

**NEW YORK  
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IMMIGRATION & NATIONALITY LAW**

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July 24, 2008

Hon. Elaine L. Chao  
Secretary of Labor  
U.S. Department of Labor  
200 Constitution Ave. NW  
Washington, DC 20210

Re: DOL's Press Release of 6/2/2008

By Fax: (202) 693-6111 and by regular mail

Dear Secretary Chao:

I am writing on behalf of the Association of the Bar of the City of New York (New York City Bar) to express our concern regarding the Department of Labor's June 2, 2008 press release announcing that the DOL will be auditing all PERM applications filed by the Fragomen Law Firm based upon a suspicion that attorney involvement in recruiting may have tainted labor market tests required under PERM.

Since its founding in 1870, the New York City Bar has worked to promote the public good by advocating for political, legal and social reform, and by promoting high ethical standards for the legal profession. The New York City Bar has grown to over 23,000 members. The Immigration and Nationality Law Committee, of which I am the chair, meets on a monthly basis for discussion of current immigration topics; organizes and sponsors educational programs; and issues reports and recommendations. A number of members of the New York City Bar and the Immigration and Nationality Law Committee regularly represent employers in the permanent foreign labor certification process, and have extensive knowledge of the DOL processes and the surrounding laws and regulations.



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Although the exact factual information surrounding the allegations has not been released, we find the assertions in the DOL's announcement and in the DOL's public affairs office's Q&A to be troubling. The DOL's press release appears to present certain allegations as fact, whereas the DOL's fact-finding process has just begun. We ask that the DOL be circumspect in its pronouncements while the investigation is ongoing.

We are particularly concerned that the DOL's interpretation of the role of an attorney in the labor certification process, as set forth in its press release and public affairs Q&A, would deprive employers of their right to effective counsel. We rely upon the regulatory provisions set forth in 20 CFR 656.10(b) setting forth the attorney's role in the labor certification process. Despite language stating an "attorney may not interview or consider U.S. workers," the regulation taken as a whole plainly recognizes attorney representation. The duty to counsel and advise clients is inherent in the job of an attorney, including as to the legal import of facts arising during the PERM recruitment process. Likewise the employer's regulatory and statutory right to counsel plainly extends to the PERM recruitment process, which is a highly complex process governed by detailed regulations and administrative case law.

An employer has the right to receive case specific advice from an attorney on the statute and regulations governing the employer's actions during the labor certification recruitment process. Attorneys are permitted to do more than simply provide generalized information on the meaning of "qualified." This is true not only in the PERM context, but in other contexts as well. For example, employment lawyers regularly and legitimately counsel employers on how to comply in specific instances with the anti-discrimination provisions in the Americans with Disabilities Act. They are not required to provide only "generalized" information. To require attorneys in the PERM context to supply only "generalized" information in such a complex area of the law is to deprive the employer client of his right to counsel.

Based upon the foregoing, we encourage and invite clarifying public pronouncement from the Department of Labor indicating the right of an employer under 20 CFR 656.10(b) to attorney representation during the PERM process that, of necessity, includes advice and counsel that apply the law to specific facts arising during the PERM recruitment process.

Thank you for your attention to this crucial matter.

Sincerely yours,

Linda Kenepaske  
Chair, Immigration and Nationality Law Committee