Dissuasion's Disappearance: DOL's Again Retreats on its PERM "Consideration" Analysis

By Angelo A. Paparelli

The U.S. Department of Labor (DOL) has retreated once again from the silly summer brouhaha it sparked on June 2 with the issuance of an ill-advised press release announcing the audit of all corporate clients of the Fragomen law firm. As readers from my previous articles (first, second and third), the DOL has been roundly criticized for its initial broadside against attorney participation in the recruitment process required under PERM labor certification regulations.

First, the agency said in its June 2 press release that "[w]here an employer does not normally involve immigration attorneys in its hiring process, there is no legitimate reason to consult with immigration attorneys before hiring apparently qualified U.S. workers who have responded to recruitment required by the permanent labor certification program [italics added]."

Next, the DOL backtracked. On June 13 it issued a "Clarification." Under the agency's new guidance, DOL recanted and discovered legitimate reasons for consultation with counsel, but a new concept, "dissuasion," was not allowed:

> After the evaluation of applications by the employer has been completed, the employer may consult with its attorney or agent about the implications of its qualification determinations on the labor certification application. Those consultations can encompass the question of whether applicants who were found by the employer to be unqualified were rejected for lawful, job related reasons. Under no circumstances, however, should an attorney or agent seek to dissuade an employer from its initial determination that a particular applicant is minimally qualified, able, willing and available for the position in question [italics supplied].

On August 29, however, issued a "Restatement" based on public feedback. The Restatement cites the June 2 press release, a June 4 FAQ, and the June 13 Clarification (labeling all three as the "Consideration Guidance Documents") and then (unceremoniously and inexplicably) junks them, noting that the Restatement "will supersede [italics in original]" all three documents. In the Restatement, DOL now concludes:

> Attorneys (and, to the extent it is consistent with state rules governing the practice of law, agents) may . . . provide advice throughout the consideration process on any and all legal questions concerning compliance with governing statutes, regulations, and policies.

As can be see from the Restatement, the rule prohibiting attorney dissuasion is nowhere to be found. I had argued in a New York Law Journal article, co-authored with Ted Chiappari, that the ban on dissuasion made no sense :

> The Labor Department cites no authority for this "dissuasion" restriction on counsel's role. A simple hypothetical illustrates why a ban on dissuasion is unwise. Suppose an employer, fearing the DOL's enforcement authority, mistakenly believes that the business must provide extensive, burdensome and costly training to an unqualified applicant, and therefore considers that applicant qualified. The lawyer for the employer could legitimately point out that the DOL regulation would treat that applicant as qualified only if the training could be conducted in a "reasonable" time. The lawyer, acting in the best interests of its employer client, could rightfully point out that such unreasonable training burdens and delay are not required by law or regulation. It is unlikely in this scenario that any court would hold that the lawyer acted improperly by seeking to dissuade an employer from its initial determination concerning the applicant's qualifications.

Despite its silent retreat on dissuasion, the DOL persists , however, in perpetuating the confusion that the agency itself has created. It offers two flatly inconsistent statements that (I predict) will require yet another published change in interpretation (will they call the next one a "Regurgitation"?):

> [G]iven 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. . . .
>
> 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 [italics added].

The agency also offers a bureaucratic koan for all stakeholders (and perhaps a court or two) to ponder: In what state(s) are agents allowed to offer legal advice? Every state of the United States -- so far as I know -- prohibits the unauthorized practice of law. Answer to the koan: Only in the DOL's state of denial.

Thankfully, the Fragomen law firm has sued DOL and requested a court injunction. The agency's behavior in unleashing and then stirring up needless quandaries and controversies -- while offering nary a hint of compliance with the Administrative Procedures Act -- must be judicially chastised. Alternatively, or better yet, in conjunction with court action, Congress, when it returns from recess, should immediately convene oversight hearings to see how taxpayer dollars are being squandered by an agency run amok.

Let's keep our fingers crossed, and hope for the best.