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U.S. Citizenship and Immigration Services

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WASHINGTON, DC 20529

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[redacted]

FILE: EAC 08 168 52703 Office: VERMONT SERVICE CENTER Date: JUL 17 2008

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]

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 was recommended to be 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 The decision of the director will be withdrawn and the petition will be denied.

The petitioner is a marine and fabrication company located along the Gulf of Mexico that provides offshore drilling rig overhaul, repair, upgrade and conversion. It also provides subcontract marine construction and fabrication for the United States Navy. It desires to continue to employ the beneficiaries as welders pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b), from June 2, 2008 to April 1, 2009. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could not be made because the petitioner had not established a temporary need for the beneficiaries' services. The DOL also determined that the petitioner had not submitted supporting documentation to justify its temporary need for the beneficiaries' services. Finally, the DOL determined that the petitioner had failed to comply with the DOL's recruitment requirements. The petitioner then filed the current petition containing countervailing evidence to overcome the DOL's decision. The director determined that the petitioner had submitted sufficient countervailing evidence to overcome the concerns of the DOL and recommended the approval of the petition. The director's decision recommending the approval of the petition for the 32 workers named in the petition is now before the AAO for review.

On notice of certification, neither counsel nor the petitioner presents additional evidence for consideration. Therefore, the record is considered complete.

As discussed below, upon careful review of the entire record of proceeding, the evidence of record does not support the director's decision to approve the petition. Accordingly, the director's decision will be withdrawn and the petition will be denied.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B temporary worker as:

> an alien having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country . . . .

The regulation at 8 C.F.R. § 214.2(h) provides, in pertinent part, the following:

(6) *Petition for alien to perform temporary nonagricultural services or labor (H-2B)*:

(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.

(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.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after the DOL has denied temporary labor certification:

(D) *Attachment to petition.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence may be filed with the director. The evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and industry in the United States. All such evidence submitted will be considered in adjudicating the petition.

(E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. workers, the prevailing wage rate for the occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence.

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 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* holds that it is the nature of the need, not the nature of the duties, that is controlling.

In the petition, the petitioner requests approval of the proffered positions as a peakload need.[1]

To establish that the nature of the need is "peakload," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

To establish that the nature of the need is a "one-time occurrence," the petitioner must demonstrate 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. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*1*).

The petitioner initially sought certification for 80 welders from June 2, 2008 through April 1, 2009. In a letter dated May 22, 2008, the petitioner requested the United States Citizenship and Immigration Services (USCIS) to extend the stay of its 32 current H-2B workers rather than petition for any new workers. Thus, the current petition is for the continuation of previously approved employment for 32 H-2B temporary workers.

The petitioner described the duties of the proffered position at section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

> Weld together structural metal components as specified by blueprints and work orders or oral instruction using brazing and various arc and gas welding equipment.

The DOL denied the petitioner's temporary labor certification on three grounds:

(1) Failure to establish that the nature of the employer's need for the services or labor to be performed is temporary;
(2) Failure to submit supporting documentation that justifies any one of the regulatory standards of temporary need; and
(3) Failure to comply with DOL requirements.

Counsel submitted a letter dated May 27, 2008 as the petitioner's countervailing evidence in response to the denial of the temporary labor certification. The petitioner also provided its monthly payroll reports for permanent and temporary welders for the 2006 and 2007 calendar years, copies of four contracts, a letter of intent and a sworn affidavit signed by the petitioner's Vice President – Production.

The first basis for DOL's denial is that the employer did not establish that its need for the beneficiaries' services or labor is temporary. The DOL in its review of the petitioner's past and present filing activity found that the petitioner has applied for three temporary labor certifications for welders in the aggregate time period from

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[1] In the letter accompanying the petition, counsel implicitly requests consideration of the petition as a one-time occurrence.

October 1, 2006 through April 1, 2009. The DOL concluded that the petitioner's filing activity establishes a pattern that demonstrates that its need for the services or labor to be performed is permanent, not temporary.

In rebuttal, counsel for the petitioner states in her letter dated May 27, 2008 that the DOL failed to consider that extraordinary circumstances created this "one-time occurrence" in the petitioner's business. Counsel states that Hurricane Katrina was the worst natural disaster to ever occur in this country and therefore, it stands to reason that the recovery and repair efforts from the storms would take longer than what had been the case in any previous natural disasters. In addition, the petitioner states that the regulations governing the Act allow for an H-2B visa to be extended for a period of up to 36 months. 8 C.F.R. § 214.2(h)(15)(ii)(C). Thus, counsel asserts that the denial by DOL based simply on the amount of time that the workers have been here is not warranted under the law.

