



OSC UPDATE

Office of Special Counsel for Immigration-Related Unfair Employment Practices

April 2007

The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) investigates and prosecutes allegations of national origin and citizenship status discrimination in hiring, firing, and recruitment or referral for a fee, as well as unfair documentary practices during the employment eligibility verification process and retaliation under the anti-discrimination provision of the Immigration and Nationality Act (INA). In addition, OSC conducts outreach aimed at educating employers, workers, and the general public about their rights and responsibilities under the INA's anti-discrimination provision.

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Employer Hotline:

1-800-255-8155

1-800-362-2735(TDD)

Worker Hotline:

1-800-255-7688

1-800-237-2515(TDD)



Wan J. Kim was sworn in as the Assistant Attorney General for the Civil Rights Division of the United States Department of Justice on November 9, 2005.

Immediately prior to his nomination, Mr. Kim served as a Deputy Assistant Attorney General in the Civil Rights Division. He has spent most of his career at the Department of Justice, having entered through the Attorney General's Honors Program as a Trial Attorney in the Criminal Division, and later serving as an Assistant United States Attorney for the District of Columbia. Mr. Kim also has worked on the staff of the Senate Judiciary Committee for former Chairman Orrin G. Hatch, and as a law clerk to Judge James L. Buckley of the U.S. Court of Appeals for the District of Columbia Circuit. Mr. Kim graduated with honors from both the Johns Hopkins University and the University of Chicago Law School. He has served as an enlisted soldier and a rifle platoon leader in the United States Army Reserve.

Born in Seoul, South Korea, Mr. Kim is the first immigrant to serve as Assistant Attorney General for the Civil Rights Division, and he is the first Korean-American ever to become an Assistant Attorney General.

OSC's Telephone Interventions

OSC's telephone intervention program is an innovative form of alternative dispute resolution. It allows a caller to OSC's worker or employer hotline to work informally with OSC's staff to resolve potential immigration-related employment disputes within hours or minutes, rather than weeks or months, without contested litigation. Employers love the program because it saves them time and money. Workers love the program because it keeps them on the job. (See page 6 for telephone intervention scenarios).

OSC's Outreach Program

OSC provides speakers to make presentations to educate workers, employers and the general public about their rights and responsibilities under the anti-discrimination provision of the Immigration and Nationality Act. Upon request, OSC also provides educational materials (printed and audiovisual) at no cost. Please contact us to learn more about these services. (See last page for OSC contact information and for the Outreach Events Calendar).

News and Notes

Protections for Workers Under the Basic Pilot Program

Although the existence of the Basic Pilot Program is well known, the protections for workers contained within the program are less well known.

Basic Pilot Background

The Basic Pilot Program is a voluntary internet-based electronic employment eligibility verification program run by United States Citizenship and Immigration Services (USCIS), with the assistance of the Social Security Administration (SSA). It is available to employers throughout the United States. The system works as follows: After hire, and after the employer and employee complete the Form I-9, participating employers submit identifying information about the employee via the internet for an initial inquiry. The program is designed to have SSA check the employee's identifying information, first to determine whether the identifying information matches SSA's records and, if so, whether the employee is authorized to work in the United States. If SSA can confirm a record match but not eligibility to work in the United States, the system will automatically forward the information to USCIS in order for USCIS to check its records and determine whether the individual is authorized to work. The employer may receive a confirmation, which means that computerized government records confirm the employee's eligibility to work in the United

States.

Alternatively, the employer may receive a tentative nonconfirmation, which means that the computerized government records cannot confirm that the individual is authorized to work in the United States. Tentative nonconfirmations may be generated by SSA or USCIS. Tentative nonconfirmations may occur for a number of reasons, including among others, typographical mistakes, name changes due to marriage or divorce that are not reported to the government, or because the individual is not authorized to work in the United States.

Employers that receive a tentative nonconfirmation must first double check the information that they entered into the system to ensure that the information was accurate. If the information was wrongly entered, the employer must enter the correct information, and rerun the query.

