WHICH PARTY HAS RESPONSBILITY FOR PAYING H-1B AND PERMANENT RESIDENCE ATTORNEY FEES AND CASE EXPENSES?

By Barry Walker [1]

The payment of attorney fees in legal matters has traditionally been an area of regulation by state law. However, the federal agencies that regulate U.S. immigration processes have increasingly undertaken to regulate these relations between attorneys and the immigration client. It is very important that immigration practitioners understand the current state of the law, concerning which party in the employer/employee relationship, has the burden of paying attorney fees and case expenses. In dual representation situations, the immigration attorney should be prepared to advise both the employer and the alien employee concerning which party can lawfully pay attorney fees, case expenses, and filing fees. The immigration attorney must diligently avoid participation in any covert scheme to shift payment to an unauthorized party.

Payment of Attorney Fees and Case Expenses in H-1B Cases

Since December 2000, U.S. Department of Labor (USDOL) regulations have addressed the issue of which party may pay the attorney fees and case expenses associated with the preparation and filing of the I-129H petition. [2] The USDOL regulations identify which "authorized deductions" may be deducted from an H-1B worker's pay, and the regulations state that the attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition, are to be considered "business expenses" of the employer, and are not to be deducted from the H-1B employee's pay. [3] The USDOL also takes the position that a deduction occurs when the H-1B employee directly pays a business expense of the employer, such as when the H-1B employee directly pays an attorney or writes a filing fee check to the USCIS.

USDOL regulations state that the deduction of the employer's business expenses from the H-1B employee's pay should not cause the employee's wages to fall below the "required wage" levels. In order to understand the calculation of these amounts, one must look to the definitions of "required wage", "actual wage" and "prevailing wage". The definitions for these concepts are found at 20 CFR §655.731 and 655.715:

> § 655.731(a)(1) The actual wage is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be

[1] Barry Walker has practiced U.S. immigration law since 1991. His practice is concentrated in employment-based immigration, including immigration for foreign physicians. He is a partner with the firm of Walker and Ungo, Tupelo, Mississippi.

[2] 20 CFR 655.731(c)(9)(ii) and 655.731(c)(9)(iii)(C)

[3] The USDOL recognizes that some expenses, such as translations and evaluations of educational credentials and other documents, are properly the expenses of the H-1B employee. Id.

considered: Experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors…

Where there are other employees with substantially similar experience and qualifications in the specific employment in question--i.e., they have substantially the same duties and responsibilities as the H-1B nonimmigrant--the actual wage shall be the amount paid to these other employees. Where no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B nonimmigrant by the employer…

§ 655.731(a)(2) The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application.

§ 655.715 …

Required wage rate means the rate of pay which is the higher of:

(1) The actual wage for the specific employment in question; or

(2) The prevailing wage rate (determined as of the time of filing the LCA application) for the occupation in which the H-1B, H-1B1, or E-3 nonimmigrant is to be employed in the geographic area of intended employment.

In the past, many attorneys have had the impression that the alien could pay attorney fees if he had a sufficient cushion above the prevailing wage. However, the regulation provides that the employer must not deduct expenses (other than allowed deductions) from the H-1B employee's pay that reduce his pay below the required wage.

The practical consequence of the USDOL rule is that the H-1b employer will almost always be required to pay the attorney fees and filing fees associated with the preparation and filing of the I-129 petition. While it is not uncommon for the employee to earn more than the prevailing wage, the H-1B employee almost never earns more than the actual wage. If the H-1B employee is the only employee at the worksite with comparable qualifications, then the H-1B employee's wage is the actual wage. Rarely will an employer pay an H-1B employee more than the wages paid to other similarly qualified employees, performing the same or similar work at the worksite.

Employers who allow H-1B employees to pay attorney fees or filing fees in H-1B cases risk assessment of fines, back pay and debarment from utilization of the immigration process. The USDOL takes the position that an employer that files an H-1B petition, where the H-1B employee has paid attorney fees or filing fees, has committed fraud in the submission of the Labor Condition Application, ETA Form 9035.

