

INTO THE CW MINEFIELD:

Ethical and Practical Considerations

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INTO THE CW MINEFIELD – ETHICAL CONSIDERATIONS

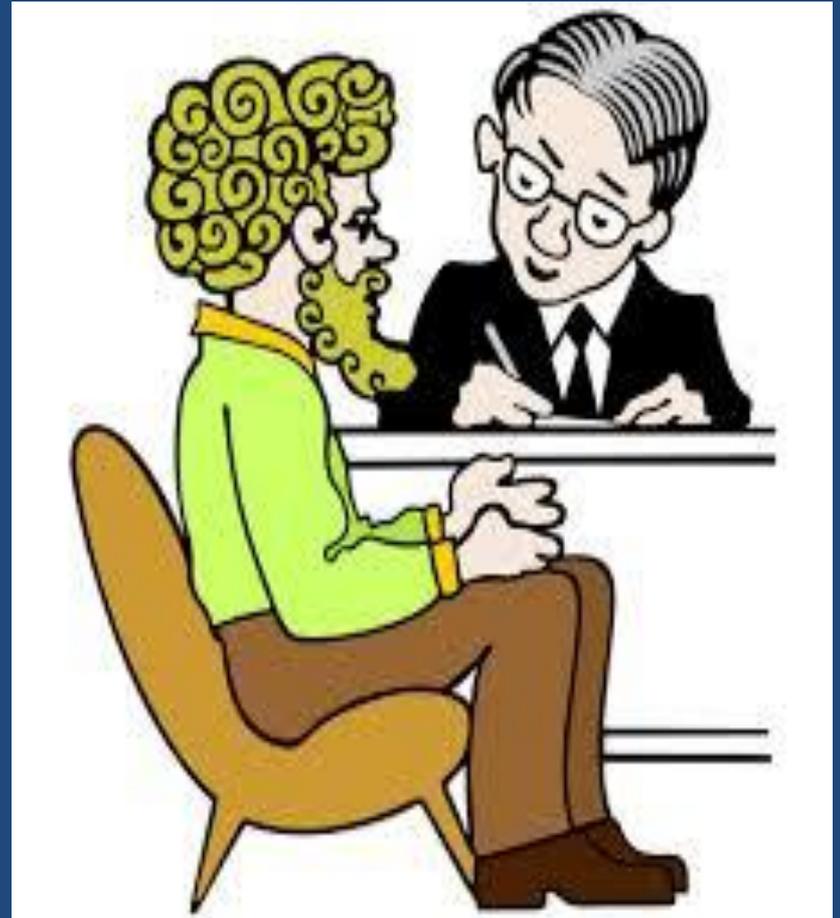


WHO IS THE CLIENT?



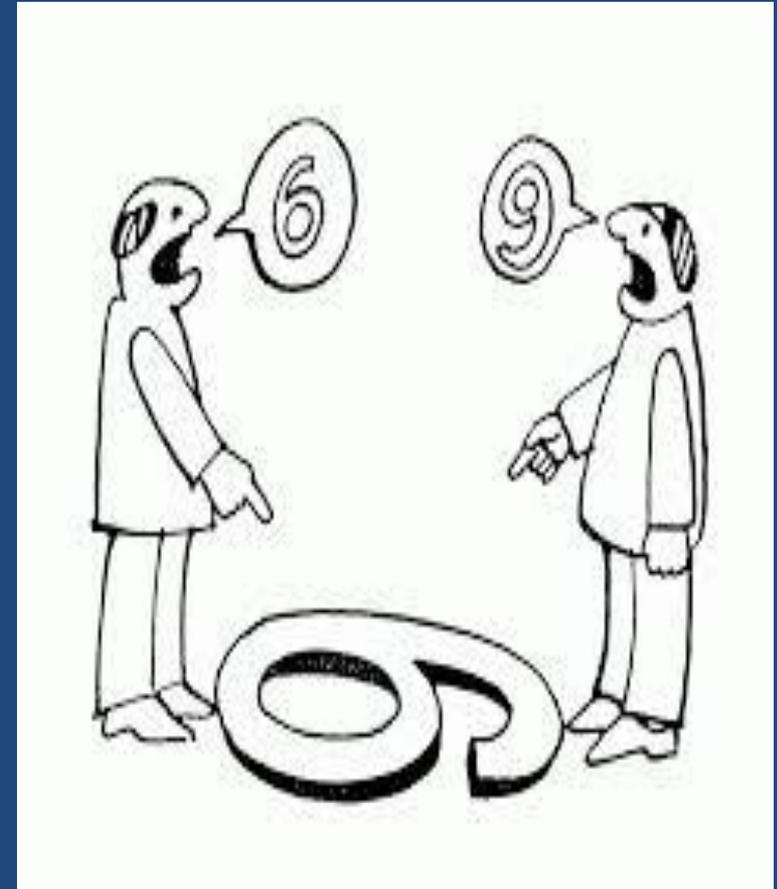
What do you think?

