In the Matter of:

PURCHASE PRO LLC,

Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Before: Monica Markley
Administrative Law Judge

DECISION AND ORDER AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s denial in the above-captioned H-2B temporary labor certification matter. 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 “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 8 CFR § 214.2(h)(1)(ii)(D); see also 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 CFR § 214.2(h)(6)(ii)(B); 20 CFR § 655.1(a). Employers who seek to hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”). 8 CFR § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 CFR § 655.50. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 CFR § 655.53.

STATEMENT OF THE CASE

On January 1, 2022, the ETA received an H-2B Application for Temporary Employment Certification (ETA Form 9142B or “Application”) from Purchase Pro LLC (“Employer”) for 75 Housekeepers to be employed from April 1, 2022 to October 31, 2022, to meet a “seasonal”
need. (AF\textsuperscript{1} 47.) The job duties were listed as “general cleaning of hotel and condo rooms,” to include stripping and remaking beds, taking out the trash, cleaning bathrooms and kitchens, vacuuming and dusting of rooms, washing dishes and appliances, washing and folding of linens, and cleaning foyers and common areas around the rooms and hotel. (AF 49). The statement of temporary need stated:

Purchase Pro, LLC is a commercial laundry and staffing company that provides linen and staffing services for hotels and restaurants in the Myrtle Beach, South Carolina area. We have been in operation as a staff provider for 4 years now and are looking to service our customers and soon-to-be customers more efficiently. Our customers rely on us to provide them with the extra staffing that they need to get through their needs and the past few years we continue to struggle with fulfilling all of the needs. The past year has seen a growth in tourism despite the pandemic with new hotels, restaurants, and attractions opening along with more routes coming through the airport with the addition of Southwest Airlines. The summer saw numbers of tourists the airport has never seen before setting records each month. Next year, more routes are being planned and more new hotels are opening which will increase the demand for workers in our area. Our customers are looking at us even more than ever to fulfill their staffing needs in which we continue to fall short on having enough workers for the demand. Along with all the new [sic], several events, which draw huge turnouts, are coming back after being cancelled the previous years. Our company has tried different social media outlets to place help wanted ads and through job placement websites. The responses from the local workforce barely exist and, on some occasions, we do not receive any unless they previously applied but never respond when called back for job offers. A recent study by the Habitat for Humanity showed the population of those 20-29 decreased in the county by 30% while those 50+ grew by 65% and retirement aged residents grew by 100%. This disparity has affected the entire job population that is available to work by keeping it below demand even though the population has increased. The cities and county continue to try and find solutions to getting workers here, but answers are usually decades away.

A summary of our payroll records for the previous years is included showing the increases in demand during the timeframe. 2021 full-time workers were only in the laundry field, but we still included them in the full staffing payroll records. April and May 2021 entries do not show the true demand that was needed during those months as we lost workers right before the spring and were having difficulties finding replacements as the numbers should be closer to the June entry if we had the workers. While we have stayed small so far, we plan to continue to grow our company as the city needs continue to grow. We have reached out to new clients and are including commitment letter that shows we have opportunities for those we are currently employing along with any new hires and H-2B workers we are able to get this summer. We are excited with the possibility that 2022 could be the biggest year this area has seen and we want to

\textsuperscript{1} The Appeal File will be cited as “AF” followed by the relevant page number.
make sure that everyone who comes here has a wonderful time and not in situations where staffing shortages take time away from their vacations.

(AF 52; AF 63-64). Employer set out “Payroll Statistics” for 2019, 2020, and 2021 showing the number of permanent workers, total hours worked by permanent workers, total earnings by permanent workers, total number of temporary workers, total hours worked by temporary workers, and total earnings by temporary workers for each month. (AF 52; AF 64-65).

Based on these assertions, Employer claimed a temporary seasonal need for H-2B Housekeepers from April 1 through October 31, 2022.

On February 2, 2022, the CO issued a Notice of Deficiency (NOD). (AF 37-46). The CO found five deficiencies with Employer’s Application: failure to establish the job opportunity as temporary in nature; failure to establish a temporary need for the number of workers requested; failure to submit an acceptable job order (due to failure to indicate the work hours within the job order); and two deficiencies in the job order assurances and contents (due to inconsistencies between the Application and the job order).

