

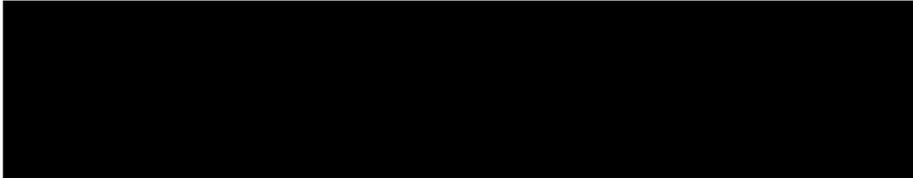
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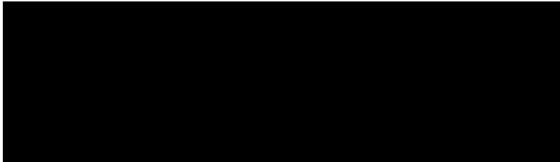
OCT 05 2007

FILE: EAC 07 233 52546 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiaries: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: On August 9, 2007, the petitioner filed the Form I-129 (Petition for a Nonimmigrant Worker) and allied documents. This petition seeks Citizenship and Immigration Services (CIS) classification of 798 aliens as H-2B temporary nonagricultural workers. The petition was filed after the Department of Labor (DOL) decided to not issue a temporary labor certification, having determined that unique, complex, and persistent circumstances generated in the Gulf Region by Hurricanes Katrina and Rita made it impossible for DOL to determine whether the employer's need is temporary within the meaning of the CIS regulations on the H-2B program. The nonimmigrant visa petition was approved by the Acting Director, Vermont Service Center, and certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii). The decision of the director will be withdrawn and the matter remanded to him for further action and consideration.

As a preliminary matter, the AAO notes that there is sufficient evidence in the record of proceeding to establish a shortage of welders and ship fitters in the geographical area related to the present petition. However, as reflected in the comments below, as presently constituted the record of proceeding does not establish a temporary need for a total of 798 welders and ship fitters in order to fill the requirements of the three clients named in the petition.

The AAO finds that, for each of the three client firms for whom the petitioner seeks H-2B workers constituted, the record of proceeding as presently constituted fails to establish (1) that there is a need for 133 welders and 133 ship fitters as asserted, and (2) that each of the asserted needs for 133 workers satisfies one of the H-2B temporary need categories at 8 C.F.R. § 214.2 (h)(6)(ii)(B) (that is, one-time occurrence, seasonal need, peakload need, or intermittent need). The AAO will remand the petition with instruction that the director issue a request for evidence (RFE) to afford the petitioner an opportunity to provide additional evidence to address the AAO's concerns addressed below.

Background

The present petition is for 798 welders, cutters, and fitters. At this time the AAO is also reviewing two other H-2B petitions for welders and ship fitters that the petitioner filed contemporaneously with the present petition. The Form I-129 receipt numbers of these petitions are EAC0724353120 and EAC0722753476. The petitioner's client in EAC0724353120 is the Florida division of Atlantic Marine; and the client in EAC0722753476 is Conrad Industries, located in Morgan City, Louisiana. Each of these petitions asserts that a particular client needs exactly the same complement of welders and ship fitters as asserted for each of the three clients in the present petition, that is, 266 welders and ship fitters separated into 133 First Class Flux Core Welders and 133 First Class Ship Fitters.

According to the present petition, the petitioner would employ the 798 workers sought and would assign 266 of them to each of these three clients in Mobile, Alabama: (1) Offshore Inland, [REDACTED] (2) D.S.I., LLC, [REDACTED] and (3) Atlantic Marine, [REDACTED] hereinafter referred to as Atlantic Marine (Mobile, AL). For each of these client firms the record contains a letter of agreement with the petitioner, on the petitioner's letterhead. Each of the letters is substantially the same and indicates that the petitioner requires the 798 workers in order to meet its commitments to provide 133 First Class Flux Core Welders and 133 First Class Ship Fitters to each of the three clients. According to the letters of agreement,

each of the three clients needs its complement of 266 First Class Flux Core Welders and First Class Ship Fitters for the same period (October 1, 2007 through August 1, 2008) and for the same work (described in the letters of agreement as ship fitting and flux core welding for retrofitting, fabricating, and building new marine vessels).

