



Issue Date: 22 October 2009

BALCA Case No.: 2010-TLN-00001

ETA Case No.: C-09247-46399

In the Matter of:

CLAY LOWRY FORESTRY, 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 September 3, 2009, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Clay Lowry Forestry, Inc., (“Clay” or “the Employer”) requesting certification for 150 “Forest and Conservation Workers” from November 15, 2009, until April 15, 2010. AF 47. On September 10, 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] registration, including proof of the registration of any Farm Labor Contractor Employees (FLCE) at the time of filing.” AF 46.

On September 11, 2009, the Employer submitted a response to the RFI. AF 34-43. The Employer attached a copy of its “Farm Labor Contractor Certificate of Registration,” which was set to expire on January 31, 2010. AF 34-37. However, copies of the Employer’s FLCE certificates were not included. *Id.*

On September 29, 2009, 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 found that the Employer failed to submit adequate documentation as a Farm Labor Contractor (“FLC”). AF 31. More specifically, the CO wrote, “A review of the employer’s response to the RFI demonstrated failure to cure the deficiency of not submitting adequate documentation as a Farm Laborer Contractor. In reviewing the documentation, the Employer submitted a valid FLC certificate, but failed to submit any FLCE certificates.” AF 32. The CO denied certification based on the Employers failure to comply with TEGL 27-06 and 20 C.F.R. § 655.3. 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 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 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 or independent FLCs who will drive the 150 workers to the jobsites. The sole issue on appeal is whether the Employer submitted to the CO “proof of current registration for all FLCEs.” A review of the record before the CO reveals that the Employer did not provide proof of registration for any FLCE at the time of filing or in its response to the RFI. In its request for review, the Employer conceded that “copies of the FLCEs were not included in the response to the RFI due to a staffing problem.”

According to the Employer, proof of FLCE registration has since been submitted to the CO, and copies were also attached to the Employer’s request for review.¹ However, the Employer must satisfy the TEGL No. 27-06 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 (Sept. 10, 2009), the ALJ observed, “While this may seem a harsh result, the standard of review leaves me no other option when . . . it appears that the CO is unwilling to accept documentation submitted after the final determination’s issuance.” The same is true in the present case. The Employer failed to comply with TEGL No. 27-06 by not submitting proof of FLCE registration 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**.

¹ Although the Employer has sent proof of the FLCE registration along with its request for review, this review is limited to the evidence before the CO at the time he issued the *Final Determination*. Therefore, the Employer’s FLCE registration cannot be considered.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

Washington, D.C.
WSC:ARH