

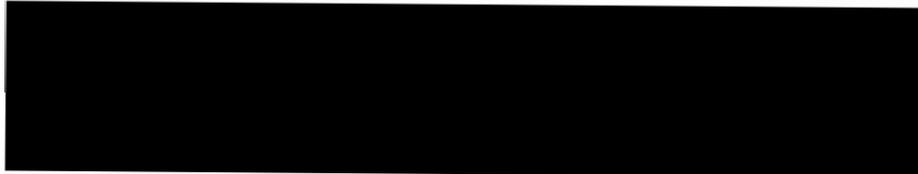
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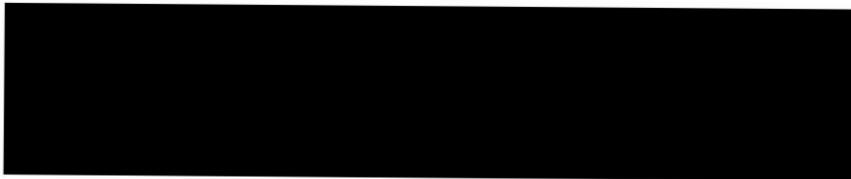
D4

FILE: EAC 07 233 52546 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: The nonimmigrant visa petition in this case was filed to secure the classification of 798 aliens as H-2B temporary nonagricultural workers, evenly divided between welders and ship fitters. The petition was filed after the Department of Labor (DOL) decided to not issue a temporary labor certification, having determined that 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 Citizenship and Immigration Services (CIS) regulations on the H-2B program. The Director, Vermont Service Center issued a decision recommending approval of the petition, and he certified it 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 evidence (RFE), render a new decision, and certify the new decision for AAO review. The matter is now before the AAO pursuant to the director's certification of his 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 As discussed below, the decision of the director will be withdrawn, and the petition will be denied.

As filed and later supplemented in response to an RFE issued prior to the director's first decision, the petition attested that the petitioner would employ the 798 H-2B workers by assigning 133 of the welders and 133 of the ship fitters to each of three different firms in Mobile, Alabama, where they would work from October 1, 2007 through August 1, 2008. The three Mobile, Alabama firms specified in the petition and their Mobile, Alabama addresses are: (1) Offshore Inland (OIS), 2735 Middle Road; (2) D.S.I., LLC, 2560 Middle Road; and (3) Atlantic Marine (Alabama Division), 660 Dunlap Road).

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, the record of proceedings does not establish the asserted H-2B temporary need for 798 of these workers to fill the requirements of the three clients named in the petition.

The AAO's previous decision and the resulting RFE noted that, contemporaneously with the present petition, the petitioner filed two other H-2B petitions that each asserted a need for exactly the same number 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.

Background

For each of the three client firms specified in the present petition (OIS; D.S.I., LLC; and Atlantic Marine) and for the single firm specified in each of the two contemporaneously filed petitions, the records of proceedings contains a letter of agreement with the petitioner, on the petitioner's letterhead. Each of the five letters is substantially the same. Each asserts that the specified client needs 133 First Class Flux Core Welders and 133 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). The AAO's previous decision notes, in part:

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.

In its previous decision the AAO also noted: "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).

At the time of its previous decision the letters of agreement were the only documents of record bearing any indicia of endorsement by the petitioner's clients. The AAO decision noted this and the facts that the record of proceedings contained no other statements by the petitioner's clients about their needs for welders and ship fitters, and that the record did not include copies of relevant business records of the clients, certified summaries of such records, or relevant contracts between the petitioner's clients and other parties that would generate each client's need for 133 welders and 133 ship fitters for the period October 1, 2007 through August 1, 2008, as specified in the letters of agreement and the petition.

As evident in the excerpt below, the AAO's previous decision alerted the petitioner to the need to provide substantive documentation establishing that each of the three specified firms named in the petition required the petitioner to provide 133 welders and 133 ship fitters for the period October 1, 2007 through August 1, 2008:

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 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 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 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.

