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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 11, 1998

Dr. Rayburn Barton
Executive Director
South Carolina Commission on Higher Education
1333 Main St.
Columbia, SC 29201

Dear Dr. Barton:

You have requested the advice of this Office as to the constitutionality of a State regulation which denies certain "non-permanent resident aliens" in-State rates when they are dependents of qualified residents although citizens who are dependents of qualified residents are entitled to in-State rates. Regs. 62-602 (I), 62-604, vol. 25A S.C. Code Ann. (Supp. 1996).¹ This regulation may be invalid by being inconsistent with State law.

Although the Commission on Higher Education is given the authority to "...prescribe uniform regulations for application of the provisions of this chapter..." under S.C. Code Ann. §59-112-100 (1990), the regulations differ from the related statutes concerning tuition rates as to the matter of dependent aliens. S.C. Code Ann. §59-112-10, et seq. The regulations bar non-permanent resident aliens from receiving in-State rates unless they fall within

¹ Reg. 62-602(I) provides that the term "non-resident alien" is defined as a person who is not a citizen or permanent resident of the United States. By virtue of their non-resident status "non-resident aliens" generally do not have the capacity to establish domicile in South Carolina."

Reg. 62-604 provides that "...all non-citizens and non-permanent residents of the United States will be assessed tuition and fees at the non-resident, out-of-state rate...", but "[c]ertain non-resident aliens present in the United States in specified visa classification may be granted in-State residency for tuition and fee purposes as prescribed by the Commission on Higher Education." None of the specified visa classifications include student visas. See Supplemental Guidelines of the Commission.

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certain visa categories. Note 1, supra. Section 59-112-20 permits independent persons residing in South Carolina for twelve months and their dependents to receive in-State rates without any limitation due to the alien status of the dependents.

As stated in Brooks v. South Carolina State Board of Funeral Service, 271 S.C. 457, 247 S.E.2d 820, 822 (1978):

The Board is a creature of statute and its authority is dependent upon statute. Calhoun Life Insurance Co. v. Gambrell, 245 S.C. 406, 140 S.E.2d 774 (1965). It possesses only those powers that are conferred expressly or by reasonable necessary implication, or are merely incidental to the powers expressly granted. Piedmont & Northern Ry. Co. v. Scott, 202 S.C. 207, 24 S.E.2d 353 (1943).

The minimum requirements for a licensed funeral director are set forth in Section 40-19-160. It is clear the Board could not adopt a rule that would reduce these minimum requirements. Lake v. Mercer, 216 S.C. 391, 58 S.E.2d 336 (1950). Neither could the Board adopt a rule that would materially alter or add to these minimum requirements. Lee v. Michigan Millers Mutual Insurance Co., 250 S.C. 462, 158 S.E.2d 774 (1968).

Although the above regulations are entitled to a presumption of validity (Ops. Atty. Gen. 2-15-89), the regulations regarding dependent aliens appear to conflict with the related statutes so as to render them invalid as those matters under Brooks.

Certain visa categories are already exempt from the regulations regarding non-permanent residents. See note 1, supra. Because of the conclusion that the regulation is invalid to the extent that it denies certain alien dependents in-State rates, the question of whether additional exemptions might be added need not be reached. But see infra.

The question has arisen as to whether the above matters could be addressed by new legislation. To justify a policy such as that set forth in the regulations, the State would probably have to meet a rational basis test for distinguishing between non-permanent resident alien dependents and citizen dependents. Plyler v. Doe, 102 S.Ct. 2382 (1982) (holding unconstitutional the denial of education to children of illegal immigrants) and Nyquist v. Mauclet 97 S.Ct. 2120 (1977) (holding unconstitutional a New York statute barring resident aliens from State financial assistance). Although these cases address situations different from that presented here, Plyler broadly states that "... the Equal Protection Clause operates of its own force to protect anyone within [the State's]

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jurisdiction' from the State's arbitrary action." 102 S.Ct. at 2399. This language may cover non-permanent resident student aliens.

A previous opinion of the Office of the Attorney General concluded that a proposed bill would be unconstitutional in treating resident alien students differently by denying them the benefit of in-state rates (Ops. Atty. Gen. (1-21-1980); see also Id. (11-20-79)); however, that conclusion did not apply to "nonimmigrant" aliens which it noted included most foreign students studying in this country. The opinion noted distinctions in the nonimmigrant's situation as to domiciliary intent.

Other authority indicates that the distinctions in "nonimmigrant students" may justify their different treatment as to in-State rates under the circumstances presented here. As stated in Regents of the University of California v. The Superior Court of Los Angeles County, 225 Cal.App.3d 972, 276 Cal.Rptr. 197 (Ct. App. CA 1990):

Federal immigration law classifies all noncitizens into two groups: immigrant aliens and nonimmigrant aliens. (8 U.S.C. § 1101(a)(3), (15).) All aliens are immigrants except those who fall into one of fourteen classes of nonimmigrants. (Id., *979 § 1101(a)(15)(A)-(J).) Examples of the fourteen classes of nonimmigrant aliens are diplomats, tourists, business travelers, students, foreign press correspondents, passengers in transit, and ships' crews... (emphasis added).

Federal law defines an alien as "...any person not a citizen or national of the United States." 42 U.S.C. §1101(a)(3). It includes certain student aliens within the category of "nonimmigrant aliens" when the following factors are present:

an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section 1184(1) of this title.....

Federal law requires these nonimmigrants to reimburse schools for the cost of their elementary and secondary education. 8 U.S.C. §1184 (1). Although it does not address college costs, the federal law indicates no basis for concluding that aliens enrolled in state colleges must receive a greater benefit than grade school students. The absence of such a reference suggests that the federal government intended for such matters to be left to the states.

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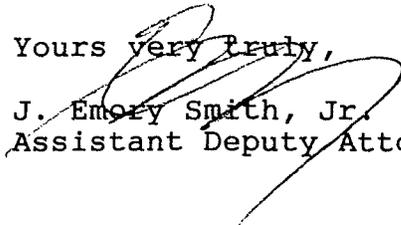
Consistent with the conclusion that non-immigrant students may be treated differently is Ahmed v. University of Toledo 664 F.Supp. 282 (N.D. Ohio 1986) which noted that student F-1 visa holders "...are not afforded special economic protection by the federal government." The Court upheld an insurance requirement imposed upon such students under a rational basis test.

This authority may permit the denial of in-State rates to dependents with F-1 visas assuming that the State has a rational basis for doing so. Any such policy would need to be established by legislation given that the regulation is now inconsistent with related statutes. If any other visa categories were to be denied in-State rates or if any exemption were to be permitted within the F-1 category, they would need to be supported by a rational reason.

This letter is an informal opinion. It has been written by the designated Assistant Deputy Attorney General and represents the opinion of the undersigned attorney as to the specific questions asked. It has not, however, been personally reviewed by the Attorney General nor officially published in the manner of a formal opinion.

If you have further questions, please let me know.

Yours very truly,


J. Emory Smith, Jr.
Assistant Deputy Attorney General

CC: Ms. Gail Morrison

JESjr