The Immigration and Nationality Act (INA) prohibits employers from knowingly hiring individuals who are not authorized to work in the United States. The INA, consequently, requires employers to verify the identity and employment eligibility of every new hire, including U.S. citizens. Employers who do not comply may be sanctioned by the Federal Government.

As part of the employment eligibility verification process, all new hires and their employers must complete the DHS Form I-9. On the first day of employment, employees must certify that they are U.S. citizens, noncitizen nationals, lawful permanent residents, or individuals otherwise authorized to be employed in the United States. Within three days of hire, every new employee must show their employer documentation establishing identity and eligibility to work in the United States. (See the I-9 Form list of acceptable documents.)

Congress recognized that the employment eligibility verification requirements and potential sanctions against employers for hiring undocumented workers could discourage some employers from hiring certain U.S. citizens and other individuals who are authorized to work in the United States. Indeed, subsequent studies conducted by the Government Accountability Office confirmed that the Form I-9 process led to discrimination, primarily against U.S. citizens and work authorized individuals who are of Hispanic and Asian descent. In addition, employers may be confused about the proper procedures to complete the Form I-9, and about the appropriate documentation that can be presented to establish employment eligibility and identity.

To address such problems, in 1986, Congress enacted the anti-discrimination provision of the INA that is enforced by the Office of Special Counsel (OSC) for Immigration-Related Unfair Employment Practices, within the Civil Rights Division, of the U.S. Department of Justice. Employers that are found to have unlawfully discriminated in violation of this provision may be required to pay back wages and civil penalties and to hire or rehire workers.

The INA’s anti-discrimination provision contains four prohibitions:

1) Prohibits citizenship (or immigration) status discrimination with respect to hiring, firing, and referring or recruiting for a fee. Citizenship status discrimination occurs when an employer treats individuals differently because of their citizenship or immigration status or because the individual is perceived as looking or sounding “foreign.” For example, an employer who refuses to hire immigrants or has more stringent hiring requirements for U.S. citizens who appear “foreign” may be committing citizenship status discrimination.

2) U.S. citizen and “green-card” (i.e., permanent resident) only policies are generally prohibited, unless required by law, regulation, or government contract. Employers may not refuse to hire refugees and asylees because their work
authorization contains a future expiration date. All employers with more than three employees are covered by the INA’s prohibition against citizenship status.

3) The INA prohibits national origin discrimination with respect to hiring, firing, and referring or recruiting for a fee. Employers may not treat individuals differently because of their place of birth, country of origin, ancestry, native language, or accent. OSC covers national origin discrimination charges against employers with four to fourteen employees; the Equal Employment Opportunity Commission has jurisdiction over national origin claims involving employers with 15 or more employees.

4) The INA also prohibits unfair documentary practices during the employment eligibility verification (Form I-9) process. In general, employers may not request more or different documents than are required to establish a worker’s identity and eligibility to work in the United States or reject documents that appear to be reasonably genuine upon their face. Employers must accept all documents that are sufficient to complete the form as long as they appear reasonably genuine on their face and relate to the employee. All individuals who possess a driver’s license and Social Security card may present them to satisfy Form I-9 requirements. Employers may not require aliens to produce “green cards” or U.S. citizens who appear “foreign” to produce birth certificates. Instead, it is the employee’s choice which of the acceptable Form I-9 documents to present. All employers with more than three employees are covered by the INA’s prohibition against unfair documentary practices.

It is unlawful for employers to intimidate, threaten, coerce, or retaliate against an individual who intends to or has filed a discrimination charge with OSC, has provided testimony or otherwise assisted OSC in an investigation, proceeding, or hearing, or has otherwise asserted their rights under the statute.

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“Look at the Facts – Not at the Faces”
10 Steps to Take to Avoid Immigration-Related Employment Discrimination

1. Treat all people the same when announcing a job, accepting applications, interviewing, offering a job, verifying eligibility to work, hiring, and firing.

2. Examine and accept original documents that reasonably appear genuine and relate to the employee.

3. Do not demand different or additional documents as long as the documents presented prove identity, work authorization, and appear genuine. A list of acceptable documents is on the back of Form I-9.

4. So long as the applicants are authorized to work in the United States, avoid requiring applicants to have a particular citizenship status, such as U.S. citizenship or permanent residence, unless mandated by law or federal contract.

5. Give out the same job information over the telephone to all callers, and use the same application form for all applicants.

6. Base all decisions about firing on job performance and/or behavior, not on the appearance, accent, name, or citizenship status of your employees.

7. Complete the I-9 form and keep it on file for at least 3 years from the date of employment or for one year after termination of employment, whichever is later.

8. On the I-9 form, verify that you have seen documents establishing identity and work authorization for all your new employees—U.S. citizens and noncitizens alike (hired after November 6, 1986).

9. If reverification of employment eligibility becomes necessary, accept any valid documents your employee chooses to present—whether or not they are the same documents the employee provided initially. For reverification, employees need only present either a List A document or a List C document (see the back of I-9 Form).

10. Be aware that U.S. citizenship, or nationality belongs not only to persons born within the fifty states, but may also belong to persons born to a U.S. citizen outside the United States. Persons born in Puerto Rico, Guam, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, American Samoa, or Swains Island also are U.S. citizens or nationals. Finally, also remember that an immigrant may become a U.S. citizen by completing the naturalization process.