The USDOL and the U.S. Citizenship and Immigration Service have recently increased site visits to H-1B employers. One of their key points of inquiry regards the payment of attorney fees and filing fees.

Prince George's County School System Case

A recent USDOL action against the Prince George County School District in Maryland, illustrates the severe consequences that an employer can experience from a USDOL violation. Administrator, Wage and Hour Division vs. Board of Education, Prince George's County, Case No. 2011-LCA-0026, AILA Doc. No. 11100764.

Prince George's County (Maryland) School District (the School District) is one of the largest public school systems in the United States. By April 2011, it employed more than 1000 H-1B foreign national school teachers, mostly from The Philippines.

On April 4, 2011, the USDOL announced that it had reached a settlement agreement with the School District, under which the School District would be assessed a civil fine in the amount of $100,000 and would pay back pay to H-1B school teachers, in the amount of $4,222,146. The School District was also penalized with a two-year debarment from filing any application with USCIS or any Labor Condition Application with USDOL.

Although the Prince George County School District is a very large employer, any size H-1B employer can anticipate that it would be subject to USDOL sanction, especially where USDOL determines that the employer has willfully violated the attestations contained in the ETA 9035.

Tennessee Physician Case
USDOL v. Kutty [4]

In a recent decision, USDOL v. Kutty, No. 3:05-CV-510 **(**August 19, 2011), the U.S. District Court for the Eastern Division of Tennessee ruled that it was proper for the Administrative Review Board of the USDOL, to assess an employer with the attorney fees and expenses associated with obtaining a J-1 waiver for several H-1B physicians. The Court held that the J-1 waiver was necessary for the physicians to be employed in H-1B status, and thus the costs of obtaining the J-1 waiver was an employer business expense, and should be paid by the employer. The J-1 waiver expenses were part of a much larger assessment including attorneys fees paid for preparation of the I-129H and other expenses. The Court stated:

> D. The ARB Was Reasonable in Ordering Dr. Kutty to Pay the Expenses Incurred in Obtaining the H-1B Visas and J-1 Waivers
>
> In the "Final Order and Decision," the ARB concluded that Dir. Kutty should pay the expenses for obtaining the H-1B visas and J-1 waivers. In reaching this conclusion, the ARB held that the fees qualified as "business expenses." Dr. Kutty objects to this determination, arguing that the expenses to obtain the H-1B visas are personal to the employee. [Dr. Kutty's Memorandum in Support of his Petition, Doc. 18, at 28].
>
> Notably, the INA regulations state that in order to satisfy the required wage obligation:

[4] Thanks to Attorney Robert Divine for furnishing the case reports and court decisions on the Kutty case.

> [t]he required wage rate must be paid to the employee, cash in hand, free and clear, when due, except that, deductions made in accordance with paragraph (c)(7) of this section may reduce cash wage below the level of the required wage. 20 C.F.R. § 655.731(c)(1) (1995). In turn, paragraph (c)(7) of 20 C.F.R. § 655.731 allows the employer to take deductions that meet certain criteria. However, deductions that are "a recoupment of the employer's business expense" are not permitted, if the deductions depress the employee's wages below the required wage. 20 C.F.R. § 655.731(c)(7)(ii), (iii)(c), (9) (1995).
> Having reviewed the statute, the Court finds that the ARB has offered a "permissible construction of the statute." Am. Nuclear Res. Inc. v. U.S. Dep't of Labor, 134 F.3d 1292, 1294 (6th Cir. 1998) (internal quotation marks and citation omitted). As an initial matter, the Court notes that obtaining the J-1 waiver is necessary to secure approval of the H-1B petitions. In addition, it is the employer-not the nonimmigrant alien-who files for the H-1B petitions. It is also the employer who attests that he will comply with the responsibilities under the INA, not the employee. It is a reasonable interpretation of the statute to impose costs on the employer, not the employee. Additionally, no fees were assessed against Dr. Kutty that were the result of work performed by the attorneys that were personal to the doctors. [AR 09089-90]. Accordingly, the ARB's decision is affirmed.

