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FILE: EAC 07 255 50515 Office: VERMONT SERVICE CENTER Date: OCT 17 2007

IN RE: Petitioner:
Beneficiaries:

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: The nonimmigrant visa petition was approved by the 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 The decision of the director will be withdrawn and the matter remanded to him for further action and consideration.

The petitioner describes itself as the leading provider of shorebased support services in the Gulf of Mexico, and its Form I-129 (Petition for Nonimmigrant Worker) indicates that the petitioner has a gross annual income of \$30,025,360 and a net annual income of \$172,849. The petitioner seeks to newly employ 75 riggers from October 1, 2007 to August 1, 2008 as H-2B temporary nonagricultural workers on the basis of peakload and one-time occurrence needs as defined at 8 C.F.R. § 214.2 (h)(6)(ii)(B).

The director determined that sufficient countervailing evidence has been submitted to show that qualified persons in the United States are not available, that the employment policies of the Department of Labor have been observed, and that the need for the services to be performed is temporary. The director's decision to approve the petition has now been certified to the AAO for review.

As discussed below, the AAO finds that, as presently constituted, the record of proceeding fails to establish (1) that there is a need for 75 riggers as asserted, and (2) that the asserted need for 75 riggers 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). Since evidentiary insufficiency was not mentioned in the director's decision, the AAO will remand this matter to the director with instruction that he issue a request for evidence (RFE) to afford the petitioner an opportunity to address the evidentiary deficiencies identified below.

The regulation at 8 C.F.R. § 214.2(h)(6) (*Petition for alien to perform temporary nonagricultural services or labor (H-2B)*) provides, in part:

(i) *General.* An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers.

(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.* As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload 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.

At the outset, the AAO notes that the record of proceedings does not include any of the documents that counsel's August 14, 2007 letter to the Vermont Service Center's Premium Processing Unit identified in the seven bulleted sections under the heading "Evidence of Recruitment." The RFE should request that the petitioner now submit those documents into the record of proceedings so that they may be considered in the adjudication of the petition.

In addition to all the other evidence of record, the AAO has fully considered the petitioner's letter of August 9, 2007, including its sections on the petitioner's Company Profile; the Oil and Gas Industry Peak Load; Temporary and Substantial Local Infrastructure Projects; TSA TWIC Card Temporary Phase In/One Time Occurrence; and the Summary, which reads in part as follows:

Granting [the petitioner's] temporary labor certification for 75 riggers is essential, critical to its survival, and vital to its meeting its contractual commitments during this unique, temporary period of peakload in customer activity and demand coupled with one[-]time infrastructure and security related problems.

The evidence of record does not include evidence that demonstrates that (1) that the petitioner has a specific need for the services of 75 temporary riggers during the period of specified need, and (2) that the asserted need qualifies as an H-2B temporary need. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm.

1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner's Form I-129 specifies the need for H-2B workers as peakload and unpredictable. The petitioner's August 9, 2007 letter asserts that there is a "unique, temporary period of peakload in customer activity" and that approval of 75 riggers is essential to its "meeting its contractual commitments." However, the record of proceedings does not document specific contractual commitments that would require the petitioner to supplement its permanent riggers with 75 H-2B temporary workers. The copies of contracts in the record of proceedings contain few instances of contractual obligations or commitments to provide a particular number of riggers. The riggers required by the contractual commitments of record number approximately 3. The petitioner's relationship to the contracting parties, and its role in providing workers to the contracting parties, is not established.¹ Further, there is no documentary evidence that these workers cannot be provided from the petitioner's regular staff of riggers. In this regard, the AAO notes that the petitioner has not submitted certified tables of monthly payroll and staffing reports or any business records that establish the numbers of temporary and permanent riggers that the petitioner employed by month in 2005, 2006, and earlier 2007.

The Oil and Gas Industry Peak Load section of the petitioner's August 9, 2007 letter includes this assertion:

With 10 new major offshore floating production facilities and 20 new, fifth generation floating drilling rigs including drill ships and semisubmersibles all sanctioned and set to enter service in the US Gulf of Mexico starting October 2007 and continuing over the next 12-15 months, [the petitioner] is entering a peak load scenario and the highest short term level of activity in its history or that of the U.S. deepwater Gulf. These new rigs will produce up to 250,000 barrels of oil and gas daily and are moored in up to 10,000 feet of water with massive infrastructure, mandating very substantial shorebased support across the [petitioner's] complete service spectrum. . . .

As presently constituted the record of proceeding provides no documentary evidence of the specific impact that the new rigs and facilities will have upon the number of riggers that the petitioner must provide its customers from October 1, 2007 to August 1, 2008.

