GARY K. NELSON, THE ATTORNEY GENERAL
STATE CAPITOL
PHOENIX, ARIZONA

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DEPARTMENT OF LAW OPINION NO. 72-15 (R-45)

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REQUESTED BY: THE HONORABLE JAMES J. SOSSAMAN
Arizona State Representative

QUESTION: Can the State of Arizona impose employment restrictions on illegal aliens, as set forth in Section 23-421 of House Bill 2154 (Second Regular Session of the 30th Arizona Legislature), which reads as follows:

> A. It is unlawful for any person doing business in this state to knowingly employ, in any industry or occupation, any person who may not lawfully under United States law be present in the United States and be so employed.

ANSWER: No.

The regulation of alien affairs is an enumerated power of Congress: "The Congress shall have the power. . . [t]o establish a uniform rule of naturalization. . . ." Article 1, Section 8, Clause 4, United States Constitution. Ruling case law has long recognized the exclusive power of the federal government to deal with immigration; Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915); Fong Yue Ting v. United States, 149 U.S. 698 (1893); and has forbidden state discrimination as to employment of lawfully admitted aliens because such discrimination is "tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." Truax, supra. Likewise in a case our office argued in the Supreme Court of the United States last year, the Court concluded that "welfare benefits cannot be denied to lawfully admitted resident aliens. Graham v. Richardson, 403 U.S. 305 (1971).

These doctrines governing the treatment of lawfully admitted aliens are settled but are not necessarily determinative of the constitutionality of the provisions of House Bill 2154. The principle factor is whether the federal government has exclusive jurisdiction in the area of regulating the

employment of illegal aliens. Hines v. Davidowitz, 312 U.S. 52 (1941), is a leading case in this area. The court declared Pennsylvania's alien registration act repugnant to and invalidated by the subsequently enacted Federal Alien Registration Act (8 U.S.C., § 1302). The court reasoned in part that:

> . . . where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation, . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations. . . . 312 U.S. at 66-67. (Emphasis added.)
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> Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, "the Act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." 312 U.S. at 66.

Congress has declared in 8 U.S.C., § 3124(a) that it is a felony to wilfully or knowingly conceal, harbor or shield illegal entrants, subject to the proviso that "employment (including the usual and normal practice incident to employment) shall not be deemed to constitute harboring." Federal law explicitly prohibits punishment for employing an illegal alien. Accordingly, it is our opinion that the provisions of House Bill 2154 fall within the prohibitions of the Hines case, supra, because House Bill 2154 complements and is additional or auxiliary to federal law regulating naturalization and immigration. Cf. Pennsylvania v. Nelson, 350 U.S. 497 (1956).

Furthermore, it appears House Bill 2154 would violate and contravene the requirement of uniformity prescribed by Article 1, Section 8, Clause 4 of the United States Constitution. The problems caused by illegal aliens are not common just to Arizona but to all states. A national problem requires the national government to rectify it by adopting a uniform solution.

Respectfully submitted,

Gary K. Nelson by F.S.

GARY K. NELSON
The Attorney General

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