



AMERICAN IMMIGRATION LAWYERS ASSOCIATION

MICHIGAN CHAPTER

January 25, 2008



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Secretary Terri Lynn Land
Michigan Department of State
Lansing, MI 48918

**RE: Michigan Driver's Licenses for Foreign Nationals
AG Opinion No. 7210**

Dear Secretary Lynn Land:

This letter is written to request that you reverse your decision to deny driver's licenses to persons who are not US citizens or have a permanent resident card, and include a broader class of foreign nationals in Michigan, consistent with Michigan law and federal immigration law. We strongly believe that your office misread the implications and challenges for businesses and lawfully present foreign nationals, in your office's attempt to implement the Michigan Attorney General's Opinion No. 7210 regarding illegal aliens and eligibility for Michigan driver's licenses.

I am writing this letter as the Michigan Chapter Chair for the American Immigration Lawyers Association (www.aila.org). The American Immigration Lawyers Association (AILA) is the national association of over 10,000 attorneys and law professors who practice and teach immigration law. AILA Member attorneys represent tens of thousands of US families who have applied for permanent residence for their spouses, children, and other close relatives to lawfully enter and reside in the United States. AILA Members represent thousands of US businesses and industries who sponsor highly skilled foreign workers seeking to enter the United States in a temporary or --having proven the unavailability of US workers -- permanent basis. AILA Members also represent foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis. Founded in 1946, AILA is a nonpartisan, not-for-profit organization that provides its Members with continuing legal education, information, professional services, and expertise through its 36 chapters and over 50 national committees. AILA is an Affiliated Organization of the American Bar Association and is represented in the ABA House of Delegates. The Michigan Chapter has over 250 members throughout our state.

We believe that Michigan law, the complexity of US immigration law, and the large number of lawfully present foreign nationals in Michigan, require the Secretary of State to implement an expansive reading and interpretation of the Attorney General's opinion. Our state cannot afford to increase another layer of difficulty to doing business to persons who are not "illegal aliens", and accordingly many more foreign nationals in Michigan should be eligible for a Michigan driver's license. We assert that there is no industry in Michigan that is not impacted negatively by your new driver's license requirements.

Our Concerns

Homeland Security

The issues of border security and undocumented aliens have become a priority at the national and state levels of government. The US Attorney General stated in his opinion that, "Recent Developments in state and federal law, as well as the changing imperatives of national security since OAG No 6883 was issued, warrant a reexamination of this subject." In a report entitled HOMELAND SECURITY Federal Effort Are Helping to Alleviate Some Challenges Encountered by State and Local Information Centers, the U.S. Government Accountability Office (hereafter "GAO") began its review under the premise that "A breakdown in information sharing was a major factor contributing to the failure to prevent the attacks of September 11, 2001, according to the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission)." The GAO added that, "most states and some local governments have, largely on their own initiative, established fusion centers to address gaps in homeland security, terrorism, and law enforcement information sharing by the federal government to provide a conduit of this information sharing within the state."¹ Accordingly, the State of Michigan was, prior to your new requirements, assisting in the efforts to keep the US safe by maintaining a complete and comprehensive driver's license database.

Businesses in Michigan

We are deeply concerned that, due to your decision to limit a driver's license to only persons who are US citizens or "lawfully admitted for permanent residence", your office is forcing US employers and foreign owned companies in Michigan to re-locate their operations outside of Michigan, as their lawfully present foreign national workforce population must drive while lawfully present in Michigan. With an ineffective public transportation system throughout the state of Michigan, we believe many employers, who may already be looking elsewhere to start, expand, or move their operations, now have a very good reason to locate outside of our state. This anti-business measure would seem to be at odds with the traditional Republican voting base.

According to the Department of Homeland Security, over 33 million new temporary visa holders ("nonimmigrant aliens") were admitted to the US in 2006. Michigan alone received over 373,000 of these new lawfully present noncitizens. These foreign nationals are lawfully present in the US and provide a significant benefit to Michigan's economy while they are here. For example, many of the automotive executives, managers, and key engineering talent come to Michigan for short term work assignments for Michigan and foreign owned companies. Every industry in Michigan is negatively impacted by your new driver's license requirements.