In the Kutty case, the ARB and the District Court appears to have overextended the reach of 20 CFR 655.731(c)(9)(ii). That provision pertains to expenses associated with preparation of the LCA and H-1B petition, or other functions which are required to be performed by the employer:

> …. except that the deduction may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of H-1B program functions <u>which are required to be performed by the employer</u>, e.g., preparation and filing of LCA and H-1B petition);

The foreign residence requirement of INA §212(e) is personal to the alien employee. A foreign medical graduate who has entered the United States to engage in graduate medical training is subject to the foreign residence requirement, and there are three enumerated ways that an alien physician can request a waiver of the 212(e) requirement:

> 1) a waiver application based on exception hardship, or
> 2) home country persecution, or
> 3) three years of service to a medically underserved area of the United States, pursuant to INA §214(l) (these are the Conrad 30 program or federal interested government agency programs)

In all of these types of waiver applications, the J-1 alien is the applicant. The third type (Conrad 30 or federal IGA) does require participation and sponsorship by the H-1B employer. However, the J-1 waiver is more akin to the type of preparation that the alien has to bring to the table in order to qualify for a change of status to H-1B, such as the costs of translations, credentialing, licensing, etc. These types of expenses are addressed in the USDOL's introduction to its release of the Interim Final Rule in 2000:

> H-1B nonimmigrants are permitted to pay the costs of functions which by law are required to be performed by the nonimmigrant, such as translation fees and other costs related to the visa application and processing. The Department also recognizes that there may be situations where an H-1B worker receives legal advice that is personal to the worker. Thus, we did not intend to imply that an H-1B worker may never hire an attorney in connection with his or her employment in the United States. While the illustrative expenses (translation fees and other costs relating to the visa application) were not denominated in the NPRM as legal expenses, if they were provided through an attorney these costs and associated attorney fees would be personal to the worker and may be paid by the worker, rather than expenses that would have to borne by the employer. Similarly, any costs associated with the H-1B worker's receipt of legal services he or she contracts to receive relative to obtaining visas for the worker's family, and the various legal obligations of the worker under the laws of the U.S. and the country of origin that might arise in connection with residence and employment in the U.S., are not ordinarily the employer's business expenses. As such, they appropriately may be borne by the worker.

See also, Naomi Schorr and Stephen Yale-Loehr discussion of this point, at Corporate Cuts: Reductions in Pay and Hours for Nonimmigrants by Naomi Schorr and Stephen Yale-Loehr, Cite as: 2 Immigration & Nationality Law Handbook 1 (2002-03 ed.)

> The DOL is specific about what the employer's "legal responsibility" is: only the LCA and the H-1B petition.
>
> While the regulations and the supplementary information to the regulations speak of the H-1B "petition," the DOL has suggested informally that it does not adhere to the plain meaning of the word "petition." According to the DOL, a petition does not just refer to INS form I-129. Rather, it includes the papers submitted in support of the petition.
>
> All other expenses associated with the H-1B program may be borne by the worker. For example, any attorneys fees for functions that are connected to verifying the validity of visa status, reviewing an employment contract, or obtaining H-4 visas for dependent family members are not the employer's business expense. The DOL acknowledges that it has "no right or any interest in inquiring into those."

It is not logical to include the attorney fees associated with obtaining the J-1 waiver, as a business expense of an H-1B employer. When it comes time to advise an employer client however, it will be necessary to point out that at least one court has ruled that the attorney fees associated in obtaining a waiver of the two-year foreign residence requirement, are business expenses of the H-1B employer and should not be borne by the H-1B employee, if they cause the compensation to fall below the required wage.

