



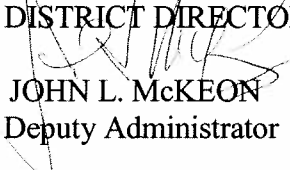
U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210



August 21, 2009

FIELD ASSISTANCE BULLETIN NO. 2009-2

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
DISTRICT DIRECTORS

FROM: 
JOHN L. McKEON
Deputy Administrator

SUBJECT: Travel and Visa Expenses of H-2B Workers Under the FLSA

As Field Assistance Bulletin No. 2007-1 explains, the H-2B visa program of the Immigration and Nationality Act (INA) allows employers to hire foreign workers to meet a temporary need for nonprofessional, nonagricultural skills, after the Employment Training Administration has issued an H-2B labor certification for use in securing the visa. When that Bulletin was issued on May 2, 2007, the Wage and Hour Division had no direct authority to enforce the conditions of H-2B visa petitions, including the prevailing wage. However, as that Bulletin clarifies, the INA does not preclude Wage and Hour from enforcing other laws (*e.g.*, the FLSA, SCA, DBRA, MSPA, and OSH Act FS/TLC) with respect to H-2B workers.

In January 2009, the Department of Homeland Security delegated to Wage and Hour enforcement authority to ensure that H-2B workers are employed in compliance with the H-2B labor certification requirements. Wage and Hour issued regulations implementing this authority, 29 C.F.R. Part 655, which became effective on January 18, 2009. Those regulations are applicable to applications for certifications filed on or after that date.

In light of Wage and Hour's new enforcement authority with regard to H-2B workers, it is important to address the interaction of the H-2B program and the FLSA. In particular, as explained below, Wage and Hour has concluded under the FLSA that the transportation expenses and visa fees of H-2B employees are primarily for the benefit of the employer. Therefore, this Bulletin clarifies that employers are responsible for paying the transportation and visa expenses of H-2B employees, where shifting these costs to employees would effectively bring their wages below the FLSA minimum wage in their first workweek of employment. The H-2B program requires employers to pay employees at least the prevailing wage. The prevailing wage must be at least the highest wage required by any applicable federal, state, or local law; therefore, the required prevailing wage may be higher than the FLSA minimum wage. The employer may be further constrained in the types and amounts of deductions that can be taken under the H-2B

program, but that issue will be addressed at a later time and is beyond the scope of this Bulletin.

FLSA Analysis:

Section 3(m) of the FLSA, 29 U.S.C. 203(m), allows an employer to count as wages the reasonable cost of “furnishing [an] employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees.” The regulations define “other facilities” as “something like board or lodging” and provide that “other facilities” include “general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel . . . electricity, water and gas furnished for the noncommercial personal use of the employee; [and] transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment.” 29 C.F.R. § 531.32(a).

“The cost of furnishing ‘facilities’ found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.” 29 C.F.R. § 531.3(d)(1); *see* 29 C.F.R. § 531.32(c). The regulations provide, for example, that items such as the following are primarily for the convenience of the employer: uniforms where the nature of the business requires the employee to wear a uniform; tools of the trade; explosives; miner’s lamps; electric power used for commercial production; company guard protection; taxes and insurance on the employer’s buildings which are not used for lodgings furnished to the employee; dues paid to chambers of commerce and other organizations; medical services and hospitalization that the employer is bound to furnish under worker’s compensation or other similar laws; and “transportation charges where such transportation is an incident of and necessary to the employment (as in the case of maintenance-of-way employees of a railroad).” 29 C.F.R. § 531.32(c); *see* 29 C.F.R. § 531.3(d)(2).

