U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

August 9, 2017 **PM-602-0147**

Policy Memorandum

SUBJECT: Definition of "Affiliate" or "Subsidiary" for Purposes of Determining the H-1B ACWIA Fee.

Purpose

The American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) establishes a fee that certain petitioners must pay when filing an H-1B petition with U.S. Citizenship and Immigration Services (USCIS). Specifically, INA 214(c)(9)(B) sets the amount of the fee at "$1,500 for each such petition except that the fee shall be half the amount for each such petition by any employer with not more than 25 full-time equivalent (FTE) employees who are employed in the United States (determined by including any affiliate or subsidiary of such employer)." The terms "affiliate" and "subsidiary" are not defined in INA 214(c)(9)(B). Therefore, to ensure consistency in adjudication and collection of the ACWIA fee, USCIS is issuing this policy memorandum (PM) which: (1) provides the agency's definitions of "affiliate" and "subsidiary" that officers should use to determine the appropriate ACWIA fee; and (2) instructs officers that H-1B employees of the parent company should not be counted toward the total number of FTE employees for purposes of determining the ACWIA fee.

Scope

Unless specifically exempted, this PM applies to and is binding on all USCIS employees.

Authorities

- INA 214(c)(9)(B), 8 U.S.C. 1184(c)(9)(B).
- The American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Public Law 105-277, div. C, tit. IV, 112 Stat. 2681, and the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106-313, 114 Stat. 1251, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, 116 Stat. 1758 (2002).
- The L-1 Visa and H-1B Visa Reform Act of 2004, (part of Consolidated Appropriations Act, 2005, Public Law 108-447, 118 Stat. 2809, 3351-61 (2004)).
- 8 U.S.C. 1356(s).

- 8 CFR 103.7.
- 8 CFR 214.2(h)(19).
- 8 CFR 214.2(l)(1)(ii)(K).
- 8 CFR 214.2(l)(1)(ii)(L)*(1),(2).*
- 20 CFR 655.736(a)(2).

Background

First enacted in 1998, the ACWIA fee was made permanent by the H-1B Visa Reform Act of 2004, enacted as part of the Consolidated Appropriations Act, 2005, Public Law 108-447, div. J, tit. IV.[1] This law set the current fee amounts of $1,500 per qualifying petition for employers with 26 or more FTE U.S. employees, or $750 for employers with no more than 25 FTE employees employed in the United States (including employees employed by any affiliate or subsidiary of such employer). This fee pays for U.S. citizens, lawful permanent residents and other U.S. workers to attend job training and receive low-income scholarships or grants for mathematics, engineering, or science enrichment courses administered by the National Science Foundation and the Department of Labor (DOL). 8 U.S.C. 1356(s)(2) - (4).

The ACWIA fee generally applies to an initial petition filed for a particular beneficiary, a petition requesting to change H-1B employers, and the first petition requesting an extension of stay in H-1B status filed by the same petitioner filing for the same beneficiary. Certain employers are exempt from paying the ACWIA fee, including primary and secondary education institutions, institutions of higher education and related or affiliated nonprofit entities, nonprofit entities engaged in curriculum-related clinical training, nonprofit research organizations, or governmental research organizations. *See* INA 214(c)(9)(A).

Policy

INA 214(c)(9)(B) sets the ACWIA fee at $1,500 but permits employers with 25 or fewer FTE employees, including the employees of "any affiliate or subsidiary of such employer" to pay a lower fee of $750. Officers should count the petitioning employer's FTE employees, plus FTE employees who are employed in the United States by affiliates and subsidiaries of the petitioner. Officers should not count employees working for affiliates and subsidiaries abroad. The DOL has published regulations defining "full-time equivalence." Generally, the number of FTE employees equals the number of full-time employees[2] plus the number of part-time employees

[1] The 1998 Act set the ACWIA fee at $500 for each H-1B worker sponsored on an H-1B nonimmigrant petition. Pursuant to Pub. L. No. 106-311, in 2000, Congress raised the ACWIA fee from $500 to $1,000. *See* Pub. L. No. 106-311, 114 Stat. 1247 (Oct. 17, 2000).

[2] The DOL defines a full-time employee as "one who works 40 or more hours per week, unless the employer can show that less than 40 hours per week is full-time employment in its regular course of business (however, in no event would less than 35 hours per week be considered to be full-time employment)." *See* 20 CFR 655.736(a)(2)(iii)(A).

aggregated to full-time equivalents. *See* 20 CFR 655.736(a)(2). Since "affiliate" and "subsidiary" are not defined in INA 214(c)(9)(B), USCIS has determined that it is necessary to provide a definition for officers to use in order to promote consistency in determining ACWIA fee payments.

