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Wage and Hour Division
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MEMORANDUM FOR: REGIONAL ADMINISTRATORS AND DISTRICT DIRECTORS

FROM: NANCY J. LEPPINK
Acting Administrator

SUBJECT: H-2A “Prohibited Fees” and Employer’s Obligation to Prohibit Fees

This memorandum provides guidance concerning prohibited cost and fee shifting under the H-2A visa program as well as the employer’s obligation to contractually forbid cost and fee shifting to employees, whether H-2A visa workers or workers in corresponding employment.

Background

The Department’s regulation at 20 C.F.R. § 655.135(j), requires that H-2A program participating employers provide assurances that “the employer and its agents have not sought or received payment *of any kind* from any employee subject to [H-2A] for *any activity* related to obtaining H-2A labor certification” (emphasis added). Further, the regulations specify that H-2A participating employers are obligated to contractually forbid “any foreign labor contractor or recruiter (or any agent of such foreign labor contractor or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H-2A workers” from seeking or receiving “payments or other compensation from prospective employees.” 20 C.F.R. § 655.135(k). There is no difference between deducting a cost directly from a worker’s wages and shifting a cost that should be borne by the employer to the employee. Further, these prohibitions apply with equal force to domestic and foreign workers under the H-2A program.

The assurances and obligations under the Department’s regulations are both independent from and complementary to those of other Federal agencies with responsibilities under the H-2A program (*i.e.*, Department of Homeland Security (DHS) and Department of State (DOS)). This memorandum provides guidance on Wage and Hour Division interpretation and enforcement of the Department’s regulations at 20 C.F.R. Part 655 and 29 C.F.R. Part 501.

Prohibited Fees

The regulation at 20 C.F.R. § 655.135(j) provides that employers are prohibited from shifting costs of any kind for any activity related to obtaining the labor certification, such as “the employer’s attorneys’ fees, application fees, or *recruitment costs*.” 20 C.F.R. § 655.135(j) (emphasis added). The preamble to the February 12, 2010 Final Rule similarly clarifies that Government-mandated costs, such as visa application, border crossing, and visa fees, are included within this prohibition. 75 Fed. Reg. 6884, 6925 (Feb. 12, 2010). The rationale for the prohibition against shifting recruitment costs was first articulated in the February 13, 2008 Notice of Proposed Rulemaking (NPRM), which states that:

Under proposed new § 655.105(n), an employer must attest that it has not shifted and will not shift to the H-2A worker the costs of preparing or filing the application, including the costs of

recruitment or attorneys' fees, and that it has not utilized a foreign recruiter without contractually prohibiting that foreign recruiter from passing on such costs. The recruitment, legal, and other costs associated with filing a temporary labor certification application are business expenses necessary for, or in the case of legal fees, desired by, the employer to complete the labor market test and to prepare and submit the labor certification application. The employer's responsibility to pay the costs of preparing an application exists separate and apart from any potential benefit that may accrue to the foreign worker as a result of the employer filing the application. Prohibiting the employer, including a Farm Labor Contractor (FLC), from passing these costs on to its H-2A worker(s) allows the Department to better protect the integrity of the process, as well as protect the wages of the H-2A worker from deterioration by disallowable deductions. Disallowable deductions taken from an H-2A worker's wages cause those workers to be paid less than the required wage, which results in an adverse effect on U.S. workers. 73 Fed. Reg. 8538, 8547 (Feb. 13, 2008).

Recruitment Costs

Thus, under the plain language of the regulation, recruitment costs must be borne by the H-2A employer.¹ The Department's intention to prohibit employers from passing on all fees associated with the recruitment of workers to those workers was clarified in the preamble to the 2009 NPRM, which stated that, "[a]s in the 2008 Final Rule and in conjunction with similar DHS regulations, the Department proposes to prohibit employers from passing on fees associated with the recruitment of workers . . . such as referral fees, retention fees, transfer fees, or similar charges" (74 Fed. Reg. 45906, 45918 (Sep. 4, 2009)). As further explained in the preamble to the December 2008 Final Rule, the Department believes that requiring employers to incur the costs of recruitment is reasonable, even when the fee is paid in a foreign country (73 Fed. Reg. 77110, 77159 (Dec. 18, 2008)).

Any fee that facilitates an employee obtaining the visa in order to be able to work for that employer will be considered a recruitment fee; however, if the fee is for an item or service that may be used outside the recruitment process, such as a passport that may be used for personal purposes and not just for travel in connection with the H-2A visa, the employee may bear that cost. Therefore, employers and all their agents (whether a first-tier agent that has a direct relationship with the employer or a downstream agent of the employer that provides services via the first-tier agent) are prohibited from passing on to employees any recruitment related fees. This comports with the regulatory language at 20 C.F.R. § 655.135(j), which states that employers and their agents are prohibited from seeking or receiving payment of any kind *for any activity* related to obtaining H-2A labor certification including recruitment costs, and with the language at 20 C.F.R. § 655.135(k), which requires the employer to contractually forbid any foreign labor contractor or recruiter (or any agent of such foreign labor contractor or recruiter) from seeking or receiving payments or other compensation from prospective employees.

Even though employers and their agents are barred from passing on any recruitment fees, employees may be charged some fees by independent facilitators for services such as assisting the employee in obtaining access to the internet or in dealing with the DOS. For example, if a prospective employee voluntarily seeks assistance from an independent third party in preparing his or her visa application, the employee who would otherwise have the option to prepare his or her own application may pay a fee for that service. An independent third party does not include anyone engaged directly or indirectly by the employer in international recruitment of H-2A workers.

