



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*

MAY 18 2012

Dana Bleau  
University of Arizona  
935 North Tyndall Avenue  
PO Box 210528  
Tucson, AZ 85721-0528

Dear Ms. Bleau:

This letter responds to your letter to the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), dated March 21, 2012. In your letter, you ask whether an employer faces any liability under 8 U.S.C. §1324b if the employer refuses to accept a valid Employment Authorization Document for I-9 purposes from a former employee who has reapplied for employment, where the employer has "actual knowledge that the F-1 student is no longer in status" despite the former employee possessing a "facially valid EAD."

Please note that OSC cannot provide an advisory opinion on any set of facts involving a particular individual or entity. We can provide, however, some general guidelines regarding the anti-discrimination provision of the Immigration and Nationality Act (INA) enforced by OSC, 8 U.S.C. § 1324b, and employer actions under that provision. The 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 process ("document abuse"); and retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision.

The events described in your letter indicate that the former student has not yet been hired but has inquired about re-employment. Regarding your inquiry about refusing to accept this individual's EAD for I-9 purposes, an employer "may not begin the Form I-9 process until you offer an individual a job and he or she accepts your offer." U.S. Citizenship and Immigration Service (USCIS) Handbook for Employers Instructions for Completing Form I-9 (M-274) (Rev. 6/01/11), at 3. Further, requesting an individual's Form I-9 documentation prior to the individual accepting a job offer may violate the anti-discrimination provision of the INA if the request is based on the individual's citizenship or immigration status.

An employer with knowledge that an individual is not work-authorized cannot employ the individual. 8 U.S.C. § 1324a(a)(1). The Department of Homeland Security has authority to investigate and prosecute employers that have actual or constructive knowledge that one or more of their employees are not authorized to work in the United States and employ or continue to employ the employee(s) after obtaining such knowledge. An employer complies with the initial

employment eligibility verification process with respect to the examination of an employee's document(s) if the document(s) reasonably appears on their face to be genuine. 8 U.S.C. § 1324a(b)(1)(A). The refusal to honor such documents based on the employee's citizenship or immigration status may violate the anti-discrimination provision of the INA. 8 U.S.C. § 1324b(a)(6).

With respect to your concern that despite the former employee possessing a "facially valid EAD," your institution nevertheless "has actual knowledge that the F-1 student is no longer in status," we recommend you contact the USCIS Verification Division at 1-888-464-4218 to ascertain whether the student is work-authorized. We caution against any assumption that the former student is presently without valid work authorization simply because he or she worked previously for your institution without valid authorization. *See* 8 C.F.R. § 214.2(f)(11)(iii) (USCIS will adjudicate the Form I-765 and, if approved, issue an EAD on the basis of the DSO's recommendation and other eligibility considerations).

Finally, where an employer declines to offer an individual employment or withdraws an offer of employment based on a reason other than knowledge that the employee lacks work authorization, it should make such decisions without regard to national origin or citizenship status.

We hope you find this information helpful.

Sincerely,



Seema Nanda  
Acting Deputy Special Counsel