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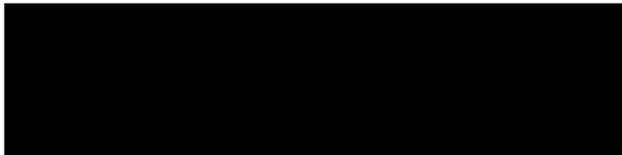
D4

FILE: EAC 07 243 53120 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)(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.

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 Director, Vermont Service Center issued a decision recommending approval of the petition, that he certified 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 additional evidence (RFE), render a new decision, and certify the new decision for AAO review. The matter is now before the AAO pursuant to the certification of the director's 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 As discussed below, the decision of the director will be withdrawn, and the petition will be denied.

### Background

In the Form I-129 (Petition for Nonimmigrant Worker), the related application to DOL for temporary labor certification (Form ETA 750), and other documentation submitted into the record, the petitioner asserted that the 133 welders and 133 ship fitters that it seeks in this petition would be assigned to work at the Jacksonville, Florida division of Atlantic Marine (hereinafter referred to as AM(JF)).

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, 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 AM(JF). 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).

Prior to counsel's reply to the remand RFE the letter of agreement was the only document of record that bore any indicia of endorsement by the petitioner's client AM(JF). The record of proceedings contained no other statements by AM(JF) about its need for flux core welders and ship fitters; and the record did 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 petition.

The AAO's prior decision includes the following sections that informed the petitioner about the evidentiary deficiencies that would be the subject of the RFE to be issued by the director.<sup>1</sup>

The first section highlighted the need for the petitioner to establish the relevance of the records submitted by Sea Services, Inc.. This section reads as follows:

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.

The AAO's prior decision provided the following guidance to the director on the content that should be included in the RFE to address the above issue:

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<sup>1</sup> The prior AAO decision also includes an additional section of evidentiary discussion and RFE guidance, but they are not material to the AAO's determination to withdraw the director's decision and deny the petition.

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.

The AAO's prior decision also includes the following section that highlighted the need for additional evidence to substantiate the petitioner's assertion that it petitioned for 266 of the temporary welders and ship fitters in order to meet AM(JF)'s need for their work:

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 petitioner'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).

The AAO's prior decision provided the following guidance to the director on the content that should be included in the RFE to address the above deficiencies:

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).

As evident in the record's copy, the content of the RFE issued by the director on remand comports with the guidance in the AAO's prior decision.

#### The Petitioner's Response to the RFE on Remand

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; (stating that Sea Services "was payroll service for Eagle Staffing/Eagle Industrial Professional Services from 2003 until 6/1/07."); (2) a 2-page document, dated October 19, 2007, describing itself as a letter, signed by the AM(JF) Director of Human Resources; (3) the service center director's prior Notice of Certification in this case (yellow highlighted at the sentence: "The petitioner submitted the actual contract between Eagle and Atlantic Marine."); (4) a table summarizing AM(JF)'s employment of welders, by month, for the period January 2006 through May 2007 (certified as accurate by the firm's Director of Human Resources); (5) a table summarizing AM(JF)'s employment of ship fitters, by month, for the period January 2006 through May 2007 (also certified as accurate by the firm's Director of Human Resources); (6) a table summarizing the employment by Atlantic Marine (Mobile, Alabama Division) of welders and fitters, by month, for the period January 2006 through May 2007 (certified as accurate by an officer of the firm); (7) an unsigned letter to the service center from the petitioner, with the signature Todd W. Linam, that addresses some of the discrepancies noted in the remand RFE; (8) an October 17, 2007 letter from Conrad Industries to the petitioner; and (9) articles concerning the shortage of welders and other skilled workers.

#### Analysis

The AAO will examine whether the need for the welding and ship fitting work to provided by the 266 beneficiaries is an H-2B temporary peakload need within the meaning of the relevant regulations at 8 C.F.R. § 214.2(h)(6). The decision will determine: (1) whether an H-2B peakload need resides with the petitioner's client AM(JF) because of its temporary need for 133 welders and 133 ship fitters; and (2) whether an H-2B temporary need resides with the petitioner because it is experiencing an H-2B peakload need by virtue of its obligation as an employment contractor to employ these workers and assign them to AM(JF).