Regarding the first deficiency, the CO found Employer “did not sufficiently demonstrate the requested standard of temporary need,” because it did not establish a seasonal need for the requested 75 housekeepers. (AF 41-42). The CO stated: “In order to establish a seasonal need, the employer must show that the service or labor for which it seeks workers is traditionally tied to a season of the year by an event or pattern and is of a recurring nature.” (AF 41). While the Employer cited a growth in tourism in the Myrtle Beach area—with more hotels opening and more airline routes coming to the area, increasing the demand for workers in the area—Employer did not demonstrate a temporary, seasonal need. The CO found Employer “has not explained how its services is traditionally tied to a season of the year by an event or pattern and is of a recurring nature.” The CO also noted Employer’s reliance on its contention that there are not enough workers to meet demand, and reminded Employer that “a labor shortage does not constitute a seasonal temporary need.” The CO additionally observed that Employer’s payroll records show “that the employer hired temporary workers all year from 2019 through 2021, with no permanent workers, except for three months in 2021 (August, September, and October). Thus, it appears the employer has a year round need,” not a temporary seasonal need. Finally, the CO noted that it “appears as if the employer is a contractor and is merely in the business of obtaining contractual obligations. Therefore, the employer has the capacity to operate on a year round basis, granted the opportunity is presented”; accordingly, the employer’s need for housekeepers is not “traditionally tied to a season of the year by an event or pattern,” and is not seasonal. The CO requested several items of documentation to further evaluate Employer’s Application and its claim of a temporary seasonal need.

Regarding the second deficiency, the CO found “[t]he employer has not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities.” (AF 42-43). The CO stated that Employer “provided three letters of intent from three different hotels which indicates that each hotel is requesting 25 Housekeepers. However, the employer did not explain why these hotels require 25 Housekeepers each, respectively.” Because it remained unclear how Employer determined a total need of 75
Housekeepers, the CO requested further explanation and documentation, as specified in the Notice of Deficiency.

Employer filed a response to the NOD on February 2, 2022. (AF 29-36). Employer authorized changes to its Application to resolve the discrepancies with the job order. (AF 33-36). Employer resubmitted the same “Payroll Statistics” for the years 2019-2021 that were submitted as attachments to its Application. (AF 31-32). Employer submitted a two-page letter reiterating its assertion of a seasonal need. (AF 29-30). Employer stated in the letter that the Myrtle Beach area “is a beach town that sees significant tourism during the Spring and Summer starting with Spring Breaks in March and continuing through the end of October.” (AF 29). Employer asserted that the increase in visitors creates “huge increases in demand for workers from our clients during timeframe between April and October.” Employer also stated that it wishes to use the increased demand to “help expand our business into new fields and more customers.” Employer stated that its “need is not there during the Winter months as much even though we operate year-round.” Employer reiterated that it provides extra staffing to local hotels and has “continue[d] to struggle with fulfilling all the needs.” Employer also reiterated the increased tourism in the area “with new hotels, restaurants, and attractions opening” and with new Southwest Airlines routes coming to the area. Employer asserted that last summer “saw numbers of tourists that the airport had never seen before,” and that with more airline routes and more hotels opening, this will “increase the demand for workers in our area during the season.” Additionally, several events are coming back after being canceled the previous summers. Employer stated that the “Myrtle Beach area has bounced back and become one of the hot spots for tourists to come visit Spring and Summer which is why we are requesting 75 workers due to having commitments, that are attached, equal to the 75 which would be on top of what workers we would normally be able to hire during this timeframe.” (AF 30). This will help hotels supplement their normal workforces “during the busy months of the summer.” Employer referenced the attached Payroll Statistics, and asserted they showed “the increases in demand during the timeframe.” Employer repeated (nearly verbatim) the assertions made in its Statement of Temporary Need in its Application. (AF 30).

The CO issued a Final Determination denying the Application on February 9, 2022. (AF 16-27.) The CO stated that she could not issue an acceptance for this case because two deficiencies still remained: failure to establish the job opportunity as temporary in nature, and failure to establish a temporary need for the number of workers requested. (AF 20-27).

