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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June 29, 2010

BY CERTIFIED MAIL AND EMAIL (apaparelli@seyfarth.com)

Angelo Paparelli, Esq.
Partner
Seyfarth Shaw LLP
620 Eighth Avenue, 32nd Floor
New York, NY 10018

Dear Mr. Paparelli,

This is in response to your email dated May 11, 2010. In your email you asked for guidance from the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") concerning pre-hire questions that make clear that your client will not hire applicants who require sponsorship for nonimmigrant visas as well as applicants holding an "open market Employment Authorization Document derived in connection with the submission of an adjustment of status application and an employment-based I-140 petition" pursuant to the American Competitiveness in the 21st Century Act, 8 U.S.C. § 1154(j).

You reference two questions that have been previously recommended by OSC as appropriate questions for employers who do not wish to hire nonimmigrant visa holders:

1. Are you legally authorized to work in the United States? __ Yes __ No
2. Will you now or in the future require sponsorship for employment visa status (e.g., H-1B visa status)? __ Yes __ No

You further indicate that job applicants holding an "open market Employment Authorization Document" typically answer "no" to the first question but also often answer "no" to the second question as well. Because your client would be required by U.S. Citizenship and Immigration Services ("USCIS") to submit a letter confirming that an individual with this status is employed in the same or a similar occupational classification in order for the agency to grant lawful permanent residency to the individual under 8 U.S.C. § 1154(j), your client does not wish to hire such individuals either.

Accordingly, you would like to know if the following question 2 suggested below would be permitted as an alternate to OSC's suggested question 2:

For purposes of the following question "sponsorship for an immigration-related employment benefit" means "an H-1B visa petition, an O-1 visa petition, an E-3 visa petition, TN status and 'job flexibility benefits' (also known as I-140 portability or Adjustment of Status portability) for long-delayed adjustment of status applications that have been pending for 180 days or longer." (Please ask us if you are uncertain whether you may need immigration sponsorship or desire clarification.)

Will you now or in the future require "sponsorship for an immigration-related employment benefit?" __ Yes __ No

As you may know, OSC is responsible for enforcing the anti-discrimination provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324b, which prohibits national origin discrimination, citizenship status discrimination, unfair documentary practices (document abuse) during the employment eligibility verification (Form I-9) process, and retaliation. Only certain "protected individuals" are protected from citizenship status discrimination. These individuals include United States citizens, United States nationals, temporary residents, recent lawful permanent residents, refugees and asylees.

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 and applicants for adjustment of status to permanent residence 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 or as an applicant for adjustment of status to permanent residence would not run afoul of the anti-discrimination provision. Thus, decisions not to hire individuals based solely on their need for visa sponsorship or their need for a written employer submission to USCIS, either currently or in the future, would generally not be actionable under the INA's anti-discrimination provision.

As you noted, an August 14, 1991, technical assistance letter issued by this office cautions against using overly technical language not easily understood by a lay person. However, because the language you propose to use clearly applies only to temporary visa holders, it does not implicate the INA's protection against citizenship status discrimination. Letter from Katherine A. Baldwin, Deputy Special Counsel, OSC, to Montserrat Miller, Attorney, Greenberg Traurig, LLP (August 12, 2009); Letter from Katherine A. Baldwin, Deputy Special Counsel, OSC, to Steve Nadel, Attorney, Ahlers & Cooney, P.C. (May 1, 2009); Letter from Patrick Shen, Special Counsel, OSC, to Sarika I. Garg, Attorney, Berry Appleman & Leiden LLP (July 31, 2008); Letter from Patrick Shen, Special Counsel, OSC, to Patricia Gannon, Attorney, Greenberg Traurig, LLP (July 31, 2008); Letter from Patrick Shen, Special Counsel, OSC, to Gregory Siskind, Attorney, Siskind Susser Bland (May 15, 2008); and Letter from Patrick Shen, Special Counsel, OSC, to Janet V. Elizondo, Deputy Director, U.S. Equal Employment Opportunity Commission Dallas District Office (January 15, 2008); and Letter from Patrick Shen, Special Counsel, OSC, to Leslie K. L. Thiele, Attorney, Whiteman Osterman & Hanna LLP (April 24, 2007), copies of the cited letters are attached. Please note, though, that the INA does protect temporary visa holders from national origin discrimination by small employers with 4-14 workers, discrimination in the Form I-9 process, and retaliation.

