



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
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August 19, 2010

Via E-mail rhandler@scmlp.com

Robert Chandler, Esq.
Stoneman, Chandler & Miller LLP
99 High Street, Suite 1610
Boston, MA 02110

Dear Mr. Chandler:

Thank you for contacting the Office of Special Counsel for Immigration-Related Unfair Employment Practices. This e-mail is in response to your letter dated July 1, 2010. In your letter, you state that your client is a company that manufactures castings for a defense contractor. You claim that the defense contractor is requiring that the quality control inspectors assigned by your client to work under the contract be U.S. citizens. These quality control inspectors are hired to check castings against the contractor's drawings. You further state that there may be a contract between the government and the defense contractor imposing such a U.S. citizenship requirement, but your client does not have access to that contract. Accordingly, you ask whether the statutory exception to the citizenship status discrimination prohibition under the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b(a)(2)(C), allows your client to legally comply with the defense contractor's request.

The Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") enforces the anti-discrimination provision of the INA. OSC's mission is to protect work-authorized individuals from employment discrimination based on citizenship status, national origin, over documentation in the employment eligibility verification (Form I-9) process (document abuse), or retaliation for filing a charge or asserting their rights under the anti-discrimination provision.

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 information regarding pre-employment inquiries and procedures under the anti-discrimination provision of the INA. The INA permits employers to discriminate on the basis of an individual's citizenship or immigration status when required for compliance with "law, regulation, or executive order, or required by Federal, State, or local government contract." 8 U.S.C. § 1324b(a)(2)(C).

We have attached previously issued technical assistance letters addressing this topic. As explained in the letters dated February 29, 2000, and October 3, 2002, in order for a U.S. citizen requirement to satisfy the exemption found in the anti-discrimination provision of the INA, an

employer must show that it is required to discriminate on the basis of citizenship status for the specific position at issue. Factors that come into play in determining whether citizenship status discrimination is required for a particular position include the express language of the restriction at issue, the employee's position, and the type of work performed by the employee. Thus, employers must examine the applicable law, regulation, executive order or contract to determine whether it requires the employer to restrict employment for a specific job on the basis of citizenship status. For more information regarding the defense contractor's U.S. citizenship requirement, you may wish to contact that company's contracting officer.

If you have any questions or need additional information regarding immigration-related unfair employment practices, please contact OSC at 1-800-255-8155 or visit our website at www.justice.gov/crt/osc.

Sincerely,

A handwritten signature in black ink, appearing to read 'Katherine A. Baldwin', with a long horizontal flourish extending to the right.

Katherine A. Baldwin
Deputy Special Counsel

Enclosures



U.S. Department of Justice

Civil Rights Division

*Special Counsel for Immigration Related
Unfair Employment Practices - NYA
950 Pennsylvania Avenue, N.W.
Washington, DC 20530*

October 3, 2002



Re: Advisory Opinion Request

Dear [REDACTED]

Thank you for your letter seeking guidance concerning the exceptions to the citizenship status discrimination prohibition under the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b(a)(2)(C). We apologize for our delay in responding.

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

As you describe in your letter, the INA permits employers to discriminate on the basis of an individual's citizenship or immigration status when required for compliance with law, regulation, executive order, or government contract. 8 U.S.C. § 1324b(a)(2)(C). The INA also permits citizenship status discrimination when the Attorney General determines that such discrimination is "essential for an employer to do business with an agency or department of the Federal, State, or local government." *Id.*

To avail itself of these exceptions, an employer must show that it is required to discriminate on the basis of citizenship status for the specific position at issue. The employer must examine the applicable law, regulation, executive order or contract to determine whether it requires the employer to restrict employment for a specific job on the basis of citizenship or

immigration status. An employer is not justified in limiting a position to only U.S. citizens if a government contract does not prohibit the hiring or access of non-U.S. citizens, but rather sets a heightened level of background review for non-U.S. citizen employees to have access to restricted information.

A U.S. citizen requirement for specific jobs does not justify a blanket U.S. citizens-only policy for all jobs. Thus, technical staff working on other contracts, cafeteria workers, and other employees, for example, who do not work in the specific position covered by the restriction, are not subject to the non-citizen bar. An employer should consider the following facts when determining whether citizenship status discrimination is required by law, regulation, executive order or government contract: the express language of the restriction at issue, the employee's position - including the type of work done, where it is done, and with whom it is done, and the physical layout of the site.

Your letter mentioned the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR). These regulations specifically allow access to all "protected individuals" under 8 U.S.C. § 1324b(a)(3)(B). See 22 CFR § 120.15 and 15 CFR § 734.2(b)(2)(ii). In other words, nationals of the United States, lawful permanent residents, asylees, refugees and temporary residents must be treated the same as U.S. citizens. All such individuals are permitted access; neither EAR nor ITAR requires citizenship status discrimination against this protected class.

In your letter, you ask whether an employer may ask prospective and existing employees their citizenship status and/or national origin for purposes of obtaining legally required export authorizations from the Government without violating the anti-discrimination provision. Assuming that a law, regulation, executive order or government contract restricts a specific position in such a manner, requesting this information does not violate the INA's prohibition against citizenship status discrimination. Again, please note that the restriction applies solely to that job and not to all hiring done by that employer. For information concerning potential unlawful discrimination under Title VII of the Civil Rights Act of 1964, including national origin discrimination, we recommend that you contact the Equal Employment Opportunities Commission (EEOC).