Assuming that the information originally entered into the system is accurate, employers must then ask the employee whether he or she wants to challenge the tentative nonconfirmation. If the employee chooses to contest, the employer must provide the employee with a referral notice (generated by the Basic Pilot Program) that provides specific instructions for the employee to contact SSA or USCIS (including telephone numbers and/or addresses). The employee then has eight federal government work days to contact the agency and to provide whatever information and/or documents the agency may

need to clarify the individual's status.

With respect to an SSA referral notice, the employee must visit an SSA office to resolve the matter. With respect to a DHS referral notice, the employee must call the telephone number provided on the notice to speak with an Immigration Status Verifier ("ISV").

Once the employee has contacted SSA, he or she should inform the employer. The employer must then resubmit the inquiry at least 24 hours after the employee has resolved the discrepancy, but no later than ten federal government work days after the date of the referral. With respect to DHS referrals, once the employee has resolved the discrepancy by calling an ISV at the telephone number provided, DHS will electronically transmit the result of the referral to the employer.

In either case, the employer should not expect the employee to return with additional written proof of employment eligibility. Furthermore, in the event that the employer is not notified by the employee that he or she has resolved the issue with SSA, the employer is nevertheless required to resubmit the inquiry on the tenth federal government work day after the referral. If an employee fails to contact DHS within eight federal government work days, DHS will automatically update the system to reflect a "DHS no show," which constitutes notice to the employer that it may terminate the employee. If, even after the employee contacts SSA or DHS, the system returns a final nonconfirmation, the employer must terminate the employee.

However, in some cases, even after ten federal government work days, the system may continue to show a tentative nonconfirmation because the government has not been able to resolve the tentative nonconfirmation.

For example, SSA may lack sufficient information to confirm a record match and may report a tentative nonconfirmation. Thereafter, the employee may provide sufficient information for SSA to show a match in its records, but SSA may nevertheless lack the information required to confirm work authorization in that employee's case. In this case, the system will automatically forward the inquiry to USCIS, which might then generate a tentative nonconfirmation pending more information from the employee or an updating of its own records. Such a situation would lead the employer to receive a second tentative nonconfirmation for the same employee, but this time from USCIS.

Another possibility is that either government agency needs additional time to process the inquiry in order to make a final determination. In certain cases, where the referral to USCIS is made automatically by the system, Program rules permit USCIS to notify the employer that it needs more time to make a determination.

Program rules also require the employer to allow the employee to continue to work during the verification process. In other words, employees may not be terminated, or otherwise adversely affected in employment, until, and unless, the system returns a final nonconfirmation.

Participating employers

sign a memorandum of understanding (MOU) with USCIS and SSA that spells out the respective duties and obligations of the employer and government. Participating employers must also complete an online web tutorial before accessing the program, and may consult the Basic Pilot Manual as well as other resources made available to them online.

Important Worker Protections:

- The Basic Pilot Program must be used for new hires only. It cannot be used to verify the employment eligibility of current employees.
- The Basic Pilot Program must be used for all new hires regardless of national origin or citizenship status; it may not be used selectively.
- The Basic Pilot Program must be used only after hire, and after completion of the Form I-9. Employers may not pre-screen applicants through use of the Basic Pilot Program.
- Employers may not take any adverse action against any employee because he or she contests a tentative nonconfirmation. This includes firing, suspending, withholding pay or training, or otherwise limiting or adversely affecting the person's employment. If an employee receives a tentative nonconfirmation, the employer must provide the person with a notice generated by the Basic Pilot Program. The employee must be given eight federal work days to contact the appropriate federal agency.
- Employers may not take any adverse action against any employee for the duration of the tentative nonconfirmation (even if it extends beyond ten government

work days) as long as the employee contacted the appropriate federal agency within eight government work days.

- Employers may terminate workers based upon the Basic Pilot Program only upon receipt of a final nonconfirmation, or upon notice that an employee has chosen not to contest a tentative nonconfirmation.
- Employers may not use the Basic Pilot Program to reverify the employment eligibility of an employee. Reverification must be conducted through the Form I-9.
- Employers participating in the Basic Pilot Program are required to post the notice provided by USCIS indicating their participation in the program and the anti-discrimination notice issued by OSC.

For more information about the Basic Pilot Program, contact OSC.

