CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

HEY BOSS, I NEED PREMIUM PROCESSING: CAN AN H-1B EMPLOYEE PAY THE PREMIUM PROCESSING FEE?

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By Cyrus D. Mehta and Myriam Jaidi

An employer is in the process of preparing an H-1B extension for an employee. The employer is preparing the petition several months before the expiration of the employee's current H-1B status, and therefore has determined to file without premium processing. Moreover, pursuant to 8 CFR § 274a.12(b)(20), the employee can continue working for the same employer for a period not to exceed 240 days after the expiration of the H-1B status provided a timely request was filed. The employee, however, has approached the employer, expressing a need for premium processing because of upcoming travel plans or other personal reasons. If the employer does not need premium processing for its own business reasons, and premium processing would be only for the employee's benefit, may the employee pay the premium processing fee, which is currently $1225? (Please note that this blog post addresses the premium processing fee in the H-1B context only; payment of the premium processing fee by a beneficiary of an I-140 immigrant petition is allowed without question.)

This is a gray area, like so many things in immigration law, because there is no clear rule on the issue and, believe it or not, different government agencies have taken different stances on the issue over time, and of course, no one approach is clearly definitive. Anecdotal data provides some guidance, as so much in our practice comes from cumulative experience on issues like the one here, i.e., whether a beneficiary may pay the premium processing fee. Although no agency has opined on the issue since 2009, allowing the H-1B beneficiary to pay the premium processing fee may be defensible where the benefit inures solely to the employee, the employer has no need for the

premium processing, and the payment of the premium processing fee does not drop the H-1B beneficiary's wage below the required wage.

In 2001, legacy INS (the agency that was dissolved in 2003 and reconstituted as three agencies within the Department of Homeland Security, specifically US Citizenship and Immigration Services (USCIS), US Immigration and Customs Enforcement (USICE), an US Customs and Border Protection (USCBP)) confirmed with AILA (American Immigration Lawyers Association) liaison that "there is no bar to employees providing the Premium Processing fee checks." See ISD Liaison Report for 8/9/01 (AILA InfoNet Doc. No. 01082431 (posted 8/24/01)). On August 12, 2009, the Vermont Service Center (one of the Service Centers of USCIS) issued a practice pointer prepared by their Adjudications Branch that made the following statement on page 12: "The petitioner, attorney, or beneficiary can pay $1000 Premium Processing fee." *See* Adjudications Branch, Vermont Service Center, *VSC Helpful Filing Tips* (August 12, 2009; AILA InfoNet Doc. No. 09112363 (posted 11/23/09)). No restrictions on the beneficiary paying the premium processing fee were noted by legacy INS or USCIS.

Interestingly, also in August 2009 the Department of Labor, Wage and Hour Division issued a Fact Sheet that conflicts somewhat with the USCIS position on the premium processing issue, but does not prohibit the employee from paying it. That Fact Sheet states that an H-1B employee, "whether through payroll deduction or otherwise, can never be required to pay the following. . . . Any deduction for the employer's business expenses that would reduce an H-1B worker's pay below the required wage rate (20 CFR § 655.731(c)(9)), including . . . any expense, including attorney's' fees and the premium processing fee (INA § 286(u)) directly related to the filing of the Petition for Nonimmigrant Worker (Form I-129/I-129W) (20 CFR §655.731(c)(9)(ii) and (iii)(C)." Other things included in that list were tools and equipment, travel expenses while on employer's business, and any expenses, including attorney's fees, directly related to the filing of the Labor Condition Application (LCA).

The only other statement from the DOL was a decision by an Administrative Law Judge (ALJ) in 2008 where the ALJ cited the regulation provision referring to the then $1000 training fee to find that the regulation requires that the employer pay the premium processing fee. *See Toia v. Gardner Family Care Corp*., 2007-LCA-00006 (ALJ Apr. 25, 2008) at page 20. This was clearly an erroneous decision because the ALJ was confusing the premium processing fee,

which the regulations do not specifically prohibit payment by the H-1B beneficiary, and the training fee, which the regulations specifically state must not be paid by the H-1B beneficiary, because both happened to be $1000 at the time of the decision. The DOL Fact Sheet is in fact more amenable to the idea that a premium processing fee could be paid by a Beneficiary because unlike the ALJ decision purporting to ban that practice, the DOL Fact Sheet leaves room to allow a beneficiary to pay a premium processing fee if doing so does not drop the wage below the required wage.

The immigration law treatise, Buffenstein & Cooper, Business Immigration Law & Practice, Volume 1, Nonimmigrant Concepts (AILA 2011), confirms this is a gray area, and provides no conclusive answer. The discussion in the treatise supports the argument that where premium processing is pursued at the insistence of the beneficiary, it could be considered the individual's expense.