Please feel free to contact us on our toll-free hotline (1-800-255-8155) or visit our website www.justice.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

August 12, 2009

Montserrat Miller, Esq.
Greenberg Traurig, LLP
1750 Tysons Boulevard, Suite 1200
McLean, VA 22012

Dear Ms. Miller:

This is in response to your July 15, 2009, letter to the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). In your letter, you request guidance regarding pre-employment questions for job applicants who are temporary nonimmigrant visa holders, such as H-1B visa holders, and whose visas will expire in one year or less. Specifically, you referenced our April 24, 2007, technical assistance letter, which suggested the following pre-employment advisory: "This employer will not sponsor applicants for the following work visas: _ ___." You then asked the following questions:

1. [W]hat if a company does in fact sponsor individuals for H-1B visas but the problem arises when someone has less than one year of lawful employment status remaining?

2. What if an applicant responds YES to the question that they "now or in the future require sponsorship for an employment visa"? Can an employer follow up that response by asking what type of visa one holds and how much time remains on their current visa and if it is one year or less not hire the individual?

3. In the alternative, is it acceptable on the job application to state, "If hired, can you provide proof that you are legally able to work in the United States for at least 12 months"? and if the person answers NO then not hire the individual?

Please note that OSC cannot provide an advisory opinion on any set of facts involving a particular individual or entity. However, we can provide some general guidelines regarding the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b, and employer actions under that provision.

As you may know, OSC is responsible for enforcing the anti-discrimination provision of the INA, which prohibits national origin discrimination, citizenship status discrimination, unfair documentary practices (document abuse) during the employment eligibility verification (Form I-9) process, and retaliation. Only certain "protected individuals" are protected from citizenship

status discrimination. These individuals include United States citizens, United States nationals, temporary residents, recent lawful permanent residents, refugees and asylees.

We will address your first two questions in conjunction. An individual who requires employer sponsorship for a visa, such as an H-1B visa holder, is not a protected individual under 8 U.S.C. § 1324b for citizenship status discrimination. Therefore, "pre-employment inquiries about applicants who require employer visa sponsorship" do not violate the prohibitions against citizenship status discrimination in 8 U.S.C. § 1324b. Letter from Patrick Shen, Special Counsel, OSC, to Patricia Gannon, Greenberg Traurig, LLP (Jul. 31, 2008), a copy of which is attached. This would include inquiries relating to the expiration date of the H-1B visa. Additionally, employment decisions made exclusively on the basis of a worker's H-1B status, or other temporary, nonimmigrant status, would not violate the citizenship status discrimination provision of 8 U.S.C. § 1324b. Letter from Katherine A. Baldwin, Deputy Special Counsel, OSC, to Steve Nadel, Attorney, Ahlers & Cooney, P.C. (May 1, 2009), a copy of which is attached.

However, please note that all work authorized individuals, including H-1B visa holders are protected from national origin discrimination and document abuse under 8 U.S.C. § 1324b(a)(l)(A) and (a)(6), as well as from retaliation under 8 U.S.C. §1324b(a)(5). See Letter from Katherine A. Baldwin, Deputy Special Counsel, OSC, to Leslie K.L. Thiele, Attorney, Whiteman Osterman & Hanna LLP (Apr. 24, 2007) (on file with OSC). See also United States v. Diversified Tech. & Servs. of Va., Inc., 9 OCAHO no. 1095 (2003) (relief ordered for all victims of document abuse without distinction as to status as a "protected individual"); United States v. Townsend Culinary, Inc., 8 OCAHO no. 1032 (1999) (same); United States v. Guardsmark, Inc., 3 OCAHO no. 572 (1993) (all work authorized individuals are protected from document abuse).

