INTERIM MEMO FOR COMMENT
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Comment Period Ends: 10-22-2010
This memo is in effect until further notice.

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

October 6, 2010 **PM-602-0009**

Policy Memorandum

SUBJECT: 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)

Purpose
This memorandum provides guidance regarding implementation of the provisions of Public Law 111-230 that increase certain H-1B and L-1 petition fees.

Scope
This memorandum applies to all USCIS employees in the Service Center Operations Directorate.

Authority
Public Law 111-230.

Background
On August 13, 2010, President Obama signed Public Law 111-230, which contains provisions to increase certain H-1B and L-1 petition fees. Effective upon enactment, Public Law 111-230 requires the submission of an additional fee of $2,000 for certain H-1B petitions and $2,250 for certain L-1A and L-1B petitions. The fee applies to petitions postmarked on or after August 14, 2010. Public Law 111-230 will remain in effect through September 30, 2014.

The additional fee applies to petitioners that employ 50 or more employees in the United States with more than 50% of their employees in the United States in H-1B or L-1A or L-1B[1] nonimmigrant status. Petitioners meeting those criteria must submit the additional fee with an H-1B or L-1 petition filed:

- To seek initial nonimmigrant status for an alien described in subparagraph (H)(i)(b) or (L) of section 101(a)(15);[2] or
- To obtain authorization for an alien having such status to change employers.[3]

[1] Individuals working in L-2 status will not be counted in this part of the calculation.
[2] If a petitioner is filing an initial H-1B or L-1 petition on behalf of a beneficiary, the new fee, if it applies, must be paid regardless of whether a prior petition seeking initial grant of status by the same petitioner for the same beneficiary was filed but denied. In other words, this fee applies to any petition seeking the grant of H-1B or L-1 status to a beneficiary if the petitioner is otherwise subject to the law.
[3] A successor in interest, as that term is defined in USCIS guidance memoranda, will not be required to pay the $2,000 or $2,250 fee (if applicable). A petition filed by a successor in interest to a company that previously

To implement Public Law 111-230, USCIS is revising Form I-129, Petition for a Nonimmigrant Worker, Form I-129S, Nonimmigrant Petition Based on Blanket L Petition, and the instructions. Certain portions of the guidance in this Policy Memorandum may be modified when the H-1B Data Collection and Filing Fee Exemption Supplement and L Supplement of Form I-129 are revised to capture information relating to the additional fees.

To facilitate implementation of this new law, USCIS has announced that petitioners should include, as part of the H-1B, L-1A, or L-1B filing packet, the new fee or a statement or other evidence outlining why this new fee does not apply. USCIS has requested that petitioners include a notation of whether the fee in Public Law 111-230 is or is not required in bold capital letters at the top of the cover letter. A Request for Evidence (RFE) may be required even in cases where that evidence is submitted, if questions still remain.

Policy
In accordance with the provisions of Public Law 111-230, USCIS will collect the additional fees required by that statute from each H-1B or L-1 petitioner, as applicable.

Implementation
The Adjudicator's Field Manual (AFM) is revised as follows:

1. Section (b) of Chapter 31.1 is revised by adding the following two paragraphs to read:

(b) Prior Laws.

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On December 8, 2004, President George W. Bush signed the Omnibus Appropriations Act of FY 2005 (also known as the H-1B Visa Reform Act) into law. This Act:

- Reinstated and increased an additional filing fee to $1,500 for certain H-1B petitions filed by petitioners with more than 25 employees in the United States, with some exceptions. This is known as the ACWIA (American Competitiveness and Workforce Improvement Act of 1998) fee.
- Set the additional fee at $750 for certain H-1B petitions filed by petitioners with 25 or fewer employees in the United States, with some exceptions.
- Instituted a Fraud Prevention and Detection Fee of $500 for the first H-1B petition filed by a particular petitioner on behalf of a specific beneficiary on or after March 8, 2005.

On August 13, 2010, President Barack Obama signed Public Law 111-230. Public Law 111-230:

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petitioned for and obtained the grant of H-1B or L-1 status for the beneficiary will be treated as an extension petition, not subject to the new fee.

- Requires the submission of an additional fee of $2,000 for certain H-1B petitions where those petitions are postmarked on or after August 14, 2010;
- Applies if:
  - The H-1B petitioner employs 50 or more employees in the United States; and
  - More than 50 percent of the petitioner's employees in the United States are in H-1B, L-1A, or L-1B nonimmigrant status; and
- Will remain in effect through September 30, 2014.

