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## Immigration lawyers outraged by DOL audit bulletin

Vesna Jaksic / Staff reporter

June 30, 2008

Only weeks after announcing it was [auditing certain immigration labor applications](#) filed by the nation's largest immigration law firm, the Department of Labor has issued a bulletin that aims to clarify the rule that triggered the audit.

The audit announcement, as well as memo, issued on June 13, have created a heated response from the immigration law community.

The issue surfaced June 2, when the DOL [announced it was auditing](#) all permanent labor certifications filed by New York's Fragomen, Del Rey, Bernsen & Loewy. With more than 250 attorneys and 1,200 professionals and support staff in 34 offices, the firm is considered the largest in the United States dedicated to corporate immigration.

The labor certification process takes place when a U.S. employer wants to sponsor a non-U.S. citizen for permanent residence in the United States. It outlines the recruitment efforts that must take place and is designed to ensure there are no qualified U.S. workers for those jobs.

The DOL said that in some cases, the firm's attorneys may have improperly advised clients to contact them before hiring apparently qualified U.S. workers, which the DOL says shouldn't be done.

Within days of the audit news, the president of the American Immigration Lawyers Association [wrote a letter to the DOL](#) to express "deep concerns" over the audit and the way it was publicly announced.

### A 'chilling effect'

In their blogs and interviews, immigration lawyers from all over the country have expressed outrage, and some said they worry about the audit's chilling effect.

Attorneys may have to think twice about when and what advice they give to clients during the labor certification process, said Kelly O'Reilly, a partner in Los Angeles' Wilner & O'Reilly, an immigration and nationality law boutique firm.

"At what point does the DOL interfere with the attorney counseling the client?" he said. "What parts of advice that you give your client is subject to scrutiny by the administrative arm of the government?"

On June 13, the DOL issued a "guidance bulletin" regarding attorneys' roles in the labor certification process. The department did not say why it issued the bulletin. A department spokesman did not make anyone available for an interview.

In the [guidance bulletin](#), the DOL outlines actions that are prohibited by attorneys in the labor certification process.

For example, the department stresses that attorneys are not allowed to screen job applications before the employers do or interview the U.S. applicants for the advertised job. The exception occurs if these are functions regularly performed by the attorney in the hiring process.

The DOL also said attorneys should not "seek to dissuade" an employer from determining that a particular applicant is minimally qualified, able and willing for the job.

In the bulletin, the department also talks about when attorneys may give advice and says it "understands and appreciates the legitimate role attorneys and agents play in the permanent labor certification process, and

respects the right of employers to consult with their attorney or agent during that process to ensure they are complying with all applicable legal requirements."

### 'Active negotiations'

In statements, Fragomen has disputed the DOL's interpretation of the rule and said its attorneys have done nothing wrong. The firm said it is in "active negotiations" with the DOL in order to free its clients' applications from the audit process.

"We strongly disagree with the Labor Department's unsupportable interpretation of the foreign labor certification regulations because it prevents employers from getting the critical legal advice they need to navigate and comply with this complex regulatory process," the firm said in a statement issued by its spokesman.

"The Program Guidance Bulletin they issued on [June 13] did not fundamentally change their position. The Bulletin is an effort to state a new interpretation while representing it as their existing position, and, therefore, apply it retroactively."

Kathleen Campbell Walker, president of the American Immigration Lawyers Association, or AILA, which has more than 11,000 members, said the bulletin did little to clarify the rule. Walker said she hopes to meet with the DOL officials to discuss the issue.

"I'm still very disappointed that this particular clarification was issued before that," said Walker, an immigration partner in the El Paso, Texas, office of Austin's Brown McCarroll.

Walker said the issue is centered on the attorneys' crucial role of providing advice during a complicated legal process.

"The role of the attorney is to make sure we have compliance with law and we feel there is some definite confusion regarding that role," she said.

The DOL did not respond to a question about whether this was the first time it was auditing all labor certifications filed by a law firm, but Walker said the move is "unprecedented" as far as she knows. She said "outrage" is the most appropriate word she can use to describe the legal community's reaction to the audit.

Greg Siskind, a partner in Memphis, Tenn.'s Siskind Susser Bland immigration law firm, said the issue will likely be a major topic of conversation during AILA's annual conference in Vancouver, Canada, which starts June 25. Because government officials are expected to attend, he said the meeting could provide clues into what direction the DOL plans to take on the issue.

Siskind said many in the legal community have had a negative reaction to the audit announcement, which he compared to what happened last year when the DOL said only employers are allowed to pay legal fees in the labor certification process, not employees. With another question involving lawyer involvement in the labor certification now at hand, Siskind said lawyers may take a tougher stand against the DOL.

"I think it will probably cause some people to rethink their strategy and think more aggressively about opposing the DOL in the courtroom," he said.

O'Reilly said because Fragomen is highly respected among immigration attorneys, everyone has been closely monitoring the situation.

"Frankly, it has a bit of chilling effect through the ranks," he said, "because if it happened to them, it can happen to most folks."