cohen&grigsby
progressive law.

Direct Dial 412.297.4859 · Direct Fax 412.394.4019 · jelliott@cohenlaw.com

July 10, 2007

VIA FACSIMILE AND FEDERAL EXPRESS

(202) 224-6020

The Honorable Senator Charles E. Grassley
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510-1501

(202) 225-8628

The Honorable Lamar Smith
United States House of Representatives
2409 Rayburn House Office Building
Washington, D.C. 20515-4321

Dear Senator Grassley and Congressman Smith:

We are writing in response to your letter of June 21, 2007, regarding videotaped portions of the 7th Annual Immigration Law Update Seminar conducted by Cohen & Grigsby's Immigration Law Practice Group in May. Let me begin by saying that the Firm sincerely regrets certain ill-chosen language used during the Seminar by Firm personnel, which has subjected the Firm to criticism and thrust it into the nation's immigration law reform debate. However, we respectfully reject any suggestion that members of the Firm have engaged in any conduct that is illegal, abusive, discriminatory against U.S. citizens, or unethical. As discussed below, the explanation of the law that the Firm gave at the Seminar was both legally correct and ethical. A law firm, of course, has an ethical obligation to assist its clients in meeting their lawful goals by lawful means. When the legal and regulatory context of the Firm's statements is properly understood, it will become clear that this is precisely what the Firm was doing.

Cohen & Grigsby is a 125-attorney law firm headquartered in Pittsburgh, Pennsylvania, founded in 1981. We practice in a number of areas of the law in addition to immigration law, including bankruptcy, business, tax, emerging business, estates and trusts, intellectual property, international business, litigation, labor and employment, and mergers and acquisitions. Our clients include private and publicly held businesses, multinational corporations, nonprofit organizations, individuals, and emerging companies.

Although your letter focuses in large part on the H-1B visa program, it is important to understand that the comments pertaining to recruitment practices made by Mr. Lebowitz (a lawyer with twenty years' experience) and our paralegals referenced in your letter do not pertain to H-1B visas. No part of the H-1B discussion at the Seminar involved recruitment issues, because recruitment is not a part of the normal H-1B statutory or regulatory scheme. Moreover, the employees for whom we file H-1B visa petitions are typically highly skilled and highly educated employees of U.S. companies who are paid wages above -- often well above -- federally-mandated "prevailing wages".

In reply to your specific questions regarding hiring of H-1B workers, please note that we do not advise anyone "how to hire only foreign labor." Rather, we work with our corporate clients after our clients have completed their recruitment process for a particular employment position and the client has identified a foreign national as the person deemed most qualified for the particular employment position. At that point, we advise our client of the legally available visa options that would best serve its interests. The discussion at the Seminar about H-1B visas comported in all respects with applicable legal requirements.

The comments by several members of our Immigration Law Practice Group highlighted in your letter refer to the "labor certification application" process, which is the first step in the permanent residence process for foreign national employees already employed by U.S. companies. That application process is known as Program Electronic Review Management ("PERM"). PERM was established by the Department of Labor ("DOL") pursuant to Congressional mandate, 8 U.S.C. § 1182(a)(5)(A), and is administered by DOL.

The labor certification application process is not a process that was developed by DOL to find jobs for U.S. workers. Rather, it is one step in determining whether a foreign national employee of a U.S. employer -- in virtually all cases a person already employed by the U.S employer under a temporary visa -- should be able to obtain permanent resident status in the United States. Many of the foreign workers whose positions become subject to the labor certification process have been legally employed under temporary visas for several years. By the time the employer has decided to proceed with the labor certification application process, the company normally has decided that the foreign national employee is of critical importance to the company. In most cases, the employer had previously determined through its regular recruitment process that the foreign national employed under a temporary visa brought special skills otherwise unavailable to the employer in the U.S. labor market.

The PERM labor certification application process involves a case by case determination by DOL that the employment of a particular foreign worker will not adversely affect the wages and working conditions of U.S. workers and that there are no able, willing, qualified, and available U.S. workers for the particular position described in the PERM application. 20 C.F.R. § 656.2(c)(1). The process developed by DOL is one that employers and their attorneys find very troublesome, because it does not allow employers to utilize their actual hiring requirements nor their actual recruitment processes. Instead, the employer is required to test the labor market for a position already occupied by a qualified foreign national employee. Immigration lawyers have the difficult task of explaining to employers performing this test that the employers cannot use the normal job requirements they have developed for the position, which while valid, thorough and rigorous, often are subjective and not subject to precise, quantitative measurement. Rather, employers must comply with DOL regulations, which require them to use only objective

and quantifiable job requirements and federally-mandated standards regarding education and experience.