With respect to your third question, please be aware that asking job applicants for proof that they are legally able to work in the United States for at least twelve months may result in the rejection of applicants who are protected from citizenship discrimination under the anti-discrimination provision of the INA. Certain "protected individuals" whose work authorization is incident to their status, such as lawful permanent residents, asylees, and refugees, may nonetheless possess an employment authorization document which expires in one year or less, even though they are authorized to work indefinitely and are entitled to an unrestricted Social Security card. Thus, although the work authorization document of such individuals may expire in less than twelve months from the date of their job application, they continue to be authorized to work when that document expires.[1] In sum, refusing to hire job applicants for failure to

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[1]As the United States Citizenship and Immigration Services (USCIS) Handbook for Employers, Instructions for Completing Form I-9 (Employment Eligibility Verification Form), Apr. 2009, at 12, explains:

> Future expiration dates may appear on the employment authorization documents of aliens, including, among others, permanent residents and refugees. USCIS includes expiration dates even on documents issued to aliens with permanent employment

provide proof of at least twelve months' employment eligibility may result in the disparate treatment of "protected individuals" in the hiring process on the basis of citizenship status under 8 U.S.C. § 1324b.

I hope 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,

Katherine A. Baldwin
Deputy Special Counsel

Enclosures

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authorization. The existence of a future expiration date:

1. Does not preclude continuous employment authorization;
2. Does not mean that subsequent employment authorization will not be granted; and
3. Should not be considered in determining whether the alien is qualified for a particular position.

U.S. Department of Justice

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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]

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[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

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July 31, 2008

VIA E-MAIL (sgarg@usabal.com)
Sarika I. Garg, Esq.
Berry Appleman & Leiden LLP
7901 Jones Branch Drive
Suite 320
McLean, VA 22102

Re: Document Number 290335

Dear Ms. Garg:

Thank you for your electronic mail to the Office of Special Counsel for Immigration-related Unfair Employment Practices (OSC), dated May 20, 2008. In your message, you present a number of scenarios associated with the requirement to verify employment eligibility. In sum, I understand your questions to be as follow:

1. How far may a business go in requesting to view documentation, such as immigration documents or I-9 forms, from employees of a contractor (such as a staffing agency)? May the business require the agency supplying the workforce to indemnify it in case there is a violation?

2. How can employers protect themselves from employer sanctions for illegal hiring when dealing with an independent contractor? Are employers excused from verifying the employment authorization of independent contractors? Should the employer ask the workers to sign a contract stating that they are authorized for employment in the United States?

3. Is it a violation of the anti-discrimination provisions of the Immigration and Nationality Act (INA) to ask job applicants, prior to the job offer, whether they are legally authorized to work in the United States, and whether they will require immigration visa sponsorship for employment? May job applicants be required to sign an attestation to this effect?

First, please be advised that the OSC may not give an advisory opinion on any set of facts involving a particular company or individual. However, I am happy to provide some general guidelines as to the anti-discrimination provisions of the INA (codified in 8 U.S.C. §1324b), which OSC enforces. 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.

Many of the issues raised in the first and second sets of questions provided above fall within the purview of the Department of Homeland Security (DHS), which enforces the laws related to hiring unauthorized workers under INA § 274A, 8 U.S.C. § 1324a. As such, I strongly encourage you to seek guidance from DHS's U.S. Citizenship and Immigration Services (USCIS) through its Office of Business Liaison by calling 1-800-357-2099, or by fax at (202) 272-1865. In addition, the *Handbook for Employers, Instructions for Completing the Form I-9 (Employment Eligibility Form)* published by USCIS, contains answers to common questions dealing with I-9 completion and employment eligibility verification. A copy of this document is available on the web at http://www.uscis.gov/files/nativedocuments/m-274.pdf.

