



U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
950 Pennsylvania Ave, NW
Washington, DC 20530
Main (202) 616-5594
Fax (202) 616-5509

AUG - 2 2011

David C. Fowler
Vice President, Product Strategy
TALX Corporation
11432 Lackland Road
St. Louis, MO 63146

Dear Mr. Fowler,

In your June 23, 2011 email, you ask whether it is discriminatory for employers to retain copies of the I-9 documents E-Verify requires employers to copy when the photo matching tool is activated, but not retain copies of other I-9 documents.

As you know, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (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. For more information about OSC, you may visit our website at: www.justice.gov/crt/about/osc.

As you may know, employers have the option as to whether or not to photocopy documents reviewed for I-9 purposes. *See* U.S. Citizenship and Immigration Service (USCIS) Handbook for Employers Instructions for Completing Form I-9 (M-274)(Rev. 1/01/11), at 40. Furthermore, for employers that use E-Verify, "[i]f the employee presents a U.S. Passport, Passport Card, a Permanent Resident Card (Form I-551) or an Employment Authorization Document (Form I-766) you must obtain a copy of it and retain it with Form I-9." E-Verify User Manual for Employers, May 2011, at 14. Thus, in order to participate in E-Verify, employers must sign a Memorandum of Agreement with E-Verify whereby they agree to photocopy the above documents, which presently activate E-Verify's photo-matching tool.

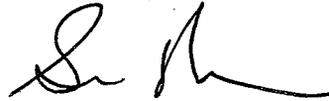
Document abuse occurs when an employer either demands that a worker produce more or different documents than those identified in the Form I-9 process, or refuses to honor documents tendered that on their face reasonably appear to be genuine, with the intent to discriminate on the

basis of national origin or citizenship status. *See* 8 U.S.C. § 1324b(a)(6). With regard to the I-9 process, action taken by an employer for reasons other than intent to discriminate do not constitute an unfair employment practice within the meaning of the anti-discrimination provision of the INA. To the extent an employer that participates in E-Verify chooses only to copy the I-9 documents of employees who present documents subject to the photo-matching tool, this would appear to be selective photocopying based on a contractual requirement and not based on citizenship status or national origin.

Please note, however, that requiring an employee to present a U.S. Passport, Passport Card, Permanent Resident Card or Employment Authorization Document (EAD, Form I-766) in order to trigger the E-Verify photo-matching feature, could constitute document abuse in violation of the anti-discrimination provision of the INA.

We hope you find this information helpful, and thank you for contacting OSC.

Sincerely,

A handwritten signature in black ink, appearing to read 'Seema Nanda', written in a cursive style.

Seema Nanda
Acting Deputy Special Counsel