



## State of North Carolina

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January 22, 2014

The Hon. Marcus Brandon  
North Carolina General Assembly  
House of Representatives  
1217 Legislative Building  
Raleigh, N.C. 27601

Re: Advisory Letter: Undocumented Students

Dear Representative Brandon:

By letter received December 18, 2013, you wrote to request a written opinion from this office on issues regarding undocumented students. You have requested an opinion regarding eligibility for in-state tuition at the University of North Carolina System schools and in the schools of the North Carolina Community College System for both: 1) Undocumented students who graduated from a North Carolina high school or who obtained the high school equivalent; and 2) For undocumented students who graduated from a North Carolina high school or who obtained the high school equivalent and who have been granted deferred action status under the Deferred Action or Childhood Arrivals ("DACA"). You have also requested an opinion as to whether undocumented students enrolled in the University System or the Community College System are eligible for professional licenses from the State of North Carolina.

The power to regulate immigration is exclusive to the federal government. *DeCanas v. Bica*, 424 U.S. 351, 354 (1976). In exercising this exclusive power over immigration, the federal government may determine 1) which individuals should be admitted to the United States and 2) how these individuals' conduct should be regulated while they are here. *Id.* at 358. This exclusive power over immigration matters was exercised by Congress when Congress codified the Personal Responsibility and Work Opportunities Reconciliation Act ("PRWORA") in 1996. *See* 8 U.S.C. § 1601. Title IV of PRWORA outlines the restrictions on immigrants, or "aliens" as they are described in the statute, receiving public benefits. Moreover, the Supremacy Clause of the Constitution of the United States subordinates the legislative and administrative acts of the individual states to those of the United States. U.S. CONST. Art. VI, Cl. 2

As to the issue regarding in-state tuition, pursuant to North Carolina General Statutes, an individual is eligible for in-state tuition in the North Carolina university system and the community college system if he or she is a legal resident who is domiciled in the State of North Carolina and who has maintained legal residence in the State for at least 12 months immediately prior to his or her classification as a resident for tuition purposes. N.C. GEN. STAT. § 116-143.1 (a) and (b). *See* also N.C. GEN. STAT. §§ 116-143.1 and 115D-39. Applicable federal law, 8 U.S.C. § 1623, entitled “Limitations on eligibility for preferential treatment of aliens not lawfully present on the basis of residence for higher education benefits,” provides:

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence with a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration and scope) without regard to whether the citizen or national is such a resident.

Because eligibility for in-state tuition in North Carolina is determined based on residency in North Carolina, federal law prohibits the undocumented individuals as described above from being eligible for the benefit of in-state tuition.

You have also inquired about the status for in-state tuition of students who have been granted Deferred Action Status under DACA. In an earlier opinion from this office based upon federal and state law, we opined that individuals who have been granted the status under DACA are legally or “lawfully present” in the United States, at least for the 2-year period of deferred prosecution. This opinion required the issuing of a North Carolina driver’s license. (*See* opinion issued to J. Eric Boyette, Acting Commissioner, Division of Motor Vehicles dated January 17, 2013). However, as to your question regarding eligibility for in-state tuition for such students, the issue here is whether an individual granted DACA status qualifies as a “resident for tuition purposes” pursuant to N.C. GEN. STAT. § 116-143.1 (a) and (b).

Under federal law, 8 U.S.C. § 1621, individuals with DACA status are not eligible to receive the benefit of in-state tuition unless a specific state statute provides otherwise. *See* 8 U.S.C. § 1621(d). We agree with University and Community College attorneys that North Carolina law does not provide for in-state tuition for these students. In order for students who have been granted DACA status to be eligible for the benefit of in-state tuition, the North Carolina General Assembly would have to amend N.C. GEN. STAT. §§ 116-143.1 and 115D-39 to make an exception for such individuals, change the residency requirements, or otherwise provide by law that individuals with DACA classification are, under such circumstances as may be set by statute, eligible for in-state tuition. You and other legislators have sponsored HB 904, which would make these changes by giving certain immigrant students in-state tuition status. However, this legislation has not been enacted.

As to the issue of whether an undocumented student is eligible for a professional license from the State of North Carolina, a federal statute, 8 U.S.C. § 1621, restricts an undocumented immigrant's eligibility to obtain a professional license. The general rule is that aliens—individuals who have immigrated to the United States from another country—are not eligible to receive any State or local public benefit. 8 U.S.C. § 1621(a). "Public benefit" is defined as "any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government." 8 U.S.C. § 1621(c)(1)(A). That same federal law, 8 U.S.C. § 1621, does grant authority to states to render an undocumented immigrant eligible to obtain such a professional license through the enactment of a State law meeting specified requirements. However, North Carolina has not enacted legislation to provide for the issuance of professional licenses to undocumented individuals.

We hope that this letter fully answers the questions posed in your letter.

This is an advisory letter only. It has not been reviewed or approved in accordance with the procedures for issuing an Attorney General's opinion.

Sincerely,



Alexander McC. Peters  
Senior Deputy Attorney General



Kimberly D. Potter  
Special Deputy Attorney General