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

SEP 27 2010

By Email (kmoody@mdta.state.md.us)

Karen Moody, Esq.
Assistant Attorney General
Maryland Transportation Authority
2310 Broening Highway
Baltimore, Maryland 21224

Dear Ms. Moody:

This letter responds to your e-mail dated March 24, 2010, to the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). Please excuse our delay in responding. You seek guidance on three questions:

1. Is it is permissible to indicate on a recruitment announcement that an organization is unable to pay expenses associated with a visa?
2. If it is ever permissible to ask if a candidate or offeree needs a visa?
3. Are there any exceptions to the requirement to pay the expenses of a visa should a candidate require the same?

Please note that OSC cannot provide an advisory opinion on any set of facts involving a particular individual or entity. We can provide, however, some general guidelines regarding the anti-discrimination provision of the Immigration and Nationality Act (INA) enforced by OSC, 8 U.S.C. §1324b, and employer actions under that provision. The anti-discrimination provision prohibits four types of employment-related discrimination: citizenship or immigration status discrimination; national origin discrimination; unfair documentary practices during the employment eligibility verification (Form I-9) process ("document abuse"); and retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision.

With respect to your first two questions, it is important to note that the individuals protected for citizenship status discrimination are limited to U.S. citizens, certain lawful permanent residents, asylees, and refugees. *See* 8 U.S.C. §1324b(a)(3). Accordingly, non-immigrant visa holders, such as H-1B visa holders, are not protected from citizenship status discrimination.

We have enclosed OSC technical assistance letters (without attachments), dated July 2, 2010, May 1, 2009, July 31, 2008, and April 24, 2007. Each of these letters discusses the issues you raise. As the July 2, 2010, technical assistance letter explains, if an employer chooses not to employ persons who require sponsorship for an employment visa, such as an H-1B visa, the employer may state in its job postings that it will not sponsor applicants for work visas. For similar reasons, as discussed in the enclosed technical assistance letters dated May 1, 2009, July 31, 2008, and April 24, 2007, an employer may ask candidates for the position whether they will require sponsorship for a visa.

However, as noted in the enclosed technical assistance letter dated May 1, 2009, employers should remember that all work-authorized persons – including non-immigrant visa holders -- are protected from national origin discrimination and document abuse under 8 U.S.C §§ 1324b(a)(1)(A) and (a)(6), and from retaliation under 8 U.S.C. §1324b(a)(5).

Regarding your third question, an employer's obligations with respect to the sponsorship and employment of individuals under the H visa program are enforced by the U.S. Department of Labor (DOL). For specific guidance regarding an employer's obligations under that program, particularly with respect to an employer's obligation to pay visa-related fees, you may contact the Office of Foreign Labor Certification of DOL's Employment and Training Administration. The Office of Foreign Labor Certification has established a mailbox for questions regarding Labor Condition Application (LCA) policies. Requests for policy guidance should be directed to LCA.Regulation@dol.gov. General inquiries regarding the H-1B program should be directed to the Office's Chicago National Processing Center at LCA.Chicago@dol.gov.

We hope you find this information helpful.

Sincerely,

Katherine A. Baldwin
Deputy Special Counsel

Enclosures

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

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

MAY 01 2009

BY EMAIL (snadel@ahlerslaw.com)
Steve Nadel, Esq.

Dear Mr. Nadel:

This is in response to your email to Linda White Andrews, dated March 31, 2009. In your email, you ask for written confirmation from the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) that your understanding of the answers to the questions set forth below is consistent with the anti-discrimination provision of the Immigration and Nationality Act (INA). Your questions and answers are as follows:

1. It is my understanding it is legal for an employer to ask the following questions in an employment application and during an interview (I am providing multiple versions of the same general question -- it is my understanding that all of these versions are legal and can be asked by an employer):

a. Will you now or in the future require sponsorship for employment visa status, for instance, H-1B visa status?

b. Will you now or in the future require sponsorship for employment visa status (for instance, H-1B visa status)?

c. Will you now or in the future require sponsorship for employment visa status, including but not limited to H-1B visa status?

2. It is my understanding an employer has no duty to sponsor individuals for employment visa status, and that this is true with regard to applicants as well as any current employees losing OPT status.