OSC and Equal Employment Commission (EEOC) Memorandum of Understanding (MOU)

OSC and EEOC have a long history of working together on their shared mission of combating employment discrimination. To further this goal, OSC and EEOC have a MOU that provides for joint outreach and training, cooperation and coordination on joint and related investigations, and reciprocal referral of charges that were originally filed with the wrong agency. Under the MOU, each agency acts as the agent of the other to receive charges that are erroneously filed with the other agency, in order to stop the filing deadline from running.

In order to advance the objectives of the MOU, OSC continues to pursue joint outreach opportunities with the EEOC and training of EEOC investigators, intake staff and National Call Center staff. The training is intended to improve the ability of EEOC staff to recognize discrimination complaints falling within OSC's jurisdiction. For example, OSC trained new EEOC investigators during their national training program held in May 2005, so that matters will be properly referred to OSC.

A particular focus has been staff training and coordinated outreach to key regions where OSC has not previously conducted EEOC training. For example, OSC trained attorneys in EEOC's New York District Office, as well as investigators and intake personnel, and met with EEOC's New York Regional Counsel to discuss ways to facilitate additional charge referrals under the MOU. OSC also forwarded training materials for distribution to EEOC's New York District and area offices.

In addition, OSC worked with the EEOC's National Call Center to revise its scripts on immigration-related employment discrimination. (The EEOC's National Call Center fields calls from the public on employment discrimination-related matters.)

OSC will continue its nationwide joint employer outreach with the EEOC through the EEOC's Technical Assistance Programs. OSC has presented or is scheduled to

present at the TAPS in the following locations in 2007: Beaver Creek, CO; Orange Beach, AL, Las Vegas, NV; Hot Springs, AR; Wisconsin Dells, WI; Charlotte, NC; San Antonio, TX; New Orleans, LA; Jackson, MS; Phoenix, AZ; Chapel Hill, NC; Memphis, TN, Dallas, TX and Hampton, VA.

This cooperation and coordination between OSC and EEOC under the MOU has substantially improved the effectiveness and efficiency of OSC's enforcement and outreach efforts.

OSC's Role in Combating H and L Visa Fraud

Over the past year, OSC has received numerous charges and hotline calls alleging that U.S. citizens and other work authorized workers were not hired or were displaced because the employer preferred to employ H or L visa holders. This type of discrimination falls under the OSC's citizenship status discrimination jurisdiction. During the investigation of these charges, OSC has encountered several companies using the H and L visa process in questionable ways.

The H-1B and the L-1 visas are two of several types of temporary work visa classifications. The H-1B visa category applies to persons temporarily in the United States to perform services in a specialty occupation that requires the theoretical and practical application of highly specialized knowledge and completion of a specific course of higher education. The L-1 visa classification is designed to facilitate a company's temporary transfer of employees with management, executive and specialized knowledge skills to the United States, to continue their employment with the same em-

ployer.

In January 2006, the Department of Homeland Security issued a statutorily mandated report on L-1 visa abuses. OSC has been participating in the inter-agency task force mandated to address these issues. Discriminatory hiring preferences for temporary visa holders fall under OSC's jurisdiction. A report from the task force is expected to be issued in the near future.

Temporary Protected Status Updates

Temporary Protected Status (TPS) is a temporary immigration status granted by the Secretary of Homeland Security to aliens in the United States who are nationals of countries subject to environmental disaster, armed conflict, or other extraordinary and temporary conditions. During the period for which a country has been designated for TPS, TPS beneficiaries may remain in the United States and may obtain work authorization.

Information about TPS designations, extensions and automatic extensions of work authorization is published by notice in the Federal Register. Individuals or employers who have questions about TPS designations or extensions for a particular country should contact OSC or visit OSC's website for further information.

Honduras and Nicaragua

The Department of Homeland Security (DHS) announced a 12-month extension of TPS for nationals of Honduras and Nicaragua from July 5, 2006 until July 5, 2007. Eligible TPS Hon-

duran and Nicaraguan nationals were required to re-register with United States Citizenship and Immigration Services (USCIS) from April 1, 2006 through June 1, 2006. In order to prevent a gap in work authorization while eligible Hondurans and Nicaraguans waited for their re-registration applications to be processed, the old employment authorization documents (EADs), or "work permits," which would have expired on July 5, 2006, were automatically extended until January 5, 2007.

