UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRAGOMEN, DEL REY, BERNSEN & LOEWY LLP,	
Plaintiff,	**Civ. No. 08-1387 (RMU)**
v.	
ELAINE L. CHAO, Secretary of Labor, and the U.S. DEPARTMENT OF LABOR,	
Defendants.	

STIPULATION OF SETTLEMENT AND ORDER

This Stipulation of Settlement (the "Stipulation") is made and entered into as of October 24, 2008 by and among Plaintiff Fragomen, Del Rey, Bernsen & Loewy LLP ("Fragomen" or "Plaintiff") and Defendants Elaine L. Chao, in her capacity as the Secretary of Labor, and the United States Department of Labor (the "Department" and, together with Secretary Chao, "Defendants").

Background and Defined Terms

A. The June 2 Press Release. On June 2, 2008, the Department issued a press release (the "June 2 Press Release") announcing that it had "begun auditing all permanent labor certification applications filed by attorneys at [Fragomen]." The June 2 Press Release stated in part that the Department had "information indicating that in at least some cases the firm improperly instructed clients who filed permanent labor certification applications to contact their

attorney before hiring apparently qualified U.S. workers." The June 2 Press Release further stated that "[t]he department's regulations specifically prohibit an employer's immigration attorney or agent from participating in considering the qualifications of U.S. workers who apply for positions for which certification is sought, unless the attorney is normally involved in the employer's routine hiring process. Where 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." The attorney-consideration-related audits described in the June 2 Press Release included requests for the following two categories of documents (using this language or substantially similar language):

(1) "All resumes received in connection with the recruitment conducted in connection with this application as required in 20 CFR 656.17(g)(1)."

(2) "Copies of all *PERM Applicant Evaluation Forms, Labor Certification – Resume Review Forms*, or any forms provided to or completed by the employer with respect to the completion of recruitment, or which have been used to complete or support the Recruitment Report."

B. The June 4 Information Paper. On or about June 4, 2008, the Department issued an Information Paper (the "June 4 Information Paper"), which elaborated on the actions described in the June 2 Press Release. The June 4 Information Paper stated in part: "The Department's regulations specifically prohibit an employer's immigration attorney or agent from participating in considering the qualifications of U.S. workers who apply for positions for which certification is sought, unless the attorney is normally involved in the employer's routine hiring process. Where 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. The Department's rule safeguards against the use of attorneys to find reasons not to hire U.S. workers that the employer would, but for the attorney's involvement, deem qualified. The rule applies only to consideration of particular applicants, and does not bar employers from seeking general advice on the meaning of 'qualified' in the context of a labor certification application."

C. The June 13 Bulletin. On June 13, 2008, the Department issued a PERM Program Guidance Bulletin entitled "Clarification of Scope of Consideration Rule in 20 CFR 656.10(b)(2)" (the "June 13 Bulletin"). The June 13 Bulletin stated in part: "After an employer evaluates a U.S. worker and concludes that the worker is unqualified, the employer may seek the advice of its attorney or agent to ensure that its reasons for rejecting the U.S. worker are lawful, and the attorney or agent may review the qualifications of the U.S. worker to the extent necessary to provide that advice. By contrast, if an employer evaluates a U.S. worker and determines that the worker is minimally qualified, the attorney, agent, or foreign worker may not thereafter consider the applicants' qualifications and attempt to substitute his or her own judgment for that of the employer."

D. The July 16 Agreement. The Department and Fragomen entered into an Agreement that became effective as of July 16, 2008 (the "July 16 Agreement"). Under the July 16 Agreement, Fragomen agreed to comply with the provisions of the June 13 Bulletin pending a judicial determination of any legal challenges to the provisions of the June 13 Bulletin; and the Department agreed to cease, on a prospective basis, its policy of automatically auditing each and every labor certification application filed by Fragomen.