DOL is fully aware of the artificial nature of the recruitment that results from the PERM labor certification application process. Recently, DOL promulgated a change to its regulations that, starting July 16, 2007, requires employers, not the alien or anyone else, to pay the cost of the labor certification process. 72 Fed. Reg. 27904, 27945 (May 17, 2007). The purpose of the change is to ensure that the employer has a vested interest in the successful outcome of this process by requiring it to incur the administrative costs associated with permanently retaining a qualified foreign worker. In explaining this change, DOL recognized that:

> "...the vast majority of aliens for whom permanent labor certifications are filed are already employed by the employer. In initiating the permanent residence process, the employer demonstrates a desire to retain the alien on a more permanent basis... The pre-existing relationship provides the employer with significant incentive to conduct a recruitment process in a manner that favors the alien."

Id. at 27920.

In sum, employers must work within a system, established by DOL, where an employer must advertise to fill positions already occupied by a foreign worker whom the employer is not seeking to replace.

Because the labor certification process runs counter to an employer's normal recruitment process, immigration law professionals must advise the employer about the technical rules governing this interview process and explain the grounds on which the employer may legally disqualify a U.S. worker for purposes of the labor certification application, if the employer believes that worker is not, in fact, qualified for the job. DOL regulations require employers to consider all "minimally qualified workers". However, in the actual hiring process, employers do not hire "minimally qualified workers" – they hire the most qualified applicant. Thus, employers need legal guidance in interviewing applicants involved in the labor certification process because they may disqualify only applicants who do not meet the federally-prescribed minimum requirements; they cannot disqualify applicants who fail only to meet the employer's actual job requirements.

You have asked us to explain certain videotaped comments by Mr. Lebowitz and our paralegals discussing the recruitment process required by DOL's labor certification regulations to test the availability of qualified U.S. workers. You make reference to the portion of the video in which Mr. Lebowitz says that the goal of the labor certification process is "not to find a qualified and interested U.S. worker." The labor certification process is commenced only when the employer's goal is to obtain permanent resident status for a critical foreign national employee. When a company approaches our Firm with the lawful goal of obtaining a green card for a foreign national employee who is already working for the company on a temporary visa, and we determine that the labor certification process is the best strategy, our immigration lawyers make this recommendation to the company, as they are ethically required to do, and then carefully follow and advise the company to follow all DOL regulations involved in the process. In this regard, please be advised that we have had our Firm's practices regarding representation of our clients with respect to compliance with the labor certification process reviewed by a distinguished immigration attorney, H. Ronald Klasko, of the Philadelphia firm of Klasko, Rulon, Stock & Seltzer, LLP, the former President and former General Counsel of the American Immigration Lawyers' Association. Mr. Klasko has confirmed that our Firm's conduct in this regard comports with all legal requirements.

The statements referenced in your letter about advertising in regional publications and internal postings accurately describe particular requirements set forth in the DOL regulations governing the recruitment phase of the labor certification process. Our paralegal correctly explained that an employer must give notice of the filing of an Application for Permanent Employment Certification by posting a notice to the employer's employees at the facility or location of the employment for at least 10 consecutive business days. 20 C.F.R. § 656.10(d)(ii). Our paralegal also correctly explained that placement of a 30-day job order with the State Workforce Agency and two Sunday newspaper advertisements in a newspaper of general circulation in the area of intended employment are mandatory. 20 C.F.R. § 656.17(e)(1)(i). For professional positions, employers must undertake any three additional forms of recruitment that are chosen from a DOL-prescribed list of ten options. Our paralegal correctly observed that advertisement in local and ethnic newspapers is one such permissible option. 20 C.F.R. § 656.17(e)(1)(ii) (I).[1] It is common and legal for employers to choose less expensive options that fully meet DOL requirements.

