The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

February 5, 2002

Thomas E. Ellenburg, Esquire
Myrtle Beach City Attorney
P.O. Box 2468
Myrtle Beach, South Carolina 29578-2468

Re: Your Letter of October 16, 2001
Myrtle Beach Business License/INS Laws

Dear Mr. Ellenburg:

You have asked this Office to render an opinion on a proposed amendment to Myrtle Beach's City ordinance related to the suspension or revocation of business licenses. You indicate that the City Council is interested in amending the ordinance to include a provision related to the licensee's requirement to document and verify each employee's employment eligibility pursuant to federal immigration laws. The proposed amendment would allow for the suspension and potential revocation of a business license when a City inspector has determined that:

> A licensee has failed to maintain or produce properly completed Employment Eligibility Verification forms I-9 for every employee as required by the United States Department of Justice.

Your specific question is: "[w]ould such a proposed law be construed as a local government's attempt to enforce INS [Immigration and Naturalization Service] laws?"

By way of background, you indicate that "the City has identified certain conditions associated with business practices which have a detrimental effect on the public at large [and] [t]he Council believes that businesses, which illegally employ individuals, cheat the public treasury, and are therefore inimicable to good business practices."

The immigration laws you refer to are found in Title 8 of the United States Code. 8 U.S.C.A. §1324a(a)(1) provides that:

> It is unlawful for a person or other entity–
> (A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

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Daniel Smith

> (B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29) to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

Section 1324a(a)(2) makes it "unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment."

As referenced in the City Council's proposed amendment, employers "must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien ...." 8 U.S.C.A. §1324a(b)(1)(A). The United States Code also provides for civil and criminal penalties should an employer fail to comply with the requirements of Section 1324a. Particularly relevant to the proposed action of the City, 8 U.S.C.A. §1324a(h)(2) provides that:

> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens (emphasis added).

It is apparent that, even though a specific intent to preempt state and local law with regard to civil and criminal sanctions is expressed, the federal government recognized the need for local governments to continue with some form of regulation of businesses who may employee unauthorized aliens.

Moreover, as a general matter, even though the power to regulate immigration is exclusively a federal power, the United States Supreme Court "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power." DeCanas v. Bica, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). The DeCanas Court noted that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State" and that a State's "attempt .... to prohibit the knowing employment by .... employers of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of such police power regulation." 424 U.S. at 356. Similar to the concerns expressed by the Myrtle Beach City Council, the DeCanas Court recognized that the use of unauthorized aliens may have a detrimental effect on the public and stated that "the [e]mployment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs [and] acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens ..." Id.

Based on the foregoing, it is my opinion that the proposed amendment to Myrtle Beach's City ordinance related to the suspension or revocation of business licenses would not constitute an improper attempt to regulate or enforce federal immigration laws.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

David K. Avant
Assistant Attorney General

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