



Issue Date: 25 November 2009

BALCA Case No.: 2010-TLN-00016

ETA Case No.: C-09257-46448

In the Matter of:

L&B REFORESTATION, INC.,

Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Jandi Rose Sorbo
Philomath, Oregon
Pro se for the Employer

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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 CO'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.

STATEMENT OF THE CASE

On August 7, 2009, the Employment and Training Administration (“ETA”) received an application from L&B Reforestation, Inc., (“the Employer”) requesting temporary labor certification for 14 Forest & Conservation Workers from October 1, 2009, through July 31, 2010. (AF 50-89).¹

On September 18, 2009, the CO issued a *Request for Further Information* (“RFI”), in which he found that the Employer failed “to submit adequate documentation as a Farm Labor Contractor (FLC).” (AF 46-49). The CO noted that the special procedures relating to tree-planting and related reforestation occupations outlined in the 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 48). The CO advised that the TEGL 27-06 states that “each facility or real property used to house and each vehicle used to transport workers must be described in the application. Housing and transport vehicles for MSPA-covered workers must be authorized for use on the FLC’s certificate of registration prior to use.” *Id.* The CO also stated that each driver must have an FLC or Farm Labor Contractor Employee (“FLCE”) certificate of registration that specifically authorizes driving. *Id.* The CO instructed the Employer to provide proof of an updated FLC certificate of registration with authorization of all vehicles being used to transport workers.² *Id.*

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

² The CO also instructed the Employer to provide proof of current FLC registration authorizing housing of workers, and evidence of the job order and newspaper advertisements. However, since these are not issues on appeal, I will not discuss them here.

The CO received the Employer's response to the RFI on September 24, 2009. (AF 31-45). Concerning FLC authorization for vehicles, the Employer stated:

Our federal Farm Labor Contractor License shows our vehicle authorization as expired. We have sent in the required information and certificates and our authorization has been extended. Replacement certificates, however, are not issued. A copy of the Certificate of Liability Insurance that was sent to the Department of Labor is attached as proof of our current vehicle authorization.

(AF 41). The Employer also asserted that proof of insurance was included with the original filing and that "the Department of Labor does not issue updated certificates." *Id.*

On October 19, 2009, the CO issued a Final Determination denying the Employer's application. (AF 26-29). The CO found that the Employer failed to submit adequate documentation as an FLC that proves its vehicles have current authorization. (AF 28-29). The CO contended, "The employer submitted an FLC license that shows all vehicles with authorization ending May 1, 2008. This date is prior to the employer's application filing date of September 14, 2009." (AF 28).

On November 2, 2009, BALCA received the Employer's request for administrative review. (AF 1-25). In this request, the Employer asserted that it had complied with the regulations and has current vehicle authorization, but that the Department of Labor did not issue new certificates to show that its authorization was extended. (AF 1-2). It also asserted that it included this information in its original application and in response to the RFI. *Id.*

The Board issued a Notice of Docketing on November 4, 2009. The CO filed a brief on November 18, 2009, asserting that denial of certification should be affirmed because the Employer did not provide proof of current vehicle authorization, which is required by TEGL 27-06. The Employer did not file an appellate brief.

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 vehicle used to transport workers must be described in the application," and "transport vehicles for MSPA-covered workers must be authorized for use on the FLC's certificate of registration prior to use." This section also states that each driver of a vehicle transporting covered workers must have an FLC or FLCE certificate of registration that specifically authorizes driving. The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

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 . . . at the time of filing." As the CO stated in the final determination, "[the] employer submitted a FLC license that shows all vehicles with authorization ending on May 1, 2008." (AF 5).

Although the Employer asserted that its vehicle authorization was extended, it did not provide adequate proof in support of its assertion, as the TEGL requires.³ The

³ As stated above, Section II.C.4 of the TEGL requires, "transport vehicles for MSPA-covered workers must be authorized for use on the FLC's certificate of registration prior to use."

Employer also contended that “the Department of Labor does not issue new certificates or licenses to show that vehicle authorization has been extended.” (AF 1). Again, the Employer has not provided any documentation to show that this is the case or that it has attempted to get new certificates. Since TEGL No. 27-06 unambiguously requires that the Employer submit proof of current FLC registration at the time of filing, I find it troubling to simply accept the Employer’s contention that new certificates showing current vehicle authorization are not available from the Department of Labor’s Wage and Hour Division. Because the burden of proof is on the Employer, the Employer needed to provide some supporting documentation that its vehicle authorization had been extended. Indeed, the Employer never explained with any specificity how it learned or received confirmation of this extension from the Wage and Hour Division. Although the Employer provided copies of its renewed insurance certificates, without more, this is insufficient to show that the Employer’s vehicle authorization had been extended.

Accordingly, I decline to reverse the CO’s denials of certification.

Order

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

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

must be authorized for use on the FLC’s certificate of registration prior to use