COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

July 24, 2006

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The Honorable Calvin C. Massie, Jr.
Commissioner of the Revenue, Campbell County
P.O. Box 66
Rustburg, Virginia 24588

Dear Mr. Massie:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether a commissioner of the revenue is required to issue a local business license under Chapter 37 of Title 58.1 to an applicant who is not legally present in the United States. If not, you inquire concerning the criteria a commissioner should use to determine whether such an applicant is legally present. You further ask whether the response would be the same when an applicant holds a permanent resident card. Finally, if the commissioner is not required to issue a local business license to an illegal alien, you ask whether a commissioner is obligated to determine the legality of such applicant's residency status.[1]

Response

It is my opinion that federal and state laws prohibit a commissioner of the revenue from issuing a local business license to an applicant who is not legally present in the United States. Further, a commissioner must verify the identity and eligibility of all business license applicants by examining documents specified by federal law, including United States passports, resident alien cards, alien registration cards, or other documents designated by the Attorney General of the United States to determine legal status. It further is my opinion that when a business license applicant holds a permanent resident card, a commissioner may issue a business license to the applicant. Finally, it is my opinion that a commissioner is required to determine an applicant's residency status as part of the business license application process.

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[1]You also ask whether a locality is required to issue a certificate of occupancy to an individual who is not a legal resident. The statutory provision authorizing this Office to respond to requests for official opinions, § 2.2-505, limits the authority to render such an official opinion to questions that are directly related to the discharge of the duties of the official requesting the opinion. The issuance of certificates of occupancy is not within the statutory duties of commissioners of the revenue. The duties of commissioners of the revenue are set out specifically in Article 1, Chapter 31 of Title 58.1, §§ 58.1-3100 to 58.1-3122.2, as well as generally in Titles 15.2 and 58.1. *See* 2000 Op. Va. Att'y Gen. 204, 205. Accordingly, I must decline to render an opinion on this particular matter.

Background

You advise that Campbell County has adopted a local business license ordinance pursuant to § 58.1-3703. You advise that your office issues business licenses for the privilege of engaging in business in Campbell County. You further relate that questions have arisen regarding the issuance of business licenses to individuals who are not legal residents of the United States.

Applicable Law and Discussion

The overriding goal of statutory interpretation is to discern and give effect to legislative intent.[2] Article I, § 8, cl. 4 of the Constitution of the United States provides that Congress shall have the power "[t]o establish an Uniform Rule of Naturalization."[3] The power to regulate immigration — an attribute of sovereignty essential to the preservation of any nation — has been entrusted by the United States Constitution to Congress.[4] "The [Supreme] Court [of the United States] without exception has sustained Congress' 'plenary power to make rules for the admission of aliens.'"[5] It is important to note that the authority to control immigration is vested solely in the federal government, rather than the individual states.[6]

Under the federal Immigration Reform and Control Act of 1986[7] (the "Immigration Act"), an illegal alien cannot lawfully be employed in the United States.[8] An illegal alien has no right to continue to reside in the United States.[9] The Immigration Act "forcefully" makes combating the employment of illegal aliens central to the "policy of immigration law."[10] The Immigration Act establishes an extensive "[e]mployment verification system,"[11] which is designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States.[12]

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[2] *See* Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976); 1990 Op. Va. Att'y Gen. 155, 155 and opinions cited therein.

[3] *See* Mathews v. Diaz, 426 U.S. 67, 81 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."); Galvan v. Press, 347 U.S. 522, 531 (1954) ("[T]hat the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.").

[4] *Id.*

[5] Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (quoting Boutilier v. I.N.S., 387 U.S. 118, 123 (1967) (discussing preeminent role of federal government in regulating immigration)).

[6] *See* Truax v. Raich, 239 U.S. 33, 42 (1915).

[7] *See* Pub. L. No. 99-603, 100 Stat. 3359 (1986).

[8] *See* 8 U.S.C.S. § 1324a(a) (LexisNexis 1997); *see also* VA. CODE ANN. § 40.1-11.1 (2002).

[9] *See generally* Appiah v. I.N.S., 202 F.3d 704 (4th Cir. 2000).

[10] I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 194 n.8 (1991).

[11] 8 U.S.C.S. § 1324a(b) (LexisNexis 1997 & Supp. 2006).

[12] *Id.* at § 1324a(h)(3) (LexisNexis 1997). For an alien to be "authorized" to work in the United States, he or she must possess a valid "social security account number card" or "other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section." *Id.* at § 1324a(b)(1)(C)(i)-(ii) (LexisNexis 1997); *see also id.* § 1324a(h)(3) (defining "unauthorized alien" as any alien "[not] authorized to be so employed by [the Immigration] Act or by the Attorney General"). Regulations implementing these provisions have been promulgated. *See* 8 C.F.R. pt. 274a (2005) ("Control of Employment of Aliens").