You also inquire about proper pre-employment inquiries to the extent that a law, regulation, executive order, or government contract restricts hiring to U.S. citizens and lawful permanent residents only (or any other combination of statuses). We do not recommend that an employer ask an applicant or employee to identify his or her specific immigration or citizenship status. Rather, we suggest that the employer ask the applicant or employee to answer a single question that determines whether he or she is within any of the statuses permitted access. For example, rather than ask each applicant to identify his or her citizenship status, the employer could ask a single question:

Are you a U.S. citizen or national, asylee, refugee, or lawful permanent resident?

Yes__ No__

If the applicant is within the appropriate class, there appears to be no reason why an employer should know whether the applicant is a lawful permanent resident instead of an asylee. Obtaining more specific information does not improve the employer's ability to conduct hiring or comply with the law, but may provide the basis for an unsuccessful job applicant to claim that the employer engaged in unlawful citizenship status discrimination.

We hope this information is helpful. If you have any additional questions, please feel free to contact Special Policy Counsel Bruce Friedman at (202) 616-5560.

Sincerely,

Juan Carlos Benítez B1/BSF

Juan Carlos Benítez
Special Counsel



U.S. Department of Justice

Civil Rights Division

*Special Counsel for Immigration Related
Unfair Employment Practices
P.O. Box 27728
Washington, DC 20038-7728*

February 29, 2000



Re: Permissible Citizenship Status Discrimination
under 8 U.S.C. § 1324b

Dear 

Thank you for your letter seeking guidance concerning the exceptions to the citizenship status discrimination prohibition under the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b(a)(2)(C). We apologize for our delay in responding. As you know from the discussions my staff has had with you, the issues presented can be quite complex.

As you describe in your letter, the INA permits citizenship status discrimination when it is required for compliance with law, regulation, executive order, or government contract. 8 U.S.C. § 1324b(a)(2)(C). When discrimination is not required, the INA permits citizenship status discrimination when the Attorney General determines that such discrimination is "essential for an employer to do business with an agency or department of the Federal, State, or local government." *Id.* It is important to recognize that these two exceptions pose different questions and involve different analyses.

With regard to the first exception, an employer must show that it is required to discriminate on the basis of citizenship status. Thus, an employer is not justified in limiting a position to only U.S. citizens if the contract does not prohibit the hiring or access of non-U.S. citizens, but sets a heightened level of background review for non-U.S. citizen employees to have access to restricted information. In addition, a U.S. citizen requirement for specific jobs does not justify a blanket U.S. citizens-only policy for all of the employer's jobs. Thus, technical staff working on other contracts, cafeteria workers, janitorial staff, and other employees whose work does not involve, for example, classified or restricted information, are not subject to the non-citizen bar.

Your letter mentioned the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR). These regulations specifically allow access to all "protected individuals" under 8 U.S.C. § 1323b(a)(3)(B). Thus, nationals of the United States, asylees, refugees and temporary residents in addition to U.S. citizens and lawful permanent residents are permitted access and citizenship status discrimination is not required in order to hire employees.

You should consider the following factors when determining whether citizenship status discrimination is required by law, regulation, executive order or government contract: the express language of the law, regulation, etc., at issue, the employee's position - including the type of work done, where it is done, and with whom it is done, and the physical layout of the site.

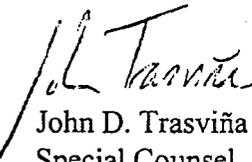
In your letter, you ask whether an employer may provide applicants with notice that a specific position is restricted by citizenship status without violating the anti-discrimination provision. Assuming that a law, regulation, executive order or government contract restricts a specific position in such a manner, providing notice to applicants does not violate the anti-discrimination provision. Again, please note that the restriction applies solely to that job and not to all hiring done by that employer.

In addition, to the extent that the law, regulation, executive order, or government contract permits the hiring of U.S. citizens and lawful permanent residents (or any other combination of statuses), we do not recommend asking an applicant to identify which acceptable status he or she is in. Rather, we suggest asking the applicant to check yes or no to a single question asking whether he or she is within any of the statuses permitted access. If the applicant is within the appropriate class, there appears to be no reason why your client should know whether the applicant is a lawful permanent resident as opposed to a U.S. citizen, for example. Obtaining this specific information before an individual is offered a position does not improve the employer's ability to conduct hiring or comply with the law. It may make it easier for an unsuccessful job applicant to claim that the employer engaged in unlawful citizenship status discrimination.

Finally, based upon the information provided, we conclude that your client cannot lawfully discriminate on the basis of citizenship status because both ITAR and EAR permit the hiring of protected non-U.S. citizens. We would, of course, be happy to reconsider this decision upon review of additional relevant information that you provide, including any applicable government contract and details concerning the employment position at issue.

We hope this information is helpful. If you have any additional questions, please feel free to contact Special Policy Counsel Bruce Friedman at (202) 616-5560.

Sincerely,


John D. Trasviña
Special Counsel