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FILE: EAC 07 243 53120 Office: VERMONT SERVICE CENTER Date: OCT 04 2007

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

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

ON BEHALF OF PETITIONER:
[Redacted]

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.

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

DISCUSSION: On August 23, 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 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 The decision of the director will be withdrawn and the matter remanded to him for further action and consideration.

As a preliminary matter, the AAO notes that there is sufficient evidence in the record of proceeding to establish a shortage of welders and ship fitters in the geographical area related to the present petition. However, as reflected in the comments below, as presently constituted the record of proceeding does not establish a temporary need for a total of 266 welders and ship fitters in order to fill the requirements of the client named in the petition.

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

Background

The present petition is for 133 welders and 133 ship fitters that the petitioner would assign to work at the Jacksonville, Florida division of Atlantic Marine (hereinafter referred to as Atlantic Marine (Jacksonville, FL)). 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 EAC0722753476 and EAC0723352546. Petition EAC0722753476 seeks 133 welders and 133 ship fitters for the petitioner to employ at Conrad Industries in Morgan City, Louisiana. 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 Atlantic Marine (Jacksonville, FL). 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).

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

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

Relevancy of the payroll and tax records submitted by the petitioner

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

Evidence to be requested in the RFE: As the Sea Services, Inc. records appear to be irrelevant to the present petition and appear in the records of proceeding of all of the three petitions now on certification to the AAO, the director's RFE should request that the petitioner:

1. Explain the relevance of these records in establishing the temporary need for the 266 welders and ship fitters requested in the present petition. If Sea Services, Inc. is a payroll agency for the petitioner, please submit proof of the relationship between Sea Services, Inc. and the petitioner.
2. If the Sea Services, Inc. records were mistakenly submitted, submit copies of the correct payroll and tax records for the relevant period.

Need for additional documentation from Atlantic Marine (Jacksonville, FL)

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, Atlantic Marine (Jacksonville, FL). Thus, the specific needs underlying this petition belong to Atlantic Marine (Jacksonville, FL), 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 documentation from Atlantic Marine (Jacksonville, FL) to establish (1) that this client firm needs the here petitioned services of 133 welders and the services 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 Atlantic Marine (Jacksonville, FL) 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 Atlantic Marine (Jacksonville, FL) 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 Atlantic Marine (Jacksonville, FL), 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 Atlantic Marine (Jacksonville, FL) 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 Atlantic Marine (Jacksonville, FL) during the periods summarized. The payroll summaries in the record are an inadequate substitute for documentation directly from Atlantic Marine (Jacksonville, FL) 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 Atlantic

Marine (Jacksonville, FL) 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 Atlantic Marine (Jacksonville, FL), and there is no indication in the record that this Sea Services, Inc. document relates to the use of welders and ship fitters by Atlantic Marine (Jacksonville, FL). 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 letter of agreement is the only document of record that bears any indication of the client's input - and the indication is no more than a signature. The record contains no attestations from Atlantic Marine (Jacksonville, FL) 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 clients, certified summaries of such records, or relevant contracts between the clients and other parties for the services that are the subject of this petition) that substantiate the need for the numbers of welders and ship fitters specified in the letters of agreement and in the present petition.

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

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 Atlantic Marine (Jacksonville, FL). The charts' highest number for temporary workers for any month between January 1, 2006 and May 2007 is 13.

In summary, the documentary evidence in the present record of proceeding does not establish (1) that Atlantic Marine (Jacksonville, FL) 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 the temporary need categories at 8 C.F.R. § 214.2 (h)(6)(ii)(B).

Evidence to be requested in the RFE: In light of the above observations about evidentiary deficiencies, apparent documentary inconsistencies, and the unlikely coincidence of Atlantic Marine (Jacksonville, FL) 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 Atlantic Marine (Jacksonville, FL):

1. A letter, on official stationery with the firm's letterhead, in which an appropriate management official of Atlantic Marine (Jacksonville, FL) with pertinent knowledge: (a) identifies his or her

official position at Atlantic Marine (Jacksonville, FL); (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 Atlantic Marine (Jacksonville, FL) to sign such documents on its behalf; (d) corroborates that Atlantic Marine (Jacksonville, FL) 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 Atlantic Marine (Jacksonville, FL) 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 Atlantic Marine (Jacksonville, FL). 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 Atlantic Marine (Jacksonville, FL) official, that the table accurately represents the information contained in the relevant business records of Atlantic Marine (Jacksonville, FL).
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 Atlantic Marine (Jacksonville, FL) official, that the table accurately represents the information contained in the relevant business records of Atlantic Marine (Jacksonville, FL).

Other discrepancies

Discussion: The AAO also notes this statement, which appears at page 4 of the petitioner's letter of June 12, 2007 to the Florida Agency of Workforce Innovation:

The attached statistics establish the following: In 2005, both Atlantic Marine and Conrad Industries employed approximately 1/3 more welders and fitters at the relevant shipyards during the first three quarters of the year than in the last quarter of the year (i.e., 18-18-23 v. 15 for Conrad Industries and 27-28-25 v. 17 for Atlantic Marine), and the payroll statistics confine [sic] this development (\$132,000.00-\$127,000.00-\$168,000.00 v. \$108,000 for Conrad Industries and \$192,000-\$204,000.00-\$180,000.00 v. \$122,400.00 for Atlantic Marine. A similar development is anticipated for the upcoming year 2007 (i.e. 210-215-213 v. 15 welders and fitters for Conrad Industries and 230-230-183 v. 40 for Marine[.]])

As presently constituted, the record of proceeding does not include the "attached statistics" referenced above as establishing the payroll and employee figures quoted above.

Evidence to be requested in the RFE:

The director's RFE should request that the petitioner submit into the record the statistical evidence of the employment and payroll records of Atlantic Marine and Conrad Industries that are cited in the above paragraph from page 4 of the petitioner's letter of June 12, 2007 to the Florida Agency of Workforce Innovation. The petitioner should be directed to identify the specific Atlantic Marine divisions to which the statistics relate (that is, the Jacksonville division, the Mobile division, or both).

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

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

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

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

ORDER: The director's decision of September 7, 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.