U.S. Department of Justice

Civil Rights Division

Immigrant and Employee Rights Section – 4CON
950 Pennsylvania Ave, NW
Washington, DC 20530
Main (202) 616-5594
Fax (202) 616-5509

September 9, 2022

By Email

Anu Jaswal
Nilan Johnson Lewis, PA
250 Marquette Avenue South, Suite 800
Minneapolis, MN 55401
ajaswal@nilanjohnson.com

Dear Anu Jaswal:

This letter is in response to your June 14, 2022, email to the Immigrant and Employee Rights Section (IER). In your email, you ask for guidance regarding pre-employment screening questions that seek information about an applicant's authorization to work in the United States. Your email references two questions that IER has previously identified as appropriate questions to ask job applicants:

1. Are you legally authorized to work in the United States? __Yes ___No
2. Will you now or in the future require sponsorship for employment visa status (e.g., H-1B visa status)? __Yes __No

Your email asks whether it is permissible under the Immigration and Nationality Act (INA) to ask additional questions to determine whether a job applicant is a U.S. worker as that term is defined by the U.S. Department of Labor's regulations concerning the permanent labor certification (PERM) program, 20 C.F.R. § 656.3. You note that to use the PERM program, an employer must demonstrate to the Department of Labor that there are no U.S. workers able, willing, qualified and available to fill the job. Accordingly, you ask whether an employer may ask applicants the following questions:

1. Are you authorized to work permanently in the United States?
2. If not, are you authorized to work temporarily in the United States?
3. Will you now or in the future require employer visa sponsorship for continued work authorization?

At the outset, we note that your third proposed question essentially mirrors one of the two questions IER has previously identified as appropriate; accordingly, this response focuses on your other two proposed questions.

As you know, IER enforces the anti-discrimination provision of the INA, 8 U.S.C. § 1324b, which prohibits, among other things, discrimination on the basis of citizenship, immigration status, and national origin. The INA's prohibition against citizenship status discrimination applies to hiring, firing, and recruitment and referral for a fee. Employers with four or more employees are covered by this part of the law. United States citizens, United States nationals, recent lawful permanent residents, refugees, and asylees are protected from citizenship status discrimination under the INA. 8 U.S.C. §§ 1324b(a)(1)-(3).

IER cannot give you an advisory opinion on any set of facts involving a particular individual or company. However, we can provide some general information regarding compliance with the anti-discrimination provision of the INA.

As you note, IER has issued technical assistance letters addressing similar questions about job applicants' citizenship or immigration status. IER has repeatedly cautioned employers against using pre-screening questions (beyond the two questions IER has deemed appropriate) for several reasons. First, such questions can raise discrimination concerns by confusing and dissuading job candidates who are protected from citizenship status discrimination under the INA. For example, asking job applicants to identify whether they have permanent authorization to work in the United States – as your question proposes – could confuse or deter candidates with indefinite work authorization, such as asylees and refugees. Second, pre-screening questions may cause rejected candidates to erroneously believe that they did not get a job because of their citizenship or immigration status, even if the employer does not actually use the answers to those questions to make employment decisions.

In addition, an employer that makes hiring decisions based on a job applicant's response to those questions risks discriminating in violation of 8 U.S.C. § 1324b(a)(1). That is the case in PERM recruitment and hiring, as well. Section 1324b(a)(1) prohibits discrimination in hiring, firing, recruitment, or referral for a fee based on citizenship or immigration status, including in the PERM process. *See United States v. Facebook*, 14 OCAHO no. 1386b, at 8-9 (June 2, 2021) (finding that OCAHO has authority to adjudicate claims that protected individuals were subjected to discrimination based on their citizenship status in the PERM recruiting process). An employer that refuses to hire someone who is protected from citizenship status discrimination under the INA, based on that person's citizenship or immigration status, could violate the law IER enforces.

Separately, we note that while IER can only provide technical assistance on potential liability under the INA's anti-discrimination provision, employers that limit their hiring based on citizenship or immigration status might face liability under other federal, state, or local laws prohibiting discrimination based on citizenship or immigration status. *See, e.g.*, CAL. LAB. CODE § 41 (West 2022); 775 ILL. COMP. STAT. 5/2-102 (2022); *Rodriguez v. Procter & Gamble Co.*, 465 F.Supp.3d 1301 (S.D. Fla. 2020).

Lastly, if you have questions about the Department of Labor's PERM regulations, you may wish to contact the Employment and Training Administration's Office of Foreign Labor Certification directly.

We hope this information is helpful. For additional information about IER's work and the INA's anti-discrimination provision, please visit www.usdoj.gov/ier. You may also wish to review IER's fact sheet, Information for Employers about Citizenship Status Discrimination, www.justice.gov/crt/page/file/1080256/download.

Sincerely,

Alberto Ruisanchez
Deputy Special Counsel