PROHIBITION ON PAYMENT OF ATTORNEY’S FEES

By Paull Hejinian

Since July 16, 2007, employers have been prohibited from “seeking or receiving payment of any kind for any activity related to obtaining permanent labor certification.”\textsuperscript{112} In essence, this rule prevents the foreign national (or anyone else) from paying an employer to sponsor a labor certification. The prohibition is very broad, and applies to payment as an incentive to file or as reimbursement for costs incurred, including covering the costs of the employer’s attorneys’ fees.

The regulation is clearly aimed at preventing an employer from having an obligation towards the foreign national. But it also prevents the relatively common practice of having foreign national employee agree to pay back labor certification costs if they leave the company during the green card application process, or soon after.

The regulation also prohibits the barter, purchase, or exchange of labor certifications. The rule prohibits the substitution of one foreign national for another on a labor certification filed after July 16, 2007, but does not prohibit the transfer of an application between employers, such as in a corporate restructuring, as long as no consideration changes hands.

What are activities “related to obtaining permanent labor certification”?

In a set of FAQs\textsuperscript{113} issued soon after the regulation was issued, the Department of Labor used a broad definition of activities “related to obtaining permanent labor certification” including, but not limited to, recruitment activity, the use of legal services, and any other action associated with the preparation, filing or pursuit of an application for labor certification.

The FAQs also defined payment to include monetary payments, deductions from wages, good, services, free labor, or any other type of “in kind” payment, as well as bribes and kickbacks. It specifically prohibited the alien from paying the employer’s attorneys’ fees in connection with the labor certification application.

This definition is very broad and successfully closes all obvious loopholes. The foreign national simply can not pay for the labor certification process in any way, directly or indirectly.

The foreign national is not prohibited from paying her own attorney’s fees. However, the PERM process is structured so that the application can be submitted only by an attorney representing the employer. And the FAQ specifically states that an attorney representing both the foreign national and the employer can not be paid by the

\textsuperscript{112} 20 C.F.R. § 656.12(b)  
\textsuperscript{113} http://www.foreignlaborcert.doleta.gov/pdf/fraud_faqs_07-13-07.pdf
foreign national. A foreign national, therefore, can pay only the legal fees of an attorney advising her on the PERM process when that attorney is not involved in any way in the preparation, filing, or obtaining of the labor certification approval. Finally, an attorney representing the foreign national may not also represent the employer, even pro bono. Dual representation, therefore, is not possible.

**What about payback agreements?**

The FAQ specifically states that the regulation prohibits payback agreements. This prevents the common corporate practice of asking (or requiring) foreign nationals to pay back all or some of the company’s costs of sponsorship under circumstances such as a voluntary termination during, or soon after, green card sponsorship.

**What if the employee agreed before July 16 to pay for the labor certification process?**

The preamble to the regulations indicated that DOL intended to prohibit any “transaction” on or after July 16, 2007 that served to reimburse the employer for expenses related to the labor certification process. The subsequent FAQs further define the prohibited transactions, clarifying that payment on or after July 16 will not be prohibited if the “payment obligation accrued, however, prior to July 16.” In the FAQs, DOL also confirmed that an attorney could seek payment on or after July 16 from a party other than the employer if the payment obligation accrued prior to that date. Thus, the important consideration is not when the employee agreed to pay the costs and fees, but when the payment obligation accrued.

**When does the payment obligation accrue?**

It appears that the payment obligation accrues only when an attorney actually performs work, and not when the foreign national pays, or agrees to pay. In other words, an engagement letter or payment agreement signed before July 16, 2007, or even actual payment before July 16, does not itself make the obligation accrue before the cut-off. The FAQs say that, where a contract exists between a foreign national and an attorney, the employer must pay “for services rendered on or after July 16 in connection with the preparation, filing or obtaining of a labor certification....” This statement indicates that DOL believes the obligation to pay for legal services does not accrue until the services have been rendered. According to the FAQs, if services were rendered prior to July 16, then an attorney may seek to collect an outstanding payment on or after July 16. DOL’s interpretation prohibits an attorney from seeking payment for services rendered on or after July 16, regardless of when the foreign national was obligated to pay the fees.

