



Issue Date: 04 November 2009

BALCA Case No.: 2010-TLN-00005
ETA Case No.: C-09233-46296

In the Matter of:

EMERALD FOREST, 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 August 21, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Emerald Forest, Inc., ("Emerald" or "the Employer") requesting certification for 300 "Forest and Conservation Workers" from September 1, 2009, until June 30, 2010. AF 74. On August 27, 2009, the CO issued a *Request for Further*

Information (“RFI”), in which he found the Employer “indicate[d] that it may be a Farm Laborer Contractor (FLC) but failed to provide adequate documentation to justify its role as a Farm Labor Contractor.”¹ AF 73. The RFI required the Employer to “provide proof of current registration, including proof of the registration of any Farm Labor Contractor Employees (FLCE) at the time of filing . . . consistent with the number of workers requested.” *Id.* The Employer was also instructed to submit proof of insurance as well as valid drivers’ licenses for all approved drivers. *Id.*

On September 8, 2009, the Employer submitted an overdue response to the RFI. AF 28-66. The Employer attached a copy of its *Farm Labor Contractor Certificate of Registration*, which was set to expire on January 31, 2011. AF 62. The FLC certificate listed four vehicles with a total seat capacity of 33. *Id.* The Employer submitted one FLCE certificate but did not attach proof of a valid driver’s license. *Id.*

On September 16, 2009, the CO issued a *Final Determination* denying the Employer’s application. AF 21-27. 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 (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 25. More specifically, the CO wrote:

Although the employer submitted a valid FLC Certificate, the vehicles listed on the certificate only covered a capacity of 33 workers. However, the employer is requesting 300 Forest and Conservation Workers. The number of vehicles is inconsistent with the number of workers requested. Additionally, the employer only submitted one valid FLCE Certificate. A valid driver’s license was not submitted with the one FLCE Certificate. The FLCE documentation provided does not cover the number of workers requested by the employer.

Id. The CO denied certification based on the Employer’s failure to comply with TEGL 27-06 as required by 20 C.F.R. § 655.3. The Employer’s appeal followed.

¹ The CO identified seven deficiencies in the Employer’s application. Three were corrected upon submission of the Employer’s response to the RFI, and the other four deficiencies were identified as grounds for denial in the CO’s *Final Determination*. I will address only one issue on appeal, since affirming on one ground requires affirming the denial notwithstanding the other issues.

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 300 workers to the jobsites. While the Employer did submit both an FLC certificate and an FLCE certificate, the CO correctly noted that the maximum seat capacity for the registered vehicles was only 33, far below the requisite amount to transport 300 workers. Even if the Employer planned to make multiple trips, it seems unlikely that he could realistically do so with only 33 seats for 300 workers. The Employer writes in its brief, "It is quite unfortunate to state that we were not prepared to register all the vehicles and drivers on such a short and limited time to respond. Our strategic position was to register the rest of our vehicles and subcontract buses and vans that could transport such large groups to the place of employment." The Employer's only defense for not documenting an adequate number of vehicles and drivers to transport 300 workers is that the Employer planned to register the vehicles at some future juncture.

However, the CO cannot accept assurances regarding compliance with the FLC registration requirements. Rather, 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 sufficient number of FLCE certificates as well as a sufficient number of registered vehicles in order to transport the requested 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:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge