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June 4, 2008

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

Dear Secretary Chao:

We are writing on behalf of the American Immigration Lawyers Association (AILA) to express the association's deep concerns regarding the Department's June 2, 2008, press release declaring that DOL will be auditing all PERM applications filed by the Fragomen law firm. AILA is the voluntary bar association of more than 11,000 attorneys representing employers, foreign nationals, and family members in all aspects of the immigration process. A significant majority of our members regularly represent employers in the permanent foreign labor certification process, and thus have a deep knowledge of the process and the surrounding law.

While AILA does not have factual information regarding the allegations to be investigated by the Department of Labor, AILA finds disturbing the assertions in DOL's unprecedented announcement and, perhaps even more, in a Q&A currently being distributed by the Department's public affairs office in connection with this matter.

### **Right to Counsel**

DOL's public position on this matter, as announced in its press release and the public affairs Q&A, has given rise to a serious concern about DOL's interpretation of the legitimate role of counsel in the labor certification process. While AILA is well aware of the specific

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regulatory provisions regarding an attorney's participation in the interviewing and consideration of candidates elicited during the PERM recruitment process, it is crystal clear that attorneys have a legitimate role in counseling employers during PERM recruitment, a highly structured process governed by detailed regulations and complex administrative case law.

The language currently in 20 CFR section 656.10(b)(2) has long been part of the labor certification regulations, pre-dating PERM by many years. Yet, in the traditional process, it was standard practice for the State Workforce Agencies, which served as receiving agents for applications in the traditional labor certification recruitments, to send the resumes to the attorney. This was a tacit acknowledgement of the role of the attorney in advising employers regarding what elements on those resumes they could or could not take into account when considering applicants.

This practice did not, and does not, constitute improper attorney participation in the consideration of applicants. Rather, it is the permissible rendering of legal advice to employer clients on the statute and regulations governing employer actions during the labor certification recruitment process. Contrary to the implication in the public affairs Q&A distributed by DOL yesterday, attorneys are permitted to do more than simply provide general information on the meaning of "qualified." An intrinsic part of the right to counsel is the right to receive advice on the application of the law to specific facts. DOL cannot change this right to counsel, ingrained through decades of practice in the presence of the same regulatory language, via press release.

As an organization with extensive expertise on this issue, AILA looks forward to working with DOL in developing clear guidance to attorneys and employers regarding the parameters of acceptable legal counseling and involvement in PERM recruitment.

### **Concerns about the DOL's Press Release**

AILA also is concerned about DOL's press release because it appears to present as fact certain allegations that are still subject to investigation and review. Specifically, the press release announced not the completion of an investigation, with factual results, but rather, the initiation of a program of massive, blanket audits based upon a suspicion that attorney involvement in recruitment may have tainted the labor market test required under PERM. Where the fact-finding process is just beginning, the government must and should be more circumspect in its pronouncements, rather than issue conclusory statements such as "the firm improperly instructed clients" or make bald claims of "improper attorney involvement."

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While an audit is not a criminal proceeding, the impact of a public announcement such as this on the business operations of a law firm can cost the firm as dearly as the results of any criminal proceeding. AILA urges the DOL to refrain from making potentially damaging public announcements prior to the conclusion of an investigation.

In sum, AILA urges DOL to respect the legitimate and legally protected role of counsel during the PERM process, and to carefully consult its regulations as well as administrative case law before issuing public statements regarding the limits of attorney representation.

Thank you for your attention to this important matter.

Sincerely,



Kathleen Campbell Walker, President



Jeanne Butterfield, Executive Director



Crystal Williams, Deputy Director of Programs

Cc: Dr. William Carlson, Administrator, Division of Foreign Labor Certification  
Mr. Gregory F. Jacob, Solicitor of Labor