The previous AAO decision provided the following guidance regarding the RFE that the director was to issue pursuant to the AAO’s remand:

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, 2735 Middle Road, Mobile, AL 36605; (2) D.S.I., LLC, 2560 Middle Road, Mobile, AL 36605; and (3) Atlantic Marine, 660 Dunlap Road, Mobile, AL 36652):

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 remand RFE was designed also to provide the petitioner an opportunity to respond to the AAO's finding that the petitioner's assertions and supporting documentation regarding DLI, LLC was questionable. The pertinent portion of the previous decision by the AAO reads as follows:

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 into the record opens with a greeting to a Mr. [REDACTED]. The letter's acceptance-of-terms line apparently bears Mr. [REDACTED] signature, before the handwritten word "Manager." The letter is addressed to:

D.S.I., LLC
2560 Middle Road
Mobile, Al 36605

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 2560 Middle Road, Mobile, Alabama 36605 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 2560 Middle Road, Mobile, Alabama: 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 names and addresses of clients for whom it performed welding or ship fitting services to retrofit, fabricate, or build new marine vessels.

The RFE issued on remand comports with the AAO's recommendations on content.

The Petitioner's Response to the Remand RFE

The petitioner's response to the director's remand RFE 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., dated October 14, 2007; (2) a June 12, 2007 letter from the petitioner to the Louisiana Department of Labor in support of an application for temporary labor certification (Form ETA 750); (3)(a) an October 29, 2007 letter from OIS's V.P. of Production, addressed to "Dear Sir/Madam," and (3)(b) a copy of the OIS/petitioner letter of agreement that the petitioner had previously submitted into the record; (4) two (2) pages of a letter from the Production Superintendent of Atlantic Marine (Alabama); (5) a table summarizing OIS's monthly employment of welders, fitters, and cutters for the period January 2006 through May 2007 (certified as accurate by OIS's V.P. of Production); (6) a table summarizing Atlantic Marine's monthly employment of welders, fitters, and cutters for the period January 2006 through May 2007 (this table has not been certified); 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 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.

There are two separate and independent grounds for the AAO's decision: (1) the petitioner's failure to establish that the client firms specified in the petition would each use 133 temporary welders and 133 ship fitters for the period October 1, 2007 through August 1, 2008, as asserted in the petition; and (2) the fact that the petitioner's need for temporary welders and ship fitters is not a temporary need as defined in the relevant regulations.

Analytical Framework

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 that 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 client firms' need for temporary welders and ship fitters

The AAO's prior decision indicates that the AAO would affirm the director's decision and approve the petition if the record as supplemented by the response to the remand RFE substantiated that the petition's 798 welders and ship fitters would be assigned to and utilized by the specified client firms as asserted in the petition, that is, in separate groups of 133 welders and 133 ship fitters assigned to work at each firm from October 1, 2007 through August 1, 2008. As discussed below, the record of proceedings does not substantiate the assertion.

Regarding DLI, LLC

Counsel responded to the remand RFE's request for documentation from DLI, LLC by stating that the petition's inclusion of welders and fitters for DLI, LLC was unintentional and merely the result of a mistake by prior counsel. In light of this response, there is no factual basis for the AAO to approve the petition for the number of welders and ship fitters that the petition identified for assignment to DLI, LLC. This reduces the number of workers under consideration for H-2B classification by 266.

At page 6 of his reply to the remand RFE, present counsel states that the petitioner "was not aware that DSI, LLC was even to be included in the petition," and that inclusion of 266 welders and fitters for DSI, LLC "was not done on purpose but was mistakenly put into the petition by the previous attorney and not noticed by the petitioner."

The only document to which counsel refers to support the claim of error by the previous attorney is a June 12, 2007 letter that the petitioner wrote to the Louisiana Department of Labor in support of an application for temporary labor certification (Form ETA 750) for 266 welders and ship fitters to work in Louisiana. This letter is not relevant to the present proceeding, which concerns a petition for the employment of 798 welders and fitters in Alabama. The AAO, however, notes the record's previously submitted copy of the petitioner's June 12, 2007 letter to the Alabama Department of Industrial Relations regarding the Form ETA 750 related to the present petition. This letter is relevant, and it establishes counsel's point that the petitioner's letter

concerning the Form ETA 750 did not mention DLI, LLC. However, the AAO finds this evidence insignificant in light of the following factors.

