

**Restatement of PERM Program Guidance Bulletin on the Clarification of Scope of Consideration Rule in 20 CFR § 656.10(b)(2)**

*The Department of Labor recently issued the following documents on the topic of attorney/agent consideration of U.S. workers under the permanent labor certification program: 1) Press Release, titled “U.S. Department of Labor auditing all permanent labor certification applications filed by major immigration law firm,” June 2, 2008; 2) Information Paper titled “Frequently asked questions on audit of permanent labor certification applications filed by attorneys at Fragomen, Del Rey, Bernsen & Loewy LLP,” June 4, 2008; and 3) PERM Program Guidance Bulletin on the Clarification of Scope of Consideration Rule in 20 CFR § 656.10(b)(2), June 13, 2008 (collectively, the “Consideration Guidance Documents”). The Consideration Guidance Documents set forth the Department’s interpretation of 20 CFR § 656.10(b)(2) – in particular, with respect to the role an attorney may play in the employer’s recruitment and hiring process. The Department acknowledges that employers often require counsel when applying for permanent labor certification. However, the Department must also ensure that the employer’s recruitment and hiring processes are conducted in good faith, in accordance with the permanent labor certification program’s statutory and regulatory requirements. Since issuing the Consideration Guidance Documents, the Department has received considerable feedback from employers and employer representatives, including attorneys and agents, that regularly practice in or make use of the PERM Program. After consideration of these comments and suggestions, the Department has decided to issue the following Restatement of the PERM Program Guidance Bulletin on the Clarification of Scope of Consideration Rule in 20 CFR § 656.10(b)(2), which will supersede the Consideration Guidance Documents.*

The Department of Labor has a statutory responsibility to ensure that no foreign worker (or “alien”) is admitted for permanent residence based upon an offer of employment absent a finding that there are not sufficient U.S. workers who are able, willing, qualified and available for the work to be undertaken and that the admission of such worker will not adversely affect the wages and working conditions of U.S. workers similarly employed. 8 U.S.C. § 1182(a)(5)(A)(i). The Department fulfills this responsibility by determining the availability of qualified U.S. workers before approving a permanent labor certification application and by ensuring that U.S. workers are fairly considered for all job opportunities that are the subject of a permanent labor certification application. Accordingly, the Department relies on employers who file labor certification applications to recruit and consider U.S. workers in good faith, even where the employer already has a temporarily-admitted foreign national working for the employer.

The Department has long held the view that good faith recruitment requires that an employer’s process for considering U.S. workers who respond to certification-related recruitment closely resemble the employer’s normal consideration process. In most

situations, that normal hiring process does not involve a role for an attorney or agent (as defined in 20 C.F.R. § 656.3) in assessing the qualifications of applicants to fill the employer's position. It also does not involve any role for the foreign worker or foreign national in any aspect of the consideration process. However, given that the permanent labor certification program imposes recruitment standards on the employer that may deviate from the employer's normal standards of evaluation, the Department understands and appreciates the legitimate role attorneys and agents play in the permanent labor certification process. Additionally, the Department respects the right of employers to consult with their attorney(s) or agent(s) during that process to ensure that they are complying with all applicable legal requirements.

By prohibiting attorneys, agents, and foreign workers from interviewing and considering U.S. workers during the permanent labor certification process, as described in 20 C.F.R. § 656.10 (b)(2)(i) and (ii), the Department does not thereby prohibit attorneys and agents from performing the analyses necessary to counsel their clients on legal questions that may arise with respect to this process. The employer, and not the attorney or agent, must be the first to review an application for employment, and must determine whether a U.S. applicant's qualifications meet the minimum requirements for the position, unless the attorney or agent is the representative of the employer who routinely performs this function for positions for which labor certifications are not filed. By requiring that initial reviews of and final determinations on all applications are made by the employer, the Department seeks to ensure that the consideration process is as close to the employer's non-immigration-related hiring process as possible and that U.S. workers receive full and fair consideration by the employer for the job. Attorneys (and, to the extent it is consistent with state rules governing the practice of law, agents) may, however, provide advice throughout the consideration process on any and all legal questions concerning compliance with governing statutes, regulations, and policies.

More specifically, the types of actions prohibited by 20 C.F.R. § 656.10(b)(2)(i) and (ii) include:

- Attorneys and agents may receive resumes and applications of U.S. workers who respond to the employer's recruitment efforts; however, they may not conduct any preliminary screening of applications before the employer does so, other than routine clerical or ministerial organizing of resumes which does not include any assessment of, or comments on, the qualifications of any applicants, unless the attorney or agent is the representative of the employer who routinely performs this function for positions for which labor certifications are not filed. The attorney or agent may not withhold from the employer any resumes or applications that it receives from U.S. workers.
- Attorneys and agents may not participate in the interviewing of U.S. worker applicants, unless the attorney or agent is the representative of the employer who routinely performs this function for positions for which labor certifications are not filed. Such involvement has resulted in an impermissible "chilling effect" on the interests of U.S. worker-applicants in the position.

Where the Department finds evidence of potentially improper attorney, agent, or foreign worker involvement in considering U.S. worker applicants, the Department will audit, and may subsequently require supervised recruitment, for those applications to determine whether the employer's recruitment and hiring processes were conducted in good faith and to ensure adherence to all statutory and regulatory requirements. In evaluating a labor certification application, the Department will look carefully at the manner in which the employer reached its determination that there are no qualified, available, able and willing U.S. workers, including scrutinizing the manner in which the decision was made and whether or not the employer deviated from its normal course of business in evaluating the qualifications of U.S. applicants.