

PUBLIC COPY



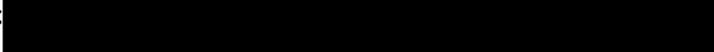
U.S. Citizenship  
and Immigration  
Services

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

tl



FILE: EAC 07 227 53476 Office: VERMONT SERVICE CENTER Date: **OCT 04 2007**

IN RE: Petitioner:   
Beneficiaries: 

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:



INSTRUCTIONS:

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

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

**DISCUSSION:** On August 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 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 The decision of the director will be withdrawn and the matter remanded to him for further action and consideration.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 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 states \$27 as the "composite rate" that would be paid by Conrad Industries.

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 Conrad Industries

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 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 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 Conrad Industries equiring 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.

#### Other discrepancies

Discussion: First, the record of proceeding does not include the "attached statistics" referenced in the following excerpt from the petitioner's letter of June 12, 2007 to the Alien Labor Certification Unit of the Louisiana Department of Labor:

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[.])

Second, on November 14, 2006 the AAO affirmed the certification and approved the H-2B petition that Eagle Staffing had filed for 180 unnamed aliens to work as flux core welders for 10 months at Conrad Industries (under Form I-129 (petition) receipt number EAC0702150433 and Form I-290C (certification) receipt number EAC0702651669.) In that petition, Eagle Staffing listed an address different than the present petitioner's and appears to be a separate legal entity. In its June 12, 2007 letter to the Alien Labor Certification Unit of the Louisiana Department of Labor, which is typed on the present petitioner's Eagle Industrial and Professional

Services letterhead stationery, the present petitioner refers to itself as "Eagle Staffing" in several places: see pages 2, 5, and 6. The AAO also notes that [REDACTED] was designated the point of contact for both the present petition and petition EAC0702150433. In light of the petitioner's interchangeable use of "Eagle Industrial and Professional Services" and "Eagle Staffing" in the context of the present petition, it appears that the petitioner's certified table of permanent and temporary welders, cutters, and fitters for the payroll reporting period January 1, 2006 through May 31, 2007 and its certified tables on the Conrad Industries payroll may encompass the employees of both Eagle Staffing and the petitioner, Eagle Industrial and Professional Services. The petitioner should clarify whether Eagle Staffing employees are included in these tables.

Evidence to be requested in the RFE:

The director's RFE should request that the petitioner:

1. 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 Alien Labor Certification Unit of the Louisiana Department of Labor. 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).
2. Clarify whether the certified tables in the record of the present proceeding include the employees of Eagle Staffing, the firm that filed petition EAC0702150433. (The certified tables are (a) the petitioner's certified table of permanent and temporary welders, cutters, and fitters for the payroll reporting period January 1, 2006 through May 31, 2007 and (b) the petitioner's certified tables on the payroll for Conrad Industries welders, fitters, and cutters for the periods January 1, 2006 to December 31, 2006 and January 1, 2007 to May 31, 2007.)
3. If the certified tables include employees of Eagle Staffing, explain why the certified tables do not appear to reflect the 180 core flux welders approved for work at Conrad Industries under H-2B petition EAC0702150433.

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 August 28, 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.