

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 05 October 2010

BALCA Case No.: 2010-TLN-00080

ETA Case No.: C-10228-50844

In the Matter of:

RED CREEK TREE PLANTING,

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 16, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Red Creek Tree Planting ("the

Employer”) requesting certification for 56 “Forest and Conservation Workers” from October 1, 2010, until May 1, 2011. AF 109.¹ The Employer submitted with its application a copy of its Farm Labor Contractor Certificate (“FLC”) with an expiration date of October 31, 2011. AF 140. The FLC showed that the Employer was authorized for transportation and listed eight approved vehicles. *Id.* In addition, the Employer submitted five Farm Labor Contractor Employees certificates (“FLCE”), although only one of the certificates was current and that certificate holder was not authorized for driving. AF 141-145. In a letter accompanying the application, the Employer noted that some of the FLCE holders were also visa holders, and as a result, their FLCE certificates would not be renewed until the “workers return to work for us next year.” AF 139.

On August 19, 2010, the CO issued a *Request for Further Information* (“RFI”). Citing to 20 C.F.R. § 655.3, the CO stated that the Employer “must provide proof of current registration, including proof of the registration of any . . . Farm Labor Contractor Employees (FLCE) at the time of filing. AF 107.

On August 26, 2010, the Employer submitted a response to the RFI. AF 93-104. The Employer explained that the FLC holder was authorized for driving and would be using one of the 15-passenger vans to transport workers. AF 93. Further, the Employer stated that one of the FLCE certificates showed that Darryl Hickman was not authorized to drive workers, but the “FLC employee registration was issued without driving authorization in error.” *Id.* The Employer was therefore attaching a corrected copy to its response. *Id.* The remaining workers, according to the Employer, were visa holders, and therefore could not renew their FLCE certificates until they return for the upcoming season. *Id.* Attached to the response was an FLCE certificate for Mr. Hickman, which showed that he was authorized to drive workers. AF 96. The authorization was valid until October 31, 2011. *Id.* The Employer also included the renewal application for an FLCE certificate for a former domestic worker; the worker’s current certificate was expired. AF 94.

On September 1, 2010, the CO issued a *Final Determination* approving a partial certification of the Employer’s request. AF 90-92. The CNPC approved the Employer for 27 workers. AF 90. The CO

¹ Citations to the 154-page Administrative File will be abbreviated “AF” followed by the page number.

stated that the Employer had two authorized drivers, and the CO determined that the Employer would only be able to transport 30 workers using its largest capacity vehicles. AF 91. The CO then reduced the number by three because the Employer's recruitment report showed that it had hired three domestic workers. *Id.* In reference to the Employer's visa holding workers with expired FLCE certificates, the CO stated that TEGL 21-06 required the Employer to provide current registration, and therefore, he did not consider them for the purposes of determining how many workers the Employer could transport. *Id.* 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 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 Employer does not dispute that it needs enough workers with sufficient FLCE certificates to transport workers to and from the jobsite. The only issue is whether the FLCE certificates 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. *See Triple T Logging*, 2009-TLN-00081 (September 10, 2009) (holding that an Employer must satisfy the registration requirements at the time of filing, or at the latest, in response to the RFI). In its request for review, the Employer stated that one of its workers had a pending certificate, and the other workers would not be entitled to certificates until they had visas. Further, the Employer noted that as long as it is required to have current certificates at the time of filing, "the employer will never have valid certificates at the time they apply for their temporary employment certification." AF 1.

Ultimately, the regulations require that the Employer submit current registration, and if the Employer is unable to do so, then its certification should be limited to the amount of workers that it is

authorized to transport. The Employer cannot rely on the fact that visa holding workers will be able to receive certificates once he or she is in the country. The CO cannot issue a certification on the basis of what may or may not happen. Instead, he needs proof that the Employer has complied with the regulations before certification is issued. Accordingly, the CO's decision to partially certify the Employer's application 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