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Opinion No. 09-134

Legality of a Guest Workers Program

QUESTIONS

1. Can the State of Tennessee legally create a Guest Workers Program in which illegal immigrants could be registered to become legal guest workers in our state?

2. If a Guest Workers Program could be created, would it be legal for the State of Tennessee to establish an immigrant worker trust fund, funded by payroll reductions from guest workers, to pay for services rendered or costs incurred by the guest worker?

OPINIONS

1. No. The creation of a Tennessee Guest Workers Program in which illegal immigrants could be registered to become legal guest workers in Tennessee would be contrary to federal law, which makes it unlawful to knowingly hire or recruit illegal immigrants for employment in the United States.

2. In light of the answer to Question No. 1, this question is pretermitted.

ANALYSIS

1. The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. 6, cl. 2. Congressional intent determines whether a federal statute preempts state law. *Wadlington v. Miles, Inc., et al.*, 922 S.W.2d 520, 522 (Tenn. Ct. App. 1996). The Supremacy Clause results in federal preemption of state law when: (1) Congress expressly preempts state law; (2) Congress has completely supplanted state law in that field; (3) adherence to federal and state law is impossible; or (4) the state law impedes the achievements of the objectives of Congress. *Wadlington*, 922 S.W.2d at 522.

You have asked whether the State can create a Guest Workers Program where illegal immigrants could register to become legal guest workers in Tennessee. As a general rule, the

power to regulate immigration is exclusively a federal power. *Decanas v. Bica*, 424 U.S. 351, 354, 96 S.Ct. 933, 936 (1976). The United States Supreme Court summarized the breadth of the federal government's power over the field of immigration in the following manner:

> The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution, the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.

Toll v. Moreno, 458 U.S. 1, 11, 102 S.Ct. 2977, 2983 (1982) (citing *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419, 68 S.Ct. 1138, 1142 (1948)). Accordingly, state power to regulate the conduct of any immigrant before naturalization has been "completely supplanted" by Congress. Acting within its exclusive power to control the conduct of immigrants prior to naturalization, Congress enacted the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324, *et seq*., for the following purposes:

> The purposes of the bill are to control illegal immigration in the U.S., make limited changes in the system for legal immigration, and provide a controlled legalization program for certain undocumented aliens who have entered this country prior to 1982. The bill establishes penalties for employers who knowingly hire undocumented aliens, thereby ending the magnet that lures them to this country.

H.R. Rep. No. 99-682(I), at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N 5649, 5650. Part of the act, entitled "Unlawful Employment of Aliens," provides:

> (1) In general
>
> It is unlawful for a person or other entity --
>
> > (A) to hire, or to recruit for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)[1] of this section) with respect to such employment[.]

8 U.S.C. § 1324a(a)(1)(A).

[1] "As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." 8 U.S.C. § 1324a(h)(3).

A Tennessee Guest Workers Program allowing illegal immigrants to become legal guest workers would interfere with the federal government's exclusive power to control the conduct of immigrants prior to naturalization and to control the terms and conditions of their naturalization. Because the federal government has the sole power to define the legal status of immigrants and has promulgated a law prohibiting any entity from recruiting or hiring an illegal immigrant, a Tennessee Guest Workers Program that purports to give illegal immigrants legal status for the purpose of employment would be preempted by the Supremacy Clause. Further, such a program would be contrary to 8 U.S.C. § 1324a(a)(1)(A) and would impede the achievement of Congress's stated objective of discouraging persons from entering this country illegally by eliminating their employment opportunities.

Accordingly, this Office is of the opinion that a Tennessee Guest Workers Program that allowed illegal immigrants to be registered for the purpose of becoming legal guest workers within the State would be preempted by federal law and, therefore, could not legally be created.

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