E. The Second Pre-Screening Information Request. On June 12, 2008, the Department inquired of Fragomen whether "any Fragomen office is providing an initial review or pre-screening of resumes and/or applications." Fragomen responded on July 18, 2008, declining to answer the Department's question on the ground (among others) that doing so would violate attorney-client confidentiality obligations. By letter dated July 29, 2008, the Department asked Fragomen to provide certain information concerning whether Fragomen had "out-stationed" employees who participated in their clients' permanent labor certification application processes and whether Fragomen personnel had conducted prescreening of resumes, at any time during the period from March 28, 2005 until the date of the letter (the "Second Pre-Screening Information Request"). In a letter dated August 12, 2008, Fragomen's counsel informed the Department that in the firm's view, its duties under professional responsibility rules prevented the firm from providing all of the specific information sought in the Second Pre-Screening Information Request.

F. The Certification Procedure. On or about August 15, 2008, the Department issued a form of "Certification" that was designed to offer some Fragomen clients the opportunity to have some of their foreign labor certification applications released from the attorney-consideration audits described in the June 2 Press Release; under the anticipated certification procedure, clients would have been asked to certify that the recruitment efforts for their pending-in-audit applications had been consistent with the provisions of the June 13 Bulletin (the "Certification Procedure").

G. The Filing of this Action and the Preliminary Injunction Motion. On August 8, 2008, Fragomen commenced the above-captioned action (the "Action") by filing its Complaint and a Motion for Preliminary Injunction (the "Preliminary Injunction Motion").

H. The August 29 Restatement. On August 29, 2008, the Department issued a document entitled "Restatement of PERM Program Guidance Bulletin on the Clarification of Scope of Consideration Rule in 20 CFR 656.10(b)(2)" (the "August 29 Restatement"). The August 29 Restatement stated that the guidance therein would "supersede" the June 2 Press Release, the June 4 Information Paper, and the June 13 Bulletin.

I. The September 17 Announcement. On September 17, 2008, the Department issued an announcement (the "September 17 Announcement") that stated: "The Department has been presented with evidence indicating that prior to its recent audits, many immigration attorneys believed that the Department's rule regarding consideration of U.S. workers did not apply to them unless they represented not only the employer seeking the labor certification, but also the alien for whom the certification was being sought. That interpretation is incorrect, as the Department's recently issued PERM program clarifying guidance makes clear. Nevertheless, the Department will apply the requirements of the consideration rule as interpreted by its recent guidance only to labor certification applications the recruitment for which was begun after August 29, 2008, the date on which the Department's final guidance was issued. All pending audits triggered exclusively by consideration-rule concerns are therefore being released and will be processed in accordance with their original filing date."

* * *

NOW THEREFORE, without any concession by Plaintiff that any of the claims asserted in this Action lacked merit, and without any concession by Defendants of any liability or wrongdoing or lack of merit in their defenses, it is hereby **STIPULATED AND AGREED** by and among the parties to this Stipulation, through their respective counsel, and it is **ORDERED**

by the Court, that the Action and the Preliminary Injunction Motion shall be resolved under the following terms:

1. Withdrawal of June Consideration Releases. The June 2 Press Release, the June 4 Information Paper, and the June 13 Bulletin (together, the "June Consideration Releases") have been superseded, as stated in the August 29 Restatement. The June Consideration Releases are no longer in effect, and they will not be enforced or reinstated.

(a) The Department acknowledges that:

i. 20 C.F.R. 656.10(b)(1) provides that "[e]mployers may have agents or attorneys represent them throughout the labor certification process."

ii. As clarified in the August 29 Restatement, "[t]he 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." As further stated in that guidance, "[a]ttorneys (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." This may include advice concerning requirements relating to whether an applicant is a qualified, willing, able, and available U. S. worker, and the fact that such advice was sought and/or given shall not itself be regarded as a bad faith deviation from the normal recruiting procedures followed by the employer for positions not involving a labor certification.

(b) Fragomen agrees that it will comply with the restrictions on preliminary screening of applications and participation in interviews set forth in the August 29 Restatement

(consistent with the provisions in the September 17 Announcement concerning prospective application), unless and until such restrictions are withdrawn or modified by the Department or a Court; provided that this subparagraph 1(b) shall not be deemed as evidence or construed as an indication that Fragomen acquiesces in the Department's view of the legality or constitutionality of the August 29 Restatement.

