



U.S. Department of Justice

Civil Rights Division

*Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
950 Pennsylvania Ave, NW
Washington, DC 20530
Main (202) 616-5594
Fax (202) 616-5509*

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BY EMAIL (ssimon@wildesweinberg.com)

Stacey A. Simon, Esq.
Senior Associate
Wildes & Weinberg P.C.
90 West Palisade Avenue
Englewood, NJ 07631

Dear Ms. Simon:

This is in response to your email dated July 27, 2015, to the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC" or "Office"). In light of recently-issued guidance, this letter supersedes the technical assistance letter that OSC issued on October 23, 2015.

You request guidance on how to advise a client following an internal audit of the client's Forms I-9. First, you seek guidance on what steps your client should take with respect to Permanent Resident Cards (Forms I-551) that you doubt the veracity of. You state that your firm's inclination is to advise the client to meet with the employees whose documentation you believe is doubtful and request that the employee present different documentation. You are concerned, however, that this post-employment request for different documentation could result in possible discrimination complaints because the affected employees share the same national origin. Second, you ask whether your firm has an "obligation to train" this client in "what to look for in a valid green card" or whether that training is "outside the scope of what their HR should be trained to do since that would take them beyond the 'reasonable person' standard?"

OSC cannot provide an advisory opinion on any set of facts involving a particular individual or entity. However, we can provide some general guidelines regarding employer compliance with the anti-discrimination provision of the Immigration and Nationality Act ("INA"). The anti-discrimination provision prohibits four types of employment-related conduct: (1) citizenship or immigration status discrimination in hiring, firing, or recruiting for a fee; (2) national origin discrimination in hiring, firing, or recruiting for a fee; (3) unfair documentary practices during the employment eligibility verification (Form I-9 and E-Verify) process ("document abuse"); and (4) retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision. 8 U.S.C. § 1324b. For more information about OSC, please visit our website at: <http://www.justice.gov/crt/about/osc>.

The issues raised in your email implicate both an employer's obligations to avoid discrimination in violation of the anti-discrimination provision and an employer's obligations to comply with the employer sanctions provisions at 8 U.S.C. § 1324a. For guidance about 8 U.S.C. § 1324a's prohibition against knowingly employing an individual who is not authorized to work in the United States, we direct you to Immigration and Customs Enforcement ("ICE") within the Department of Homeland Security. Information about ICE's worksite enforcement activities can be found at www.ice.gov/worksite, and contact information for Special Agent in Charge field offices can be found at www.ice.gov/contact.

To prevent discrimination in violation of the anti-discrimination provision, an employer (or its representative) conducting an internal Form I-9 audit should conduct the audit in a consistent manner – treating similarly-situated employees in a similar manner – and should not treat employees differently based on citizenship, immigration status, or national origin. For example, an employer should not base its selection of which Forms I-9 to review on employees' citizenship, immigration status, or national origin. In addition, employers should apply the same level of scrutiny to Form I-9 documentation and not apply different levels of scrutiny based on citizenship, immigration status, or national origin.

In answer to your specific question regarding Permanent Resident Cards that you doubt the veracity of, we refer you to joint guidance that OSC and ICE recently issued. The guidance reminds employers that they "are required to accept original Form I-9 documentation that reasonably appears to be genuine and to relate to the individual presenting the documentation." *Guidance for Employers Conducting Internal Employment Eligibility Verification Form I-9 Audits*, U.S. Immigration and Customs Enforcement and the Office of Special Counsel for Immigration-Related Unfair Employment Practice, at 3 (2015), available at <http://www.justice.gov/crt/file/798276/download>. However, in the context of an internal audit, an employer "should recognize that it may not be able to definitely determine the genuineness of Form I-9 documentation based on photocopies of the documentation" and "[a]n employer may not conclude, without foundation, that a photocopy of an employee's Form I-9 documentation is not genuine or does not relate to the individual." *Id.* The guidance also advises that "[a]n employer should not request documentation from an employee solely because photocopies of the documents are unclear."


If an employer conducting an internal Form I-9 audit concludes, based on a photocopy, that a document does not appear genuine or to reasonably relate to an individual, the employer "should address its concern with the employee and provide the employee with the opportunity to choose a different document to present from the Lists of Acceptable Documents." *Id.* However, the employee also has the option to give the employer the originally presented document to resolve the employer's concerns, and the employer is not prohibited from reviewing the original document and determining that it appears to be genuine and to reasonably relate to the employee. If after reviewing the originally presented document, an employer determines that it appears genuine and reasonably relates to the employee, then the employer must accept that document and not request additional documents. If the originally presented document is unavailable or if, after reviewing the original document, the employer concludes that it does not appear to be genuine or to reasonably relate to the individual, the employer should provide the employee with

an opportunity to choose a different document to present from the Lists of Acceptable Documents.

We direct you to ICE regarding your question on whether your firm is obligated to train your client on “what to look for in a valid green card.” We reiterate, however, that an employer that subjects documentation to additional scrutiny based on the citizenship, immigration status, or national origin of the employee presenting the documentation may violate the anti-discrimination provision.

We hope this information is helpful. Thank you for contacting OSC.

Sincerely,



Alberto Ruisanchez
Deputy Special Counsel