Except for the difference in the name of the particular client, the letters of agreement submitted into the records of the present and the other two petitions are identical. These letters of agreement read as follows:

The following sets forth our agreement.

Eagle Industrial and Professional services agrees to provide 266 workers [-] 50% First Class Flux Core Welders and 50% First Class Ship Fitters [-] for the period of 1 October, 2007 through 1 August, 2008. The temporary manpower provided by Eagle Industrial and Professional services will assist [CLIENT NAMED] in completing time sensitive projects by employing Ship Fitters and Flux Core Welders to retrofit, fabricate and build new Marine vessels.

Eagle Industrial and Professional Services responsibilities include: Lodging, transportation, PPE, tools, workers compensation, general liability, all taxes, all visa documentation and drug screening.

Payment terms: Invoice is sent on Tuesday (weekly), payment is due on Friday (weekly).

Notably, the letters of agreement are the only documents of record that bear any indicia of endorsement by the petitioner's clients. The records of proceeding contain no other statements by the petitioner's clients about their needs for flux core welders and ship fitters; and the records do not include copies of relevant business records of the clients, certified summaries of such records, or relevant contracts between the clients and other parties for the type of services that is the subject of the petitions.

The director should issue an RFE that is consistent with the discussion below.

Relevancy of the payroll and tax records submitted by the petitioner

In the present petition and the two contemporaneous petitions referenced in this RFE the petitioner has submitted copies of payroll records and employment tax records of only one firm, Sea Services, Inc. The tax records bear a different address and Federal Employer Identification Number (EIN) than the petitioner's. The evidence of record does not indicate a connection between Sea Services, Inc. and either the petitioner or any of the clients mentioned in the record of proceeding.

As these records appear to be irrelevant to the present petition, the RFE should request that the petitioner:

1. Explain the relevance of these records in establishing the temporary need for 798 welders and ship fitters. If Sea Services, Inc. is a payroll agency for the petitioner, please submit proof of the relationship between Sea Services, Inc. and the petitioner.

2. If the Sea Services, Inc. records were mistakenly submitted, please submit copies of the correct payroll and tax records for the relevant period.

Need for further information regarding the client D.S.I., LLC.

Discussion: D.S.I., LLC. is one of the three clients that the present petition identifies as needing 133 welders and 133 ship fitters. The letter of agreement with D.S.I., LLC that the petitioner has submitted in to the record opens with a greeting to a [REDACTED]. The letter's acceptance-of-terms line apparently bears Mr. [REDACTED] signature, before the handwritten word "Manager." The letter is addressed to:

[REDACTED]

Likewise, item 5 of Part 5 of the Form I-129 and item 7 of the petitioner's application for temporary labor certification list the D.S.I., LLC address [REDACTED] as one of the three addresses where the aliens would perform their work.

The AAO recognizes that the letter of agreement with D.S.I., LLC asserts a need for 133 First Class Ship Fitters and 133 First Class Flux Core Welders in order to "retrofit, fabricate, and build new Marine vessels." However, the record contains no evidence to corroborate that D.S.I., LLC is actually engaged in the shipbuilding business. The undated, 11-page document that the petitioner's recruitment manager wrote in support of the petition contains no information about D.S.I., LLC. In fact, the letter does not even mention D.S.I., LLC as one of the firms requiring welders and ship fitters from the petitioner. Further, the June 12, 2007 letter from the petitioner's recruiting manager to the H-2B unit of the Alabama Department of Industrial Relations provides information about four other client firms, but does not mention D.S.I., LLC.

The AAO further notes that its search of Lexis/Nexis revealed the following business names as variants of a firm named D S I, LLC with business contacts at [REDACTED] DSI Sandblasting and Painting Inc; DSI Sandblasting and Painting, Incorporated; DSI Sandblasting Haunting Inc; and DSI Sandblasting Inc. None of these business names indicates involvement with the welding and ship-fitting work that is the subject of the present petition.

Evidence to be requested in the RFE: In light of the above, the RFE should request that the petitioner provide a statement signed by an appropriate management-level official of the petitioner's client D.S.I., LLC, on that firm's letterhead, that: (1) explains whatever relationships there are between that firm and the sandblasting and painting firm that shares its name and address; (2) states when D.S.I., LLC began to retrofit, fabricate, and build new marine vessels; and (3) for calendar years 2005 and 2006 identifies the name and addresses of clients for whom it performed welding or ship fitting services to retrofit, fabricate, or build new marine vessels.