Under the FLSA, there is no legal difference between deducting a cost from a worker’s wages and shifting a cost to an employee to bear directly. As the court stated in *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1236 (11th Cir. 2002) (citations omitted), “[a]n employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deductions drive wages below the minimum wage. *See* 29 C.F.R. § 531.36(b). This rule cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during the employment.” This is so because wages are not truly “received” unless they are paid “free and clear” and, thus, an employee cannot “kick-back” directly or indirectly to the employer or to another person for the employer’s benefit any part of the wage delivered to the employee. 29 C.F.R. § 531.35; *see Castellanos-Contreras v. Decatur Hotels, L.L.C.*, 2009 WL 2152622, at *5 (5th Cir. 2009), quoting *Mayhue’s Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1199 (5th Cir. 1972) (An employer-imposed requirement “is a kick-back if it ‘tend[s] to shift part of the employer’s business expense to the employees.’”). “For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer’s particular work, there

would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act.” 29 C.F.R. § 531.35. If an employee incurs pre-employment expenses that are primarily for the benefit of the employer, they are considered *de facto* deductions from the employee’s wages during the first workweek and such deductions must be reimbursed to the extent that the costs incurred effectively reduce the employee’s wages below the minimum wage.

In light of these principles, and assuming that the transportation and other expenses could potentially qualify as “other facilities” that are “something like board or lodging” (*see infra*, p. 11, n.4), the question is whether these expenses for H-2B nonimmigrant workers are “an incident of and necessary to the employment,” and therefore are primarily for the benefit and convenience of the employer. The expenses at issue here have some value and benefit for both the employer and the employee. The employer benefits because it obtains workers in a situation where the employer has determined, and the Department of Labor has certified, that there are not sufficient able, willing and qualified U.S. workers available to perform the work and, thus, foreign workers must be brought into the United States for temporary employment. The workers receive the benefit of a temporary job and temporary entry into the United States. Thus, the question is which party should be viewed as the primary beneficiary of the transportation and other expenses.

The Wage and Hour Division has addressed this general issue a number of times over the years. Over a period of 30 years beginning in 1960, Wage and Hour issued a series of opinion letters consistently concluding that the cost of transporting remotely hired temporary employees to and from the point of hire is a cost that must be borne by the employer, as a cost incidental to the employer’s recruitment program, because the transportation is primarily for the employer’s benefit; therefore, such transportation costs could not reduce the employees’ wages below the required minimum wage. *See, e.g.*, Opinion Letters dated May 11, 1960; February 4, 1969; November 10, 1970; November 28, 1975; September 26, 1977; March 6, 1979; November 28, 1986; and June 27, 1990 (1990 WL 712744); *see also* Field Operations Handbook, 30c13(e). The Department successfully asserted this position in litigation in *Marshall v. Glassboro Service Ass’n, Inc.*, 1979 WL 1989 (D.N.J. 1979) (subsequent history omitted), where the court referred to the Administrator’s earlier opinion letters and stated that the cost of transporting migrant farmworkers from Puerto Rico to New Jersey “cannot properly be included in the computation of the employees’ minimum wages.”

In a letter dated May 11, 1994, Secretary Reich noted this longstanding interpretation, but stated that agricultural growers had raised concerns about its costs to employers and the possible destabilization of the agricultural work force. The Secretary recognized, however, that there also was a need to protect farmworkers’ wages. Therefore, he stated that the Administrator of Wage and Hour would examine the issue to determine whether an opinion letter or rulemaking should be used to provide further guidance. The letter concluded that, “pending resolution of the policy and procedural issues relating to the treatment of transportation expenses, we are not prepared to assert violations in this area under the FLSA.” The Administrator repeated these points in a June 30, 1994, letter.

In a letter dated May 10, 1996, Wage and Hour clarified that its “policy remains that worker-incurred transportation costs from the point of remote hire to the worksite are primarily for the benefit of the employer.” The letter stated that the Department would continue to assert a violation of the FLSA where the employee either pays the transportation costs directly to the employer or its agent, or reimburses such costs advanced by the employer or its agent (such as through deductions from pay), where such payments result in the employee receiving less than the minimum wage. However, as an enforcement practice, Wage and Hour stated it would not assert a violation with regard to workers in the H-2A program if they received inbound transportation reimbursement by the time they completed 50% of their contract work period or immediately thereafter, as required by the H-2A regulations.¹ With regard to a situation where a worker directly incurred the cost of transportation from the location where he or she was remotely hired to the worksite, without any advance or other direct involvement of the employer, the letter repeated the Secretary’s nonenforcement policy, pending further review. The Assistant Secretary for Congressional and Intergovernmental Affairs reaffirmed this interpretation and enforcement practice in a May 30, 2001, letter to Senator John Warner.

In 2002, the Eleventh Circuit in *Arriaga*, while recognizing that the DOL letters were consistent over a lengthy period, independently evaluated whether such transportation costs are “an incident of and necessary to the employment.” 305 F.3d at 1241. The court considered the dictionary definitions of the regulatory terms (“incident” meaning “anything which inseparably belongs to, or is connected with, or inherent in, another thing” and “necessary” meaning “of an inevitable nature: inescapable”). 305 F.3d at 1242. The court emphasized that the visa program involves workers performing temporary work. It stated that, by participating in the visa program, the employers understand that the nonimmigrant alien workers they employ are not coming from commutable distances. In that situation, one-time transportation costs are:

¹ This Field Assistance Bulletin addresses the requirements of the FLSA only in the context of the H-2B program; however, because of the similarities to the H-2A program, we discuss some H-2A rulings because they are relevant by analogy. It also is important to note that, even where other programs impose lesser expense reimbursement requirements than the FLSA, those other programs do not override the FLSA’s independent requirements (*see, e.g.*, 20 C.F.R. § 655.22(g)(2) (identifying visa costs as the responsibility of the employee for purposes of the H-2B program, but recognizing that an employer subject to the FLSA may not make deductions that would violate the FLSA)). Furthermore, deductions for expenses that are primarily for the benefit of the employer “that reduce an employee’s rate of pay below the highest applicable legally-required minimum wage [such as the H-2B prevailing wage] are illegal *unless* the law establishing that minimum wage allows the particular deductions.” Wage and Hour Opinion Letter FLSA2001-7 (Feb. 16, 2001) (emphasis in original); *see De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F.Supp.2d 1295, 1316 (N.D. Ga. 2008). Thus, employers must always determine their wage requirements under each applicable Act and then apply the highest requirement in order to satisfy all laws. *See Powell v. United States Cartridge Co.*, 339 U.S. 497, 519 (1950).

an inevitable and inescapable consequence of having foreign H-2A workers employed in the United States; these are costs which arise out of the employment of H-2A workers. When a grower seeks employees and hires from its locale, transportation costs that go beyond commuting are not necessarily going to arise from the employment relationship. Employers resort to the H-2A program because they are unable to employ local workers who would not require such transportation costs; transportation will be needed, and not of the daily commuting type, whenever employing H-2A workers.

305 F.3d at 1242.

The *Arriaga* court further concluded that long-distance transportation costs are primarily for the benefit of the employer because they are nothing like board and lodging; they are one-time costs that arise from the employment itself, not “universally ordinary living expenses that one would incur in the course of life outside of the workplace,” as are the “other facilities” listed in the regulations (such as electricity, gas or water for the employee’s personal use). 305 F.3d at 1243. *Accord, e.g., DeLeon v. Eller & Sons Trees Inc.*, 581 F. Supp. 2d 1295 (N.D. Ga. 2008) (H-2B); *Rosales v. Hispanic Employee Leasing Program*, 2008 WL 363479 (W.D. Mich. 2008) (H-2B); and *Rivera v. Brickman Group*, 2008 WL 81570 (E.D. Pa. 2008) (H-2B).

Finally, the *Arriaga* court noted that some categories of costs are “more nuanced” than others and “are primarily for the benefit of the employer or the employee depending on the specific facts.” For example, a uniform is for the primary benefit of the employer if it is special clothing required by the nature of the business; however, if the required uniform is merely ordinary street clothing, the employee would incur that expense as a normal living expense, and it is therefore not primarily for the benefit of the employer. 305 F.3d at 1243-44. Looking at the specific facts applicable in the H-2A context, the court found that one-time transportation costs and visa fees were necessary because of the employers’ decision to bring workers into the country under the visa program for temporary or seasonal workers. However, the workers receive only the right to perform work for the designated employer and, at the conclusion of the specified work period (unless the worker has secured employment with a subsequent H-2A employer) or upon termination of the worker’s employment (whichever occurs first), the worker must leave the country. Because such costs do not routinely arise in the ordinary course of life or work, but are certain to arise under the visa program, the employer is the primary beneficiary and must reimburse workers for them up to the amount needed to satisfy the minimum wage.

In December 2008, six years after the *Arriaga* decision was issued, the Department rejected the holding of *Arriaga* in the preamble to final rule implementing the H-2B program. See 73 Fed. Reg. 78020, 78039-41 (December 19, 2008); see also 73 Fed. Reg. 77110, 77148-52 (H-2A) (December 18, 2008). The Department for the first time stated that it believed that the better reading of the FLSA and the regulations is that relocation costs under the H-2B program are not primarily for the benefit of the employer, that relocation costs paid for

by H-2B workers do not constitute kickbacks within the meaning of 29 CFR 531.35, and that reimbursement of workers for such costs in the first paycheck is not required by the FLSA. 73 Fed. Reg. at 78039. The preamble concluded that an employee's inbound relocation transportation costs in this context do not constitute a kickback because they "either primarily benefit the employee, or equally benefit the employee and the employer." 73 Fed. Reg. at 78040.

In weighing the relative balance of benefits derived, the preamble emphasized that the travel of such workers far away from their homes not only allows them to earn more money than they could have in their home country over a similar period of time, but also allows them to live and engage in non-work activities in the United States. Foreign workers value these benefits so highly that they have been willing in many instances to pay recruiters thousands of dollars (a practice that the final rule curtailed) just to gain access to the job opportunities. 73 Fed. Reg. at 78040-41. The preamble further noted that the regulation at 29 C.F.R. § 531.32(a) provides that transportation is a facility under section 3(m) when it is furnished to employees between their homes and work, is not compensable, and is not an incident of and necessary to employment. Because the regulation does not expressly distinguish between commuting and relocation costs, the preamble concluded that inbound relocation costs "fit well within the definition as they are between the employee's home country and the place of work." 73 Fed. Reg. at 78041. Disagreeing with *Arriaga*, the preamble stated that both relocation costs and normal commuting expenses are incurred by employees for the purpose of getting to a work site and would not be incurred but for the job. Therefore, "[i]nbound relocation costs are not, absent unusual circumstances, any more an 'incident of * * * employment' than is commuting to a job each day." *Id.* Finally, the preamble concluded that the fact that H-2B workers are temporary guest workers does not change the equation. The facts that the workers derive less benefit from the jobs because they are only temporary, and employers derive a greater-than-usual benefit from such costs because they are only permitted to hire foreign guest workers when they have attempted but are unable to hire U.S. workers, did not change the Department's view. 73 Fed. Reg. at 78041.

Three months later the Department published a notice in the Federal Register withdrawing this preamble interpretation. 74 Fed. Reg. 13261 (March 26, 2009). The Department noted that prior to the preamble interpretation courts had uniformly held that such travel expenses were primarily for the benefit of employers. It also noted that the Department had not sought public comments on this FLSA issue when it published the proposed H-2B rules. Because this is an important issue, with potentially adverse impacts on low-wage U.S. workers and foreign guest workers, the Department withdrew the interpretation for further consideration and stated that it could not be relied upon as a statement of agency policy for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259, or otherwise. The Department also stated that, after reconsideration of the issue, it would provide guidance through a mechanism established for disseminating its opinions and interpretations of the FLSA.²

² The FLSA specifically authorizes the Administrator of Wage and Hour to issue a "regulation, order, ruling, approval, or interpretation" of the FLSA and recognizes the Administrator may modify or rescind those interpretations. *See* 29 U.S.C. 259(a).

Wage and Hour has now completed its review of this issue in the context of the H-2B visa program. We have concluded that our longstanding interpretation is correct. We agree with our 2008 preamble that both the employer and the temporary nonimmigrant workers derive some benefit from these costs and the resulting employment relationship. We further agree that the issue is whether those expenses are primarily for the benefit or convenience of the employer, because if the employer is the primary beneficiary, it must reimburse an employee for the employee's expenses up to the point that is necessary in order to comply with the requirement that he or she receive the minimum wage free and clear. The preamble inaccurately characterized these expenses as "relocation" costs when in fact the expenses are costs incurred as a result of travel away from the employee's foreign home for temporary employment, not a change in the employee's domicile for permanent employment. Moreover, this situation involves the employer's assertion, and the Department of Labor's certification, that there are not sufficient U.S. workers available to perform the work. After weighing all the factors relevant to transportation and other costs incident to temporary employment under the H-2B program, we believe that the employer is the primary beneficiary of the temporary employee's travel and immigration-related costs.

Courts construing the term "primarily for the benefit of the employer" in the section 3(m) context generally have assessed the relative value of the facility to the employer and the employee. *Soler v. U.S. Department of Labor*, 833 F.2d 1104, 1109 (2d Cir. 1987) ("the balancing of benefits test established by the Regulation provides a common-sense and logical approach"). For example, the court in *Brennan v. Modern Chevrolet Co.*, 363 F. Supp. 327 (N.D. Tex. 1973), *aff'd*, 491 F.2d 1271 (5th Cir. 1974)(table), examined whether the employer or the employees were the primary beneficiaries where a car dealer provided its salesmen with demonstrator cars to drive. The employees used the cars to demonstrate the vehicles to customers. They also drove the cars to and from work and were permitted to use the vehicles for their own personal needs and purposes. In some cases, members of their families also used the vehicles, and 90% of the miles were for personal purposes. Even though the employees clearly derived significant benefit from the use of the vehicles, the court concluded that the dealership was the primary beneficiary because it benefited from having its salesmen driving the product it was engaged in selling, even when they were driving the cars on personal business. The court viewed the cars as tools of the trade necessary to the conduct of the employer's business. *Id.* at 333. *Accord, Marshall v. Sam Dell's Dodge Corp.*, 451 F. Supp. 294, 304 (N.D.N.Y. 1978). Thus, the fact that an employee benefits greatly from an item does not mean that the employee is the primary beneficiary. Indeed, even lodging can be for the primary benefit of the employer, such as when an employer requires an employee to live on-site to meet a particular need of the employer. *Marshall v. DeBord d/b/a/ Bernie's Rest Haven*, 84 Lab. Cas. ¶33,721 (E.D.

Accordingly, as applicable to employees in the H-2B program, this Field Assistance Bulletin interpreting the FLSA supersedes all prior inconsistent interpretations, including the interpretation set forth in the withdrawn preamble at 73 Fed. Reg. 78039-41, and the enforcement practices set forth in the 1994-2001 letters, as applicable to H-2B workers (*see* pp. 3-4).

Okla. 1978) (lodging not a section 3(m) facility where employees lived on-site at nursing home because at least one employee had to be available at all times).

Applying this primary beneficiary analysis in the H-2B context, we first note that employers are only permitted to use the H-2B visa program to bring foreign guest workers into the country in very limited circumstances, and only after the Department of Labor has certified that there are not enough able and qualified U.S. workers available for the position and that the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6). The application process for obtaining a certification imposes stringent requirements on employers that are unlike their normal employee recruiting procedures. The employers' choice to utilize this process, and their attestation that they are unable to find qualified and available U.S. workers, is evidence of their specific need for, and benefit from, those foreign workers. Indeed, the entire application process is designed to demonstrate to the Department's satisfaction that the employer would not otherwise be able to fulfill its identified employment needs because there are not sufficient U.S. workers available.

