Comprehensive Guide on The Impact of Related Entities on H-1B Dependency, USCIS Fees, and More For Employers

This employer guide aims to provide important information regarding the impact of related entities on the H-1B program, specifically as it relates to the aggregation of employees for H-1B dependency determinations and USCIS fees. This guide also provides helpful insight regarding the multiple petitions rule for cap-subject H-1B petitions, which specifically affects related entities.

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INTERNATIONAL LEGAL AND BUSINESS SERVICES GROUP

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The H-1B program, on its own, entails a level of complexity that requires careful legal representation to navigate. When a company is related to another company, either through a parent/subsidiary or affiliate relationship, or by virtue of common ownership, this area of law can become even more nuanced. This employer guide aims to provide important information regarding the impact of related entities on the H-1B program, specifically as it relates to the aggregation of employees for H-1B dependency determinations and USCIS fees. This guide also provides helpful insight regarding the multiple petitions rule for cap-subject H-1B petitions, which specifically affects related entities.

Related Entities & H-1B Dependency

When you file an H-1B petition, you must indicate on the Labor Certification Application ("LCA") whether your company is "H-1B dependent." An employer is considered H-1B dependent if it has 25 or fewer full-time equivalent employees and at least eight H-1B nonimmigrant workers; 26-50 full-time equivalent employees and at least 13 H-1B nonimmigrant workers; or 51 or more full-time equivalent employees of whom 15 percent or more are H-1B nonimmigrant workers.

For H-1B dependent employers, there are additional attestations that must be made on the LCA, unless the H-1B petition is being filed for an "exempt" H-1B nonimmigrant. An exempt H-1B nonimmigrant means either the candidate holds a master's degree or higher in the specific specialty or earns wages at an annual rate of at least $60,000. If the H-1B nonimmigrant is not exempt by virtue of the education held or salary offered, H-1B dependent employers must meet several additional requirements before the petition can be filed.

Related Entities & H-1B Dependency (continued)

First, the H-1B dependent employer must make a good faith effort to recruit U.S. workers for the position. Any qualified U.S. worker must be given fair consideration for the job position. Foreign workers cannot be shown any favor over U.S. workers. This means that any equally or better qualified U.S. worker who applies for the position must be offered the job and the H-1B dependent employer is prohibited from favoring current nonimmigrant employees who have not yet obtained H-1B status (such as those working on CPT or OPT while on F-1 status).

The purpose of an LCA is to protect both the foreign worker and the U.S. worker, by ensuring that the wages and benefits offered to a foreign worker are the same as those offered to U.S. workers. Hiring foreign workers cannot be used as a way to drive down wages. As such, when H-1B dependent employers are conducting this required recruitment, all applicants must be offered the same salary and benefits that will be offered to the H-1B employee. All applicants must be given fair consideration, irrespective of immigration status. For H-1B dependent employers, recruitment for the position must include internal and external recruitment, which must be conducted prior to filing the LCA. Proof of this recruitment process must be included in the employer's Public Access File (PAF) for the non-exempt H-1B nonimmigrant worker. If a qualified U.S. worker applied for the position and was not offered the job, there must be a justification substantiated by supporting documentation included in the file.

Related Entities & H-1B Dependency (continued)

Second, the H-1B dependent employer must attest that no similarly employed U.S. worker will be displaced within a period beginning 90 days before and ending 90 days after the H-1B petition is filed for a nonimmigrant worker. Finally, H-1B dependent employers must attest there will be no secondary displacement. This means that on the LCA, the H-1B dependent employer attests that it will not place the H-1B nonimmigrant at any other employer's worksite that will result in the displacement of any similarly situated U.S. worker. In other words, the H-1B dependent employer must attest that no U.S. worker will be displaced at either their own company or at the end client's worksite, if applicable.

Under the Internal Revenue Code, all employees "within a controlled group of corporations" will be treated as the employees of a single employer. A "controlled group of corporations" is a parent-subsidiary controlled group, a brother-sister-controlled group, or a combined group. These groups are defined below:

- A parent-subsidiary-controlled group is one or more chains of corporations connected through stock ownership with a common parent corporation where at least 80 percent of the stock (by voting rights or value) of each subsidiary corporation is owned by one or more of the other corporations (either another subsidiary or the parent corporation), and the common parent corporation owns at least 80 percent of the stock of at least one subsidiary.
- A brother-sister-controlled group is a group of corporations in which five or fewer persons (individuals, estates, or trusts) own 80 percent or more of the stock of the corporations and certain other ownership criteria are satisfied.
- A combined group is a group of three or more corporations, each of which is a member of a parent-subsidiary controlled group or a brother-sister-controlled group and one of which is a common parent corporation of a parent-subsidiary-controlled group and is also included in a brother-sister-controlled group.

