U.S. Department of Labor Board of Alien Labor Certification Appeals
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Issue Date: 06 November 2015

BALCA Case No.: **2012-PER-01140**
ETA Case No.: A-10096-93511

In the Matter of:

WALDORF SCHOOL OF ORANGE COUNTY,
          Employer,

    on behalf of

BENNETT, CHRISTOPHER IAN,
          Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: William B. Bennett, Esquire
          Law Office of Manulkin & Bennett
          Fountain Valley, California
          For the Employer

Before: Paul R. Almanza, *Administrative Law Judge*, Morris D. Davis,
          Administrative Law Judge, and Stephen R. Henley, *Chief Administrative*
          Law Judge

DECISION AND ORDER
DIRECTING GRANT 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 found at Title 20, Part 656
of the Code of Federal Regulations. [1]

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[1] "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 filed an *Application for Permanent Employment Certification* (ETA Form 9089) sponsoring the Alien for permanent employment in the United States for the professional position of "Teacher" in Costa Mesa, California. (AF 177-188).[2] On the Form 9089, the Employer reported that its recruitment efforts included a radio advertisement and an advertisement placed on the Employer's website. (AF 181). The Certifying Officer ("CO") audited the application. (AF 173-176). The Employer's audit response included a CD with an audio recording of the radio advertisement, a broadcast contract between the Employer and a radio station, and screenshots from the Employer's computer displaying a web browser with the advertisement running along a time and date application. (AF 116-172).

The CO denied the application on two grounds. (AF 113-115). First, the CO stated the Employer failed to provide dated copies of its website posting as required by 20 C.F.R. § 656.17(e)(1(ii)(B). (AF 114). Second, the CO stated the Employer failed to provide a copy of the radio advertisement's text as required by 20 C.F.R. § 656.17(e)(1)(ii)(J). *Id.*

The Employer disputed both grounds in a request for reconsideration. (AF 3-9). The Employer first argued that the time and date application displayed in its screenshots sufficiently functioned as a time stamp for the purposes of 20 C.F.R. § 656.17(e)(1(ii)(B). (AF 6). Next, the Employer argued a CD recording of its radio advertisement satisfied 20 C.F.R. § 656.17(e)(1)(ii)(J). (AF 7-8). The Employer noted that the regulation states radio advertisements "…**can** be documented by providing a copy of the employer's text of the employer's advertisement…," not that radio advertisements must be documented by a written text. (AF 7) (Employer's emphasis added). The Employer also noted:

> …[C]lear logic shows that proof of a radio advertisement cannot be proven by radio text. A radio advertisement is communicated to its audience verbally and not in written form. Thus, to penalize an employer for not providing a radio text is unreasonable where the original form of the advertisement was not in written text, but in verbal form.

(AF 8).

The CO declined to reverse the denial on reconsideration. (AF 1-2). In particular, the CO described the Employer's website screenshots as a "manually produced document" that "…is not inherent to the actual Web listing itself and does not provide the Department with a reasonable measure of proof to independently verify the website advertisement was posted during the recruitment period." (AF 1). The CO also found that the Employer's CD was not an adequate "text" for the purposes of Section 656.17(e)(1)(ii)(J). (AF 2).

Neither party filed a brief on appeal.

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[2] Citations to the Appeal File are abbreviated as "AF" followed by the page number.

DISCUSSION

An employer seeking to sponsor an alien for a professional occupation under the PERM regulations must conduct a series of mandatory recruitment steps as well as three "additional" recruitment steps. 20 C.F.R. 656.17(e)(1)(ii). An employer may choose to place an advertisement on its website or to place an advertisement on the radio, among other methods, to satisfy its obligation to conduct additional recruitment steps. *Id.*

The Employer's website posting is governed by 20 C.F.R. § 656.17(e)(1(ii)(B), which provides, "[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 advertise the occupation involved in the application." Previous panels have determined that the "documentation requirement should be read with a degree of flexibility." *DGN Technologies, Inc.*, 2011-PER-1366 (Jul. 31, 2015). Under this interpretation, BALCA panels have, for example, accepted printouts with handwritten dates because the regulation "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." *Id.*; *see also DGN Technologies Inc.*, 2012-PER-854 (Aug. 20, 2015).

In this case, the Employer provided several screenshots that captured the text of the advertisement in a web browser and the time and date of the document in an application running alongside the browser. We find the screenshots are "dated copies" of the Employer's website posting. Accordingly, the CO erred in denying certification on the basis of 20 C.F.R. § 656.17(e)(1(ii)(B).

The Employer's radio advertisement is governed by 20 C.F.R. § 656.17(e)(1)(ii)(J), which provides, "[t]he use of radio and television advertisements can be documented by providing a copy of the employer's text of the employer's advertisement along with a written confirmation from the radio or television station stating when the advertisement was aired." An employer need not submit a written text of a radio advertisement in order to comply with this regulation. *See Nine Muses and Apollo, Inc.*, 2011-PER-25 (Dec. 27, 2011) (holding "[t]he audio recording provided of the ad text is by definition a copy of the employer's text, and we can find no reason not to accept it as sufficient documentation under § 656.17(e)(1)(ii)(J)). In the instant case, the Employer supplied an audio recording of its advertisement as well as a contract from the radio station confirming when the advertisement ran. We find this documentation satisfies the Employer's obligations under 20 C.F.R. § 656.17(e)(1)(ii)(J). The CO erred in denying certification on this ground.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that the denial of labor certification in this matter is **REVERSED** and that this matter is **REMANDED** for certification pursuant to 20 C.F.R. § 656.27(c)(2)

Entered at the direction of the panel by:

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

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.