



Issue Date: 05 August 2010

BALCA Case No.: 2010-TLN-00071

ETA Case No.: C-10167-50287

In the Matter of:

BARRETO FORESTRY CONTRACTING, INC.,

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 June 16, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Barreto Forestry Contracting, Inc., ("the

Employer”) requesting certification for 60 “Forest and Conservation Workers” from July 15, 2010, until December 31, 2010. AF 52.¹ The Employer submitted with its application a copy of its Farm Labor Contractor Certificate (“FLC”) with an expiration date of December 31, 2010. AF 123. The FLC showed that the Employer was not authorized for transportation, housing, or driving. *Id.* In addition, the Employer submitted six Farm Labor Contractor Employees certificates (“FLCE”) with varying expiration dates. AF 124-129. The Employer also submitted proof of insurance and a written assurance that the certificates and insurance policy would be renewed for the entire period of need. AF 140.

On June 18, 2010, the CO issued a *Request for Further Information* (“RFI”), in which he found the Employer failed to submit proof of an FLC that authorized it to transport workers. AF 50. Further, the CO noted that with only six authorized FLCE certificates, the Employer is only able to transport 58 workers, not the 60 requested. *Id.* The CO required the Employer to submit proof that the Employer held an FLC certificate which authorized it to transport workers and sufficient FLCE certificates to drive the total number of workers to the worksite. *Id.* Accordingly, the CO also asserted 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 June 28, 2010, the Employer submitted a response to the RFI. AF 14-45. The Employer attached, *inter alia*, a copy of a new FLC, which had been amended on September 15, 2009. AF 18. The new certificate authorized the Employer to transport workers and had an expiration date of December 31, 2010. *Id.* However, the authorization for the specific vehicles listed on the FLC expired on December 5, 2009. *Id.* The Employer also included in its response to the RFI two applications for FLCE certificates, along with the applicants’ driver’s licenses. AF 40-45.

On July 6, 2010, the CO issued a *Final Determination* denying the Employer’s application. AF 9-13. 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

¹ Citations to the 163-page Administrative File will be abbreviated “AF” followed by the page number.

12, 2007) (“TEGL 27-06”) applied to the Employer’s application pursuant to 20 C.F.R. § 655.3. Accordingly, the CO asserted that although the Employer had an FLC certificate, it did not have any authorized vehicles in order to transport workers given that the vehicles listed on his FLC certificate expired on December 5, 2009. Further, the FLCE applications submitted by the Employer would not “suffice as proof of current registration as these workers did not receive their FLCE Certificates before the employer filed its application.” AF 13. The CO denied certification based on the Employer’s failure to provide an FLC with authorized vehicles sufficient to transport 60 workers. The Employer’s appeal followed.

In its appeal, the Employer argued that “the employer did provide written assurance that the FLC and/or FLCE certificates . . . would be applied for prior to their expiration.” AF 1. Accordingly, the Employer attached a new FLC certificate, which included eight vehicles authorized for transportation.² *Id.* The certificate was received on July 14, 2010. *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.” (emphasis added).

The parties do not dispute that the Employer qualifies as an FLC or that the Employer needed an FLC certificate that included authorized vehicles in order for the Employer to transport workers. The only issue is whether the FLC certificate must be current at the time the application is filed. Section 2.A of TEGL 27-06 clearly requires that the Employer submit proof of *current* registration. Despite the

² The Board may only consider the written record as it appeared before the CO, so the Employer’s new FLC certificate will not be considered.

Employer's argument that the TEGL only requires a written assurance that the Employer will renew its FLC certificate, a reading of the entire TEGL 27-06 makes it clear that a written assurance is only anticipated where the Employer has a current FLC certificate that is set to expire during the period of need. Nothing in the TEGL suggests that Employers who do not have current certificates can submit a written assurance instead of an FLC certificate. Moreover, allowing an Employer who does not have an FLC certificate with the appropriate authorizations to receive certification based on its written assurance that it will eventually be certified is contrary to the H-2B program and the TEGL. The Employer's written assurance cannot stand in the stead of a valid FLC certificate with the appropriate authorizations. 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:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Washington, D.C.
WSC:ARH