Ethical Considerations and Beyond:

Permanent Residence through Labor Certification

by Susan Bond[[1]](#endnote-1)

Without a doubt, immigration law is one the most complex areas of law to practice. With respect to employment-based immigration, dual representation is interwoven into each of the many steps of the process of applying for work authorization through non-immigrant visas as well as in the pursuit of permanent residence. Each of these processes is for the benefit of an employer and the foreign national employee and as such, we are working for the benefit of all parties. Due to a variety of reasons however, including the lengthy processing times involved, the changing economy or simply just the choice to seek a new direction in life, the goals or needs of one or more of the parties may change. When this happens, attorneys may find themselves faced with some of the most difficult and challenging ethical situations, even for the most seasoned practitioner.

Within the many sub-specialty areas of employment-based immigration law, this author believes the pursuit of permanent residence through the labor certification process or PERM[[2]](#footnote-1)is particularly complex, with countless considerations that must be addressed before the long journey is undertaken to reach the final destination and ultimate approval of permanent residence. Probably in no other area of immigration law are the initial decisions made by the attorney so critical, and with such far reaching consequences, as found in the labor certification process.

The ethical considerations posed in this paper will include from start to finish, many of the scenarios encountered during the process of obtaining permanent residence through the labor certification process and address these issues with respect to dual representation. These scenarios start at the initial intake and case review, and continue throughout the processing of the I-485 application for adjustment to lawful permanent resident status.

As attorneys, we owe our clients a duty to zealously represent them and we owe them the duties of confidentiality and loyalty. We must keep abreast of the law, which is ever-changing in our practice area, so we are fully capable to properly inform and advise our clients. We must be fully apprised of every aspect of our client’s status and background, as well as the employer’s financial situation past, present and future. While of course we want clear and concise representation agreements, we cannot ask a client to waive our duties in anticipation of a crisis or conflict. Our duties as attorneys attach upon a reasonable reliance by the individual that we are accepting confidential information and we have imparted our legal advice pursuant to those disclosures. The duties do not simply attach to the person paying our fees, nor do they end when a conflict arises.

The choices made and the advice given by the attorney at the beginning of this process will follow each and every party throughout the processing of the ETA 9089, the I-140 immigrant petition, and I-485 adjustment of status. In fact, each decision made throughout the processing of the case will lay the foundation for the next step, much as building a structurally sound home requires constructing on a solid foundation. If the foundation was properly planned and executed, the success of each consecutive step in building the case should naturally follow and result in the ultimate approval and grant of permanent residence for the foreign national. Likewise, if there are mistakes made or shortcuts taken at the initial phases in this complicated process, those mistakes could be devastating for your clients, and the results could include the company losing a valuable employee, the foreign national losing status and being required to depart the country and wait years for the possibility of returning to the U.S., as well as damage to the reputation of the attorney within the legal community. It is with great care and consideration that we must proceed to ensure the effective results for all parties.

In representing a company that seeks work authorization or permanent residence for an employee, the attorney is seeking positive results for both the company and foreign national, and of course, in a perfect world, no conflicts would exist. But prior to any conflicts arising and if only in anticipation, dual-representation should be addressed.

*If you are uncertain or not convinced that dual representation exists, consider the following:*

In determining what relief is available and the possibilities for obtaining permanent residence for an individual, specifically through the labor certification process, the attorney must evaluate the corporate client’s eligibility to sponsor an individual and the foreign national’s eligibility to be granted permanent residence. The attorney must fully disclose to both parties all considerations for each step in the PERM process, as well as the liabilities and implications of filing the I-140 immigrant petition and the adjustment of status. It would be difficult, if not impossible, for an attorney to properly counsel the company and/or the foreign national, without detailed information regarding the company and the foreign national employee. The attorney has a duty to fully inform the parties, and as the steps in the permanent residence through PERM are all interwoven, the attorney must fully disclose, inform and educate the parties, regarding all steps in the process, so that an informed decision can be made moving forward.

In advising the corporate client, the attorney must fully disclose both the benefits and liabilities regarding the labor certification process, including the financial obligations of paying the appropriate wage to the employee through the disclosure of financial documents, which corporate clients are often reluctant to share. The client must understand the requirement of performing a test of the labor market through a good-faith recruitment campaign, and the client must also be fully informed of the prohibition against accepting any recoupment of costs from the foreign national employee for payment of fees associated with the labor certification process.[[3]](#footnote-2) The attorney will advise the corporate client not only with respect to this particular application, but also consider other foreign nationals who have been sponsored by the company, their job classifications, the requirements listed in any other applications as they relate to the current application the company is considering, and then balance and consider each and every factor prior to properly advising the client and moving forward.