Regarding the first deficiency, the CO stated in the “Denial Discussion”:

The employer has responded to the NOD by indicating that its need is tied to the recurring tourism that comes into the Myrtle Beach, South Carolina area, as the area experiences a peak in visitors during the spring, summer, and fall seasons. The employer attests that tourism peaks due to spring break and vacation trips that often last until the end of October. The employer further expresses that as Myrtle Beach, South Carolina experiences a peak in tourism, its company experiences an increase in demand from its clients during the months of April – October. However, the employer’s payroll documentation does not support the employer’s nature of Temporary Need. In Section B. Item 7 of the ETA Form 9142, the
employer indicated that it has a “seasonal” need for temporary workers. However, a seasonal need is not reflected in the employer’s 2021 payroll documentation. In its NOD response, the employer attested that its need for temporary workers during its winter season is not as significant as its need for temporary workers during its requested period of need. However the employer’s payroll documentation indicates a need during the winter that is consistent with its need during the Spring, Summer, and Fall seasons.

(AF 23). The CO set out Employer’s “2021 Payroll Statistic,” and noted that the “2021 payroll documentation indicates that more work is being performed in the non-seasonal months of March, November, and December than the seasonal months of April and May.” Additionally, the 2021 payroll documentation showed more workers in November and December (12 per month) than in the claimed “seasonal months” of April (11 workers) and May (9 workers). Similarly, there were more temporary workers in the non-seasonal month of March (18 workers) than the claimed seasonal months of April (11), May (9), September (15), and October (12). (AF 23-24).

The CO also noted that Employer’s 2021 payroll documentation shows that when permanent workers were hired in August through October 2021, the temporary workers experienced a decrease in total hours worked. This suggests “that the employer has a need for permanent workers,” and that Employer’s temporary workers are replacing permanent staff rather than filling a seasonal need for a temporary increase in workers.

Overall, the CO found that the 2021 payroll documentation “does not substantiate” an increased demand “only during the months of April – October,” to corroborate the claimed seasonal need, and instead shows “a consistent demand for work during the entirety of the year.” The CO concluded that Employer’s “explanation and documentation does not establish that the employer has a seasonal temporary need for workers during the requested period of need from April 1, 2022 to October 31, 2022. Therefore, the employer did not overcome the deficiency.” (AF 24).

Regarding the second deficiency, the CO noted that Employer indicated it requested 75 workers “due to the fact that it has heavy commitments in the Myrtle Beach area, which is a hot spot for tourists to visit during the spring and summer seasons.” While the employer “indicates that it has attached its aforementioned commitments within its NOD Response,” in fact, “the employer has not submitted any documentation regarding the ‘commitments’ it indicated was attached within its NOD Response.” The payroll statistics showed “the highest number of temporary workers on the payroll reached 44 in August of 2019 but several other months within the ‘peak’ had significantly less temporary workers.” Having reviewed the payroll statistics, the CO found that Employer’s “2019-2021 payroll documentation does not substantiate that the employer has a need for a total of 75 workers during its requested period of need.” (AF 26). After setting out Employer’s Payroll Statistics from 2019-2021, the CO further stated: “The employer’s explanation and documentation failed to establish that the number of workers being requested for certification is true and accurate and represents bona fide job opportunities. Therefore, the employer did not overcome the deficiency.” (AF 27).
For these reasons, the CO denied the Employer’s Application for temporary labor certification for 75 H-2B workers.

By letter filed on February 15, 2022, Employer requested administrative review of the Final Determination. (AF 1-15.) Employer argued in its request for review that the CO misinterpreted its response and overlooked its evidence, as shown by a request for Food/Beverage gross sales reports even though this application is for maids and housekeepers; payroll records that show an increase in need for the time period requested; explanations that show Employer had a greater demand than it could fulfill; letters of commitment that were overlooked, which establish a need for 75 workers; and the approval of similar requests by other employers in the area. Overall, Employer contended that the CO did not properly look at its evidence, and argued its evidence supports certification.

I issued a Notice of Assignment and Expedited Briefing Schedule on February 23, 2022. The Notice stated that the regulations require an employer to submit its argument in its request for review, and provide only for a responsive brief from the CO. Thus, I permitted the CO to file a brief within seven business days of receipt of the Appeal File, and stated I would consider Employer’s arguments in its request for review. The CO waived her right to file a brief, and relies on the reasoning stated in the Final Determination.

