



AILA National Office  
Suite 300  
1331 G Street, NW  
Washington, DC 20005

Tel: 202.507.7600  
Fax: 202.783.7853

[www.aila.org](http://www.aila.org)

October 22, 2010

Office of Public Engagement  
United States Citizenship and Immigration Services  
20 Massachusetts Ave. NW  
Washington, DC 20529

Via e-mail: [opefeedback@uscis.dhs.gov](mailto:opefeedback@uscis.dhs.gov)

Re: **AILA Comments on USCIS Interim Guidance  
Memorandum: Implementation of Provisions of Public Law  
111-230 Instituting Increased Fees for Certain H-1B and L-1  
Petitions and Applications (AFM Update AD10-48)**

The American Immigration Lawyers Association (AILA) submits the following comments on the USCIS Interim Guidance Memorandum, “Implementation of Provisions of Public Law 111-230 Instituting Increased Fees for Certain H-1B and L-1 Petitions and Applications (AFM Update AD10-48)” (hereinafter “Interim Guidance”).

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on this Interim Guidance and believe that our members’ collective expertise qualifies us to offer views that will benefit the public and the government.

### **Introduction**

At the outset, we would like to commend USCIS for its stakeholder engagement, including the telephonic briefing on August 19, 2010 regarding implementation of this new law. Open dialog with stakeholders, particularly with respect to the institution of new procedures for a new law, clearly leads to more efficient implementation for both the government and the public.

In addition, we would like to commend USCIS for the provision in the Interim Guidance clearly stating that individuals working in L-2 status will not be counted in the calculation of whether more than 50% of an employer's workforce is in H-1B or L-1 nonimmigrant status. We believe this makes practical sense for employers and is in accordance with the spirit of the law. AILA additionally commends USCIS for requiring only a simple statement that the petitioner is or is not subject to the additional fee.

### **Specific Comments**

#### **1. *When the Calculation of 50 or More Employees and More than 50% in H-1B or L-1 Status Must Be Made***

AILA recommends that USCIS clarify that the calculation of whether an employer employs 50 or more employees with more than 50% of the employees in H-1B or L-1 status must be made at time of filing each new H-1B or L-1 petition with USCIS.

#### **2. *Revision to AFM Chapter 31.3 Section (h) Paragraph (6)***

The Interim Guidance establishes a new section (h) to Chapter 31.3 of the Adjudicator's Field Manual (AFM) including paragraph (6) *Treatment of Petitions Once Revised Form I-129 Is Published*. This paragraph states that if a petition subject to the additional fee is submitted without the fee, it will normally be rejected and not receipted into the USCIS case system. However, where an adjudicator encounters a petition subject to the additional fee that was receipted without the fee, the adjudicator is instructed to issue a Notice of Intent to Deny (NOID) soliciting the additional fee. The next sentence goes on to note "[w]henever possible, the notice should cover any other deficiencies in the filing." Given that additional deficiencies may be covered and would have to be responded to by the petitioner, the document issued by the adjudicator should be in the form of a Request for Evidence (RFE) rather than a NOID. The RFE should provide an appropriate time to respond, generally more than 30 days, as provided in paragraph (h)(5).

#### **3. *Clarification Regarding Which Employees to Count in Completing the 50% Calculation***

The Interim Guidance proposes revising Section (b) of Chapter 31.1 and Section (a) of Chapter 32.3 of the AFM to require submission of the additional fee if "more than 50 percent of the petitioner's employees in the United States are in H-1B, L-1A, or L-1B nonimmigrant status...." AILA urges USCIS to clarify the phrase "in H-1B, L-1A, or L-1B nonimmigrant status" in this revised section of the AFM. Specifically, USCIS should modify the provision to clarify that employees with a pending I-485 adjustment of status application are not counted as H-1B or L-1 nonimmigrants for purposes of calculating whether the company exceeds the 50% threshold and is therefore subject to the additional fee.

***4. Refund of Public Law 111-230 Fees Where Petitioner Is Determined to Not Qualify as an Employer***

The Interim Guidance revises the AFM to apply the definition of “United States employer” found at 8 CFR §214.2(h)(4)(ii) to the determination of who is subject to the Public Law 111-230 fee, but states that “use of this definition for purposes of determining the application of this new fee does not extend or authorize its application beyond Public Law 111-230 and the H-1B rules and regulations.” AILA urges USCIS to enumerate and implement procedures to ensure the prompt refund of all Public Law 111-230 fees in instances where USCIS determines, through initial screening or the adjudications process, that an H-1B or L-1 petitioner does not qualify as a “United States employer” under 8 CFR §214.2(h)(4)(ii).

**Conclusion**

AILA appreciates the opportunity to comment on the Interim Guidance and we look forward to a continued dialogue with USCIS on this matter.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION