



**Issue Date: 10 September 2009**

**BALCA Case No.: 2009-TLN-00081**

ETA Case No.: C-09194-45589

*In the Matter of:*

**TRIPLE T LOGGING,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Before: **JOHN M. VITTON**  
Chief Administrative Law Judge

## **DECISION AND ORDER**

This case arises from a request for review of a United States Department of Labor Certifying Officer's denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2009).

### **Statement of the Case**

On July 13, 2009, the Employment and Training Administration ("ETA") received an application from Triple T Logging ("the Employer") requesting temporary labor certification for 140 forestry and conservation workers from October 01, 2009, through March 31, 2010. *See* AF 253-397.<sup>1</sup> On July 20, 2009, the CO issued a *Request for Information* ("the RFI") in which he found that the Employer failed "to submit adequate documentation as a Farm Labor Contractor." AF 250-252. The CO noted that the special procedures relating to tree-planting and related reforestation occupations outlined in Training and Employment Guidance Letter 27-06 (June 12, 2007) ("TEGL 27-06") apply to the Employer's application by operation of 20 C.F.R. § 655.3 (2009). *Id.* The CO found that the Employer had not

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<sup>1</sup> Citations to the Appeal File will be abbreviated "AF" followed by the page number.

complied with TEG 27-06 because it failed to submit with its application a current Farm Labor Contractor (“FLC”) certificate of registration containing all necessary vehicle and transportation authorizations. *Id.* The CO provided the following instructions for correcting the deficiency:

The employer must provide proof of current registration, including proof of the registration of any Farm Labor Contractor Employees at the time of filing. The FLC and FLCE certificate(s) of registration must be valid for the entire period of need. If the expiration date of the FLC and FLCE certificate(s) falls at any point during the period of need, the employer must submit a signed written assurance that an application for renewing the FLC and FLCE certificate(s) are valid during the entire period of need.

The employer also must submit FLC and FLCE documentation showing that the number of vehicles is consistent with [the] number of workers requested as well as proof of insurance and proof of valid driver’s licenses for appointed drivers.

*Id.*

On July 31, 2009, the Employer electronically submitted a response to the RFI. *See* AF 227. In this e-mail, the Employer wrote, “The complete vehicle list will be sent to USDOL CNPC on Monday August 3<sup>rd</sup>. The Employer is having the vehicle inspection completed and does hereby attest that he will have the results on Monday August 3<sup>rd</sup>. Please accept the documents attached that include everything requested except the vehicle inspection list which is forthcoming.” *Id.* The response included, *inter alia*, a July 28, 2009, fax from Normany Parham, a representative of the Employee Standards Administration’s Wage and Hour Division (“WHD”). AF 243-245. The fax contained a copy of the Employer’s FLC certificate of registration authorizing the Employer to transport and drive workers under the Migrant and Seasonal Agricultural Worker Protection Act (“the Act”). AF 245. The certificate was issued on July 28, 2009, and is set to expire on June 30, 2010. *Id.* The fax also contains a portion of a document explaining the certificate’s significance. AF 244. In the document, Sharlyn Simon, WHD’s National Certification Program Manager, explained that the certificate’s holder is “permitted to drive any vehicle used to transport migrant and seasonal agricultural workers within the meaning of the Act so long as such vehicle meets the safety standards set forth by the Act and the Regulations.” *Id.* Ms. Sharon added that “[i]f operated by a farm labor contractor the vehicle must also be registered with the U.S. Department of Labor.” *Id.*

In the July 31, 2009, e-mail, the Employer also explained that Ms. Parham faxed a copy of the Employer’s FLC certificate “to prove good faith effort” and to inform ETA that the Employer’s Farm Labor Contractor Employee (“FCLE”) certificates were “in process” but were delayed due to a backlog. AF 227. Ms. Parham’s cover sheet contains no explanation either confirming or denying this contention. AF 243. The Employer also submitted the following attestation:

Triple T Logging does hereby attest that the attached Farm Labor Contractor Certificate and Farm Labor Contractor Employee certificate could show expiration dates occurring during the period of employment. As applicants for temporary non-agricultural workers, we understand that all drivers must be covered by a FLC and FLCE. This serves as an attestation that the FLC and FLCE’s are in process at USDOL Employment Standards Administration Wage and Hour Division with Normany Parham of the Atlanta National

Certificate Team and will be timely renewed by the start date of this application and maintained for the entire period of the requested work authorization. The vehicle inspections are in process and will be completed on Monday, August 3, 2009 also within time before the start date of this application. Copies of the renewed policy will be on file should USDOL NPC or USCIS request the renewal.

AF 210.<sup>2</sup>

On August 10, 2009, the Employer submitted a supplemental response to the RFI. *See* AF 193-226. The supplemental response included the documentation submitted with the July 31, 2009, response and, *inter alia*, an August 3, 2009, contract in which Transport Frontera LLC agreed to transport 45 workers from their living quarters to the work site during the Employer's period of need. *See* AF 221. The supplemental response also contained leasing agreements for five passenger vans. AF 222-226.

