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OSC Issues Guidance to Employers Related to Immigration Questions During the Hiring Process

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Employers often face a difficult balancing act attempting to comply with the Immigration and Nationality Act's anti-discrimination provisions, on the one hand, and manage their bottom line, on the other hand. As employers know, it can be costly to sponsor a prospective foreign hire to work in the United States legally. But employers are often uncertain what types of pre-employment inquiries are permissible to determine if a prospective employment candidate requires immigration sponsorship. Fortunately, the U.S. Department of Justice's Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) recently issued a technical assistance letter with some helpful guidance.

As background, an attorney recently requested guidance on whether an employer could ask the following questions of a job applicant during the pre-screening process:

1. Will you now, or in the future, require sponsorship (i.e. H-1B visa, etc.) to legally work in the U.S.?
2. If so, are you current in a period of Optional Practical Training (OPT)?
3. If you have OPT, are you eligible for a 24-month OPT extension based upon a degree from a qualifying U.S. institution in Science, Technology, Engineering or Mathematics?

Because a negative answer to the third question would have disqualified the applicant, the employer wanted to ensure the questions would not violate the INA's anti-discrimination provision.

In its technical assistance letter, the OSC explained that it did not find such inquiry discriminatory. Specifically, the OSC determined that "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 not likely violate 8 U.S.C. 1324b." Likewise, an employer that asks questions designed to demonstrate a preference of one class of nonimmigrant visa holders (i.e. STEM OPT students) over another would not violate the INA's prohibition on citizenship status discrimination. The OSC, however, did caution employers against asking job applicants detailed questions about their immigration or citizenship status because it may deter protected individuals, such as refugees or asylees, from applying due to a misunderstanding, and as a consequence, asking those questions may be deemed actionable.

Continue to check back with us for updates on the status of this important immigration issue. If questions regarding how to comply with the INA's anti-discrimination provision arise, employers should immediately seek counsel. For more information, please contact Maria del Carmen Ramos at 813.227.2252 or mramos@slk-law.com.

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