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U.S. Citizenship  
and Immigration  
Services



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FILE: EAC 07 227 53476 Office: VERMONT SERVICE CENTER Date: JAN 22 2008

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** On August 2, 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 266 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 Director, Vermont Service Center issued a decision recommending approval of the petition, that he certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii). On review, the AAO withdrew the director's decision and remanded the petition to the director with instructions to issue a request for additional evidence (RFE), render a new decision, and certify the new decision for AAO review. The matter is now before the AAO pursuant to the certification of the director's new decision, which recommends approval of the petition. As discussed below, the decision of the director will be withdrawn, and the petition will be denied.

The AAO remanded the petition upon finding that the record of proceeding failed to establish (1) that there is a need for 133 welders and 133 ship fitters as asserted in the petition, 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). On remand, the petitioner provided evidence in response to the RFE and the director again recommended approval of the petition and certified his decision to the AAO.

### Background

The present petition is for 133 welders and 133 ship fitters that the petitioner would assign to work at Conrad Industries, Morgan City, Louisiana. At this time the AAO is also reviewing the certifications of 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 EAC0723352546. Petition EAC0724353120 seeks 133 welders and 133 ship fitters for the petitioner to employ at the Jacksonville, Florida division of Atlantic Marine. The petitioner filed EAC0723352546 for 798 welders and ship fitters that it would divide into 133 welders and 133 ship fitters for each of these three clients in Mobile, Alabama: (1) Offshore Inland; (2) D.S.I., LLC; and (3) the Mobile, Alabama division of Atlantic Marine. Thus, the present petition and the other two that are being reviewed at this time all assert that a particular client needs exactly the same complement of welders and ship fitters - that is, 266 welders and ship fitters separated into 133 First Class Flux Core Welders and 133 First Class Ship Fitters.

The present record of proceeding contains a letter of agreement, on the petitioner's letterhead, between the petitioner and the petitioner's client firm Conrad Industries. This letter is substantially the same as each of the other four letters of agreement that appear in the other two records of proceeding. According to each of the five letters of agreement that appear in the three records of proceeding, the particular client firm identified in each letter depends upon the petitioner to provide 266 workers, of whom 133 are to be First Class Flux Core Welders and 133 are to be First Class Ship Fitters. According to the letters of agreement, each of the five 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).

The record of proceeding of the present petition contains an additional letter of agreement, on the petitioner's letterhead and dated after the filing of the petition, that indicates \$27 as the "composite rate" that would be paid by Conrad Industries.

In its prior decision the AAO noted that the letters of agreement were the only documents of record that bore any indicia of endorsement by the petitioner's clients; that the records of proceedings contained no other statements by the petitioner's clients about their needs for flux core welders and ship fitters; and that the records did 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 AAO's prior decision includes the following section that informed the petitioner about the evidentiary deficiencies that would be the subject of the RFE to be issued by the director.<sup>1</sup>

Discussion: The petitioner is an employment contractor. As such, it asserts, in the present petition, that it is petitioning for 266 H-2B welders and ship fitters in order to satisfy the welding and ship fitting needs of one of its client firms, Conrad Industries of Morgan City, Louisiana. Thus, the specific needs underlying this petition belong to Conrad Industries, for whom and at whose worksite 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

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<sup>1</sup> The prior AAO decision includes two additional sections of evidentiary discussion and RFE guidance, but they are not material to the AAO's determination to withdraw the director's decision and deny the petition.

documentation from Conrad Industries to establish (1) that this client firm needs the here petitioned services of 133 welders and of 133 ship fitters for retrofitting, fabricating, and building new marine vessels during the period October 1, 2007 through August 1, 2008; and (2) that its needs qualify as H-2B temporary needs in accordance with the regulation at 8 C.F.R § 214.2(h)(6). This the petitioner has not done.

