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

CAN THE BENEFICIARY PAY THE FEE IN FEDERAL COURT LITIGATION CHALLENGING AN H-1B VISA OR LABOR CERTIFICATION DENIAL?

Posted on June 11, 2018 by Cyrus Mehta

There is a clear prohibition to the foreign national beneficiary paying attorney fees and costs associated with labor certification. Similarly, fees and costs associated with the preparation of an H-1B petition and Labor Condition Application are considered unauthorized deductions from the beneficiary's wage. These prohibitions are set forth in regulations of the Department of Labor that require the employer to bear such fees and expenses. Do these prohibitions extend to situations where the beneficiary seeks federal court review of a denial of an H-1B petition or labor certification application without the employer under the Administrative Procedures Act and pays the fees and costs of such litigation? Should not the Administrative Procedures Act trump DOL regulations that hinder the ability of a beneficiary to initiate and seek review by a federal court of an erroneous denial?

When a beneficiary sues without a petitioner, he or she must assert standing as well as whether the beneficiary's claim fell within the zone of interests that the statute was supposed to protect. Under Article III of the Constitution, the plaintiff must have suffered an injury in fact that is fairly traceable to the challenged conduct and is likely to be redressed by a favorable decision. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A plaintiff also has the ability to sue when his or her claim is within the "zone of interests" a statute or regulation protects. See *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 134 S. Ct. 1377 (2014).

For example, in the H-1B context, *Tenrec, Inc. v. USCIS*, No. 3:16□cv□995□SI, 2016 U.S. Dist. LEXIS 129638 **21□22 (D. Or. Sept. 22, 2016) held that H□1B petition beneficiaries have standing because approval gives them "the right to live and

work in the United States, and imposes obligations such as complying with "extensive regulations" on their conduct; they also have the potential for future employment with a new petitioner. Still, there is no guarantee that every court will recognize that a beneficiary has standing in a lawsuit challenging the denial of a nonimmigrant petition. In *Hispanic Affairs Project v. Perez*, 206 F. Supp. 3d 348 (D.D.C. 2016), the court decided that H-2A sheepherders lack standing because congressional intent was to protect U.S. workers.

With respect to labor certifications, in *Ramirez v. Reich*, 156 F.3d 1273 (D.C Cir. 1998) the DC Circuit Court of Appeals recognized the foreign national's standing to sue, but then denied the appeal since the employer's participation in the appeal of a labor certification denial was essential. While the holding in *Ramirez* was contradictory, as it recognized the standing of the non-citizen but turned down the appeal due to the lack of participation of the employer, the employer's essentiality may have been obviated if the employer had indicated that the job offer was still available. Still, in *Gladysz v. Donovan, 595 F. Supp. 50 (N.D. Ill. 1984)* where the non-citizen sought judicial review after the employer's labor certification had been denied, the court held that the beneficiary was in the zone of interests, but the labor certification denial was upheld as it was not arbitrary and capricious.

If the foreign national seeks review of the denied labor certification in federal court, would the DOL still expect the employer to bear the fees of the litigation pursuant to 20 CFR § 656.12(b)? It can be argued that 20 CFR § 656.12(b) should be limited to activity related to obtaining labor certification and not while appealing a denial to federal court where the employer has dropped out as a plaintiff. If that is not the case, the DOL would be obliterating the alien's ability to seek review in federal court assuming that the employer still had a job offer open for the alien. 20 CFR § 656.12(b) barring the alien from paying the attorney's fee ought to also be challenged by the foreign national who has standing to seek review of the denied labor certification in federal court. Based on the above, it is both necessary and proper to avoid any interpretation of § 656.12(b) that conflicts with the beneficiary's right under the APA from seeking judicial review in federal court, a right that Congress has not taken away. It can be argued that DOL cannot condition or restrict the full and complete exercise of the foreign national's APA rights in any way. That being the case, the courts should be properly reluctant to impose by judicial fiat that which is not already found in the law with unmistakable clarity. See *National Cable & Telecomms.*

Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005)("*Chevron's* premise is that it is for the agencies, not courts, to fill statutory gaps"). Here, when we look at INA § 212(a)(5)(A) there is nothing for DOL to add. The statute is clear and unambiguous. If Congress wants to prevent the alien from going into court under the APA to challenge the denial of a labor certification, then Congress knows how to do it. If DOL wanted to stipulate that an employer always had to go to BALCA or forget about the APA, it could have said too.

Neither Congress nor the DOL has done so despite the fact that the INA has been amended many times and DOL has reinvented the labor certification process more than once. Their silence speaks volumes. There is no need for DOL to clarify what Congress has made crystal clear. That being the case, it is even more transparent that a federal court must honor the intent of Congress and stay its hand against any temptation to take the APA arrow out of a beneficiary's quiver. The silence of those most directly responsible for the creation and administration of the labor certification process suggests, indeed commands, that the foreign national's rights under the APA not only be respected but nurtured and encouraged

The situation is somewhat analogous to the purported regulatory limitations period for federal court review of a naturalization denial, which the Tenth Circuit rejected in *Nagahi v. INS*, 219 F.3d 1166 (10th Cir. 2000).

