STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Ms. Celia Jackson
Secretary
Department of Regulation & Licensing
1400 East Washington Avenue
Madison, WI 53708

Dear Secretary Jackson:

Through the Department of Regulation & Licensing's interim general counsel, you ask whether the Department of Regulation & Licensing and its affiliated licensing and credentialing boards (collectively "DRL") are required to comply with 8 U.S.C. § 1621(a) and (c)(1)(A), which provide that an alien who is not in the United States in compliance with applicable federal law is not eligible for any state public benefit including a professional license or credential.

I have concluded, notwithstanding the absence of any Wisconsin statute limiting eligibility for professional licenses or credentials to persons who are in the country legally, that federal law is controlling so that DRL is prohibited from granting any professional license or credential to an alien who is present in the United States illegally. And because DRL is prohibited from issuing professional licenses or credentials to illegal aliens, it must put in place some kind of procedure practicably designed to reasonably insure that it does not issue licenses or credentials in violation of federal law.

Regulation of immigration is exclusively a federal power. *DeCanas v. Bica*, 424 U.S. 351, 354 (1976). The federal government has broad power to determine which aliens should be admitted to the United States and to regulate their conduct while they are here. *Id.*, 424 U.S. at 358. The states, having no such power, can neither add to nor take from the conditions lawfully imposed by Congress on the admission and residence of aliens in the United States or the several states. *Id.*

Exercising its plenary power over immigration, Congress enacted the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, codified in 8 U.S.C. § 1601, *et seq.*

> The governing principle of this Act is that
>
> an alien who is not—
>
> (1) a qualified alien . . .
>
> (2) a nonimmigrant under the Immigration and Nationality Act . . . , or
>
> (3) an alien who is paroled into the United States . . . for less than one year,
>
> is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

8 U.S.C. § 1621(a). Under the relevant definition, a state or local public benefit includes "any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government[.]" 8 U.S.C. § 1621(c)(1)(A).

In enacting this legislation, Congress expressly declared a national policy to remove the incentive for illegal immigration provided by the availability of public benefits. *Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 607-08 (E.D. Va. 2004); *Doe v. Wilson*, 67 Cal. Rptr. 2d 187, 191 (1997) (quoting 8 U.S.C. § 1601(6)). Thus, Congress intended to preempt existing state laws dealing with the eligibility of aliens for public benefits, *Equal Access Education*, 305 F. Supp. 2d at 605, and eliminate any eligibility illegal aliens had under those laws. *Doe*, 67 Cal. Rptr. 2d at 189.

Any state that wants to act contrary to federal policy has to make an affirmative legislative determination to do so. *Equal Access Education*, 305 F. Supp. 2d at 605. "A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d).

Illegal aliens can only become eligible for state public benefits, therefore, through the enactment of a new state law expressly making them eligible. *Doe*, 67 Cal. Rptr. 2d at 190. In the absence of any such law, states are prohibited from providing illegal aliens with any public benefits other than those few benefits specifically excepted under the federal law. *Equal Access Education*, 305 F. Supp. 2d at 605 n.18; *Doe*, 67 Cal. Rptr. 2d at 190. *See generally Derby v. Brenner Tank, Inc.*, 187 Wis. 2d 244, 247, 522 N.W.2d 274 (Ct. App. 1994) (Supremacy Clause mandates that any conflicts between state and federal law be resolved in favor of federal law).

Wisconsin has not enacted any law affirmatively providing that an alien who is not lawfully present in the United States would be eligible for a public benefit for which the alien would not otherwise be eligible under federal law. Indeed, the Wisconsin Legislature has enacted some laws denying benefits to illegal aliens. *See, e.g.*, Wis. Stat. § 108.04(18) (2005-06) (unemployment benefits); Wis. Stat. § 49.45(27) (2005-06) (medical assistance benefits). So DRL may not issue a professional license or credential to any person who is not in this country legally.

Because DRL is prohibited from issuing professional licenses or credentials to illegal aliens, it must put in place some kind of procedure practicably designed to reasonably insure that it does not issue licenses or credentials in violation of federal law.

Federal law does not dictate what the states must do to insure that applicants for state public benefits are lawfully present in the country so as to be eligible for these benefits. However, Congress has authorized the states to "require an applicant for State and local public benefits (as defined in section 1621(c) of this title) to provide proof of eligibility," which would include proof that they are qualified legal aliens. 8 U.S.C. § 1625.

Asking applicants for a professional license or credential to supply evidence substantiating their legal immigration status would be consistent with existing state procedures. Wisconsin law requires applicants for professional licenses or credentials to provide their respective examining board with evidence that they meet qualifications necessary to obtain the license or credential. *E.g.*, Wis. Stat. § 448.05(2) (2005-06) (license to practice medicine); Wis. Stat. § 452.09(2) (2005-06) (license to practice real estate); Wis. Stat. § 470.04(2) (2005-06) (license to practice geology). The preemptive federal law regarding immigration status essentially creates an additional qualification for obtaining a state professional license or credential, *i.e.*, that the applicant be in the country legally. So requiring an applicant to provide evidence of legal immigration status simply adds one more qualification to the list of those the applicant must establish to obtain the license or credential.

Finally, although federal law requires the states to verify the immigration status of a person who applies for federal public benefits, it does not require, but permits, the states to verify the immigration status of a person who applies for state public benefits. *See* 8 U.S.C. § 1642(b). Similarly, although state law does not require DRL to verify the qualifications of an applicant for a professional license or credential, it does not prohibit DRL from verifying these qualifications.

However, I recommend that DRL verify the immigration status of all applicants for state professional licenses and credentials to be certain that it is not issuing them in violation of federal law.

This leads to your second question which is what practical steps DRL should take to implement a screening process so that it does not issue professional licenses or credentials to illegal aliens in violation of federal law.

I suggest that you contact the Systematic Alien Verification for Entitlements ("SAVE") Program operated by the U.S. Citizenship and Immigration Services in the Department of Homeland Security. As stated on the SAVE internet home page, the SAVE program enables federal, state, and local government agencies and licensing bureaus to obtain the immigration information they need to determine a non-citizen applicant's eligibility for public benefits. More information about the SAVE program is available on the program website or by calling (202) 272-8720.

Additionally, pursuant to 8 U.S.C. § 1642(a)(1), the Attorney General of the United States has issued interim guidance to determine who is a qualified alien eligible to receive federal public benefits. The interim rules are printed in 62 Fed. Reg. 61344-02 (Nov. 17, 1997), and a copy is enclosed.

I hope that this information is useful to the Department of Regulation & Licensing and its affiliated licensing and credentialing boards.

Sincerely,

J.B. Van Hollen

J.B. Van Hollen
Attorney General

JBVH:TJB:ajw:lkw

Enclosure