**U.S. Department of Justice**
Civil Rights Division

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*Unfair Employment Practices - NYA*
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**By Email (mgoeschl@morganlewis.com)**

Malcolm K. Goeschl
Morgan, Lewis & Bockius LLP
One Market, Spear Street Tower
San Francisco, CA 94105

Dear Mr. Goeschl:

This letter is in response to your January 7, 2013, email seeking technical assistance on behalf of a client that "has a policy of not hiring employees who require export licenses and would like to prescreen applicants who will require such a license." We apologize for the delay in our response. Your email poses four questions:

1. May the employer prescreen job applicants from certain countries who will require export licenses?

2. If yes, do you have recommendations on how the employers should do this without violating employment verification antidiscrimination laws? Would any of the following questions be acceptable to put on a job application?

    a. Are you a national of a country that may require the employer to obtain an export license? (This question may be problematic because the applicant will not likely know whether this is the case or not, and because if the applicant is a LPR, he/she would not need an export license).

    b. Are you currently in nonimmigrant status (e.g., F-1, H-1B, L-1), and a national of a country that may require the employer to obtain an export license?

    c. Are you currently in nonimmigrant status (e.g., F-1, H-1B, L-1), and a national of one of the following countries [the list would be countries that the employer knows trigger export license requirements]?

    d. Do you now or will you in the future require immigration sponsorship to work at [the employer]? If you answered yes to this question, please answer the following question: are you a national of one of the following countries: [the

list would be countries that the employer knows trigger export license requirements]?

3. Do you have any other suggested questions to prescreen applicants who require export licenses?

4. Assuming the employer cannot, or chooses not to prescreen applicants who require export licenses, may it rescind its offer to an employee once it learns that he/she requires such a license? This would typically happen as soon as the employee accepts the offer of employment, and provides documentation to begin the immigration sponsorship process.

As you may know, OSC enforces the anti-discrimination provision of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. § 1324b. The anti-discrimination provision prohibits four types of unlawful conduct: (1) citizenship or immigration status discrimination; (2) national origin discrimination; (3) unfair documentary practices during the employment eligibility verification (Form 1-9) process ("document abuse"); and (4) retaliation for filing a charge or asserting rights under the anti-discrimination provision. Although OSC cannot give you an advisory opinion on any set of facts involving a particular individual or company, we are pleased to provide some general guidelines regarding compliance with the anti-discrimination provision of the INA.

We understand your questions regarding employment of individuals who may require an export license to refer to the requirements of the International Traffic in Arms Regulations ("ITAR") and/or the Export Administration Regulations ("EAR"). Your questions appear to relate to the employment of individuals who are not considered "U.S. persons" under ITAR and individuals who are covered by the export control rule under the EAR. Under the ITAR, a "U.S. person" includes a lawful permanent resident or a protected individual as defined by 8 U.S.C. § 1324b(a)(3). *See* 22 C.F.R. § 120.15. The statutory definition of "protected individuals" under the anti-discrimination provision of the INA includes, among other individuals, U.S. citizens and nationals, refugees and asylees. *See* 8 U.S.C. § 1324b(a)(3)(B). Please note that guidance on the licensing of foreign persons by the U.S. Department of State states that while the ITAR imposes licensing requirements, "the ITAR does not, however, impose requirements on U.S. companies concerning the recruitment, selection, employment, promotion or retention of a foreign person." U.S. Department of State, Directorate of Defense Trade Controls, "Licensing of Foreign Persons Employed by a U.S. Person – UPDATED" (07/18/2012), available at http://www.pmddtc.state.gov/licensing/documents/WebNotice_LicensingForeign2.pdf. Under the EAR, the export control rule does not apply to an individual admitted for lawful permanent residence or a protected individual as defined by 8 U.S.C. § 1324b(a)(3). *See* 15 C.F.R. § 734.2(b)(2)(ii).

Citizenship status discrimination occurs when individuals are not hired or are fired because of their citizenship or immigration status. 8 U.S.C. § 1324b. However, an employer may consider citizenship status if it is required in order to comply with a law, regulation, or executive order, or the terms of a Federal, State, or local government contract. 8 U.S.C. § 1324b(a)(2)(C). Under the INA, only "protected individuals" as defined by 8 U.S.C. § 1324b(a)(3) are protected from citizenship status discrimination. Therefore, an employer that

has a policy of not hiring individuals who are not "protected individuals" based solely on the person's citizenship status would not be in violation of the INA's anti-discrimination provision.

With respect to your questions relating to asking applicants whether they are currently in nonimmigrant status, your questions as posed may screen out refugees and asylees who, as noted above, are protected from citizenship status discrimination, and who may misunderstand the question to preclude their eligibility for employment. If the information is sought for compliance with export licensing requirements, and not for employment eligibility verification or any discriminatory purposes, inquiring about an applicant's citizenship or country of origin for this purpose would not appear to violate the INA's anti-discrimination provision as long as such inquiries are made uniformly and without the intent to discriminate on the basis of national origin or citizenship status.

Notwithstanding the limited scope of protection from citizenship status discrimination, please note that all work-authorized individuals are protected from national origin discrimination, document abuse and retaliation under 8 U.S.C. § 1324b. This office investigates claims of national origin brought against employers with four to 14 employees and the Equal Employment Opportunity Commission investigates national origin discrimination claims against employers with more than 14 employees. As a result, an employer that refuses to hire a work-authorized individual who is not a "protected individual" for citizenship status, but rather, based on that individual's country of origin and/or country of citizenship may be committing prohibited national origin discrimination. To the extent an employer screens out all applicants from particular countries or rescinds job offers for certain applicants based on the assumption that the employer would need to obtain an export license for those individuals at some point during the employment relationship, the applicants may allege national origin discrimination in a charge filed with OSC (or with the EEOC depending upon the size of the employer). An allegation of this nature would prompt an OSC investigation if the employer is determined to have four to 14 employees or would be referred to the EEOC in the case of a larger employer.

We hope this information is helpful. For more information on the INA's anti-discrimination provision, please call OSC's employer hotline at 1-800-255-8155 or visit OSC's website at www.usdoj.gov/crt/about/osc.

Sincerely,

Seema Nanda
Deputy Special Counsel