The regulation at 8 C.F.R. § 214.2(h)(6) 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 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.

AM(JF)'s Need for the Petitioner's Welders and Ship Fitters

As already noted, the petitioner seeks approval of the proffered position as a peakload need. Per 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), the petitioner must establish: (1) that it regularly employs permanent workers to perform the services or labor at the place of employment; (2) that it employs permanent staff in the type of job that is the subject of the petition; (3) that it needs to supplement those permanent staff workers at the place of employment on a temporary basis; (4) that the reason for need for the temporary supplementation is a seasonal or short-term demand; and (5) that the temporary additions to staff will not become a part of the petitioner's regular operation.

The documentary evidence about the AM(JF)'s need for the 133 welders and 133 ship fitters sought in the petition include: (1) the letter of agreement between the petitioner and AM(JF); (2) the two certified tables summarizing the petitioner's monthly payroll reports for its welders, fitters, and cutters assigned to AM(JF) during the periods January 1, 2006 to December 31, 2006 and January 1, 2007 to May 31, 2007; (3) the two-page document, dated October 19, 2007, describing itself as a letter, signed by the AM(JF) Director of Human Resources; (3) the service center director's prior Notice of Certification in this case (yellow highlighted at the sentence: "The petitioner submitted the actual contract between Eagle and Atlantic Marine."); (4) the certified table summarizing AM(JF)'s employment of welders, by month, for the period January 2006 through May 2007; (5) the certified table summarizing AM(JF)'s employment of ship fitters, by month, for the period January 2006 through May 2007 (also certified as accurate by the firm's Director of Human Resources); and (6) the articles regarding the shortage of welders and other skilled laborers.

At the outset, the AAO acknowledges that the information in the record of proceedings establishes that there is a shortage of welders and ship fitters in the geographical area of the petitioner's client AM(FJ). However, this fact is not relevant to the issue of whether the record of proceedings establishes that AM(FJ)'s need for welders and ship fitters is temporary within the meaning of 8 C.F.R. § 214.2(h)(6).

The content of the letter of agreement between the petitioner and AM(JF) asserts that AM(JF) will use the petition's 133 welders and 133 ship fitters "for the period 1 October 2007 through 1 August 2008" to help AM(JF) complete "time sensitive projects." The letter is not supplemented by any business records or other documents that identify the particular projects involved and how the specific numbers of required welders and ship fitters were determined. The record contains no attestations from AM(JF) 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. 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 tables summarizing the petitioner's monthly payroll reports for its welders, fitters, and cutters assigned to AM(JF) during the periods January 1, 2006 to December 31, 2006 and January 1, 2007 to May 31, 2007 do not establish AM(JF)'s need for 166 welders and 166 ship fitters during the petition period.

The petitioner's Sea Services records do not distinguish between occupations and are not probative on the issue of AM(JF)'s need for 133 welders and 133 ship fitters during the petition period.

The two-page AM(JF) submission dated October 19, 2007 and attachments signed by the AM(JF)'s Director of Human Resources does not establish that AM(JF) has an H-2B peakload need for the 266 workers sought in the petition.

In this submission the Director of Human Resources asserts that he has "personal knowledge of the employment and staffing needs of Atlantic Marine Florida, LLC including our need for welders and ship fitters during our peak load and off peak business cycle during the business year." Despite this assertion of personal knowledge, the Director of Human Resources neither cites any specific contractual arrangements with clients as the basis for the number of welders and ship fitters sought, nor attests that such arrangements were in place at the time that the letter of agreement was filed, nor attests that AM(JF)'s assertion of a specific need for 266 welders and ship fitters was based upon actual contracts that would require these workers. Rather, as the basis for AM(JF)'s determination that 133 welders and 133 ship fitters were needed, the Director of Human Resources indicates that these specific numbers were based upon "its forecasted business cycle"; the fact that "[o]ur peak load business cycle *often* rises after hurricane season subsides[,] typically around October 1"; and on "our previous years staffing levels throughout the year and our forecasts for contractual growth for the coming peak load and off peak seasons." The AAO finds that the October 19, 2007 AM(JF) letter does not establish the asserted need for the 266 workers that are the subject of the petition, and that AM(JF) has not provided copies of its forecasts or conveyed the calculations that it used to reach them.