2. A new section (h) is added to Chapter 31.3 to read:

(h) Additional Fee Required by Public Law 111-230. Public Law 111-230, enacted August 13, 2010, requires the submission of an additional fee of $2,000 for certain petitions seeking H-1B classification.

(1)Definition of Employer. To determine who is subject to the additional fee of $2,000, USCIS will apply the definition of "employer" found at 8 CFR §214.2(h)(4)(ii), which states:

> [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.

The 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.

(2) Counting Full-time and Part-time Employees. For the purposes of Public Law 111-230, all employees, whether full-time or part-time, will count towards the calculation of whether an employer is subject to the new fee.

(3) U.S. and Foreign Payrolls. When calculating the percentage of employees in H-1B or L-1 status, all employees in the United States, regardless of whether they are paid through a U.S. or foreign payroll, will count toward the calculation.

(4) Treatment of Petitions Filed Before Publication of Revised Forms. If either an initial petition for H-1B classification or an H-1B petition requesting a change of employer is filed before the revised Form I-129 is published, the adjudicator will review any explanation or supporting evidence to determine whether the fee

required by Public Law 111-230 applies to the petition, as explained in the following chart:

<table>
<tr><th>If …</th><th>And …</th><th>And …</th><th>And …</th><th>Then …</th></tr>
<tr><td>The H-1B petition is postmarked before August 14, 2010</td><td colspan="3">→</td><td>The fee does not apply; adjudicator can adjudicate the case</td></tr>
<tr><td rowspan="5">The H-1B petition seeking either (a) initial grant of nonimmigrant classification for the beneficiary or (b) authorization for an alien already classified as an H-1B nonimmigrant to change employers is postmarked on or after August 14, 2010 through, and including, September 30, 2014</td><td colspan="3">The petitioner has paid the fee required by P.L. 111-230 OR the petitioner has attached a statement or evidence that it is exempt from the fee required by P.L. 111-230, →</td><td>The adjudicator can adjudicate the case</td></tr>
<tr><td rowspan="4">The petitioner has not paid the fee required by P.L. 111-230 AND the petitioner has not attached a statement or evidence that it is exempt from the fee required by P.L. 111-230,</td><td>The employer has fewer than 50 employees in the United States →</td><td></td><td>The fee does not apply, adjudicator can adjudicate the case</td></tr>
<tr><td rowspan="2">The employer has 50 or more employees in the United States</td><td>50% or fewer of the employees in the U.S. are in H-1B, L-1A, or L-1B nonimmigrant status</td><td>The fee does not apply, adjudicator can adjudicate the case</td></tr>
<tr><td>More than 50% of the employees in the U.S. are in H-1B, L-1A, or L-1B nonimmigrant status</td><td>The fee DOES apply. The adjudicator must issue an RFE explaining that the petitioner must either submit the fee or provide evidence that it is, in fact, not subject to the fee.</td></tr>
<tr><td>The adjudicator CANNOT determine from other documents submitted whether the fee required by P.L. 111-230 applies →</td><td></td><td>The adjudicator must issue an RFE explaining the provisions of P.L. 111-230 and informing the petitioner that he or she must submit either the fee or a statement or other evidence as to why the fee does not apply.</td></tr>
</table>

(5) Composition of Request for Evidence (RFE). If the fee applies but was not collected or if the adjudicator cannot determine whether the fee applies, the

adjudicator should issue an RFE to the petitioner soliciting the additional fee or a statement or other evidence that the fee does not apply. The RFE should also cover any other deficiencies in the filing.

An RFE issued to address only the new fee, should provide the petitioner with a maximum of 30 days to respond to the RFE. If the RFE addresses other deficiencies that would normally allow for more time to respond, then the RFE may provide more than 30 days.

The RFE will inform the petitioner that it must submit an additional fee if it employs 50 or more individuals in the United States and over 50% of those employees are in H-1B, L-1A, or L-1B nonimmigrant status.

