



U.S. Department of Justice

Civil Rights Division

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Unfair Employment Practices - NYA
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DEC 23 2011

BY EMAIL AND FIRST CLASS MAIL (craig.longnecker@evrinc.com)

Craig Longnecker
1575 DeLucchi Lane, Suite 207B
Reno, Nevada 89502

Dear Mr. Longnecker:

Thank you for your e-mail, dated August 25, 2011, to the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). We apologize for the delay in our response. In your email you inquire about an employer that wishes to use two different employment eligibility reverification processes depending upon whether an employee has had "a change in citizenship status" at the time of employment eligibility reverification (referred to in your inquiry as "presentation of continued work authorization"). Specifically, you propose that where an employee whose work authorization has expired has also had "a change in citizenship status," the employer representative completing Section 3 would ask the employee to fully complete Section 1 of the Form I-9 (presumably to identify his or her new "citizenship status" by checking the appropriate box in Section 1). In contrast, in instances in which an employee needs to have his or her employment eligibility authorization reverified but has not had "a change in citizenship status," you propose that the employer only record the employee's name in Section 1 in addition to completing Section 3. You explain that the two different reverification processes are necessary because the employer "may or may not have certain government contracts which require . . . employees to be of either US citizen or Lawful Permanent Resident status." As a preliminary matter, you do not specify whether the change in citizenship status that you refer to is limited only to employees who have adjusted their status to U.S. citizen, or whether it more broadly refers to employees who have adjusted their status from either one immigrant category to another or from non-citizen to U.S. citizen.

OSC is responsible for enforcing the anti-discrimination provision of the Immigration and Nationality Act ("INA" or "the Act"), 8 U.S.C. § 1324b, which prohibits discrimination in hiring, firing, or recruitment or referral for a fee that is based on an individual's national origin or citizenship status. The statute also prohibits unfair documentary practices during the employment eligibility verification (Form I-9) process on the basis of citizenship status or national origin (document abuse), and retaliation or intimidation. 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. However, we can provide some general guidelines regarding employer compliance with the INA's anti-discrimination provision.

The anti-discrimination provision of the INA prohibits citizenship status discrimination in hiring, firing or recruitment or referral for a fee. 8 U.S.C. § 1324b(a)(1)(B). The prohibition on citizenship status discrimination, however, does not apply where United States citizenship is required by “law, regulation, executive order, or federal, state, or local government contract.” 8 U.S.C. § 1324b(a)(2)(C). An employer may in those limited circumstances impose a United States citizenship requirement on those specific jobs covered by the law, regulation, order, or contract. Otherwise, it is unlawful for an employer to limit the consideration of job applicants solely to U.S. citizens or lawful permanent residents. Your inquiry suggests that an employer already employing a workforce consisting of both citizens and non-citizens may need to ascertain *current* citizenship or immigration status before assigning an employee to work on a particular government contract. Therefore, you propose that an employer in this situation rely on the Form I-9 process to ascertain current “citizenship status.” You describe a proposed process in which at the time of reverification, an employee who has had a change of “citizenship status” will need to complete Section 1 of the Form I-9 in its entirety, unlike employees being reverified who have not had a change in “citizenship status.”

As you may know, at the time of initial employment eligibility verification, employees must complete Section 1 of the Form I-9. *See U.S. Citizenship and Immigration Services, Handbook for Employers, Instructions for Completing Form I-9, (Form M-274, Rev. 06/01/11), p. 3.* For those employees whose employment authorization has expired, the employer must reverify the worker’s continued employment authorization no later than the date the work authorization expires by either completing Section 3 on the original Form I-9 or by completing a new Form I-9. *See U.S. Citizenship and Immigration Services, Handbook for Employers, Instructions for Completing Form I-9, (Form M-274, Rev. 06/01/11), pp. 9-10; U.S. Citizenship and Immigration Services, Form I-9, Employment Eligibility Verification, (Form I-9, Rev. 08/07/09), p. 2.* A U.S. citizen or noncitizen national never needs reverification. In addition, a lawful permanent resident who presented either a permanent resident card (Form I-551) or a combination of a List B document and an unrestricted Social Security card for the Form I-9 should never be reverified. When completing a new Form I-9 for reverification, the employer must write the employee’s name in Section 1 of the new Form I-9 and complete Section 3. *Id.*

OSC is unaware of any guidance that permits an employer to ask an employee to complete all of Section 1 on a new Form I-9 at the time of reverification. Moreover, to the extent that an employer adopts a procedure requiring employees with a change of citizenship or immigration status to provide additional information at the time of reverification, the employer representative conducting the reverification may be more likely to ask the employee to produce documents evidencing his or her change in citizenship or immigration status. Employers that request more or different documents during the initial employment eligibility verification process *or* during the employment eligibility reverification process on the basis of national origin or citizenship status may violate the anti-discrimination provision of the INA. Therefore, to the extent an employer seeks to ascertain current citizenship status for any of its employees in order to determine whether a particular employee may work on a government contract, OSC strongly recommends making that assessment separate and apart from the I-9 process, and not necessarily at the same point in time as the employee’s employment authorization expires.

Please also note that all work authorized individuals, including visa holders are protected from document abuse under 8 U.S.C. § 1324b(a)(1)(A) and (a)(6), as well as from retaliation under 8 U.S.C. § 1324b(a)(5). ; United States v. Townsend Culinary, Inc., 8 OCAHO no. 1032 (1999) (relief ordered for all victims of document abuse without distinction as to status as a "protected individual"); United States v. Guardsmark, Inc., 3 OCAHO no. 572 (1993) (all work authorized individuals are protected from document abuse).

We hope that this information is helpful. If you have any questions regarding this matter, please do not hesitate to contact the undersigned attorney at 1-800-255-7688 (toll free) or directly at (202) 514-5686. Thank you for your anticipated cooperation in this matter.

Sincerely,

A handwritten signature in blue ink that reads "Seema Nanda by DS". The signature is written in a cursive style.

Seema Nanda
Acting Deputy Special Counsel