

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 04 April 2013

BALCA Case No.: 2013-TLN-00043
ETA Case No.: H-400-12361-373171

In the Matter of:

GREEN TREE REFORESTATION, INC.,

Employer

Certifying Officer: Chicago National Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for administrative review of the Certifying Officer’s *Final Determination* denying temporary labor certification under the H-2B non-immigrant program. For the reasons set forth below, the Certifying Officer’s denial in this matter is REMANDED.

BACKGROUND

The H-2B non-immigrant program allows employers to bring foreign nationals to the United States on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States].” See 8 U.S.C. § 1101(a)(H)(ii)(b). An employer who seeks to hire foreign workers through this program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”), Office of Foreign Labor Certification (“OFLC”). See 8 C.F.R. § 214.2(h)(6)(iii). To apply for such certification, an employer must file an *Application for Temporary Employment Certification* (ETA Form 9142) with the Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20 (2008). After an employer’s application has been accepted for processing, it is reviewed by an OFLC Certifying Officer, who will either request additional information or issue a determination granting or denying the requested labor certification. 20 C.F.R. § 655.23. If the Certifying Officer denies the employer’s application for temporary labor certification, in whole or in part, then the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

Procedural History

On January 23, 2013, Green Tree Reforestation, LLC (“the Employer”) filed an *Application for Temporary Employment Certification* with the CNPC requesting temporary employment certification for 10 H-2B Reforestation Worker positions from April 15, 2013 to November 30, 2013. AF 61-78.¹ The Employer sought these workers to assist with the following reforestation activities: thinning, tree stand improvement, fire trails, planting, pruning, fuel reduction, slashing, hand piling, and chipping. AF 67. The Employer listed Bell Mountain, in Bellevue, Idaho as the place of employment, but indicated that workers would also be transported to the following worksites: (1) Mary’s Peak and Tillmook (in Oregon); (2) Blaine County (in south-central Idaho); and (3) Snohomish County (in the Seattle-Bellevue-Everett township, Washington state). AF 68.

The Certifying Officer (“CO”) issued a *Request for Information* (“RFI”) on January 30, 2013, identifying three deficiencies in the Employer’s application. AF 56-60. Only one of these deficiencies is relevant to this appeal: the Employer’s “[f]ailure to submit adequate documentation as a Farm Labor Contractor (FLC).” AF 56-60. In particular, the RFI stated:

The employer submitted information that indicates that it may be a Farm Labor Contractor (FLC) that will transport workers to and from worksites. However, the employer did not provide adequate documentation to justify its role as a Farm Labor Contractor and it did not provide Farm Labor Contractor Employee (FLCE) certificates to support the transporting of workers.

Additional Information Requested:

The employer must provide proof of current registration, including proof of the registration of any Farm Labor Contractor Employees at the time of filing. The FLC and FLCE certificate(s) of registration must be valid for the entire period of need. If the expiration date of the FLC and FLCE certificates falls at any point during the period of need, the employer must submit a signed written assurance that an application for renewing the FLC and FLCE certificates will be submitted timely to the Department of Labor’s Wage and Hour Division in order to ensure that the certificates are valid during the entire period of need.

AF 58. The CO provided the Employer seven calendar days—*i.e.*, until Wednesday, February 6, 2013—to remedy the deficiency. On February 5, 2013, however, the Employer’s agent contacted the CNPC and asked to extend this deadline to Monday, February 11, 2013. AF 55. The CNPC responded in an unsigned email on February 7, 2013, and granted the extension requested by the Employer. AF 54.

