

# Passing On H-1b Costs to the Employee? Smart Business Practice or DOL Violation?



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**A**fter all the costs associated with an H-1B petition are totaled, the sum can be alarming. In order to offset this cost, some employers ask that the beneficiary, the employee who is being hired, reimburse the company in whole or in part. Which costs may and may not be paid by the beneficiary can be a tricky matter. What follows is an analysis of H-1B costs and who may pay what.

All deductions from an H-1B worker's pay fall into three categories: authorized, unauthorized, or prohibited.<sup>1</sup> Authorized deductions can be taken without worry of whether or not such a deduction will lower the employee's rate of pay below the required wage rate.<sup>2</sup> Unauthorized deductions, counter to what the term may connote, can be taken from an employee's wage but are considered non-payment and are only allowed if the beneficiary's wage rate, after the deduction(s), is greater than the required amount listed on the Labor Condition Application (LCA).<sup>3</sup> Unauthorized deductions cannot push the employee's wage below either the prevailing wage rate or the actual wage rate, i.e. salaries of those similarly employed and qualified at the work site. Prohibited deductions may not be taken from the employee's pay regardless of the effect they would have on the required wage rate.<sup>4</sup>

The most straightforward of the deductions is the prohibited deduction. The Training Fee associated with the H-1B petition is the only prohibited deduction associated with the cost of filing an H-1B petition.<sup>5</sup> *Rajan v. International Business Solutions, Ltd.* and the language in the relevant regulation make it very clear that the Training Fee is to be paid by the employer or a third party; it is not to be reimbursed in part or whole by the employee. This fee must be completely shouldered by the employer or a party who is not the employee.<sup>6</sup>

Deductions are considered by the Department of Labor (DOL) to be authorized if:

<sup>1</sup> See U.S. Department of Labor- Wage and Hour Division, Fact Sheet #62H.

<sup>2</sup> 20 C.F.R. 655.731(c)(9)

<sup>3</sup> 20 C.F.R. 655.731(c)(11)

<sup>4</sup> 20 C.F.R. 655.731 (c)(10)

<sup>5</sup> It is not however, the only prohibited deduction. Other deductions not associated with the filing of the H-1B petition but dealing with the employee are prohibited. Those prohibited deductions fall outside the scope of this article. See 20 C.F.R. 655.731(c)(10)(i).

<sup>6</sup> 20 C.F.R. 655.731(c)(10)(ii).

- o The deduction is reported as such on the employer's payroll records,
- o The employee has *voluntarily* agreed to the deduction and such agreement is documented *in writing* (a job offer which carries a deduction as a condition of employment does not meet this requirement),
- o The deduction is for a matter that is principally for the benefit of the employee,
- o The deduction is not a recoupment of the employer's business expenses,
- o The amount deducted does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered, and
- o The amount deducted is not more than 25% of the employee's disposable earning.<sup>7</sup>

An Education Evaluation arguably qualifies as an authorized deduction. Similar to a translation fee, which is payable by the employee, the employee is benefiting from the evaluation and will be able to use it in the future in his/her private capacity if s/he so wishes. Of course, if the employee is paying for the evaluation, then s/he must be able to acquire a copy of the evaluation so that the future benefit upon which his/her payment is presumed is a real possibility.

Attorney's fees associated with obtaining H-4 status for family members accompanying the Beneficiary may qualify as authorized deductions since the Beneficiary is the party who primarily benefits from such fees. In addition, attorney fees associated with visa issuance, assuming that international travel is not a requirement for the position, could be properly considered as authorized deductions. In order to properly deduct the attorney fees associated with these processes, it is important that the attorney break down the specifics of how much is being charged for each element of the H-1B process- this will allow the employer to deduct those fees associated with the retention of the visas for the accompanying family members without concerning itself with the deduction requirements necessary for unauthorized deductions.

The circumstances surrounding the Premium Processing Fee determine if deduction of the fee is to qualify as authorized or unauthorized. While the speedy decision that the Premium Processing Fee guarantees often benefits both the employer and the employee, it is important to take notice of which party requests and benefits most from premium processing. If the employee has decided to utilize premium processing for his/her own personal benefit,<sup>8</sup> then the employer may be reimbursed by the employee in accordance with the requirements established by the DOL for authorized deductions. If the employer is

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<sup>7</sup> 20 C.F.R 655.731 (9)(i), (ii), and(iii).

<sup>8</sup> For example: the employee decides that he/she does not wish to wait the prolonged period for regular processing and opts for premium processing so that he/she may get his/her travel plans and preparations in order as quickly as possible.

the party desiring premium process and who will benefit from such processing,<sup>9</sup> then any deductions from the employee's pay are unauthorized and, as such

Deduction of attorney's fees associated with the filing of the LCA or H-1B and the Base Fee (or I-129 Fee) are considered to be unauthorized. These fees are considered to be the employer's business expenses and, for this reason, are not authorized deductions. These fees may be deducted from the employee's pay so long as they do not drop the rate of pay below the required wage rate.