---

[1] Employers are not permitted to use the recruitment media normally used to fill specific positions. In today's world, many employers recruit solely on line or by using headhunters. But DOL regulations require employers to use a different recruitment regimen for the "test of the labor market."

As Mr. Lebowitz and our paralegals described in the Seminar, once the required recruitment steps have been completed, the labor certification regulations and administrative interpretations by the Board of Alien Labor Certification Appeals require that the employer evaluate all of the resumes received against DOL's objective job-related requirements for the position to determine whether any candidates are potentially qualified. Those determined to be potentially qualified must be interviewed. However, even if the employer ultimately determines a U.S. candidate is both qualified for and interested in the position that was advertised, the Labor Certification regulations *do not require the employer to hire the U.S. job candidate.* Rather, in this circumstance an employer may not file a labor certification application on behalf of the foreign worker who seeks employment-based lawful permanent residence. If the foreign worker is allowed to stay longer in the U.S. under the terms of his or her visa, which often is the case, the company may continue to employ the foreign worker until the visa expires.

We are well-aware that many persons who understand the labor certification process find it unfair to American applicants who are led to believe that an advertised job posting represents an open position that an employer wishes to fill immediately. However, the appropriate response, we respectfully suggest, is not to challenge those who attempt to live by the rules, but to change the rules.

As previously noted, we regret the ill-chosen language referenced in your letter that was used as a shorthand description of the complex labor certification process. In the future, we will be more mindful of our words and the impressions they convey. However, we must repeat that all of our Firm's employees, including the attorneys and other professionals in the Firm's Immigration Practice Group, adhere to the highest ethical standards. Certainly, we have never "enticed fraud or abuse." Nor have we ever discriminated against anyone because of their national origin or for any other unlawful reason. To the contrary, the reputations of our attorneys and other professionals are at the highest level among our peers, our clients and government officials. It is for this reason that we are particularly concerned about allegations addressed by you to DOL regarding our Firm's "unethical" conduct, which we strongly believe are unfounded.

Finally, we wish to respond to two specific requests in your letter. In the past five years our Firm either has petitioned for or hired four H-1B visa holders. We also have assisted a great many employers in obtaining H-1B visas for foreign national employees. We do not have the authorization of these clients to provide you with their names and believe that, in the circumstances, we may not do so without violating our ethical duty of confidentiality to our clients.

We hope that this letter addresses your concerns. If you or your staff have any additional questions, please contact our Firm's counsel, James Hamilton of Bingham McCutchen LLP, at (202) 373-6026.

Sincerely yours,

COHEN & GRIGSBY, P.C.

By: Jack W. Elliott
President

JWE/zc
1241045_1

U.S. Department of Labor

Assistant Secretary for
Employment and Training
Washington, D.C. 20210

JUL 30

The Honorable Charles E. Grassley
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

Thank you for your letter regarding the administration of the Department's Foreign Labor Certification Program. You requested our review of a Cohen & Grigsby law firm video and the firm's alleged "unethical procedures and advice to clients" regarding the recruitment of U.S. workers.

The Department takes the issue of program integrity very seriously regardless of which foreign labor certification program is in question. Your letter references the H-1B Specialty Occupation Program; however, our understanding of the videotape is that the seminar was referencing the Permanent Labor Certification Program ("PERM" or the Green Card Program). The H-1B and PERM programs have different statutory requirements for the testing of our nation's labor market for U.S. workers.

The Department's Employment and Training Administration (ETA) took a number of concrete and assertive actions within 24 hours of the videotape being posted on the YouTube Web site. Our actions are in accordance with the statutory responsibility of the Secretary of Labor under the Immigration and Nationality Act to ensure there are no U.S. workers available for a permanent position and the hiring of a foreign worker would not have any adverse impact on similarly employed U.S. workers. In addition, the Department's PERM program regulations authorize a number of specific actions designed to protect U.S. workers and maintain the integrity of the permanent labor certification process.

We are reviewing PERM applications filed by the Cohen & Grigsby firm on behalf of their client employers to verify that U.S. workers who applied but were not selected for advertised positions were rejected for lawful reasons. In the event we determine U.S. workers were not lawfully rejected, ETA will take appropriate action as specified in our regulations. With regard to H-1B applications, as you know, current law restricts our review of employer-filed H-1B applications to one of "obvious errors and omissions" and the statute does not require a structured test of the domestic labor market prior to filing an application with us.