The author of the June 12, 2007 letter is [REDACTED] who signed as the petitioner's recruitment manager. Mr. [REDACTED] also signed the following documents that assert that the petitioner would provide welders and ship fitters to DSI, LLC: (1) the Form ETA 750, which (at Part 7) specifies DSI, LLC's address (2560 Middle Road, Mobile, AL 36605) as one of the addresses where the aliens will work; (2) the Form I-129 (Petition for Nonimmigrant Worker), which (at section 5 of Part 5) specifies DSI, LLC's address as one of the places where the beneficiaries will work; (3) a table summarizing the petitioner's monthly payroll for welders, fitters, and cutters whom the petitioner provided to DSI, LLC during the year 2006 (which reports that the petitioner provided such temporary workers to DSI, LLC from May through September 2006); (5) a table summarizing the petitioner's monthly payroll for welders, fitters, and cutters whom the petitioner provided to DSI, LLC during the months January through May 2007 (which lists one such temporary worker for February through May of 2007); and (6) a letter on the petitioner's stationery to DSI, LLC, with a "Manager" co-signature from DSI, LLC, that states, in pertinent part and verbatim:

[The petitioner] 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 provide by Eagle Industrial and Professional Services will assist D.S.I., LLC in completing time sensitive projects by employing Ship Fitters and Flux Core Welders to retrofit, fabricate and build new Marine vessels.

In light of this evidence of Mr. [REDACTED]'s active and affirmative participation in compiling this petition for welding workers for DSI, LLC, the claims of mistake, lack of knowledge by the petitioner, and sole responsibility residing with the prior attorney are not credible.

The AAO next notes this statement by counsel, at page 6 of his response to the remand RFE:

DSI, LLC is a painting and blasting company that works of [sic] ships at sea. They are a vital client of the petitioner. However, the petitioner does not provide the services of its ship fitters and welders to DSI, LLC

This acknowledgment - which is the petitioner's response to the remand RFE's request for corroborative documentation from DSI, LLC - indicates that the petitioner had no arrangements to provide DSI, LLC with the workers claimed in the petition. Yet, it appears that Mr. [REDACTED] the petitioner's Recruiter/Marketing Manager, signed official records (the Form I-129 and the related Form ETA 750) and submitted supporting documentation (such as the letter of agreement with DSI, LLC and the petitioner's monthly-payroll-report tables on DSI, LLC) that state otherwise.

The extent of documents bearing a Mr. [REDACTED] signature in support of a need of 266 welders and fitters for DLI, LLC is obvious in the record of proceedings; but it was not sufficiently addressed by present counsel's assertion to the effect that prior counsel was solely responsible for the inclusion of the 266 DSI, LLC jobs that should not have been included in the petition. It was incumbent upon the petitioner to present independent objective evidence to resolve the issue of the petitioner's role in the inclusion of the 266 DSI, LLC jobs, and

attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, present counsel's assertion, which is not substantiated by any documentation - particularly documentation addressing the participation of the petitioner's Recruiting/Marketing Manager in the inclusion of the 266 workers - carries no weight. 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 role of the petitioner's Recruiting/Marketing Manager in the petition's inclusion of 266 workers for DSI, LLC without a factual basis weighs against the credibility of the petition as a whole, and is itself a sufficient independent reason for denying the petition.

Regarding OIS

The RFE issued upon remand requested, in part, that the petitioner provide a letter from an appropriate management official at OIS (as well as at DLI, LLC and Atlantic Marine) that "explains in detail how the firm determined the specific number of workers cited in the letter [of agreement in which each firm asserted a need for 133 welders and 133 ship fitters]." The OIS letter submitted in response states that OIS determined its need for welders and ship fitters "in terms of numbers of personnel and peakload seasonality based on [its] normal peak load business cycle," which the letter describes as rising in February and beginning to decline in October. The letter does not describe any calculations used to derive a need for 133 welders and 133 ship fitters; nor does it otherwise illuminate how the need for 266 workers was determined "in terms of numbers of personnel and peakload seasonality based on [its] normal peak load business cycle." The nebulous information in the letter does not establish a factual basis for the need for the welders and ship fitters asserted for OIS.

The OIS letter's lack of substantive information is not remedied by the only additional OIS documentation submitted in response to the remand RFE, which is the table on the monthly number of welders, cutters, and fitters that OIS employed from January 2006 to May 2007. This table is separated into the following categories: Permanent Employment; Temporary Employment - Eagle Industrial Professional Services; and Temporary Employment - Other Sources. According to the table, 85 is the highest total number of temporary welders, cutters, and fitters during any month, from all sources combined. This number is only a third of the 266 that the petition asserts OIS now requires from the petitioner alone. It is not evident how the past use of a significantly lower number of workers supports the need asserted in the petition for 266.

