



Issue Date: 17 December 2009

BALCA Case No.: 2010-TLN-00023

ETA Case No.: C-09289-46706

In the Matter of:

ABEL SANCHEZ FORESTRY SERVICE,
Employer

Certifying Officer: Robert E. Meyers
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 October 16, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Abel Sanchez Forestry Service ("Sanchez" or "the Employer") requesting certification for 100 "Foresters" from October 1, 2009, until July 31, 2010. AF 137. On October 23, 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] (“FLC”) registration, including proof of the registration of any Farm Labor Contractor Employees (“FLCE”) at the time of filing.” AF 135. The Employer also had to submit proof that “the number of vehicles [was] consistent with the number of workers requested as well as proof of insurance and proof of valid driver’s licenses for approved drivers.” *Id.*

On October 28, 2009, the Employer submitted a response to the RFI. AF 96-132. The Employer attached a copy of its “Farm Labor Contractor Certificate of Registration,” which authorized Abel Sanchez to drive workers to and from the worksite. AF 112. The FLC did not authorize Sanchez to transport, and the FLC did not include a list of vehicles authorized for transportation. *Id.* The Employer also submitted FLCE certificates for four individuals, as well as driver’s licenses, proof of insurance, and copies of a “Vehicle Mechanical Inspection Report” for four vans. AF 117-132.

On November 12, 2009, the CO issued a *Final Determination* denying the Employer’s application. AF 92-95. 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 wrote:

Although the Employer submitted current FLC and FLCE Certificates of Registration, the FLC Certificate indicated that the employer was authorized for driving, but not authorized for the transportation of workers.

Furthermore, the employer did not submit documentation regarding authorized vehicles for transporting workers. The applications for Vehicle Mechanical Inspection do not suffice as proof of authorized vehicles. The TEGL is specific in that all transport vehicles for MSPA-covered workers must be authorized for use on the FLC’s Certificate of Registration prior to use. The FLC Certificate did not list any current, authorized vehicles to be used for the transportation of workers.

AF 95. The CO denied certification based on the Employer’s failure to provide an FLC listing authorized vehicles for transportation. 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 . . . at the time of filing." Section II.C.4 further explains that each vehicle used to transport workers "must be authorized for use on the FLC's certificate of registration." *Id.*

According to 29 C.F.R. §500.48 (d), (e), the authority to drive a vehicle and the authority to transport a worker are separate authorizations requiring different submissions of proof. The authorization to transport workers includes a listing on the FLC of the authorized vehicles along with the maximum number of workers able to be transported based on the vehicle's seating capacity and the Employer's liability insurance. 20 C.F.R. § 500.48 (d). The authority to transport involves the Employer's "ownership and control" of the vehicle. *Id.* The authorization to drive a worker, which does not require the ownership or control of a vehicle, requires the driver to submit a driver's license and a doctor's attestation on a prescribed form. 20 C.F.R. § 500.48 (e). An FLC certificate may authorize an Employer to transport and drive workers, or, as is the case in the present, only authorize the Employer to engage in one of the two activities. Either way, in order to have authorized vehicles listed on the FLC as required by TEGL 27-06, the Employer must be authorized to transport workers. *See* 29 C.F.R. §500.48 (d); TEGL 27-06, Attachment A, Section II C.4 .

The Employer argues in his brief that TEGL 27-06 only requires that "the driver must hold a valid Farm Labor Contractor certificate that specifically authorizes driving." While the Employer correctly notes that all drivers must be authorized, TEGL 27-06, Attachment A, Section II, C.4 also requires that all vehicles used for transport be authorized for use on an FLC certificate. Under the regulations, the only way to obtain the registration of a vehicle on an FLC certificate is for an Employer to be authorized to transport workers.

A review of the record before the CO reveals that the Employer did not provide an FLC listing any authorized vehicles for transporting workers. The single FLC before the CO evidenced only that the Employer could drive the workers. Accordingly, the Employer had multiple drivers but did not have an authorized vehicle to use. As a result, the Employer could not transport workers.

According to the Employer, this case should be remanded so that the CO can review a new FLC certificate showing that the Employer is authorized to transport and has registered the vehicles.¹ However, TEGl No. 27-06 requires that the Employer satisfy the FLC 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. While this may seem a harsh result given the Employer's submission of new evidence, my review is limited to the evidence submitted to the CO. *See Clay Lowry Forestry, Inc.*, 2010-TLN-00001 (Oct. 22, 2009). 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:

A

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

¹ Although the Employer has sent proof of an FLC certificate listing four vehicles 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 new evidence cannot be considered. It should also be noted that the Employer failed to explain why it did not submit the correct FLC to the CO following the RFI.

