Sharing the Cost of Immigration Sponsorship

When shifting responsibility for fees to employees is permissible and when it's not

By Avalyn C. Langemeier

When a U.S. employer decides to sponsor a foreign national for a work visa, and perhaps later for permanent residence, questions often arise as to who is able to cover the costs. Are there any scenarios in which the employer is able to shift the cost of work visa sponsorship and immigration sponsorship to the foreign national worker?

In many situations, the foreign national worker can pay for the work visa, but there are notable exceptions—including the H-1B specialty occupation work visa and the PERM labor certification application. This article sheds some light on these exceptions and on when sharing some of these costs and fees is permitted—and, more notably, when it's not.

H-1B SPECIALTY OCCUPATION WORK VISA

In order to file an H-1B petition with the U.S. Citizenship and Immigration Services (USCIS), a labor condition application (LCA) must be filed with the U.S. Department of Labor (DOL) concerning the work conditions of the petitioning employer's employees, and H-1B filing fees must be paid to USCIS. (An LCA must be filed for H-1B, H-1B1, and E-3 workers. For purposes of this article, references to "H-1B" include "H-1B1" and "E-3" as well.) Because of the LCA attestations, the DOL has weighed in on the "required wage" that must be paid by the employer for the filing of an H-1B petition with USCIS.

The required wage is the higher of the "prevailing wage" or "actual wage" paid to employees with similar experience and qualifications for the position. See 20 C.F.R. 655.731(a). The actual wage is the guaranteed wage paid by the employer to all individuals in the position with similar experience and qualifications. See 20 C.F.R. 655.731(a)(1).

The required wage must be paid to the H-1B employee when due, except that authorized deductions may reduce the cash wage below the required wage. Benefits and eligibility for benefits provided as compensation for services must be paid on the same basis and in accordance with the same criteria as the employer offers to U.S. workers. These benefits include paid vacations and holidays, health, life, disability, and other insurance plans, retirement plans and cash bonuses, and stock options. By requiring H-1B workers to be treated similarly to U.S. workers, H-1B workers are protected from abuse. Similarly, U.S. workers are protected, as the hiring of an H-1B worker does not depress the wages and working conditions of the U.S. workers. See 20 CFR 655.731(c).

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PERMISSIBLE AUTHORIZED DEDUCTIONS VERSUS BUSINESS EXPENSES

Permissible authorized deductions are deductions that may drop the H-1B worker's salary below the required wage, except that an employer's business expense shall not be paid by the H-1B employee. See 20 C.F.R. 655.731(c)(9).

Permissible authorized deductions are limited and include

- deductions required by law, such as Social Security;
- deductions that are authorized by collective bargaining agreement, or are reasonable and customary in the occupation or area of employment, except that the deduction may not recoup an employer's business expense; or
- deductions for which the employee has given voluntary, written authorization and that are principally for the benefit of the employee, are not a recoupment of an employer's business expense, do not exceed actual cost, and do not exceed limits set for garnishment of wages in the Consumer Credit Protection Act.

Business expenses are defined by the DOL as expenses that are "required to be performed by the employer" in preparation of the LCA or H-1B. These business expenses, such as H-1B attorney fees and costs, are not permitted to be paid by the H-1B employee if payment by the H-1B employee would reduce the salary below the required wage. See *Kutty v. DOL*, Case No. 11-6120 (6th Cir. 2014)—the court affirmed the decision finding the employer personally liable and medical clinics corporately liable for back wages and the costs of obtaining the H-1B, and for other immigration violations. See also *Matter of [name not provided]*, EAC 03 132 50139 (AAU Jan. 23, 2007)—attempts by the H-1B employer to recover sums spent on attorney fees connected to the performance of H-1B functions were considered an impermissible recoupment of business expenses.

In one case, the DOL fined Prince George's County (Maryland) Public Schools for H-1B violations. The parties reached a settlement in July 2011 to pay more than $4.2 million in back wages when the teachers paid the attorney fees, and in some cases filing fees, which reduced their salary below the required wage. The administrative law judge approved this settlement with the DOL on September 20, 2011, whereby the schools agreed to pay the more than $4.2 million in back wages, a $100,000 civil penalty conditioned upon a two-year debarment period, and debarment from the H-1B program for two years. See ALJ Decision and Order approving settlement

agreement, *Wage & Hour Div. v. Prince George's Co. Bd. of Education,* Case No. 2011-LCA-00026, 9/20/2011.

In a more recent case, *Matter of Sajida Ahad, M.D., 4/13/16,* a DOL judge found that an employer impermissibly reduced the wage that was listed on the LCA and H-1B and ordered payment of $223,824 to the H-1B employee. The employer had argued that clinical compensation was guaranteed for only the first two years of employment and that after that time period it could be reduced for decreased productivity, including decreased productivity that was due to the H-1B employee's taking of authorized vacation and maternity leave.

Accordingly, H-1B-related fees and expenses cannot be considered permissible deductions when they would reduce the salary to below the required wage—the higher of prevailing or actual wage. If the payment of costs would not reduce the wage below the required wage and would otherwise qualify as a permissible authorized deduction, then such payments by the H-1B employee would be permissible.