LEGAL STANDARD

The standard of review in H-2B cases is limited. A reviewing judge may consider only “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The evidence is reviewed de novo, and a reviewing judge must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. 20 C.F.R. § 655.61(e). An employer seeking to hire employees under the H-2B program bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361.

DISCUSSION

The H-2B program is designed for employers seeking to import workers to provide temporary nonagricultural services or labor. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Accordingly, an employer seeking H-2B temporary labor certification must establish that its need for nonagricultural services or labor is temporary in nature. 20 C.F.R. § 655.6. Temporary service or labor “refers to any job in which the petitioner’s need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.” 8 C.F.R. § 214.2(h)(6)(ii)(A). Employment is of a temporary nature when the employer needs a worker for a limited period of time. 8 C.F.R. § 214.2(h)(6)(ii)(B). An employer must establish that its need for temporary services or labor “will end in the near, definable future.” Id.
The petitioning employer must demonstrate that its need for the services or labor qualifies under one of the four standards of temporary need: a one-time occurrence, a seasonal need, a peak load need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B); Alter and Son General Engineering, 2013-TLN-00003 (Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need); Baranko Brothers, Inc., 2009-TLN-00051 (Apr. 16, 2009). The applicable federal regulation provides:

(ii) Temporary services or labor -

(A) Definition. Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) Nature of petitioner’s need. Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

(1) One-time occurrence. The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

(2) Seasonal need. The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

(3) Peakload need. The petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.

(4) Intermittent need. The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but
occasionally or intermittently needs temporary workers to perform services or labor for short periods.

8 C.F.R. § 214.2(h)(6)(ii).

Here, Employer asserted a *seasonal* need for temporary H-2B workers. Accordingly, Employer was required to establish that it has a temporary need for workers to perform the listed job duties for a limited period of time that will end in the near future, and that the work requested “is traditionally tied to a season of the year by an event or pattern and is of a recurring nature.” Employer has not made that showing here for the 75 requested housekeepers.

Employer did not establish a “season” running from April 1 through October 31. Employer relies heavily on the assertions of increased Spring Break and summer tourism, aided by new airline routes, new hotels, and returning events. However, several points undercut Employer’s arguments. First, Employer’s claimed “season” begins April 1, *after* the “Spring Breaks in March” cited by Employer in its response to the NOD. Second, the hotels and airline routes exist year-round; while they certainly assist the Myrtle Beach area in increasing its tourism business, the existence of these items does not establish a *season* that runs from April 1 to October 31. Third, Employer’s repeated reliance on “summer” or “spring and summer” vacations does not demonstrate how or why the claimed season runs through October 31—well after summer has ended.

Fourth, and critically, Employer’s “Payroll Statistics” do not support the claim of a season running from April 1 through October 31, with an off-season November through March. For the year 2019, the data perhaps shows an increased workload from April (34 workers) through August (44 workers), but the number of workers in the claimed seasonal months of September (22) and October (25) is similar to the number of workers in the off-season months of November (22) and March (24). For the year 2020, the data shows a marked *decrease* in the number of workers from April through October, likely due to the onset of the COVID-19 pandemic. For the year 2021, when Employer reports a record number of tourists in the area, the payroll data shows less workers in April (11) and May (9) than in the off-season month of March (18), before the numbers increase for June through October. The variability in these numbers does not satisfy Employer’s burden to show that the housekeeping services for which H-2B workers are sought are “traditionally tied to a season of the year by an event or pattern and is of a recurring nature.”

Additionally, as the CO noted, Employer uses temporary workers year-round. For the three-year period of 2019-2021, Employer reported having permanent workers for only three months (August-October 2021). And, in its request for review, Employer clarified that these permanent workers were also H-2B workers; Employer classified them as “permanent” if they worked three months or longer, and classified them as “temporary” if they only stayed a month or two. (AF 2). As noted at the outset, to prove a temporary need, Employer must establish that it needs the workers for a limited period of time, and that the need for temporary labor “will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). I agree with the CO that for at least some of the positions sought, Employer in fact has a full-year need for permanent employees, not a temporary need for seasonal help.
For these reasons, I find and conclude that Employer has not established entitlement to certification, because it has not demonstrated a temporary need for 75 housekeepers for a “season” purportedly running from April 1 through October 31. Employer has not met the regulatory requirement that it “establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature.”

