



U.S. Department of Justice

Civil Rights Division

*Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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BY EMAIL (APaparelli@seyfarth.com)

Angelo A. Paparelli
Seyfarth Shaw LLP
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Dear Mr. Paparelli:

Thank you for contacting the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). This is in response to your e-mail dated March 11, 2014, in which you request information regarding an employer's consideration of a job applicant who is an F-1 student visa holder with optional practical training (OPT). You state that the applicant's final period of OPT employment authorization will expire "three months after application for employment" and that the applicant "has no ability to extend employment authorization under the F-1 optical practical training regulations because his or her studies are not in a STEM field and the employer is not enrolled in E-Verify; moreover, he or she is not eligible for any other available work authorization status." Specifically, you ask:

1. Could a company lawfully decline to extend an offer of employment to a candidate solely based on the fact that he/she will only have work authorization for three months without engaging in citizenship status or national origin discrimination?
2. If the company may lawfully decline such employment, may it communicate to the applicant this ground as the basis for their decision?
3. How should this be documented internally by the company in its business records and in its Applicant Tracking files (for OFCCP, etc. purposes)?

As you know, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) investigates and resolves charges of national origin and citizenship status discrimination in hiring, firing or recruiting or referring for a fee; discriminatory documentary practices in the employment eligibility verification process ("document abuse"); and retaliation under the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b. OSC cannot provide an advisory opinion on any specific case or set of facts. However, we can provide general information on the INA's anti-discrimination provision and the Form I-9 process.

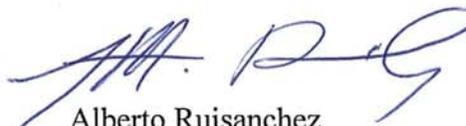
With respect to your first question, OSC cautions against making assumptions based on an individual's current employment authorization status; employers may not know whether an individual is in the process of transitioning to a different immigration status that would extend or continue the individual's ability to work in the United States. That being said, the categories of individuals protected from citizenship status discrimination are limited to U.S. citizens, lawful permanent residents who are not yet eligible to apply for naturalization or who have applied within six months of eligibility, asylees, and refugees. 8 U.S.C. § 1324b(a)(3). Accordingly, F-1 visa holders are not protected from citizenship status discrimination. Therefore, as OSC has noted in the past, an employer that asks whether an applicant would require sponsorship now or in the future is unlikely to implicate the anti-discrimination provision's prohibition against citizenship status discrimination.¹ Similarly, communicating to an unsuccessful applicant that the employer's unwillingness to sponsor the applicant was the basis for the non-hire decision is not likely to lead to a determination by OSC that an employer has committed unlawful citizenship status discrimination.

However, all work-authorized individuals are protected from national origin discrimination under the anti-discrimination provision. Accordingly, an individual who believes that he or she was not hired based on national origin—based on country of origin, accent or appearance, for example—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.

With respect to your inquiry about documenting information in a company's business records and Applicant Tracking Files, there are no tracking obligations under the anti-discrimination provision. However, we recommend clearly documenting selection and hiring decisions, including the basis for those selection and hiring decisions. Furthermore, once an employer is notified about the initiation of an OSC investigation, it has an obligation to preserve all relevant documentation.

We hope this information is of assistance to you. Please feel free to contact us through our toll-free employer hotline at 1-800-255-8155 or visit our website at www.justice.gov/crt/about/osc if you have any further questions.

Sincerely,



Alberto Ruisanchez
Acting Deputy Special Counsel

¹ We also refer you to a previously-issued OSC technical assistance letter addressing the potential to violate the anti-discrimination provision if an employer requests to see a document and subsequently rejects the document based on a future expiration date: <http://www.justice.gov/crt/about/osc/pdf/publications/TAletters/FY2013/174.pdf>