



**Issue Date: 31 July 2015**

**BALCA No. 2011-PER-01366**  
ETA No. A-08303-00628

*In the Matter of:*

**DGN TECHNOLOGIES INC.,**  
*Complainant,*

*on behalf of*

**BANDA, PAVAN BHARATH,**  
*Alien.*

Certifying Officer: Atlanta National Processing Center

Appearances: Ranvir Singh  
President, DGN Technologies Inc.  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Stephen R. Jones, Attorney  
United States Department of Labor  
Office of the Solicitor  
Employment and Training Legal Services  
*For the Certifying Officer*

Before: Paul R. Almanza, Larry S. Merck, and Morris D. Davis  
*Administrative Law Judges*

**DECISION AND ORDER**  
**REVERSING DENIAL OF CERTIFICATION**

**PER CURIAM.** 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 at 20 C.F.R. Part 656.<sup>1</sup>

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<sup>1</sup> "PERM" is an acronym for the "Program Electronic Review Management" system established by the regulations that went into effect on March 28, 2005.

## BACKGROUND

The Employer is sponsoring the Alien for permanent employment in the United States for the professional position of “Computer and Information Systems Manager.” (AF 84-93).<sup>2</sup> The Employer reported on its ETA Form 9089 application that one of its recruitment steps was posting an advertisement for the job on the Employer’s website from July 1, 2008 to August 1, 2008. (AF 88).

The Certifying Officer (CO) audited the application, and following review of the Employer’s audit response, denied certification on the ground that the Employer failed to provide dated copies of its website advertisement. (AF 38-39).<sup>3</sup> The CO noted that the Employer’s website copies contained a handwritten notation that states “continuous posting since June 1, 2008.” (AF 39; *see also* AF 76).

The Employer requested reconsideration and/or review of the denial (AF 3-37) stating that it had posted this position (and its other positions) on its website and never removed them. The Employer noted that the regulation says it “can” document website advertisements by providing dated copies, and that an Employment and Training Administration “FAQ” states that it is possible to document the advertisement by providing an affidavit from the official within the employer’s organization responsible for the posting of such occupations attesting to the posting. The Employer noted that its documentation of the website posting had been annotated with the handwritten notation attesting to continuous posting of the advertisement. Moreover, the Employer’s president was now stating “under the penalty of perjury” that “the position was posted continuously on our website and specifically for the period July 1 to August 1, 2008.” (AF 4).

The CO reconsidered, but found that the ground for denial was valid because “the documentation provided by the employer with its audit response contained a handwritten notation and does not allow the Certifying Officer to confirm there is a logical nexus between the job offered and the placement of the advertisement on the employer’s website....” (AF 1-2).

On appeal, the Employer filed a statement confirming its intention to pursue the appeal, but did not file an appellate brief or other statement of position.

The CO filed a short letter stating his position on appeal. The CO cited the panel decision in *Defense Language Institute Foreign Language Center*, 2010-PER-1016 (Aug. 22, 2011), in support of the decision to deny certification.

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<sup>2</sup> In this Decision, “AF” is an abbreviation for “Appeal File.”

<sup>3</sup> The CO denied certification on a second ground, but later accepted the Employer’s argument and documentation relating to this ground on reconsideration. Thus, this issue is not before the Board on appeal.

## DISCUSSION

When an employer sponsors an alien for permanent employment in the United States in a professional position, it must conduct certain “additional” recruitment steps. Advertising the position on the employer’s website is one method an employer can use to support the application. The regulations provide that “[t]he use of the employer’s Web site as a recruitment medium can be documented by providing dated copies of pages from the site that advertises the occupation involved in the application.” 20 C.F.R. § 656.17(e)(1)(ii)(B). Thus, dated copies of the actual web pages from the employer’s website used to advertise the position constitute the “primary” evidence that may be used by an employer to document this recruitment step. A “substantial failure” by an employer to provide the documentation required by the audit may result in the application for permanent labor certification being denied. 20 C.F.R. § 656.20(b).