Because I find that the CO properly denied certification based on the first deficiency (failure to establish the job opportunity as temporary in nature), I do not address the second deficiency here (failure to establish a temporary need for the number of workers requested).

I will briefly address a few of Employer’s other arguments. Its contention that the CO did not actually look at its evidence because the CO requested in the NOD “summarized monthly food/beverage gross sales report for a minimum of two previous calendar years for the employer’s worksite location” is unavailing. First, the CO appears to have requested this documentation because one of Employer’s commitment letters states that Employer provides the Crown Reef resort with staff in housekeeping, laundry, food and beverage, and other front of the house positions. Second, Employer did not submit the requested information in its response to the NOD. Despite the fact that failure to provide requested information is an independent reason to deny an application, the CO did not deny Employer’s Application based on this omission. Accordingly, the ignored request for the food and beverage sales reports is irrelevant to the ultimate denial of Employer’s Application.

Employer challenged the CO’s review of its payroll documentation, claiming the 2019 numbers clearly showed an increase beginning in April, and pointing to certain months that show clear increases over other months. However, as discussed above, the numbers do not show a “season” from April 1 through October 31, that is “tied to a season of the year by an event or pattern and is of a recurring nature.” While Employer is correct that some of the claimed “seasonal” months have higher work numbers than some of the off-season months, that is not consistently true for the length of the “season” claimed by Employer; as discussed above, some “seasonal” months had numbers comparable to or lower than off-season months. Likewise, even accounting for the effects of the pandemic in 2020, the claimed seasonal increases were not consistent from year to year; for example, Employer had 34 workers in April 2019 but only 11 in April 2021; 37 workers in May 2019 but only 9 in May 2021; 40 workers in June 2019 but only 21 in June 2021; and 40 workers in July 2019 but only 20 in July 2021. There is not enough consistency in Employer’s numbers to establish a “season” for the period claimed that is “of a recurring nature.” Employer attributes this variability to its struggle to find available workers, and argues that the numbers “do not reflect the amount of workers we are asked for by clients that we are unable to fill”; while this may be true, this means that Employer’s hiring patterns are due to the fluctuating availability of workers, rather than being “tied to a season of the year by an event or pattern and [] of a recurring nature.”
As discussed above, Employer’s argument noted that both its “permanent” and its “temporary” workers are H-2B workers, who are by definition temporary.\(^2\) See 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Thus, as Employer has employed “temporary” workers year-round throughout the three-year period from 2019-2021, several of Employer’s positions are neither temporary nor seasonal.

Finally, Employer contended that “every other application” for H-2B housekeepers in the Myrtle Beach area was approved, showing a seasonal need. However, Employer did not cite or provide any specific applications that were approved, so it has not been shown whether those employers even claimed a seasonal need (as opposed to a peakload need or other temporary need), whether those employers claimed the same “season” of April 1 through October 31, or whether those employers had payroll data or other documentation that confirmed the period of temporary need they alleged, among other things. Thus, the approved applications could have been based on different facts, different grounds, and different dates. Additionally, the fact that the CO may have approved similar applications in the past is not grounds for reversal of the denial in any event. See Rollins Sprinkler & Landscape, LLC, 2017-TLN-00020 (Feb. 23, 2017).

The employer bears the burden of demonstrating eligibility for the H-2B program. As discussed above, Employer failed to sufficiently demonstrate how its request for temporary labor certification meets the regulatory criteria for a temporary, seasonal need for 75 Housekeepers. Therefore, after reviewing the record in this matter, I find that the CO’s denial of certification should not be disturbed.

For these reasons, I find that the CO properly denied Employer’s H-2B Application for Temporary Employment Certification, and the denial will be affirmed.

ORDER

It is hereby ORDERED that the Certifying Officer’s denial of the Employer’s Application for Temporary Employment Certification is AFFIRMED.

For the Board:

MONICA MARKLEY
Administrative Law Judge

\(^2\) An H-2B worker “is an alien who is coming temporarily to the United States to perform temporary services or labor without displacing qualified United States workers available to perform such services or labor ….” 8 C.F.R. § 214.2(h)(6)(i)(A) (emphasis added).