Highway Safety

If the Secretary continues with her restrictive approach in interpreting the Attorney General's opinion, the state will collect fewer fees from driver's license applications. We strongly believe that unlicensed foreign nationals will continue to drive to work and around our state. Without the proper screening and testing, they will endanger our residents. They may also be more likely to flee accident scenes. Moreover, without a Michigan license, these foreign nationals will probably not be able to secure automobile insurance, which could have devastating consequences to Michigan's citizens and noncitizens alike.

¹ GAO-08-35 p. 1 (October 2007).

Your interpretation of the Attorney General's definition also appears to remove the restriction on use of a foreign driver's license to drive in Michigan for those who are resident in the state for more than 30 days. If the AG's opinion is interpreted to deem only US citizens and aliens admitted for permanent residence to be "residents" for driver's license purposes, then others living and driving in the state for 30 days would not be deemed subject to this restriction. This would allow the use of foreign driver's licenses and render auto insurance requirements difficult or impossible to enforce for such drivers.

Statutory Construction

The legislature has spoken and elected to include many more persons in Michigan a driver's license, assuming they meet all other eligibility requirements. Accordingly, your office should interpret the Attorney General's opinion very strictly, and not commit what commentators are already calling "economic suicide" for our state.

Work Authorization

The Attorney General did mention a driver's license and its usefulness in securing work authorization in the US. It is worth noting that a driver's license is never the only evidence that a prospective employee can present to prove work authorization. The I-9 Employment Eligibility Verification form requires that an employer see, if a driver's license is presented to prove work authorization, an additional form of valid identification to work in the US in addition to the driver's license (like a social security number without a DHS restriction printed on the card). Federal law requires that an I-9 form be completed for every newly hired employee in the US. Making foreign nationals ineligible for a driver's license, unfortunately, will do nothing to address unlawfully present foreign nationals working for Michigan employers.

The Attorney General mentioned in his opinion that the Social Security Administration (SSA) has taken significant steps to limit fraud in their application and social security issuance process. By preventing foreign nationals who lack lawful status or valid work authorization from securing a social security number, SSA has taken the critical step in ensuring only authorized noncitizens can work in the US. Precluding noncitizens from securing a Michigan driver's license will not change federal work eligibility requirements, and will not address undocumented workers taking jobs from Michigan residents.

What Does the Attorney General's Opinion Actually Require?

We believe the Attorney General's opinion does not require that only aliens lawfully admitted for permanent residence (also called "green card holders") or US citizens are eligible for a Michigan driver's license, assuming they meet all other residency and testing requirements. We believe the Secretary must include many other groups of foreign nationals who are lawfully present in the classes of persons who are eligible for a Michigan Driver's license. The Attorney General's opinion did not use the "terms of art" under the Immigration and Nationality Act (INA) or its Regulations. The Attorney General specifically confirmed in his opinion that "Michigan law must be interpreted against the background of federal law when considering questions involving aliens". Accordingly, we believe that the Secretary should change her policy and utilize an appropriate level of flexibility in implementing the Attorney General's opinion.

The Attorney General titled the opinion "Permanent Residency Requirement of Driver's Licenses," and states in the summary that "A person who is not a lawful resident of the United

States cannot be a resident” for driver’s license purposes. The Attorney General only cites one section of the INA throughout his entire opinion, and that is the section that defines aliens “lawfully admitted for permanent residence” (8 USC 101(a)(20)). The Attorney General did cite several cases in his opinion, but these appear to be cited to confirm his authority to change Michigan’s procedures, rather than to confirm that he was limiting this rule to only include green card holders.

The Attorney General did not use the term “lawfully admitted for permanent residence” in either the title or the summary of his opinion. The Attorney General was free to do so, but did not. We are left to assume that he may have meant something different in his opinion.

