



**Issue Date: 16 October 2009**

**BALCA Case No.: 2009-TLN-00103**

ETA Case No.: C-09219-46110

*In the Matter of:*

**ZAVALA FORESTRY SERVICES,**

*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Appearances: Christi Tabaretti  
International Labor Management Corporation  
Vass, North Carolina  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Vincent C. Costantino, Senior Trial Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: **WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

**DECISION AND ORDER AFFIRMING CERTIFYING OFFICER'S**  
**DENIAL OF CERTIFICATION**

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("CO") 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). Following the CO’s denial of an application under 20 C.F.R. § 655.32, the applicant may request review by the Board of Alien Labor Certification Appeals (“the Board” or “BALCA”). § 655.33. The administrative review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and “such evidence as was actually submitted to the CO in support of the application.” § 655.33(a), (e).

### **STATEMENT OF THE CASE**

On August 7, 2009, the Employment and Training Administration (“ETA”) received an application from Zavala Forestry Services (“the Employer”) requesting temporary labor certification for 15 Forest & Conservation Workers from October 1, 2009, through April 1, 2010. (AF 59-75).<sup>1</sup>

On August 13, 2009, the CO issued a *Request for Further Information* (“RFI”), in which he found, in part, that the Employer failed “to submit adequate documentation as a Farm Labor Contractor.”<sup>2</sup> (AF 57-58). 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). (AF 58). The CO found that the Employer had not complied with TEGL 27-06 because, although it submitted a Farm Labor Contractor (“FLC”) certificate, it “failed to include FLCE certificates and driver’s licenses showing that the intended drivers are authorized to drive the vehicles listed.”<sup>3</sup> *Id.* Furthermore, the CO stated that “the FLC certificate submitted

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

<sup>2</sup> The CO also found that the Employer failed to establish that the nature of its need was temporary. (AF 57). However, since it was not discussed in the final determination, it is no longer an issue.

<sup>3</sup> “FLCE” refers to “Farm Labor Contractor Employees.”

was illegible, making it unclear to determine the certificate's validity period." *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 approved drivers.

The employer must provide a legible copy of its FLC certificate.

*Id.*

The CO received the Employer's response to the RFI on August 21, 2009. (AF 40-54). In response to the above-quoted instructions, the Employer included a copy of an FLC certificate, a copy of a driver's license, and copies of Texas liability insurance cards.

On August 24, 2009, the CO issued a second RFI, stating, "The FLC certificate provided by the employer listed vehicle authorization ending September 22, 2008." (AF 39). The CO directed the Employer to "provide proof of current registration." *Id.* The CO received the Employer's response on August 28, 2009. (AF 20-35). It included: an attestation regarding authorization of vehicles, a copy of a doctor's certificate, and a copy of a vehicle mechanical inspection report.

On September 16, 2009, the CO issued a Final Determination denying the Employer's application. (AF 16-19). The CO found:

The TEGL governing processing of reforestation cases (TEGL 27-06, Attachment A) is specific in that transport vehicles for MSPA-covered workers must be authorized for use on the FLC's Certificate of registration prior to use. Although the employer submitted a valid FLC Certificate, the vehicles listed on the FLC Certificates showed vehicle authorization ending September 22, 2008. In review of the employer's response to the RFI, the employer submitted an attestation regarding current vehicle

authorization and an application to ESA Wage and Hour Division for one vehicle with a capacity of 6. The employer failed to provide proof of current vehicle authorization. The attestation, along with application to Wage and Hour is insufficient in proof of current vehicle authorization.

(AF 19).

On September 25, 2009, BALCA received the Employer's request for administrative review. (AF 1-15). In this request, the Employer asserted, "A signed attestation was sent in stating that application was made to get a new certificate showing the current and correct vehicle authorization dates." (AF 1). The Employer contended that it had sent in all of the information needed to get a new certificate, but that proof is not yet available. *Id.*

The Board issued a Notice of Docketing on September 30, 2009. The CO filed a brief on October 7, 2009, asserting that denial of certification should be affirmed because the Employer did not provide proof of current vehicle authorization.

On October 5, 2009, BALCA received the Employer's new FLC certificate.

## **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" (emphasis added). 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. The FLC registration card that the Employer submitted expired on September 22, 2008. In its request for review, the Employer stated:

A signed attestation was sent in stating that application was made to get a new certificate showing the current and correct vehicle authorization dates. Mr. Zavala has spoken with someone at ESA regarding the application for the new current card, and they have stated that they have all the information that is need to issue the new one. Unfortunately, they are not able to do so immediately because there are so many others in process ahead of him. They have assured him that it will be taken care of but that the proof will not be available by this Friday. He can guarantee that when the new card comes in that he will forward it on to the case officers in Chicago.

In this assertion, the Employer essentially conceded that it lacked proof of current registration at the time of filing and indicated that it has only recently attempted to renew its certification. 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.<sup>4</sup>

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<sup>4</sup> As discussed supra, while the Employer filed a new FLC certificate on October 5, 2009, § 655.33 precludes me from considering evidence that the Employer did not submit to the CO in support of the application. Thus, I am unable to consider the new FLC certificate as part of the application.

**ORDER**

Based on the foregoing, **IT IS ORDERED** that the CO's denial of certification is **AFFIRMED**.

For the Board:

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**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

Washington, DC  
WSC: EB