U.S. Department of Justice
Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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July 26, 2011

Fazila Vaid
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1475 E. Woodfield Rd., Suite 800
Schaumburg, IL 60173

Dear Fazila Vaid:

This is in response to your email dated June 22, 2011. In your email, you inquired whether a company can legally terminate a new hire that is an applicant for, but has not yet been granted, permanent residence on the grounds that he or she lied on the application when he or she responded respectively "Yes" and "No" to the following two questions:

1. Are you currently a U.S. citizen or national, an alien lawfully admitted for permanent residence, a refugee, an individual granted asylum, or admitted for residence as an applicant under the 1986 immigration amnesty law? This does not include people admitted exclusively on nonimmigrant visas, such as B, H, O, E, TN, L or individuals on F-1 visas completing CPT (Curricular Practical Training) or OPT (Optional Practical Training). Yes or No

2. Will you now, or in the future, require sponsorship for U.S. employment visa status? (e.g., H-1B or permanent Residency status) Yes or No

In your email, you state that the company has a policy of not sponsoring individuals for employment as well as a policy that provides for termination of an employee for falsifications or misrepresentations on a job application. You further state that a dishonest response to Question 2 above becomes apparent after acceptance of an offer of employment, when "the new hire presents short-term work authorization (i.e. a work permit, a/k/a EAD) for I-9 completion because his or her green card application has not yet been approved." You also inquire whether an employer could ask the following questions in lieu of the two questions posed above:

1. Are you currently a U.S. citizen or national, an alien lawfully admitted for permanent residence, a refugee, an individual granted asylum, or admitted for residence as an applicant under the 1986 immigration amnesty law? Yes No

Please answer this question based on your current status only. Do not answer based on a status for which you've applied but have not yet established. Note: individuals admitted exclusively on nonimmigrant visas, such as B, H, O,E, TN, L

or individuals on F-1 visas completing CPT (Curricular Practical Training) or OPT (Optional Practical Training) are not included in the classifications listed above and should, therefore, answer "No" to this question.

2. Are you an individual currently admitted exclusively on a nonimmigrant visa, such as B, H, O, E, TN, or F-1? Yes No

3. If you indicated that you would require sponsorship (either now or in the future), please list the prior nonimmigrant visa status that you have held in the U.S. (e.g. H-1B, F-1, J-1, TN) and the dates you held such status.

The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) investigates and prosecutes employers charged with national origin and citizenship status discrimination, as well as 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. For more information on OSC, please visit our website at: http://www.justice.gov/crt/about/osc/.

Please note that OSC cannot provide an advisory opinion on any specific case or set of facts. However, we can provide general guidelines as to the coverage of the statute and the legality of various pre-employment inquiries under the anti-discrimination provisions of the INA, 8 U.S.C. § 1324b.

Employers may enforce a policy requiring truthfulness on the job application for all of its employees, as long as the employer applies the policy consistently to all employees without regard to citizenship status or national origin. But an individual with an independent grant of work authorization, such as an EAD granted while an application for permanent residence is pending, would not necessarily require employer-based visa sponsorship. Moreover, employers may violate the anti-discrimination provision of the INA by refusing to hire or by firing an individual based on the fact that the employment authorization the individual presented for the Form I-9 has a future expiration date. See In re charge of Haroldo Batres v. The Beverly Center, 5 OCAHO 762 (1995). To do so, could constitute document abuse in violation of the anti-discrimination provision of the INA.

Regarding your proposed rewritten Questions 1 and 2, under the anti-discrimination provision of the INA, employers cannot reject certain job applicants based on citizenship or immigration status. 8 U.S.C. §1324b(a)(1). Those protected from citizenship status discrimination include U.S. citizens, certain lawful permanent residents, asylees, and refugees. 8 U.S.C. § 1324b(a)(3). Although nonimmigrant visa holders are not protected from citizenship status discrimination, as indicated in previous technical assistance letters (please find the enclosed July 2010, July 2008, and April 2007 letters addressing this topic), OSC does not recommend asking any applicants to specify their citizenship or immigration status at the application stage. Applicants asked to specify their citizenship or immigration status in the context of the employment application process—including those protected from citizenship status discrimination—may perceive that the employer considered that information in making its hiring decision. Furthermore, applicants who are confused about the characterization of their

immigration status, but who nevertheless possess documents evidencing current work authorization, may inadvertently mischaracterize their status on the job application, resulting in disqualification.

Regarding your proposed Question 3, in previous technical assistance letters our office has recommended that employers with non-sponsorship policies simply ask an applicant, "Will you now, or in the future, require sponsorship for U.S. employment visa status (e.g. H1-B visa status)?" This question is directed at individuals who are non-immigrant visa holders, including those on CPT/OPT, and does not necessarily inquire about individuals with EADs that will not require employer sponsorship (please see the enclosed July 2010 and July 2008 letters addressing this topic).

We hope you find this information helpful.

Sincerely,

Seema Nanda
Acting Deputy Special Counsel

Enclosures