Your letter specifically requested information about the level of fraud monitoring in the H-1B program and responses to several specific questions. On June 8, 2007, the Department of Labor transmitted to the Committees on the Judiciary of the Senate and the House of Representatives, in accordance with provisions of the H-1B Visa Reform Act of 2004, a report on the number of investigations undertaken and the related expenditures. I have enclosed a copy of the full report for your information. You also asked four questions with regard to the Department's administration of the INA Section 286(V) funds. The answers to these questions are provided in a separate enclosure.

I hope that this information responds to your questions and concerns. I will be pleased to work with you further to ensure that our Foreign Labor Certification Programs are not abused. If you have further questions, please contact me at 202-693-2700.

Sincerely,

Emily Stover DeRocco

Enclosures

Response to Questions on Department of Labor Administration of INA Section 286(v) Funds

Question 1: Annually, what is the total amount of funds deposited into the Fraud Fee account under INA Section 286(v)? Of this amount, what is provided to the Department of Homeland Security under 286(v)(2)(c)?

The following table outlines the H-1B deposits by Department for FY 2005 and FY 2006.

Agency	FY 2005	FY 2006	Total	Percentage
Department of Labor [1]	15,833,754.49	56,444,562.59	72,278,317.08	33.33%
Department of State	28,533,812.42	43,744,504.66	72,278,317.08	33.33%
Department of Homeland Security	28,542,373.41	43,757,629.33	72,300,002.74	33.34%
Grand Total	**72,909,940.32**	**143,946,696.58**	**216,856,636.90**	**100.00%**

[1] DOL's total for FY 2005 does not reflect a warrant totaling $12,700,057.93 that was effective 9/05. The warrant was not made available in DOL's system until 7/06.

Question 2: How have the funds provided pursuant to 286(v)(2)(c) been used in FY 2005, FY2006, and thus far in FY 2007? How many funds are not expended in a given year?

In fiscal year 2005, the Employment Standards Administration's Wage and Hour Division (WHD) concluded 97 H-1B investigations, which disclosed a total of 750 violations. WHD collected more than $3.3 million in back wages for 517 employees. Consistent with its statutory authority, the agency also assessed over $1.3 million in civil money penalties in 2005. Sixteen H-1B employers were disqualified from participation in the foreign labor employment programs under sections 204 and 214(c) of the INA, for a period of either one or two years depending on the severity of the violations.

In fiscal year 2006, WHD increased the number of concluded H-1B cases from 97 to 135 and collected almost $3.1 million in back wages for 657 employees. This represents an increase of 39 percent in the total number of investigations concluded. Eighty (80) percent of the 135 investigations disclosed violations. Investigators found a total of 1,007 violations, an increase of nearly 35 percent above the number found in fiscal year

2005. WHD assessed over $213,000 in H-1B civil money penalties in 2006, and six willful violators were disqualified from future participation in the nonimmigrant visa and permanent worker programs for at least one year.

Also in fiscal year 2006, WHD used the H-1B funding in connection with its membership in the multi-agency Anti-Fraud Benefit Task Force (Task Force). This task force was created to provide a platform for member agencies to disclose their initiatives, share information, discuss joint efforts, and assist other agencies in combating visa benefit fraud. WHD plays a prominent role as a member of the Task Force.

The H-1B funding was used to increase coordination between Task Force members, which in turn has enhanced the process of detecting benefit fraud. For example, WHD agreed to train State Department consular officers to recognize indicators of potential H-1B wage or working condition violations when they interview H-1B visa applicants in their home countries. Officers representing eight different State Department posts from across the world attended the May 2006 training. As result of this effort, the number of valid complaints from the State Department increased from 54 in 2005 to 85 in 2006. This first training session, which was delivered at the State Department's Consular Office in Williamsburg, Kentucky, was so successful that H-1B training will be given on a recurring basis.

The H-1B funding also supports the additional resources required to develop H-1B cases for litigation. As mandated by the INA, WHD issues a letter of determination of findings in each case for which the agency finds reasonable cause to investigate. The letter constitutes written notification of the investigation findings to the employer and sets forth the proposed remedies. WHD issued 100 determination letters in fiscal year 2005. In fiscal year 2006, the number of letters issued increased to 130. On average, 35 to 40 percent of WHD determination letters are appealed to the Office of the Administrative Law Judges. This high ratio of cases referred for litigation, which is the highest of any statute enforced by the WHD, requires the Office of the Solicitor (SOL) to review the investigation findings in every H-1B investigation.

