**Department of Health and Human Services**
**DEPARTMENTAL APPEALS BOARD**
**Appellate Division**

Promptcare New England Respiratory LLC
Docket No. A-15-91
Decision No. 2673
January 26, 2016

# FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Promptcare New England Respiratory LLC (Petitioner), appeals a May 28, 2015 decision in which an Administrative Law Judge (ALJ) sustained the revocation of Petitioner's Medicare enrollment and billing privileges by the Centers for Medicare & Medicaid Services (CMS). *Promptcare New England Respiratory, LLC*, DAB CR3910 (2015) (ALJ Decision). For the reasons stated below, we affirm the ALJ's conclusion that CMS lawfully revoked Petitioner's Medicare enrollment and billing privileges effective August 27, 2014.[1]

## Background

Prior to the events which led to this proceeding, Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). In order to maintain Medicare enrollment and associated "billing privileges," a DMEPOS supplier must be in compliance with the standards in paragraphs (1) through (30) of 42 C.F.R. § 424.57(c). In addition, DMEPOS and other suppliers must comply with the requirements contained or referenced in 42 C.F.R. §§ 424.515 and 424.516. CMS (through its contractors) performs on-site inspections to verify compliance with these and other program requirements. *See* 42 C.F.R. §§ 424.57(c)(8), 424.517.

[1] The ALJ noted that CMS originally revoked Petitioner's enrollment and billing privileges effective June 11, 2014 but subsequently changed the effective date to August 27, 2014. ALJ Decision at 1, n.1. (Citation omitted) Promptcare does not dispute the correctness of the changed effective date, and that date is consistent with 42 C.F.R. § 424.57, which, as amended, states the general rule that the effective date of a revocation is 30 days from the date CMS mails the supplier notice of its revocation determination. *See, e.g., Benson Ejindu, d/b/a Joy Medical Supply*, DAB No. 2572, at 9 (2014) (explaining when and how the general rule applies, giving its regulatory history).

CMS is authorized to revoke a DMEPOS supplier's Medicare enrollment for noncompliance with any of the standards in section 424.57(c). 42 C.F.R. § 424.57(d);[2] *see also 1866ICPayday.com, L.L.C.*, DAB No. 2289, at 13 (2009)("[F]ailure to comply with even one supplier standard is a sufficient basis for revoking a supplier's billing privileges.") In addition, CMS is authorized to revoke a supplier's enrollment for any of the "reasons" listed in paragraphs (1) through (12) of section 424.535(a). *Id.* § 424.535(a). (Section 424.535 applies to all types of Medicare "suppliers," not just DMEPOS suppliers.)

In a letter dated July 28, 2014, CMS notified Petitioner that his Medicare supplier number had been revoked because of noncompliance with section 424.57(c)(7).[3] CMS Ex. 3, at 1-2. That regulation requires, among other things, that a DMEPOS supplier "[m]aintain[] a physical facility on an appropriate site" that is "accessible to the public, Medicare beneficiaries, CMS, NSC and its agents" and is "accessible and staffed during posted hours of operation." 42 C.F.R. § 424.57(c)(7)(i)(C). The regulation further requires that DMEPOS suppliers "[m]aintain[] a permanent visible sign in plain view and post[] hours of operation. If the supplier's place of business is located within a building complex, the sign must be visible at the main entrance of the building or the hours can be posted at the entrance of the supplier." 42 C.F.R. § 424.57(c)(7)(i)(D).

In support of its July 28, 2014 revocation determination, CMS stated as follows:

> Recently, a representative of the NSC attempted to conduct a visit of your facility on June 10, 2014 and on June 06/11 2014; however, the visits were unsuccessful because there was no one available and/or the business was closed with no hours of operation posted. Because we could not complete an inspection of your facility, we could not verify your compliance with the supplier standards. Based on a review of the facts . . . you are considered to be in violation of 42 C.F.R. §§ 424.535(a)(5)(ii) and all supplier standards as defined in 42 C.F.R. § 424.57(c).

CMS Ex. 3, at 2.

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[2] The editorial note following section 424.57 states that a January 2, 2009 final rule (74 Fed. Reg. 198) re-designated paragraph (d) of section 424.57 as paragraph (e) but that this and other changes to section 424.57 were not incorporated into the codified text of the regulation because of an "inaccurate amendatory instruction."