This verification system is critical to the regime of the Immigration Act. To enforce it, the Immigration Act mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work.[13] When an alien applicant is unable to present the required documentation, he cannot be hired.[14]

Similarly, when an employer unknowingly hires an illegal alien or the alien becomes unauthorized to continue working while employed, the Immigration Act compels the employer to discharge the worker upon discovery of the worker's undocumented status.[15] Employers who violate the Immigration Act are punished by civil fines[16] and may be subject to criminal prosecution.[17] Additionally, the Immigration Act makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents.[18] Thus, the Immigration Act prohibits aliens from using or attempting to use "any forged, counterfeit, altered, or falsely made document"[19] or "any document lawfully issued to or with respect to a person other than the possessor"[20] for purposes of obtaining employment in the United States. Aliens who use or attempt to use such documents are subject to fines and criminal prosecution.[21]

In addition to the restrictions contained in the Immigration Act, § 40.1-11.1 of the *Virginia Code* imposes a criminal penalty upon those who knowingly employ or assist in the employment of illegal aliens. The Supreme Court of Virginia has observed that § 40.1-11.1 demonstrates "the intent of our legislature to support the national policy."[22]

Neither the Immigration Act nor § 40.1-11.1 specifically addresses whether an illegal alien may obtain a business license. However, the statutes that deny lawful employment to illegal aliens, by extension, also would apply equally to the issuance of a business license. "The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms."[23] Furthermore, statutes should not be interpreted in ways that produce absurd or irrational consequences.[24] "Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."[25] "It is well settled that liberal interpretation of a statute leading

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[13] 8 U.S.C.S. § 1324a(1)(B), (3); § 1324a(b).

[14] *Id.* at § 1324a(a)(1).

[15] *Id.* at § 1324a(a)(2).

[16] *Id.* at § 1324a(e)(4)(A) (LexisNexis 1997).

[17] *Id.* at § 1324a(f)(1) (LexisNexis 1997).

[18] *Id.* at § 1324c(a) (LexisNexis 1997).

[19] *Id.* at § 1324c(a)(2).

[20] *Id.* at § 1324c(a)(3).

[21] *See* 8 U.S.C.S. § 1324c(d)(3) (LexisNexis 1997); 18 U.S.C.S. § 1546(b) (LexisNexis 1994 & Supp. 2006).

[22] Peterson v. Neme, 222 Va. 477, 482, 281 S.E.2d 869, 871 (1981).

[23] *See Vollin*, 216 Va. at 679, 222 S.E.2d at 797.

[24] McFadden v. McNorton, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952); *see also* Op. Va. Att'y Gen.: 1993 at 192, 196, 1991 at 5, 7; 1986-1987 at 307, 308.

[25] Am. Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982).

to absurd or unjust results is to be avoided and that the statute should be given a meaning in accord with its spirit and the purpose of its enactment."[26]

The Immigration Act and § 40.1-11.1 prohibit the employment of illegal aliens by any employer. The prohibition of the employment of illegal aliens is a fundamental basis of federal immigration policy. In my opinion, the policy underlying the immigration laws of the United States, which clearly makes unlawful the employment of illegal aliens, applies with equal clarity to illegal aliens seeking a license to conduct business within the Commonwealth. Such policy dictates that illegal aliens should not garner economic profit from their unlawful presence in the Commonwealth in violation of the Immigration Act and the intent of the General Assembly stated in § 40.1-11.1.

An alien who is a permanent legal resident of the United States is distinguishable from an illegal alien. A permanent resident card evidences an alien's status as a lawful resident with a right to live and work permanently in the United States.[27] A permanent resident card is also called an alien registration receipt card or a "green card." When such card is approved, the resident alien is a lawful permanent resident who is entitled to live and work in the United States.[28] Aliens who are issued green cards have legal status in the United States and may be lawfully employed. Therefore, such aliens may also obtain a business license in order to conduct a business within the Commonwealth.

As previously noted, the Immigration Act mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work.[29] When an alien applicant is unable to present the required documentation, he cannot be hired.[30] Further, a 1977 opinion of the Attorney General concludes that § 40.1-11.1 "imposes a requirement on the persons affected thereby to ensure that any alien employed or referred for employment can provide [the required] documentation."[31] It is, therefore, incumbent upon the official issuing a business license to determine the legal status of a business license applicant's residency as part of the application process.

Conclusion

Accordingly, it is my opinion that federal and state laws prohibit a commissioner of the revenue from issuing a local business license to an applicant who is not legally present in the United States. Further, a commissioner must verify the identity and eligibility of all business license applicants by examining documents specified by federal law, including United States passports, resident alien cards, alien registration cards, or other documents designated by the Attorney General of the United States to determine legal status. It further is my opinion that when a business license applicant holds a permanent resident card, a commissioner may issue a business license to the applicant. Finally, it is my opinion that a commissioner is required to determine an applicant's residency status as part of the business license application process.

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[26] Harris v. United States, 215 F.2d 69, 75-76 (4th Cir. 1954).

[27] *See* 8 C.F.R. § 264.1 (2005); *id.* at 274a.2(b)(1)(v)(A)(2) (2005).

[28] *See* 8 U.S.C.S. § 1255(a) (LexisNexis Supp. 2006).

[29] *See supra* note 13.

[30] *See supra* note 14.

[31] 1977-1978 Op. Va. Att'y Gen. 152, 154.

Thank you for letting me be of service to you.

Sincerely,

Robert F. McDonnell

2:213; 1:941/06-049