



U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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OCT 06 2010

By Email (vaguilar@qual-pro.com)

Valorie Aguilar
Qual-Pro Corporation
18510 South Figueroa Street
Gardena, California 90248-4519

Dear Ms. Aguilar:

This letter responds to your e-mail dated April 14, 2010, to the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). We apologize for the delay in responding. In your e-mail you inquire about the use of information and documents provided by an employee in connection with completing a Form I-9 in order to comply with the International Traffic of Arms Regulations (hereinafter "ITAR") implementing the Arms Export Control Act of 1976, 22 U.S.C. §2778.

OSC enforces the anti-discrimination provision of the Immigration and Nationality Act (INA), codified at 8 U.S.C. §1324b. OSC cannot provide an advisory opinion on any particular instance of alleged discrimination or on any set of facts involving a particular individual or entity. We can, however, provide some general guidelines regarding employer compliance with the INA's anti-discrimination provision. The INA's 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) process (*i.e.*, "document abuse"); and retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision.

At the outset, we would like to address two general concerns raised by your inquiry. First, your request for guidance appears to assume that only U.S. citizens, U.S. nationals and lawful permanent residents qualify as a "U.S. person" under the ITAR. Under the ITAR, a "U.S. person" includes an individual who is a protected individual as defined by 8 U.S.C. 1324b(a)(3). *See* 22 C.F.R. § 120.15. Protected individuals under 8 U.S.C. § 1324(a)(3) include, among other classes of immigrants, refugees and asylees. *See* 8 U.S.C. §1324b(a)(3)(B). Accordingly, the class of aliens potentially eligible for employment under the ITAR is broader than your questions suggest, and the exclusion of refugees and asylees from employment based on their immigration status may constitute prohibited citizenship status discrimination under 8 U.S.C. § 1324b(a)(1)(B).

Second, your inquiry also appears to be based on a proposal to use information and documents obtained from an employee in connection with the Form I-9 process for different and

wholly unrelated purposes under an unrelated statute. The INA expressly provides that the attestation portion of Section 1 of the Form I-9 may not be used for purposes other than enforcement of the INA, or to support a related criminal prosecution. *See* 8 U.S.C. §1324a(b)(5). Furthermore, although an employer may be requesting specific documents to satisfy ITAR requirements, the request for specific documents could create the appearance of prohibited document abuse under 8 U.S.C. § 1324b(a)(6). For these reasons, employers may wish to avoid policies and/or procedures that use information and documents gathered during the Form I-9 process for purposes unrelated to verifying employment eligibility under 8 U.S.C. § 1324a.

Subject to the two general concerns outlined above, we address below each of the four questions you posed in your e-mail of April 14, 2010.

1. *"How do I know if the employee is indeed a permanent resident alien if they did not supply me with the Alien card of identification? Let's say they just checked that box and put a number and gave me a driver's license and social security? In order for me to comply with ITAR I must make sure they are of a certain status."*

As noted above, 8 U.S.C. § 1324a(b)(5) prohibits the use of the information provided in the employee's attestation portion of the Form I-9 for other purpose. Moreover, while an alien is required to provide his or her DHS alien number in Section 1 of the Form I-9, the employee is not required to present, and an employer is not permitted to request, a document reflecting that number. *See Handbook for Employers, M-274 (rev. 07/31/09) (hereinafter "Handbook"), Answer to Question 11 at p. 30.* To request a specific document from non-U.S. citizens during the Form I-9 process may violate 8 U.S.C. §1324b(a)(6), which prohibits an employer from requiring specific documents to establish work authorization based on citizenship status or national origin. The anti-discrimination provision of the INA does not, however, prohibit an employer from implementing a *separate and distinct* verification procedure under the ITAR requiring the presentation of documents establishing citizenship or immigration status necessary to ensure compliance with the ITAR.

2. *"[I]f I do have documents stating permanent resident and they have expired do I have to see their new documentation?"*

We assume that your question deals with an existing employee whose Form I-551 was current when presented for Form I-9 purposes upon hire, but has subsequently expired. For purposes of re-verification of employment authorization under the INA, the expiration of a Form I-551 *after* the individual's work authorization has been established through the Form I-9 process does not trigger an obligation on the part of the employer to re-verify the individual's work authority. *Handbook at p. 12.* In fact, an employer may not request a lawful permanent resident to provide additional evidence of employment eligibility in this context. *See* 8 U.S.C. § 1324b(a)(6). Questions about re-verification requirements under the ITAR should be directed to the Directorate of Defense Trade Controls at the address noted below.

3. "If the employee is on a work permit am I to assume that this employee will not be able to work under the ITAR regulations within our company?"

An employer may not assume that an employee who presented a time-limited work permit (e.g., an Employment Authorization Document) to establish his or her work authorization under 8 U.S.C. §1324b would not qualify for employment under the ITAR. Both refugees and asylees may, but are not required to, present an EAD when establishing their work authorization. As noted above, the ITAR's definition of a "U.S. person" appears to include, among other classes of aliens, refugees and asylees. See 22 C.F.R. § 120.15 and 8 U.S.C. §1324b(a)(3)(B). The failure to consider an otherwise eligible individual for employment simply because of the nature of the document(s) he or she presents to establish work authorization may constitute prohibited citizenship status discrimination under 8 U.S.C. §1324b(a)(1)(B).

4. "What if they tell me they are working on getting their green card and have filed for it with a lawyer but still do not have it due to the long process? Are they protected if they have receipts? If not then am I to assume that they are not legal to work as an employee for us if we are under the ITAR regulation?"

As noted previously, refugees and asylees are included in the definition of "U.S. person" under ITAR. Because refugees and asylees may apply to adjust their status to that of lawful permanent resident, an employer's failure to hire them would not appear to be justified by ITAR. For Form I-9 purposes, receipts evidencing an application for a *replacement* document are acceptable as temporary evidence of work authorization. See Handbook for Employers: Instructions for Completing Form I-9, M-274 (rev. 07/31/09), at p. 7-9 and p. 32-33. In addition, receipts for an application to renew an expiring Permanent Resident Card (Form I-551) typically include language stating that the applicant's right to work and travel is extended for one year. For Form I-9 purposes, such receipts qualify as a List C, Item 8 document. See 8 C.F.R. § 274a.2(b)(vi)(A); Handbook at p. 9. "However, receipts showing that a person has applied for an initial grant of employment authorization or for renewal of employment authorization are not acceptable [to establish work authority]. *Id.* at p. 32 (Answer to Question 25). See also Form I-9, Instructions at p. 1 and p. 42.

Please note that the ITAR is administered and enforced by the Directorate of Defense Trade Controls of the U.S. Department of State. For specific guidance on the compliance requirements and procedures of the ITAR, you may visit its Web site at <http://www.pmdctc.state.gov/>. You may contact the Directorate of Defense Trade Controls directly by mail at the following address:

U.S. Department of State
Directorate of Defense Trade Controls
Compliance & Registration Division
2401 E Street NW, SA-1, Room H1200
Washington, DC 20522-0112

We hope the information provided above is helpful.

Sincerely,

A handwritten signature in black ink, appearing to read 'Katherine A. Baldwin', with a long horizontal flourish extending to the right.

Katherine A. Baldwin
Deputy Special Counsel