Upon processing these applications for renewed work authorization, USCIS issued new EADs for Hondurans and Nicaraguans. Only some re-registrants received approval or denial notices by January 5, 2007. Due to the high volume of re-registration applications, some re-registrants may have to visit an application support center (ASC) to obtain an extension sticker on their EADs, or wait to receive their EADs on a later date. Extension stickers should be valid through June 2007.

TPS was first granted to nationals of Honduras and Nicaragua in January 1999 because of conditions stemming from Hurricane Mitch.

El Salvador

DHS announced a 12-month extension of TPS for nationals of El Salvador from September 9, 2006, until September 9, 2007. Eligible Salvadoran nationals were required to re-register with USCIS from July 3, 2006 through September 1, 2006.

Upon processing these

re-registration applications, USCIS issued new EADs for some TPS Salvadorans. In order to prevent a gap in work authorization while eligible Salvadorans waited for their re-registration applications to be processed, the old EADs, which bear expiration dates of September 9, 2006, were automatically extended until March 9, 2007. For those Salvadorans who received EADs with an expiration date of July 5, 2006, during the previous re-registration period, DHS similarly automatically extended them until March 9, 2007.

Only some re-registrants received approval or denial notices, by March 9, 2007. Due to the high volume of re-registration applications, some re-registrants may have to visit an application support center to obtain an extension sticker on their EADs, or wait to receive their EADs on a later date. Extension stickers should be valid through June 2007.

TPS was first granted to nationals of El Salvador in 2001 because of the damage caused by devastating earthquakes.

Somalia

DHS announced an 18-month extension of TPS for nationals of Somalia from September 17, 2006 through March 17, 2008. Eligible Somalians were required to re-register with USCIS from July 27, 2006 to September 25, 2006.

Upon processing these applications, USCIS issued new EADs for TPS Somalians. In order to prevent a gap in work authorization while eligible Somalians waited for their re-registration applications to be approved, the old EADs, which bear expiration dates of September 17, 2006, were automatically extended until March 17, 2007. TPS was first granted to nationals of

Somalia in 1991 due to extraordinary and temporary conditions resulting from an ongoing armed conflict

Burundi

DHS announced a 12-month extension of TPS for nationals of Burundi until November 2, 2007. Eligible Burundians were required to re-register with USCIS from September 14, 2006 through November 13, 2006.

Upon processing these applications, USCIS will issue new EADs for Burundians. In order to prevent a gap in work authorization while eligible Burundians wait for their re-registration applications to be processed, the old EADs, which bear expiration dates of November 2, 2006, have been automatically extended until May 2, 2007.

There are approximately 27 nationals of Burundi who were eligible for re-registration.

Liberia

DHS announced that it has terminated the TPS designation of Liberia. The designation will end September 30, 2007. After reviewing country conditions and consulting with the appropriate government agencies, the Secretary of Homeland Security determined that conditions in Liberia no longer support the TPS designation.

TPS was first granted to nationals of Liberia in 1991 and that designation was terminated in 1999. Subsequently, TPS was designated for Liberians again in 2002 due to ongoing armed conflict.

Eligible Liberians were required to re-register with DHS to maintain their TPS benefits until expiration of the designation. The re-registration period ran from September 20, 2006 through November 20, 2006. In order to prevent a gap in work authorization while eligible Liberians waited for their re-registration applications to be processed, DHS granted an automatic six-month extension of EADs to April 1, 2007.

Once the TPS designation is no longer in effect, former TPS beneficiaries return to the immigration status they held before regis-

tering for TPS (unless that status has since expired or been terminated) or to any other status they may have acquired while registered for TPS.

Sudan

DHS announced an 18-month extension of TPS for nationals of Sudan from May 2, 2007 through November 2, 2008. Eligible Sudanese are required to re-register with USCIS from March 8, 2007 to May 7, 2007.

Upon processing these applications, USCIS will issue

new EADs for TPS Sudanese. In order to prevent a gap in work authorization while eligible Sudanese wait for their re-registration applications to be approved, the old EADs, which bear expiration dates of May 2, 2007, are automatically extended until November 2, 2007.