- Employer contacted you
- Employer is paying your bill
- Employer will be the petitioner on the I-129 CW



Additional Facts

- You will need confidential information from the employee
- The employee will get the benefit of the petition
- You will advise the employee on some matters



The Subtleties

- The employee thinks you're working on his/her behalf
- You write to the employer and employee on your letterhead
- You speak with DHS & answer questions about the employer & employee



WHO IS THE CLIENT?



The “Simple Solution”

- Employer



“Dual Representation”

- Nearly all immigration cases involve “dual representation”
- Both the petitioner and the beneficiary are typically clients



Further Reading

- “Dual Representation in Immigration Practice,” by Bruce A. Hake (AILA)
<http://www.aila.org/content/default.aspx?bc=15764%7C15765%7C16565>
- “Emerging Issues in Dual Representation...” by Cyrus D. Mehta (PLI)
www.pli.edu/emktg/all_star/Dual_Rep22.doc
- “Walking a Tightrope...” by Geoffrey Tobias
<http://www.ober.com/publications/209-walking-tight-rope-ethical-considerations-pitfalls-representing-both-employer>

CONFIDENTIALITY

- Hypothetical: employee discloses criminal history unknown to employer



- Hypothetical: employee discloses employer requires employee to pay fees

The Duty of Loyalty

Hypothetical: What if employer decides to terminate the employee after you've filed the CW petition.



Precaution Strategies

1. A letter to each client about the dual representation
2. A written explanation about confidentiality vs. disclosure of information obtained
3. A written description of specific conflicts that may arise
4. A signed informed consent from both dual clients, based on the disclosures, waiving conflicts and agreeing what to do if irresolvable conflict arises
5. A well-documented file