As a general rule, OSC will not find reasonable cause to believe discrimination has occurred simply because employers require that all employees and contract workers be authorized to work; nor would OSC find that demanding to see the Form I-9 documentation for employees provided by a staffing agency is a per se violation of INA § 274B. However, in doing so, employers may not act in a discriminatory manner nor treat employees disparately because of national origin or citizenship status. Moreover, employers may be liable for discriminatory behavior towards employees a staffing agency provides if there is a joint-employer relationship. It is OSC's longstanding practice to examine the totality of evidence when determining whether there is reason to believe that discrimination has occurred.

In your second and third sets of questions, you query whether an employer may require independent contractors or job applicants to sign a contract or otherwise attest that they are authorized to work, and that they do not require visa sponsorship. OSC cannot provide legal advice on the advisability of agreements between employers and independent contractors to ensure the employment eligibility of contract workers. Keep in mind, however, that an employer may not circumvent its verification obligations by treating an employee as an independent contractor, and cannot impose such agreements in a discriminatory manner.

Additionally, there already is a requirement for employees and employers to attest to work authorization and verification thereof by completing the Form I-9. By law and USCIS policy, the I-9 must be completed *after* the employer makes a firm job offer and within three days of the commencement of employment. Therefore, requiring a job applicant to attest to employment eligibility prior to receiving an offer of employment may be impermissible pre-screening. Because discriminatory practices frequently are associated with pre-screening, OSC will investigate an employer for a potential violation of the anti-discrimination provision of the INA whenever there is an allegation of pre-screening. Additionally, pre-screening practices may be found to violate the laws that DHS enforces. See 8 C.F.R. § 274a.2(b) (2008).

Finally, the prohibition against citizenship status discrimination does not require the employer to petition for a visa on any worker's behalf. However, to avoid the appearance of citizenship status discrimination, OSC recommends that you ask only whether the applicant will need visa sponsorship, not what specific citizenship status the applicant currently holds.

I hope this information is of assistance to you. For further information regarding OSC, or the INA's anti-discrimination provision, please feel free to call us at 1-800-255-8155.

Sincerely,

Patrick Shen
Special Counsel

U.S. Department of Justice
Civil Rights Division

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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

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

May 15, 2008

By Email (gsiskind@visalaw.com)

Gregory Siskind, Esq.
Siskind Susser Bland
1028 Oakhaven Road
Memphis, Tennessee 38119

Dear Mr. Siskind:

This is response to your email to Katherine Baldwin, dated February 5, 2008. Please excuse our delay in responding. In your email, you inquire whether persons who do not fall within the definition of "protected individuals" under 8 U.S.C. §1324b(a)(3) are protected from "document abuse" or other forms of discrimination under the anti-discrimination provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §1324b.

While 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 entity, we can provide information as to the scope of protections afforded under the anti-discrimination provisions of the INA.

As you may know, under the anti-discrimination provision of the INA, U.S. citizens, U.S. nationals, temporary residents, recent lawful permanent residents (and those who have applied for and completed the naturalization process within a statutorily prescribed period), refugees and asylees are "protected individuals" with standing to assert citizenship status discrimination claims. In contrast, non-immigrant visa holders, such as H, L, J and F visa holders, Temporary Protected Status (TPS) receipients and other authorized workers, do not fall within the class of protected individuals, and are not protected from citizenship status discrimination.

However, all work authorized individuals are protected from national origin discrimination and document abuse under 8 U.S.C. §§ 1324b(a)(1)(A) and (a)(6), as well as from retaliation under 8 U.S.C. §1324b(a)(5). *See* Letter from Katherine A. Baldwin, Deputy Special Counsel, dated April 24, 2007, a copy of which is attached. *See also United States v. Diversified Technology & Services of VA, Inc.*, 9 OCAHO No. 1095 (2003) (relief ordered for all victims of document abuse without distinction as to status as a "protected individual"); *United States v. Townsend Culinary, Inc.*, 8 OCAHO No. 1032 (1999) (same); *United States v. Guardsmark*, 3 OCAHO No. 572 (1992) (all work authorized individuals are protected from document abuse). *But see Ondina-Mendez v. Sugar Creek*, 9 OCAHO No. 1085 (2002) (protection against

document abuse based on citizenship status extends only to "protected individuals" within the meaning of 8 U.S.C. § 1324b(a)(1)).