TPS was first granted to nationals of Sudan in 1997 due to extraordinary and temporary conditions resulting from an ongoing armed conflict.

Typical OSC Telephone Intervention Scenarios

1. The Legal Permanent Resident With A Temporary I-551 Machine Readable Immigrant Visa (MRIV)

Employee: (speaking with OSC equal opportunity specialist using a foreign language telephone interpreter): I applied for a job and during the hiring process the employer asked me to complete section one of the I-9 Form and to produce proof of my eligibility to work in the United States. I showed my valid I-551 machine readable visa (MRIV) attached to my unexpired foreign passport, but the employer stated that he had never seen anything like it before. He then declined to accept it and insisted that I produce a permanent resident card instead.

OSC Equal Opportunity Specialist: The type of document you presented to the employer is acceptable for employment eligibility verification, and should be accepted, assuming it bears certain notations. May I contact the employer on your behalf and explain the situation?

(Employee gives OSC permission to contact the employer.) In discussion with the employer's counsel, or, if the employer is not represented in this matter, directly with the employer, the OSC equal opportunity specialist explains that the document presented by the employee satisfies the requirements of the I-9 Form. The equal opportunity specialist further explains that since June 28, 2004, newly issued MRIVs have been printed with the statement "upon endorsement serves as temporary I-551 evidencing permanent residency for 1 year." When an MRIV bearing this statement is contained in an unexpired foreign passport and is endorsed with an admission stamp, it constitutes a temporary Form I-551 valid for one year from the date on the admission stamp and can be used to establish employment eligibility for that period of time.

OSC Equal Opportunity Specialist: Hello. I contacted your employer and the matter has been resolved. Human Resources will accept the document you originally presented.

2. The Company Hiring Employees From Acquired Company For Whom There Are No I-9 Forms

Employer: (speaking with OSC attorney): My company has just acquired a new company and has hired its employees. In the process of merging the records of the companies, I noticed that the newly acquired company does not have I-9 Forms for about 20 employees. I contacted the acquired company's former human resources manager, who informed me that I-9 Forms were not completed for these employees because they were hired before November 6, 1986, and accordingly, the company was not required to have those employees complete I-9 Forms. Can you tell me whether the human resources manager's interpretation of the law is correct? If so, do we need to complete I-9 Forms for these employees?

OSC Attorney: The former human resources manager's interpretation of the law is correct. The requirement that every employer must have each new employee complete an I-9 Form does not apply to those employees hired before November 6, 1986. Consequently, since your company has this explanation and presumably proof of hire dates for these 20 employees, your company need not ask these employees to complete I-9 Forms.

Employer: Thank you for this very helpful information.

CASE UPDATES

During fiscal year 2006, OSC received 346 charges of alleged discrimination and directly handled more than 7,567 calls on its worker and employer hotlines. In the same period, OSC successfully resolved 85 investigations. This includes letters of resolution issued to employers who voluntarily entered into bi-lateral settlement agreements with the charging parties resolving discrimination charges. Letters of resolution are also issued to conclude independent investigations where the employer has voluntarily corrected its practices and no victims can be identified. In addition, OSC, through its hotlines, was able to intervene on 189 occasions in order to educate employers about their responsibilities under the Immigration and Nationality Act and to assist workers obtain early resolution of their claims of employment discrimination.

Settlement Reached with National Retail Chain

In March 2006, OSC entered into a settlement agreement with a national retail chain resolving a charge filed by an asylee. The charge alleged that the retail chain had committed document abuse during the employment eligibility verification process when it discharged the individual for failure to produce one specific document to verify her work authorization. Although the asylee produced other legally accepted documents, the employer rejected them.

OSC's investigation revealed that three other non-citizens were discharged for similar reasons, and that the employer required non-citizens to present specific types of documents to verify work eligibility

while allowing citizens to present a variety of documents.

Under the settlement agreement, the retail chain agreed to provide back pay ranging from \$2,100 to \$13,800 (totaling more than \$22,000) to the four wrongfully-terminated employees, to pay a civil penalty of \$14,000, and to injunctive relief, including the training of its personnel in proper employment eligibility verification procedures.

