ALAN WILSON
ATTORNEY GENERAL

December 17, 2013

The Honorable Shane Massey
Senator, District No. 25
P.O. Box 142
Columbia, SC 29202

Dear Senator Massey:

By your letter dated October 18, 2013, you have inquired about the issuance of traffic citations for driving without a license to Mexican nationals who possess both a valid Mexican driver's license and H-2A agricultural visa.[1] Specifically, you explain that "law enforcement agencies in a number of jurisdictions have been issuing traffic citations for driving without a driver's license to Mexican nationals who are in South Carolina pursuant to a valid H2 agricultural visa and who are operating a vehicle with a valid Mexican driver's license." Continuing, you express that Section 56-1-30(2) can be read "to permit foreign nationals to drive in South Carolina provided that the driver is over sixteen years of age, maintains a foreign residence, has no intention to relocate to South Carolina, and has a valid driver's license from his or her native country." Accordingly, you have asked us to issue an opinion "concerning the application of [Section 56-1-30(2)] to the scenario described above." Our response follows.

[1] Section 1101(a)(15)(H)(ii)(a) of title 8 of the United States Code allows aliens to obtain visas, referred to as H-2A visas, to come "temporarily to the United States to perform agricultural labor or services ... of a temporary or seasonal nature." U.S. Atty. Gen. Op., 2008 WL 5417041 (December 18, 2008) (citing 8 U.S.C.A. § 1101(a)(15)(H)(ii)(a) (West Supp. 2008)). The regulation applicable to H-2A visas explains temporary labor as employment that "except in extraordinary circumstances last[s] no longer than one year." 8 C.F.R. § 214.2(h)(5)(iv)(A). The regulation further defines "seasonal" work as employment "tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations." Id. Under either definition contained within the regulation, an alien cannot stay in the United States for more than three years. 8 C.F.R. § 214.2(h)(6)(ii)(b).

Law/Analysis

Section 56-1-20 of the South Carolina Code provides that "(n)o person, *except those expressly exempted in this article*, shall drive any motor vehicle upon a highway in this State unless such person has a valid motor vehicle driver's license issued to him under the provisions of this article." S.C. Code Ann. § 56-1-20 (2006) (emphasis added). Section 56-1-30 of the Code, subsections one through six, define the exemptions mentioned in the statute. S.C. Code § 56-1-30(1)-(6) (2006). In particular, the exemption mentioned in your letter, Section 56-1-30(2), provides nonresidents, who are sixteen years of age or older and possess a valid operator's or chauffeur's license issued by the nonresident's foreign state or country, an exemption from Section 56-1-20's licensure requirement so long as the nonresident retains a permanent address in the foreign state or country that issued the operator's license.[2] In interpreting this provision, this Office has previously opined that an individual is exempted under Section 56-1-30(2) "if he comes within the two basic provisions of this subsection." Op. S.C. Atty. Gen., 1983 WL 182046 (November 2, 1983). First, he must possess a valid operator's or chauffer's license from a foreign state or country indicating the individual has a permanent address within such foreign state or country, and second, he must regularly receive his mail at this permanent address, and the address must be on file with the motor vehicle authorities of the licensing state or country. Id.

It is with this background that we now address the question mentioned in your letter, whether Mexican nationals who possess both a valid Mexican driver's license and H-2A agricultural visa may claim exemption from South Carolina's licensure requirement under Section 56-1-30(2). Because we believe that possession of both a valid Mexican driver's license and H-2A agricultural visa provide *prima facie* evidence supporting Section 56-1-30(2)'s licensing exemption, we believe that they can. In light of this finding, we further advise law enforcement to cease ticketing individuals who present these credentials.

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[2] Section 56-1-30(2) states:

> A nonresident who is at least sixteen years of age and who has in his immediate possession a valid operator's or chauffeur's license issued to him in his home state or country may operate a motor vehicle, but a person may not claim nonresidence exemption under this provision who does not maintain a permanent residence address in the state or country of which he holds a valid and current operator's or chauffeur's license at which he regularly receives his mail and which address is on file with the motor vehicle authorities of that state or country; also, a person may not claim nonresidence exemption under this provision who for all other intents and purposes has or may remove his residence into this State.

S.C. Code Ann. § 56-1-30(2) (2006).

1. **A Valid Mexican Driver's License is *Prima Facie* Evidence of an Operator's License issued by a Foreign Country as Required by Section 56-1-30(2) of the South Carolina Code**

With respect to the first requirement for exemption—that an individual must be sixteen or over and possess a valid operator's or chauffeur's license issued by the nonresident's foreign state or country—we believe, assuming the individual in possession of the valid operator's license is sixteen years of age or older, that a Mexican operator's license serves as *prima facie* evidence of such a requirement. Specifically, a valid Mexican operator's license clearly satisfies Section 56-1-30(2)'s "license issued to him in his home state or country" language.

2. **A Valid H-2A Agricultural Visa is *Prima Facie* Evidence that the Individual who is in Rightful Possession of such a Visa is not a South Carolina Resident**

Moving to requirement two—that an individual receive regular mail at the foreign address—we believe that possession of a valid H-2A agricultural visa, although not indicative of regular mail service, ultimately serves as *prima facie* evidence of an individual's residence, or in this case, nonresidence. In previous opinions we have recognized that residence, like domicile, is a question of intent. See Op. S.C. Atty. Gen., 1983 WL 182046 (November 2, 1983) ("[R]esidence, as utilized in [§ 56-1-30(2)], contemplates more than mere physical presence within the state. 'Residence' has been construed by our courts to be essentially equivalent to 'domicile' institutes dealing with several other governmental functions."). However, where an individual is only legally present in the country because of a document which shows that the individual's presence is temporary and is not an immigrant, we believe that such a document necessarily indicates the individual in possession of that document is a nonresident. Specifically, we believe that since an H-2A agricultural visa is a nonimmigrant visa for temporary employment with "temporary" meaning employment that typically lasts less than one year and is prohibited from lasting more than three years, such a visa clearly shows that its' holder cannot legally establish residence in any state, much less South Carolina. See 8 C.F.R. § 214.2(h)(5)(iv)(A); U.S. Atty. Gen. Op., 2008 WL 5417041 (December 18, 2008) (citing 8 U.S.C.A. § 1101(a)(15)(H)(ii)(a) (West Supp. 2008)) (stating that H-2A agricultural visas are only issued to aliens who are temporarily in the United States "to perform agricultural labor or services ... of a temporary or seasonal nature."). Therefore, lawful possession of an H-2A visa serves as *prima facie* evidence that such an individual is not, and cannot intend to be, a resident of South Carolina meaning such an individual, if otherwise qualified by meeting the requirements of section one above, would qualify for exemption under Section 56-1-30(2) of the Code.

Conclusion

Since possession of both a valid Mexican driver's license and H-2A agricultural visa provide *prima facie* evidence supporting Section 56-1-30(2)'s licensing exemption, we believe that a Mexican national who possesses both a valid Mexican driver's license and H-2A agricultural visa is exempt from Section 56-1-20's South Carolina licensure requirement. As a result, it is the opinion of this Office that the practice mentioned in your letter—issuing a citation for driving without a license to an individual who holds both a valid Mexican driver's license and a valid H-2A agricultural visa—is at odds with the terms of Sections 56-1-20 and 56-1-30 of the Code and is without legal authority.

Sincerely,

Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General