WHD, in coordination with SOL, used the H-1B funding to develop and deliver additional comprehensive H-1B training for managers and investigators. The three-day training sessions covered the H-1B sections of the INA, which permit employers in the U.S. to hire nonimmigrant alien workers in specialty occupations (8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), 1184), and the Department of Labor implementing regulations at 20 C.F.R. Part 655, Subparts H and I. WHD held the training classes in seven locations across the country beginning in July 2006, and continuing through November 2006.

To augment the training, WHD invited other federal agencies with H-1B program responsibilities to participate. The Department's Employment and Training Administration; the Department of Homeland Security's (DHS) U.S. Citizenship and Immigration Services (USCIS); the Department of State's Consular Office, Fraud Prevention Program; and DHS's Immigration and Customs Enforcement gave detailed presentations on their respective roles in the administration of nonimmigrant guest worker programs.
In total, WHD and SOL trained 240 investigators, managers, and attorneys in 2006.

Finally, during 2006, WHD completed and disseminated, via its Field Operations Handbook (FOH), detailed guidance and information for all staff to assure uniform H-1B enforcement.

In 2007, WHD continues to use H-1B funding to train staff. The 2007 training consisted of three two-day H-1B training sessions for an additional 90 WHD investigators and managers.

Through May 2007, the Department has spent $2,784,474 on H-1B related issues.

Question 3: How does the Department plan to spend the remaining dollars left in FY 2007?

WHD will maintain an active enforcement program in fiscal year 2007, and will spend remaining H-1B funding to respond to complaints and, to the extent possible, conduct random investigations of willful violators.

WHD will continue to use the H-1B funding to disseminate compliance information on H-1B visa program requirements and employer obligations to employers, H-1B nonimmigrant workers, and U.S. workers. WHD will also continue to provide the State Department with H-1B worker information cards, so that agency can continue its practice of issuing the cards to visa recipients in their home countries. In addition, WHD is seeking agreement from USCIS to provide worker information cards to new H-1B employers. These cards have been and will continue to be distributed at all public venues that provide WHD an opportunity to discuss H-1B requirements (*e.g.*, public seminars, meetings, conferences, and continuing education classes).

WHD will use H-1B funding to take additional steps in fiscal year 2007 to educate the public on the H-1B requirements. Specifically:

- WHD plans to conduct at least five day-long compliance assistance seminars for interested parties. These sessions will be conducted in those areas of the country with the highest concentration of H-1B workers.

- WHD will seek to disseminate compliance assistance through the American Immigration Lawyers Association's information events.
- WHD will offer education seminars on H-1B requirements to foreign consulates that are located in U.S. cities with a high concentration of H-1B employers and/or nonimmigrant workers. These seminars will help foreign consulate staff recognize potential H-1B violations, refer workers to WHD for further information, and refer employers and employees interested in the program to local WHD offices.

In fiscal year 2007, SOL will use H-1B funding to offset costs associated with H-1B enforcement actions and defensive litigation, as well as costs associated with reviewing all H-1B litigation in which the Department is not a party for possible participation as amicus curiae. SOL will also use the H-1B funding to provide legal support to WHD for the training and outreach the agency plans to conduct in fiscal year 2007, as described above, and continue to provide legal opinions and advice as necessary.

Question 4: How many complaints have been lodged to the Department of Labor regarding the H-1B visa program? Of these how many investigations have been opened by the Department in the last year? How many have been closed and why have they been closed?

Prior to fiscal year 2006, all H-1B investigations were initiated as a result of a complaint; WHD first used the random investigation authority to investigate willful violators in 2006, supported by the use of the H-1B funding.

In fiscal years 2005 and 2006, WHD concluded 232 H-1B investigations. WHD concluded 97 H-1B investigations in fiscal year 2005, which disclosed a total of 750 violations. In fiscal year 2006, WHD increased the number of concluded H-1B cases from 97 to 135, representing an increase of 39 percent in the total number of investigations concluded.