2. Release of Attorney Consideration Audits. Consistent with the September 17 Announcement, and as explained further below, the Department has released, or will promptly release within thirty (30) days of the entry of this Stipulation as an Order by the Court, all pending audits of alien labor certification applications filed by Fragomen that were triggered solely by attorney-consideration issues.

(a) The audits to be released as described above shall include the audits in the "1,400 pending cases [] under analyst review" as of May 12, 2008 and the "1,000 new cases" received by the Department between May 12, 2008 and July 15, 2008, as referred to in footnote 1 on page 12 of the Declaration of William L. Carlson dated August 29, 2008 (the "Carlson Declaration"). These cases shall be processed and adjudicated according to the Department's usual procedures, with priority dates based on the dates these applications originally were filed.

i. All cases in the categories described in this sub-paragraph 2(a) that had already completed the analyst review process and had not been selected for an audit prior to the issuance of an attorney-consideration audit pursuant to the initiative announced in the June 2 Press Release shall be processed and adjudicated according to the Department's usual procedures for cases not selected for audit.

ii. With respect to any cases in the categories described in this sub-paragraph 2(a) that had ***not*** already completed the analyst review process prior to the issuance of

an attorney-consideration audit pursuant to the initiative announced in the June 2 Press Release, the Department may conduct the normal analyst review process to select cases for potential audits.

(b) With respect to the "nearly 1,300 cases filed by Fragomen [that as of May 12, 2008] were already being audited for issues unrelated to" attorney-consideration issues, as referred to in footnote 1 on page 12 of the Carlson Declaration, the audits on issues unrelated to attorney-consideration issues shall be processed by the Department according to usual procedures with a priority date based on the date the application was originally filed. However, in each instance where a case meeting this description subsequently received a supplemental audit notice based on attorney-consideration issues, the supplemental portion of the audit based on attorney-consideration issues shall be released.

(c) For any cases filed on or after July 16, 2008 that received audit notices that included the requests related to attorney-consideration issues described above in Paragraph A as well as requests based on unrelated issues (such as, for example, standard vocational preparation or business necessity issues), the portion of the audit based on attorney-consideration issues shall be released, but the portion(s) of the audit based on unrelated issues shall be processed by the Department according to usual procedures with a priority date based on the date the application was originally filed. To the extent the time to respond to the audit notice in such a case has not already passed as of the date of this Stipulation, Fragomen shall not be required to respond to the portion of the audit based on attorney-consideration issues.

3. Destruction of Audit Response Materials. Within thirty (30) days of the entry of this Stipulation as an Order by the Court, the Department will destroy all materials produced by Fragomen in response to the attorney-consideration audits that are being released as described in

paragraph 2 above. The Department shall certify to Fragomen the destruction of all such material (including all copies of such material). The certification will be signed by Dr. William L. Carlson.

(a) For the cases to be entirely released from audit as described in paragraph 2(a) above, the Department shall destroy (within the thirty (30) day period noted above) all materials produced by Fragomen in response to such audit, including (without limitation) resumes, forms, recruitment reports, cover letters, documentation concerning business necessity, documentation concerning standard vocational preparation, and other documentation.

(b) For the cases described in subparagraph 2(b) above, the Department shall destroy (within the thirty (30) day period noted above) all materials that were produced in response to the supplemental audit notice addressing attorney-consideration issues. Such materials shall include (without limitation) all resumes, forms, recruitment reports, cover letters, and other documentation submitted in response to any such supplemental audit notice.

4. Effect on July 16 Agreement and Certification Procedure. This Stipulation and Order shall supersede the July 16 Agreement, which shall no longer be effective. In addition, the Certification Procedure shall be terminated, and Fragomen (rather than the Department) shall inform Fragomen's clients that the Certification Procedure has been terminated in light of the terms hereof.

5. Non-Retaliation. The Department shall not retaliate in any way against Fragomen or any client represented by Fragomen based on Fragomen's having challenged the Department's policies as unlawful or unconstitutional, or having filed or prosecuted the Action or the Motion for Preliminary Injunction.