3. It is my understanding that if an applicant will need sponsorship at any time, for example, even 27 months in the future, the employer can reject the applicant for this reason.

4. It is my understanding that if an employer discovers it has hired someone who will need sponsorship in the future, the employer can terminate the individual on this basis even if the need for sponsorship will not occur until some time in the future, for example,

when the need for sponsorship will not occur for 15 or 20 months. In other words, employment decisions based on a need for sponsorship are legal, regardless of whether the need for sponsorship exists now or will exist in the future, and regardless of whether the individual is an applicant or a current employee.

5. It is my understanding that the same principles apply to all types of employment sponsorship, including H-1B and green card sponsorship – there is no duty to sponsor, and the need for sponsorship now or in the future is a legitimate basis for employment decisions.

6. It is my understanding that because an employer has no duty to sponsor, and no duty to hire persons who will need sponsorship in the future, an employer may draw lines in its decision-making that are more favorable to such individuals. For instance, an employer can determine that it will consider hiring persons who will need sponsorship in the future if the need for sponsorship will not arise until some identified time in the future, for example, at least 20 months from date of hire. (In other words, when the individual will be able to work for at least 20 months before employment eligibility is lost, or any other threshold period of time the employer feels is sufficient to justify the training time, hiring costs, etc., that may be incurred). Further, if the employer hires such an individual, the employer would have no duty to sponsor the individual when the time comes, and when the employment eligibility is lost the individual can then be terminated as a result.

7. It is my understanding an employer can establish different policies per department or even per job category. For example, if an employer were to determine that for some positions it will not hire anyone who will need sponsorship now or in the future; for other positions the employer will hire if the need for sponsorship will not occur for at least two years (but the employer will not sponsor when the time comes); and for other positions the employer could agree to sponsor individuals.

As you may be aware, OSC enforces the anti-discrimination provision of the INA. The anti-discrimination provision prohibits four types of employment-related discrimination: citizenship or immigration status discrimination; national origin discrimination; unfair documentary practices during the employment eligibility verification (Form I-9) process ("document abuse"); and retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision. Only U.S. citizens or nationals, recent permanent residents, refugees and asylees are protected from citizenship status discrimination.[1]

---

[1] Only persons defined as "protected individuals" under the INA § 274B(a)(3) are protected from citizenship status discrimination. A "protected individual" is defined as "a citizen of the United States, or . . . an alien who is lawfully admitted for permanent [or] . . . temporary residence, . . . is admitted as a refugee, . . . or is granted asylum . . . but does not include an . . . alien who fails to apply for naturalization within six months of the date when the individual first becomes eligible . . . to apply for naturalization . . .."

This office cannot give you an advisory opinion on any set of facts involving a particular individual or company. However, we can provide some general guidelines regarding compliance with the anti-discrimination provision of the INA. Because temporary visa holders are not protected from citizenship status discrimination, an employment decision made exclusively on the basis of an individual's status as a temporary visa holder would not run afoul of the anti-discrimination provision. Thus, decisions not to recruit, or to hire or fire individuals based solely on their need for visa sponsorship, either currently or in the future, would generally not be actionable under the INA's anti-discrimination provision. Of course, such employment decisions must be made without the intent to discriminate against the applicant or employee based on their national origin or to retaliate against a person for activity that is protected under the statute.

Please feel free to contact us on our toll-free hotline (1-800-255-8155) or at our website www.usdoj.gov/crt/osc, if you have further questions regarding immigration-related employment discrimination. We hope this information is of assistance to you.

Sincerely,

Katherine A. Baldwin
Deputy Special Counsel

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

JUL 31 2008

Ms. Patricia Gannon
Greenberg Traurig, LLP
MetLife Building
200 Park Avenue
New York, NY 10166

Re: Request for Guidance on Questioning of Applicants

Dear Ms. Gannon:

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

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

KB:MH:JS:WG
CB: 261381

APR 24 2007

Leslie K. L. Thiele
Whiteman Osterman & Hanna LLP
Attorneys at Law
One Commercial Plaza
Albany, NY 12260

Dear Ms. Thiele:

This is in response to your inquiry dated November 22, 2006, to our Office regarding certain questions that your client proposes to ask job applicants regarding their work authorization. We apologize for the delay of our response.

