

# Marine

## News

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## Offshore Annual

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## Where Have All of the U.S. Citizen Offshore Workers Gone?



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Even though it has been almost four years since Hurricane Katrina and production levels on the Outer Continental Shelf (OCS) are experiencing a temporary decline due to the downturn in the economy, there continues to be a demand for foreign personnel to work in support of OCS activities. From welders to caterers, from chief engineers to deck hands and commercial divers, foreign personnel continue to fill critical positions onboard vessels and platforms. The question remains, where have all of the U.S. citizens gone? Whether the shortage is an actual shortage of personnel or a factor of undesirable wages and a lack of interest in an offshore career, the shortage is real, has operational consequences, and can be addressed through a Coast Guard regulatory exemption in accordance with 33 C.F.R. Part 141.

The shortage, or unavailability, as it is technically called, has recently received the attention of the Coast Guard's National Offshore Safety Advisory Committee (NOSAC), which formed a subcommittee at its last meeting to develop criteria for the Coast Guard to use in determining if an actual labor shortage exists and to define what constitutes an emergency need. In order to understand this issue, it is important to first understand the citizenship restrictions that are placed on OCS operations.

Through the Outer Continental Shelf Lands Act (OCSLA) and its amendments, Congress announced that the U.S. Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the OCS and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed. What this means in simple terms is that U.S.-flag vessels and platforms conducting operations on the OCS must be manned or crewed by citizens of the United States or resident aliens.

This citizenship restriction typically becomes an issue in three different situations: (1) a U.S.-flag vessel or offshore platform cannot find enough U.S. citizens or resident aliens to fill its regular complement (i.e., unavailability); (2) a U.S.-flag vessel with a U.S. crew or an offshore platform needs to supplement its crew with foreign specialists, professionals, or other technically-trained personnel to handle emergencies or other temporary operations; and (3) a foreign-flag vessel with a foreign crew has to route relief crews through

the United States or make U.S. port visits. A common theme that runs through all three situations is the requirement for foreign workers to possess a B-1 (OCS) visa in order to be allowed ashore in the United States, either en route to or from the OCS, or during a U.S. port visit. Failure of a crewmember to possess a B-1 (OCS) when a vessel pulls into a U.S. port will result in the owner/operator of the vessel having to post an armed guard at the gangway and the crew not being permitted to disembark the vessel or depart the country without an armed escort. A brief discussion of each exemption follows below.

### **Foreign-Flag Vessels**

In general, under the OCSLA manning requirements, the crew of any vessel engaged in OCS activities, whether U.S. or foreign flagged, must be either U.S. citizens or resident aliens. However, a manning exemption exists under OCSLA allowing a foreign-flag vessel to employ foreign nationals if it can be demonstrated that citizens of a foreign nation have the absolute right to effectively control the vessel (i.e., bareboat charter) or that the ownership of the vessel is over 50 percent foreign at every tier of ownership. The application is submitted to the Coast Guard's Foreign & Offshore Vessels Division and must contain, among other things, information such as project scope, vessel specifications, and a detailed description of ownership of every company in the vessel's chain of ownership. Approval can often take 30 days or more depending on the complexity of the particular case. Once the exemption is received, it remains valid until the vessel comes under either U.S. ownership or control. Following the approval, the vessel owner can begin the process of obtaining the B-1 (OCS) visas for the crew.

### **Unavailability of U.S. Citizens or Resident Aliens**

This situation is directly linked to the number of U.S. citizens or resident aliens that are qualified and available to work offshore. Before utilizing foreign personnel in vacant positions, an unavailability exemption must be requested from the Coast Guard's Foreign & Offshore Vessels Division. This is accomplished by the applicant demonstrating that it has attempted to locate qualified U.S. citizens or resident aliens through several different advertising



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media including, but not limited to, newspapers, internet, and trade shows/job fairs. Given that the Coast Guard makes its determination in consultation with the U.S. Department of Labor, it is also important that the applicant register and post advertisements with the two largest state labor organizations that deal with offshore occupations; namely, the Texas and Louisiana Workforce Commissions. In addition to the advertising information, the applicant must also include the number of personnel needed, the position they will fill, the vessel and/or platform upon which the foreign personnel will be stationed, and also information pertaining to the particular applicant's hiring statistics (e.g., number of applicants, new hires and terminations over the last several quarters). Once the Coast Guard makes its determination that an unavailability exists, a letter will be issued that can then be utilized by the recruited foreign personnel to obtain a B-1 (OCS) visa from a U.S. embassy or consulate. The temporary exemption is typically valid for one year from the date of issue under the condition that the applicant will continue to advertise for and hire either U.S. citizens or resident aliens if and when they become available. When the proper visa is granted, the foreign workers will then be permitted to travel to the U.S. and ultimately to the OCS.

### **Foreign Specialists and Technically Trained Personnel**

With respect to specialists and other technically-trained personnel, the exemption is typically only granted in emergency situations or for other temporary operations. An example of a situation where this type of exemption would be applicable is following a major hurricane event that results in widespread destruction that requires additional personnel, particularly to assist with the assessment of damages and repairs of offshore platforms.

One of the pieces of data that the Coast Guard uses to determine if an emergency situation exists is the percentage of oil and gas that is shut-in as reported by the Minerals Management Service.

For example, immediately following the 2005 hurricane season, the shut-in percentage was approximately 95 percent, and following the 2008 season it was approximately 59 percent; both of these were considered to be emergency situations. A situation that could constitute a temporary operation is where a foreign specialist is brought onboard a vessel or platform to either install a new piece of equipment or to train the regular crew on its use.

These exemptions are issued by the local Officer in Charge of Marine Inspections in the particular Coast Guard Sector where the operations will occur and include, among other things, the name and passport information for the particular specialist, the project information, and the estimated duration of the project. These exemptions may be granted for a set time period of time that could range from one week, to several months, or a year, depending on the particular circumstances. Based on the issuance of such an exemption, a foreign worker may obtain a B-1 (OCS) visa. The strict citizenship requirements imposed on OCS operations, cou-

pled with the requirement for offshore workers to possess a B-1 (OCS) visa when traveling in the United States, has made exemptions from these restrictions commonplace in facilitating OCS operations.

Whether you are a small company that has resisted bidding on a larger contract because you are unsure where the qualified personnel would come from, a company that wants to contract with a foreign-flag vessel but does not want to deal with contract delays due to personnel issues, or a platform or vessel owner in need of a foreign specialist to assist with a new equipment installation, the exemptions discussed above may be the answer.

Given that the failure to secure the exemption and/or the proper visas for the personnel can result in fines, penalties, lengthy operational delays and personnel issues including deportation, it is strongly encouraged that U.S. counsel be sought to assist with preparing and submitting the exemption requests. Moreover, it is important to use counsel who are experienced in this specialized area of the law to make sure that the necessary legal requirements are sufficiently addressed in submitting an exemption and to avoid lengthy delays in obtaining approval.