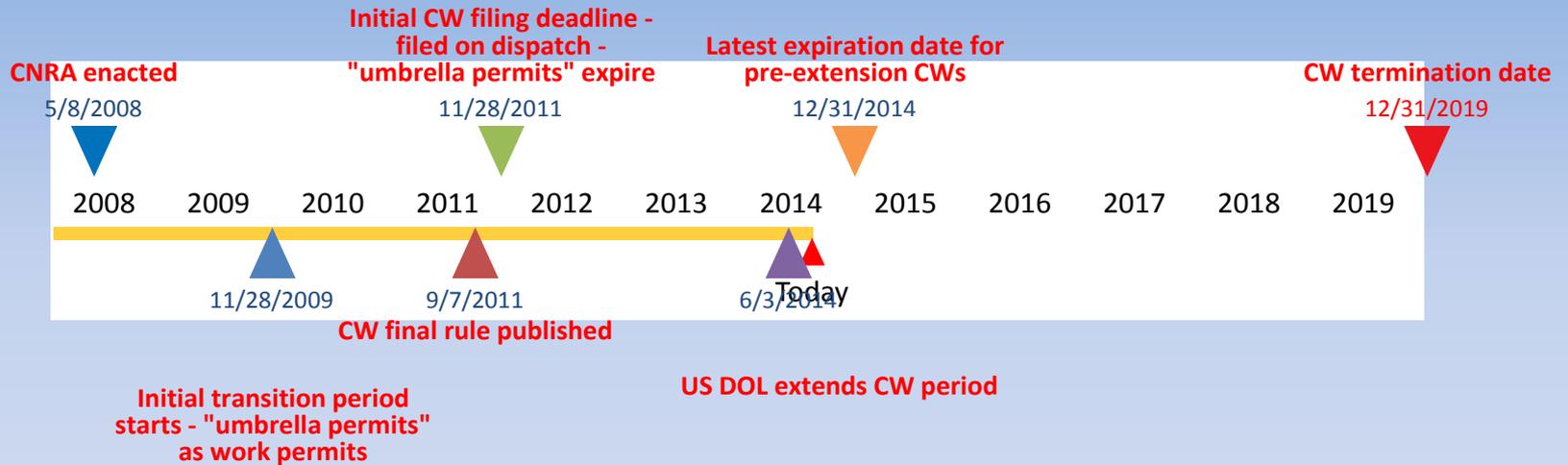
PRACTICAL CONSIDERATIONS



CW Historical Overview

1. May 8, 2008 - Consolidated Natural Resources Act signed by President Bush
2. November 28, 2009 - Commencement of Initial Transition Period (Umbrella Permits)
3. November 28, 2011 - 1st round of CW applications
4. December 31, 2014 - End of initial Transition Period (extended for 5 years)
5. December 31, 2019 – End of Extended Transition Period

PL 110-229 (CNRA) Timeline



Sniffing Out Danger



Critical Concepts

- Visa vs. Status
- Unlawful presence – presence in the United States without status (overstay of admission; unlawful entry = additional problems)
- Unauthorized work – work without employment authorization
- Three year bar – overstay authorized stay 180 days
- Ten year bar - overstay authorized stay one year or more
- Tolling – no unlawful presence accrues for 120 days while petition pending if:
 - Lawfully admitted or paroled
 - Non-frivolous application filed prior to expiration of stay
 - No unauthorized employment after expiration

Employer (ER) Qualifications

EMPLOYER MUST:

- Be engaged in “legitimate business”
- Consider all available U.S. workers for the position
- Offer terms and conditions of employment consistent with the nature of the employer’s business in the CNMI
- File the necessary forms to hire transitional workers
- Comply with all federal and CNMI requirements relating to employment: examples include nondiscrimination, occupational safety, and minimum wage requirements
- Pay reasonable transportation costs of the individual to the individual’s last place of foreign residence if the individual is involuntarily dismissed from employment for any reason before the end of the period of authorized admission

What is a “Legitimate Business”?

A legitimate business is defined as:

- A real, active, and operating commercial or entrepreneurial undertaking,
- Which produces services or goods for profit,
- Or is a governmental, charitable, or other validly recognized nonprofit entity.
- The business must meet the legal requirements for doing business in the CNMI.
- A business will not be considered legitimate if it engages directly or indirectly in prostitution, human trafficking, or any other activity that is illegal under Federal or CNMI law.
- No direct hire of domestics except caregivers (PIP).

Employee (EE) Qualifications

A foreign worker may be classified a CW-1 nonimmigrant during the transition period if he or she:

- Is ineligible for any other employment-based nonimmigrant status under U.S. immigration law
- Will enter or stay in the CNMI to work in an occupational category designated as needing alien workers to supplement the resident workforce
- Is the beneficiary of a petition filed by a legitimate employer who is doing business in the CNMI
- Is not present in the United States, other than the CNMI
- Is lawfully present in the CNMI if present in the CNMI
- Is otherwise admissible to the United States or is granted any necessary waiver of a ground of inadmissibility

