



**Issue Date: 27 July 2020**

BALCA CASE NO.: 2020-TLC-00092

ETA CASE NO.: H-300-20160-633779

*In the Matter of:*

**PLOMERO HUNTING AND OPERATIONS, LLC,**  
Employer.

**DECISION AND ORDER REMANDING DENIAL OF  
TEMPORARY LABOR CERTIFICATION**

This matter is before the Board of Alien Labor Certification Appeals on Plomero Hunting and Operations, LLC's application for a certification under the H-2A temporary alien agricultural labor certification program.<sup>1</sup> The H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. The certifying officer at the Department of Labor's Employment and Training Administration denied the application. Plomero Hunting and Operations, LLC timely requested administrative review. *See* 20 C.F.R. § 655.164(b).

This Decision and Order is based on the written record, which consists of the Administrative File. Having considered the full record, I will remand for further action the certifying officer's denial of the labor certification.

Findings of Fact

Plomero Hunting and Operations, LLC ("Plomero") operates a ranch in Texas, where it raises livestock. AF at 82.<sup>2</sup> Some of the livestock, including whitetail deer, is used for recreational hunting on the ranch. *Id.* Plomero applied for an H-2A Temporary Employment Certification based on a seasonal need to hire one agricultural equipment operator from August 20, 2020 to June 19, 2021. AF at 61, 69.

Plomero described the job duties of this position at length in its application:

This job requires a minimum of 6 months of verifiable agricultural experience operating heavy duty agricultural equipment. Applicants must be able to furnish verifiable job reference(s) or comparable third party documentation from recent

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<sup>1</sup> *See* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 20 C.F.R. Part 655, Subpart B

<sup>2</sup> "AF" refers to the Administrative File.

employer(s) establishing acceptable prior experience. Workers must be able to perform manual as well as mechanized activities with accuracy and efficiency. Workers will perform any combination of the following tasks: attend to whitetail deer and cattle on the ranch; stock deer feeders; clean water troughs; attend to pastures or fields; examine animals to detect diseases and injuries; spray insecticide; assist with castration; clip identifying notches on or brand or clips tags on animals; work in fields, clean around barns; trim trees, clear roads of debris; maintain over 9,500 acres of fence line; maintain landscape around headquarters; clean and maintain ranch in preparation for hunting season. Workers may be required to load, unload and transport cattle. Mow, cut, and weed ranch roads and fields. Perform ditching, shoveling, hoeing, hauling, ground preparation, and other manual tasks. Bending, stooping and kneeling required. Use hand tools including but not limited to hoes, shovels, shears, clippers, loppers, and saws. Lift, carry, and load/unload products or supplies. Use power equipment including but not limited to: bull dozers, tractors, planters, mowers, plows, sprayers, cultivators, power shears, chain saws, high lifts, fork lifts, skid loaders. Brush management will be accomplished using a mechanical roller chopper. Must operate agricultural equipment safely, with or without direction. Apply pesticides, herbicides, fungicides, and other crop protectants. Mix and apply fertilizers, plant growth chemicals, conditioners, and other plant related treatments at the correct times depending on plant type, growth, climate and crop conditions. Assist with farm building/field maintenance and repairs. Build/repair fences. Workers will load trucks with bales of hay and sacks of grain and feed weighing up to and including 60 pounds and lifting to a height of 5 feet.

AF at 77.

In a statement of temporary need, Plomero explained that its workload varies during the year, but fall, winter, and spring have the “heaviest workload” for an agricultural equipment operator. AF at 82. In the application: Plomero describes its workers’ activities by season:

- In the fall (beginning in late August), Plomero’s workload increases to prepare for the start of deer hunting season in October. *Id.* Workers fill corn feeders for deer, plow and plant crops to attract animals, maintain ranch roads by cutting vegetation that had grown during the spring and summer, and clean the ranch headquarters. *Id.*
- Workers continue these duties through the winter. *Id.* They also manage brush, apply herbicide along fences, and fill protein feeders for deer to supplement their nutrition. *Id.* Deer need this nutritional supplement after their breeding season “and while native forage is dormant due to colder temperatures.” *Id.*
- In the spring, brush management is the “primary responsibility” for the agricultural equipment operator. *Id.* But once fawning season begins for whitetail deer in late May, brush management halts to avoid harming the fawns. *Id.*

- In late springtime, an agricultural equipment operator can still service equipment and make repairs, but the workload for the job declines in the latter part of June. *Id.*
- In the summer, Plomero is able to sustain its ongoing operations with its existing workforce and no longer needs an agricultural equipment operator. *Id.* Plomero asserted that it needed a seasonal agricultural equipment operator “to satisfy its added work demands during the requested period of need.” *Id.*

