USCIS Defines the terms “Affiliates” and “Subsidiary” for H-1b Professional Visa filings

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Intro:

Mr. Andrew Cuevas, Esq., is the President of Cuevas, Garcia & Torres, P.A., and Vantage Property Title Company. Cuevas, Garcia & Torres, P.A., provides legal services in the areas of Community Association Law, Corporate Law, Real Estate law, and Business Immigration, including title insurance services through Vantage Property Title Company. If you have any questions regarding this article or any other questions, you may contact Mr. Cuevas at (305) 461-9500 or via e-mail at acuevas@cuevaslaw.com. If you are interested in reading previous newsletters, please visit www.cuevaslaw.com, select the icon for **Newsletters**, and then choose the area of law you are interested in.

The H-1B category is provided for professionals who have received job offers from a United States employer in a “specialty position.” A "specialty occupation" is defined by the United States Citizenship and Immigration Service (USCIS) as an occupation that requires:

1. Theoretical and practical application of highly specialized knowledge.
2. A bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

On August 9, 2017 the USCIS issued a policy memorandum to clarify the definition of “Affiliate” or “Subsidiary” for Purposes of Determining the H-1B ACWIA Fee. 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 the 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 ($750.00) 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 the INA 214(c)(9)(B), therefore the policy memorandum was issued to assist with this issue. 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.

Although DHS does not define “affiliate” in the ACWIA fee context, the USCIS will look to the definitions that apply to L-1 nonimmigrant intracompany transferees. “Affiliates” therefore will be 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….”

Likewise, the term “subsidiary” will also utilize the L-1 nonimmigrant intracompany transferee definition, which defines “subsidiary” as “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.”

This article is solely a partial explanation of all the issues related to the topic of this newsletter, and is not to be considered legal advice. Persons interested in obtaining more information on the H-1b Professional Visa should consult with their legal counsel to obtain explanations of all issues addressed herein.