For example, under the H-2B program, employers must first engage in recruitment efforts in the U.S. labor market to determine if a qualified U.S. worker is available for the position. In order to ensure that an adequate test of the U.S. labor market is made, the employer must obtain from the government a wage rate that must be offered in the recruitment of U.S. workers (which must be the highest of the prevailing wage rate, the federal minimum wage or the state minimum wage). The employer also must submit a job order to the appropriate State Workforce Agency (SWA) for posting. *See* 20 C.F.R. § 655.15. The job order must include information regarding the job duties, the minimum qualifications required (if any), any special requirements, the expected dates of employment, and the rate of pay. The posting must remain open for at least 10 days. If the area of intended employment is in more than one state, the SWA must forward the information to all the other states listed as anticipated worksites. Where the employer is a party to a collective bargaining agreement covering the occupation at that worksite, the employer also must contact the local affiliate of the labor organization regarding the job opening. The employer must place two newspaper advertisements for the job, including one in the Sunday paper. The employer must: offer and subsequently pay throughout the period of employment a wage that is equal to or higher than the prevailing wage for the occupation at the skill level and in the area of intended employment; provide terms and conditions of employment that are not less favorable than those offered to the foreign workers; and not otherwise inhibit the effective recruitment and consideration of U.S. workers for the job. If the employer has laid off any U.S. workers in the occupation in that area within 120 days prior to the date it will need an H-2B worker, it must notify each laid-off worker of the job opportunity. *See* 20 C.F.R. § 655.15. An employer may apply for a labor certification from the Department only after it has completed its U.S. recruitment efforts. The application requires the employer to provide a description of its business history and activities, and its schedule of operations throughout the year. The employer must demonstrate that its need is a temporary need, and explain how it meets the regulatory standards for a one-time occurrence, or a seasonal, peakload, or intermittent need, in order to qualify for guest workers. The employer also

must justify any increase or decrease in the number of H-2B positions being requested from the previous year, if applicable. *See* 20 C.F.R. § 655.20-.22.

The regulations require the employer to prepare and submit to the Department a report regarding its recruitment efforts, including information such as the name and contact information of each U.S. worker who applied or was referred to the job, the disposition of each worker including any applicable laid-off workers, and the lawful job-related reason(s) for not hiring any such U.S. workers. The employer must maintain records of its recruitment efforts for three years, for potential review and audit or investigation by the Department. *See* 20 C.F.R. § 655.15. The employer is required to attest that it will abide by the conditions applicable to the program, including that it will notify its workers of the requirement that they leave the U.S. at the end of the authorized period of stay or separation from the employer, whichever is earlier. It also must attest that the job is not available because the prior occupants are on strike or locked out in the course of a labor dispute involving a work stoppage. *See* 20 C.F.R. § 655.22.

Under these circumstances, we believe travel and immigration-related costs necessary for workers hired under the H-2B program are for the primary benefit of their employers, and the employers therefore must reimburse the employees for those costs in the first workweek if the costs reduce the employees' wages below the minimum wage.³ Congress limited the circumstances in which employers could use this program to the situation where there are not sufficient able, willing and qualified U.S. workers available to perform the temporary labor or services needed, and the employment of the alien worker will not adversely affect the wages and working conditions of similarly-employed U.S. workers. As the program requirements set forth above demonstrate, this visa program imposes significant obligations upon employers in order to ensure that the Department certifies that such a labor shortage exists, and visas therefore may be granted, only in circumstances that protect U.S. workers from any adverse effects caused by the importation of foreign workers. Thus, this process involves the imposition of distinct, additional recruiting requirements on employers. The employers' choice to utilize this process, and their attestation that they are unable to find qualified and available U.S. workers, is evidence of their specific need for, and benefit from, those foreign workers. As the court stated in *Arriaga*, such travel and visa costs "are an inevitable and inescapable consequence" of having foreign workers employed in the United States, and these costs arise out of the employment of such workers. 305 F.3d at 1242, 1244. Therefore, under 29 C.F.R. § 531.32(c), these travel and visa expenses should be viewed as an "incident of and necessary to the employment" because they are not ordinary living expenses (*i.e.*, unlike board and lodging, or electricity, water, or gas for personal use, they do not have substantial value to an employee that can be used

³ The same type of analysis as applied in this Field Assistance Bulletin would have to be performed whenever an employee must travel for temporary employment from the point of hire to a distant worksite location. Whenever the employer is found to be the primary beneficiary, the employer must reimburse such expenses if the failure to do so would bring the employee's wage below the minimum wage.