(a) The Department shall review, audit, and adjudicate permanent labor certification applications filed by Fragomen according to the same standards, criteria, and review procedures it applies to other permanent labor certification applications.

(b) The Department will provide Fragomen information reflecting the percentage of pending permanent labor certification applications that are in audit, on a quarterly basis, for eighteen (18) months after the date this Stipulation is filed with the court. This information shall be provided to counsel for Fragomen within thirty (30) days of the end of each quarter, beginning with the quarter ending December 31, 2008.

(c) The Department shall take reasonable steps to bring the obligations described herein to the attention of its appropriate staff and to ensure that they comply with said obligations. Those steps shall include (without limitation) disseminating, within five (5) business days hereof, a notice substantially in the form of the annexed Exhibit A to the Center Director, Certifying Officers, and analysts in the Atlanta National Processing Center. The notice shall be sent under the name of the Administrator of the Office of Foreign Labor Certification or a higher ranking official of the Department.

6. Withdrawal of Second Pre-Screening Information Request. The Second Pre-Screening Information Request is hereby deemed withdrawn, without prejudice to the Department's right to make other requests for supplemental information pursuant to 20 C.F.R. 656.20(d).

7. Retention of Jurisdiction. This Court shall retain jurisdiction with respect to the implementation and enforcement of the terms of this Stipulation and Order for a period of eighteen (18) months after the date of this Stipulation. This Stipulation will terminate at the end of that eighteen (18) month period.

8. Dismissal. Plaintiff agrees to dismiss the Action with prejudice pursuant to Rule 41 (a)(1)(ii) of the Federal Rules of Civil Procedure, effective upon entry by the Court of this Stipulation and Order. Plaintiff waives any claims based on facts that were known or reasonably could have been known at the time of filing of this Action. Plaintiff is not waiving any right to litigate claims based on Defendants' conduct subsequent to the date of the filing of the Action, except that Plaintiff shall not bring an Action in any court challenging the August 29 Restatement or any of its provisions, so long as the Court retains jurisdiction with respect to the implementation and enforcement of the terms of this Stipulation and Order pursuant to paragraph 7 above.

9. Attorneys' Fees and Costs. The parties agree that each party shall be responsible for its own attorneys' fees and costs incurred in this Action.

10. Participation in Drafting. Each of the parties acknowledge that they participated in the creation and drafting of this Stipulation. In the event a court of law or equity may find the terms and conditions of this stipulation to be ambiguous, the doctrine of *contra proferentem* shall not apply as a ground for construing any ambiguities against any party.

Dated: October 24, 2008

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IT IS HEREBY ORDERED THAT:

(1) The case is dismissed with prejudice; and

(2) The Court will retain jurisdiction over the Stipulation for a period of eighteen (18) months.

Honorable Ricardo M. Urbina
United States District Judge

Date: November 3, 2008

Exhibit A: Form of Notice to be disseminated to the Center Director, Certifying Officers, and analysts in the Atlanta National Processing Center

This notice is being circulated to advise the Center Director, Certifying Officers, and analysts in the Atlanta National Processing Center (NPC) of certain legal obligations that must be honored by the Department of Labor and all of its employees in connection with a Stipulation of Settlement that has been agreed to by the parties and signed by the Court in the lawsuit entitled *Fragomen, Del Rey, Bernsen & Loewy LLP ("Fragomen") v. Chao et al.* (the "Lawsuit"). Specifically, the Department, OFLC, and all certifying officers and their staff must not retaliate in any way against Fragomen or any client represented by Fragomen based on Fragomen's having challenged the Department's policies as unlawful or unconstitutional, or having filed or prosecuted the Lawsuit. The Center Director, Certifying Officers, and analysts in the Atlanta NPC must review, audit, and adjudicate permanent labor certification applications filed by Fragomen according to the same standards and criteria OFLC applies to permanent labor certification applications filed by other law firms.

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Director, Office of Foreign Labor Certification

Dated: October __, 2008