Need for additional documentation from each of the petitioner's clients - Offshore Inland; D.S.I., LLC; and Atlantic Marine (Mobile, AL)

Discussion: The petitioner is an employment contractor that in the present petition asserts the need to provide H-2B employees to satisfy the welding and ship fitting needs of these three client firms: Offshore Inland; D.S.I., LLC; and the Mobile, Alabama division of Atlantic Marine. The specific needs underlying this petition belong to the three client firms for whom and at whose locations the petitioner's H-2B employees would perform their welding and ship fitting. Therefore, it is incumbent upon the petitioner to submit to CIS sufficient documentation from each of the three client firms to establish that that client firm's particular need for welders and ship fitters qualifies as an H-2B temporary need in accordance with the regulation at 8 C.F.R § 214.2(h)(6). This the petitioner has not done.

The present record of proceeding contains, in table form, three certified summaries of monthly payroll reports for welders, fitters, and cutters (one certified summary for each of the three clients). None of these documents have significant evidentiary value in establishing that each of the three client firms (Offshore Inland; D.S.I., LLC; and Atlantic Marine (Mobile, AL) requires the number of welders and ship fitters asserted by the petitioner. A deficiency common to all three summaries is that they are not certified by the client firms that the petitioner says are generating the need. Further, the record does not establish that the summaries encompass all of the welders and ship fitters used by the clients during the summarized periods. The payroll summaries that separately list each client's monthly payrolls for welders, cutters, and fitters are limited to only those workers furnished by the petitioner. The record does not establish that the petitioner was the sole source of welders, cutters, and fitters during the periods of the payroll records; and the clients nowhere attest that the figures in the summaries accurately capture all welders, cutters, and fitters employed by the petitioner during the period in question. The payroll summaries in the record are an inadequate substitute for documentation directly from each of the three clients that attests to all welders, cutters, and fitters that the client used from all sources, including its own staff and other suppliers of workers besides the petitioner. Such evidence should demonstrate that each client's individual needs are seasonal, peakload, or a one-time occurrence under 8 C.F.R § 214.2(h)(6).

As noted in the background section earlier in this RFE, the letters of agreement are the only documents of record that bear any indication of the clients' input - and the indication is no more than a signature. The record contains no attestations from the petitioner's clients about how they calculated the need for 133 welders and 133 ship fitters; and the petitioner's submissions contain no client documents (such as relevant business records of the clients, certified summaries of such records, or relevant contracts between the clients and other parties for the services that are the subject of this petition) that substantiate the need for the numbers of welders and ship fitters specified in the letters of agreement and in the present petition.

It is remarkable that in the same period five clients would need exactly the same number of First Class Flux Core Welders and exactly the same number of First Class Ship Fitters. The AAO finds it doubtful that each of five clients would actually need 133 workers in each of two job categories for the same employment period.

Other aspects of the present record of proceeding make the asserted need of 266 workers per client questionable.

These features noted earlier in this decision bear negatively on the credibility of the asserted need: (1) the petitioner's unexplained submission of payroll and tax records from Sea Services, Inc., a business entity with

a different business name, Federal EIN, and address; and (2) the lack of any information about D.S.I., LLC, one of the clients cited in the petition as requiring 266 workers. Also, the petitioner submitted documents with conflicting information about who engaged the petitioner to provide the 798 workers. According to the Form I-129, Form ETA 750, and letters of agreement submitted into this record of proceeding, the petitioner was engaged by Offshore Inland; D.S.I., LLC; and the Alabama division of Atlantic Marine. However, the 11-page undated "Request for Adjudication of I-129 Petition" states (at page 4) that the petitioner "has been engaged by Conrad Industries, a ship builder in Alabama and Atlantic Marine for 798 welder/fitters." Another variation on the firms for whom the petitioner requires this petition's workers is the June 12, 2007 letter from the petitioner's recruiting manager to the H-2B unit of the Alabama Department of Industrial Relations which states (at page 2) that the 798 workers specified in the labor condition application are needed to serve Atlantic Marine, Conrad Industries, and Offshore Inland Marine & Oilfield Services. Within the four corners of this petition, then, the petitioner variously asserts that the 798 workers are needed at (1) Offshore Inland; D.S.I., LLC; and Alabama division of Atlantic Marine; (2) Conrad Industries, Offshore Inland, and Atlantic Marine; and (3) Conrad Industries and Atlantic Marine. Also, at page 5 of the "Request for Adjudication" is the apparently inaccurate statement that the petitioner "has a contract with Conrad Industries and Atlantic Marine in Louisiana for 798 workers beginning October 1, 2007": there is no evidence of record of any agreement with a Louisiana office of Atlantic Marine.

