amount of work experience when the labor market test was conducted. ETA Form 9089, Part H, states that the petitioner would not accept a combination of education and experience as an alternative.

The RFE/NDI further advised the petitioner that this office had reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and

Admissions Officers (AACRAO).[3] 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://aacraoedge.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 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.* 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.

As stated in the RFE/NDI, EDGE provides a great deal of information about the educational system in Switzerland, and while it confirms that a Diploma in Hotel Management from the Swiss Hotel Association is awarded upon completion of three years of tertiary study and represents attainment of a level of education comparable to two years of university study in the United States, it does not suggest that the three-year Hotel Management diploma may be deemed a foreign equivalent degree to a U.S. baccalaureate. This appears to be in accord with the FIS evaluation.

In response to the RFE/NDI, counsel submitted a letter from [redacted] for the petitioner, a copy of the petitioner's recruitment report, a copy of the prevailing wage request form, copies of advertisements and job postings, and copies of resumes submitted in response to the advertisements and job postings.

The occupational classification of the offered position is not one of the occupations statutorily defined as a profession at section 101(a)(32) of the Act, which states: "The term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

Part F of the ETA 9089 indicates that the DOL assigned the occupational code of 11-1021.00 and title General and Operations Manager, to the proffered position. The DOL's occupational codes are assigned based on normalized occupational standards. The occupational classification of the offered position is determined by the DOL (or applicable State Workforce Agency) during the labor certification process, and the applicable occupational classification code is noted on the labor

---

[3] In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision.

certification form. O*NET is the current occupational classification system used by the DOL. Located online at http://online.onetcenter.org, O*NET is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States.[4]

In the instant case, the DOL categorized the offered position under the SOC code 11-1021.0. The O*NET online database states that this occupation falls within Job Zone 3.

According to the DOL, one or two years of training involving both on-the-job experience and informal training with experienced workers are needed for Job Zone 3 occupations. The DOL assigns a standard vocational preparation (SVP) of 6 to Job Zone 3 occupations, 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://www.onetonline.org/link/summary/11-1021.00* (accessed February 24, 2011). Additionally, the DOL states the following concerning the training and overall experience required for Job Zone 3 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.

See id. Because of the requirements of the proffered position and the DOL's standard occupational requirements, the proffered position is for a skilled worker, but might also be considered under 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 regulation uses 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.

---

[4] *See* http://www.bls.gov/soc/socguide.htm.

baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The regulation at 8 C.F.R. 204(5)(l)(3)(ii)(B) states the following:

> 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.

The above regulation requires that the alien meet the requirements of the labor certification.

Because the petition's proffered position qualifies for consideration under both the professional and skilled worker categories, the AAO will apply the regulatory requirements from both provisions to the facts of the case at hand, beginning with the professional category.

Initially, however, we will provide an explanation of the general process of procuring an employment-based immigrant visa and the roles and respective authority of both agencies involved.

As noted above, the Form ETA 9089 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.

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. 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).[5] 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 at 1012-1013.

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 at 1008. 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, revisited this issue, stating:

---

[5] Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

> 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).

Therefore, it is the DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of USCIS to determine if the petition and the alien beneficiary are eligible for the classification sought. For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires that the alien had a U.S. baccalaureate degree or a foreign equivalent degree and be a member of the professions. Additionally, the regulation requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." (Emphasis added.)

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 USCIS or 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).

Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement of a "degree" for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that a member of the professions must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we

did not require "a" degree that is the foreign equivalent of a U.S. baccalaureate degree, we would not consider education earned at an institution other than a college or university.

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 bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. Where the analysis of the beneficiary's credentials relies on work experience alone or in combination with one or more lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a single-source "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.

As noted above, the beneficiary possesses a diploma in Hotel Management from the Swiss Hotel Management School, Les Roches. The FIS evaluation states that the beneficiary's diploma is equivalent to an associate's degree in hotel and restaurant management from an accredited community college in the United States. The Kersey and Danzig evaluations conclude that the beneficiary's diploma is equivalent to a bachelor's degree in hotel management from a U.S. college or university.