[3] As CMS notes, the letter gave a second basis for the revocation, noncompliance with 42 C.F.R. § 424.57(c)(2), which prohibits suppliers from falsely stating or misrepresenting a material fact on an application for billing privileges and requires them to notify CMS within 30 days of any changes to the information on the application, and both bases were upheld on reconsideration. CMS's Response to Petitioner's Request for Review (CMS Response) at 2, n.1, citing CMS Ex. 5. CMS, however, chose not to argue the second basis before the ALJ. ALJ Decision at 2, n.2.

Petitioner requested reconsideration. CMS Ex. 4, at 1. With respect to the alleged failure to post hours of operation as required under § 424.57(c)(7)(i)(D), Petitioner asserted that "it posted its hours of operation on the two inside lobby placards that are located upon entry in the front and back doors to the office building . . . there are only two entrances to the building (front and back) [and] [a]ny individual entering the building would walk past the lobby placards that displayed PromptCare's hours of operation." CMS Ex. 4, at 2. Petitioner offered as evidence a photograph of the building which depicts the front of the building. CMS Ex. 4, at 66. Petitioner also offered photographs showing its hours of operation which it claimed were posted on one of the lobby's placards and on the front door of its office suite.[4] CMS Ex. 4, at 68, 72; see also CMS Ex. 4, at 2 ( reconsideration request citing photos enclosed as Exs. F and H). The reconsideration decision upheld the revocation under both 42 C.F.R. § 424.57(c)(2) and 42 C.F.R. § 424.57(c)(7). CMS Ex. 5, at 5.

Petitioner timely requested an ALJ hearing on the reconsidered determination. In its request for hearing, Petitioner reiterated the position it took on reconsideration that the front and back entrances are the only entrances to the building complex in which its office suite is located and that it posted its hours of operation at those entrances on a lobby placard. Request for hearing at 6. Petitioner enclosed a photograph of the building and "the inside lobby placard." *Id*., citing Exs. E, F.[5] However, in its pre-hearing brief – which also responded to CMS's motion for summary judgment – Petitioner dropped that argument and instead argued that it posted its hours of operation at the handicap entrance of the building "located on the ground floor next to Promptcare's suite" and that the handicap entrance is the "'main entrance' or 'principal door' to the building complex . . . ." Promptcare's Pre-Hearing Brief and Response to CMS's Motion for Summary Judgment With Incorporated Memorandum of Law (P. Br.) at 2; *see also* P. Ex. 1 (declaration of Joseph Zangrilli) at 3(stating that "Promptcare has always considered the handicap door . . . to be the Main Entrance."). Petitioner argued that Ms. Harris, the inspector, thus, did not see signage posting Petitioner's hours of operation because she "entered the building complex from a non-handicap accessible entrance" which Petitioner styled "the Alternative Entrance". *I*P. Br. at 3. Petitioner further stated that its

[4] We note that Petitioner's representation on page 2 of its reconsideration request that Exhibit H showed the hours of operation on the front door of its office suite is inconsistent with its statements on the same page that "The NSC representative thought that PromptCare was not operational because the hours of operation were posted on the inside lobby placards under the PromptCare signage, and not on the internal suite's front door" and that "PromptCare realizes that posting the hours of operation on the inside lobby placard instead of on the suite's front door, may have caused confusion for patients and site inspectors . . . ." CMS Ex. 4, at 2 (emphasis added). In light of Promptcare's subsequent repudiation of its claims, discussed by the ALJ and later in our decision, that its hours were posted on the lobby placards and the front door of its office suite, this discrepancy need not be resolved.