*Notice of Deficiency.* Reviewing the application, the certifying officer found that Plomero failed to establish a temporary need; she therefore issued a notice of deficiency. AF at 52-55. In it, she stated that she “presumed” that the statement of the job duties described work that would “occur on a year-round basis.” AF at 55. She determined that Plomero failed to submit evidence to support its contention that its need was temporary. *Id.* She required Plomero to submit a 2019 payroll report for agricultural equipment operators to substantiate the temporary need. *Id.*

*Employer’s response.* Plomero submitted a letter, a consultant’s report, a 2019 payroll report, and a schedule of Texas’ hunting season dates in 2020 and 2021. AF at 38-48.

In the letter, Plomero explained that the agricultural equipment operator job was a new position, and thus there was no payroll record for the job in 2019. AF at 38. In an effort to comply with the certifying officer’s request, Plomero submitted a payroll report for all employees in 2019. It explained that this would illustrate the seasonal trends of its business—that the workload increases from winter to spring and decreases in the summer. AF at 38-39. The payroll report does show that Plomero employed three workers from January 2019 to May 2019, and one worker in the other months of 2019. Labor expenses were the greatest in January through June 2019 and in December 2019. AF at 45-47.

Plomero explained that it created the position of agricultural equipment operator in 2020 on the advice a wildlife biologist consultant. AF at 39. Plomero submitted the consultant’s report, which recommended a significant augmentation to brush management to enhance the habitat for deer and improve general ranch operations. AF at 42-43.<sup>3</sup> But, despite the large amount of work

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<sup>3</sup> As the consultant wrote: “From a brush management perspective, you have witnessed just how productive and effective the old brush strips are for both deer and livestock. The strips are incredibly valuable because of the added ‘edge effect’ they offer. You currently have all of the big iron on the ranch needed to improve the ranch moving forward so formulate a plan using pastures instead of the entire ranch. The property is huge and it is hard to take a large bite so take only smaller bites and swallow as they are completed. Start in the worst pasture first and fix the worst parts before moving to the next pasture in a rotational, systematic, manner. In areas you want to improve the habitat for primarily deer hunting and access, the rollerchopper/aerator is the best tool for the job. It does require maintenance, but that very maintenance is the reason it works so well-it puts the preferred browse plants back on the ground where deer can utilize it and it provides improved nutrition at the same time. The added ground disturbance will enhance forb and eventually grass production so know for the diesel spent, the rollerchopper/aerator is doing double and even triple duty for you with a single pass. The root plow can be used where more permanent grass is desired, such as in the old strips. Of course, this is a much slower process and takes additional expense and planning but the long term benefits are huge as you have already witnessed. When Mr. Ray installed those original strips twenty plus years ago, he knew the benefit would last for decades and here we are two decades later, his original costs and efforts are still being productive and realized. So you can know that any additional strips and rootplowing will be present on the ranch far into the future and will provide excellent wildlife and livestock habitat for the next one or two generations at least. It is critical to note that all equipment operations in the pasture should pause during

to be done, the consultant emphasized that: “It is critical to note that all equipment operations in the pasture should **pause during the months of June through August** as this is the time when young deer fawns will be on the ground and we do not want to injure these animals.” AF at 39, 43.

Plomero stated in its letter that it lacked “sufficient fulltime staff to perform the brush management activities during the period of need” and that its temporary need subsides in mid-June, when it needs to suspend activities so as to protect the fawns. AF at 39-40. As brush management activities cease in the summer, Plomero can rely on its permanent employees to perform the ongoing duties at the ranch. AF at 40.

*Denial of application.* On July 15, 2020, the certifying officer denied the application for a failure to establish a seasonal need. AF at 13. She stated that the 2019 payroll report was insufficient to establish the temporary need. *Id.* She acknowledged that Plomero had created the job this year, and she briefly summarized the consultant’s report. But she concluded that this did not sufficiently document a temporary seasonal need as defined in the regulations. To the contrary, she found:

The Department has determined the job duties to be performed by the agricultural equipment operator occurs year round and a pause in the work to be performed does not eliminate the need to perform the duties between the months of June through August; it only establishes the employer unwillingness to allow the performance of the job duties.

*Id.*

### Discussion

On administrative review, “the ALJ will, on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.” 20 C.F.R. § 655.171(a).

