Obligations Overlooked – Typical Mistakes H-1B Employers Make

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Employers hurried in the last weeks of March to file H-1B petitions out of fear of missing out on the chance to obtain their share of the 85,000 new visas available annually. U.S. Citizenship and Immigration Services (USCIS) did in fact have to conduct a lottery on April 7 to allot the visa numbers among the roughly 124,000 petitions filed for H-1B workers (technically as "specialty occupation workers").

Just by electronically submitting the Department of Labor form ETA-9035 labor condition application (LCA), a prerequisite for the H-1B petition, the employer is committing to abide by the many obligations imposed by Labor Department regulations—even before USCIS has adjudicated the H-1B petition or the foreign worker has started employment. A recent Labor Department administrative law judge (ALJ) decision is good reason to review the legal obligations of the employer under the H-1B program and learn how to avoid common mistakes made by all too many employers who are trying to control costs or save time and work.

In Administrator, Wage and Hour Division, U.S. Dept. of Labor v. North Shore School for the Arts,[1] the employer, North Shore School, was relieved of any obligation to pay back wages for nonproductive time. While the outcome for the school proved fortunate, the decision—based on unique facts—will most likely provide limited precedential value. North Shore School highlights, however, a variety of typical mistakes that well-meaning H-1B employers make and underscores the consequences faced if they fail to fulfill their immigration obligations.

Doing a Favor

The North Shore School offered the foreign national a part-time position as a piano teacher, 20 hours per week at $40 per hour. During her 21 weeks of employment, the foreign national only taught 74.5 hours of piano lessons, or about 3½ hours per week. The school paid her no salary. The foreign national claimed her employment was terminated because the hours she had worked had "paid back" the fees and costs to the school related to obtaining the H-1B visa.

The school's executive director petitioned for the H-1B "'basically as a favor' for the foreign national,"[2] and "was willing to help [her] with her immigration issues as long as it did not cost [the

[1] 2012-LCA-00039 (Jan. 18, 2013).
[2] Id., at 8.

school] money."[3] How familiar this sounds. The authors so often get inquiries from potential employers interested in "helping" a foreign national that we have a name for this type of matter: "accommodation" cases.

While the intentions may be noble, and the motives altruistic, accommodating employers often lose interest or decide not to proceed when they discover the extensive obligations and costs associated with H-1B sponsorship, the most important of which is that there must be an actual, well-defined job, paid at the higher of the prevailing wage in the locality, or the actual wage paid to the employer's similarly situated workers at the job site. In addition, the position must be a "specialty occupation," a job that requires at least a bachelor's degree (or the work-experience equivalent) in a specialized field.[4] The job location(s) must be identified, and cannot change to another metropolitan area.[5]

No law bars an employer from creating a job to help out a foreign national, but USCIS is skeptical of accommodations, especially if made by a smaller, newer or not so profitable employer. Consequently, there is a much greater risk that USCIS will challenge or deny the H-1B petition. Even if USCIS approves the petition, as it did for the North Shore School, both the USCIS's Fraud Detection and National Security (FDNS) unit and the Labor Department's Wage and Hour Division may later investigate the employer to insure compliance with H-1B legal requirements.[6] One of USCIS's and the Labor Department's legitimate concerns is precisely the approach taken by North Shore School: The employer doesn't want the "favor" it's doing to cost anything.

Allowing Worker to Pay Costs

By way of background, before signing or submitting a "labor condition application" to the Labor Department or the H-1B petition to the USCIS, the employer must determine what the "actual wage" is—the wage rate paid by the employer to all other workers with similar experience and qualifications for the job offered—and the "prevailing wage" for the geographic area of employment, typically by reference to a Labor Department-sanctioned published wage survey. In addition, employers are generally obligated to pay the required salary (the higher of the prevailing or actual wage) "for the entire period of authorized employment."

Moreover, the wage requirement "includes the employer's obligation to offer benefits…provided as compensation for services to H-1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers."[7] There are limited exceptions—for example, for nonproductive time when the H-1B worker is not ready, willing or able to work.[8] In

[3] Id., at 5.
[4] See, in general, 8 C.F.R. §214.2(h)(4).
[5] See 20 C.F.R. §655.731.
[6] FDNS investigations are generally random whereas the Labor Department investigations are generally triggered by a complaint from an aggrieved H-1B worker, a competitor, or even a U.S. consular officer when suspicions are raised at a visa interview.
[7] 20 C.F.R. §655.731(a).
[8] 20 C.F.R. §655.731(c)(7)(ii).

North Shore School the ALJ found that the H-1B worker was not willing to work and therefore was not entitled to back wages for nonproductive time. In cases where the H-1B worker is "benched" for lack of assigned work, lack of a license or any other decision by the employer, the employer must generally pay the full salary and maintain benefits.[9]

In addition, employers are prohibited from passing on to the foreign worker the costs of the H-1B petition. (So there are two financial considerations here for the employer—the compensation of the H-1B worker and the transactional costs of the H-1B petition.) The Labor Department regulations prohibit deductions from wages that are "a recoupment of the employer's business expense (e.g.,…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 the LCA and H-1B petition))."[10]

The statutory prohibition on cost shifting is narrower: The employer is forbidden from receiving reimbursement by the H-1B worker of the training surcharge ($1,500 for employers with more than 25 full-time equivalent employees; $750 for employers with 25 FTE employees or less).[11] This has led many lawyers to argue that the Labor Department regulations are invalid because they overreach, improperly invading the province of the states which regulate the practice of law including the appropriateness of fees and costs.[12]

Uneven enforcement, which has left some in the regulated community with the impression that the Labor Department is primarily concerned that the H-1B worker be paid at least the prevailing wage, has emboldened some lawyers to advise their clients that payment or reimbursement of lawyers' fees by the foreign national is acceptable. This advice can be risky, however, since the amount of the legal fees and costs will pale in comparison to the cost of defending a full-scale Labor Department H-1B audit and bearing the range of penalties, which include both fines and debarment from participation in nonimmigrant work visa sponsorship for at least a year.