Related Entities & H-1B Dependency (continued)

As such, if your company is part of one of these defined groups, each company within the group will need to be included in the H-1B dependency calculations. In other words, you will need to consider the total number of employees in the employer group as well as the total number H-1B employees in the employer group when determining the percentage of H-1B employees. If the total number of H-1B employees within the employer group meets the percentage threshold for H-1B dependency, you must mark the LCA "H-1B dependent" even if the percentage is not met within your individual company. Then, if the H-1B petition is not being filed for an exempt nonimmigrant (based on education or salary), you will have to ensure compliance with the additional attestations described above.

Related Entities & ACWIA Fees

In addition to H-1B dependency, related entities can also affect the required USCIS fees. For the ACWIA fee, which is required when filing an H-1B New, Transfer, or First Extension petition, the employees of affiliate and subsidiary companies are included in the calculation.

The ACWIA fee for companies with 25 or fewer employees is $750. For those with 26 or more, the ACWIA fee is $1500. In determining the employee number, employees of any affiliate or subsidiary must be included.

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."

Related Entities & ACWIA Fees (continued)

For purposes of the ACWIA fee, USCIS relies on the definition of "affiliate" found in the L-1 regulations. As such, affiliate is defined in pertinent part as: "(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…."

Importantly, for ACWIA purposes, the employees of the parent company of a petitioning employer should not be counted. Only subsidiaries and affiliates, as defined above, are included for ACWIA purposes.

Related Entities and the Public Law Fee

By contrast, related entities do not affect the Public Law fee. The Public Law fee is the additional $4,000 fee imposed on H-1B petitioners with 50 or more employees, with at least 50% on H-1B. The Public Law fee is required for H-1B New and H-1B Transfer petitions. When determining whether the Public Law fee applies, you look only at the H-1B petitioning company's employees; the employees of any affiliate, subsidiary, or other related entity are not considered.

On the USCIS website, USCIS specifically states that "employees of related entities will not count." As such, USCIS will not aggregate the employees of related entities when determining the Public Law fee, even if those employees have been considered for ACWIA purposes or when determining H-1B dependency status.

Related Entities and the Multiple Petition Rule

Finally, related entities should be very careful when filing H-1B cap subject petitions. The multiple petition rule states that an employer may not file, in the same fiscal year, more than one H-1B petition on behalf of the same H-1B beneficiary, if the H-1B beneficiary is subject to the annual cap. The regulations go on to state, in relevant part that:

> "If USCIS believes that related entities (such as a parent company, subsidiary, or affiliate) may not have a legitimate business need to file more than one H-1B petition on behalf of the same alien . . ., USCIS may issue a request for additional evidence or notice of intent to deny or notice of intent to revoke each petition."

Importantly, USCIS extends this rule to all companies acting in concert, even if there is no legal relationship between the companies. In Matter of S-Inc, a decision from the AAO formally adopted by USCIS, ILBSG challenged USCIS's interpretation of "related entities" and forced the agency to provide much needed official guidance. As a result of our appeal to the AAO, USCIS formally clarified that "related entities" includes H-1B petitioners, whether or not related through corporate ownership and control, that file cap-subject H-1B petitions for the same beneficiary for substantially the same job. In other words, if two companies file cap-subject H-1B petitions for the same beneficiary for the same end client project, USCIS will consider the companies related for purposes of the multiple petition rule. USCIS' rationale is that in these instances, there is a presumption the companies have acted in concert, even if there is no legal relationship.

As such, when related entities register for and/or file H-1B cap-subject petitions for the same nonimmigrant candidate, the job opportunities must be completely separate and distinct. This means a different project, a different location, etc. If an H-1B petitioner is ever unsure whether the rule is implicated, we advise first consulting with an experienced immigrant attorney before filing.

Conclusion

The H-1B program requirements can be complex to navigate, particularly for companies which are part of a larger employer group. Because related entities must be considered when making determinations regarding H-1B dependency and calculating the required fees, ILBSG recommends working with an experienced attorney to ensure complete compliance. If you have any questions about your company's legal relationship with any other company and how this might affect your H-1B petitions, please reach out to an ILBSG attorney today. We are here to help.

Have questions about Related Entities?

Contact us anytime at Info@BizLegalServices.com

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