[5] These are the same photos denominated as Exhibits E and F that Petitioner submitted with its reconsideration request; on DAB E-File, the exhibits that Petitioner submitted on reconsideration appear in docket entry #1). Promptcare did not cite Exhibit H, which it submitted with its request for hearing.

representation in its request for hearing that it posted its hours of operation on placards at the front and back entrances to the building was a "miscommunication" and that while the "Alternative Entrance" at the time of the inspector's visit had a placard "that directed [the inspector] to Promptcare's office located in Suite C," the placard "did not display Promptcare's hours of operation at the time of inspection." *Id*.; *see also* Petitioner's Request for Departmental Appeals Board Review (RR) at 2 (explaining that the placards were placed "to demonstrate corrective action in response to the NSC's revocation of Promptcare's Medicare provider number"). )

Finding that Petitioner's exhibits created a dispute as to material facts, the ALJ denied CMS's motion for summary judgment. ALJ Decision at 2. However, since CMS had proposed no witnesses and had not asked to cross-examine Petitioner's one witness, Mr. Zangrilli, the ALJ "proceed[ed] to decide this case on the merits and evaluat[e] the parties' evidence without an in-person hearing because a hearing is unnecessary." *Id*. The ALJ noted that CMS had come forward with time and date-stamped photographic evidence which showed no posting of hours on at least one of the two lobby placards that Petitioner's request for review stated contained that posting and, in addition, no posting of hours of operation on the front door to Petitioner's suite. *Id*. at 3, citing CMS Ex. 2, at 2, 4; *see also* CMS Ex. 2, at 1, 3 (larger photos of front door to suite and placard). The ALJ then stated, "When confronted by this contradictory evidence, Petitioner now admits, as it must, that the lobby placard 'did not display Promptcare's hours of operation at the time of the inspection'". *Id*. at 3, citing P. Br. at 3. The ALJ continued, "Petitioner also repudiates its previous photographic evidence showing that its hours of operation were posted on the front door to its office." *Id*. at 4, citing P. Br. at 3 ("Ms. Harris knocked on Promptcare's door – which was unlocked and did not contain Promptcare's hours of operation.").

## Standard of Review

Our standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. Our standard of review on a disputed finding of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. *See Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html.

## Discussion

Petitioner argues in its Request for Review that in concluding that Petitioner was not in substantial compliance with 42 C.F.R. § 424.57(c)(7)(i)(D), the ALJ erroneously concluded that a supplier could not meet the requirements of this regulation by posting its hours of operation on a door leading into the supplier's office suite and improperly shifted the burden of proof from CMS to Petitioner to demonstrate compliance with

Supplier Standard 7. We find no merit in either argument for the reasons discussed below and further conclude that substantial evidence in the record as a whole supports the ALJ's determination that Petitioner did not post its hours of operation in either location permitted by Supplier Standard 7.

A. The ALJ correctly recognized that DMEPOS suppliers located within building complexes have two permissible alternative locations for posting hours of operation.

The requirement in Supplier Standard 7 that addresses the issue here, a supplier's posting of its hours of operation, requires that suppliers "[m]aintain[] a permanent visible sign in plain view and post[] hours of operation. If the supplier's place of business is located within a building complex, the sign must be visible at the main entrance of the building or the hours can be posted at the entrance of the supplier." 42 C.F.R. § 424.57(c)(7)(i)(D). Here, there is no dispute that the supplier's place of business is located within a building complex. *See* P. Ex. 3 (diagram of the building, the entrances and Petitioner's office suite – Suite 1C – relied upon by both parties, the ALJ and now the Board). Thus, Petitioner had the option of posting its hours of operation at either the main entrance to the building complex or at the entrance to its office suite. Petitioner argues that the ALJ ignored the second alternative and that this was an error requiring reversal because, Petitioner maintains, it posted its hours of operation at the handicap-accessible entrance to its office suite (located at B on the diagram) which Petitioner argues was "the entrance of the supplier." Alternatively, Petitioner argues that the same handicap-accessible entrance was the "main entrance of the building." We conclude that the ALJ properly considered both compliance options and that substantial evidence in the record as a whole supports his conclusion that Petitioner had not posted its hours at either location at the time of the inspector's visits.

Petitioner bases its argument that the ALJ ignored the second option on language in the ALJ Decision that Petitioner takes out of context. That language states that "Supplier Standard 7 expressly requires that Petitioner's hours of operation 'must be visible at the main entrance of the *building*,' rather than of Petitioner's offices." ALJ Decision at 4 (citing 42 C.F.R. § 424.57(c)(7)(i)(D))(emphasis by ALJ). The language seized upon by Petitioner was actually part of a longer passage in which the ALJ discussed and rejected Petitioner's argument that the side, handicap-accessible entrance to its building was the "main entrance of the building" as a whole. The passage in its entirety reads as follows:

> Petitioner describes the building's "main" entrance as the handicap-accessible entrance; yet, this entrance appears to offer access only to Petitioner's office, rather than to all of the building's offices. P. Br. at 5; P. Ex. 3. No one would rationally consider a building's "main" entrance to be

> one that offers access only to one of the building's tenants, rather than to all of its tenants, and Supplier Standard 7 expressly requires that Petitioner's hours of operation "must be visible at the main entrance of the *building*," rather than of Petitioner's offices.

