



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*

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Via First Class Mail and Facsimile (507-284-8591)

Christopher L. Wendt, Esquire
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Dear Mr. Wendt:

Thank you for your January 13, 2009, letter to the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). In your letter, you note that employers enrolled in the Department of Homeland Security's (DHS) electronic employment eligibility verification (E-Verify) program must reject Employment Eligibility Verification (Form I-9) List B (identity) documents that do not contain photographs, and must make copies of certain List A documents. You inquire whether rejection of List B documents that do not contain photographs and copying of certain List A documents would violate the anti-discrimination provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324b.

Please note that OSC cannot provide an advisory opinion on any particular case of alleged discrimination or on any set of facts involving a particular individual or entity. However, we can provide some general guidelines regarding the anti-discrimination provision of the INA and employer actions under that provision.

As you may know, under the anti-discrimination provision of the INA, OSC protects work authorized individuals from employment discrimination based on citizenship or immigration status, national origin, over-documentation in the employment eligibility verification process ("document abuse"), and retaliation for filing a charge or asserting their rights under the anti-discrimination provision. The document abuse provision of the INA prohibits an employer from requesting more or different documents or rejecting documents for employment eligibility verification with the intent to discriminate on the basis of national origin or citizenship status. 8 U.S.C. § 1324b(a)(6). By law, a new employee may choose to show either one document from a list of acceptable documents that demonstrate identity and eligibility to work (List A) or a combination of one document from a list of acceptable identity documents

(List B) paired with one document from a list of acceptable documents showing eligibility to work in the United States (List C). All work authorized individuals are protected from document abuse, and OSC has jurisdiction over employers charged with document abuse who have four or more employees.

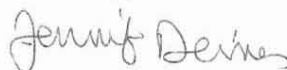
In order to enroll in E-Verify, an employer must sign the E-Verify Memorandum of Understanding ("E-Verify MOU"), and agree to complete the Form I-9 before submitting a query to E-Verify with respect to any new employee. E-Verify MOU, Art. II, C.7. As you correctly point out in your letter, the DHS Handbook for Employers (M-274, Rev. 11/01/2007) and the E-Verify MOU both emphasize that an employer enrolled in E-Verify may only accept a List B document containing a photograph when completing the DHS Form I-9. E-Verify MOU, Art. II, C.5; DHS Handbook for Employers, pp. 6, 22. Your letter asks whether an employer's consequent rejection of a List B document without a photograph could violate the document abuse provision of the INA, 8 U.S.C. § 1324b(a)(6).

Where an employer rejects a List B document without a photograph in order to comply with its E-Verify contractual obligations, the employer would be acting to fulfill its contractual obligation with DHS, rather than with an intent to discriminate. However, an employer must exercise this obligation consistently and uniformly with respect to all new employees who choose to present List B documents to prove identity. Also, with respect to accepting or rejecting Form I-9 documents generally, employers, including those enrolled in E-Verify, may not make distinctions based on an employee's actual or perceived national origin or citizenship status in deciding whether to accept or reject a document. 8 U.S.C. § 1324b(a)(6).

Your letter also asks about the E-Verify MOU's requirement that an employer make a photocopy of a Form I-551 or I-766 if an employee chooses to present either document during the Form I-9 process. E-Verify MOU Art. II, C.5. The DHS Handbook states at page 23 that "if you wish to make photocopies [of I-9 documents], you should do so for all employees," however, an employer that makes photocopies only of Forms I-551 and I-766 to comply with its E-Verify contractual obligations is acting to fulfill its contractual obligations, rather than with an intent to discriminate. Like an employer's obligation with respect to List B documents, an employer must exercise this obligation consistently and uniformly with respect to all new employees who choose to present a Form I-551 or I-766.

I hope that this information is helpful. For further information on the INA's anti-discrimination provision, please feel free to consult OSC's website at <http://www.usdoj.gov/crt/osc/>, or call OSC at 1-800-255-8155.

Sincerely,



Jennifer Deines
Trial Attorney