



U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration-Related  
Unfair Employment Practices - NYA  
950 Pennsylvania Ave, NW  
Washington, DC 20530  
Main (202) 616-5594  
Fax (202) 616-5509

April 9, 2013

**Via E-Mail (jwalstad@usbr.gov)**

Jesse Walstad  
Human Resources Program Management  
Bureau of Reclamation  
Denver Federal Center

Dear Jesse Walstad:

Thank you for contacting the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"). We apologize for the delay in our response. This letter is in response to the e-mail you sent OSC on January 30, 2013, in which you inquire whether the following statement contradicts the anti-discrimination provision of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. § 1324b: "On an individual basis, you may legally prefer a U.S. citizen or noncitizen national over an equally qualified alien to fill a specific position, but you may not adopt a blanket policy of always preferring citizens over noncitizens." Specifically, you ask whether a federal agency employer can legally prefer a U.S. citizen over an equally qualified non-citizen in the absence of express statutory authority to do so. You also ask whether an employer can ask "for I-9 data prior to offering a position."

Although OSC cannot give you an advisory opinion on any set of facts involving a particular individual or company, we are pleased to provide some general guidelines regarding compliance with the anti-discrimination provision of the INA. Please visit our website as well at <http://www.justice.gov/crt/about/osc/>, or call our employer hotline at 800-255-8155 for additional guidance.

The INA prohibits citizenship status discrimination with respect to hiring, firing, and recruitment or referral for a fee, by employers with more than three employees. This means that employers may not treat individuals differently because of their citizenship status or immigration status. The INA specifically authorizes all employers to prefer a U.S. citizen over an equally qualified non-U.S. citizen:

Notwithstanding any other provision of this section, it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified.

8 U.S.C. § 1324b(4).

The above-quoted provision applies to all employers covered by 8 U.S.C. § 1324b. However, section 1324b does not cover federal agencies (except for an agency that has waived sovereign immunity). See Office of Legal Counsel, *Memorandum Opinion for the General Counsel*, 6 U.S. Op. Off. Legal Counsel 121, 1992 WL 881060 (O.L.C.) (August 17, 1992) (finding that, because section 1324b does not contain an express waiver of sovereign immunity, federal agencies are generally not subject to the prohibitions of that section). Additionally, under Executive Order 11935, federal agencies are expressly authorized to make hiring restrictions based on U.S. citizenship. See *Executive Order 11935* (September 2, 1976) (restricting employment of non-citizens in competitive service positions). As a result, federal agencies are permitted to prefer U.S. citizens to non-U.S. citizens, whether or not the individuals are equally qualified.

With respect to your last question, you may not ask for I-9 information prior to an offer of employment. Publicly available guidance issued by U.S. Citizenship and Immigration Services ("USCIS"), the agency that publishes the I-9 Form, states: "The law requires that you complete Form I-9 only when the person actually begins working for pay. However, you may complete the form earlier, as long as the person has been offered and has accepted the job. You may not use Form I-9 to screen job applicants." Handbook for Employers: Guidance for Completing Form I-9, available at [www.uscis.gov/files/form/m-274.pdf](http://www.uscis.gov/files/form/m-274.pdf), p. 41. This rule applies to all employers, including federal agencies.

We hope this information is of assistance to you. Please feel free to contact us through our toll free number at 800-255-8155 if you have any further questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Seema Nanda".

Seema Nanda  
Deputy Special Counsel