The crux of the matter is whether the premium processing fee would be viewed as a "business expense" of the employer under the DOL regulations governing the H-1B LCA, in which case the DOL could view it as a wage & hour issue and analyze whether the deduction of the premium processing fee worked an impermissible dropping of the H-1B employee's wage below the required wage (the higher of the actual or prevailing wage). This is something of a distinction without a difference because in any cases where you have more than one similarly situated employee in a position (i.e., where the position is not unique) the deduction of the premium processing fee would always drop the wage below the actual wage. In positions that are unique, whatever is paid to the unique employee is the actual wage so the premium processing fee would not necessarily drop the wage below the prevailing wage.

There is anecdotal evidence, based on surveying attorneys on a private list serve, that the DOL in at least two LCA investigations did not consider the premium processing fee to be an employer's expense where the employee has requested premium processing for the employee's benefit. Many attorneys on the AILA list serve seemed to agree that premium processing should not be considered an employer expense, but this thread has not been updated since 2007.

One interesting question is whether the premium processing fee could be deducted from a benefit such as a performance bonus. Cash bonuses are considered a "benefit" under the DOL regulations. The regulation states as

follows:

> *Benefits and eligibility for benefits provided as compensation for services (e.g., cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; retirement and savings plans) shall be offered to the H-1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.*

Thus, a company is required to ***offer*** H-1B employees the same benefits as US workers. However, another section of the regulation makes clear that the H-1B employee may choose to turn down benefits:

> *The benefits received by the H-1B nonimmigrant(s) need not be identical to the benefits received by similarly employed U.S. workers(s), provided that the H-1B nonimmigrant is offered the same benefits package as those workers but voluntarily chooses to receive different benefits (e.g., elects to receive cash payment rather than stock option, elects not to receive health insurance because of required employee contributions, or elects to receive different benefits among an array of benefits)*

The upshot is that there is a strong argument to be made for the conclusion that where an employee demands premium processing of an H-1B petition solely for the employee's benefit, that premium processing fee should not be deemed an "employer business expense" such as to trigger a wage/hour analysis of the offered wage that could result in a finding against the employer. In addition, the fee could be deducted from the performance bonus so long as the employee has been offered benefits on the same basis and using the same criteria as offered to US workers, but opts for a different benefit. If an employer takes this approach it would likely be best to get the employee's agreement in writing that they are opting out of the full bonus because of their own need for premium processing on an H-1B petition to accommodate their personal circumstances, and that the premium processing is not done for the employer's benefit.

Obviously, given the conflicting positions taken by USCIS and the DOL regarding premium processing fees, this remains a gray area and the most risk adverse and cautious approach would be to avoid any question of the employer paying the appropriate wage by having the employer pay the premium processing fee. However, as noted above, it is defensible to have the employee pay the premium processing fee where it inures solely to the employee's benefit.

What are the risks? The regulations provide for various penalties relating to LCA violations. A DOL action would only likely come to pass in the event of an employee filing a wage and hour complaint with the DOL, and based on a single complaint on any LCA issue, the DOL could audit all of the LCA files of an employer.

If an employee complains and the DOL determines that the premium processing fee worked a reduction in the required wage, the employer would be required at the very least to reimburse the employee for the premium processing fee. Assuming in the worst case that the DOL misconstrues the premium fee to be like the training fee, which is what the ALJ did in the 2008 decision noted above, the DOL may also impose a $1,000 fine per violation. As a practical matter, an employee may first make a demand for reimbursement or back wages before complaining to the DOL, and under those circumstances, it would be advisable for the employer to reimburse the employee for the premium processing fee. The regulations provide for enhanced penalties for "willful" failure to pay the required wage such as fines up to $5,000 and debarment from filing new H-1Bs. However, this is truly a worst case scenario speculation, based on collective experience with DOL investigations where DOL auditors have taken the position that the fee was not an employer's business expense and have not required the employer to reimburse the employee for payment of the premium processing fee. The expectation would be that an employer would be able to present a strong argument that this is a gray area and there was no willful failure here.

We hope that the DOL and USCIS will coordinate their positions on premium processing in H-1B cases and recognize that it is often employees, not employers, who truly need premium processing on their H-1B cases, and thus should be able to make the payment in those cases to facilitate their own personal plans. Moreover, premium processing is not directly related to the filing of an H-1B petition. It only expedites the petition, which has in any event been filed, and the employee often then desires that the H-1B petition be expedited for personal reasons. In such cases the premium processing fee should not be viewed as an employer's business expense, thus allowing both the employer and employee the best outcome.