As noted in the RFE/NDI issued by this office, 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Counsel has stated on appeal that the FIS evaluation is "questionable" and should be given less weight than the [redacted] Counsel states that, because the FIS evaluator was asked to review the beneficiary's education and experience, the "easiest course of action was to issue an equivalency determination based upon this 'combination' which met the needs for the benefit sought rather than to perform the research and analysis required to determine the equivalency of the education alone to a U.S. bachelor's degree."

Counsel's argument is unpersuasive. First, counsel has not provided any objective evidence to support her argument that the FIS evaluation should be given less weight than the [redacted] Second, there is nothing in the FIS evaluation to indicate that the evaluator was simply taking the "easiest course of action" to determine that the beneficiary possessed a bachelor's degree. It appears that the FIS evaluator reviewed the beneficiary's diploma and transcripts from the Swiss Hotel Association Management School, as well as outside research materials including college catalogs. If, upon reviewing the relevant documentation, the evaluator believed that the beneficiary's diploma was equivalent to a U.S. bachelor's degree, the "easiest course of action" would have been to rely on the diploma alone, rather than taking the additional step of reviewing the beneficiary's employment history. Finally, contrary to counsel's assertion, it appears that the evaluator did perform research to determine the equivalency of the beneficiary's diploma. Based on this research, the evaluator concluded that the diploma was equivalent to an associate's degree from a U.S. school.

Counsel states that are "credible, logical and well-documented" and should be given "strong consideration." Specifically, counsel notes that these evaluations cite the fact that the Swiss Hotel Association Hotel Management School is accredited by the New England Association of Schools and Colleges (NEASC). However, the fact that the school is accredited by the NEASC says nothing about whether the diploma held by the beneficiary is equivalent to a U.S. bachelor's degree.

The concludes that the beneficiary's diploma is equivalent to a U.S. bachelor's degree based on "the credibility of the Swiss Hotel Association Hotel Management School 'Les Roches,' the nature of the coursework, and the related areas." However, this conclusion is no more detailed than the conclusion of the FIS evaluation thus it is not clear why should be given more weight. Although lists a number of "research sources," copies of these sources are not provided and no explanation is provided as to how these sources support the conclusion that the beneficiary's diploma is equivalent to a U.S. bachelor's degree.

The , concludes that the beneficiary's diploma is equivalent to a U.S. bachelor's degree. Although, as noted by counsel, the evaluation is 14 pages long, it provides almost no analysis of the beneficiary's course of study at the Swiss Hotel Association Hotel Management School. Instead, the information contained in is mostly general in nature and not clearly applicable to the instant case. For example, the evaluation notes that three-year bachelor degree programs exist at several regionally accredited colleges and universities in the United States. However, the existence of three-year degree programs in the United States is not useful in evaluating unrelated foreign degrees. At issue is not whether it is possible to obtain a baccalaureate in less than four years in the United States, but the actual equivalence of the specific diploma that the beneficiary obtained.

The notes that a number of U.S. graduate schools, in some cases, may consider a holder of a three-year bachelor's degree for admission to a graduate program. However, as stated above, the issue here is whether the beneficiary's diploma is equivalent to a U.S. bachelor's degree. General information about how certain schools treat three-year degrees is not relevant to the issue at hand.

In addition, states that a U.S. bachelor's degree is "not invariably wedded to a four-year enrollment." In support of this, the Kersey evaluation cites the United Nations Educational, Scientific and Cultural Organization (UNESCO) "Recommendation on the Recognition of Studies and Qualifications" which was adopted in 1993. Specifically, quotes the following which is found in paragraph 1(e) of the Recommendation on the Recognition of Studies and Qualifications:

> "Recognition" of a foreign qualification in higher education means its acceptance by the competent authorities of the State concerned (whether they be governmental or nongovernmental) as entitling its holder to be considered under the same conditions as those holding a comparable qualification awarded in that State an deemed comparable, for the purposes of access to or further pursuit of

> higher education studies, participation in research, the practice of a profession, if this does not require the passing of examinations or further special preparation, or all the foregoing, according to the scope of the recognition.

