U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Public Engagement
Washington, DC 20529

U.S. Citizenship and Immigration Services

August 2, 2010

Talking Points and Executive Summary

Teleconference with H-2A Petitioners

Background

On July 27, 2010, USCIS hosted a teleconference for H-2A petitioners to provide an explanation of the regulatory bar on the passing of recruitment and employment-related costs imposed as a condition of employment to H-2A workers. While the conference call focused on prohibited fees with respect to the H-2A nonimmigrant agricultural worker classification, similar principles and rules apply to the H-2B nonimmigrant, nonagricultural worker classification.

By regulation, USCIS has the authority to deny or revoke a petition when an H-2A worker pays, directly or indirectly, fees that are conditions of obtaining an offer of H-2A employment. See 8 CFR § 214.2(h)(5)(xi). It is important to note that this rule is not new and that the requirements under this rule have not changed; this rule was published in the Federal Register on December 18, 2008 after notice-and-comment rulemaking, and the rule went into effect on January 17, 2009.

Principal Themes

The H-2A regulations specify what fees are prohibited.

- Prohibited fees are all those that are imposed as a *condition* of the H-2A worker's employment or recruitment. Payment of such fees is prohibited whether the payment was made before or after approval of the petition.

- The regulations regarding prohibited fees are intentionally worded broadly. The supplemental information section of the H-2A final rule states explicitly that the rule does not provide a list of prohibited fees, so that the prohibition remains general and is intended to cover "*any money*" paid by the alien worker as a condition of an H-2A employment. As stated in the rule, prohibited fees can include any other form of compensation as well.

- The regulation does provide certain limited exceptions, including:

    - government-mandated passport fees, visa fees, or inspection fees (to the extent permissible under applicable law).

AILA InfoNet Doc. No. 10080473. (Posted 08/04/10)

- the lower of the actual cost or fair market value of transportation to the employment site *as long as the* passing of such costs to the worker is not prohibited by statute.
  - We recommend you refer to guidance issued by the U.S. Department of Labor as to further guidance on what costs may be passed to the worker. *See U.S. Department of Labor Final Rule, Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 FR 6884, 6914-6916 and 6924-6926 (Feb. 12, 2010).

- Fees paid for *by the employer* to a recruiter, facilitator, or similar employment service are NOT considered prohibited fees. An employer may choose to avoid any prohibited fee issues (and therefore, any related requests for further evidence) by paying all otherwise prohibited fees, rather than passing such fees on to the H-2A worker or allowing the worker to take on these costs.

If the fees do not fall under the limited exceptions allowed, USCIS then determines whether the fees are conditions of employment.

- In determining whether fees are conditions of employment, USCIS will focus on whether an H-2A worker has or has had a meaningful opportunity and a truly independent choice to voluntarily decline the payment of fees that do not fall within any exception, and still obtain employment with a particular employer. The mere fact that an H-2A worker has decided he or she would like to work in this country as a nonimmigrant or for a particular employer does not, in itself, establish that the H-2A worker has had a meaningful opportunity and/or independent choice to agree to the payment of any fees.

- USCIS will focus on the *totality of circumstances* surrounding the payment of fees to a particular facilitator/recruiter or any deductions from the worker's paycheck that are paid to a facilitator/recruiter or similar employment service.

- The factors that USCIS may consider in determining whether the fees are prohibited, include, but are not limited to the following factors:

  - Statistics: such as the number of H-2A workers who have been able to opt out of the payment of a fee to a particular recruiter.

  - Process: whether an H-2A worker has been given sufficient time and information to understand the offer of employment terms and conditions and/or whether the visa process has been adequately explained to the H-2A worker.

  - Findings or reports: information from within DHS or other federal agencies that a particular employer, agent, facilitator, recruiter, or similar employment service may be charging a prohibited fee.

  - Inconsistencies: conflicting statements or reports by a petitioner, employer or employment service that may call into question whether the payments are conditions of employment.

  - Bargaining position: the level of the worker's education and/or experience and the relative bargaining power of the worker vis-à-vis the recruiter, facilitator, or similar employment service.

- The mere fact that an H-2A worker signs or has signed a document stating that he/she has agreed to pay the fee does not, by itself, establish that the fee is not a condition of employment.

- Again, these are among some of the factors that USCIS will consider in examining the totality of circumstances surrounding the payment, or promise of payment, of any fees by the H-2A worker.

As the upcoming fall harvest season approaches, USCIS anticipates the possibility of issuing Requests for Evidence (RFEs) to certain petitioners.

- The RFE will provide the petitioner with 84 days to respond. This will provide ample time for an employer to respond to any RFE. An employer may respond to an RFE sooner than 84 days, and, in such cases, USCIS will review the response upon receipt.

- If USCIS does not receive any response to this RFE, it will proceed with a denial. A Notice of Intent to Deny (NOID) will not be issued.

- Please note that the information that USCIS receives in response to the RFE may be shared, as appropriate, with other federal agencies.