independent of the job performed), and they do not ordinarily arise in an employment relationship (unlike daily home-to-work commuting costs).⁴

Moreover, in contrast to the employers' greater-than-normal benefit from these expenses, the workers benefit from these positions less than employees typically benefit from new jobs. The positions are, by definition, temporary with no possibility of the jobs becoming permanent, no matter how well the employees perform or what skills they acquire. When the work period is completed, and if the employees have not secured subsequent temporary employment under the visa program, the employees have no option to remain in the United States. They are not permitted to seek work from another U.S. employer, except under the visa program, thereby reducing whatever benefit they may have obtained from their ability to enter the country. These temporary jobs require them to move away from their families, friends and home country, to a place where many of the workers have a limited ability to participate in normal social and community activities because of language barriers. Thus, while the employees benefit economically from these temporary jobs, there are countervailing hardships as well.⁵

⁴ The 2008 preamble asserted that because § 531.32(a) does not expressly distinguish between daily commuting and relocation costs, these travel and associated costs "fit well" within the regulatory definition of a facility because they are transportation between home and work. Although not expressly stated, we believe that the regulation clearly means that normal daily commuting may be a "facility," as evidenced by other regulations using similar wording, such as the one implementing section 7(e)(2)'s exclusion from the regular rate of reimbursement for expenses an employee incurs "on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer." 29 C.F.R. § 778.217(a). That regulation provides that reimbursement for "temporary *excess* home-to-work travel expenses incurred (i) because the employer has moved the plant to another town before the employee has had an opportunity to find living quarters at the new location or (ii) because the employee, on a *particular occasion*, is required to report for work at a place other than his regular workplace" may be excluded from the regular rate. 29 C.F.R. § 778.217(b)(5) (emphasis added). However, if the reimbursement is not for an expense "incurred by the employee on the employer's behalf or for his benefit or convenience," such as where the "employer reimburses the employee for expenses normally incurred by the employee for his own benefit," the reimbursement must go into the regular rate. 29 C.F.R. § 778.217(d). Therefore, because an "employee normally incurs expenses in traveling to and from work . . . [i]f the employer reimburses him for these *normal everyday expenses*, the payment is not excluded from the regular rate." *Id.* (emphasis added). Thus, the regulations do not always use talismanic words such as "daily commute"; however, when they refer to travel between home and work, they are referring to a normal, everyday commute in contrast to an "excess" or "particular occasion" commute. *Compare* 29 C.F.R. § 785.35 (travel from home to work at the beginning of the workday and back to home at the end of the workday is "ordinary home to work travel") and § 785.37 (travel to a distant city for a special one-day work assignment "cannot be regarded as ordinary home-to work travel"). In any event, the travel expenses in issue here do not comport with the example of a "facility" in § 531.32(a) because they are "an incident of and necessary to the employment."

Finally, the 2008 preamble emphasized as evidence of the employees' benefit the fact that some workers have been willing to pay their travel and visa costs, and even additional recruiter fees, in order to obtain these jobs. However, an employee's willingness to work for a particular level of wages has never been the test for compliance with the FLSA. Some employees have always been willing to work for less than the minimum wage or to waive their right to overtime for hours worked in excess of 40 in a week. However, employees are not permitted to waive their rights under the FLSA, because it was enacted in order to protect employees from substandard wages and excessive hours in "recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. . . No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945). "While in individual cases, hardship may result [from this prohibition on waiver], the restriction will enure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large." *Id.* at 713. Therefore, employees' willingness to bear their inbound travel and visa costs, and thereby to work for wages below the minimum wage, does not establish that the employees are the primary beneficiaries of such expenses. Otherwise, employees' willingness to purchase uniforms required by the nature of the job or to purchase tools of the trade, even if the expense brings their pay below the minimum wage, would similarly demonstrate that such items are for their primary benefit. *See* 29