The present record contains, in table form, certified summaries of monthly payroll reports for Conrad Industries for welders, fitters, and cutters for the periods January 1, 2006 to December 31, 2006 and January 1, 2007 to May 31, 2007. Either alone or in combination with the other documentation of record, these tables do not establish (1) that Conrad Industries requires 133 welders and 133 ship fitters as asserted by the petitioner, and (2) that each of the asserted needs for 133 workers is a one-time occurrence, seasonal need, peakload need, or intermittent need.

Those tables of monthly payroll reports are not certified by Conrad Industries, the client firm that the petitioner says is generating the needs for the welders and ship fitters. Further, the record does not establish that the summaries in the tables encompass all of the welders and ship fitters used by the client Conrad Industries during the summarized periods. The payroll summary tables list only monthly payrolls for welders, cutters, and fitters that the petitioner furnished. The record does not establish that the petitioner was the client's sole source of welders, cutters, and fitters during the periods of the payroll records; and the client nowhere attests that the figures in the summaries accurately capture all welders, cutters and fitters employed by Conrad Industries during the periods summarized. The payroll summaries in the record are an inadequate substitute for documentation directly from Conrad Industries that attests to the total number of welders, cutters, and fitters that this client used for each month in the reported period (January 2006 through May 2007) from all sources, including its own staff and other suppliers of workers besides the petitioner. Such evidence should demonstrate that the needs of Conrad Industries are either one-time occurrence, seasonal, or peakload as these terms are defined at 8 C.F.R. § 214.2 (h)(6)(ii)(B).

The multi-page document "Sea Services, Inc[.] Payroll Summary June 2006 through June 2007" appears to be irrelevant. As mentioned earlier, there is no apparent connection between Sea Services and the petitioner. Further, there is no apparent connection between Sea Services, Inc. and Conrad Industries, and there is no indication in the record that this Sea Services, Inc. document relates to the use of welders and ship fitters by Conrad Industries. The AAO also notes that this Payroll Summary document does not specify the types of workers to which it relates. Likewise, it is not evident that the submitted copies of quarterly tax returns from Sea Services, Inc. have any bearing on the present petition. The unexplained submission of payroll and tax records from Sea Services, Inc. is alone cause for questioning the credibility of the petition.

As noted in the background section earlier in this decision, the letters of agreement are the only documents of record that bear any indication of the client's input - and the indication is no more than a signature. The record contains no attestations from Conrad Industries about

how it 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 client, certified summaries of such records, or relevant contracts between the client 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.

The merits of the claimed need for 266 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 charts for Conrad Industries. The charts' highest number for temporary workers for any month between January 1, 2006 and May 2007 is 22.

In summary, the documentary evidence in the present record of proceeding does not establish (1) that Conrad Industries requires 133 welders and 133 ship fitters as asserted by the petitioner, and (2) that each of the two 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).

The AAO's prior decision provided the following guidance to the director on the content that should be included in the RFE to address the above issues:

Evidence to be requested in the RFE: In light of the above observations about evidentiary deficiencies, apparent documentary inconsistencies, and the unlikely coincidence of Conrad Industries requiring exactly the same number of First Class Flux Core Welders and of First Class Ship Fitters as four other clients of the petitioner, for the same period, the director's RFE should request that the petitioner provide the following documentation from Conrad Industries:

1. A letter, on official stationery with the firm's letterhead, in which an appropriate management official of Conrad Industries with pertinent knowledge: (a) identifies his or her official position at Conrad Industries; (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 Conrad Industries to sign such documents on its behalf; (d) corroborates that Conrad Industries 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 Conrad Industries 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 Conrad Industries. 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 Conrad Industries official, that the table accurately represents the information contained in the relevant business records of Conrad Industries.
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 Conrad Industries. 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 Conrad Industries official, that the table accurately represents the information contained in the relevant business records of Conrad Industries.

As evident in the record's copy, the content of the RFE issued by the director on remand comports with the guidance in the AAO's prior decision.