The AAO further notes that that, although the letter purports to corroborate the accuracy of the "letters of agreement" that are attached to it, the document submitted into the record contains no such attachments. Thus, the attempted corroboration fails due to the absence of the particular documents to be corroborated.

The certified table from AM(JF) attesting to the monthly numbers of welders and fitters that this firm used during the period January 2006 through May 2007 does not establish its peakload need for 166 welders and 166 ship fitters.

The table shows the following total number of welders (including AM(JF) permanent staff and temporary workers from all sources) for welders: January 06: 120; February 06: 84; March 06: 61; April 06: 55; May 06: 50; June 06: 72; July 06: 72; August 06: 61; September 06: 51; October 06: 58; November 06: 73; December 06: 83; January 07: 75; February 07: 145; March 07: 118; April 07: 120; and May 07: 176.

The table AM(JF) shows no use of the petitioner's welders during the reported period for any month other than May 2007, in which it employed 6 of the petitioner's welders.

The table reports the following use of temporary welders from sources other than the petitioner: January 06: 75; February 06: 35; March 06: 10; April 06: 8; May 06: 7; June 06: 29; July 06: 20; August 06: 10; September 06: 4; October 06: 8; November 06: 26; December 06: 11; January 07: 42; February 07: 97; March 07: 60; April 07: 61; and May 07: 109.

The table shows the following total number of fitters (including AM(JF) permanent staff and temporary workers from all sources): January 06: 181; February 06: 186; March 06: 155; April 06: 91; May 06: 78; June 06: 117; July 06: 126; August 06: 125; September 06: 110; October 06: 116; November 06: 105; December 06: 68; January 07: 136; February 07: 158; March 07: 192; April 07: 200; and May 07: 231.

The AM(JF) table reports the following use of temporary fitters from sources other than the petitioner: January 06: 78; February 06: 75; March 06: 60; April 06: 10; May 06: 10; June 06: 45; July 06: 40; August 06: 25; September 06: 15; October 06: 15; November 06: 20; December 06: 20; January 07: 75; February 07: 82; March 07: 91; April 07: 82; and May 07: 101.

The table reports the following use of temporary fitters from the petitioner: August 06: 12; September 06: 12; October 06: 12; November 06: 9; December 06: 7; January 07: 2; February 07: 2; March 07: 2; April 07: 2; and May 07: 2.

The table weighs against the petition. The table is not consistent with the temporary peaking of AM(JF)'s need for welders and ship fitters. Neither the number values nor their fluctuations from month to month are consistent with the petitioner's claim that AM(JF) would utilize 133 welders and 133 ship fitters for a continuous period of 11 months.

The figures in this table from the AM(JF) Director of Human Resources are materially inconsistent with the monthly payroll-report table that the petitioner submitted on the number of welders, cutters, and fitters that it provided to AM(JF) from January through December 2006: Here are (1) the AM(JF) table's combined figures for those temporary welders and ship fitters who were provided by the petitioner, and (2) in parenthesis, the petitioner's payroll-report table's figures on the combined number of welders and fitters that it provided to AM(JF) in the corresponding month: January: 0 (0); February: 0 (0); March: 0 (0); April: 0 (0); May: 0 (0); June: 0 (0); July: 0 (13); August: 12 (9); September: 12 (11); October: 12 (9); November 9 (9); and December 7 (3).

As the above discussion relates, the assertion that AM(JF) has a peakload need for the workers that are the subject of this petition is not supported by the record of proceedings, which includes unresolved material inconsistencies and lacks persuasive documentary evidence. 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 Obaighena*, 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). Further, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Petitioner's Need for the 133 Welders and 133 Ship Fitters

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):<sup>2</sup>

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 asserts a need that within the meaning of the H-2B regulations at 8 C.F.R. § 214.2(h)(6) is permanent rather than temporary.

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

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

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 use 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.