



**Issue Date: 25 September 2003**

**BALCA Case No.: 2003-INA-81**  
ETA Case No.: P2000-CA-09508682/ML

*In the Matter of:*

**NETLINK TECHNOLOGY, INC.,**  
*Employer,*

*on behalf of*

**YEE HIEN KOH,**  
*Alien.*

Appearance: Meei-Ling Chen  
For Employer and Alien  
Rowland Heights, CA

Certifying Officer: Martin Rios  
San Francisco, CA

Before: Burke, Chapman and Vittone  
Administrative Law Judges

### **DECISION AND ORDER**

**PER CURIAM.** This case arises from an application for alien labor certification<sup>1</sup> filed by Netlink Technology, Inc. (“Employer”) on behalf of Yee Hien Koh (“Alien”) for the position of Market-Research Analyst. (AF 52-53). This decision is based on the record upon which the Certifying Officer (“CO”) denied certification and Employer’s Request for Review, as contained in the Appeal File (“AF”). 20 C.F.R. § 656.27(c).

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<sup>1</sup> Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

## **STATEMENT OF THE CASE**

On October 3, 2002, the CO issued a Notice of Findings (“NOF”) questioning whether Employer could offer permanent full-time work pursuant to 20 C.F.R. § 656.3. (AF 48-49). The CO requested documentation of Employer’s ability to provide permanent full-time employment to a U.S. worker at the terms and conditions stated on the ETA 750A. (AF 49). The CO requested a copy of Employer’s business license, state and federal business income tax returns as well as surveys, reports, and opinion polls produced by the Alien (AF 49).

In Rebuttal, filed on October 29, 2002, Employer asserted that it had the ability to provide permanent, full-time employment to a U.S. worker at the terms and conditions stated on the ETA 750 A. (AF 30-47). Employer included a copy of a City of Tustin Business Tax Certificate containing an expiration date of December 31, 2002 and showing that a business tax was paid “to engage in, carry on or conduct the business, trade, calling, profession, exhibition or occupation coded above until this certificate expires.” (AF 32). Employer included a copy of the California State Board of Equalization Seller’s Permit authorizing Employer, pursuant to sales and use tax law, to engage in the business of selling tangible personal property at the location stated on the permit. (AF 33). Other documents included with Employer’s rebuttal were: 1999 and 2000 U.S. corporation income tax returns and corresponding schedules, (AF 34-43), Employer’s quarterly federal tax returns for the quarters ending March 31, 2002, June 30, 2002, and September 30, 2002, (AF 44-46), and a document regarding Market Research

Analysts that provides information such as an “O\*Net Description,” geographic level, and wage levels. (AF 47).

On November 27, 2002, the CO issued a Final Determination (“FD”) denying certification. (AF 28-29). The CO indicated that Employer failed to produce surveys, reports, or opinion polls prepared by the Alien to demonstrate a bona fide job opportunity and as such, Employer had not shown that the job opportunity was clearly open to any qualified U.S. worker. (AF 29).

By letter dated December 23, 2002, Employer filed a Request for Review and the matter was docketed in this Office on March 13, 2003. (AF 1-27). With the Request for Review, Employer submitted three sets of documents: (1) Opinion Poll (For Broadband Router), dated Dec. 17-20, 2001, (2) Report for Product Analyst and Forecasting of D-Link DDS Switch, dated Dec 2000 – Feb. 2001, and (3) Telephone Survey (For Networking Products), dated Oct. 11-15, 2000. (AF 2-27).

Employer’s letter was addressed to the Chief Administrative Law Judge in care of the U.S. Department of Labor in San Francisco, CA. (AF 1). Employer did not specifically request review or state the grounds for appeal; instead, Employer’s letter indicated that rebuttal documents were included, specifically a survey, report, and opinion poll prepared by the Alien. The CO treated this letter as a Request for Review and forwarded the matter to this Office. Implicit in Employer’s statement is the appeal of the CO’s finding in the FD that Employer failed to produce documentation reasonably

requested by the CO. As such, this letter will be treated as a Request for Review on these grounds.

### **DISCUSSION**

Twenty C.F.R. § 656.20(c)(8) provides that there must be a permanent, full-time job opportunity clearly open to U.S. workers. The employer has the burden of proof to document that a bona fide job opportunity exists and is available to U.S. workers. *See Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*). The CO can make reasonable requests for documentation to support an employer's assertion of a bona fide job opportunity. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*).

In this case, the CO requested documentation in the NOF regarding the Alien's work as a market research analyst. The CO questioned the bona fide nature of the position, as there was no evidence that the Alien had performed any market research or analysis for Employer. To rebut this finding, the CO requested any surveys, reports, or opinion polls produced by the Alien to document a current job opening for permanent, full-time employment. (AF 49). Employer failed to provide any such documentation and instead submitted a job description, including salary figures, for the position of Market Research Analyst. (AF 47). Employer did not state why the survey, report, and opinion poll had not been provided and failed to justify the omission. The CO then issued the FD, finding that Employer had failed to show a job opportunity that was clearly open to U.S. workers. (AF 29).

Certification is properly denied when an employer fails to produce reasonable documentation as requested by the CO. *See Britt's Antique Importers/Exporters*, 1990-INA-276 (Dec. 17, 1990); *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991). If an employer fails to produce the documentation and does not justify its failure, certification is properly denied. *See Vernon Taylor*, 1989-INA-258 (Mar. 12, 1991). Employer has neither provided the documentation reasonably requested by the CO nor justified the failure to provide such documentation. As such, certification was properly denied on this ground.

With the Request for Review, Employer attached a copy of a report, survey, and opinion poll prepared by the Alien. (AF 2-27). Employer made no indication as to why this documentation was not provided when requested. Twenty C.F.R. § 656.26(b)(4) states that the request for review shall be based only on "such evidence that was within the record upon which the denial of labor certification was based." Evidence first submitted with the Request for Review will not be reviewed by the Board. *See Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *White Harvest Mission*, 1990-INA-195 (Apr. 19, 1991).

The documentation submitted with Employer's Request for Review will not be reviewed, as it was not part of the record upon which certification was denied. It is therefore unnecessary to address the merits of Employer's new submission, as certification was properly denied based on the failure to document a bona fide job opportunity.

## **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

**A**

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 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, N.W.  
Suite 400  
Washington, D.C. 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