The Attorney General did focus his opinion on illegal aliens. He stated in the body of his opinion that “The question then becomes whether an illegal alien may be legally considered a permanent resident of the state”. Note, the Attorney General finally referred to the INA five paragraphs later by citing the official definition of aliens lawfully admitted for permanent residence. In addition, he clearly states in Footnote 4 that “This opinion addresses only whether an illegal alien may obtain a driver’s license in Michigan under the specific provisions and definitions set forth in the Michigan Vehicle Code”.

The Attorney General also did not defer to the Immigration Act’s definition of “residence” or “permanent” for Michigan’s driver’s licenses rules (cited at 8 USCS 1101(a)33, and (31) respectively).

It is worth noting that no other state in the US requires that only US citizens or aliens lawfully admitted for permanent residence are eligible for a state driver’s license. We would be the first state to take that restrictive position. There is nothing in the text of the opinion that confirms the Attorney General was taking that bold step.

For these reasons we assert that the Secretary must interpret the Attorney General’s Opinion No. 7210 to include more persons than just those who are US citizens or aliens lawfully admitted for permanent residence.

Who Should Be Allowed to Receive a Michigan Driver’s License?

The definition of who is an “illegal alien” is not an easy determination, even for those of us who practice in the field. The term “illegal alien” is not defined in the Immigration and Nationality Act (it is referred to in a few sections but is never defined, which is further demonstrated by the Attorney General citing a dictionary definition for illegal alien). We assert that all noncitizens who are able to prove they are in the US and not “illegal”, who meet all other Michigan defined domicile and examination eligibility requirements, should be eligible for a Michigan driver’s license, and should include:

1. All noncitizens who have been issued a resident alien card or stamp in an unexpired foreign passport, form I-551 card or stamp, by the US Citizenship and Immigration Services (USCIS).
2. All noncitizens in the US in nonimmigrant status as defined under 8 USCS 1101(a)(15), and as evidenced by a valid I-94 card. US immigration law allows for temporarily admitted noncitizens, referred to as “nonimmigrant aliens”, to work or be present in the US under a wide range of categories. Most of these classifications can be extended, for many years. Many noncitizens will hold this status for several years, if they are applying to secure a US green card, until the green card can be approved.

3. All noncitizens who have an application pending for an extension of their nonimmigrant status, as evidenced by an I-797 receipt notice issued by a USCIS Regional Office. Please note, these noncitizens are eligible to continue working in the US for up to 240 days while the extension process is pending (8 CFR 274a.12(b)(20)). USCIS frequently experiences significant processing delays.
4. All persons who can evidence their ability to work in the US with an unexpired Employment Authorization Document issued by the USCIS (form I-766, I-688, I-688A, or I-688B).
5. All noncitizens who have been granted asylee or refugee status in the US.
6. All noncitizens who have applied for asylee or refugee status in the US.
7. All persons eligible to work in the US, as listed on the I-9 Employment Eligibility Verification Form, page 2.
8. Any other noncitizens not defined in the above paragraphs, but are listed as eligible for employment in the US under 8 CFR 274a.12.
9. All persons with a social security number.
10. All persons not "unlawfully present" in the US pursuant to 8 USCS 212(a)9(B), and as defined in the US Department of Justice Memorandum dated June 12, 2002, interpreting unlawful presence, in the absence of USCIS regulations (see the attached). These include: persons who have been granted voluntary departure, withholding or suspension of deportation or cancellation of removal, temporary protected status or deferred enforced departure; those persons subject to withholding or deferral of removal and deferred action; and those persons with properly filed applications based on Cuban-Haitian entrant, legalization and special agricultural worker applications for lawful temporary residence which are pending through an administrative appeal, and Adjustment of Status (I-485).


Deferral to the Federal Government's Classifications

Finally, we strongly assert that any weaknesses in the US border security, admission process to the US, or employment verification process should be dealt with on a federal level, and not through draconian changes at the state or local levels.

Conclusion

For these reasons, we request that you reverse your decision to deny driver's licenses to persons who are not US citizens or have a permanent resident card, and include a broader class of foreign nationals in Michigan, consistent with Michigan law and federal immigration law.

