It's a common sticking point that often happens when employers finally find the right talent for the position: the candidate is well qualified, but their immigration status and need for visa sponsorship is unclear. Best practices generally dictate that an inquiry concerning a job candidate’s immigration status is not appropriate during the hiring process. But this means an employee might be hired even when their visa is at imminent risk of lapsing post-employment offer. Most employers would prefer to avoid the risks and costs of hiring a new employee in these cases and often consider asking the candidate questions such as:

- Do you now, or will you in the future, require sponsorship (e.g., H-1B visa status, etc.) to work legally in the United States?
- If you will require sponsorship, do you currently hold Optional Practical Training (OPT)?
- 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 and Customs Enforcement?

The Department of Justice (DOJ) Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) recently issued a technical assistance letter addressing whether it is permissible to ask job applicants about sponsorship needs.

OSC explained that 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 likely would not violate the law. OSC also indicated that 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.

However, OSC cautions that asking job applicants detailed questions about their immigration or citizenship status may deter individuals who are protected from citizenship status discrimination, such as refugees and asylees, from applying...
because of a misunderstanding about their eligibility for the position and therefore cautions employers against asking such detailed questions. OSC also cautioned that all work-authorized individuals are protected from national origin discrimination under the antidiscrimination provision.

The TAL is available by clicking here. If you have questions concerning employment based immigration issues, contact Brandon Davis at brandon.davis@phelps.com.