Settlement Reached with Construction Firm

In March 2006, OSC entered into a settlement agreement with a construction firm resolving a charge filed by a lawful permanent resident. The charge alleged that the firm committed document abuse when it rejected the individual's valid permanent resident card and Social Security card during the employment eligibility verification process. Under the settlement agreement, the firm agreed to pay more than \$11,000 in back and front pay, a civil penalty, and other injunctive relief, including the training of its employees in proper employment eligibility verification procedures.

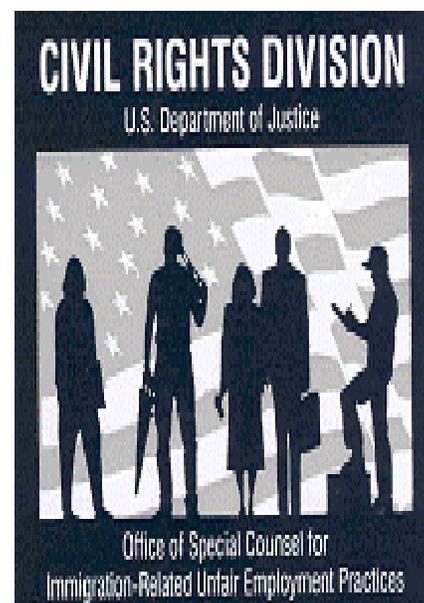
Resolution Between Poultry Processing Company and Work-Authorized Individual

In April 2006, OSC issued a letter of resolution dismissing a charge of document abuse filed by a work-authorized immigrant. The charge alleged that the company had wrongfully used the Basic Pilot Program to reverify the employment eligibility of the individual even though the program's rules specifically prohibit using the program for reverification purposes. The Basic Pilot Program is an electronic employment eligibility verification program administered by the Department of Homeland Security. In re-

sponse to OSC's investigation, the company and the charging party entered into a bilateral settlement that provided the charging party with \$3,400 in back pay. The company also agreed to accept OSC training of its human resources managers on proper employment verification procedures.

Resolution Between Temporary Staffing Agency and Refugees

In December 2006, OSC issued letters of resolution dismissing three charges of discrimination filed by refugees from Somalia. The charges alleged that the staffing agency had committed citizenship status discrimination when it terminated the three refugee workers. In response to OSC's investigation, the staffing agency resolved the matter through bi-lateral settlement agreements with the charging parties, pursuant to which each worker received \$13,000 in back pay and the company agreed to conduct diversity training for management and supervisory personnel to increase cultural sensitivity.



Outreach Events Calendar

Date	Location	Sponsor	Target Audience
April 19	Silverton, OR	Hurst Berry Farm Cooperative	Employers
April 20	Teleconference	Employers' Association of N.J. (OSC Grantee)	Employers
April 25	Dallas, TX	Catholic Charities of Dallas, Inc. (OSC Grantee)	Employers
April 26	Holyoke, MA	Legal Services Corporation of Central Mass (OSC Grantee)	Employers, workers & service providers
April 26	Bethesda, MD	Clark Concrete Contractors LLC	HR Professionals
April 30	Atlanta, GA	Mexican American Legal Defense & Education Fund (MALDEF)	Workers & service providers
June 12	Arlington, VA	American Council on International Personnel Symposium	Employers
June 19	Louisville, KY	DARI conference (at request of AFOP, OSC Grantee)	Farmworker advocates & service providers
July 28-Aug 4	Atlanta, GA	National Bar Ass'n Annual Convention	Immig Attys, advocates & service providers
August 8	Miami, FL	Florida's 2007 Statewide Refugee Services Conference	Advocates, service providers and employers

If your organization is interested in having OSC speak at an educational event, please contact us.

How to Contact OSC

Main Number: (202) 616-5594/TDD: (202) 616-5525

Fax Number: (202) 616-5509

Toll Free Information Number and Worker Hotline:

1-800-255-7688

(202) 616-5525 or 1-800-237-2515

(TDD for hearing impaired) (Language interpretation available)

Employer Hotline: 1-800-255-8155

1-800-362-2735 (TDD for hearing impaired)

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We Value Your Feedback! Is there a topic you would like to read about in our newsletter?

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