The UNESCO recommendation relates to admission to graduate school and training programs and eligibility to practice in a profession. Nowhere does it suggest that a three-year diploma, such as the one held by the beneficiary, must be deemed equivalent to a four-year degree. More significantly, the recommendation does not define "comparable qualification." At the heart of this matter is whether the beneficiary's diploma is, in fact, the foreign equivalent of a U.S. baccalaureate. The UNESCO recommendation does not address this issue.

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).

Given the petitioner's failure to resolve the inconsistencies between the evaluations submitted and the information relating to the hotel management diploma obtained from EDGE, the AAO finds that the petitioner has failed to establish, by a preponderance of the evidence, that the beneficiary's diploma in hotel management from the Swiss Hotel Association Hotel Management School, Les Roches, is equivalent to a U.S. bachelor's degree.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," from a college or university in the required field of study listed on the certified labor certification, 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.

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), which finds that 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." 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*, 437 F. Supp. 2d at 1179 (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 USCIS, 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*, 2006 WL 3491005 (D. Or. 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 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 USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19.

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 petitioner must demonstrate about the beneficiary's qualifications. *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 the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Further, the employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the proffered position. *Maramjaya v. USCIS*, Civ. Act. No. 06-2158, 14 n. 7. Thus, USCIS agrees that the best evidence of the petitioner's intent concerning the actual minimum educational requirements of the proffered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence is needed to ensure inflation of those requirements is not occurring in an effort to fit the beneficiary's credentials into requirements that do not seem on their face to include what the beneficiary has.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS 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, 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.

As noted above, on November 18, 2010, the AAO issued an RFE/NDI to the petitioner. In response to the RFE/NDI, counsel submits a copy of the petitioner's recruitment report, a letter from , Director of Human Resources for the petitioner, a copy of the prevailing wage request form, copies of advertisements and job postings, and copies of resumes submitted in response to the advertisements and job postings.

The letter from suggests that the requirements for the hotel manager position are "a bachelor's degree or equivalent in hotel and restaurant management (whether the degree itself, an appropriate combination of education and experience, or a lengthy record of successful employment) plus 24 months of experience in a hotel management occupation." However, this statement appears to conflict with the ETA Form 9089 which, as noted above, states that a bachelor's degree is required and that an alternate combination of education and experience that is not acceptable. This also seems to conflict with the Sunday newspaper advertisements and local newspaper advertisements which state that the Hotel Manager position requires a "BA/BS or foreign equiv. in hotel and restaurant mgmt."[6]

In addition, the prevailing wage request form states that the minimum education required is "Bachelor." The posting from the Texas Workforce Commission website states that the position requires a "Bachelor's degree or equivalent in hotel and restaurant management." However, no explanation of the term "or equivalent" is provided in the posting. The internal posting similarly states that the position requires a "Bachelor's degree or equivalent" but does not elaborate on the meaning of the term "or equivalent."

---

[6] The DOL has 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 phases 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). The DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition" and SESAs should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." . The 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."

Finally, the recruitment report also states that the position requires "a bachelor's degree or equivalent in hotel and restaurant management." The recruitment report also states that the "requirements described in Part H of the ETA Form 9089 represent our actual minimum requirements for the job opportunity." The report also notes that one applicant was found to be unqualified for the position because he or she "did not have the required Bachelor's degree or equivalent in Hotel and Restaurant Management."

The ETA Form 9089 does not provide that the minimum academic requirements of a Bachelor's degree in Hotel and Restaurant Management might be met through a three-year diploma or some other formula other than that explicitly stated on the ETA Form 9089. The copies of the advertisements and job postings provided with the petitioner's response to the RFE/NDI issued by this office also fail to advise any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency. Thus, the alien does not qualify as a skilled worker as he does not meet the terms of the labor certification as explicitly expressed or as extrapolated from the evidence of its intent about those requirements during the labor certification process.

The beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree, and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act.

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.