In order to show that the employer paid for all services rendered on or after July 16, as required by the regulations, an attorney should be able to document when work was done and when specific stages of the process were completed. This information also may be needed to answer Question I-23 on the ETA 9089. (Question I-23 is discussed in detail below.)
In some cases, foreign nationals do not have agreements directly with attorneys but instead they agree to repay the employer for the costs of the labor certification process. In the FAQs, DOL uses the same standard of when the payment obligation “accrued” for agreements between a foreign national and his or her employer. Since the employer is not providing services to the foreign national, the FAQs do not include a similar discussion limiting payment to services rendered before July 16. In short, on this issue, DOL has not defined when the payment obligation accrues in an agreement between an employer and a foreign national.

**What happens to reimbursement agreements signed before July 16, 2007?**

Some employers have reimbursement agreements with foreign national employees in which the foreign nationals agree to reimburse all or part of the costs of the labor certification process if they leave the company within a specified period of time.

It is clear that these agreements are prohibited after July 16. However, agreements signed before July 16 might be valid if the payment obligation also accrued before that date. One could argue that the payment obligation accrued on the day the person left the company, because the leaving triggered the agreement. Alternatively, one could argue that the payment obligation accrued when the agreement was signed, regardless of when the person actually left the company. DOL did not address either of these situations in the regulations or FAQs. In the absence of clear guidance and in light of DOL’s prohibition on reimbursement agreements, an employer should consider the situation carefully before seeking to enforce an existing reimbursement agreement.

**How should I answer Question I-23 on the ETA 9089?**

The FAQs confirm that for PERM applications filed on or after July 16, 2007, DOL will require an affirmative answer to Question I-23 on the ETA 9089 where the employer has sought or received payment from the employee, even where the payment was permissible because the payment obligation accrued prior to July 16. Although Question I-23 refers only to the receipt of payment, DOL will require an affirmative answer where the employer has sought payment, but not yet received payment, from the employee. In addition, DOL will require an affirmative answer to Question I-23 where the attorney sought or received payment directly from the employee. Affirmative answers to Question I-23 must describe the payment, the source of the payment and how, if applicable, the payment obligation accrued prior to July 16, 2007. The FAQs caution employers to be prepared to explain and support the details of such payment, should the information be requested by a Certifying Officer.

**Can attorneys still receive payment from a foreign national for other parts of the process, including the I-140 and I-485?**

The DOL regulations address only labor certifications. The regulation does not prohibit the foreign national from paying for other parts of the permanent residence
process, including costs and fees of preparing and filing the immigrant visa (I-140) and adjustment of status (I-485) petitions. Arguably, some of the work done at the time of preparing a labor certification application, such as collecting work experience letters and education documents, relates to the preparation of the I-140 rather than the labor certification itself. The foreign national could pay for these activities, if they were related only to the filing of these petitions, and not related to the labor certification application itself.

The regulations do not specifically address attorneys structuring fee agreements to relieve the financial burden on employers. However, it would certainly be viewed as improper to change a fee structure to avoid this regulation. It is clear that DOL believes that allowing payment by a party other than the employer undermines the labor certification process. It is likely that DOL will consider any effort to avoid or redistribute the effect of the regulations as undermining the integrity of the process.

On the other hand, it would probably not be improper for an attorney to itemize fee agreements to separate out the costs of a labor certification. For example, if an attorney previously charged a single legal fee for the entire process from labor certification through adjustment of status, it would be appropriate for the attorney to segment future agreements into the stages of the process, clearly defining the fees for the labor certification stage. An attorney may not charge an unreasonable fee, and thus each segment of the agreement must reflect an appropriate fee for that stage of the process. Under current USCIS regulations and policy, an employer is not required to pay for the costs associated with the immigrant petition and application for adjustment of status for employment-based cases. A segmented fee agreement would allow an employee, or other party, to pay for these later stages of the process.

What are the penalties?

The regulation states that evidence of a violation of this rule would be grounds for a government investigation, and may be grounds for denial of the application, revocation of the application after approval, or even debarment of the employer, attorney, or agent.

About the Author

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