*Standard of review.* The regulations are silent about the deference that the Board of Alien Labor Certification Appeals should accord to a certifying officer’s determination.<sup>4</sup> When the certifying officer’s determination turns on the Employment and Training Administration’s long-

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the months of June through August as this is the time when young deer fawns will be on the ground and we do not want to injure these animals.” AF at 41-42.

<sup>4</sup> Before the current regulations went into effect on March 15, 2010, the prior regulations specified that the standard of review was “legal sufficiency.” 20 C.F.R. § 655.112(a) (2008). Some BALCA panels interpreted legal sufficiency to imply an arbitrary and capricious standard of review. *See J and V Farms, LLC*, 2015-TLC-22, slip op. at 3 n.1 (BALCA March 4, 2016) (citing *Bolton Springs Farm*, 2008-TLC-28, slip op. at 6 (BALCA May 16, 2008)). But the prior regulations never defined “legal sufficiency.” *See id.*; 20 C.F.R. § 655.112(a) (2008). The current regulations removed the reference to legal sufficiency and did not address the deference, if any, BALCA should accord to a certifying officer’s decision. *See* 75 Fed. Reg. 6884, 6931 (Feb. 12, 2010). The current regulations’ silence leaves the question open and requires BALCA judges to find an appropriate standard of review.

established, policy-based interpretation of a regulation, it would seem that considerable deference is owed to ETA. *Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (describing the deference courts give administrative agencies). In such cases, BALCA likely should not overturn a certifying officer's reliance on the established policy interpretation unless it is arbitrary or capricious. Absent ETA's long-standing, policy-based interpretation of a regulation, it would appear that BALCA should review the certifying officer's denial *de novo*. On the present record, I need not determine the deference owed the certifying officer, for I would affirm the denial of the application on the less deferential *de novo* review standard.

*H-2A program requirements.* An employer seeking certification under the H-2A program must establish that it has a temporary or seasonal need for agricultural labor or services. 20 C.F.R. § 655.161(a).<sup>5</sup> The regulations define seasonal and temporary:

[E]mployment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

20 C.F.R § 655.103(d).<sup>6</sup>

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<sup>5</sup> In some earlier BALCA decisions, my colleague Judge Colwell seems to have suggested that there is a presumption that the care and feeding of livestock occur on a year-round basis and thus that the employer can rebut the presumption with an evidentiary showing that the need for the employees is less than year-round. *See, e.g., Cowboy Chem., Inc.*, 2011-TLC-211, slip op. at 4 (BALCA Feb. 10, 2011) (“[D]uties are relevant inasmuch as the care and feeding of animals are presumed to occur on a year-round basis and therefore reflect a year-round need for workers. However, this presumption can be overcome if the employer can sufficiently explain why it does not need workers on a year-round basis.”) (citing *Gisi Pheasant Farm*, 2011-TLC-139 (BALCA Jan. 25, 2011)); *Altendorf Transport, Inc.*, 2011-TLC-158 (BALCA Feb. 15, 2011).

With all respect to Judge Colwell's suggestion, there is no such presumptions, and even if there were, it would not apply here. First, nothing in the regulations establishes a presumption that the care and feeding of livestock is need year-round. More to the point is that, because the applicant employer may rebut the “presumption” with evidence that of a seasonal need, this would-be “presumption” is really no more than a misstatement of a well-settled rule applicable in every H-2A application: namely, that the proponent of an order has the burden of persuasion. *See Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 275-76 (1994) (proponent of an order from an administrative agency has the burden of proof, and that is a burden of persuasion, not a mere burden of production). That well-settled rule already requires the applicant employer to present persuasive evidence of any asserted seasonal need in every case; the would-be “presumption” merely duplicates the same requirement.

Second, the employer's stated need here is not (or at least not primarily) for an additional employee for the care and feeding of the livestock; it is for the operation of agricultural equipment for the primary purpose of brush management.

<sup>6</sup> Certifying officers employ a “ten-month rule” as guidance when they determine whether to “require an employer to either modify its application or prove that its need is, in fact, of a temporary or seasonal nature.” *Grand View Dairy Farm*, 2009-TLC-9, slip op. at 7 (BALCA Nov. 3, 2008). “The ‘ten-month rule’ serves only as a signal that an employer may need to substantiate that its labor need is truly temporary.” *Grasslands Consultants, LLC*, 2016-TLC-12, slip op. at 5 (BALCA Jan. 12, 2016). It is not determinative on a BALCA appeal. In any event, Plomero's application comes within the so-called “10-month rule.”