With respect to the foreign national employee, the attorney will collect information about the employee’s past, current and future immigration status, and review documentation regarding the employee’s education and experience as related to the labor certification process, the I-140 immigrant visa process, and ultimately, for the application for adjustment of status. In most situations, the attorney has either represented the employee in applying for H-1B status or may currently be doing so in conjunction with the labor certification process. In reviewing these documents, strategizing, and dispensing legal advice, the attorney considers the process as a whole including the timing of the processes, balancing when the labor certification should begin, and of course, whether it is even feasible to proceed with the labor certification process, based on the attorney’s analysis of all information gathered and reviewed. The attorney will address issues that will impact the foreign national worker, now and in the future.

Based on the requirement that the attorney become fully informed regarding all parties’ eligibility to provide a sound strategy for the future, the attorney will be hard pressed to competently represent the employer, while at the same time attempt to avoid any interaction with the foreign national, which is without a doubt, required to properly prepare any petitions. If however, the attorney does insist that the foreign national is not a client, then the attorney is faced with an uncomfortable situation, specifically the attorney would be prohibited from counseling or extracting advice from the foreign national in preparation of his corporate client’s goals, other than encouraging the employee to seek advice from other counsel, given the prohibition against advising non-clients. [[4]](#footnote-3)

Full disclosure is inherent in representing our clients properly and of course required in situations involving dual representation. Rule 1.06 of the Texas Rules states that a lawyer may not represent a client in a substantially related matter unless “each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any”. The corresponding rule in the ABA Model Rules, states that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest, unless each affected client gives informed consent, confirmed in writing.[[5]](#footnote-4) In the exchange of information and providing legal analysis, if indeed the attorney is fully discharging his or her duties, dual representation will attach.

*Below are some common scenarios related to permanent residence through the labor certification process:*

**First Scenario:** Your corporate client calls you and is ready to start the green card process. The client has previously sponsored only H-1B petitions so they are new to this process. They want to know what the education and experience requirements are for the position in the PERM application, and want to know if they can list a Master’s degree requirement, because the foreign national employee has suggested this and it will make them all very happy.

**Issues:** Does the attorney suggest requirements that may be more appealing to the company and foreign national, or should the attorney review the employer’s corporate structure, the other workers in similar positions, and advice the employer based on these criteria, to determine the job requirements?

**Guidance:** The job requirements must represent the employer’s actual minimum requirements for the job opportunity and the employer must not have hired workers with less training or experience for the jobs substantially comparable to that involved in the job opportunity.[[6]](#footnote-5)

**Second Scenario:** The foreign national calls your office, a friend having shared your contact information. The foreign national is employed on a full-time basis pursuant to H-1B status, and has a willing employer who will process the green card application with the requirement that the employee pay back the costs of the green card process should the employee voluntarily quit his job within 3 years of being granted permanent residence? Unless the employee agrees, the employer will not sponsor the green card, the employee will run out of H-1B time, and will be required to depart the US.

**Issues:** Can the company shift the burden of fee or costs to the employee who is willing to pay? Can the company enter into a contractual arrangement whereby the employee works for a given number of years in exchange for the employer paying the costs associated with the PERM or green card process?[[7]](#footnote-6)

**Guidance:** Under no circumstances may an employer seek or receive any payment of any kind for any activity related to obtaining permanent labor certification. No, any contract resulting in the employee paying any of the expenses associated with the labor certification would be invalid as it conflicts with the law. The alien is not permitted to pay any expenses associated with the green card process nor is the alien permitted to reimburse the employer, offer wage concessions, kickbacks, back pay, forfeit vacation, or any other method to financially compensate the employer.[[8]](#footnote-7) The employer, the foreign national and the attorney must attest to this on the ETA 9089, and if issued an audit, the Department of Labor may require further attestations that no money has changed hands for this process.

**Third Scenario:** The employer contacts the attorney to let her know that the company is ready to proceed with labor certifications on behalf of three of its best workers, who are all currently in H-1B status. The company also discloses that the company is on the verge of bankruptcy but has opened several new contracts that will put them back in the black financially. However if the foreign national workers learn of this financial situation, they would likely resign. This would jeopardize the company’s financial recovery, as all of the worker hold jobs in high demand and are of course in the fifth year of H-1B status which you filed on their behalf.