#### The Petitioner's Response to the Remand RFE

The petitioner's response to the director's RFE on remand includes an 11-page letter of response from the petitioner's newly appointed counsel, dated November 8, 2007, and copies of the following documents, which are referenced in the letter as exhibits: (1) a copy of a letter from Sea Services, Inc., signed October 16, 2007; (2) an October 17, 2007 "Letter of Intent," from the Director of Human Resources of Conrad Industries to the petitioner; (3)(a) page 4 of the director's prior decision in this case, highlighted in part; and (3)(b) the complete prior decision of the director; (4)(a) a two-page document from the Director of Human Resources of Atlantic Marine Florida, LLC, dated October 19, 2007, self-described as a letter, although it bears no addressee; and (4)(b) a table summarizing Atlantic Marine Florida's employment of welders, fitters, and cutters for the period January 2006 through May 2007 (certified as accurate by the firm's Director of Human Resources); (5)(a) two (2) pages of a letter from the Production Superintendent of Atlantic Marine, Inc. (Alabama); and (5)(b) a table summarizing the monthly employment by Atlantic Marine (Alabama) of welders, fitters, and cutters for the period January 2006 through May 2007 (this table has not been certified); and (6) an unsigned letter, on the petitioner's stationary, bearing the signature block "Todd W. Linam, Eagle Industrial Professional Services; and (7) articles concerning the shortage of welders and other skilled workers.

#### Analysis

For the reasons discussed below, the AAO finds that petitioner has not established that it has an H-2B temporary need for the welders and ship fitters specified in the present petition. Accordingly, the director's decision will be withdrawn, and the petition will be denied.

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.

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Reg. Comm., Nov. 1982), states the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. *Matter of Artee* also holds that it is the nature of the need, not the nature of the duties, that is controlling.

The petitioner is an employment contractor. It has asserted that it filed the petition in order to secure H-2B employees to satisfy the short-term welding needs of a particular client firm, Conrad Industries. (*See*, for example: section 5 of Part 5 of the Form I-129 and section 7 of Part A of the Form ETA 750 related to the petition.) Thus, the specific need underlying this petition belongs to Conrad Industries, for whom and at whose work locations the petitioner's H-2B employees would perform their welding. Because the petition is predicated upon Conrad Industries' welding requirements, it is incumbent upon the petitioner to submit to CIS sufficient documentation from Conrad Industries to establish that this client firm's particular need for temporary welders 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, although that type of information was a focus of the AAO's prior decision and the remand-RFE.

The body of the October 17, 2007 letter of intent from Conrad Industries that the petitioner submitted in response to the remand RFE reads as follows:

This letter shall serve as conformation of Conrad Industries' intention to require the services of Eagle Industrial and Professional Services for the purposes of repair, maintenance, and new construction of vessels required at our three facilities. Thus, we will have the need for 100 welders during the period of 10/1/2007 to 08/1/2008.

If you have any questions or need any additional information, please feel free to contact me at [the phone number of the Director of Human Resources, who signed the letter.]

The letter does not provide any of the following items of material information sought by the remand RFE: (1) the basis of the signer's knowledge about the number of welders and ship fitters needed by Conrad Industries to perform its contractual commitments; (2) "corroborat[ion] that Conrad Industries contracted to pay [the petitioner] 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 (3) explanation "in detail" of how Conrad Industries determined the specific number of workers specified in its earlier letter of agreement with the petitioner for 133 welders and 133 ship fitters for the period in question.

The Conrad Industries letter submitted in reply to the remand RFE also materially conflicts with the earlier letter of agreement, the petition, and the Form ETA 750 related to the petition: the Conrad Industries October 17, 2007 letter asserts a need for only 100 welders; the letter of agreement accepted by the same person at Conrad Industries on June 15, 2007, the petition, and the Form ETA 750 all attest to the need for 133 welders and 133 ship fitters.

The petitioner's response to the RFE fails to provide the documentation from Conrad Industries that the remand RFE requested regarding that firm's employment of welders and ship fitters from January 2006 to May 2007. Counsel's statement that Conrad Industries refused to provide this staffing information does not remedy the absence of this information which the AAO deems material to evaluating the factual basis for the petitioner's assertion that it needs 266 unnamed workers to meet the needs of Conrad Industries.

