



U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration Related
Unfair Employment Practices - NYA
950 Pennsylvania Avenue, NW
Washington, DC 20530

February 3, 2010

Via electronic mail to: ann@allott.com

Ann Allott, Esq.
Allott Immigration Law Firm
Centennial, Colorado 80122

Dear Ms. Allott:

This letter responds to your e-mail of October 14, 2009, seeking guidance on how an employer should, consistent with the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. §1324b, respond to a "Notice of Suspect Documents" issued by Immigration and Customs Enforcement (ICE) of the Department of Homeland Security (DHS). Your e-mail states that one of your client's received such a Notice on September 18, 2009, following an audit of your client's Forms I-9 by ICE.

The Office of Special Counsel for Immigration Related Unfair Employment Practices (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.

A Notice of Suspect Documents is issued by ICE based on a physical audit of an employer's Forms I-9. *See* 8 U.S.C. §274a.9(c); 8 C.F.R. §274a.9(c). The Notice identifies those employees that ICE believes may not be authorized to work in the United States based on the documents and other information listed in the employee's Form I-9. *Id.* *See also United States v. LFW Dairy Corp., d/b/a J & J Dairy Corp.*, 10 OCAHO no. 1129, at 3 and 4 (2009).

The anti-discrimination provision of the INA, 8 U.S.C. §1324b, prohibits the request for specific documents or the rejection of documents during the employment eligibility verification process with the intent to discriminate on the basis of national origin or citizenship status. *See* 8 U.S.C. §1324b(a)(6). However, it has been long recognized that action by an employer taken for reasons other than an intent to discriminate does not constitute an unfair employment practice within the meaning of the anti-discrimination provision of the INA. *See Ondina-Mendez v. Sugar Creek Packing Co.*, 9 OCAHO no. 1085, at 18-19 (2002). While an ICE Notice of Suspect Documents may provide a non-discriminatory reason behind the decision to re-verify an employee's employment eligibility, the standard for accepting documents presented by the

employee to re-establish his or her employment eligibility remains the same – whether the document(s) presented reasonably appear on their face to be genuine and to relate to the person who presents the document(s). *See* 8 C.F.R. §274a.2(b)(1)(ii)(A).

We hope that this information is helpful.

Sincerely,

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

Katherine A. Baldwin
Deputy Special Counsel