



Issue Date: 21 October 2016

BALCA Case No.: 2012-PER-03266
ETA Case No.: A-11145-80778

In the Matter of:

AMNEAL PHARMACEUTICALS LLC,
Employer,

on behalf of

PATEL, PARITA MAHENDRAKUMAR,
Alien.

Certifying Officer: Atlanta National Processing Center

Appearance: Sanford A. Posner, Esquire
Atlanta, Georgia
For the Employer

Before: Stephen R. Henley, *Chief Administrative Law Judge*; William T. Barto,
and Marc R. Hillson¹, *Administrative Law Judges*

DECISION AND ORDER
AFFIRMING 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” labor certification regulations at 20 C.F.R. Part 656.²

BACKGROUND

The Employer filed an *Application for Permanent Employment Certification* (“Form 9089”) sponsoring the Alien for permanent employment in the United States in Paterson, New Jersey. The occupational title listed in Form 9089, Section F-3 was “Chemists,” Standard

¹ Appointed under the U.S. Office of Personnel Management Senior Administrative Law Judge Program. *See* 5 C.F.R. § 930.209.

² “PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005.

Occupational Classification Code 19-2031.00. (AF 193).³ The Certifying Officer (“CO”) audited the application. (AF 189-191). Included in the Employer’s response was a document that purported to indicate that the position was posted on the Employer’s website, but the document on its face indicated that it was “unpublished.” (AF 67-68).

The CO denied the application on six different grounds. For the purposes of deciding this appeal, we focus on the CO’s fifth denial ground— that the Employer failed to properly document its website advertisement in accordance with 20 C.F.R. § 656.17(e)(1)(ii)(B). (AF 20). The Employer asked for reconsideration, contesting all six grounds cited by the CO. With respect to the failure to properly document its website advertisement, the Employer stated that it was “unsure as to why the document states ‘unpublished.’” (AF 4). The Employer also submitted a document from an independent consultant, which stated, in pertinent part:

I am a marketing consultant for [the Employer] and I work on their company website. Please be advised that the oldest job posting log that can be pulled (July 29, 2011-attached for reference) shows the Quality Control Supervisor job posting from February 28, 2011 in Archive status. I can confirm that, procedurally, a posting is archived after it's been posted live on the web. Therefore an Archive status would indicate that the Quality Control Supervisor job posting was posted live on the web and available for viewing by the general public prior to being archived.

(AF 15). The job posting log attached to the statement included the full text of the website advertisement embedded between computer code.⁴ (AF 16). The log also cryptically stated “‘Archive, ’ February 28, 2011 – 3:50:26 PM’ , ‘April 26, 2011 – 11:57:14 AM.’”⁵ *Id.*

The CO reconsidered, accepting the Employer’s reasoning concerning two of the grounds for denial, but finding the other four grounds for denial were valid. (AF 1-2). In particular, the CO affirmed his finding regarding the inadequate evidence of the company website posting, stating, with respect to the documentation supplied by the independent consultant who works on the Employer’s website, the “document does not provide adequate documentation that the job opportunity was posted and does not provide the contents, dates, etc. Since the employer failed to provide adequate documentation of its Web site posting with its audit response, the Certifying Officer has determined this reason for denial as valid in accordance with the Departmental regulations at 20 C.F.R. § 656.17(e)(1)(ii)(B).” (AF 2).

³ Citations to the Appeal File are abbreviated as “AF” followed by the page number.

⁴ A representative sample is as follows:

PM', '- ', 'NildaLewis', 1298925662), (84, 'DC1700', 'Quality Control Chemist', 'Paterson, NJ', 'Quality Management', 'Perform physical and chemical analysis of raw materials, in-process, and finished pharmaceutical products, including products on stability, according to written methods, material specification, and company policies as

(AF 16).

⁵ We note that the Employer attested on the Form 9089 that its website advertisement ran from February 28, 2011 to March 31, 2011. (AF 196).

The Employer filed a statement confirming its intention to proceed with the appeal. Neither the Employer nor the CO, however, filed appellate briefs.

DISCUSSION

The regulations allow the use of the Employer's website as a recruitment medium. A website advertisement "can be documented by providing dated copies of pages from the site that advertise the occupation involved in the application." 20 CFR § 656.17(e)(1)(ii)(B). Panels have interpreted this documentation requirement flexibly, affording employers the opportunity to document their efforts through reasonably equivalent alternative methods. *See St. Landry Parish School Board*, 2012-PER-01135 (Apr. 28, 2016) (finding that an affidavit of publication from an account executive that did not include the text of a website advertisement was not reasonably equivalent to a dated copy of the advertisement); *DGN Technologies, Inc.*, 2011-PER-01366 (July 31, 2015) (finding that copies of a website advertisement with hand-written dates were reasonably equivalent to dated copies of a website advertisement with computer generated dates).

At the same time, the Board has cautioned that "[w]ebsite pages are often ephemeral. Thus, retention 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." *EZChip, Inc.*, 2010-PER-00120 (Jan. 12, 2011), slip op. at 5; *PSI Family Services, Inc.*, 2010-PER-00097 (Apr. 6, 2010), slip op. at 7.

The issue before us is whether the following items submitted by the Employer, when considered together, are reasonably equivalent to a dated copy of the website advertisement: 1) a February 28, 2011 printout from the website that contains the full text of the advertisement, but that also indicates the page was "unpublished;" 2) a statement from the Employer's marketing consultant explaining that the advertisement had been published because the page was archived by the server; and 3) a technical log from the server that includes the full text of the advertisement along with the dates February 28, 2011 and April 26, 2011.⁶

We find that these documents, even when considered together, are not reasonably equivalent to a dated copy of the website advertisement. That the marketing consultant did not provide his statement in the form of an affidavit or under penalty of perjury is a critical factor in our analysis.⁷ Absent an affidavit or a declaration offered under penalty of perjury, we are not able to determine whether the consultant's explanations of the Employer's technological procedures are true and accurate. Therefore, we cannot determine whether the Employer's

⁶ Because the CO did not bar the website documentation submitted by the Employer on reconsideration, we may consider it on appeal. *See Actuarial Systems Corp.*, 2012-PER-01599 (May 26, 2016).

⁷ We note that case law and guidance from the Office of Foreign Labor Certification ("OFLC") privilege alternate website documentation that takes the form of an affidavit. *See PSI Family Services, Inc.*, slip op. at 5 (quoting an OFLC response to a frequently asked question for the proposition that an "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").

website advertisement was actually published. Accordingly, we affirm the CO's determination in this matter.⁸

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

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 ten double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed ten double-spaced pages. Upon the granting of a petition the Board may order briefs.

⁸ Because we affirm denial on this ground, we do not reach the other reasons cited by the CO.