



**Issue Date: 01 December 2015**

BALCA CASE №: 2016-TLN-00003  
ETA CASE №: H-400-14336-045681

*In the Matter of:*

**WILLIAMS FORESTRY & ASSOCIATES,**  
Employer.

### **Order of Remand to Certifying Officer**

Williams Forestry & Associates asked the Secretary of Labor to approve its labor certification application, a step the Immigration and Nationality Act requires to obtain a visa to admit a non-immigrant worker to the United States under the H-2B visa program. The Certifying Officer found the application deficient, as do I. The remedy is not outright denial, but a remand under 20 C.F.R. § 655.61(e)(2) to afford the Certifying Officer an opportunity to evaluate additional information the Employer must disclose.

#### **A. The Application, its Omissions, and Their Consequences**

Each of 95 individuals, as I read the job order included in Williams' application, will plant 1,200 to 1,500 seedlings in re-forestation efforts every day. The job will last about 150 work days.<sup>1</sup> The applicant "must be able, willing, and qualified . . . to work through all areas of intended employment" as they move among reforestation projects in Virginia, Alabama, Florida, Georgia, Kentucky, Maryland, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, West Virginia, New Jersey and New York,<sup>2</sup> from January 4 through April 22, 2016.<sup>3</sup> Williams assures an applicant the regular and overtime hourly wages its job order discloses will "equal or exceed the highest of the prevailing wage or the Federal, State, or local minimum wage."<sup>4</sup> Williams adroitly

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<sup>1</sup> Admin. Rec. at P47.

<sup>2</sup> Admin. Rec. at P47.

<sup>3</sup> Admin. Rec. at P13.

<sup>4</sup> Admin. Rec. at P47.

sidesteps how the worker will be lodged even though the work its job order describes precludes commuting from any fixed abode. An employer who makes it impractical—if not impossible—for its workforce to commute must describe in the certification application those efforts the employer makes to facilitate lodging for its continually mobile work force.

Parsing the arguments Williams offers for reversal first requires limited analysis of the H-2B visa program’s implementing regulations and of the requirements of the Administrative Procedure Act.

### **B. The H-2B Regulations**

Recent joint regulations the Secretaries of Labor<sup>5</sup> and Homeland Security adopted in late April 2015 implement the Immigration Act’s H-2B visa program.<sup>6</sup> The principles of that program task the Secretary of Labor to advise the immigration authorities,<sup>7</sup> through the labor certification application process, whether “a qualified U.S. worker is available to fill the petitioning H-2B employer’s job opportunity and whether a foreign worker’s employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers.”<sup>8</sup> The Secretary of Labor has assigned to a Certifying Officer responsibility to certify or deny those applications.<sup>9</sup>

### **C. The Administrative Procedure Act**

The Administrative Procedure Act characterizes any form of permission an agency grants as a “license.”<sup>10</sup> Section 554(a) of the current codification of the APA<sup>11</sup> does not create a substantive right to a full trial-type hearing on an initial licensure application. The text of the APA specifically contemplates that a license application may be determined with “procedures for the submission of all or part of the evidence in written form.”<sup>12</sup> This proceeding at the Board of Alien Labor Certification Appeals follows that APA authorization:

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<sup>5</sup> The amended H2-B regulations published as interim final rules at 80 Fed.Reg. 24042 *et seq.* (April 29, 2015) are codified at 20 C.F.R. Part 655 (2015).

<sup>6</sup> INA section 101(a)(15)(H)(ii)(b) codified as 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

<sup>7</sup> See 8 C.F.R. § 214.2(h)(6)(iii)(A), (C), (iv)(A).

<sup>8</sup> See 8 C.F.R. § 214.2(h)(6)(iii)(A) and (D).

<sup>9</sup> 20 C.F.R. § 655.50 (2015).

<sup>10</sup> 5 U.S.C. § 551(8).

<sup>11</sup> 5 U.S.C. § 554.