The record of proceeding does not contain documents that establish any of the following: the extent of the petitioner's asserted contract backlog; the number of riggers that new offshore production facilities, drill ships, and semisubmersibles will generate for the petitioner during the period October 1, 2007 to August 1, 2008; or an H-2B temporary need for riggers during the requested period on the basis of contract commitments,

¹ The AAO notes that the opening clause and Appendix E of the Hess Corporation's Master Service Contract with C-Port II, LLC identifies the petitioner as a party to the contract, as one of eight (8) related companies. However, as numbered clause 3 states, the contract creates no obligations. The AAO also notes that Exhibit D of Allseas USA Incorporated's Master Service Agreement with Lot 14, L.L.C. expressly incorporates the petitioner and seven (7) other Lot 14 affiliates as Lessor with Lot 14. However, the contract does not specify the petitioner or any other affiliate as obligated to provide a particular service.

additional business, or any other factors. The evidence of record fails to corroborate that the petitioner is experiencing a peakload need for riggers for its clients. According to the regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), to meet the H-2B peakload standard:

The petitioner must establish [1] that it regularly employs permanent workers to perform the services or labor at the place of employment and [2] 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 [3] that the temporary additions to staff will not become a part of the petitioner's regular operation.

In its August 9, 2007 letter, under the headings "Temporary and Substantial Local Infrastructure Projects" and "TSA TWC Card Temporary Phase In/One Time Occurrence" the petitioner asserts, without supporting documentation, that local infrastructure projects and the implementation of the Transport Security Administration's (TSA) Transport Worker Identification Card (TWIC) Program has so reduced the available workforce of riggers as to create a one-time occurrence under 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

Neither the August 9, 2007 letter nor any documentation in the record of proceedings provides evidence of the petitioner's particular experience with the TWIC Program, or evidence that the TWIC program has so affected the petitioner's ability to employ riggers for its own work as to constitute a one-time occurrence under 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

The record of proceedings does not contain documentation that establishes that local infrastructure projects and implementation of the TWIC program have created the asserted reduction in available workers. Therefore, the record lacks an evidentiary basis upon which the AAO may find a one-time occurrence or any other H-2B temporary need as defined at 8 C.F.R. § 214.2(h)(6)(ii)(B).

The director should issue an RFE that provides the petitioner an opportunity to provide documentary evidence that substantiates the petitioner's claim that it has an H-2B peakload need for 75 riggers for the period October 1, 2007 to August 1, 2008. The RFE should request that the petitioner provide the following documentation:

1. There are no contracts of record establishing any request to Cajun Industries to provide riggers. The RFE should request work orders, statements of work, contracts, service agreements, work schedules, or other documents prepared in the usual course of business that substantiate the petitioner's assertion that its own contractual commitments require it to hire 75 temporary riggers to supplement its permanent staff of riggers during the period October 1, 2007 to August 1, 2008.
2. All of the documents that counsel's August 14, 2007 letter to the Vermont Service Center's Premium Processing Unit identified in its seven bulleted sections under the heading "Evidence of Recruitment." Although cited as enclosures, these documents were not included with counsel's letter. The petitioner should include tables of monthly payroll and staffing reports, certified as true and accurate, that establish the numbers of temporary riggers and permanent riggers that the petitioner employed by month in 2005, 2006, and earlier 2007.

3. A statement from an appropriate management official of the petitioner that explains why the petitioner needs 75 temporary riggers for the period October 1, 2007 to August 1, 2008. The statement should: (a) address the requirement that the temporary additions to staff will not become a part of the petitioner's regular operation; (b) state whether the temporary additions to staff would replace, rather than supplement, any of the petitioner's permanent electrician employees; (c) substantiate that the petitioner needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand in effect from October 1, 2007 to August 1, 2008; and (d) demonstrate the increases in contractual commitments that account for any increases in the numbers of temporary riggers required in the period of this petition (October 1, 2007 to August 1, 2008) as compared to the years 2005 and 2006 as reflected in the certified payroll and staffing-level documents to be submitted under paragraph 2, above. The official making the statement should sign the statement beneath a typed attestation that the statement is true and accurate.
4. Documentation that establishes that the short-term demand that requires the hiring of 75 H-2B riggers from October 1, 2007 to August 1, 2008 is a peakload need of the petitioner within the meaning of 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).
5. Documentation that establishes that, as asserted in the petitioner's letter of August 9, 2007, local infrastructure projects and the implementation of the TWIC program has so reduced the available workforce of riggers as to create a one-time occurrence under 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

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. After consideration of whatever matters the petitioner submits in response to the RFE, the director will enter a new decision and certify it 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 17, 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.