Upon review, the petitioner has not provided evidence to establish "extraordinary circumstances" and that the petitioner will perform hurricane repair work constituting a temporary "one-time" need for additional welders from June 2, 2008 through April 1, 2009. The petitioner has not shown that its work primarily consists of contracts for oil rig repair and construction work as a result of storm damage that necessitates the use of temporary H-2B welders. Simply 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)). The record reflects that the petitioner's need for welders is continuous and year-round, and is not a one-time occurrence to end April 1, 2009. The petitioner has not shown that the current petition is due to extraordinary circumstances resulting from storm damage.

The second basis for the DOL's denial is the petitioner's lack of supporting documentation justifying any one of the regulatory standards of temporary need. In the current case, the petitioner seeks approval of the proffered positions as a peakload or a one-time occurrence need.

In its decision, the DOL took into consideration the petitioner's client list and three contracts: Crosco Zagreeb, Frontier Driller, Inc. and Northrop Grumman. The DOL found that the evidence was undated and was insufficient to establish temporary need, and further that conflicting evidence of record indicated dates for completion, contrary to the petitioner's statement.

In reviewing the Crosco Zagreeb contract, the DOL found that the contract is silent as to when the employer is obligated to perform the work. The DOL stated that the petitioner submitted a letter entitled "Statement as to Industry Reason for Undated Contracts" to explain why the contracts do not indicate when work will be performed. The DOL found that various pages of the contract with Crosco Zagreeb clearly establish scheduled dates for completion of work in contrast to the petitioner's statement indicating why the industry has undated contracts. The petitioner does not submit its contract with Crosco Zagreeb or the above mentioned statement with the current petition as part of its countervailing evidence. Absent the Crosco Zagreeb contract, and the statement about the undated contracts, the petitioner has not overcome the objections made by the DOL that the contracts do not contain delivery dates that fall within the requested period of need.

Furthermore, the DOL stated that the employer also submitted an untitled document that listed the names of its clients, whether the employer was under contract, the start date of the project, and the delivery date. The DOL stated that the untitled document contradicted the employer's "Statement as to Industry Reason for Undated Contracts." The DOL stated that the untitled document did not adequately establish a client relationship with all of the clients listed, and did not clearly establish a start date for each contract. The employer listed 18 clients that it engaged to provide services; however, the document states clearly that the employer's contract with 11 out of 18 listed clients were only tentative. The DOL stated that it could not issue certification for prospective employment and therefore, the employer's listing of tentative clients could not be used as supporting documentation. The petitioner did not submit this document or any countervailing evidence to dispute the DOL's finding upon filing the current petition.

The DOL found that neither the Northrop Grumman contract nor the Frontier Driller contract documented the petitioner's temporary need for welders. The Northrop Grumman contract requires United States workers only; the Frontier Driller contract does not establish a commitment by the petitioner to provide temporary workers. The AAO finds the evidence submitted by the petitioner subsequent to the DOL's finding does not overcome the DOL's concerns.

The petitioner states that it currently has hurricane repair contracts that extend for the next several months. As countervailing evidence, the petitioner submitted copies of four contracts: Northrop Grumman, Noble Drilling (U.S.), Inc., Frontier Driller, Inc. and Transocean Offshore Deepwater Drilling, Inc. The copies of the agreements contained in the record of proceeding for Noble Drilling (U.S) Inc.[2] and Frontier Driller, Inc. do not have the applicable work/purchase orders attached to explain the type of work the beneficiaries will be performing for the companies. According to the contracts, the work/purchase orders control and govern all work accepted by the petitioner. As the DOL stated in its decision, the Frontier Driller contract is silent as to when the petitioner is obligated to perform the work. The AAO notes that the contract with Noble Drilling suffers from the same deficiency. There is no work order or change order requesting work under the contract. Absent the work/purchase orders, the petitioner has not established that it has a binding commitment to perform work for either company.

Counsel states in her May 27, 2008 letter that the copies of the four contracts (Noble Drilling (U.S.), Inc., Frontier Driller, Inc., Northrop Grumman and Transocean Offshore Deepwater Drilling, Inc.[3]) represent rig repair work that will take place during the time period of the requested extension. The petitioner states in its letter dated May 22, 2008 that the contract with Northrop Grumman is for the petitioner to produce numerous hull sections for the United States Navy's San Antonio class amphibious warships. One of the requirements of the Northrop Grumman contract is that only United States citizens or lawful permanent residents may perform the work. Therefore, the petitioner does not need temporary workers to fulfill this contract, but states that it is left with a labor shortage with respect to its other contract obligations. If the petitioner is experiencing a severe labor shortage based on its year-round work, it may wish to use immigrant visa programs to alleviate the problem.

The petitioner's agreement with Noble Drilling (U.S) Inc. was submitted as countervailing evidence along with the petitioner's support letter dated May 27, 2008.