EXPENSES PERSONAL TO THE EMPLOYEE CAN BE PAID BY THE EMPLOYEE

Payment by the H-1B employee of expenses that are "personal" to the H-1B employee is permitted regardless of whether the salary is reduced to below the required wage. For example, an H-1B employee's payment of a recruiter fee is permitted. An H-1B employee can also pay the legal and filing fees for his or her H-4 dependents, as these are expenses personal to the H-1B employee and are not required for preparation and filing of the LCA or H-1B.

H-1B FILING FEES AND PREMIUM PROCESSING

The $325 H-1B filing fee can be paid by the H-1B employee, unless payment by the employee would reduce the salary below the required wage. Because this fee is nominal, especially with respect to the other fees, generally employers pay this filing fee as a matter of course.

The American Competitiveness and Workforce Improvement Act (ACWIA) filing fee, which is used to train U.S. workers, must be paid by the employer. This filing fee is $750 or $1,500, depending on the size of the employer.

The $500 anti-fraud filing fee, which is used to fund the USCIS anti-fraud program, can never be paid by the H-1B employee or by anyone on behalf of the employee, per USCIS and DOL regulations. Can the H-1B employee, however, pay for premium processing, which is optional? The answer depends.

If premium processing is needed so that the foreign national can begin work with the H-1B employer by the requested start date, then premium processing would be a business expense. The employer must pay for the fees and costs related to requesting premium processing, including the $1,225 USCIS premium processing filing fee, even if payment by the H-1B employee would not reduce the salary to below the required wage.

An H-1B employee who does not need an expedited H-1B approval for work, but who wants the approval only for his or her peace of mind or for the benefit of a family member, could pay for premium processing. For example, H-1B employees can pay for premium processing if they seek an expedited H-4 approval so that a child can obtain the concurrently requested H-4 approval to obtain his or her driver's license.

POSSIBLE FINES FOR VIOLATIONS

In the event of a DOL investigation, failure of the employer to meet the wage requirements and other obligations under the LCA or misrepresentation of LCA conditions may result in payment of back wages, civil money penalties ranging from $1,000 to $35,000 per violation, and/or debarment from all future approvals of any nonimmigrant visa petitions, immigrant visa petitions, or labor certification applications for at least one year. See 20 C.F.R. 655.810.

Because an employer must comply with both USCIS and DOL regulations and the circumstances are case-specific, employers are advised to speak with an immigration attorney to analyze when the employer need not pay for costs and fees associated with an H-1B filing.

PERM LABOR CERTIFICATION APPLICATION

The PERM Labor Certification Application is the first step in the three-step permanent resident process and does not provide work authorization. PERM labor certification is a program monitored by the DOL and requires the U.S. employer to conduct good-faith recruitment through advertisements and other recruitment activities to demonstrate that hiring the foreign worker for a permanent position in the U.S. will not deprive an able, willing, qualified, and

available U.S. worker of a job. The PERM process involves filing the application electronically, which enables the DOL to track and analyze data to more quickly uncover any fraudulent applications. The date that the PERM labor certification application is filed is the "priority date" and establishes the foreign worker's place in line for the green card process.

By regulation, employers *must* pay all costs, including attorneys' fees, and advertising costs involved in the labor certification process where the attorney represents both the employer and the foreign national. The employer cannot require or accept payment or reimbursement from the foreign national for any fees and costs related to the labor certification process. Foreign nationals may pay their own attorney's fees if the attorney represents only the foreign national worker.

For employers that have reimbursement agreements whereby the foreign worker agrees to reimburse the employer for permanent residence process fees and costs should the foreign worker leave the company before or soon after obtaining permanent residence, employers should be clear that the agreement excludes reimbursement by the foreign worker for the PERM labor certification process. Employers must pay for all fees and costs related to the PERM labor certification process and cannot accept reimbursement by the foreign national or a third party paying on the employee's behalf. The foreign national can pay, however, for the fees and costs related to the I-140 Immigrant Petition and I-485 application to adjust to permanent residence unless it is the company's policy to pay for these processes.

CRYSTAL CLEAR

To summarize the above, all fees and costs related to the PERM labor certification application process must be paid by the employer. Therefore, in this situation, no analysis is needed because the regulations are crystal clear that the employee—or someone paying on the employee's behalf—must *not* pay for the PERM labor certification application process.

When it comes to H-1B-related fees and expenses, with the exception of the ACWIA and anti-fraud filing fees, these fees may be paid by the H-1B employee or by anyone on behalf of the employee *as long as* such contribution is not to pay for an employer's business expense and does not reduce the employee's salary to below the "required" wage.

Employers are advised to speak with an immigration attorney to analyze when the employer need not pay for costs and fees associated with an H-1B filing.

This also means the *lawful* amount that an H-1B employee may pay toward the costs of his or her H-1B petition process is *very limited*. Because any contribution by the employee to the costs associated with the H-1B process will be "suspect" in the event of a routine USCIS "site visit," or in the unlikely event of a wage dispute or allegation made by the H-1B employee, all H-1B costs should be paid directly by the H-1B employer, and no costs should be reimbursed by the H-1B employee or anyone on his or her behalf.

A determination of whether and how much an H-1B employee may lawfully contribute to the cost of the H-1B process in any given case will require a thorough, case-by-case, factual review and legal analysis. Without this review, the full cost of the H-1B process, including all legal fees and expenses, must be paid by the employer. While there are many instances when costs can be shared, there are also many instances when costs cannot be shared. In the end, it may be simpler if the employer has a policy in place to pay all H-1B fees and costs as a precaution. *M*

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