The Employment and Training Administration, Office of Foreign Labor Certification, recognized in a FAQ answer that credible documentation of a recruitment step can take a form other than the “primary evidence” specified in the regulation. That FAQ states:

#### **4. Can the employer submit alternative evidence in the absence of primary evidence in response to an audit request?**

Under the procedures outlined in 20 CFR 656.20, in response to an audit, employers must present the required documentation. The documentary evidence the regulations require the employer to maintain in its compliance file is what is sought in an audit request. For example, the use of an employer’s web site is to be documented by dated copies of pages from that site advertising the occupation involved in the application. However, if the employer does not have the primary evidence suggested by the regulation, it may attempt to satisfy the request through the use of alternative evidence not specifically listed in 656.17. In the case of the employer’s web site, in the absence of a copy of the posting, the employer may provide an affidavit from the official within the employer’s organization responsible for the posting of such occupations on the web site attesting, under penalty of perjury, to the posting of the job. Whether 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.<sup>[4]</sup>

In the instant case, the CO found that the handwritten notation on the website printout supplied with the audit response was inadequate to document that the website recruitment step was posted in relation to the instant PERM application.

We disagree. The language of the regulation at 20 C.F.R. § 656.17(e)(1)(ii)(B) requires only that the employer provide “dated copies” as documentation of a job posting on an employer’s website. The regulation does not specify that the date be generated electronically; nor does it require that the date to be accompanied by a signature or attestation of the authorized

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<sup>4</sup> [www.foreignlaborcert.doleta.gov/faqsanswers.cfm#audit4](http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#audit4).

person responsible for the posting. Furthermore, the existence of an alternative to providing dated copies as described in the FAQ above, suggests that the documentation requirement should be read with a degree of flexibility. Although printouts of online advertisements displaying an electronically generated date verifying the date and duration of the posting may have been the type of proof contemplated by the regulations, we find that by providing printouts containing a handwritten date, the Employer in this case has technically complied with the regulations, having supplied the required “dated copies.”

Furthermore, we find that the case cited by the CO in support of denial, *Defense Language Institute Foreign Language Center*, does not provide relevant guidance in the present matter. In that case, the panel affirmed the denial on the grounds that the Employer’s documentation of the website advertisement did not clearly relate to the position for which labor certification was sought, the advertisement was printed after the recruitment for the position for which the PERM application was filed, and the dates printed on the advertisements did not match the dates reported on the Form 9089. These grounds are all distinct from the issue presently under consideration—whether a handwritten date which matches that reported on the Form 9089 is sufficient documentation.<sup>5</sup>

We are aware that other panels have chosen to affirm denial in over 50 cases involving the same employer, DNG Technologies, Inc., and an almost identical fact pattern. *See e.g., DNG Technologies, Inc.*, 2012-PER-1654 (Feb. 26, 2013); *DNG Technologies, Inc.*, 2011-PER-1468 (Aug. 20, 2012). Because these cases involved the same employer, similar circumstances, and a close time frame, we view the panels’ decisions as a whole and respectfully disagree based on the discussion above. We therefore reverse denial, finding that a handwritten date on a printout does not constitute a “substantial failure” by an employer to provide the documentation required.

## **ORDER**

Based on the foregoing, **IT IS ORDERED** that the denial of labor certification in this matter is **REVERSED**.

Entered at the direction of the panel by:

Todd R. Smyth  
Secretary to the Board of Alien Labor  
Certification Appeals

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<sup>5</sup> The panel in *Defense Language Institute Foreign Language Center* also based its decision on the grounds that the Employer failed to apprise U.S. workers with enough specificity in violation of 20 C.F.R. § 656.17(f), which was not cited by the CO in the present case, and which was found by the Board not to apply to additional recruitment in the en banc decision in *Symantec Corp.*, 2011-PER-1856 (July 30, 2014) (en banc).

**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 en banc review by the Board. Such review is not favored and ordinarily will not be granted except (1) when en banc 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 en banc 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.