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New Visa Guidance for Crews Working on Offshore Wind Projects

The U.S. State Department published new guidance on visas issued to crewmembers who will work aboard vessels engaged in offshore wind farm operations. Vessel owners and project managers in the offshore wind sector should examine these changes and implement internal procedures to facilitate future wind farm projects.

NEW DEVELOPMENT

The State Department has updated its policy guidance in the Foreign Affairs Manual of the United States (the "FAM") to include a visa category for offshore wind projects. Blank Rome coordinated this effort along with the relevant agencies in the U.S. government. This new guidance solves a regulatory hurdle that had been causing logistical problems for the industry by clarifying the correct type of visa that will be issued by U.S. embassies to crewmembers working on vessels on offshore wind projects.

BACKGROUND

The traditional method of obtaining visas for crewmembers engaged on energy projects located on the U.S. Outer Continental Shelf ("OCS") is to obtain a B-1 visa with an OCS annotation. Crewmembers are issued such a visa on the basis of a letter of non-applicability, which is issued by the U.S. Coast Guard (the "Coast Guard" or "USCG") when it is determined that a vessel is owned or controlled more than 50 percent by foreign interests so that foreign citizens can crew a vessel engaged in OCS energy projects. The

authority to regulate offshore wind farm energy projects was authorized pursuant to Section 388 of the Energy Policy Act of 2005, which amended the Outer Continental Shelf Lands Act. 43 U.S.C. § 1337(p)(1)(c). Nevertheless, the Coast Guard takes the position that it lacks statutory authority to regulate wind farms located on the OCS. As a result, the Coast Guard will not issue letters of non-applicability, which refusal rendered the State Department unable to issue B-1 (OCS) visas for offshore wind projects.

This has created confusion in industry as to the type of visa that an embassy will issue because crews could no longer obtain a B-1 (OCS) visa. A normal C-1/D crewman visa is not a viable option as it is only valid for 29 days. This type of visa would have provided an inadequate amount of time for the crew to conduct wind farm-related operations offshore. Such an issue could have proven to be a large impediment to the development of the nascent offshore wind sector in the United States.

ANALYSIS

As a result of the confusing visa scheme in place and the lack of specific guidance on offshore wind, U.S. embassies worldwide were interpreting the relevant regulations and guidance in different ways. Some embassies would issue B-1 visas for “transit” purposes. Other times, some consular officials would refuse visas for certain individuals while approving visas for crewmembers on the same vessel. Moreover, it was uncertain how officers of the U.S. Customs and Border Protection (“CBP”) would interpret the applicability of a visa for a crewman headed for a vessel to support a windfarm project on the OCS when arriving in the United States at an airport or port facility to meet a vessel.

Coordination between Blank Rome, the Coast Guard, CBP, and the State Department led to a solution that would allow crewmembers working on offshore wind projects to obtain a B-type visa in order to provide crewman enough time to complete work on an offshore project. Specifically, the State Department amended the FAM on August 20, 2019, to provide guidance to embassy officials to issue a B-1 visa for an offshore windfarm project without the issuance of a Coast Guard non-applicability letter. Under this guidance the B-1 visa should have the following annotation: “B-1 for Transit or Travel to the OCS for Wind Activities; Not OCS Activity.” This B-1 visa provides the flexibility for crewmembers on offshore wind projects on the OCS to transit to their vessels and perform the projects necessary to their vessel’s mission. The FAM now reads:

Activities occurring on the OCS that do not involve “minerals of the OCS,” *e.g.* a wind farm project, would not be considered by the USCG to be an OCS activity and, therefore, an alien seeking a visa to transit or travel to the OCS would not have a USCG letter to present. Applicants seeking to transit or travel to the United States to join a vessel engaged in non-OCS activity, to include wind farm activity, are not subject to the requirements above. As the OCS is not within the “United States” for visa purposes, you may issue a B-1 visa to an alien who is otherwise eligible for the B-1 visa and who seeks to transit or travel to the OCS for non-OCS activity. The visa

may be annotated, but should be distinguished from the annotation in the paragraph above. For example, the visa may be annotated as follows: “B-1 for Transit or Travel to the OCS for wind activities; not OCS activity.”

Interestingly, in parallel to the changes for OCS projects, the State Department has changed its approach on the visa regime for oil and gas projects. The new guidance changes the annotation for the visa for an oil and gas project from B-1 (OCS) to “B-1 for Transit or Travel to the OCS.” This annotation distinguishes it from the wind farm annotation.

Although these changes are a positive step for all involved in the offshore wind industry, there are still outstanding issues that this change does not address. As this visa is OCS-specific, it may not be the proper visa for crewmembers working on non-OCS offshore wind projects, *i.e.*, those within 3 nm of shore. Additionally, the Coast Guard continues to take the position that it does not have authority to regulate offshore wind projects. It remains unclear if the Coast Guard’s decision not to regulate offshore wind could pose future difficulties for industry.

CONCLUSION

The changes to the FAM are a positive step to facilitate offshore wind projects in the United States. Project managers and vessel owners and operators should study these changes and ensure that its applicable visa application procedures for its crewmembers and contractors take into account this guidance to ensure that offshore wind projects can be adequately staffed without delays. Additionally, given the nascent nature of the offshore marine industry and the different U.S. government agencies involved in regulating wind farms, stakeholders should expect similar regulatory issues to occur in the future.

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