*Id*. Thus, in context, it is clear that the language Petitioner cites does not reflect a conclusion by the ALJ that a supplier whose office is located within a building complex cannot meet Supplier Standard 7 by posting its hours of operation "at the entrance of the supplier" but only a finding that Petitioner's posting of hours at the handicap-accessible entrance, had it done so, would not constitute a posting at the main entrance to the building.

In addition, the ALJ Decision as a whole reflects the ALJ's understanding that Petitioner would have met the regulation's requirement had it posted its operating hours either at the main entrance to the building or at the entrance to Petitioner's offices within that building.[6] *See*, *e.g*. ALJ Decision at 1 ("Credible evidence establishes that Petitioner did not comply with Supplier Standard 7's . . . requirement to post its hours of operation at the main entrance to its building or on its door . . . ."); ALJ Decision at 3 ("However, the credible evidence demonstrates that Petitioner failed to post its hours of operation at the building's main entrance, the side entrance, or on its door and, therefore, Petitioner was noncompliant with Supplier Standard 7."). The ALJ upheld the revocation, as these quoted statements show, not because he misunderstood the regulation or ignored the alternative compliance methods it provides. Rather, the ALJ upheld the revocation because he concluded, based on what he found to be the "credible evidence," that at the time of the survey, Petitioner had not posted its hours at the main entrance to the building, at the door to its office suite within that building or at the side, handicap-accessible entrance to Petitioner's office, which Petitioner maintained was the "main" entrance to the building and the "entrance to the supplier's office" within the meaning of Supplier Standard 7. As we discuss in the next section, the ALJ's conclusion is supported by substantial evidence in the record as a whole.

[6] It appears that "entrance to the supplier's office" refers to an entrance that can be accessed from within the building complex rather than from outside it since the option applies only "[i]f the supplier's place of business is located within a building complex." Neither party makes a contrary argument, but Petitioner's argument that posting hours at its handicap-accessible entrance should suffice seems to assume without so stating that the entrance to the supplier's office need not be inside the building complex. For reasons that will become clear later, we need not resolve this issue in this decision.

B. Substantial evidence in the record as a whole supports the ALJ's conclusion, applying the burden of proof correctly, that at the time of the on-site inspection, Petitioner had not posted its hours of operation at either location permitted by Supplier Standard 7.

Petitioner spends a great deal of time on appeal, as it did in its prehearing brief, arguing that the handicap-accessible entrance to its office suite on the side of the building was both the "entrance to the supplier's office" and the "main entrance of the building" within the meaning of Supplier Standard 7. However, this argument is irrelevant absent a threshold showing that the ALJ's conclusion that Petitioner had not posted its hours in either location at the time of the onsite inspection is not supported by substantial evidence. If the hours were not posted at either entrance, it makes no difference what entrance (one claimed by Petitioner or one claimed by CMS) constituted the main entrance to the building complex or the entrance to Petitioner's office suite within the meaning of section 424.57(c)(7)(i)(D). Accordingly, we look first to whether the record supports the ALJ's conclusion that the hours were not posted at either of the entrances Petitioner relies on or, indeed, at any entrance.

Petitioner argued before the ALJ, as it does here, that at the time of the inspector's visit its hours of operation were posted at the handicap-accessible entrance, the entrance it now argues was both the main entrance to the building complex and the entrance to its office suite. Petitioner relies on the Zangrilli declaration. *See* P. Ex. 1. The declaration states, in relevant part, that Petitioner "has always considered the handicap door" to be the Main Entrance to its building complex; that Petitioner has two entries to its office suite; and that a change to its hours of operation that occurred "[o]n, or about, May 9, 2014 . . . was reflected on Promptcare's hours that were posted at the Main Entrance of Promptcare's building . . . ." P. Ex. 1, at 3. The ALJ discussed these statements but concluded they were "undermined by arguments and even documentary evidence that Petitioner itself previously submitted at the reconsideration stage." ALJ Decision at 3. Petitioner argues that the "ALJ "was required to place the burden to prove non-compliance upon CMS" and that since CMS "presents no evidence contrary to this position . . . [the ALJ] should have taken this statement as true." RR at 9. In failing to do so, Petitioner argues, the ALJ improperly shifted the burden of proof.

