



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*

SEP 10 2012

David R. Burton
General Counsel
National Small Business Association
1156 15th Street NW, Suite 1100
Washington, DC 20005-1711

Dear Mr. Burton:

Your letter of June 21, 2012, to the U.S. Department of Homeland Security ("DHS"), Immigration and Customs Enforcement ("ICE") seeking clarification on a number of questions relating to the Deferred Action for Childhood Arrivals ("DACA") program has been referred to the U.S. Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") for partial response.

OSC, a section within the Department of Justice's Civil Rights Division, is responsible for enforcing the anti-discrimination provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324b, which prohibits discrimination in hiring, firing, or recruitment or referral for a fee that is based on an individual's national origin or citizenship status. The statute also prohibits unfair documentary practices during the employment eligibility verification (Form I-9 and E-Verify) process on the basis of citizenship status or national origin (document abuse), and retaliation or intimidation. OSC cannot provide specific information regarding DACA as DHS is responsible for its implementation. However, we can provide some general guidelines regarding employer compliance with the INA's anti-discrimination provision, which may answer some of your questions.

In your first question, you ask whether "those receiving deferred action can be hired, and, if so, what documents constitute proof they are authorized to work." Every individual in the United States is required to establish his or her employment authorization by satisfying the requirements of the Form I-9. 8 U.S.C. § 1324a(b). Information on the requirements of the Form I-9 can be found in the Instructions that accompany the Form I-9, on the U.S. Citizenship and Immigration Services ("USCIS") I-9 Central website (www.uscis.gov/I-9Central) and in the USCIS Handbook for Employers, Instructions for Completing Form I-9 (Form M-274, Rev. 06/01/11). One of the documents acceptable for purposes of the Form I-9 is an Employment Authorization Document (Card) that contains a photograph (Form I-766). Under existing regulations, an individual whose case has been deferred is eligible to receive employment authorization for the period of deferred action, provided he or she can demonstrate "an economic necessity for employment." www.uscis.gov/childhoodarrivals. OSC is not aware of any guidance at this time

indicating that the requirements of the Form I-9 have been changed for beneficiaries of the DACA program.

In your third question you ask what an employer should “do when a person who has received deferred action fails (as is likely) the E-Verify verification process.” An employer that participates in the E-Verify program should continue to use the program for all new hires, regardless of citizenship status or national origin, and should follow appropriate procedures applicable to the E-Verify result that is generated for each employee. In particular, OSC notes that employers are generally prohibited from running existing employees through E-Verify and from taking adverse action against an employee for receiving a tentative nonconfirmation (“TNC”) if the employee decides to contest the TNC, unless and until that TNC becomes a final nonconfirmation (“FNC”) in E-Verify. 8 U.S.C. § 1324a note, Sect. 403(a)(4)(B)(iii). OSC is not aware of any guidance at this time indicating that existing E-Verify procedures have been changed for beneficiaries of the DACA program. Nor is OSC aware that E-Verify would be unable to confirm the employment eligibility of individuals who have received Employment Authorization Documents, whether based on the DACA or other programs.

In your fourth question you ask: “How long does a deferred action employment authorization last? What must an employer do when it expires? When are employers subject to civil or criminal penalties for retaining—or failing to retain—someone whose deferred action has expired?” Public guidance from USCIS indicates that beneficiaries of the DACA program are eligible for employment authorization during the period of deferred action. USCIS, Consideration of Deferred Action for Childhood Arrivals Process, www.uscis.gov/childhoodarrivals. Employers are required to reverify the employment authorization of employees that have a temporary period of work authorization. Discussion of this requirement and the procedures for proper reverification of employment authorization are set forth in the Instructions to the Form I-9, on the I-9 Central website, and in the Handbook for Employers referenced above. OSC is not aware of any guidance at this time that reverification procedures are different for beneficiaries of the DACA program. The prohibition against discrimination in the Form I-9 process includes reverification, as well.

In your seventh question, you ask: “When are employers subject to civil or criminal penalties for failing to hire someone who is eligible for or has received deferred action? Can an employer take into account the ‘temporary’ nature of the work authorization when deciding among candidates?” The anti-discrimination provision of the INA provides that employers may not discriminate in the hiring process on the basis of an applicant’s citizenship status in the case of a “protected individual,” defined to include citizens and nationals of the United States, certain lawful permanent residents, refugees and asylees. 8 U.S.C. § 1324b(a)(3). Accordingly, employers do not violate the anti-discrimination provision of the INA by refusing to hire an individual who does not fall within the definition of a “protected individual” on the basis of his or her citizenship status. 8 U.S.C. § 1324b(a)(1)(B). Beneficiaries of the DACA program do not have a citizenship status that falls within the definition of a “protected individual,” and therefore are not protected from citizenship status discrimination under the anti-discrimination provision. Please note, however, that all individuals with employment authorization, including those falling outside the definition of a “protected individual,” are protected from national origin discrimination under 8 U.S.C. § 1324b(a)(1) and from document abuse under 8 U.S.C. §

1324b(a)(6). Consequently, employers may not use the "temporary nature" of an individual's employment authorization as a pretext for discrimination on the basis of national origin. Furthermore, employers should ensure that beneficiaries of the DACA program are not subjected to unfair documentary practices in the employment eligibility verification and reverification process. Finally, beneficiaries of the DACA program are protected from retaliation for exercising their rights under the anti-discrimination provision of the INA. 8 U.S.C. §1324b(a)(5).

The remainder of your inquiry does not pertain to the anti-discrimination provision. We hope this information is helpful. Please do not hesitate to contact the Department, or OSC directly at oscrt@usdoj.gov, if we may be of assistance with this or any other matter.

Sincerely,



Seema Nanda
Deputy Special Counsel