The Employer’s agent filed a response to the RFI with the CNPC on February 8, 2013. AF 28-53. In a cover letter, the Employer’s agent stated that it “is attaching Farm Labor Contractor Licenses for this employer. Employer is submitting a signed written assurance that

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

an application for renewing the FLCs will be submitted to the Department of Labor's Wage and Hour Division in order to ensure valid certificates." AF 30. But these documents were not attached to the response. The CO emailed the Employer's agent on February 11, 2013, to inform her of the omission, and asked her to send the missing documentation as soon as possible. The Employer's agent responded by email the next day, February 12, 2013, attaching FLC certificate number C-09-023922-E-13-R. AF 25-27.²

After reviewing the Employer's response, the CO determined that the Employer did not provide adequate documentation to justify its role as a Farm Labor Contractor and did not provide documentation to support the transportation of the 10 workers for which it requests certification. AF 23. Specifically, the CO noted that the FLC certificate the Employer provided was not valid for transportation and did not list any authorized vehicles. Consequently, on February 20, 2013, the CO issued a *Final Determination* denying certification. AF 20-24.

The Employer's agent petitioned BALCA for administrative review on March 8, 2013. AF 1-19. According to the Employer's agent, the Employer has obtained "adequate documentation." AF 1. She stated that this documentation was sent to the CNPC, via email, on February 28, 2013, and attached a copy of this documentation for the Board's review. AF 1, 6-18. The Board issued a Notice of Docketing on March 13, 2013 to notify the parties that the appeal had been docketed and to provide the parties an opportunity to submit briefs on an expedited basis. Neither party filed a brief in this matter.

DISCUSSION

Scope of Review

The H-2B regulations limit the scope of the Board's review to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e). Accordingly, I may not consider any of the supplemental documentation that the Employer's agent attached to the request for administrative review.

Special Guidelines for Processing H-2B Temporary Labor Certification in Tree Planting and Related Reforestation Occupations

Pursuant to his authority under 20 C.F.R. § 655.3, the OFLC Administrator issued special guidelines for processing H-2B labor certification applications that involve tree planting and related reforestation occupations. See TEGL 27-06, <http://wdr.doleta.gov/directives/attach/TEGL/TEGL27-06.pdf> (issued June 12, 2007). Under these guidelines, an employer who is a Farm Labor Contractor (FLC) must register as a FLC with the Department of Labor's Employment Standards Administration (ESA) before filing an H-2B application for workers who will be performing predominantly manual work. See TEGL 27-06, Attachment A, Section II (A). "The employer must also provide proof of current registration, including proof of the

² The copy of this certificate in the Administrative File is not legible.

registration of any Farm Labor Contractor Employees at the time of filing.” *Id.*³ The TEGL additionally states that transport vehicles for covered workers “must be authorized for use on the FLC’s certificate of registration prior to use.”

In the instant case, the Employer concedes it is a Farm Labor Contractor. The Employer’s agent provided the Employer’s FLC certificate in response to the RFI. Nevertheless, the CO denied the Employer’s application, stating that the Employer “did not provide adequate documentation to justify its role as a Farm Labor Contractor and . . . did not provide documentation to support the transporting of the 10 workers it has requested.” AF 23. But, aside from observing that “[t]he FLC certificate is not valid for transportation and does not list any authorized vehicles,” the CO did not indicate why the Employer’s documentation was inadequate. *Id.* Notably, the TGEL only states that transport vehicles for covered workers “must be authorized for use on the FLC’s certificate of registration *prior to use*”; it does not state prior to filing an application. The TGEL does, however, require proof of current registration at the time of filing. The CO’s denial does not speak to whether the Employer provided this proof, and the Administrative File does not contain a legible copy of the FLC certificate that the Employer’s agent provided in response to the RFI. I am thus unable to confirm whether the Employer provided adequate documentation to justify its role as a Farm Labor Contractor. Accordingly, I remand this matter to the CO for a determination as to whether the Employer has provided proof of current registration.

ORDER

In light of the foregoing, I hereby REMAND this matter to the Certifying Officer for processing consistent with this decision.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

³ This section of the TEGL further provides that the FLC and FLCE certificate(s) of registration must be valid for the entire period of need. *Id.* If the expiration date of the FLC or FLCE certificate(s) falls at any point during the period of need, the employer must submit a signed written assurance that an application for renewing FLC and FLCE certificate(s) will be submitted timely to ESA in order to attempt to ensure that the certificate(s) are valid during the entire period of need. *Id.*