



U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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SEP 25 2013

BY EMAIL AND FIRST CLASS MAIL (Eileen.scofield@alston.com)

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Dear Ms. Scofield:

Thank you for your letter, dated August 22, 2013, to the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). In your letter, you seek guidance from OSC concerning the steps that employers should take when an asylee or refugee worker presents an Employment Authorization Document or Form I-766 ("EAD") for initial I-9 purposes, and the EAD subsequently expires. Specifically, you ask whether OSC will view as discriminatory, an employer's decision to follow the Form I-9 instructions and reverify the EADs of asylee or refugee workers when their EADs expire, in light of the fact that "asylees and refugees have unrestricted work authorization." (citing to 8 C.F.R. § 274a.12(a) and Immigration and Naturalization Service Memorandum on the Meaning of 8 C.F.R.a.12(a) as it Relates to Refugee and Asylee Authorization for Employment, William Yates (March 10, 2003)).

OSC is responsible for enforcing the anti-discrimination provision of the Immigration and Nationality Act ("INA" or "the Act"), 8 U.S.C. § 1324b, which prohibits discrimination in hiring, firing, or recruitment or referral for a fee that is based on an individual's national origin or citizenship status. The statute also prohibits unfair documentary practices during the employment eligibility verification (Form I-9) process on the basis of citizenship status or national origin (document abuse), and retaliation or intimidation. 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 INA's anti-discrimination provision.

The document abuse provision of the INA prohibits an employer from requesting more or different documents or rejecting valid employment eligibility verification documents with the intent to discriminate on the basis of national origin or citizenship status. 8 U.S.C. § 1324b(a)(6). Document abuse can also occur during the reverification process. *See Townsend Culinary, Inc.*, 8 OCAHO no. 1032 (1999).

When completing the Form I-9 a worker must select a box in Section 1 indicating his or her status (citizen, noncitizen national, lawful permanent resident, alien authorized to work). The selection applicable to refugees and asylees—alien authorized to work—has a field that requests “expiration date, if applicable.” The Form I-9 instructions provide that refugees or asylees may write “N/A” in the space provided for the expiration date in Section 1. Form I-9 Instructions, pp.2, 5.

After employees complete Section 1, they must present documents evidencing identity and employment eligibility in order for the employer to complete Section 2 of the Form I-9. USCIS guidance provides that refugee and asylee workers are not required to present an EAD for Section 2 in order to complete the Form I-9. *See* U.S. Citizenship and Immigration Service Handbook for Employers, M-274, p. 13. Rather, refugee and asylee workers may choose to present other documents, such as a driver’s license (List B) and unrestricted Social Security card (List C), to satisfy the Form I-9 requirements. *Id.* The Form I-9 instructions further provide that reverification of a worker’s employment authorization does not apply for refugees and asylees “unless they chose to present evidence of employment authorization in Section 2 that contains an expiration date and requires reverification, such as Form I-766, Employment Authorization Document.” Form I-9 Instructions, p.3. Thus, an employer that reverifies the employment authorization of an asylee or refugee that originally presented an EAD upon the EAD’s expiration is following USCIS guidance. OSC would therefore be unlikely to find a violation of the anti-discrimination provision unless the employer somehow acted in a discriminatory manner based on national origin or citizenship status.

In your letter you also raise a concern related to refugee and asylee workers who are unable to present a new unexpired EAD by the date of expiration of their originally presented EAD. For reverification, an employee may present unexpired documentation from **either** List A or List C showing he or she is still authorized to work. Employers cannot require the employee to present a List A document. Form I-9 Instructions, p. 5. Thus, a refugee or asylee that originally presented an EAD could, for instance, present an unrestricted Social Security card at reverification. Furthermore, the receipt rule would allow a worker to present a receipt for a lost, stolen or misplaced document for reverification purposes. Form I-9 Instructions, p. 4. To the extent an employer requires an employee to present a specific document, such as an unexpired EAD, for reverification purposes, it may violate the anti-discrimination provision’s prohibition against document abuse.

We thank you for raising these important issues and hope that this information is helpful. If you have any questions regarding this matter, please do not hesitate to contact us at 1-800-255-7688 (toll free).

Sincerely,



Seema Nanda
Deputy Special Counsel