Further, the accuracy of the numbers submitted by OIS and the petitioner are inconsistent and therefore unreliable. According to the petitioner's monthly-payroll-report table on the number of temporary welders, cutters, and fitters that it provided to OIS, the petitioner assigned the following total number of such workers from January 2006 through December 2006: January: 0; February: 0; March: 0; April: 20; May: 38; June: 42; July: 41; August: 16; September: 30; October: 11; November: 0; and December: 0. These figures are

materially inconsistent with figures in the OIS table on the number of temporary workers provided by the petitioner. Those OIS figures, in parenthesis after the petitioner's payroll-report's figures, are: January: 0 (0); February: 0 (0); March: 0 (0); April: 20 (44); May: 38 (60); June: 42 (61); July: 41 (56); August: 16 (54); September 30 (53); October 11 (23); November 0 (1); and December 0 (0). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Regarding Atlantic Marine

For the reasons discussed below, the AAO also finds that the documentation submitted on behalf of Atlantic Marine, Inc. in response to the remand RFE does not provide a sufficient basis for the AAO to determine the number of H-2B temporary workers, if any, to which Atlantic Marine may be entitled.

The evidentiary weight of the Atlantic Marine letter in response to the remand is insignificant. The letter appears to be missing at least one page.¹ Also, despite its statement to the contrary, as submitted into the record the Atlantic Marine letter is not accompanied by the "letters of agreement" that it references as "attached to this letter." Therefore, the record neither establishes the particulars of the "letters of agreement" (such as signer, date, and addressee) nor their content.

Also, the AAO accords no weight to the table on Atlantic Marine welders, fitters, and cutters that is submitted in response to the remand RFE. The table does not comport with the RFE's request that Atlantic Marine certify its accuracy. Further, the table's lack of certification conflicts with the Atlantic Marine letter's introducing the table as a certified document. Further, as noted above, the table is presented as an attachment to what appears to be an incomplete copy of the Atlantic Marine letter.

Further, the accuracy of the numbers submitted for Atlantic Marine and the petitioner are also inconsistent and therefore unreliable. According to the petitioner's monthly-payroll-report table on the number of temporary welders, cutters, and fitters that it provided to Atlantic Marine, the petitioner assigned the following total number of such workers from January 2006 through December 2006: January: 0; February: 0; March: 0; April: 0; May: 3; June: 2; July: 8; August: 9; September: 4; October: 3; November: 3; and December: 5. These figures are materially inconsistent with the Atlantic Marine table on the number of temporary workers provided by the petitioner for the same period, January through December 2006. Those Atlantic Marine figures, in parenthesis after the petitioner's payroll-report's figures, are: January: 0 (15); February: 0 (26); March: 0 (33); April: 0 (56); May: 3 (62); June: 2 (62); July: 8 (66); August: 9 (0); September 4 (0); October 3 (20); November 3 (16); and December 5 (49). Doubt cast on any aspect of the

¹ The first page of the submitted document refers to itself as a letter, and the final page bears the closing and signature standard for a letter. Neither of the two pages submitted into the record, however, bear the parts normally expected at the beginning of a letter, such as the addresses of the sender and the addressee, the date of the letter, and a salutation to the addressee.

petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*.

For the reasons discussed above, the record of proceedings fails to establish the need for H-2B temporary workers asserted in the petition for any of the three clients.

The AAO also finds that the tables submitted into the record do not establish that the temporary workers sought for OIS and Atlantic Marine would be assigned to them to satisfy peak load needs of these clients. Per 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), essential elements of an H-2B peakload include, but are not limited to: (1) regular employment of permanent staff in the type of job that is the subject of the petition; (2) and a seasonal or short-term demand that generates the need to supplement those workers on a temporary basis.

The peakload asserted by the petition for each client firm is October 1, 2007 through August 1, 2008. Neither the OIS nor the Atlantic Marine tables shows use of welders and fitters that parallels the petition's claim of a peak demand for these types of workers from October 1 to August 1.

The Petitioner's Need for the Welders and Ship Fitters

As noted earlier in the decision, counsel has already acknowledged that DLI, LLC does not have the need for 266 beneficiaries as alleged in the petition. Therefore, the following discussion concerns only the petition's assertion of an H-2B temporary need for 266 welders (133 for OIS and 133 for Marine Atlantic) and 266 ship fitters (also to be evenly divided between OIS and Martine Atlantic) from October 1, 2007 to August 1, 2008.

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):²

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.

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

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 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 establish that the petitioner's need for welders and ship fitters 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 use immigrant visa programs to alleviate the problem.

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

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