U.S. Department of Justice
Civil Rights Division

Office of Special Counsel for Immigration-Related Unfair Employment Practices - NYA
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September 30, 2013

Via Email (lcooney@balglobal.com)
Liane Hicks Cooney, Esq.
Berry Appleman & Leiden LLP
7901 Jones Branch Drive, Suite 320
McLean, VA 22102

Dear Ms. Cooney:

This is in response to your email dated August 6, 2013. We apologize for the delay in our response. In your email, you ask whether an employer in the following situation should be concerned about engaging in a discriminatory hiring decision: "US Company frequently hires foreign nationals and sponsors them for H and L visas when needed. A foreign national candidate applied for a position, but the company does not believe the candidate is appropriate for the role offered and does not wish to sponsor an H-1B petition for this particular job opening. May the company decline to extend an offer to a candidate because visa petition sponsorship would be required, although it does file immigration petitions for other positions within the organization?"

The Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") investigates and prosecutes employers charged with national origin and citizenship status discrimination, as well as over-documentation 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. For more information on OSC, please visit our website at: www.justice.gov/crt/about/osc.

Please note that OSC cannot provide an advisory opinion on any specific case or set of facts. However, we can provide general guidelines as to the coverage of the statute and the legality of various pre-employment inquiries under the anti-discrimination provision of the INA, 8 U.S.C. § 1324b.

In your email, you state that the company does not believe the candidate is "appropriate" for the role offered. It is unclear whether the company has determined the candidate to be unqualified for the position. In order to establish a *prima facie* case of citizenship status or national origin discrimination in hiring, there must a showing that the (1) applicant is a member of a protected class; (2) the applicant suffered an adverse employment action; (3) the applicant was qualified for the position and (4) the position remained open or was filled by similarly qualified applicants outside the protected class. Hill v. Lockheed Martin Logistics Mgmt., 354 F.3d 277, 285 (4th Cir. 2004) (*en banc*). Furthermore, individuals protected from citizenship

status discrimination are limited to U.S. citizens, certain lawful permanent residents, asylees and refugees. 8 U.S.C. §1324b(a)(3). Therefore, an individual with or seeking an H-1B visa would not be able to establish a prima facie case of citizenship status discrimination because that individual is not in the protected class, and a company can choose not to employ a person because that individual requires visa sponsorship. See http://www.justice.gov/crt/about/osc/pdf/publications/TAletters/FY2013/171.pdf; http://www.justice.gov/crt/about/osc/pdf/publications/TAletters/FY2012/157.pdf.

Please also note that although all work-authorized individuals are protected from national origin discrimination under the anti-discrimination provision, Salazar-Castro v. Cincinnati Public Schools, 3 OCAHO No. 406 (1992), only employers with between four and 14 employees are covered under the anti-discrimination provision. Id. Therefore if an applicant who was rejected for employment files a charge of national origin discrimination with OSC, the office would typically lack jurisdiction to investigate if the employer has 15 or more employees. Individuals claiming national origin discrimination against larger employers may file a charge with the Equal Employment Opportunity Commission, which has jurisdiction to investigate employers with 15 or more employees.

We hope you find this information helpful.

Sincerely,

Seema Nanda
Deputy Special Counsel