**Issues:** Does the financial viability of the company raise issues for the labor certification process? If the company can’t proceed with the labor certification, does the attorney have an ethical obligation to disclose to the employees the reasons the company cannot proceed, or would a bare disclosure that the process cannot move forward be sufficient to discharge the attorney’s duties?

**Guidance:** The employer must prove that is has the ability to pay the offered wage to the beneficiary, from the time that the ETA 9089 is submitted, until the adjudication of the I-485 adjustment of status application. The attorney must review the petitioner’s financial documents and determine if, based on a preponderance of the evidence, it meets this standard.[[9]](#footnote-8) Whether or not a duty has been created to the employee will be fact specific. As determining the ability to pay the wages is part of the attorney assessing the case and determining whether to proceed, it is not likely the attorney owes any disclosures regarding the reasons for not proceeding.

**Fourth Scenario:** The final certification of the ETA 9089 has been received, and the company is ready to proceed with filing the I-140 immigrant petition for the company’s employee, who holds H-1B status. The employee contacts your office, to ask you if the company will file the I-140 via premium processing, so that the priority date will be locked in upon approval. The foreign national employee expresses his concern over rumors about the company’s financial troubles and is worried about his status and upcoming six year end date, and hints that he has thoughts of leaving the company.

**Issues:** Does the attorney have an obligation to notify the employer regarding the foreign national’s implied intention to leave the company as soon as the I-140 is approved? Would the fact that the employer paid all fees related to the PERM process and H-1B, but the foreign national worker will pay the filing fees and legal fees for the I-140, including the fees for premium processing change your opinion?

**Guidance:** Whether disclosures are required, or a withdrawal is required, would depend on several factors. Has the attorney clearly outlined the terms of dual representation? Has the attorney discussed the issues openly with all parties prior to this scenario? An attorney’s ethical duties do not depend on which party paid the attorney’s fees, but rather on whether or not the client or party who has engaged advice from the attorney has a reasonable expectation that there exists an attorney/client relationship.

**Fifth Scenario:** One of your best corporate clients just lost its HR Manager and has requested that you review the resumes received in connection with the PERM process and draft emails for applicants who are not qualified.

**Issues:** Would it be acceptable to perform an initial review the resumes in connection with the PERM process, if the company would have the final decision on interviewing the applicant?

**Guidance:** Attorneys cannot be involved with the interview process or have influence over the applicants considered for the position.[[10]](#footnote-9) To maintain integrity throughout the process, the attorney should offer guidance and legal advice throughout the process, to ensure the employer is following the recruitment procedures pursuant to the regulations, however should not be involved in the vetting of applicants.[[11]](#footnote-10)

**Sixth Scenario:** You have an approved labor certification and are gathering the information and evidence for the I-140 immigrant petition. Due to time and a variety of reasons, you failed to determine whether or not the foreign national met the minimum requirements in the PERM advertisements prior to submitting the ETA 9089, and the foreign national has now disclosed to you that he only holds a 3 year bachelor’s degree from his home country of India, and he knows that he is not qualified for the position in the EB2 category, as the requirements for the position are a Bachelor’s degree or the equivalent, and 5 years of experience. The foreign national has asked you to submit the I-140 as EB2, and is willing to pay the legal fees and filing fees, knowing the case may be denied. The company has agreed to this course of action and is willing to waive any liabilities in the event the I-140 is denied.

**Issues:** Do you submit the I-140 immigrant petition, requesting EB2 category? What considerations or issues may arise choosing this strategy?

**Guidance:** No, the Texas Rules of Professional Conduct prohibit frivolous claims and require a lawyer to not knowingly make a false statement of material fact or law to a third person. [[12]](#footnote-11) Furthermore, the rules go on to say that a lawyer not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous. [[13]](#footnote-12)

**Seventh Scenario:** The ETA 9089 and the I-140 immigrant petition have been approved for your corporate client, the foreign national has been working for the corporate client in H-1B status for over five years, and his family is on H-4 status. You have represented all parties throughout the process. The foreign national has now accepted a job offer with another company, and the corporate client, very unhappy that they have spent thousands of dollars on this process, requests that you notify USCIS that the employee is no longer employed pursuant to H-1B status. The company further tells you that it will not keep the job offer open, and requests you also notify USCIS that they will not use the I-140 immigrant petition.