As explained in the preamble to the 2010 Final Rule, such fees may be paid by employees only if they are not made a condition of access to the job opportunity. In other words, employees cannot be required to bear such costs if they are de facto recruitment fees charged for access to the H-2A job. 75 Fed. Reg. at 6925. Similarly, an employee may only pay such fees if they are for services that are voluntarily requested by the H-2A employee. If an employee lacks a meaningful opportunity and an independent choice to refuse or decline the service which requires the payment of the fee, the fee is a condition of employment.

¹ Because U.S. workers must be offered the same benefits, wages and working conditions as H-2A workers, recruitment costs for U.S. workers must be paid by the employer. 20 C.F.R. § 655.122(a).

Whether a fee is a condition of employment will depend on the totality of the circumstances, including but not limited to:

- the number of H-2A workers who have opted out of the payment of the fee;
- whether an H-2A worker has been given sufficient time and information to understand the offer of the service for which the fee was paid; or
- the level of the worker's education and/or experience and the relative bargaining power of the worker vis-a-vis the recruiter, facilitator or employment service.

The signing of a document by a prospective worker stating that he/she has agreed to pay the fee does not, in and of itself, establish that the fee is voluntary. Such documents and the circumstances surrounding the signing of those documents will be closely scrutinized to ascertain the bona fides of the assertion that the agreement was voluntary.

Government-Imposed Costs

As the preamble to the February 2010 Final Rule states, Government-mandated fees such as visa application, border crossing, and visa fees (including those imposed by the DOS or other government contractors) are integral to the employer's choice to use the H-2A program to bring foreign workers into the country (75 Fed. Reg. at 6925). Such expenses provide no benefit to the employee other than for that particular limited employment situation. The preamble to the September 2009 NPRM clearly states the Department's intent that "a visa fee for an H-2A visa is one directly attributable to the employer's need for the worker to enter the U.S. to work for the employer; as such it is not reimbursable from the employee to the employer" (74 Fed. Reg. at 45918). Requiring employers to bear the full cost of their decision to import foreign workers is a necessary step toward preventing the exploitation of foreign workers, with its concomitant adverse effect on U.S. workers (75 Fed. Reg. at 6925).

Government-required fees associated with obtaining a visa include the following:

- visa application fee (\$150 as of June 4, 2010 to Banamex in Mexico for example);
- Consulate interview fee (\$26 to a third-party contracted by DOS in Mexico);
- random fingerprinting at the Consulate (\$85); and
- visa issuance fee (formerly \$100, but eliminated as of February 2, 2010 in Mexico).

Obligation to Contractually Forbid

20 C.F.R. § 655.135(k) requires the employer to provide an assurance to the government that it has contractually forbidden "any foreign labor contractor or recruiter (or any agent of such foreign labor contractor or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H-2A workers to seek or receive payments or other compensation from prospective employees." By submitting the application for H-2A certification to the Department of Labor, the applicant is assuring the federal government that it has contractually forbidden those parties who will recruit workers on its behalf from seeking or receiving payments from prospective workers for costs which are to be borne by the employer.

To make such an assurance necessitates that the employer (either directly or through its agent) has taken affirmative, specific action to contractually prohibit such parties from seeking or from receiving such payments. The existence of a properly executed, legally binding written contract that meets the criteria above will be considered *prima facie* evidence of compliance with the requirement to contractually forbid the passing of prohibited fees to prospective workers.

Enforcement Guidance

If a determination is made that a worker has paid a fee or other such cost that should have been borne by the employer, whether to the employer or a person acting on the employer's behalf, and such monies have

not been fully reimbursed to the worker in the worker's first paycheck, the Wage and Hour Division will construe the failure as a violation of 20 C.F.R. § 655.135(j). (Note: Employers are not obligated to advance such fees to employees; rather, employers may wait and reimburse such fees in the employee's first paycheck (75 Fed. Reg. at 6925).) Since the amounts addressed in 20 C.F.R. § 655.135(j) and (k) are prohibited, it does not matter whether such an amount reduces the worker's wages below the H-2A required wage rate.

Further, if the employer cannot document that the employer's agent (or other persons acting on the employer's behalf to recruit the H-2A worker(s)) were contractually forbidden to charge workers fees (or other monies) for obtaining the employment, the employer may be cited for failing to comply with 20 C.F.R. § 655.135(k).

Contractually forbidding an agent, foreign labor contractor, or recruiter (or any agent of such foreign labor contractor or recruiter) from charging fees to workers for obtaining the job may not shield the employer from potential liability. If it is determined that the employer knew or reasonably should have known that the H-2A worker paid or agreed to pay a prohibited fee (*i.e.*, a fee that is a cost that should have been borne by the employer) to a foreign labor contractor or recruiter, the employer can still be in violation of 20 C.F.R. § 655.135(j). However, should the circumstances demonstrate that the employer made a good faith effort to ensure that prospective workers were not required to pay prohibited fees (such as inquiry of both workers and agents/recruiters/facilitators regarding payment of such fees), the Department will take the circumstances into consideration in determining whether a violation occurred.

Violations of the assurances in 20 C.F.R. § 655.135 (j) and (k) are subject to the full range of sanctions and remedies discussed in 29 C.F.R. § 501.16, including but not limited to assessment of civil money penalties and recovery of unpaid wages. Note that this includes recovery of recruitment fees paid in the absence of contract clauses required by 20 C.F.R. § 655.135(k). In addition, the regulation at 29 C.F.R. § 501.20(d)(1)(viii) specifically includes a violation of the requirements of 20 C.F.R. § 655.135(j) or (k) as a basis for debarment or revocation.