CW PROCEDURAL OVERVIEW

APPLICATION TYPE	WHEN TO FILE PETITION	WHEN FILING IS EFFECTIVE	WORKING WHILE APPLICATION PENDING	UNLAWFUL PRESENCE ACCRUES WHILE PETITION PENDING	UNAUTHORIZED EMPLOYMENT ACCRUES WHILE PETITION PENDING	NOTES
Initial Petition	By 11-28-11	On Mailing	Yes	No	No	Very few of these are still pending
Timely Renewal w/ Existing ER	Prior to expiration of existing CW permit	Receipt by USCIS	No. Must wait until approval of Petition (2-6 mos. or more)	Yes, unless subject to 120 days grace period while tolling	Yes, because work is not authorized	EE must stop working when old CW expires, wait to start working until new CW is approved. Proposed regulations allow work for 240 days grace period ; no final rule yet
Late Renewal w/ Existing ER	File ASAP after expiration of prior CW	Receipt by USCIS	No, must wait for consular processing	Only while EE remains within CNMI	Only if EE works after expiration & before departing CNMI	If ER misses filing for renewal while EE still in status, then EE must depart at end of term. ER must then file Petition w/USCIS and after approval EE files DS-160 with US Consulate and receives visa to return to CNMI
Transfer to New Employer (while still in CNMI in CW status)	Prior to expiration of existing CW permit	Receipt by USCIS	Yes. Must wait until receipt from USCIS (2-3 weeks)	No	No	EE works for old ER until expiration of old CW, starts w/ new ER after receipt for new Petition. Rule allows concurrent employment.
New Employer (new hire from off-island)	Up to six months in advance of needing EE	Receipt by USCIS	No	N/A	N/A	ER files I-129CW w/ California Service Center; send approval letter to EE in home country; EE files DS 160 w/ US Consulate; receives CW visa to enter CNMI
Involuntary Termination	New ER must file w/in 30 days grace period	Receipt by USCIS	Yes. Must wait until receipt from USCIS (2-3 weeks)	No	No	If no filing by new ER w/in 30 days, must exit CNMI. See, above for hire from off island/consular processing
Voluntary Termination	File before quitting or depart CNMI (10 day grace period before unlawful presence))	Receipt of I-797C From USCIS	Yes. Must wait until receipt from USCIS (2-3 weeks) or consular process	No	No (unless working illegally)	If EE quits job, must find new ER to file before quitting or consular process.

CW PITFALLS



Common Errors

- File first advertise later
- ER failure to respond to RFEs or NOIDs
- ERs failure to inform worker of RFEs and/or denials
- EE filing for reconsideration or appeal of denial
- Involuntary vs. voluntary termination of employment
- Filing for PIP to “improve” status from a CW

Common Bases of Denial

- EE out of status at time of application
- Filing for renewal after prior CW status has expired
- Filing more than 30 days after involuntary termination of EE
- Filing first, advertising later
- ER is a shadow or illegitimate business
- Failure to provide employment records for the prior employment period

Failure to Provide Employment Records – Common Scenarios

- Prior employer stopped paying worker long before new application, no recent wage records exist.
- Prior employer went out of business but did not notify USCIS.
- Employees paid in cash; no sufficient records.
- Prior employer kept insufficient payroll records, for purpose of evading taxes.
- Prior employer did not pay minimum wage but rather allowances and/or commissions.
- Employer engages in “creative” bookkeeping.

RECOMMENDATIONS

- Streamline renewal process, improve transparency
- Give workers notice of disposition and opportunity for relief
- Regulatory amendment to grant 240 day grace period to work while renewal pending
- Continued need for foreign workers foreseeable
 - 2010 census:
 - Population 53,883
 - US citizens 24,168
 - Non-citizens 29,715
 - Unemployed USC's = 20% of total number of foreign workers
 - If all USC's employed, still need 11,000 workers

(Source: Notice of extension by DOL, 6/3/14 Federal register)

Additional Useful CW Information

- California Service Center CW Help Desk:
CNMI.CSC@uscis.dhs.gov
- USCIS Q&A (new 8/5/14):
<http://tinyurl.com/ohdbm56>
- USCIS Q&A for employers (7/20/14):
<http://tinyurl.com/omasd27>
- US DOL press release extending CW period:
<http://tinyurl.com/krsgsx7>
- US DOL Federal Register notice:
<http://tinyurl.com/ohcc3kq>

THEN AND NOW