⁵ We thus disagree with the Fifth Circuit's recent decision in *Castellanos-Contreras* holding that the FLSA does not require employers to reimburse H-2B employees for their transportation and related fees. 2009 WL 2152622, at *9. The court concluded that, because the FLSA kick-back regulation does not specifically address transportation, visa and recruitment expenses and the Department of Homeland Security and Department of State regulations do not require employers to pay such expenses, they are not employers' business expenses. *Id.* at *5-7. The court declined to follow *Arriaga* both because that decision involved H-2A, instead of H-2B, and because it relied upon section 3(m) and the "incident of and necessary to" standard in § 531.32 instead of § 531.35 (the kick-back regulation). The court also stated that the fact that the 2009 H-2B regulations newly require employers to forbid their recruiters from charging fees to employees suggests that such fees were not previously an employer expense. We believe that the *Arriaga* court correctly relied upon the section 3(m) principle -- that an employer may take credit only for a facility that is for the employee's primary benefit and may not require an employee to bear an employer business expense if that will reduce the employee's pay below the minimum wage -- as that principle is interpreted in both § 531.32 and § 531.35 (indeed, § 531.35 contains a cross-reference to § 531.32). The fact that § 531.35 does not specifically address transportation, visa and recruitment fees for temporary foreign workers is irrelevant to the analysis. The regulation sets forth the general prohibition against kick-backs and has one example relating to tools of the trade; that does not indicate that kick-backs for other employer expenses are permissible. The *Castellanos-Contreras* decision is, of course, binding precedent in the Fifth Circuit.

C.F.R. §§ 531.3(d)(2), 531.32(c). Accordingly, in the context of the H-2B temporary nonimmigrant visa program, we conclude that such travel and visa costs are for the primary benefit of the employer.⁶ Therefore, the employer must reimburse those costs in the first workweek to the extent that they reduce the employee's wages below the minimum wage.

Questions also have arisen regarding the responsibility for recruiter fees. Recruiters help H-2B employers locate workers in foreign countries. For example, recruiters may find the employees, interview them, and help them process the necessary paperwork to obtain their visas. In the 2008 final rule implementing the H-2B program, the Department provided that the employer must attest that it "has contractually forbidden any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2B workers to seek or receive payments from prospective employees." 20 C.F.R. § 655.22(g)(2). The preamble to the final rule stated that the Department believes "that requiring employers to incur the costs of recruitment is reasonable, even when taking place in a foreign country . . . The fact that a recruiter is essential to the securing of such worker does not dissuade the Department from requiring the employer to bear the expense; rather, it underscores the classification of that payment as a cost allocable to the employer." 73 Fed. Reg. at 78037. The Department continues to believe that employees should not have to pay a recruiter for access to this visa program, because the employer is the primary beneficiary of these costs. Thus, under both the visa program regulations and the FLSA, we believe that employers are responsible for paying the fees of any recruiters they retain to recruit foreign workers and provide access to the job opportunity. *See Rivera v. Brickman Group, Ltd.*, 2008 WL 81570, at **13-14 (E.D. Pa. 2008) (because the H-2B employer required the employees to use a particular recruitment company, it was required to reimburse them where the recruiter fees reduced their wages below the FLSA minimum).

Lastly, we believe that obtaining a passport and incurring any related costs are for the primary benefit of the employee as the employee may use the passport for purposes other than employment.

⁶ The preamble to the final rule stated that "[t]aking the *Arriaga* court's logic to its ultimate conclusion would potentially subject employers across the U.S. to a requirement to pay relocation expenses for all newly hired employees . . ." 73 Fed. Reg. at 78041. We believe that this statement ignores the many significant differences between the situation in which an employee relocates for permanent employment and temporary employment pursuant to the H-2B visa program. This letter addresses only the specific situation of employers who employ workers for temporary work pursuant to this visa program which, as noted above: may be utilized only when there are not sufficient U.S. workers available and employment of the alien workers will not adversely affect the wages and working conditions of similarly-employed U.S. workers; imposes very different requirements on employers than the normal hiring process; involves atypical expenses; and results in greater-than-normal benefits to employers and less-than-typical benefits to employees.