We find no merit in Petitioner's argument. In the first place, Petitioner misstates the burden of proof on the compliance issue. In *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 F. App'x 181 (6th Cir. 2005), a skilled nursing facility appeal under 42 C.F.R. Part 498, the Board laid out the burden of proof framework that the Board has subsequently applied in other Part 498 appeals, including provider/supplier appeals such as *Ronald J. Grason, M.D.*, DAB No. 2592 (2014) and *MediSource Corp.*, DAB No. 2011, at 3 (2006). *See also Dr. S.A. Brooks, DPM*, DAB No. 2615, at 16 (2015)(noting *Batavia* involved "a CMS determination different from the matter at issue here, so the rationale in that decision

would not necessarily apply," but nonetheless assuming the correctness of CMS's assertion that the framework did apply and rejecting CMS's argument that the ALJ misapplied the framework). Under that framework, "CMS must come forward with evidence that establishes a prima facie case. Once CMS meets this burden, the provider must prove his case by a preponderance of the evidence." *Ronald J. Grason, M.D.* at 5 (citing ALJ Decision at 4 citing *Batavia*).

In addition to incorrectly stating that CMS has the burden of proving noncompliance, Petitioner incorrectly argues, in essence, that the ALJ should have required CMS to make a prima facie case that the front door the inspector entered and photographed, rather than the side, handicap-accessible entrance, is the main entrance. We find no basis for this argument. There was no dispute prior to Petitioner's filing its prehearing brief, which was also Petitioner's response to CMS's motion for summary judgment, that the front door the inspector entered was the main entrance to the building or at least one of two main entrances, the doors at the front and rear of the building. Indeed, according to Petitioner at the time it requested reconsideration and appealed, those two entrances were the only entrances to the building. Thus, CMS met its burden to present a prima facie case of noncompliance with 42 C.F.R. § 424.57(c)(7)(i)(D), when, as the ALJ noted, CMS presented time and date-stamped photographs taken by the inspector "showing that Petitioner had not, in fact, posted its hours of operation on at least one of the lobby placards [located inside the front and rear entrances], directly contradicting Petitioner's earlier statement [in its reconsideration request and request for hearing]." ALJ Decision at 3. At that point, the burden shifted to Petitioner to rebut the photographic evidence and show by a preponderance of the evidence that it was, in fact, in compliance with the hours posting requirements of Supplier Standard 7. Petitioner, however, did not attempt to rebut either CMS's photographic evidence or the inspector's reports which were consistent with the photos. Instead Petitioner repudiated its own earlier submitted (and non-date or time-stamped) photos of the placards showing hours of operation and changed its argument to claim that the side, handicap-accessible entrance was the main entrance to the building and the entrance to its office suite and that its hours were posted there. It is specious for Petitioner to suggest that CMS was required to make a new prima facie showing addressing an entirely new argument (or to disprove that argument), especially when that new argument was wholly inconsistent with the argument on which Petitioner based its reconsideration request and request for hearing.

We also reject Petitioner's argument that the ALJ should have given the Zangrilli declaration controlling weight. *See* RR at 9. The Board does not disturb ALJ findings on weight or credibility absent compelling reasons for doing so. *E.g. Ridgecrest Healthcare* DAB No. 2598, at 10 (2014), citing *Van Duyn Home & Hosp.*, DAB No. 2368, at 10-11 (2011), citing *Koester Pavilion*, DAB No. 1750, at 16, 21 (2000). We find no reason at all to disturb the ALJ's weight or credibility determinations here, much less a compelling reason. We have already discussed, and concur in, the ALJ's conclusion that Petitioner's own arguments and documentary evidence undermined the declarant's statements about

the side, handicap-accessible entrance. The ALJ made additional findings undercutting the declaration and Petitioner's position that it posted its hours of operation on the side, handicap-accessible entrance. The ALJ found that Petitioner "does not offer any documentary evidence, such as a photograph, that it posted its hours of operation at the side, handicap-accessible entrance." ALJ Decision at 3. Although Petitioner did submit a photograph of the outside of that entrance, the ALJ found that the photograph "does not display [Petitioner's] hours of operation." *Id*., citing P. Ex. 4.

