U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration Related
Unfair Employment Practices - NYA
950 Pennsylvania Avenue, NW
Washington, DC 20530

VIA MAIL AND E-MAIL (dstump@usvisagroup.com)

July 2, 2010

T. Douglas Stump, Esq.
Stump & Associates, P.C.
50 Penn Place, Ste. 1320
1900 N.W. Expressway
Oklahoma City, OK 73118

Dear Mr. Stump:

This letter responds to your e-mail of April 19, 2010, concerning an employer that does not wish to sponsor employees for visas. The following question appears on its employment application: "Are you authorized to work on an unrestricted basis?" You inquire whether an employer may terminate an employee who answered the question affirmatively but is, in fact, a student who possesses an F-1 visa, on the premise that the employee made a false representation. You also request "sample language that would be acceptable in job ads addressing the fact that company will not sponsor for H-1s and thus does not want to hire on EADs related to OPT."

As you know, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) investigates and resolves charges of national origin and citizenship status discrimination in the workplace, including over-documentation in the employment eligibility verification process ("document abuse"), and retaliation under the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. §1324b. OSC cannot provide an advisory opinion on any specific case or set of facts. However, we can provide general information on the INA's anti-discrimination provision and the Form I-9 process.

The categories of individuals protected from citizenship status discrimination in recruitment, hiring and firing include U.S. citizens, lawful permanent residents who are not yet eligible to apply for naturalization or who have applied within six months of eligibility, asylees, and refugees. 8 U.S.C. § 1324b(a)(3). Accordingly, F-1 visa holders are not protected from these forms of discrimination.

With respect to questions that may be asked on an employment application, OSC does not recommend asking applicants to specify their citizenship status at the application stage because a rejected applicant who is protected from citizenship status discrimination may perceive that that the employer used that information to discriminate against him or her. Similarly, asking an applicant if he or she has an "unrestricted" basis for work or temporary work authorization may be misleading for some applicants who are protected for citizenship status discrimination — such as asylees or refugees — who are work authorized incident to status but may nonetheless possess work authorization documents with an expiration date.

However, the following question would not raise these concerns, should an employer choose to use it on an employment application: "Will you now or in the future require sponsorship for employment visa status (e.g., H-1B visa status)?" In addition, employers seeking to notify prospective job applicants in job postings that they are unwilling to sponsor nonimmigrant visas may wish to use the following language: "Applicants must be currently authorized to work in the United States on a full-time basis."

For your benefit, we are attaching a July 31, 2008, letter responding to a similar inquiry. We hope that this information is of assistance to you.

Sincerely,

Katherine A. Baldwin
Deputy Special Counsel

Enclosure

U.S. Department of Justice
Civil Rights Division

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950 Pennsylvania Avenue, NW
Washington, DC 20530

JUL 31 2008

[redacted]

Re: Request for Guidance on Questioning of Applicants

Dear Ms[redacted]

Thank you for your letter dated July 2, 2008, to the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"). In your letter you request guidance concerning the acceptability of questioning job applicants regarding their need for future employment authorization. Specifically, you inquired as to whether employers may ask job applicants the following question:

> *Do you now or at any time in the future require the filing of any application or petition with the U.S. Citizenship & Immigration Services (e.g., Form I-765, application for employment authorization)?*

Please note that the OSC may not provide advisory opinions on any particular case of alleged discrimination, or on any set of facts involving a particular individual or entity. However, OSC is able to provide some general guidelines regarding pre-employment inquiries in light of the anti-discrimination provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §.1324b. These anti-discrimination provisions prohibit four types of conduct: (1) citizenship or immigration status discrimination; (2) national origin discrimination; (3) unfair documentary practices during the employment eligibility verification (Form I-9) process ("document abuse"); and (4) retaliation for filing a charge or asserting rights under the anti-discrimination provision.

OSC does not recommend that you ask job applicants the aforementioned question. Instead, the question which former Special Counsel John Trasvina proposed in 1998 and which you quote in your letter is more appropriate. Specifically, Mr. Trasvina said that employers may ask:

> *Will you now or in the future require sponsorship for employment visa status (e.g. H-1B visa status)?*

There is a significant difference between the two questions. As you know, the class of workers protected from citizenship status discrimination under the INA includes U.S. citizens, lawful permanent residents or conditional/temporary residents, refugees, and asylees. 8 U.S.C. § 1324b(a)(3). Persons with no right to work in the United States, or persons on temporary work visas, are not protected from citizenship status discrimination. By definition, anyone who requires employer sponsorship for a visa would not fall within the protected class. Thus, employers may make pre-employment inquiries about applicants who require employer visa sponsorship without violating the prohibitions against citizenship status discrimination contained in 8 U.S.C. § 1324b.

In contrast, the question you pose implicates protected persons, who still may have to file an "application" or "petition" for, *inter alia*, employment authorization or removal of condition. While the question, standing alone, does not violate INA's anti-discrimination provisions *per se*, there is a risk that job applicants may infer, correctly or incorrectly, from the question that an employer is seeking to deny employment to these protected persons. A rejected applicant may rely upon such an inquiry later to allege that the employer's failure to hire was unlawfully discriminatory. Moreover, asking applicants to specify whether or not they will require the filing of an application for employment authorization with U.S. Citizenship & Immigration Services may be confusing to them, and may not elicit the correct information in any event.

We hope that this information is helpful. Please feel free to call OSC through our toll free number at 1-800-255-8155, if you have further questions about this matter.

Sincerely,

Patrick Shen
Special Counsel