In North Shore School, the employer admitted that it accepted payment from the H-1B worker for fees incurred in the filing of the H-1B petition, and that payment was apparently made by salary withholding until the H-1B filing costs (apparently covered up front by the employer) had been recouped. By requiring that back wages be paid by the employer for all hours worked, the ALJ in effect disallowed the employer's attempt to shift the H-1B costs to the H-1B worker.

A lawyer tempted to accommodate both clients in a dual client representation—the foreign national who is willing to pay the fees and eager to get the visa, and the employer who is willing

[9] 20 C.F.R. §655.731(c)(7)(i).
[10] 20 C.F.R. §655.731(c)(9)(C).
[11] 8 U.S.C. §§1182(n)(2)(C)(vi)(II), 1184(c)(9), INA §§214(n)(2)(C)(vi)(II), 214(c)(9). INA §214(c)(12) (8 U.S.C. §1184(c)(12)) also imposes the $500 fraud prevention fee on the "employer," but this is not cross-referenced in INA §213(n)(2)(C)(vi)(II).
[12] See, e.g., AILA Comments on DOL H-1B Rule, AILA InfoNet Doc. No. 15re9010 (posted Feb. 19, 1999), available on the InfoNet service of the American Immigration Lawyers Association.

to file the H-1B petition but wants to avoid the costs—without advising the employer of its obligations under the Labor Department regulations and the cost of defending an H-1B audit, is doing a disservice to the employer client and cavalierly risking one's bar license and malpractice coverage.

Joint Representation

When an employer has the foreign national locate competent immigration counsel, that can be a legitimate way to save time and tap into available networks. Neither employers nor foreign nationals may appreciate, however, that immigration attorneys preparing H-1B petition papers must represent the employer (and may or may not represent the foreign national). The lawyer (and the employer) should therefore insist on defining their relationship clearly, with the lawyer explicitly informing the employer that, by entering a notice of appearance with USCIS, the lawyer is acting as the employer's attorney of record.

The attorney is of course bound by state ethics rules regarding dual representation and potential conflicts of interest. The attorney should therefore advise the employer up front regarding its obligations under the H-1B program, including the obligation to pay attorney fees and other costs of the H-1B petition. Presumably, had North Shore School been properly advised of its obligations, it would likely have never agreed to proceed with the H-1B petition.

Moreover, depending on applicable bar rules, dual representation ordinarily requires (and in any case, prudence warrants) a written disclosure and signed mutual consent to joint representation, outlining the potential risks that employer and employee may encounter, each party's right to obtain independent legal counsel, and the lawyer's duty to share with both parties all facts disclosed to the lawyer that are material to the representation. For many lawyers, stress- and nightmare-free sleep is only available by forswearing joint representation, and instead representing only the employer, who instructs the lawyer and the H-1B worker to cooperate.

Employer expectations on outside immigration counsel to interact directly with foreign national employees (driven in part by the complexity of the law and the lack of in-house HR immigration expertise and time), and the resulting perception by those employees of an attorney-client relationship, make it difficult if not impossible, however, to avoid joint representation in many cases.

Failure to Properly Terminate

One aspect of the Labor Department jurisprudence is so counterintuitive that it bears mention here. The Labor Department regulations provide: "Payment [of wages] need not be made if there has been a bona fide termination of the employment relationship."[13] Nothing unusual there. Immediately after this sentence, the Labor Department regulations include the following: "DHS

[13] 20 C.F.R. §655.731(c)(7)(ii).

regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)).”[14] In 2006, the Labor Department’s Administrative Review Board (which reviews ALJ decisions), in Amtel Group of Florida, Incorporated v. Rungvichit Yongmahapakorn,[15] interpreted “bona fide termination” in light of this last sentence.

Accordingly, in order to effect a properly bona fide termination of H-1B employment and cut off any back wage liability, the employer must both notify the USCIS that it has terminated the employment relationship with the H-1B worker and make available to the H-1B worker, at no cost, transportation home.[16] To document the latter, a written statement should be signed by the H-1B worker acknowledging that return transportation has been provided. Unless these conditions are met, the employer risks liability for back wages for the period of the validity of the H-1B petition, even if the employee rendered no services during that time.

On April 17, the “Gang of Eight” senators—Chuck Schumer, John McCain, Dick Durbin, Lindsey Graham, Robert Menendez, Marco Rubio, Michael Bennet and Jeff Flake—who have been working for months on comprehensive immigration reform, introduced the “Border Security, Economic Opportunity and Immigration Modernization Act,” a bill with over 800 pages of immigration provisions, including over 50 pages dedicated to H-1B visas. While reasonable minds will differ on the merits of this bill and any comprehensive immigration reform legislation that ultimately may be enacted, one thing seems sure: H-1B employers will continue to face a more and more complex body of law with more, not fewer, traps for the unwary.[i]

[14] Id.
[15] ARB Case No. 04-087, 2004-LCA-006 (Sept. 29, 2006).
[16] This issue was notably absent from North Shore School (because of a joint pre-trial stipulation of facts, including the date of termination of the H-1B worker’s employment).

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