

**OPINION
76-124**

March 30, 1976 (OPINION)

Mr. Jay A. Palmer
District Director
United States Department of Justice
Immigration and Naturalization Service
932 Post Office Building and Custom House
180 East Kellogg Boulevard
St. Paul, MN 55101

Dear Mr. Palmer:

RE: Your File SPM 287-C(I)(JPH)

Recently you requested this office to issue its opinion regarding the authority of the state and certain law enforcement officers to seize a driver's license issued to illegal aliens. Your questions were:

1. Whether authority exists under North Dakota State laws for seizure of state driver's licenses held by illegal aliens and the statutory basis for such authority.
2. Assuming power to seize state documents is authorized by state law, do Service officers have authority, either as private citizens or law enforcement officers, to make these seizures, or do they need authorization from state authorities in order to do so?"

Before answering these questions, it should be noted that the provisions of Chapter 39-06 of the N.D.C.C., which govern the issuance and use of a motor vehicle operator's license set forth no requirements as to the individual's citizenship. The prior negative statement is predicated upon two sections of law granting the Highway Commissioner authority to revoke or suspend an individual's driver's license.

"39-06-31. Mandatory revocation of licenses. - The commissioner shall revoke forthwith the license of any operator upon receiving a record of such operator's conviction of any of the following offenses:

1. Manslaughter or negligent homicide resulting from operation of a motor vehicle;
2. Any felony in the commission of which a motor vehicle is used; or
3. The making of a false affidavit or statement under oath to the commissioner under this chapter or under any other law relating to the ownership or operation of motor vehicles."

"39-06-32. Authority to suspend licenses. - The commissioner may suspend the license of an operator, after hearing, upon

proof by a fair preponderance of the evidence, that the licensee:

1. Has committed an offense for which mandatory revocation of license is required upon conviction;
2. Is incompetent to drive a motor vehicle;
3. Has permitted an unlawful or fraudulent use of his license; or
4. Has committed an offense in another state which if committed in this state would be grounds for revocation."

Neither of these two provisions would provide the state with the necessary authority to seize an illegal alien's driver's license. A third remedy exists whereby the individual driver's license may be canceled.

As part of the driver's licensing procedure, each individual is required to file an application with the Highway Department. This requirement is provided for under the provisions of Section 39-06-07 of the N.D.C.C., as amended, where it states in part:

"39-06-07. Application for license or instruction permit.

1.* * *

2. Every said application shall state the full name, date of birth, sex, and residence address of the applicant, and briefly describe the applicant, and shall state whether the applicant has theretofore been licensed as an operator or chauffeur, and, if so, when and by what state or country, and whether an application has ever been refused, suspended, canceled, or revoked and, if so, the date of and reason for such suspension, cancellation, revocation, or refusal. The application shall contain such other information as the commissioner may require. * * *

As part of the information required by the Highway Commissioner, the applicant is required to give his place of birth on the application, which is not required to be made under oath. (See Section 39-06-31, subsection 3) Assuming that in the case of an illegal alien, false information was given relative to the place of birth, then the Highway Commissioner would be empowered to cancel the individual's driver's license under the provisions of Section 39-06-24, of the N.D.C.C. as amended, for the reason that the individual failed to give the correct information on his application.

"39-06-24. Authority to cancel licenses. - The commissioner may cancel any operator's license or permit upon determining that the licensee is not entitled to the issuance of a license under the laws of this state or that said licensee failed to give the required or correct information on his application or committed any fraud in making such application or the fee was in the form of an insufficient fund or no-account check. Upon such cancellation, the licensee must surrender the license or

permit so canceled to the commissioner."

Upon making the determination that the license is subject to cancellation, the Highway Commissioner is authorized to issue his order calling for the immediate return of the license and upon failure to do so, has the right to direct a highway patrolman or peace officer to obtain the license.

"39-06-37. Surrender and return of license.

1. The commissioner upon cancelling, suspending or revoking a license shall require that such license shall be surrendered to and be retained by the commissioner.
2. If any person fails immediately to return to the commissioner any license or permit which has been canceled, suspended, or revoked, the order of the commissioner shall authorize any highway patrolman or peace officer to secure possession thereof and return the same to the commissioner. A suspension, revocation, or cancellation shall be deemed to have commenced when the order is delivered to the licensee at his address of record in the department. Constructive delivery under this section shall be considered as occurring forty-eight hours after proper deposit in the mails."

The phrase "peace officer" has been given a statutory definition by the Legislature. That definition is:

"29-05-10. 'Peace officer' defined. - A peace officer is a sheriff of a county or his deputy, or a coroner, constable, marshal, or policeman of a township or city."

Upon the foregoing authority, it is my opinion that under the North Dakota law, the Highway Commissioner legally can provide for the cancellation and return of a driver's license issued to an illegal alien when that individual has supplied false information on the application for his driver's license.

Although the state has the authority to cause the cancellation of the illegal alien's driver's license, the Highway Commissioner lacks the statutory right to direct his order cancelling the license to anyone other than a highway patrolman or a peace officer. Since the definition of a peace officer under Section 29-05-10, supra, excludes service officers of the Immigration and Naturalization Service, the Highway Commissioner cannot direct an order to such personnel.

Therefore, I would conclude that the officers of the Immigration and Naturalization Service do not have authority under North Dakota law to seize the driver's license of an illegal alien.

Because of the conclusion reached as to the authority of your personnel to act in the described situation, no opinion is offered as to the other questions raised in your letter.

Sincerely,

ALLEN I. OLSON

Attorney General