



U.S. Department of Justice

Civil Rights Division

*Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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JAN - 5 2011

BY FIRST CLASS MAIL AND EMAIL (RKrug@HSPLEGAL.COM)

Mr. Robert Krug, Esq.
70 W. Madison St., Suite 4000
Chicago, IL 60602

Dear Mr. Krug:

Thank you for your e-mail inquiry dated November 21, 2011. In your email you ask if there are any circumstances during the Form I-9 process when an employer can request documents outside of those on the List of Acceptable Documents. In your follow-up inquiry, you explain that your client seeks EB-5 investor status, pursuant to 8 C.F.R. § 204.6, and would like guidance on requesting additional or specific documents during the employment eligibility verification (Form I-9) process in order to confirm that an employee is a "qualifying" worker for EB-5 purposes.

Please note that the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) cannot provide an advisory opinion on any particular instance of alleged discrimination or on any set of facts involving a particular individual or entity. However, we can provide some general guidelines regarding employer compliance with the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b, which OSC enforces. The anti-discrimination provision prohibits hiring, firing, recruitment or referral for a fee, and unfair documentary practices during the employment eligibility verification (Form I-9) process (document abuse) on the basis of citizenship or immigration status or national origin. It also prohibits retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision. For more information, you may visit our website at www.justice.gov/crt/about/osc or call our toll-free hotline at 800-255-8155.

Pursuant to federal law, employers must verify the identity and employment authorization of each person they hire. 8 U.S.C. § 1324a(b)(1)(a). Under 8 U.S.C. § 1324a(b)(1)(B), a new employee may choose to show either a Form I-9 List A document (identity and work authorization), or both a List B (identity) and a List C (work authorization) document. See U.S. Citizenship and Immigration Service (USCIS) Handbook for Employers, Instructions for Completing Form I-9 (M-274) (Rev. 06/01/11) (hereinafter "M-274"), pages 4-5, 37-38 (discussing an employee's choice of employment eligibility and identity documents).

No provision of the INA specifies any exceptions or special rules regarding altering the types of I-9 documents acceptable to determine whether employees are “qualifying” workers for EB-5 purposes. Moreover, neither the Form I-9 nor the M-274 discusses any exceptions based on whether an individual is a qualifying employee for EB-5 purposes. See id.

We recognize that, in addition to other requirements, EB-5 Immigrant Investors must create or preserve at least 10 full time jobs for “qualifying” employees, and that certain categories of work authorized individuals, such as non-immigrant aliens, do not constitute “qualifying” employees. 8 C.F.R. § 204.6. We caution, however, against verifying qualifying status during or through the Form I-9 process. An employer that requests a specific document or additional documents for the Form I-9 beyond the List of Acceptable Documents based on an employee’s immigration or citizenship status may be deemed to violate the anti-discrimination provision of the INA, depending on the specific circumstances of the case. Therefore, OSC encourages an employer to develop a process to determine “qualifying” status that is separate from the Form I-9 process.

We hope this information is helpful.

Sincerely,



Seema Nanda
Acting Deputy Special Counsel