**Issues:** What consequences may follow the notification to USCIS that the company will not utilize the I-140 immigrant petition? Is the attorney required to notify USCIS that an employer has no intention of holding a permanent job offer open for the foreign national? Does the foreign national have a protected interest in the I-140?

**Guidance:** Unlike the requirement that the petitioner notify USCIS of changes in terms and conditions of H-1B employment found at 8 C.F.R. §214.2 (h)(11), here is no legal requirement that the petitioner notify USCIS that an employee who has a pending or approved I-140 immigrant is no longer with the sponsoring company.

The company may believe there is a compelling reason to request that USCIS be notified in the event a foreign national is no longer employed. In general, this will be true only if the company’s ability to pay will be in question if and when they sponsor other employees for permanent residence. The company may need to balance its interests in future filings with the impact of notifying USCIS that the previous employee is no longer employed. If in fact the employer is determined to notify USCIS, in general the attorney should not be involved in this transaction, aside from notifying the foreign national and company of the consequences of such action. If all parties agree in writing at the outset that the I-140 may be withdrawn if the employee departs but before obtaining permanent residence, and that you may submit the withdrawal request on behalf of the company.

**Eighth Scenario:** Your firm is approached by a potential corporate client that owns a small construction company. The company suspects that many of its employees do not have work authorization but they are willing to sponsor the employees to get them lawful status, because the employees are like family and the business could not operate without them. The company is ready to pay you for the PERM process, and if needed, the I-140 and I-485 fees, and let your firm take care of each and every step in the process. In fact, the company would prefer to remain ignorant of each of the employee’s status, until they all have work authorization, or hell freezes over, whichever comes first.

**Issues:** Can you ethically represent the company or the workers, or both in this situation? Could representing the company or employee give rise to any criminal charges, either for the law firm or the client(s)? Does the attorney have a duty to discuss the possibility of inadmissibility at this point, or is the only obligation regarding the PERM process?

**Guidance**: An attorney can ethically represent both parties but full disclosure is required as the employer must be apprised that it will be disclosing on the ETA 9089 they are employing individuals who do not have lawful work authorization.[[14]](#footnote-13)

Employing individuals without work authorization could potentially result in the employer facing criminal charges or heavy sanctions.[[15]](#footnote-14) In addition, the attorney has an affirmative obligation to address inadmissibility issues and any other potential hurdles from the initiation of the PERM process through permanent residency so the company can make an informed decisions regarding proceeding with the labor certification and adjustment of status**.**[[16]](#footnote-15)

**Ninth Scenario:** You have been asked to represent a small company that wants to file a labor certification on behalf of the director of operations, who is the owner’s uncle.

**Issues:** Can the company pursue the labor certification?

**Guidance:** Where a familial relationship exists between the stockholders, corporate officers, or partners and the foreign national, the company must disclose the relationship on Form ETA 9089 at C.9, and be prepared to provide proof that a bona fide job opportunity exists, and that the foreign national does not have any influence or control over the job opportunity. This may be satisfied by copies of partnership agreements, corporate documents, and financial records including shareholder distributions and investment amounts for each owner.[[17]](#footnote-16)

The issue of sponsoring family members and close friends for labor certifications, however, is much more complex. Employers are strongly discouraged from sponsoring immediate family, family through marriage, and even close friends for labor certifications. [[18]](#footnote-17) BALCA has routinely held that a relationship invalidating a bona fide job offer may arise where the beneficiary is related to the petitioner “by blood, financial, by marriage, or through friendship.” [[19]](#footnote-18)

**Tenth Scenario:** The I-140 has been approved, and through some miracle known only to the visa bulletin gods, the foreign national’s priority date is current and you have filed the I-485 applications on behalf of the employee and his family members, which are all pending. The company, also your client, paid all fees associated with the labor certification process, I-140, the H-1B and H-4 petitions, but the employee has paid all fees associated with the I-485 process. The foreign national employee is a Security Systems Engineer, and your corporate client provides security solutions to its clients. The employee has just called you to request your assistance or a referral for a criminal attorney. The employee discloses to you that he been arrested and charged with conspiracy to defraud his insurance company by providing a falsified claim.