[3] The petitioner's contract with Transocean Offshore Deepwater Drilling, Inc was submitted as countervailing evidence along with the petitioner's support letter dated May 27, 2008.

The petitioner's ship repair agreement with Transocean Offshore Deepwater Drilling, Inc. shows that the delivery date of the vessel was between November 15, 2007 and January 1, 2008. Absent a redelivery and acceptance agreement completed by the petitioner and Transocean Offshore Deepwater Drilling, Inc., this contract expired before the start of the requested employment and cannot be considered as evidence of the petitioner's need for temporary welders.

The record also contains a letter of intent dated April 30, 2008 between the petitioner and Transocean Offshore Deepwater Drilling, Inc. The letter states that the petitioner desires the authority to proceed with the acquisition of critical long delivery material, engineering preparation work, and prefabrication of critical components which need to be completed prior to vessel (Celtic Sea) arrival at the shipyard. The letter also states that Transocean Offshore Deepwater Drilling, Inc. is under no obligation to award the agreement to the petitioner. The petitioner has not established that it has a binding contract to perform work for this company.

The record of proceeding contains a sworn affidavit from the petitioner's vice-president of production. The vice-president states that contracts are undated for the following reasons. He states that contracts with clients are signed months before the rig or vessel is brought to the shipyard; that clients want to bring the rig or vessel in at a time that works with their drilling schedules and that the petitioner must have room at the facility. The DOL found that the petitioner's statement that industry contracts are not dated conflicted with evidence of record establishing that the contracts reflected a schedule for completion and that the contracts were signed at the same time that work was expected to commence. The affidavit leaves unexplained the DOL finding that the evidence submitted did establish dates and schedules. It ignores the contradictory evidence cited by the DOL and does not overcome the DOL's concerns.

Further, the DOL stated that the payroll documentation does not establish that the petitioner's need for welders is temporary. The monthly payroll records show that the petitioner has continuously employed temporary welders from November 2006 through December 2007. The 2006 and 2007 monthly payroll reports do not support the dates of need listed on the Form ETA 750. The monthly payroll reports do not show the petitioner having a steady increase in the number of temporary welders for the period of intended employment (June 2, 2008 through April 2009). The report indicates that there were no temporary welders from January through October 2006, the temporary workers slightly increased to 21 in November, 91 in December, then to 105 in January 2007, 115 in February, 114 in March and ending with 98 in April of 2007. The evidence contained in the record of proceeding does not substantiate the petitioner's temporary need from June 2, 2008 through April 2009. As stated above, one of the contracts, Crosco Zagreeb, was not submitted with the countervailing evidence; the petitioner states that one of the requirements of the contract with Northrop Grumman is that only United States citizens or lawful permanent residents may perform the work, therefore, temporary workers cannot be used; the agreement with Frontier Driller, Inc., does not have a purchase/work order attached and the Transocean Offshore Deepwater Drilling, Inc. contract expired and a change in schedule[4] signed by the petitioner and Transocean Offshore Deepwater Drilling, Inc. has not been provided by the petitioner. The AAO finds that the petitioner has failed to establish that it will employ 32 welders in the area of intended employment from June 2, 2008 to April 1, 2009.

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[4] See contract entitled "Transocean Amirante" Upgrade and Refurbishment Ship Repair Agreement, Agreement No: SMS-S289, under Section 2-Contractor Management Services, 2.2 Project WBS, Schedule Specifications and Reporting (2.2.2. Schedule Specifications).

Finally, in its final determination notice dated May 5, 2008, the DOL states its third basis for denying the certification is that the employer failed to comply with the DOL's recruitment requirements. TEGL 21-06, Change 1, section IV.F., states that the employer "shall document that union and other recruitment sources, appropriate for the occupation and customary in the industry, were contacted and either unable to refer qualified United States workers or non-responsive to the employer's request." The record of proceeding contains a copy of the petitioner's recruitment report that states that a letter was sent to the local union on March 13, 2008 advertising the job openings. The recruitment report also states that there were four (4) applicants for the position and three applicants did not meet the minimum requirements, one applicant was hired and the local union was non-responsive. Thus, the employer has provided the appropriate evidence to prove that it complied with the DOL's recruitment requirements.

In summation, the nature of the asserted need appears to be continuous and ongoing. The countervailing evidence provided with the petition does not establish the petitioner's temporary peakload need for the beneficiaries' welding services. The petitioner has not shown that its current contractual obligations are a result of hurricane storm damage, and therefore, might possibly be viewed as a "short-term" one-time demand resulting from extraordinary circumstances. Contrary to the petitioner's assertions, the evidence of record does not establish a short-term demand for welders and that the temporary additions to the staff will not become a part of the petitioner's regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*3*).

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

ORDER: The decision of the director dated June 12, 2008 is withdrawn. The nonimmigrant visa petition is denied.