

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 10 March 2010

BALCA Case No.: 2010-TLN-00037

ETA Case No.: C-09357-48052

In the Matter of:

PROGRESSIVE SOLUTIONS,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

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

**DECISION AND ORDER AFFIRMING DENIAL OF
CERTIFICATION**

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the 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).

Statement of the Case

On December 22, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Progressive Solutions, LLC ("the

Employer”) requesting certification for 50 “Vegetation Applicators” from February 1, 2010, until October 31, 2010. AF 113-124.¹ On December 29, 2009, the CO issued a *Request for Further Information* (“RFI”), in which he found the Employer failed to submit “proof of current [Farm Labor Contractor] (“FLC”) registration, including proof of the registration of any Farm Labor Contractor Employees (FLCE) at the time of filing.” AF 112. The CO also stated that “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) will be submitted timely.” *Id.*

On January 6, 2010, the Employer submitted a response to the RFI. AF 64-107. The Employer attached, *inter alia*, a copy of its “Farm Labor Contractor Certificate of Registration,” which authorized the Employer for transportation and driving. AF 95. Copies of any FLCEs were not included² in the response to the RFI, although the Employer’s cover letter explained: “Please note the following attachments include with RFI original documents. . . .A current copy of our FLCE license (please note that FLCE Drivers expired with Visa expiration, drivers and trucks will be added prior to season.)” AF 66.

In a subsequent response to the RFI on January 7, 2010, the Employer again stated that the FLCE would be attached. AF 34-65. Although the remainder of the submission was nearly identical to the first response, the second response to the RFI failed to include both the Employer’s FLC and FLCEs.

On February 1, 2010, the CO issued a *Final Determination* denying the Employer’s application. AF 29-32. The CO noted that the special procedures relating to tree-planting and related reforestation occupations outlined in Training and Employment Guidance Letter 27-06, Attachment A, Section II (June 12, 2007) (“TEGL 27-06”) applied to the Employer’s application pursuant to 20 C.F.R. § 655.3. Accordingly, the CO wrote:

The employer failed to provide any Farm Labor Contractor Employee (FLCE) certificates to support the transporting of workers. Specifically, the employer indicated that sixty (60) workers

¹ Citations to the 124-page Administrative File will be abbreviated “AF” followed by the page number.

² Page AF 95 of the appeal file was illegible. According to the CO, the page was illegible when it was received at the processing center. The Employer was provided with a chance to send additional copies of the information but failed to submit another copy of AF 95.

will need to be transported from multiple worksites. However, no documentation was provided to show proof of [the] certified drivers that will transport these sixty (60) workers.

AF 32. The CO denied certification based on the Employer's failure to provide sufficient FLCEs to transport 60 workers. The Employer's appeal followed.

In its appeal, the Employer argued that "it is not clear [from the RFI] whether the CO requested that we provide additional documentation of our Farm Labor Contractor (FLC) registration, or our Farm Labor Contractor Employee registrations, or both." AF 3. The Employer goes on to note that "our failure to include FLCE documentation in this case was due in part to confusing wording in the RFI." AF 4. Finally, the Employer argued that "the CO's decision to deny our Application on the basis that we did not provide a sufficient amount of FLC and/or FLCE documentation strikes us as unreasonable."³ *Id.*

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 the CO observed, TEGL 27-06 contains ETA's procedures for processing such applications. ETA has published the guidance letter to its website at <http://wdr.doleta.gov/directives/attach/TEGL/TEGL27-06.pdf>. Section 2.A of TEGL 27-06 requires that an employer qualifying as an FLC 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 or independent FLCs who will drive the 60 workers to the jobsites. It is equally clear from the Employer's statements that it did not submit valid FLCE certificates either with its

³ The Employer also argued that the CO did not issue the Final Determination within the required seven business days of receipt of the Employer's response, and the board should therefore reverse the CO's findings. I find that this argument is without merit. Unfortunately for the Employer, the delayed response did not change the fact that the Employer failed to submit its FLCE certificates. Further, it would be inappropriate and completely contrary to the H-2B regulations to award certification when the Employer admittedly did not supply the required documentation.

application or as requested by the CO. While the Employer may argue that the RFI wording was confusing, the language indicated in no uncertain terms that the Employer should submit “proof of current [Farm Labor Contractor] (“FLC”) registration, including proof of the registration of any Farm Labor Contractor Employees (FLCE) at the time of filing.” The language contained in the RFI explicitly requested any FLCE certificates that the Employer would use in conjunction with its FLC. There was nothing ambiguous about the CO’s request.

Further, there was nothing unreasonable about a CO’s denial of certification based on the Employer’s failure to submit required documentation. The regulations and the TEGl indicate that the Employer must satisfy these requirements at the time of application or, at the very least, in response to a subsequent RFI. Based on the record before the CO, it is clear the Employer did neither. In *Triple T Logging*, 2009-TLN-00081, slip op. at 4 (Sept. 10, 2009), the ALJ affirmed a denial of certification based on a failure to submit FLCE certificates at the time of application or in response to an RFI. As in *Triple T Logging*, the Employer failed to provide FLCEs sufficient enough to transport 60 workers at the time of filing or, even when afforded an opportunity to do so, in response to the RFI. Accordingly, the CO’s decision to deny certification is affirmed.

Order

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

For the Board:

A

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge