

Avoiding Citizenship and National Origin Discrimination— The Tricky Analysis Surrounding What Employers May Request from Foreign National Candidates During the Pre- employment Process



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It may be hard to imagine, but prior to 1986 it was not illegal for an employer to hire an undocumented worker. All of that changed with the enactment of the Immigration Reform and Control Act of 1986 (IRCA). In addition to requiring employers to verify the work eligibility for all employees, IRCA's antidiscrimination provisions prohibit an employer from discriminating in hiring or firing on the basis of an individual's citizenship status or national origin.

The pre-employment process is wide open with traps for an employer to inadvertently run afoul of antidiscrimination provisions under IRCA. One issue that is particularly tricky, and perhaps not given enough attention, is what an employer is and is not allowed to request from a foreign national candidate seeking employment. On one hand, it is impossible to properly assess eligibility for applicable nonimmigrant work authorization options without knowing the individual's complete immigration history. On the other hand, an employer needs to be mindful of not stumbling into a citizenship status or national origin discrimination claim. How does an employer properly walk this fine line?

I. Antidiscrimination Provisions

We must first understand the antidiscrimination provisions under IRCA. Section 274B(a)(1) of the Immigration and Nationality Act (“INA”) reads that it is an unfair immigration-related employment practice for an employer to discriminate against any individual with respect to hiring, recruiting, or discharging the individual because of his/her citizenship status or national origin. Citizenship status includes an individual’s immigration status.

However, the INA’s antidiscrimination provisions for citizenship discrimination only apply to protected individuals under the law, which includes (1) U.S. citizens and nationals; (2) lawful permanent residents (green card); (3) refugees; and (4) asylees. These citizenship discrimination provisions therefore do not apply to foreign nationals in nonimmigrant status.

While nonimmigrants are not a protected class of individuals for *citizenship discrimination*, employers still need to be mindful that nonimmigrants could claim *national origin discrimination* if they believe the decision not to hire them was based on country of origin, accent or appearance. National origin discrimination applies to treating individuals differently because of place of birth, country of origin, ancestry, native language, accent or because they look “foreign.”

II. How Should Employers Juggle These Considerations?

An employer is not required to hire a foreign national who requires sponsorship for non-immigrant work authorization. But how does an employer inquire about work authorization status without worrying about engaging in citizenship or national origin discrimination?

Thankfully, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) provides some cover and helpful guidance on what initial inquiries are allowed. OSC confirms that employers may ask these three questions during the pre-employment process:

1. Do you now, or will you in the future, require sponsorship (e.g., H-1B visa status, etc.) to work legally for THE COMPANY in the United States?
2. If you will require sponsorship, do you currently hold Optional Practical Training (OPT)?
3. If you currently hold OPT, are you eligible for a 24-month extension of your OPT, based upon a degree from a qualifying U.S. institution in Science, Technology, Engineering, or Mathematics (STEM), as defined by Immigration & Customs Enforcement?

See <https://www.justice.gov/crt/file/867386/download>

It is important to note that these three questions are an all or nothing proposition. If you ask one, you need to ask all three.

The responses to these three questions may elucidate information that the individual is a foreign national who will

require sponsorship. In fact, in many cases, even without these three questions, a foreign national candidate will be very up front with their immigration status and volunteer information about their sponsorship needs. An employer's next consideration is how to proceed with this knowledge. Is it safe to request documentation regarding their immigration history or should that be deferred until after the offer of employment has been officially accepted?

There is no explicit right or wrong answer to that question. Some employers may choose to not ask any related work authorization questions during the pre-employment process, while others will only ask the three questions above provided by the OSC. Still others are comfortable with requesting immigration history information from a foreign national in nonimmigrant status.

Interestingly, since nonimmigrants are not protected under INA antidiscrimination provisions, requesting certain documentation and or deciding not to hire a nonimmigrant based on the sponsorship requirement would not violate antidiscrimination provisions. The OSC confirms this by writing:

"Accordingly, 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 likely not violate 8 U.S.C. 1324b. Similarly, an employer that asks questions designed to prefer certain classes of nonimmigrant visa holders (e.g. STEM OPT students) over other classes of nonimmigrant visa holders is unlikely to violate the INA's prohibition against citizenship status discrimination."

See <https://www.justice.gov/crt/file/867386/download>

Therefore, if the individual volunteers information about their nonimmigrant status or the initial three questions approved by the OSC trigger a confirmation that an individual is a foreign national nonimmigrant who requires sponsorship (e.g. H-1B), an employer may request documentation relating to the individual's H-1B eligibility without violating citizenship status discrimination provisions. They may wish to do so before making an offer, while other employers defer this analysis until after the offer and risk the scenario of having to rescind the offer.

While those in nonimmigrant status are not a protected class under citizenship discrimination provisions, an employer still needs to be careful about those in a protected class or engaging in national origin discrimination.

For example, OSC cautions against requesting certain documentation and engaging in citizenship discrimination against a *protected class* of individual. It writes:

"However, asking job applicants detailed questions about their immigration or citizenship status may deter individuals who *are* protected from citizenship discrimination, such as refugees and asylees, from applying due to a misunderstanding about their eligibility for the position. Therefore, we caution employers against asking detailed questions pertaining to status that may lead to such confusion."

See <https://www.justice.gov/crt/file/867386/download>

Again, while nonimmigrants are not a protected class under citizenship discrimination, national origin discrimination is still a concern. OSC confirms that "...all work-authorized individuals are protected from national origin discrimination under the antidiscrimination provision. Accordingly, individuals who believe that they were not hired

based on national origin—for example, their country of origin, accent or appearance—may allege discrimination on this basis.”

III. No Really... How Should Employers Juggle These Considerations?

These can be slippery concepts and trying to forge a policy to cover every scenario can feel overwhelming. There are some simple steps to consider:

- Take a conservative approach and do not ask for any citizenship or immigration status information during the pre-employment process. This may require an offer to be rescinded if it turns out that an individual cannot be sponsored for nonimmigrant works status.
- Ask the three questions approved by OSC, but do not request any specific documentation relating to immigration history. Again, this may require an offer to be rescinded if it turns out that an individual cannot be sponsored for nonimmigrant works status. If the individual volunteers information about their nonimmigrant status or the initial three questions approved by the OSC trigger a confirmation that an individual is a foreign national nonimmigrant who requires sponsorship (e.g., H-1B), request documentation relating to the individual's H-1B eligibility. While this would not violate citizenship discrimination provisions, be very careful not to trigger any national origin discrimination issues.
- In any case, do not request documentation verifying employment eligibility prior to extending an offer.
- In any case, be mindful about documented reasons for not hiring an individual.
- Always be consistent with whatever approach you take.

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