This Office cannot give you an advisory opinion on any particular cause of alleged discrimination, or on any set of facts involving a particular individual or entity. However, we can provide some general guidelines regarding pre-employment inquiries under the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b.

Your letter notes that your client wishes to pose two questions to applicants related to their work authorization. You ask whether it is legally permissible for an employment application to contain the following question:

> Do you have *Unrestricted United States Work Authorization*?
>
> If you are a U.S. citizen, permanent resident alien, temporary resident alien, applicant for temporary resident status, refugee, or asylee, you have *Unrestricted U.S. Work Authorization*. If you are on an F, J, H, L, or any other non-immigrant visa, you do not.
>
> ☐ Yes, I have *Unrestricted U.S. Work Authorization*.
>
> ☐ No, I do not have *Unrestricted U.S. Work Authorization*.

Your client's second question is posed as a follow-up question to the first question. You ask whether it is legally permissible to present the following list of "visa status" options to an applicant who has answered "no" to the first question:

> ☐ (1) I have started an application for U.S. Permanent Residency with my employer, as a self-

petitioner, or as the immediate relative of a U.S. citizen.

- ☐ (2) I am currently on an F-1 visa or utilizing my OPT (Optional Practical Training).
- ☐ (3) I am currently on a J or L visa.
- ☐ (4) I am currently on a TN visa.
- ☐ (5) I am currently on an H-1B visa through an academic institution or not-for-profit employer.
- ☐ (6) I am currently on a U.S. visa not mentioned above (ex: B1, B2, or visa waiver) or I do not have any U.S. work authorization at all.

As you are probably aware, the INA prohibits citizenship status and national origin discrimination with respect to hiring, termination, and recruiting or referring for a fee. See 8 U.S.C. § 1324b(a)(1)(B). The INA also prohibits employers from engaging in "document abuse" or over-documentation in the employment eligibility verification process (§ 1324b(a)(6)) and retaliatory conduct (§ 1324b(a)(5)).

Citizenship status discrimination occurs when protected individuals[1] are not hired because of their real or perceived immigration or citizenship status, or because of their type of work authorization, but the prohibition does not extend to discrimination that is otherwise required in order to comply with law, regulation, executive order, or Federal, State, or local government contract. 8 U.S.C. § 1324b(a)(2)(C).

While non-immigrant visa holders are not protected from citizenship status discrimination, all work-authorized individuals, including many non-immigrant visa holders, are protected under the INA's prohibitions against national origin discrimination and document abuse. 8 U.S.C. §§ 1324b(a)(1)(A) and (a)(6). Thus, requests to produce a particular document or documents in order to confirm visa status or requests for specific documents to establish employment eligibility, might cause an applicant to allege document abuse. Similarly, an applicant's perception that he or she was rejected for employment on the basis of national origin may prompt the individual to allege national origin discrimination.

Consequently, it is preferable to ask employment applicants whether they are "legally authorized to work in the U.S." As a general rule, this is all that an employer must verify under the law. Applicants asked to specify their citizenship or immigration status in the context of the employment application process may perceive that the employer considered the information in making the hiring decision and committed prohibited discrimination.

In your letter you indicate that some nonimmigrant visa types are preferable to your client because they do not require the employer to bear significant cost and the applicant can start work without delay. However, rather than asking the applicant to choose from a list of specific visa statuses, the employer may wish simply to state: "This employer will not sponsor

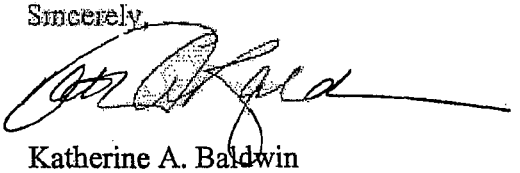
---

[1] Under the INA, only U.S. citizens and nationals and certain documented immigrants, including many lawful permanent residents, asylees, and refugees, are protected from citizenship status discrimination. 8 U.S.C. § 1324b(a)(3).

applicants for the following work visas: _____." In addition, the employer may specify the date by which the applicant must be eligible to begin work. In the alternative, if the employer is willing in certain instances to sponsor particular individuals for employment visas, the employer may simply ask whether the applicant will now or in the future require sponsorship for an employment visa.

We hope that you will find this information helpful.

Sincerely,



Katherine A. Baldwin
Deputy Special Counsel