In his letter of response to the remand RFE, it appears that counsel is asserting a basis of need that is independent from the petitioner's reliance on its commitments to Conrad Industries. Counsel states, in part:

In the present case the petitioner has need for all the requested beneficiaries. The petitioner based the requested number on its current staffing levels and needs during peakload as well as its projected need over the ten month period beginning October 1, 2007. . .

[Counsel's November 8, 2007 letter, at page 2.]

The petitioner submitted its request for the particular number of workers based on the staffing levels it employed last year during its peak load season as well as the numbers it projected it would need during the peakload season.

[Counsel's November 8, 2007 letter, at page 3.]

The AAO is not persuaded by this assertion. It conflicts with the petitioner's assertions that its agreement with Conrad Industries gives rise to the petition, in (1) the Form I-129 and the related Form ETA 750, that specify the Conrad Industries address as the sole location where the beneficiaries would work; (2) the submission of the June 15, 2007 letter of agreement as proof of the need for 133 H-2B welders and 133 H-2B ship fitters; (3) the statement at page 3 of the petitioner's undated brief submitted in support of the initial petition, entitled "Request for Adjudication of I-129 Petition," that the petitioner has been engaged by Conrad Industries to provide the welders and ship fitters that are the subject of the petition.

Upon consideration of the entire record of proceedings, including all the documents submitted in response to the remand RFE, the AAO finds that the petitioner has failed to overcome material deficiencies in the petition that were identified in its prior decision and in the remand RFE.

The record of proceedings does not substantiate that Conrad Industries was contractually obligated to employ 266 temporary welders and ship fitters from the petitioner and that the petitioner was contractually obligated to provide that number of workers. Not only has Conrad Industries declined to provide documentation to support the numbers cited in the letter of agreement, but also the letter from Conrad Industries submitted in the RFE response cites a need for 166 fewer workers than in the letter of agreement. These facts suggests that, at the time the letter of agreement was signed, Conrad Industries either had substantially less need for temporary welders and fitters from the petitioner than it stated, or that its need is also being supplied by other temporary labor contractors. Each scenario indicates that Conrad Industries did not obligate itself to use, and that the petitioner did not obligate itself to supply, a firm number of temporary welders and fitters. Further, the above discussed discrepancy in the numbers of required temporary workers and Conrad Industries' refusal to provide supportive documentation requested in the remand RFE makes it impossible for the AAO to determine the extent of its need for temporary workers from the petitioner. 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). Thus, the record fails to establish the extent to which any workers brought into the United States under this petition would in fact be employed for the purpose upon which the petition is based.

Further, the material conflict between the June 15, 2007 petitioner/Conrad Industries letter of agreement for 266 welders and ship fitters and the Conrad Industries October 17, 2007 "Letter of Intent" acknowledging a need for only 100 welders undermines the credibility not only of both letters of agreement, but also the reliability of other documents in the record that are not supported by independent evidence. Doubt cast on any aspect of the petitioner's proof may justify reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It was incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and to provide competent objective evidence pointing to where the truth, in fact, lies. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Finally, the AAO finds unpersuasive counsel's assertion to the effect that, apart from the evidence of the petitioner's arrangements with Conrad Industries, there is sufficient additional evidence about the petitioner's own operations and needs for temporary welders and temporary ship fitters to establish that it has a peakload need for these workers.

As discussed above, the petition presents Conrad Industries as the source of the jobs identified in the petition. As such, the petition cannot succeed without proof of the existence of those Conrad Industries jobs. Further, the AAO finds that there is insufficient evidence in the record of proceedings about the petitioner to establish a factual basis for the peakload need that it asserts. Counsel asserts, without corroborating documentation and explanation, that the need for 266 welders and ship fitters to work at Conrad Industries is based upon the petitioner's "current staffing levels and needs during peakload as well as its projected need over the ten month period beginning October 1, 2007." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*. 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*; *Matter of Laureano*; *Matter of Ramirez-Sanchez*.