<sup>12</sup> 5 U.S.C. § 556(d).

the review available to an applicant like Williams is confined to legal argument based solely on the evidence it submitted to the Certifying Officer.<sup>13</sup> Throughout this licensing proceeding, as the proponent of the license Williams bears the burden of proof.<sup>14</sup>

Its application omits information the Certifying Officer needs to evaluate under 20 C.F.R. § 655.18(10) (2015), so Williams has yet to carry its burden.

#### **D. The Certifying Officer's Decision**

The Certifying Officer's Notice of Deficiency is no model of English syntax. The Notice required that Williams describe in an amended job order the lodging arrangement for successful job applicants, phrasing it inartfully as: "state that the employer optional housing will provide."<sup>15</sup> The Certifying Officer went on to require that the job order also state that the lodging be "at no cost to the worker."<sup>16</sup> For this second requirement, the Certifying Officer relied on principles developed under § 3(m) of the Fair Labor Standards Act of 1938 in 29 C.F.R. § 531.3(d)(1).<sup>17</sup> But the conclusion about how lodging costs should be allocated is premature, for what Williams proposes to do to assist the workers in locating lodging hasn't been described.

The job order tells applicants that Williams provides some sort of transportation from a "designated locale to [the] job site"<sup>18</sup> for each day's work. Williams says in the brief it filed that it is not providing lodging.<sup>19</sup> Perhaps it isn't. But the regulation obligates Williams to disclose the assistance it provides workers in securing lodging, even if it doesn't pay for lodging outright.<sup>20</sup> I infer from the record that Williams makes some sort of arrangements for lodging, arrangements it has yet to disclose. I cannot believe, and reject the idea that Williams leaves each worker entirely to his or her own

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<sup>13</sup> 20 C.F.R. § 655.61(a)(5) (2015).

<sup>14</sup> See 5 U.S.C. § 556(d), and the Secretary of Labor's instruction to the Certifying Officer: "certify the application only if the employer has met all the requirements of this subpart." 20 C.F.R. § 655.50(b)(2015).

<sup>15</sup> Admin. Rec. at P.10.

<sup>16</sup> Admin. Rec. at P10.

<sup>17</sup> Adopted at 32 Fed. Reg. 13575 (Sept. 28, 1967).

<sup>18</sup> Admin. Rec. at P47.

<sup>19</sup> Employer's brief at 5.

<sup>20</sup> "If the employer provides the worker with the option of board, lodging, or other facilities, . . . or *intends to assist workers to secure such lodging, disclose the provision and cost of the board, lodging, or other facilities, . . . or [the] assistance to be provided.*" 20 C.F.R. § 655.18(10) (emphasis added).

devices in finding and negotiating the price for lodging. The worker will have spent the day planting about 1,200 seedling “using hand planting tools in forest environment[s] in various weather /terrain conditions,”<sup>21</sup> and will reside nowhere more than a few days. Without some common lodging plan, how are each of the 90-some workers to be at a common spot at 7 a.m., so Williams can transport them to the day’s worksite?<sup>22</sup>

It’s implausible that Williams has no involvement whatever in lodging its work force. The Certifying Officer was right to require Williams to describe in its job order whatever it will do to assist workers to find lodging. Assistance includes such things as “reserving a block of rooms for employees, . . . negotiating a discounted rate on the workers’ behalf, or arranging to have housing provided at a subsidized cost for employees.”<sup>23</sup> And there the Certifying Officer ought to have stopped. Once Williams specifies how it intends to assist its workers in finding lodging, Williams can explain why it believes the assistance is not something done for its own benefit as the employer.

How the FLSA, or any other law the Secretary of Labor enforces, may bear on the amendments Williams makes to its application cannot be assessed yet.

*Remanded.*

FOR THE BOARD:

William Dorsey  
ADMINISTRATIVE LAW JUDGE

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<sup>21</sup> Admin. Rec. at P47.

<sup>22</sup> Williams’ job order says “Possible daily/wkly hrs: 7a—4p; 35-55+. M—F.” Admin. Rec. at P47.

<sup>23</sup> See 80 Fed Reg. at 24062. Under 20 C.F.R. § 655.18(b) (10) (2015), all efforts the employer makes to assist an employee in finding lodging must be stated in the job order.