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## **A Practical Guide to Dual Representation: What Employers And Foreign National Employees Must Know About Dual Representation In Immigration Cases**

by Michael Maggio

### **Introduction**

Representing two clients simultaneously, or dual representation, is as omnipresent in the practice of immigration law as processing delays. For years, many prominent business immigration law practitioners convinced themselves, and employers too, that in immigration cases involving a petitioner and beneficiary, the inherent potential for conflicts in interests between the employer and the employee posed by dual representation could be avoided simply by declaring the employer to be the sole client. This approach puts the foreign national beneficiary in a position of a human appendix: a functionless organ occasionally susceptible to rupture. It also substantially diminishes the value of a significant employer-provided benefit because if the immigration lawyer only represents the employer, then the employee must secure his or her own immigration attorney. Although this seemingly “simple solution,” has lost much of its luster, it persists even though it is almost universally agreed that an immigration lawyer represents the petitioning employer **and** the foreign national beneficiary. Those who cling to the “simple solution” ignore the fact that dual representation exists regardless of who signs the representation agreement, or who pays the fee. The only exception to this rule is when both parties have their own immigration counsel. Immigration attorneys and employers who continue to adhere to the “simple solution” to avoid dual representation problems do so at their own peril, and to the detriment of their employees too.

### **Anticipating Conflicts**

Except for the limited circumstances where a foreign national may self-petition, foreign nationals lack the capacity to file a relative-based or employment-based visa petition, as well as a labor certification application. Thus, the immigration attorney always is the petitioner’s attorney, even if hired and paid by the foreign national. Other immigration applications can only be filed by a foreign national, such as an application for a change of status from one nonimmigrant classification to another; an application for adjustment of status to permanent resident; and, consular visa applications. When those applications are filed, the immigration attorney acts for the foreign national. The existence of an attorney-client relationship with both the petitioner and the beneficiary is beyond dispute under those very common circumstances.

There also is widespread recognition that an implied attorney-client relationship can be established merely by the attorney's conduct, and a putative client's expectations created by attorney conduct. Stated differently, when an immigration lawyer acts like the petitioner's or the beneficiary's attorney in the preparation of a labor certification application or visa petition, for example, the lawyer very well may be the attorney for both the foreign national and the employer. Significantly, these attorney-client relationships, even when merely implied, bring all of the attending privileges and responsibilities, as well as the nettling conflict issues, which can arise whenever an attorney represents two parties in the same matter.

Those new to immigration law learn quickly that conflicts arise frequently between petitioners and beneficiaries in employment -based cases. Attorneys are permitted to represent two parties simultaneously, if so authorized, unless their interests conflict. If a conflict cannot be resolved to the satisfaction of all concerned, the attorney must withdraw from the matter.

Conflict problems are much less likely to occur when the employer and the foreign national understand from the outset that their case involves dual representation, and what that means. Representing two parties simultaneously in one matter requires the attorney to disclose information, and to be equally loyal, to both parties. If both parties understand the duties of dual loyalties that come with dual representation, counsel is less likely to face the "I wish I had not been told that" problem every immigration attorney has experienced. Information such as an employer's plans to lay-off a co-client, or a co-client's expressed desire to leave the employer can cause classic immigration conflicts of interest that are as common to practice in immigration law as they are in the rest of life. The attorney who receives such information from one of two co-clients cannot take sides, or even provide advice to an inquiring co-client without the potential for a conflict problem. This important lesson was learned the hard way recently by a prominent immigration lawyer who advised a corporate client about mechanics and immigration implications of laying off an adjustment of status applicant co-client: the lawyer agreed to pay \$250,000 in damages after initially denying that the corporate client's employee was his client too.

## **AC21**

Concerns about conflicts of interest, avoiding them, and their consequences have been magnified by the "portability" provisions of the American Competitiveness in the 21st Century Act (AC21) because foreign workers are no longer tethered to the sponsoring employer as they were before.

H-1B employees, for example, are free to start work with a new employer as soon as an H-1B petition by a new employer has been received by the United States Citizenship and Immigration Services (CIS); in the past it was necessary for the foreign worker to have an approval in hand for new H-1B employment before commencing work with the new employer. The potential for conflicts is even greater under AC21's adjustment of status portability provision which authorizes adjustment of status beneficiaries to continue their case with a new employer after their adjustment case has been pending for 180 days, so long as they will be working in the same or a similar occupational classification; previously employment-based green card applicants were required to work for their sponsoring employer after obtaining residency.

AC21-related and other potential conflicts are minimized when the employer and the employee are advised about the availability and meaning of portability at the start of the case, at the same time dual representation is explained.

### **Formation of the Attorney-Client Relationship**

Attorneys like to claim as many clients as possible, unless someone alleges attorney wrongdoing. Then the lawyer sometimes asserts that the accuser never was a “real client.” Likewise, the accuser may claim to have an attorney-client relationship with a particular lawyer because that is where the deepest pocket may lie. Who is an attorney’s client? Attorneys act on behalf of a client. If an attorney acts on behalf of someone, he or she is probably his or her lawyer, for that particular matter. This can include merely providing information and advice in a context that indicates that an attorney is treating an individual like a client.

### **Prohibition Against Advising Non-client**

Most bar association rules prohibit an attorney from giving legal advice to a non-client. Practically speaking, this means that only when an employer and an employee each have their own counsel can an immigration attorney safely assert that he or she does not represent both parties. This rule applies similarly if the attorney asserts he or she only represents the employer or the employee, and again, regardless of who pays the attorney’s fees. Stated simply, the lawyer is ethically obligated to tell either the unrepresented employer or the unrepresented employee that they must hire their own immigration attorney unless both the employer and employee agree to be represented by the same attorney.