Plomero showed that its ranch is a small operation with one to three employees working at various times of the year. It hired a consultant and was advised that it needed to improve its brush management so as to enhance the habitat for deer. But, because of the seasonal nature of the deer fawning and that risk of injury to fawns that ongoing brush management would pose, the consultant described it as “crucial” that brush management operations be paused from June to August, the time period during which “fawns will be on the ground.” AF at 43. Plomero plans to follow the consultant’s recommendations, including the cessation of brush management operations for much of the summer season.

I am convinced that, as Plomero states, the consultant’s report was the primary impetus for Plomero’s seeking an H-2A worker to perform brush management. The description of the work the consultant suggested (*see* fn. 2 above) shows that the job is extensive and time-consuming for an employee with agricultural equipment skill and experience. The recommended work could readily require an additional worker with the needed skills at the times that the work was to be performed. I also accept from the consultant’s “crucial” warning not to engage in brush management during the fawning season that the brush management work is seasonal: At the least, it excludes certain times from June into August based on the seasonal breeding and fawning patterns of the deer. Given that Plomero is a small operation with one to three employees, adding even one more employee meets the regulatory requirement that the need is for “labor levels far above those necessary for ongoing operations.” 20 C.F.R. § 655.103(d).<sup>7</sup>

The difficulty is that the question is not whether a specific duty is seasonal; it is whether the need for an additional worker is seasonal. *See Altendorf Trans., Inc.*, 2011-TLC-158, slip op. at 11 (BALCA Feb. 15, 2011) (quoting *Sneed Farm*, 1999-TLC-7, slip. op at 4 (BALCA Sept. 27, 1999)). “To determine whether the Employer’s need for labor is seasonal or temporary, it is necessary to establish when its season occurs and how the need for labor or services during this time of the year differs from other times of the year.” *Id.*

Plomero has shown that the brush management work would be the additional worker’s principal duty in the spring and part of his duties in the winter. But there is nothing on the record to suggest that any brush management would be done in the autumn. Plomero states that, in the autumn, the agricultural equipment operator would fill corn feeders, plow and plant crops, maintain ranch roads, and clean ranch headquarters. But there is no explanation why Plomero needs an additional worker in the fall to perform these duties—duties its typical workforce apparently has been doing in the past.

If Plomero applied for the certification based on an asserted seasonal need in winter and spring, and had the certifying officer denied that application, I would have found on this record that Plomero met the regulatory requirements. Contrary to the certifying officer’s conclusion, the fact that Plomero could not establish the seasonal need with its 2019 payroll records is not a basis to deny the certification. There were no payroll records for previously employed agricultural equipment operators because Plomero had not previously employed such workers.

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<sup>7</sup> When a business operates with one to three employees, even the addition of just one more employee is at least a 33 percent increase in the number of employees. That is a need far above the number needed for ongoing operations in the ten months covered.

The more general payroll records produced are insufficient, standing alone, to establish the required showing for certification. But they are relevant and, more importantly, they are only a minor part of the record; Plomero offered much more evidence.<sup>8</sup>

I also reject the certifying officer's conclusion that Plomero has a need to keep the job filled in June through August and won't do it only because it is "unwilling." If anything, the certifying officer is neglecting that the impetus to hire an agricultural equipment operator was to do the extensive brush management work that the consultant recommended. At the same time as the consultant recommended the work, the consultant also warned that the work could not be done in summer because it would injure the fawns. It isn't that Plomero was unwilling to have the additional employee work in summer; rather, it is that the seasonal work ceases and that dissipates the need for the additional employee. In short, there's no need for an agricultural equipment operator in summer. To be sure, any rancher who purposely engages in activity likely to injure her livestock won't be a rancher for long.

In all, I find that Plomero has not established a temporary or seasonal need for one agricultural equipment operator for the entire time period for which Plomero applied: August 20, 2020 to June 19, 2021. But, at the same time, I find that, on this record, it has shown a temporary or seasonal need for one agricultural equipment operator from the beginning of its winter season in late 2020 to June 19, 2021. I therefore will remand the matter to give the certifying officer and Plomero an opportunity to consider whether a certification is proper for a shorter period or whether additional evidence explains why the agricultural equipment operator is needed in the autumn.

#### Order

This matter is REMANDED for the certifying officer to allow an amendment to the application to cover a shorter time period or to consider additional evidence as described in the discussion above.

SO ORDERED.

For the Board of Alien Labor Certification Appeals

STEVEN B. BERLIN  
Administrative Law Judge

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<sup>8</sup> The payroll records are relevant to show the small size of Plomero's ongoing operations and thus that a need for even one more employee is still far above the number of persons already employed.