- The adjudicator must deny the petition if the petitioner fails to respond to the RFE. (Previously submitted fees will not be refunded.)
- If the petitioner responds to the RFE and indicates that it is not subject to the fee, but there are discrepancies that indicate otherwise, further clarifying information may be requested, or in certain cases, a notice of intent to deny (NOID) may be issued.
- A petition cannot be approved if the petitioner responds to the RFE and provides evidence that it is subject to the additional fee, but fails to submit the additional fee with the response. (If a petition is denied, previously submitted fees will not be refunded.)

(6) Treatment of Petitions Once Revised Form I-129 Is Published. After the revised Form I-129 is implemented, an H-1B petition subject to the additional fee that is submitted without the fee will be rejected. Rejected filings do not retain a filing date. If, after the revised form is implemented, an adjudicator encounters an H-1B petition that was receipted without the additional fee and determines that the fee was required, the adjudicator should issue a NOID soliciting the additional fee. Whenever possible, the notice should cover any other deficiencies in the filing.

(7) Submission of Inaccurate Statement(s) by Petitioner to Avoid Payment of Fee. The adjudicator should follow local procedures to refer to the Center Fraud Detection Office (CFDO) any petition where there is information or documentation to substantiate that the petitioner has inaccurately presented material facts in the petition and supporting documentation to avoid paying the additional fee.

3. Section (a) of Chapter 32.3 to is revised to read:

(a) General.

(1) Basic Provisions. Section **101(a)(15)(L)** of the Act and regulations at **8 CFR**

214.2(l) are designed to facilitate the temporary transfer of foreign nationals with management, executive, and specialized knowledge skills to the United States to continue employment with an office of the same employer, its parent, branch, subsidiary, or affiliate. Petitioners seeking to classify aliens as intracompany transferees must file a petition on **Form I-129** (including the L supplement) or, in the case of a visa-exempt alien, on **Form I-129S** with USCIS for a determination of whether the alien is eligible for L-1 classification and whether the petitioner is a qualifying organization. An individual L-1 petition is filed at the service center having jurisdiction where the alien will be employed, except that NAFTA cases (discussed in **Chapter 37**) may be filed at Class A ports of entry. General adjudicative principles and procedures described in **Chapter 10** apply. For statistical purposes, executives and managers are internally coded (in CLAIMS) L-1A and specialized knowledge employees are coded L-1B, although only "L-1" is used for visa issuance and admission purposes.

(2) Fee Required by Public Law 111-230. Public Law 111-230, enacted August 13, 2010, requires the submission of an additional fee of $2,250 for certain L-1 petitions.

(A) Application of the Fee. Public Law 111-230:

- Requires the submission of an additional fee of $2,250 for certain L-1A and L-1B petitions, where those petitions are postmarked on or after August 14, 2010;
- Applies if:
  - The L-1 petitioner employs 50 or more employees in the United States; and
  - More than 50 percent of the petitioner's employees in the United States are in H-1B, L-1A, or L-1B nonimmigrant status; and
  - Will remain in effect through September 30, 2014.

(B) Definition of Employer. To determine who is subject to the additional fee of $2,250, USCIS will apply the definition of "employer" found at 8 CFR §214.2(h)(4)(ii), which states:

> [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.

The 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.

(C) Counting Full-time and Part-time Employees. For the purposes of Public Law 111-230, all employees, whether full-time or part-time, will count towards the calculation of whether an employer is subject to the new fee.

(D) U.S. and Foreign Payrolls. When calculating the percentage of employees in H-1B or L-1 status, all employees in the United States, regardless of whether they are paid through a U.S. or foreign payroll, will count toward the calculation.

(E) Treatment of Petitions Filed Before Publication of Revised Forms. If either an initial petition for L-1 classification or an L-1 petition requesting a change of employer is filed before the revised Form I-129 and Form I-129S are published, the adjudicator will review any explanation or supporting evidence to determine whether the fee required by Public Law 111-230 applies to the petition, as explained in the following chart:

If …	And …	And …	And …	Then …
The L-1 petition or Form I-129S filed by a visa-exempt individual is postmarked before August 14, 2010	→			The fee does not apply; adjudicator can adjudicate the case
The L-1 petition (or Form I-129S filed by a visa-exempt individual) seeking either (a) initial grant of nonimmigrant classification for the beneficiary or (b) authorization for an alien already classified as an L-1 nonimmigrant to change employers is postmarked on or after August 14, 2010 through, and including, September 30, 2014	The petitioner has paid the fee required by P.L. 111-230 OR the petitioner has attached a statement or evidence that it is exempt from the fee required by P.L. 111-230,	→		The adjudicator can adjudicate the case
	The petitioner has not paid the fee required by P.L. 111-230 AND the petitioner has not attached a statement or evidence that it is exempt from the fee required by P.L. 111-230,	The employer has fewer than 50 employees in the United States	→	The fee does not apply, adjudicator can adjudicate the case
		The employer has 50 or more employees in the United States	50% or fewer of the employees in the U.S. are in H-1B, L-1A, or L-1B nonimmigrant status	The fee does not apply, adjudicator can adjudicate the case
			More than 50% of the employees in the U.S. are in H-1B, L-1A, or L-1B nonimmigrant status	The fee DOES apply. The adjudicator must issue an RFE explaining that the petitioner must either submit the fee or provide evidence that it is, in fact, not subject to the fee.
		The adjudicator CANNOT determine from other documents submitted whether the fee required by P.L. 111-230 applies	→	The adjudicator must issue an RFE explaining the provisions of P.L. 111-230 and informing the petitioner that he or she must submit either the fee or a statement or other evidence as to why the fee does not apply.

(F) Treatment of I-129S. If the fee applies, the petitioner should remit the additional fee to the USCIS office where the Form I-129S is filed.

(G) Composition of Request for Evidence (RFE). If the fee applies but was not collected, or if the adjudicator cannot determine whether the fee applies, the adjudicator should issue an RFE to the petitioner soliciting the additional fee or a statement or other evidence that the fee does not applies. The RFE should also cover any other deficiencies in the filing.

An RFE issued to address only the new fee, should provide the petitioner with a maximum of 30 days to respond to the RFE. If the RFE addresses other deficiencies that would normally allow for more time to respond, then the RFE may provide more than 30 days.

The RFE will inform the petitioner that it must submit an additional fee if it employs 50 or more individuals in the United States and over 50% of those employees are in H-1B, L-1A, or L-1B nonimmigrant status.

- The adjudicator must deny the petition if the petitioner fails to respond to the RFE. (Previously submitted fees will not be refunded.)
- If the petitioner responds to the RFE and indicates that it is not subject to the fee, but there are discrepancies that indicate otherwise, further clarifying information may be requested, or in certain cases, a notice of intent to deny (NOID) may be issued.
- A petition cannot be approved if the petitioner responds to the RFE and provides evidence that it is subject to the additional fee, but fails to submit the additional fee with the response. (If a petition is denied, previously submitted fees will not be refunded.)

(H) Treatment of Petitions Once Revised Form I-129 and Form I-129S Are Published. After the revised Form I-129 and Form I-129S are implemented, an L-1 petition subject to the additional fee that is submitted without the fee, will be rejected. Rejected filings do not retain a filing date. If, after the revised form is implemented, an adjudicator encounters an L-1 petition that was receipted without the additional fee and determines that the fee was required, the adjudicator should issue a NOID soliciting the additional fee. Whenever possible, the notice should cover any other deficiencies in the filing.

(I) Submission of Inaccurate Statement(s) by Petitioner to Avoid Payment of Fee. The adjudicator should follow local procedures to refer to the Center Fraud Detection Office (CFDO) any petitions where there is information or documentation to substantiate that the petitioner has inaccurately presented material facts in the petition and supporting documentation to avoid paying the additional fee.

4. Section (a) of Chapter 32.4 of the AFM is revised by adding a second note to read:

Note 2: Although Public Law 111-230, enacted August 13, 2010, requires the payment of an additional fee in the case of certain L-1 petitions, that fee does not apply to the filing of a blanket L-1 petition. However, the additional fee may apply to certain I-129S petitions submitted to USCIS by visa-exempt aliens.

5. The AFM **Transmittal Memoranda** button is revised by adding, in numerical order, a new entry to read:

AD 10-48 (10/06/2010)	Chapter 31.1(b); Chapter 31.3(h); Chapter 32.3(a); and Chapter 32.4(a)	Provides guidance on implementation of the provisions of Public Law 111-230 requiring the payment of an additional fee in the case of certain petitions and applications relating to H-1B and L-1 nonimmigrants.

Use
This guidance is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by 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 regarding the guidance contained in this memorandum should be directed through appropriate channels to the Service Center Operations Directorate.