**Issues:** Do the attorney have an obligation to disclose the arrest to the employer, given the employee paid all of the fees associated with the I-485 process? Do you still owe any duties to the corporate client in this situation? Since the arrest happened after the I-485 was filed, do you have a duty to amend the I-485 filing or document the arrest and outcome to USCIS? Would non-disclosure be deemed misrepresentation to the Service?

**Guidance:** The arrest and ultimate conviction could result in the employee being inadmissible and placed in removal proceedings. If convicted, the employer may be liable to its own clients if there are any security or background check requirements for the employee to perform services to the clients, due to the nature of the employment. And, the attorney must also decide whether there is an obligation to notify USCIS that the I-485 needs to be amended and the arrest disclosed, given employment-based adjustment applicants do not always receive the opportunity for an interview. Other considerations would be the duty of loyalty and confidentiality, and how to balance disclosure of the facts without harming either or party.

In disclosing, carefully consider the expectations of privacy that each party may have, and whether you have openly shared communications previously.

See 2006 U.S. Dist. Lexis 11160. An employee brought suit against attorney for disclosure of criminal activity. However, the court found no breach of confidentiality and no connection between attorney disclosure of crimes and termination of employment. Whether there is a duty to amend the application or withdraw would be based on the totality of the circumstances, including a determination by the attorney if it is possible to proceed while serving the best interests of both parties. Given that employment-based adjustments are not always afforded an interview, amended or notifying the Service may be the only chance the parties have to amend the record before adjudication. Also consider 8 C.F.R. 1003.102(c) which proscribes willfully misleading a CIS officer concerning a material or relevant matter.

“Knowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads, misinforms, threatens, or deceives any person (including a party to a case or an officer or employee of the Department of Justice), concerning any material and relevant matter relating to a case, including knowingly or with reckless disregard offering false evidence. If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures”

From the initial consultation until the adjustment of status, the corporate client and the foreign national must be fully informed. It is up to each attorney to determine, based on our ethical rules and good judgment, whether dual representation has attached, and if so, how to proceed. As attorneys, it is our job to maintain our knowledge and keep our finger on the pulse of changes, constantly learning and reviewing AAO, BALCA decisions and sharing our experiences of other practitioners. To make it through the process of obtaining permanent residence for your client through the labor certification process means you have run a marathon, not a sprint. It is an arduous journey, but a positive outcome is extraordinarily gratifying.

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   \*The opinions expressed within this paper are solely those of the author, and not endorsed by any group or agency, but rather presented as guidelines and references for continuing education purposes. [↑](#endnote-ref-1)
2. Program Electronic Review Management found at C.F.R. § 656.17 [↑](#footnote-ref-1)
3. 20 C.F.R. § 656.12(b) [↑](#footnote-ref-2)
4. ABA Model Rules of Professional Conduct, rule 4.3 [↑](#footnote-ref-3)
5. ABA Model Rules of Professional Conduct Rules 1.7(a)(4). [↑](#footnote-ref-4)
6. 20 C.F.R. § 656.17 (i)(1)(2) [↑](#footnote-ref-5)
7. See 20 C.F.R. § 656.12(b) [↑](#footnote-ref-6)
8. See 20 C.F.R. § 656.12(b) [↑](#footnote-ref-7)
9. 8 C.F.R. § 204.5(g)(2) [↑](#footnote-ref-8)
10. 20 C.F.R. § 656.10 (b)(2)(i) [↑](#footnote-ref-9)
11. 20 C.F.R. § 656.10(b)(2)(i) [↑](#footnote-ref-10)
12. Texas Rules of Professional Conduct 4.01 [↑](#footnote-ref-11)
13. Texas Rules of Professional Conduct 3.01 [↑](#footnote-ref-12)
14. Texas Rules of Professional Conduct 1.03(b) Communication: A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation. [↑](#footnote-ref-13)
15. 8 U.S. Code §1324 a(1) [↑](#footnote-ref-14)
16. Texas Rules of Professional Conduct 1.03(b) [↑](#footnote-ref-15)
17. 20 C.F.R. § 656.17 (l) [↑](#footnote-ref-16)
18. 20 CFR § 656.17(L) [↑](#footnote-ref-17)
19. See *Matter of Chamdal Food Mart*, 2000-INA-92 (BALCA May 15, 2000 and *Matter of Sunmart* 374, 2000-INA-93 (BALCA May 15, 2000) [↑](#footnote-ref-18)