On August 11, 2009, the Certifying Officer ("the CO") denied certification. AF 189-192. The CO explained that the Employer's responses failed "to overcome the deficiencies outlined in the RFI." AF 192. In particular, the CO found "insufficient" the Employer's attestation that the FLC and FLCE certificates were "in process." *Id.* The CO added, "The FLC certificate provided in the form of a fax was not complete in that the employer's section (right-hand side) did not include a name or signature." *Id.* The Employer's appeal followed.

### Discussion

On January 18, 2009, new regulations governing ETA's processing of H-2B visa applications took effect. *See* 73 Fed. Reg. 78,020 (Dec. 19, 2008). 20 C.F.R. § 655.3 (2009) indicates that ETA's special procedures for processing applications requesting reforestation workers remained in effect after January 18, 2009. As discussed *supra*, TEGL 27-06 contains ETA's procedures for processing such applications and is available on ETA's website. TEGL No. 27-06, Attachment A, Section 2.A requires that an employer qualifying as an FLC under the Act must "provide proof of current registration, including proof of the registration of any Farm Labor Contractor Employees . . . at the time of filing." Section II.C.4 further explains that each driver of a vehicle transporting covered workers must have an FLC or FLCE certificate of registration that specifically authorizes driving.

The parties do not dispute that the Employer qualifies as an FLC or that the Employer must obtain certificates for all FLCEs who will drive the workers to the jobsites. The sole issue on appeal is whether the Employer's submissions to the CO satisfied ETA's requirements. TEGL No. 27-06, Attachment A, Section 2.A requires submission of "proof of current registration" for all FLCEs at the time of filing. A review of the record prepared before the CO reveals that the Employer did not provide proof of such registration at the time of filing or in its responses to the RFI. In its request for review, the Employer essentially conceded that it lacked such proof at the time of filing when it wrote, "Normany Parham agreed to fax employer a partial FLC to prove to USDOL CNPC that indeed the requested documents were in process and that the process would be completed before employer's requested start date of need on the ETA-9142." AF 4. Moreover, the documentation provided also contained no such

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<sup>2</sup> Though listed as an attachment and dated July 31, 2009, the attestation does not appear in the Appeal File with the July 31, 2009, submission. *See* AF 227, 243. Rather, the CO included the attestation only with the Employer's August 10, 2009, supplemental response to the RFI, which contains, *inter alia*, the July 31, 2009, submissions.

assurance from Ms. Parham. *See* AF 243.<sup>3</sup> TEGL No. 27-06 unambiguously requires that the Employer register *before* filing and provide proof of registration *at the time of filing*. Lacking proof of current FLCE registration even after affording the Employer an opportunity to remedy this deficiency, the CO correctly denied certification.

In its request for review, the Employer also wrote, “USDOL CNPC states that the employer did not submit FLCE certificate(s); however, the enclosed FLCE certificates were an attachment to the e-mail to which USDOL CNPC refers to in the Final Determination. Thus the FLCE certificates were submitted to USDOL CNPC.” AF 4; *see* AF 90 (specifying that the certificates were sent as attachments to the Employer’s July 31, 2009, e-mail). The Employer’s July 31, 2009, e-mail contradicts this contention. Therein, the Employer wrote that it submitted Ms. Parham’s fax because some of its FLCE certificates were still “in process.” AF 227. Likewise, the Employer did not list the FLCE certificates as attachments. *Id.* The Employer instead listed “Fax from Normany Parham of USDOL Wage & Hour Atlanta National Certificate Team to prove she is currently processing this employer’s FLC/FLCE’s.” *Id.* Furthermore, since the July 28, 2009, fax’s cover sheet indicated that the fax contained only two additional pages, it does not appear that the CO omitted anything from this attachment when preparing the Appeal File. *See* AF 243. The Employer’s contention that it submitted all FLCE certificates on July 31, 2009, is also inconsistent with its July 31, 2009, attestation. *See* AF 210 (referencing “the attached Farm Labor Contractor Certificate and Farm Labor Contractor Employee certificate” but also attesting that “the FLC and FLCE’s are in process” at WHD). Accordingly, I reject the Employer’s contention, find that the Employer did not submit the required FLCE certificates to the CO, and affirm the application’s denial.<sup>4</sup> While this may seem a harsh result, the standard of review leaves me no other option when, as here, it appears that the CO is unwilling to accept documentation submitted after the final determination’s issuance.

### **Order**

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

For the Board:

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**JOHN M. VITTON**  
Chief Administrative Law Judge

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<sup>3</sup> Even if Ms. Parham had provided an assurance, the Employer would have established only that it could provide proof of FLCE registration before its period of need begins.

<sup>4</sup> The Employer attached to its request for review certificates that were issued on July 28, 2009. AF 91-109. Given that my review is limited to the record assembled before the CO, I am unable to consider this documentation because I find that the Employer did not submit it prior to the application’s denial. *See* 20 C.F.R. § 655.33(a)(5), (e) (2009).