The merits of each client firm's claimed need for 266 First Class First Class Flux Core Welders and First Class Ship Fitters are also rendered questionable by the unexplained disparity between that figure of 266 and the numbers of workers listed in the petition's payroll tables for each client firm. The tables' highest numbers for temporary workers for any month between January 1, 2006 and May 2007 are as follows: (1) Offshore Inland: 42; D.S.I., LLC: 3; Atlantic Marine (Mobile, AL): 55. Further, the number of workers reflected on these tables is significantly lower than the 798 welders and ship fitters sought in the present petition.

Evidence to be requested in the RFE: In light of the above observations about evidentiary deficiencies, inconsistencies, and the unlikely coincidence of all five of the petitioner's clients requiring exactly the same number of workers for the same period, the AAO requests that the petitioner provide the following documentation from each of the three client firms for whom a letter of agreement appears in the record of this proceeding (that is: (1) Offshore Inland, [REDACTED] (2) D.S.I., LLC, [REDACTED] and (3) Atlantic Marine, [REDACTED]

1. A letter, on official stationery with the firm's letterhead, in which an appropriate management official with pertinent knowledge: (a) identifies his or her official position at the firm; (b) specifies the basis of his or her knowledge about the number of welders and ship fitters needed by the firm to perform its contractual commitments; (c) corroborates that the letter of agreement submitted into this record bears the signature of a person authorized by the firm to sign such documents on its behalf; (d) corroborates that the firm contracted to pay Eagle Industrial and Professional Staffing Services for 133 First Class Flux Core Welders and 133 First Class Ship Fitters for the period October 1, 2007 through August 1, 2008 for retrofitting, fabricating, and building new marine vessels; and (e) explains in detail how the firm determined the specific numbers of workers cited in the letter.

2. A table showing, for each month of the period January 2006 to May 2007, the number of First Class Flux Core Welders who worked on retrofitting, fabricating, or building new marine vessels for the firm. For each month, the table should divide the total number of First Class Flux Core Welders into these subcategories, as appropriate: permanent workers; temporary workers from Eagle Industrial & Professional Services; and temporary workers from any other source. To establish its authenticity, the table should bear a certification, signed by the appropriate official of the firm, that the table accurately represents the information contained in the relevant business records of the firm.
3. A table showing, for each month of the period January 2006 to May 2007, the number of First Class Ship Fitters who worked on retrofitting, fabricating, or building new marine vessels for the firm. For each month, the table should divide the total number of First Class Ship Fitters into these subcategories, as appropriate: permanent workers; temporary workers from Eagle Industrial & Professional Services; and temporary workers from any other source. To establish its authenticity, the table should bear a certification, signed by the appropriate official of the firm, that the table accurately represents the information contained in the relevant business records of the firm.

The director may also request any additional information or evidence that he deems necessary to adjudicate the matter at hand.

As discussed above, the director's decision will be withdrawn, and the matter will be remanded for the director to: issue an RFE consistent with this decision's discussion of the evidence to be requested in the RFE; enter a new decision after his consideration of whatever matters the petitioner submits in response to the RFE; and certify the new decision to the AAO for review.

Regulations related to the RFE process include the following provisions. The regulation at 8 C.F.R. § 103.2(b)(8), allows the petitioner 12 weeks from the date of the RFE notice to respond to CIS and additional time may not be granted. All evidence submitted in response to an RFE must be submitted at one time. The submission of only some of the requested evidence will be considered a request for a decision based on the record. 8 C.F.R. § 103.2(b)(11). If the petitioner's response to the RFE does not establish that the petition was approvable at the time it was filed, then the petition cannot be approved. 8 C.F.R. § 103.2(b)(12). Failure to respond to an RFE notice will be considered as an abandonment of the petition. 8 C.F.R. § 103.2(b)(13).

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of September 4, 2007 approving the petition is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision. Upon completion, the director shall certify the decision to the AAO for review.