### **Minimizing Conflicts**

Conflicts arise in dual representation cases most frequently when a co-client tells the attorney something he or she must disclose to the other co-client, and disclosure could be to the detriment of the other co-client, and disclosure is not authorized. For example, plans to lay off an employee, or an employee’s plans to change jobs, can raise conflict problems. The attorney’s duty to guard client confidences then directly conflicts with the attorney’s duty of loyalty. One duty compels disclosure to the other co-client while another duty requires secrecy. When this happens, and the conflict cannot be resolved, the attorney must withdraw from the matter, and that can lead to dissatisfaction all around.

Minimizing conflict problems requires a two-fold approach: employers and employees must understand that their case involves dual representation, and what that means; and, the co-clients should understand where conflicts are most likely to arise so potential conflict issues are minimized.

It can be surprising for a corporate client to learn that their immigration counsel will simultaneously represent an employee or a would-be employee. Nonetheless, employers must understand how, when, and why the peculiarities of immigration law give rise to dual representation, and practically speaking, what this means. It is important for corporate clients to understand when and how an attorney-client relationship is formed so that the employer’s

potential or current employees do not become their immigration counsel's client too, until the right moment. For example, when an employer seeks an immigration attorney's advice regarding visa eligibility for a potential employee, or a current employee's visa eligibility, the employer should take care to not place their immigration counsel in a position where they are the current or future employee's attorney, until the company has decided to proceed with his or her case. Contact between immigration counsel and the foreign national should be avoided, or kept to an absolute minimum, until the employer agrees to go forward with the case. This point is underscored when one considers what occurs when an attorney-client relationship has been established with the employee, and there are prevailing wage problems: disclosing that information to the foreign national could be highly embarrassing, or worse, for the employer. What is more, that information could result in the need to advise the employer that it is not prudent to go forward with the H-1B or labor certification case.

Employers do appreciate the necessity and benefits of dual representation when they are well educated on what seems to be, like much of immigration law, a counter-intuitive subject. Their willingness to sponsor a foreign employee, and in many instances pay for the foreign national's immigration status, is a tremendous employee benefit. The value of that benefit is substantially diminished if the employer's immigration counsel must tell their foreign national employees they are obliged to hire their own immigration attorney. Employers likewise are not interested in depending on the promptness of an employee's immigration counsel to ensure the timely issuance of an EAD or advance parole document. It surely is best for both parties to have the same immigration counsel.

Corporations and other institutions that permit foreign employees to "hire their own immigration attorney" usually do not understand that they are authorizing their workers to hire the institution's immigration counsel because only the employer has the ability to file most employment-based immigration applications. Immigration attorneys who are hired by foreign nationals for employment-based cases are obligated to tell the petitioning employer that, in fact, they are his or her lawyer too. This also involves dual representation, the potentials for a conflict of interest, and what will happen if a conflict develops. And, as difficult as it may be, foreign workers who have hired what may be their first lawyer must understand that their lawyer also represents their boss; that their lawyer must be loyal to their boss; and, that despite the attorney-client privilege, there are some things their lawyer does not want to hear about.

Explaining that a particular case involving dual representation and what that means should be done in a letter to both the petitioner and the beneficiary. For example, in employment-based cases, dual representation is best explained and understood along these lines:

In employment-based immigration cases, the attorney represents both the petitioning employer and the employee-beneficiary, regardless of who pays the attorney's fees. In this type of case, immigration documents can only be submitted to the government by the petitioning employer on behalf of an employee-beneficiary. Therefore, the attorney must be authorized by the employer to file papers on the employer's behalf, which if approved, will enable the employee-beneficiary to be eligible to receive a visa. This means that the attorney acts as the employer's lawyer. The attorney represents the foreign

national throughout this stage of the process too, and even more so when the attorney submits papers for the foreign national to the CIS or the U.S. Consulate required for visa issuance. Attorneys are permitted to represent two parties simultaneously, if authorized by both to do so, unless an irresolvable conflict in interest between the parties occurs. By agreeing to have our firm proceed with this case, you will be authorizing our firm to represent both of you.

Please note that representing two parties simultaneously in one matter also requires an attorney to disclose information and be equally loyal to both parties. What an employer says to the attorney about an employee usually must be disclosed to the employee, and vice-versa. Under those occasions where the disclosure of information or other circumstances have the potential for a conflict of interest between a petitioning employer and the employee-beneficiary, the attorney cannot take sides regardless of which party pays the attorney's fees. If a conflict cannot be resolved, the attorney must withdraw from representing both parties.

Understanding AC21's portability provisions, which are summarized here, can minimize AC21 conflicts.

An employer must intend to employ the sponsored employee under the terms of the labor certification application for this process to be lawful. Notably, however, the sponsored employee is free to leave the sponsoring employer, and continue the case without prejudice, once the foreign national's adjustment of status application has been pending with the CIS for more than 180 days, so long as the employee will work for another employer in the same or a similar occupational classification. Please let us know if you have questions about this.

## **Conclusion**

Clients rightfully expect that their immigration attorney will be loyal to them, keep their confidences and fight for their interests. Individuals and institutions also understandably want to know who their lawyer is, and what is the precise scope of his or her representation. The dual representation that is inherent to most employment-based immigration cases clouds those client expectations, and can lead to conflicts of interest. Conflicts of interest are minimized and client loyalty and happiness are best maintained in immigration cases involving a petitioner and a beneficiary when both clients fully understand that the immigration attorney represents both of them. Both parties must also be educated about the limits and benefits of dual representation. When areas of potential conflict, such as AC21 portability, also are understood by both parties at the outset, then conflicts, misunderstandings, and client dissatisfaction occur less often.