Affiliates

Although DHS does not define "affiliate" in the ACWIA fee context, DHS does define "affiliate" in the context of L-1 nonimmigrant intracompany transferees in 8 CFR 214.2(l)(1)(ii)(L)(*1*) and (*2*). In this section, "affiliate" is defined in pertinent part as: "(*1*) [o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual, or (*2*) [o]ne of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity…."[3] Subparagraph (3) does not apply in the H-1B context (even by extension) because Congress only meant for that partnership provision to apply specifically to multinational managers and executives. This intent appears in the language in 8 U.S.C. 1101, note 12, which clarifies that this accounting partnership definition only applies when considering sections 101(a)(15)(L) and 203(b)(1)(C) of the INA "and for no other purpose." Adopting the L-1 nonimmigrant definition of "affiliate" is a rational approach since this definition has already been defined in DHS regulations. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (presuming that Congress is aware of USCIS regulations at the time it passes a law). Furthermore, adopting an existing definition used in another employment-based nonimmigrant visa context provides for improved consistency and ease of application by officers and stakeholders.

Officers should use the definition of "affiliate" in 8 CFR 214.2(l)(1)(ii)(L)(*1*) and (*2*) when determining the proper FTE employee count for the ACWIA fee. Officers should count the petitioning employer's FTE employees and FTE employees of its affiliates, as applicable. Under this definition, the parent of the petitioning employer should not be counted.

Subsidiaries

[3] Under 8 CFR 214.2(l)(1)(ii)(L) an *Affiliate* is:
(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or
(3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

DHS regulations also define "subsidiary" in the context of L-1 nonimmigrant intracompany transferees in 8 CFR 214.2(l)(1)(ii)(K). The regulation states that a subsidiary is "a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity." Like the definition of affiliate, using an already defined and frequently used definition from DHS regulations is a rational approach and provides for improved consistency and ease of application by officers and stakeholders. *See Goodyear Atomic Corp.*, 486 U.S. at 184-85.

Officers should use the definition of "subsidiary" at 8 CFR 214.2(l)(1)(ii)(K) when determining the proper FTE employee count for the ACWIA fee. Officers should count the petitioning employer's FTE employees and the FTE employees of its subsidiaries, as well as subsidiaries of subsidiaries and affiliates, as applicable.

Policy Conclusion

When determining the appropriate amount of the ACWIA fee, officers should count FTE employees of the petitioning employer and the petitioning employer's affiliates and subsidiaries, as those terms are defined at 8 CFR 214.2(l)(1)(ii)(L)(*1*)-(*2*) and 8 CFR 214.2(l)(1)(ii)(K), respectively. Officers should not include FTEs employees from the petitioning employer's parent company or the parent(s) of any affiliates. In other words, officers should count down and horizontally, including the petitioning employer's other affiliates and subsidiaries, but not up toward its parent or its affiliates' parent(s).

Types of Evidence

To determine if a petitioner may have employees at affiliates or subsidiaries that should be included in the total number of employees when determining the applicable ACWIA fee amount, officers must review the relevant evidence submitted by the petitioner. This evidence may include documentation from the following non-exhaustive list:

- Information provided in the current petition;
- Previous petitions, if applicable;
- Statement from the petitioner attesting to the total number of full-time equivalent employees employed in the United States by the petitioner and its affiliates and subsidiaries;
- The most recent Securities and Exchange Commission Form 10-K filed by the U.S. entity, which lists all the U.S. and foreign affiliates and subsidiaries;
- Copies of bylaws or other corporate documents that list any U.S. and foreign affiliates and subsidiaries;

- The most recent filings that the foreign affiliate or subsidiary filed with a foreign government agency, including any annual report or document which list any U.S. affiliates or subsidiaries;
- Copies of quarterly corporate tax returns;
- Payroll records, including federal or state quarterly wage statements, covering the period of time when the petition was filed;
- Employee lists with position titles and employment start dates;
- Public records;
- IRS annual tax returns including all attachments and schedules; and
- Any other corporate documents that list all U.S. and foreign affiliates and subsidiaries.

Implementation

USCIS is issuing this PM as a final memorandum.

Use

This PM is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications and petitions. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Office of Policy and Strategy.