



U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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June 15, 2016

Sent via E-Mail (Christopher.Thomas@ogletreedeakins.com)

Christopher L. Thomas
Wells Fargo Center
1700 Lincoln Street, Suite 4650
Denver, CO 80203

Dear Mr. Thomas:

This is in response to your email dated May 25, 2016, to the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC" or "Office"). In your email, you seek this Office's views on whether it is permissible for employers to ask the following questions of job applicants:

- A. Do you now, or will you in the future, require sponsorship (e.g., H-1B visa status, etc.) to work legally for THE COMPANY in the United States?
- B. If you will require sponsorship, do you currently hold Optical Practical Training (OPT)?
- C. If you currently hold OPT, are you eligible for a 24-month extension of your OPT, based upon a degree from a qualifying US institution in Science, Technology, Engineering, or Mathematics (STEM), as defined by Immigration & Customs Enforcement (and as outlined in the following government website:

<https://www.ice.gov/sites/default/files/documents/Document/2016/stem-list.pdf>

In your email, you explain that "a negative answer to the third question would be reason for disqualification." You would like our Office to address whether this series of questions would run afoul of the anti-discrimination provision of the Immigration and Nationality Act (INA), which this Office enforces.

OSC cannot provide an advisory opinion on any set of facts involving a particular individual or entity. However, we can provide some general guidance regarding employer compliance with the anti-discrimination provision of the INA. The anti-discrimination provision prohibits the following types of employment-related conduct: (1) national origin, citizenship, or immigration status discrimination in hiring, firing, or recruiting or referral for a fee; (2) unfair documentary practices during employment eligibility verification (generally, the Form I-9 and E-Verify processes) ("document abuse"), which includes requesting more or different documents than required for employment eligibility verification because of an individual's citizenship, immigration status, or national origin; and (3) retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision.

8 U.S.C. § 1324b. For more information about OSC, please visit our website at:

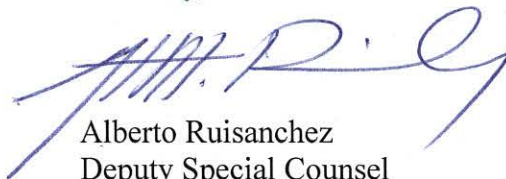
<http://www.justice.gov/crt/about/osc>.

As you know, the statute prohibits denying protected individuals employment because of their real or perceived immigration or citizenship status. U.S. citizens and nationals, refugees, asylees, and recent lawful permanent residents are protected from citizenship status discrimination in hiring under the INA. Accordingly, an employer that asks all of its job applicants whether they will require sponsorship now or in the future and refuses to hire those who require sponsorship would likely not violate 8 U.S.C. 1324b. Similarly, an employer that asks questions designed to prefer certain classes of nonimmigrant visa holders (e.g., STEM OPT students) over other classes of nonimmigrant visa holders is unlikely to violate the INA's prohibition against citizenship status discrimination. *Cf.* Letter from Alberto Ruisanchez, Deputy Special Counsel, OSC to Angelo A. Paparelli, Seyfarth Shaw LLP (Apr. 30, 2014), available at <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/06/180.pdf> (company unlikely to violate the anti-discrimination provision when rejecting applicant based on remaining time left on OPT visa since F-1 visa holders are not protected from citizenship status discrimination). However, asking job applicants detailed questions about their immigration or citizenship status may deter individuals who *are* protected from citizenship status discrimination, such as refugees and asylees, from applying due to a misunderstanding about their eligibility for the position. Therefore, we caution employers against asking detailed questions pertaining to status that may lead to such confusion.

In addition, all work-authorized individuals are protected from national origin discrimination under the anti-discrimination provision. Accordingly, individuals who believe that they were not hired based on national origin—for example, their country of origin, accent or appearance—may allege discrimination on this basis. As you may know, OSC has jurisdiction over national origin claims involving entities with between four and 14 employees, whereas the Equal Employment Opportunity Commission (EEOC) has jurisdiction over claims involving employers with 15 or more employees. For more information about national origin discrimination liability for employers with 15 or more employees, you may wish to contact the EEOC at 1-800-669-4000 (TTY 1-800-669-6820) or visit the EEOC's website at www.eeoc.gov.

We hope that this information is helpful.

Sincerely,



Alberto Ruisanchez
Deputy Special Counsel