U.S. Department of Justice
Civil Rights Division

Office of Special Counsel for Immigration Related
Unfair Employment Practices - NYA
950 Pennsylvania Avenue, NW
Washington, DC 20530

April 29, 2010

Nicole Gardner, Esq.
Gardner and Hughes
1701 South Boulevard
Charlotte, NC 28203

Dear Ms. Gardner,

This letter is in response to your e-mail of February 12, 2010, seeking guidance on how an employer should, consistent with the anti-discrimination provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1324b, deal with various situations involving the transition of an employee from undocumented work status to legally authorized work status. We apologize for the delay of our response.

The Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") cannot provide an advisory opinion on any particular instance of alleged discrimination or on any set of facts involving a particular individual or entity. However, we can provide some general guidelines regarding employer compliance with the INA's anti-discrimination provision. The anti-discrimination provision prohibits discrimination on the basis of national origin, citizenship status, or immigration status, including document abuse during the employment eligibility verification process, and retaliation.

In your e-mail, you ask three questions. First, you ask about an employer's obligations when the employer discovers that an employee, though having previously provided false work authorization documents, is now authorized to work. The INA prohibits an employer from hiring an individual "knowing the alien is an unauthorized alien . . . with respect to such employment." 8 U.S.C. § 1324a(a)(1)(A). However, if there is no actual or constructive knowledge by the employer that the employee is an unauthorized alien, then § 1324a(a)(1)(A) is not violated. *See Mester Mfg. Co. v. INS*, 879 F.2d 561, 566–67 (9th Cir. 1989) (holding that a violation of § 1324a(a)(1)(A) requires a showing that the employer had actual or constructive knowledge that the employee is an unauthorized alien). Note also that an employer's good faith compliance with the requirements of the Form I-9 is a defense to an alleged violation of § 1324a(a)(1)(A). *Id.* § 1324a(a)(3). Thus, if an employer seeks appropriate documents for the Form I-9 and the documents reasonably appear to be genuine on their face and to relate to the person, then the employer is presumed not to have violated § 1324a(a)(1)(A). *See Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 553 n.9 (9th Cir. 1991) (explaining that an affirmative defense to § 1324a(a)(1)(A) can be shown by an employer "who has complied in good faith with the verification requirements" of the Form I-9, as long as the documents presented "reasonably appear on their face to be genuine").

With respect to continuing employment, the INA provides that "[i]t is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." *Id.* § 1324a(a)(2). However, the courts have held that the employment of currently authorized employees is permissible, even if the employees were previously unauthorized to work. *NLRB v. A.P.R.A. Fuel Oil Buyers Group*, 134 F.3d 50, 57 (2d Cir. 1997).

Your second question asks whether it is proper to have a company policy that any employee who provides false information to the employer as part of the I-9 process will be terminated. As noted above, the INA prohibits employers from treating employees differently in, *inter alia*, firing based on their citizenship status, immigration status, or national origin. *Id.* § 1324b(a)(1). A policy that on its face or in application distinguishes between a certain form of dishonesty (i.e., false information on the Form I-9) from every other form of dishonesty (e.g., false information on W-4 forms, employment applications, resumes, etc.) may violate the anti-discrimination provision of the INA, if based on an intent to discriminate on the basis of citizenship status, immigration status, or national origin.

Finally, your third question asks whether it is proper to allow continued employment for work authorized employees who previously provided false information on the Form I-9, while terminating employees for other dishonesty. As noted above, § 1324b requires that employees be treated the same regardless of citizenship status, immigration status, or national origin.

I hope this information is helpful to you. Should you have any further questions, please contact OSC's employer hotline at (800) 255-7688. If you have any questions regarding worksite enforcement, please contact the Department of Homeland Security, Immigration and Customs Enforcement at (866) 347-2423.

Sincerely,

Katherine A. Baldwin
Deputy Special Counsel