U.S. Department of Justice
Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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September 30, 2013

BY EMAIL (gendelman@fosterquan.com)
Gary Endelman
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600 Travis Street, Suite 2000
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Dear Mr. Endelman:

This is in response to your email dated August 29, 2013. In your email you ask whether an employer can "ask a job applicant now working in H1B status for another company how much time is left out of the maximum six years in their H1B status." You explain the concern that "if someone only has a short amount of time remaining out of the maximum allowed six years in H-1B status, [the company] would be compelled to sponsor them for lawful permanent resident status which they might not want to do" in a particular instance, even though the employer does generally sponsor individuals for both H-1B and lawful permanent resident status.

As you are aware, 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 employer compliance with the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b, enforced by OSC, and employer actions under that provision. 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 and E-Verify) process ("document abuse"); and retaliation for filing a charge, assisting in an investigation or asserting rights under the anti-discrimination provision. 8 U.S.C. § 1324b. For more information about OSC, please visit our website at: http://www.justice.gov/crt/about/osc.

Citizenship status discrimination may occur when an employer rejects an applicant for employment based on the applicant's citizenship or immigration status. The class of individuals protected from this type of discrimination is limited to U.S. citizens, U.S. nationals, lawful permanent residents, asylees and refugees. 8 U.S.C. § 1324b(a)(3)(A-B).

OSC understands your concern to be one of business necessity in that the employer you inquire about may not be successful in preserving the H-1B legal status of an applicant based on (1) the limited time period remaining on the applicant's visa or (2) the imminent expiration of the applicant's second H-1B visa. H-1B visa-holders are not covered by the INA's prohibition on citizenship status discrimination. For this reason, employers generally do not violate the anti-

discrimination provision when they do not hire individuals based on the fact that the individual will require sponsorship, or a particular type of sponsorship. Employers that would like to know whether an applicant would require sponsorship if hired may ask whether the applicant would require sponsorship now or in the future without running afoul of the anti-discrimination's prohibition against citizenship status discrimination. *See* Letter from Seema Nanda, Deputy Special Counsel, OSC to Nataliya Binshteyn, Attorney, Greenburg Traurig, LLP (Sept. 6, 2013), available at: http://www.justice.gov/crt/about/osc/pdf/publications/TAletters/FY2013/171.pdf.

Your email does not indicate whether the employer in question will request to see the applicant's H-1B visa documentation, or whether it will ask the applicant how much time is remaining under the applicant's H-1B visa so that it can make a determination as to whether the applicant will require sponsorship. Under the anti-discrimination provision, document abuse may occur when an employer rejects an employee's Form I-9 document(s) based on the individual's national origin or citizenship status. 8 U.S.C. § 1324b(a)(6). Document abuse has been interpreted to cover the full spectrum of hiring. *See United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO 1148 at 10 ("our cases have long held that it is the entire selection process, not just the hiring decision alone, which must be considered in order to ensure that there are no unlawful barriers to opportunities for employment… Discrimination can thus occur at any point in the hiring process."). Therefore, an employer that inquires about the impending expiration of an individual's employment authorization document, or actually rejects a document based on a future expiration date, may violate the anti-discrimination provision, depending on the specific facts of the case. Further, all work-authorized individuals, including H-1B visa-holders, are protected from this kind of discrimination. *United States v. Townsend Culinary, Inc.*, 8 OCAHO 1032 (1999) (relief ordered for all victims of document abuse without distinction as to status as a "protected individual"); *United States v. Guardsmark, Inc.*, 3 OCAHO 572 (1993) (all work authorized individuals are protected from document abuse).

Lastly, OSC cautions against making assumptions based on an individual's current employment authorization document or current status; employers may not know whether an individual is in the process of transitioning to a different immigration status that would extend or continue the individual's ability to work in the United States beyond the expiration date on the employee's current employment authorization document.

We hope this information is helpful. Thank you for contacting OSC.

Sincerely,

Seema Nanda
Deputy Special Counsel