Petitioner does not dispute these ALJ findings, and our own review of the record finds unequivocal support for them. Petitioner Exhibit 4, which the ALJ addressed, is a close-up photo of the handicap-accessible door that shows some sort of paper or placard on the door, but the paper or placard contains no hours of operation or other visible writing. Petitioner submitted another photograph that appears to be another view of the same side, handicap-accessible entrance, albeit taken from further away. *See* P. Ex. 2. The ALJ did not discuss this photo, but, like the close-up photo he did discuss, this second photo also shows no posting of hours or other written information on the paper or placard visible on the door. None of the other documentary exhibits Petitioner relied on during the hearing before the ALJ shows any posting of hours on any door.

In addition, as the ALJ noted, documentary evidence Petitioner submitted with its reconsideration request undermines Petitioner's argument. ALJ Decision at 3. The photos submitted by Petitioner in the reconsideration proceeding do not show the handicap-accessible entrance at all but, instead, show the entrance at the front of the building (which Petitioner then claimed was one of only two entrances to the building along with the back entrance), a placard inside the entrance to the building and a sign on the door leading into Petitioner's office suite from the inside of the building.[7] *See* P. Ex. E; P. Ex. F; P. Ex. C, at 71. Indeed, Petitioner did not even mention the handicap accessible entrance in its reconsideration request. *See* P. Ex. C at 2; P. Ex. B at 4. Although office hours are shown on the photo of the placard inside the building's front door and the photo of the door leading into Petitioner's office suite from inside the building, as previously discussed, Petitioner repudiated those photos in its pre-hearing brief, admitting that its office hours were not posted in either location at the time of the inspection. ALJ Decision at 3-4, citing P. Br. at 3 (statements by Petitioner that "The Alternative Entrance placard – contrary to a miscommunication in Promptcare's Request for an Administrative Law Judge Hearing Appeal – did not display Promptcare's hours of

[7] As indicated in note 4, *supra*, the photo of hours on the front door of Petitioner's suite is inconsistent with statements in Petitioner's request for reconsideration indicating that the hours were not posted there.

operation at the time of inspection[]" and that "[The inspector] knocked on Promptcare's door – which was unlocked and did not contain Promptcare's hours of operations . . . .").[8]

For the reasons stated, we conclude that substantial evidence in the record as a whole supports the ALJ's conclusion that Petitioner was not in compliance with 42 C.F.R. § 424.57(c)(7)(i)(D) because at the time of the inspection, Petitioner had not posted its hours of operation in either of the alternative locations required by the regulation and, indeed, had not posted its hours of operation at any entrance. Accordingly, we need not address the other arguments in Petitioner's appeal.

Conclusion

For the reasons stated above, we affirm the ALJ Decision to uphold the revocation of Petitioner's Medicare enrollment and billing privileges.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member

[8] The statement repudiating Petitioner's earlier argument that it had posted its hours on placards and the diagram in Petitioner Exhibit 3 use the term "Alternative Entrance," whereas Petitioner earlier referred to those entrances as the "front" and "back" entrances to the building. *See* P. Ex. 3; P. Ex. C, at 2; Request for hearing at 6. Although Petitioner's statement repudiating its earlier argument (see P. Br. at 3) specifically references the placard at the "Alternative Entrance" entered by the inspector, which Petitioner and the diagram indicate was the front entrance to the building, the statement makes no attempt to carve out from the repudiation an exception for the rear entrance placard, and Petitioner did not argue in its pre-hearing brief or here that it posted its hours at the rear entrance at the time of the inspection. Moreover, as the ALJ noted, Petitioner presented documentary evidence of only one placard. ALJ Decision at 3; P. Ex. F. Petitioner's repudiation of its photos eliminates the only documentary evidence having potential to support Petitioner's earlier claim, subsequently repudiated, that it had placards with posted hours at the front and back entrances.