Payment of H-1B Attorney Fees and Expenses by a Third Party

It is clear that the USDOL has not prohibited the payment of these fees by a third party, so long as the third party is not reimbursed by the H-1B employee. Again, refer to Schorr and Yale-Loehr, id:

> The DOL position on attorneys fees, then, is similar to its position on the $1,000 H-1B filing fee:
>
> "The Department agrees that the statute does not prohibit payment of the filing fee by a third party, nor does it require payment only from the employer. However, the Interim Final Rule does prohibit third-party payment if the third party receives or asks for reimbursement from the alien."

Our office has represented H-1B clients, where a third party has donated money for payment of attorney fees and expenses. The donations were made directly from the third party to the employer, and the employer has issued checks for the attorney fees and filing fees. The third party has signed an acknowledgement that reimbursement from the H-1B employee is not lawful, is not expected and will not be accepted. Under these circumstances, some H-1B cases have been facilitated, especially for public school teacher cases where the school districts are very limited in their budgets.

NEW RULES: DON'T ACCEPT PAYMENT FOR H-1B ATTORNEY FEES FROM THE ALIEN EMPLOYEE!

Payment of Attorney Fees in Labor Certification (PERM) Cases

The rules regarding payment of attorney fees in PERM cases are somewhat more straightforward than in H-1B cases. Essentially, it is clear that the attorney fees and expenses associated with the preparation and filing of the ETA 9089, are to be paid by the employer. This is true of all cases where the attorney represents both the employer and alien employee. See:

20 CFR part 656; 72 Fed. Reg. 29704 (May 17, 2007).

656.12(b) **An employer must not seek or receive payment of any kind for <u>any activity related to obtaining permanent labor certification</u>, including payment of the employer's attorneys' fees, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing a permanent labor certification application**, except when work to be performed by the alien in connection with the job opportunity would benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer. An alien may pay his or her own costs in connection with a labor certification, including attorneys' fees for representation of the alien, **except that where the same attorney represents both the alien and the employer, such costs shall be borne by the employer**. For purposes of this paragraph (b), payment includes, but is not limited to, monetary payments; wage concessions, including deductions from wages, salary, or benefits; kickbacks, bribes, or tributes; in kind payments; and free labor.

656.12(c) Evidence that an employer has sought or received payment from any source in connection with an application for permanent labor certification or an approved labor certification, except for a third party to whose benefit work to be performed in connection with the job opportunity would accrue, based on that person's or entity's established business relationship with the employer, shall be grounds for investigation under this part or any appropriate Government agency's procedures, and may be grounds for denial under §656.32, revocation under §656.32, debarment under §656.31(f), or any combination thereof.

With regard to payment of fees by third parties, this rule is somewhat more restrictive than the H-1B rules. In the PERM case, a third party may pay attorney fees, only if the work that the alien performs accrues to the benefit of the third party, due to the third party’s established relationship with the employer. It is not easy to imagine situations where this type of relationship might exist between an employer and third party. However, one example might be where a Parent Teachers Organization (PTO) pays the attorney fees and expenses related

to a PERM case for a public school teacher. This would be helpful in situations where the school district is hampered by a shortage of funding.

Back Loading Fees

Some clients will request that an attorney "back load" their fees. For example, an employer might be willing to support the alien for permanent residence, but may be willing to pay little or nothing of the fees required to obtain permanent residence. The alien will sometimes suggest that the attorney accept a reduced fee from the employer, for the initial PERM processing. The alien will then offer to pay enhanced fees for the subsequent I-140 and I-485 procedures.

Attorneys should be cautioned against participating in these types of arrangements. It is likely that the USDOL would consider these types of arrangements to be fraudulent.

NEW RULES: DON'T ACCEPT FEES FROM THE ALIEN EMPLOYEE, FOR PROCESSING OF THE APPLICATION FOR ALIEN LABOR CERTIFICATION (PERM)

NEW RULES: IT MAY BE PERMITTED TO ACCEPT FEES FROM THIRD PARTIES, UNDER LIMITED CIRCUMSTANCES

NEW RULES: DON'T AGREE TO "BACK LOAD" YOUR FEES, IN ORDER TO CIRCUMVENT USDOL REGULATIONS