The Tenth Circuit said of the INA's broad grant of authority to the Attorney General to make rules that "while this delegation is a broad grant of authority, it does not extend to creating limits upon judicial review." *Nagahi*, 219 F.3d at 1170. The Secretary of Labor has, if anything, less broad authority, and what authority the Secretary does have also does not extend to creating limits on judicial review, even indirect ones.

The regulation should not strictly apply to a situation where the attorney is representing the foreign national only and not the employer, which could happen if the alien is the only plaintiff in the APA action that we are contemplating. 20 CFR § 656.12(b)-(c) states:

(b) An employer must not seek or receive payment of any kind for any activity related to obtaining permanent labor certification, 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.

(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.

In this scenario, the *employer* is not seeking or receiving any payment. The only sentence which that fact does not take out of the picture immediately is the one stating that "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."

But even when the employer is the plaintiff, along with the beneficiary, or both the employer and the beneficiary are plaintiffs, it can be argued with equal force that the prohibition against the foreign national paying the fees in a DOL regulation cannot override a claim under the APA that falls within the "zone of interests" that the statute was intended to protect. The beneficiary is paying attorney fees not to obtain labor certification but to seek redress against the DOL for erroneously denying his or her labor certification.

The same analysis can extend to prohibition of payments by the foreign national in the H-1B context. The relevant regulation involves the definition of authorized deduction at 20 CFR § 655.731(c)(9)(ii), which states in relevant part:

he 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 which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition).

Unlike 20 CFR § 656.12(b)-(c), there is no absolute prohibition towards payment of attorney fees and costs relating to the preparation and filing of an LCA and H-1B petition. They are treated as business expenses and have the effect of deducting the beneficiary's wage. If the beneficiary's wage falls below the required wage, it would result in violation. A similar analysis would apply as in the PERM labor certification context. If the lawsuit is being filed by the employee only, then it does not make sense to describe it as among the "H-1B program functions which are required to be performed by the employer", because almost by definition, an employee-only APA action cannot be something required to be done by the employer. Even if the lawsuit is being filed by the employer on behalf of the employee, and the employee pays, it can be forcefully argued that the prohibition against this sort of unauthorized deduction is limited to the preparation and filing of an LCA and H-1B petition, and not when the fee is paid to challenge an arbitrary and capricious denial of an H-1B petition in federal court.

An action in federal court is authorized under the APA and should be distinguished from an administrative challenge of a denial to the Board of Alien Labor Certification Appeals or the Appeals Administrative Unit. Those challenges are not governed by the APA but by agency regulations, which insist that only the employer or petitioner may seek administrative review. The APA, on the other hand, allows the plaintiff, which may include both the petitioner and the foreign national beneficiary, to show that the claim falls within the "zone of interests" that the statute was intended to protect and the plaintiff has suffered injuries "proximately caused" by the alleged statutory violation. *See Lexmark supra*. Even in the administrative review context, the USICS has recognized that the beneficiary of an I-140 may administratively challenge the revocation of an I-140 petition who has exercised job portability pursuant to INA 204(j). See *Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017). While there has never been a prohibition against beneficiaries paying fees and costs associated with I-140s, and so the welcome development under *Matter of V-S-G* is not relevant to this discussion regarding fees, the DOL may still argue that it has latitude to prohibit payment of fees by the beneficiary

whose employer is seeking administrative review at BALCA or the AAO of a denied labor certification or H-1B petition. However, this supposed latitude arguably diminishes or evaporates in the context of an APA action is filed in federal court where the beneficiary's zone of interests that the statute was intended to project have been violated.

Under the Trump administration, there have been an increasing number of H-1B denials of petitions that were routinely approved previously. The stakes are extremely high for such beneficiaries who are caught in the crippling employment-based preference backlogs, and need to seek H-1B extensions well beyond the six year limitation. A denial of a routine H-1B extension can have a devastating impact on the beneficiary and the family. A beneficiary caught in this predicament may have no choice but to resort to suing the agency in federal court. An employer may be gun shy to sue or pay for the litigation, and thus the beneficiary would need to take the initiative and pay the fees and costs associated with such litigation. While we have not yet seen an increase in labor certification denials, they do happen and the stakes are equally high, if not higher, for the foreign national beneficiary who would need to seek redress in federal court. DOL regulations prohibiting payment of fees and costs associated with the preparation of applications should logically not apply to lawsuits in federal court against government agencies to challenge their denials. This is an issue of first impression, and if the DOL continues to assert that fees and costs paid by the foreign national relating to such litigation are prohibited, those rules - especially 20 CFR § 656.12(b)-(c) and 20 CFR §655.731(c)(9)(ii) - ought to also be challenged alongside the lawsuit to set aside a wrongful denial.

(The author thanks David Isaacson for his invaluable input).