

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 29 April 2013

BALCA Case No.: 2011-PER-02935
ETA Case No.: A-09096-37572

In the Matter of:

DGN TECHNOLOGIES, INC.,
Employer

on behalf of

AMIT BHANDARI,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearances: Nadeem Yousaf, Esquire
Fremont, California
For the Employer

Gary M. Buff, Associate Solicitor
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: **Romero, Avery, and Kennington**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the “PERM” regulations found at Title 20, Part 656 of the Code of Federal Regulations (C.F.R.).

BACKGROUND

On April 6, 2009, the Certifying Officer (CO) accepted for processing Employer's Application for Permanent Employment Certification (ETA Form 9089) for the position of "Computer and Information Systems Manager" (AF 62-71).¹ Because the application was for a professional position, Employer listed three types of professional recruitment, one of which was posting on Employer's website. Employer indicated on the Form 9089 that the posting on its website occurred from November 30, 2008 to December 30, 2008. (AF 66).

On January 29, 2010, the CO notified Employer that its ETA Form 9089 was selected for audit. (AF 59-61). Among other documentation, the CO directed the Employer to submit its recruitment documentation. (AF 59). The CO received Employer's response on March 1, 2010.² (AF 58). On July 23, 2010, the CO denied certification of Employer's application for one reason: Employer failed to respond to the audit notification within the required time. (AF 55-57).

On August 5, 2010, Employer requested reconsideration. (AF 14-54). Employer included its audit response. As supporting documentation of the Employer's website posting, Employer submitted a copy of a job posting from its website with an illegible handwritten notation of the date that the posting was created. (AF 41). Employer also submitted a recruitment report signed by its President, Ranvir Singh, which indicated the position was listed on its website from November 30 to December 30, 2008. (AF 36-37). On March 21, 2011, the CO denied the application for a second time. (AF 11-13). The CO denied certification of Employer's application on one ground—Employer failed to provide adequate documentation showing that it advertised the job opportunity on its website as required by 20 C.F.R. § 656.17(e)(1)(ii)(B). (AF 12).

Employer requested reconsideration on April 18, 2011. (AF 3-10). Employer included a letter from Ranvir Singh stating he was responsible for posting all positions on the website and could definitively state that the position was continuously posted on the website. (AF 4).

On September 20, 2011, the CO issued a letter of reconsideration. (AF 1-2). The CO determined Employer's request did not overcome the deficiency stated in the determination letter because the President's statement accompanying the motion for reconsideration was not a sworn affidavit and also because it constituted new evidence not in the record on which the denial was based. Therefore, the CO determined that the reason for denial was valid pursuant to 20 C.F.R. §§ 656.24(g)(2)(i) and 656.24(g)(2)(ii) and thus forwarded the case to BALCA on September 15, 2011.

On January 4, 2012, BALCA issued a Notice of Docketing. Employer filed a Statement of Intent to Proceed on January 12, 2012.

DISCUSSION

¹ In this decision, AF is an abbreviation for Appeal File.

² Employer's response to the audit notification was not included in the administrative file. Employer provided a copy of its audit response with its Request for Reconsideration dated August 5, 2010.

Under 20 C.F.R. § 656.17(e)(1)(ii), one of the additional recruitment steps an employer can utilize in advertising a professional occupation is to advertise the position on its own website. This step “can be documented by providing dated copies of pages from the site that advertise the occupation involved in the application.” 20 C.F.R. § 656.17(e)(1)(ii)(B).

The regulations require an employer to maintain all supporting documentation of all recruitment steps taken and all attestations made in the application for labor certification for five years. 20 C.F.R. §§ 656.10(f), 656.17(a)(3), 656.17(e)(1). A substantial failure by an employer to provide the documentation required by the audit will result in the application for permanent labor certification being denied. 20 C.F.R. § 656.20(b).

“The regulations do not preclude an employer from providing documentation of the advertisement posted on its website in a manner other than by submitting dated printouts of the website advertisement.” *PSI Family Services, Inc.*, 2010-PER-00097 (Apr. 16, 2010). The Office of Foreign Labor Certification (OFLC) website states that the CO may find documentation adequate without dated copies of the advertisement from the employer’s website. The OFLC website includes a Frequently Asked Question (FAQ) and response, which states, “the employer may provide an affidavit from the official within the employer’s organization responsible for the posting of such occupations on the website attesting, under penalty of perjury, to the posting of the job.”³ However, the FAQ states that there is no guarantee that the CO will find such a submission to be adequate documentation of the posting on the website.⁴

In the instant case, Ranvir Singh signed the recruitment report, which was included with the audit response. The recruitment report indicates that the position was posted on Employer’s website from November 30 to December 30, 2008. However, it does not indicate that Ranvir Singh was the official within Employer’s organization responsible for the posting of such occupations on the website. Further, the recruitment report was not attested to in affidavit form. The screenshots provided by Employer include an illegible handwritten note indicating the date on which the job was posted on Employer’s website. However, it does not indicate who made the handwritten notation. Thus, the audit response documentation did not establish the dates of posting in the form specified by the regulations or in the affidavit format specified by the OFLC FAQ. Therefore, we find that the evidence provided by Employer with its audit response was not adequate documentation of the posting on the website.

“[R]etention of reliable contemporaneous documentation of the status of a web page on the dates attested to in the Form 9089 is essential for an employer to be able to meet the PERM documentation requirement of dated copies of company website postings.” *PSI Family Services, Inc.*, *supra*. In the instant case, Employer did not provide documentation of the website advertisement through the method specified under the regulation, the method articulated in the FAQ response, or any other adequately credible documentation form. Therefore, we find the

³ www.foreignlaborcert.doleta.gov/faqsanswers.cfm#audit4 (last visited February 25, 2013).

⁴ The FAQ states that “[w]hether such evidence will be accepted depends upon the nature of the submission and the presence of other primary documentation. The more primary evidence is not provided, the more likely the audit response will be found to be non-responsive.”

www.foreignlaborcert.doleta.gov/faqsanswers.cfm#audit4 (last visited February 25, 2013).

documentation provided was deficient as proof of the dates of a company website recruitment effort.

The Employer provided a letter written by Ranvir Singh with its motion for reconsideration. The CO declined to consider the letter, finding that it was not in affidavit form and that it constituted “new evidence.” The regulation governing motions for reconsideration, at 20 C.F.R. § 656.24(g)(2), limits the type of evidence that can accompany a motion for reconsideration for applications submitted after July 16, 2007 to:

- (i) Documentation that the Department actually received from the employer in response to a request from the Certifying Officer to the employer; or
- (ii) Documentation that the employer did not have an opportunity to present previously to the Certifying Officer, **but that existed at the time the Application for Permanent Labor Certification was filed**, and was maintained by the employer to support the application for permanent labor certification in compliance with the requirements of §656.10(f). (Emphasis added).

The letter submitted by Employer with the request for reconsideration does not meet these criteria, and we therefore find that the CO’s decision not to consider the letter was supported by the regulations. Because the letter was not part of the record upon which the application was denied, it is not part of the record the panel may review on appeal. *See* 20 C.F.R. §§ 656.26(a)(4)(i) and 656.27(c).

Based on the foregoing, we affirm the CO’s denial of labor certification.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

Lee J. Romero, Jr.
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.