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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DEC 22 2010

Via Email (Linda.L.HILLS@ojd.state.or.us)

Ms. Linda Hills
HR Manager
Oregon Judicial Department
1241 State St. 2R
Salem, OR 97301

Dear Ms. Hills:

This is in response to your e-mail dated August 19, 2010, to the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). We apologize for the delay in our response. In your e-mail, you request guidance regarding a question that the automated recruitment software purchased by your agency uses in its employment application: "Can you, after employment, submit proof of your legal right to work in the United States? Yes/No." You further ask where an applicant responds to the question with a "no" answer, whether the employer may disqualify that applicant from further consideration.

As you may know, OSC enforces the anti-discrimination provision of the INA. The anti-discrimination provision prohibits four types of unlawful 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 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 information concerning the employment eligibility verification process.

The Form I-9 is to be completed at the time that employment begins, *see* Form I-9 (Rev. 8/7/09). It includes Lists of Acceptable Documents that make clear to employees what documents are acceptable for establishing authorization to work in the United States. The Form I-9 and accompanying guidance, which is published by the U.S. Citizenship and Immigration Services (USCIS), may be obtained by visiting the USCIS website at www.uscis.gov.

We are enclosing letters previously issued by OSC discussing appropriate questions about work authorization in job applications. As noted in the enclosed July 31, 2008, letter, because the I-9 Form is supposed to be completed after hire, pre-employment questions about proof of employment eligibility — even if general in nature -- may lead to a perception that the

employer is engaged in prescreening, i.e., making employment decisions based upon a pre-employment determination about applicants' citizenship status.

An applicant's response to the pre-employment inquiry: "Can you, after employment, submit proof of your legal right to work in the United States? Yes/No," may lead an employer to draw incorrect conclusions about an applicant's ability to show acceptable proof of employment eligibility for Form I-9 purposes. For example, applicants may not understand what constitutes "proof" of their legal right to work without first reviewing the I-9 Lists of Acceptable Documents. Applicants may be similarly unaware of the receipt rule for documents that have been lost, stolen or damaged that is described in the Form I-9 Instructions and in the Handbook for Employers: Instructions for Completing the Form I-9 (Employment Eligibility Form), M-274 (Rev. 7/31/09), which allows an employee to present a receipt as acceptable proof of employment eligibility in some instances.

These problems can be avoided by asking whether an applicant is currently authorized to work in the United States. The focus of a question phrased in this manner is on the applicant's work-authorized status as opposed to the unspecified document(s) that he or she may possess to evidence his or her status.

We hope this information is helpful. For further information regarding OSC, or the INA's anti-discrimination provision, please feel free to call our toll-free hotline at 1-800-255-8155, or visit our website at: www.justice.gov/crt/osc.

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
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Washington, DC 20530

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

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)(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, 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.

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July 31, 2008

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Special Counsel