It is not clear whether or not the Fraud Fee which was implemented in March 2005 is unauthorized or prohibited. The language of the act regarding the Fraud Fee states that "the Secretary of Homeland Security shall impose a fraud prevention and detection fee on an employer filing a petition."<sup>10</sup> Almost identical language is used in the Act to refer to the Training Fee.<sup>11</sup> Such similarity could be read to mean that the restrictions of the Training Fee also apply to the Fraud Fee. However, 20 C.F.R. 655 is explicit in saying that the employee cannot pay the Training Fee; no such statement is made regarding the Fraud Fee. The regulation regarding the Training Fee, 20 C.F.R. 655, predates the creation of the Fraud Fee, which may explain this discrepancy. Nonetheless, the language referring to the Fraud Fee is not explicitly prohibitive and an employer may decide to be reimbursed by the employee. If an employer chooses to do so, any deductions from the employee's salary to pay for this fee must meet the DOL requirements for unauthorized deductions.<sup>12</sup>

Before any payments are made by the employee or deductions are taken from his/her pay to reimburse the employer, it must be determined if such deduction is permitted and if so, whether or not it is authorized or unauthorized. Once these preliminary determinations are made, appropriate steps must be taken to ensure that the DOL's requirements are met. As a practical matter, there are very few circumstances in which the prospective employee could legally be made to pay for the costs associated with the H-1b process without an employer risking non-compliance and causing significant record keeping.

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<sup>9</sup> For example: the employer has an immediate need or desire for the foreign national to begin work.

<sup>10</sup> 8 U.S.C.A. §1184(c)(12)(A)

<sup>11</sup> 8 U.S.C.A. §1184(9)(A)

<sup>12</sup> 8 C.F.R. §103.2(f)(1) and Instructions for I-907

FEE	CAN EMPLOYEE PAY?	SPECIFICATIONS
1. Attorney's Fees	Depends	<p>The DOL considers deductions to be <b>authorized</b> if:</p> <ul style="list-style-type: none"> <li>o The deduction is reported as such on the employer's payroll records,</li> <li>o The employee has <i>voluntarily</i> agreed to the deduction and such agreement is documented <i>in writing</i> (a job offer which carries a deduction as a condition of employment does not meet this requirement),</li> <li>o The deduction is for a matter that is principally for the benefit of the employee,</li> <li>o The deduction is not a recoupment of the employer's business expenses,</li> <li>o The amount deducted does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered, and</li> <li>o The amount deducted is not more than 25% of the employee's disposable earning.</li> </ul> <p>[20 C.F.R. 655.731(c)(9)(iii)]</p> <p><b>Unauthorized deductions</b> (which include attorney's fees for the preparation and filing of the LCA and H-1B petition) are considered non-payment [20 C.F.R. 655.731(c)(11)] and are only allowed if the beneficiary's wage rate (after the deductions) is greater than the required amount listed on the LCA. Such deductions cannot push the employee's wage under either the prevailing wage rate or the actual wage rate (i.e. salaries of those similarly employed and qualified at the work site) 20 C.F.R. 655.731(c)(11)</p>
2. Filing Fees a. Base b. Training c. Fraud d. Premium Processing	a. Depends b. No c. Maybe d. Depends	a. Employee payment of the I-129 fee is considered an unauthorized deduction and must follow the DOL's guidelines for such deductions (see above). b. The training fees of the LCA or H-1B petition are to be paid by the employer or a third party, who is not to be reimbursed in part or whole by the employee. (20 C.F.R. 655.731(c)(11); <i>See Rajan v. International Business Solutions, Ltd.</i> ) c. It is not clear whether or not an employee may pay this fee. The language states that "the Secretary of Homeland Security shall impose a fraud prevention and detection fee on an employer filing a petition" [8 U.S.C.A. §1184(c)(12)(A)]. Almost identical language is used in the act to refer to the training fee [8 U.S.C.A. §1184(9)(A)]; such similarity could be read to mean that the restrictions of the training fee also apply to the fraud fee. However, 20 C.F.R. 655 is explicit in saying that

		<p>the employee cannot pay the training fee and no such statement is made regarding the fraud fee. 20 C.F.R. 655 predates the fraud fee which may explain this discrepancy. Unlike the training fee, there is no clear prohibition of the employee paying the fraud fee. If deductions are taken from the employee's salary to pay for the fee, then it must meet the DOL regulations for unauthorized deductions.</p> <p>d. The premium processing fee may be paid by the party which it benefits. If the employee has decided to utilize the premium processing fee for its own benefit, then they may not be reimbursed by the employee. If the employee is the party desiring premium process and who will benefit from such processing, then the employee may be charged the fee. If this payment is to be deducted from the employee's wage, the DOL requirements (see above) must be met. (8 C.F.R. §103.2(f)(1) and Instructions for I-907)</p>
3. Education Evaluation	Yes	<p>While documentation dealing with the issue of who may pay for the Education Evaluation is lacking, it seems that the employee may pay this fee. In order for the deduction to be appropriate, it must meet the DOL requirements (listed above). Similar to a translation (the fees of which are payable by the employee), the employee is benefiting from the evaluation and will be able to use it in the future in his/her private capacity if s/he so wish. (Of course, if the employee is paying for the evaluation, then s/he should be able to acquire a copy of it so that the future benefit upon which his/her payment is presumed is a real possibility). 20 C.F.R. 655.731(c)</p>
4. Miscellaneous	Yes	<p>It must be determined whether such fees fall under the category of authorized or unauthorized deductions. Once this decision is made, appropriate deductions which follow the DOL's regulations (see above) may be taken.</p>

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