Further, the table on the petitioner's employment of welders, fitters, and cutters from January 1, 2006 to May 31, 2007 indicates that the petitioner does not have a peakload need. The table indicates that the petitioner employs temporary welders and fitters throughout the year. Thus, the petitioner fails to satisfy the second element of the H-2B peakload qualifying criterion at 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), namely, that 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." The table indicates that the petitioner supplements its permanent staff of welders and ship fitters throughout the year.

Counsel is correct in asserting that it is the nature of the petitioner's need that determines whether or not a petition establishes an H-2B temporary need.

In support of this proposition counsel cites the following section at Part III of Attachment A of DOL Employment and Training Administration's Training and Employment Guidance Letter (TEGL) 21-06, Procedures for H-2B Temporary labor Certification in Non-Agricultural Occupations (April 4, 2007):<sup>2</sup>

C. Job contractors typically supply labor to one or more employers as part of signed work contracts or labor services agreements. The temporary or permanent nature of the work to be performed in such applications will be determined by examining the job contractor's need for such workers, rather than the needs of its employer customers.

Although not discussed by the petitioner, CIS is bound to apply the above approach by the precedent decision *Matter of Artee*, mentioned earlier in this decision as part of its analytical framework. *Matter of Artee* compels a finding that the record of proceedings establishes that the petitioner's need is permanent rather than temporary.

The present proceeding's salient facts are similar to those in *Matter of Artee*, where a "temporary help service" was seeking H-2B classification for alien machinists that it would employ but assign to perform their work at the petitioner's client firms. As in the present proceedings, the *Matter of Artee* petitioner was attempting to use the H-2B program to obtain temporary workers that it would assign to clients to help relieve a labor shortage expected to be of long duration.

The text of *Matter of Artee* includes the following discussion:

The business of a temporary help service is to meet the temporary needs of its clients. To do this they must have a permanent cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand. By the very nature of this arrangement, it is obvious that a temporary help service will maintain on its payroll, more or less continuously, the types of skilled employee most in demand. This does not mean that a temporary help service can never offer employment of a temporary nature. If there is no demand for a particular type of skill, the temporary help service does not have a continuing and permanent need. Thus a temporary help service may be able to demonstrate that in addition to its regularly employed workers and permanent staff needs it also hires workers for temporary positions. For a temporary help service company, temporary positions would include positions requiring skill for which the company has a non-recurring demand or infrequent demand.

There is currently a wide-spread shortage of skilled machinists in the United States. Because of this shortage, the petitioner, as a prudent business measure, has ensured that it can supply machinists to its customers. Its need to supply machinists to its customers is ongoing. Therefore, as long as this universal shortage of machinists exists, the nature of the need for

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<sup>2</sup> This paragraph remains intact in Change 1 to (TEGL) 21-06, which was issued on June 25, 2007.

the position with the petitioner is such that the duties are not temporary and will persist as long as the shortage.

In the absence of evidence that the petitioner has a non-recurring or infrequent demand for skilled machinists, the following order is entered:

**ORDER:** The petition is denied.

[18 I & N Dec., at 367, 368 ]

The principles of *Matter of Artee* are incorporated clearly in the H-2B temporary-need definitions at 8 C.F.R. § 214.2(h)(6)(ii), where the need for workers is evaluated solely in terms of the petitioner.

The AAO finds that the following evidence of record establishes that the petitioner is asserting a need for welders and ship fitters that is permanent within the meaning of the relevant H-2B regulations: (1) the petitioner's year-round employment of temporary welder and ship fitters, as reflected in its table on its welders, cutters, and fitters from January 1, 2006 through May 31, 2007; (2) the information in the record of proceedings about the continuing shortage of welders and other skilled workers; (3) and the record's information about the continuing need of the petitioner's clients for such workers.

If the petitioner is experiencing a severe labor shortage, it may wish to use immigrant visa programs to alleviate the problem.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The director's decision of December 7, 2007 is withdrawn. The petition is denied.