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USCIS ISSUES GUIDANCE ON INCREASE IN H-1B AND L FEES

Posted on August 20, 2010 by Cora-Ann Pestaina

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On August 19, 2010 USCIS held a stakeholders teleconference to provide much needed guidance on its implementation of Public Law 111-230 which was signed into law by President Obama on August 13, 2010 and will remain in effect until September 30, 2014. The panel included such recognizable names as Donald Neufeld. Although Public Law 111-230 increases H-1B and L-1 petition fees effective immediately upon enactment on August 13, 2010, USCIS will apply it to certain H-1B and L-1 petitions postmarked on or after August 14, 2010.

Essentially, Public Law 111-230 applies to employers who employ more than 50 employees AND have more than 50% of the workforce employed on H-1B, L-1 or on an employment authroization document (EAD) pursuant to L-2 status. Both full-time AND part-time employees must be counted and employers need only consider employees currently working in the U.S. Employers with employees on H-1B, L-1 or L-2 status, where the employees are constantly entering and leaving the US, should perform their calculation for purposes of Public Law 111-230 at the time of filing the relevant H-1B or L-1 petition. Public Law 111-230 only applies upon the petitioner filing its first H-1B or L-1 petition on behalf of the beneficiary. Accordingly, Public Law 111-230 does not apply when filing H-1B or L-1 petitions for extensions of stay by the same petitioner for the same beneficiary.

Several stakeholders had questions with regard to corporations with several subsidiaries each holding its own Federal Employer Identification Number. Stakeholders were concerned that depending on which corporation was used to perform the calculation, the employer could be subject or not subject to

Public Law 111-230. USCIS offered no particular guidance on this except to point out that for the purposes of Public Law 111-230, it will use the definition of employer found at 8 CFR§214.2(h)(4)(ii) which states:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

(1) Engages a person to work within the United States;
(2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
(3) Has an Internal Revenue Service Tax identification number.

Under Public Law 111-230, in addition to the filing fee ($320), the fraud fee ($500), the education and training fee (in the case of H-1Bs - $750 or $1,500) and the optional premium processing fee ($1000), affected petitioners must submit an additional fee of $2,000 if filing an H-1B petition and $2,250 if filing an L-1 petition. USCIS emphasized that it prefers a separate check made out to "Department of Homeland Security" for the required amount. Petitioners seeking guidance on what to write in the memo line on the check will have to wait, but can write "Public Law 111-230 fee" for now. In order to be consistent with the intent of the legislation, USCIS expects the fee to be paid by the petitioner.

USCIS stressed that petitioners who may have already submitted an H-1B or L-1 petition and think that the law may apply to them, should wait for a Request for Evidence ("RFE"). They will be given 30 days to pay the fee or provide evidence as to why they are not subject to the fee or the petition will be denied. USCIS assured listeners that an H-1B or L-1 petition would not be rejected for lack of this fee but would receive an RFE. Going forward, USCIS expects Petitioners who may appear subject to Public Law 111-230 (e.g. a dependent H-1B employer) to include an attestation along with its petition explaining why it is not subject to Public Law 111-230. Petitioner should include whatever evidence it deems appropriate along with this attestation. Soon USCIS will provide further guidance on what evidence it expects to receive.

USCIS is working on new Form I-129 which will include questions pertaining to this new law and will assist petitioners in determining whether the law is applicable to them. USCIS could not comment on any implementations of the law by the Department of State (e.g. re L-1 blanket petitions).