Very truly yours,



Michael P. Nowlan



U.S. Department of Justice
Immigration and Naturalization Service

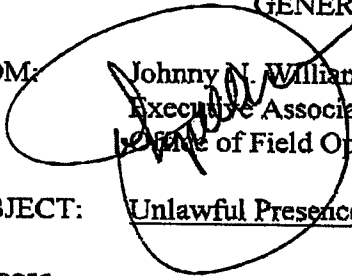
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Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

JUN 12 2002

MEMORANDUM FOR REGIONAL DIRECTORS
DEPUTY EXECUTIVE ASSOCIATE COMMISSIONER,
IMMIGRATION SERVICES
GENERAL COUNSEL

FROM:  Johnny N. Williams
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Unlawful Presence

Purpose

This memorandum addresses issues relating to the 3- and 10-year bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Immigration and Nationality Act (Act) and the decision to designate as a period of stay authorized by the Attorney General the entire period during which an alien has been granted deferred action by the Immigration and Naturalization Service (INS). This period of stay authorized by the Attorney General covers only the period during which deferred action is in effect. It does not eliminate any unlawful presence that accrued before the alien was granted deferred action.

The decision to designate deferred action as a period of stay authorized by the Attorney General does not in any way alter the nature of deferred action or the standards for granting it. See Chapter 17.7 of the INS's Detention and Deportation Manual. Note that Chapter 17.7(a) will be amended in the second paragraph to be consistent with the policy guidance provided herein.

Any adjustment of status application that is pending denial or has been denied because of unlawful presence that the alien accrued while in deferred action status may be re-evaluated in light of this policy memorandum.

This memorandum also provides clarification on the period of stay authorized by the Attorney General with respect to applicants for temporary protected status (TPS) and deferred enforced departure (DED). These policies and procedures are effective immediately and will be included in the Adjudicator's Field Manual (AFM) in the next release of INSERTS.

For purposes of section 212(a)(9)(B)(ii) of the Act, and for no other purpose or benefit under the Act, the INS has designated the following as periods of stay authorized by the Attorney General:

- Current grants of voluntary departure;
- Current grants of deferred action in effect on or after April 1, 1997;
- Refugee status;
- Asylee status;
- Grants of withholding or deferral of removal under the United Nations Convention Against Torture;
- Legalization and special agricultural worker applications for lawful temporary residence which are pending through an administrative appeal;
- Grants of withholding or suspension of deportation, or cancellation of removal;
- Properly filed applications for temporary and permanent residence by Cuban-Haitian entrants under section 202(b) of Pub. L. 99-603 through administrative appeal;
- Current grants of TPS and DED. For TPS, the period of stay authorized by the Attorney General begins on the date a prima facie TPS application is filed with the Service, if that application is ultimately approved. If the TPS application is denied, or if the TPS application does not establish the alien's prima facie eligibility, unlawful presence begins accruing on the date the previous stay

authorized by the Attorney General expired. For DED, the period of stay authorized by the Attorney General takes effect beginning on the date specified in the Executive Order. When TPS or DED are no longer in effect, the accrual of unlawful presence resumes;

- Properly filed, affirmative applications for adjustment of status under section 245 of the Act [including section 245(i)], and properly filed, affirmative registry applications under section 249 of the Act. The period of stay authorized by the Attorney General continues if the application is denied and renewed in proceedings, through review by the Board of Immigration Appeals. The alien must, however, be eligible to renew the denied application in proceedings and have a legal basis for renewing that application; and

- Certain pending applications for extension of stay or change of status.

Please direct any further questions relating to operational issues, through supervisory channels, to Kathy Dominguez in Headquarters Office of Field Services Operations at 202-616-1050 or Danielle Lee in Headquarters Office of Service Center Operations at 202-305-8010. Direct questions relating to policy issues, through supervisory channels, to Sophia Cox in Headquarters Office of Adjudications at 202-514-4754.

Memorandum for Regional Directors, et. al
Subject: Unlawful Presence

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