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U.S. Citizenship and Immigration Services

D4

[redacted]

FILE: EAC 07 249 52117 Office: VERMONT SERVICE CENTER Date: OCT 12 2007

IN RE: Petitioner: [redacted]
Beneficiaries:

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

ON BEHALF OF PETITIONER:

[redacted]

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

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

DISCUSSION: The nonimmigrant visa petition was approved by the Director, Vermont Service Center, and certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(*2*)(*ii*). The decision of the director will be withdrawn and the matter remanded to him for further action and consideration.

The petitioner describes itself as the leading provider of shorebased support services in the Gulf of Mexico, and its Form I-129 (Petition for Nonimmigrant Worker) indicates that the petitioner has a gross annual income of $30,025,360 and a net annual income of $172,849. The petitioner seeks to newly employ 125 crane operators from October 1, 2007 to August 1, 2008 as H-2B temporary nonagricultural workers on the basis of peakload and one-time occurrence needs as defined at 8 C.F.R. § 214.2(h)(6)(ii)(B).

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

As discussed below, the AAO finds that, as presently constituted, the record of proceeding fails to establish (1) that there is a need for 125 crane operators as asserted, and (2) that the asserted need for 125 crane operators satisfies one of the H-2B temporary need categories at 8 C.F.R. § 214.2(h)(6)(ii)(B) (that is, one-time occurrence, seasonal need, peakload need, or intermittent need). Since evidentiary insufficiency was not mentioned in the director's decision, the AAO will remand this matter to the director with instruction that he issue a request for evidence (RFE) to afford the petitioner an opportunity to address the evidentiary deficiencies identified below.

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

> (i) *General.* An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers.
>
> (ii) *Temporary services or labor*:
>
> > (A) *Definition.* Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.
> >
> > (B) *Nature of petitioner's need.* As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for

> the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need:
>
> (*1*) *One-time occurrence.* The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.
>
> (*2*) *Seasonal need.* The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.
>
> (*3*) *Peakload need.* The petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.
>
> (*4*) *Intermittent need.* The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

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

> Granting [the petitioner's] temporary labor certification for 125 crane operators is essential, critical to its survival, and vital to its meeting its contractual commitments during this unique, temporary period of peakload in customer activity and demand coupled with one[-]time infrastructure and security related problems.

The evidence of record does not include evidence that demonstrates that (1) that the petitioner has a need for the services of 125 crane operators during the period of specified need, and (2) that the asserted need qualifies as an H-2B temporary need. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19

I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner's Form I-129 specifies the need for H-2B workers as peakload and unpredictable. The petitioner's August 9, 2007 letter asserts that there is a "unique, temporary period of peakload in customer activity" and that approval of 125 crane operators is essential to its "meeting its contractual commitments." The petitioner's September 14, 2007 letter identifies the proposed work as a "contract backlog peak." However, the record of proceedings does not document specific contractual commitments that would require the petitioner to supplement its permanent crane operators with 125 H-2B temporary workers. The copies of contracts in the record of proceedings contain few instances of contractual obligations or commitments to provide a particular number of crane operators. The crane operators specified by the contractual commitments of record number approximately 4. The petitioner's relationship to the contracting parties, and its role in providing workers to the contracting parties, is not established.[1] Further, there is no documentary evidence that these workers cannot be provided from the petitioner's regular staff of crane operators. In this regard, the AAO notes that according to the certified tables of monthly payroll reports that the petitioner submitted into the record, the petitioner employed no temporary crane operators in 2005, 2006, and 2007, but employed a high of 114, 157, and 132 permanent crane operators in 2005, 2006, and 2007, respectively. Further, the petitioner's tables do not reflect a seasonal or short-term demand for crane operators for the months of October through August of the following year.

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

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

The record of proceeding, however, does not contain documents that establish any of the following: the extent of the petitioner's asserted contract backlog; the number of crane operators that new offshore production facilities, drill ships, and semisubmersibles will generate for the petitioner during the period October 1, 2007 to August 1, 2008; or an H-2B temporary need for crane operators during the requested period on the basis of contract commitments, additional business, or any other factors. The evidence of record fails to corroborate that the petitioner is experiencing a peakload need for crane operators for its clients. According to the regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*), to meet the H-2B peakload standard:

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

> The petitioner must establish [1] that it regularly employs permanent workers to perform the services or labor at the place of employment and [2] that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and [3] that the temporary additions to staff will not become a part of the petitioner's regular operation.

In its August 9, 2007 letter, under the headings "Temporary and Substantial Local Infrastructure Projects" and "TSA TWC Card Temporary Phase In/One Time Occurrence" the petitioner asserts that local infrastructure projects and the implementation of the Transport Security Administration's (TSA) Transport Worker Identification Card (TWIC) Program has so reduced the available workforce of crane operators as to create a one-time occurrence under 8 C.F.R. § 214.2(h)(6)(ii)(B)(*1*). The petitioner reiterates this assertion in its September 14, 2007 letter as follows:

> [P]lease note that . . . [the] petition was based on peak load (contract backlog peak) and one time occurrence (Transportation Worker Identification Card – TWIC implementation, and local temporary public infrastructure projects) and not Hurricane Katrina or Rita. . . .

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

The director should issue an RFE that provides the petitioner an opportunity to provide documentary evidence that substantiates the petitioner's claim that it has an H-2B peakload or one-time occurrence need for 125 temporary crane operators for the period October 1, 2007 to August 1, 2008. The RFE should request that the petitioner provide the following documentation:

1. There are no contracts of record establishing any request to Cajun Industries to provide crane operators. The RFE should request work orders, statements of work, contracts, service agreements, work schedules, or other documents prepared in the usual course of business that substantiate the petitioner's assertion that its own contractual commitments require it to hire 125 temporary crane operators to supplement its permanent staff of crane operators during the period October 1, 2007 to August 1, 2008.

2. A statement from an appropriate management official of the petitioner that explains why the petitioner needs 125 temporary crane operators when the record's certified payroll tables indicate no earlier use of temporary crane operators. The statement should: (a) address the requirement that the temporary additions to staff will not become a part of the petitioner's regular operation; (b) state whether the temporary additions to staff would replace, rather than supplement, any of the petitioner's permanent crane-operator employees; and (c) substantiate that the petitioner needs to supplement its permanent crane-operator staff at the place of employment on a temporary basis due to a seasonal or short-term demand. The official making

the statement should sign the statement beneath a typed attestation that the statement is true and accurate.

3. Documentation that establishes that the short-term demand that requires the hiring of 125 H-2B crane operators from October 1, 2007 to August 1, 2008 is a peakload need of the petitioner within the meaning of 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

4. A statement, certified as true and accurate by an appropriate management official of the petitioner, that specifies (a) the number of cranes that the petitioner's crane operators would operate at the place of employment (identified on the Form I-129 (Part 2 Item 5, and Part 1) as [redacted]ncluding those on board ships or vessels at that location; (b) the total number of the petitioner's permanent crane operators; and (c) why the petitioner's staff of permanent crane operators is not sufficient to operate the cranes at the employment site during the period of requested employment, October 1, 2007 to August 1, 2008.

5. Documentation that establishes that, as asserted in the petitoner's letters of August 9, 2007 and September 14, 2007, local infrastructure projects and the implementation of the TWIC program has so reduced the available workforce of crane operators as to create a one-time occurrence under 8 C.F.R. § 214.2(h)(6)(ii)(B)(*1*).

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

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

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

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

ORDER: The director's decision of October 1, 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.