U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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Sent via E-Mail (ebord@morganlewis.com)

Eric S. Bord
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Dear Mr. Bord:

This is in response to your letter of February 10, 2016, to the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC" or "Office"). In your letter, you seek guidance on an employer's obligations to comply with the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b, when verifying employees' citizenship status under U.S. export control laws, including the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR). Specifically, you ask whether an employer or contractor may require employees to present documents establishing their citizenship or immigration status to ensure the employer's compliance with U.S. export control regulations. You also seek this Office's views on whether it is permissible for employers, including staffing agencies, to ask job applicants or newly-hired employees the following questions:

> The following questions are for the sole purpose of ensuring compliance with U.S. rules concerning the export of controlled or protected technologies or information, including but not limited to U.S. State Department regulations at 22 C.F.R. Subchapter M, U.S. Department of Energy regulations found in 10 C.F.R. Part 810, the U.S. Nuclear Regulatory Commission regulations in 10 C.F.R. Part 110, and the U.S. Department of Commerce's Export Administration Regulations found in 15 C.F.R. Part 730 et seq., as may be amended (collectively, "Export Control Laws").
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> If you **do not** wish to be considered for positions whose activities are subject to the Export Control Laws, then you may **skip** the following questions. If you **do** wish to be considered for positions whose activities are subject to the Export Control Laws, then you **must** answer these questions:

1. I am one of the following: (a) a citizen of the United States; (b) a lawful permanent resident of the United States; or (c) a person admitted into the United States as an asylee or refugee: YES or NO
2. If you answered "NO" to Question 1, then please indicate your
    a. Citizenship:
    b. U.S. Immigration Status:

OSC cannot provide an advisory opinion on any set of facts involving a particular individual or entity. However, we can provide some general guidance regarding employer compliance with the anti-discrimination provision of the INA. The anti-discrimination provision prohibits the following types of employment-related conduct: (1) national origin, citizenship, or immigration status discrimination in hiring, firing, or recruiting or referral for a fee; (2) unfair documentary practices during the employment eligibility verification (generally, the Form I-9 and E-Verify processes) ("document abuse"), which includes requesting more or different documents than required for employment eligibility verification because of an individual's citizenship, immigration status, or national origin; and (3) 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.

Your letter implicates several parts of the anti-discrimination provision. The statute prohibits denying protected individuals employment because of their real or perceived immigration or citizenship status. U.S. citizens and nationals, refugees, asylees, and recent lawful permanent residents are protected from citizenship status discrimination under the INA, and are also considered "U.S. persons" under ITAR and EAR. As we noted in our February 25, 2013, technical assistance letter,[1] ITAR "does not, however, impose requirements on U.S. companies concerning the recruitment, selection, employment, promotion or retention of a foreign person." https://www.pmddtc.state.gov/licensing/documents/WebNotice_LicensingForeign2.pdf, fn 1. Instead, ITAR requires that employers obtain export licenses for non-U.S. person employees if their positions require access to information governed by ITAR. *Id.* As a result, ITAR does not limit the categories of work-authorized non-U.S. citizens an employer may hire.

You inquire whether an employer or staffing agency may ask the above questions of "all new applicants in a nondiscriminatory manner prior to offer and acceptance of employment." Assuming an employer is hiring for at least some positions not subject to export control laws, we discourage asking the proposed questions for positions that are not subject to export control laws to avoid generating confusion among applicants or human resources personnel about the need for this information.[2] In addition, asking job applicants questions about their immigration or citizenship status for positions that are subject to export control laws may deter individuals who are protected from citizenship status discrimination, such as refugees and asylees, from applying due to a misunderstanding about their eligibility for the position. For example, asylees and refugees responding to your proposed Question One might have a different understanding of the term "admitted" than the meaning the term carries under U.S. immigration laws.

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[1] Available at https://www.justice.gov/crt/about/osc/pdf/publications/TAletters/FY2013/163.pdf.

[2] We note that even when the questions asked are carefully worded or carefully explained to applicants, certain classes of protected individuals may nevertheless be inadvertently excluded. For instance, the questions you propose do not reference U.S. nationals, who are protected individuals. 8 U.S.C. § 1324b(a)(3)(A).

To the extent an employer (including a staffing agency) asks the questions you propose of all job applicants or new hires to determine only whether the employer (including a staffing agency's client) will need an export license for certain individuals for particular positions, it is unlikely that the employer would violate the INA's prohibition against citizenship status discrimination. However, if an employer were to reject a protected individual's application based on that individual's answers or a staffing agency were to limit the scope of potential assignments based upon a protected individual's answers, including answers provided by a U.S. national, the employer may be engaging in citizenship status discrimination. Moreover, such questions may lead an applicant who is protected from citizenship status discrimination, but who is not hired for other reasons, to believe that the applicant's immigration or citizenship status was the reason for the rejection, prompting the individual to file a charge of discrimination with our Office.

The above questions also raise concerns under the anti-discrimination provision's prohibition against national origin discrimination. All work-authorized individuals are protected from national origin discrimination under the anti-discrimination provision, and an employer that refuses to hire individuals or, in the case of a staffing agency, limits the scope of potential assignments based on individuals' country of origin may run afoul of this prohibition. Your questions as posed could lead to unlawful hiring decisions by human resources personnel who make assumptions about an applicant's eligibility based on his or her country of citizenship or show a preference in hiring based on national origin. Your proposed questions could also lead rejected applicants who disclosed their country of citizenship in response to proposed Question Two to believe that they were denied employment due to their actual or perceived national origin and file a discrimination charge. Please note that this Office investigates national origin discrimination claims against employers with four to 14 employees, and the Equal Employment Opportunity Commission investigates national origin discrimination claims against employers with 15 or more employees. For more information about the EEOC's national origin discrimination jurisdiction, you may visit www.eeoc.gov.

Finally, your inquiry implicates the prohibition against unfair documentary practices in the employment eligibility verification process, 8 U.S.C. § 1324b(a)(6). As this Office explained in a previously-issued technical assistance letter dated October 6, 2010,[3] an employer that implements a document verification process to determine only a new employee's immigration or citizenship status to comply with export control laws is unlikely to violate the anti-discrimination provision if the document verification process is separate and distinct from the employment eligibility verification process. However, we caution employers that to the extent these separate and distinct processes appear to be integrated, such as due to proximity in time, employees and human resources personnel may have the impression that the documentary requests are for employment eligibility verification purposes.

We hope that this information is helpful.

Sincerely,

Alberto Ruisanchez
Deputy Special Counsel

[3] Available at https://www.justice.gov/crt/about/osc/pdf/publications/TAletters/FY2011/134.pdf.