We hope that the information provided above is helpful. If you would like further information on the INA's anti-discrimination provisions, please consult our website at http://www.usdoj.gov/crt/osc/index.html, or call our telephone hotline at 1-800-255-8155.

Sincerely,

Patrick Shen
Special Counsel

Enclosure: OSC Technical Assistant Letter, dated April 24, 2007

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

[redacted]

APR 24 2007

Dear Ms. [redacted]:

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

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[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

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

JAN 15 2008

Via First Class Mail and Email (janet.elizondo@eeoc.gov)
Janet V. Elizondo
Deputy Director
U.S. Equal Employment Opportunity Commission Dallas District Office
207 S. Houston, 3rd Floor
Dallas, TX 75202

Dear Ms. Elizondo,

Thank you for your email, dated September 24, 2007, to Jodi Danis of the Civil Rights Division. Your email was forwarded to this Office for response. In your email, you inquire as to the legality of a particular question on an employment application. We apologize for our delay in responding.

Please be advised that this Office cannot give 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.

The Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) was established in 1986 to enforce the anti-discrimination provision of the INA. Our mission is to protect work-authorized individuals from employment discrimination based on citizenship or immigration 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 of the INA. Individuals who believe that they have been discriminated against in violation of the INA may file a charge with OSC.

Citizenship status discrimination occurs when individuals are not hired or are fired because of their real or perceived citizenship or immigration status or because of their type of work authorization. Under the INA, U.S. citizens, refugees, asylees, recent permanent residents, and temporary residents are protected from citizenship status discrimination. 8 U.S.C. § 1324b(a)(3).

Document abuse occurs when an employer requests more or different documents than required for employment eligibility verification, and does so with the intent to discriminate on the basis of national origin or citizenship status. 8 U.S.C. § 1324b(a)(6). By law, a new employee may choose to show either one document from an Employment Eligibility Verification (I-9) Form list of acceptable documents that demonstrate identity and eligibility to work (List A), or a combination of one document from the I-9's list of acceptable identity documents (List B) paired with one document from a list of acceptable documents showing authorization to work in the United States (List C).

As described in your email, the employment application specifically asks: "Are you prevented from lawfully becoming employed in this country because of visa or immigration status? (Proof of citizenship will be required upon employment.)" The statement in parenthesis in the second part of the question could imply that U.S. citizenship is required for employment. However, an employer may only require U.S. citizenship in limited circumstances. The INA permits employers to discriminate on the basis of an individual's citizenship or immigration status only if: (1) required by law, regulation, executive order; (2) required by federal, state or local government contract; or (3) the Attorney General determines that it is essential in order for an employer to do business with an agency or department of the federal, state or local government. 8 U.S.C. § 1324b(a)(2)(C).

To avail itself of this exception, an employer must examine the applicable law, regulation, executive order or contract to determine whether it requires the employer to restrict employment for a specific position on the basis of citizenship or immigration status. A U.S. citizenship requirement for specific jobs does not justify a blanket U.S. citizens-only policy for all jobs by that employer. For example, 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. 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.

Moreover, a request for a specific document during the employment eligibility verification (Form I-9) process, such as "proof of citizenship," may constitute document abuse. Instead, an employer should permit employees to produce whichever acceptable documents they choose to verify their employment eligibility. If the employer is trying to ascertain whether an individual is eligible to work in the United States without employment sponsorship, the intent would be clearer if the question asked all applicants: "Are you currently legally authorized to work in the United States on a full-time basis?" This will provide the employer with the requisite information to discern whether the individual can comply with the INA's employment eligibility verification (Form I-9) procedure without suggesting to applicants that the employer prefers a specific type of work authorization or immigration status. It is also a more precise way of soliciting the information sought than the current phraseology, which because it is phrased in

the negative, would allow someone who currently is not authorized to work, but potentially could obtain employment sponsorship, to answer the question affirmatively.

We hope this information satisfactorily addresses your concerns.

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

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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