



U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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September 5, 2013

BY EMAIL (lthiele@woh.com)

Leslie K.L. Thiele

Partner

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Dear Ms Thiele:

This is in response to your email dated June 19, 2013. In your email you ask about “the rights of an employer when confronted with an employee with expiring conditional permanent residence.” You explain that the employer has an employee with conditional permanent residence that will be expiring in the near future and your client understands that the employee will not be able to file for an I-751 waiver to remove the residency conditions by the expiration date on the employee’s Alien Registration Receipt Card (also known as an I-551, Permanent Resident Card, or green card) because the employee’s divorce is not yet final. The employer has notified the employee that upon the expiration date on his Alien Registration Card, the employee will not be allowed to work until his I-751 waiver request has been filed and he has received extended work authorization, even though the USCIS Employer Handbook indicates that the card should not be reverified. The employer is concerned that because it has actual knowledge of the employee’s “impending loss of work authorization,” it cannot allow the employee to continue to work.

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 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 (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>

USCIS guidance provides that employers should not reverify an Alien Registration Receipt Card/Permanent Resident Card regardless of whether the Form I-551 contains an expiration date of 10 years, two years, or no expiration date at all. U.S. Citizenship and

Immigration Service (USCIS) Handbook for Employers, Guidance for Completing Form I-9 (M-274) (Rev. 04/30/13N), p. 12. Thus, while cards issued to lawful permanent residents for two years are limited in duration because of the conditions on status, they are still not subject to reverification. M-274, p.12.

To remove conditions on their permanent residence, individuals must file a Form I-751. Individuals must generally file jointly with their spouse, but may request that the joint filing requirement be waived for various reasons, including if the marriage was entered into in good faith but was later terminated due to divorce. 8 U.S.C. § 1186(c)(4). USCIS guidance provides that a conditional permanent resident who is separated from his or her spouse may file a Form I-751 prior to the divorce becoming final, though the conditional resident will have to establish that the divorce has become final by a deadline set by USCIS in adjudicating the petition. See April 3, 2009, memo from Donald Neufeld, USCIS Acting Associate Director to Field Staff, "I-751 Filed Prior to Termination of Marriage," available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/i-751_Filed_%20Prior_Termination_3apr09.pdf. Further, USCIS regulations provide, "Upon receipt of a properly filed Form I-751, the alien's conditional permanent resident status shall be extended automatically, if necessary, until such time as the director has adjudicated the petition." 8 C.F.R. 216.4(a)(1). Thus, any conditional resident who has properly filed a Form I-751 remains a conditional resident at least until a decision is made on his or her Form I-751. An employee whose Resident Alien Card/Permanent Resident Card is reverified, or who is requested to produce additional documents based on the fact that the individual is a conditional resident or because the individual has presented a two-year green card, may allege discrimination on the basis of citizenship status in violation of the anti-discrimination provision.

Separate from the re-verification process, as you point out, an employer may not employ or continue to employ an employee who it knows is not currently authorized to work. 8 U.S.C. § 1324a. Your inquiry does not indicate why the employer believes that the employee will not file a Form I-751 or otherwise be able to extend work authorization. As a general rule, OSC discourages the practice of inquiring about an employee's current employment authorization status—outside of an employer's obligation to reverify an employee whose temporary employment eligibility document has expired—without a credible basis for believing that an employee may lack current employment authorization. Furthermore, to the extent an employer suspects that an employee may lose his or her current employment authorization at some point in the future, the employer may not be in a position to know whether that employee will obtain a different basis for employment authorization or in fact be able to extend or continue his or her current work authorization before the future expiration date.

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

Sincerely,



Seema Nanda
Deputy Special Counsel