OPINION
78-110

November 6, 1978 (OPINION)

Mr. Dennis Schulz, Secretary
North Dakota Real Estate Commission
Box 727
Bismarck, ND 58505

Dear Mr. Schulz:

This is in response to your letter of October 12, 1978, wherein you request an opinion of this office relative to certain provisions contained in Section 43-23-08 of the North Dakota Century Code. You submit the following facts and inquiry in your letter:

> The North Dakota Real Estate Commission request an opinion of your office with regard to whether the Commission may license a real estate broker or salesperson who meets all the requirements of the Real Estate License Law except for the citizenship requirement contained in Subsection 2 of Section 43-23-08 of the North Dakota Century Code which reads as follows:
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> 2. In addition to the requirements establish by subsection 1, an applicant for a broker's or salesman's license must be at least eighteen years of age and shall be a citizen of the United States."
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> Recently, the Commissioner receive an application from an individual who is not a citizen of the United States and will not qualify to become a citizen for some time. Upon reviewing the application, the Commission noted that the citizenship requirement in many jurisdictions has been held to be invalid. Copies of recent opinions are enclosed for your review.
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> Please be advised that the last examination during 1978 will be held in late November. The deadline date for submitting the examination roster is November 8th.
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> Thus, we would sincerely appreciate your cooperation in issuing an opinion at the earliest possible date so that a determination can be made regarding the applicant.

You have also enclosed with your inquiry copies of reports and opinions relative to the matter as published by the National Association of Real Estate License Law Officials.

Insofar as the issue presented by your letter involves a determination as to the constitutionality of a statute, we must note that historically this office has generally declined to make such determinations for the reasons that (1) a statute duly enacted into law may only be declared unconstitutional by the concurrence of four judges of the Supreme Court (North Dakota Constitution Section 88), (2) it is presumed that the enactment of a statute is intended to be

in compliance with the Constitutions of the State and of the United States (Section 1-02-38 (1), North Dakota Century Code), and (3) the attorney general shall be served with notice and shall be entitled to be heard if a statute, ordinance or franchise is alleged to be unconstitutional (Section 32-23-11, North Dakota Century Code), presumably for the purpose of defending the constitutionality of such statute pursuant to the provisions of Section 1-02-38(1) of the North Dakota Century Code.

With regard to the specific issue raised by your letter, however, we find overwhelming administrative and judicial precedent upon the matter which we feel we cannot ignore and which compels a conclusion to which this office must respond by expression in the form of an official opinion.

We would initially noted the text of an opinion of the Pennsylvania Attorney General, dated March 21, 1972, addressed to the Real Estate Commission of that state, wherein the exact question was considered, which opinion concluded that the citizenship requirement in Pennslyvania real estate brokers' law was unconstitutional and unenforceable. That opinion relied upon an earlier opinion of the Pennsylvania Attorney General dated December 17, 1971, addressed to the state veterinary board, wherein the issue was dealt with at length, considering the citizenship requirement for licensure, determining that such requirement was unconstitutional, stating:

> It is our opinion and you are so advised that the citizenship requirement in Section 3(c) of the Law is unconstitutional and you are therefore instructed to issue a license to practice veterinary medicine to the particular applicant and to any other non-citizen applicants who meet all other requirements.

The basis for this determination was expressed in the published text of that opinion, relying on the provisions of the Fourteenth Amendment to the United States Constitution which provides:

> "Nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis supplied)

The Equal Protection Clause has been applied to several facets of related occupations and matters which were deemed relevant to the issue of state licensing laws, establishing precedent as to application of its principles, which were considered by the Pennsylvania opinion which we have reviewed and with which we find ourselves in accord. Rather than to attempt rephrasing of the text of that opinion, we will rather quote the relevant portion as follows:

> It has long been held that the above-quoted Equal Protection Clause applies not only to citizens of the United States, but to aliens as well. Yick Wo v. Hopkins, 118 U.S. 356, 639 (1886). This does not mean that a state may not classify on the basis of citizenship, but that such classification must be reasonable and when based on alienage, the "are inherently suspect and subject to close scrutiny." Graham v. Richardson,

403 U.S. 365, 372 (1970).

> Thus, in Traux v. Raich, 239 U.S. 33 (1915), the Supreme Court held unconstitutional an Arizona law which required employers of more than five workers to employ at least eight percent qualified electors or native born citizens on the ground that it violated the rights of aliens to equal protection. The Court stated that the broad range of legislative discretionary power to classify "does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood." 239 U.S. at 41. The Court continued that the right to work in the common occupations "is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." Idem. The fact that the law allowed a twenty percent quota of aliens did not save it because the State had no right at all to enact any restraint in the area.
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> The next landmark case on this subject is Takahashi v. Fish and Game Commission, 334 U.S. 410 (1947). That case involved a California law which restricted commercial fishing licenses to persons who were citizens or eligible for citizenship. This meant that Japanese citizens, who were not eligible for United States citizenship, were prohibited from obtaining such licenses. California justified the law on the ground that fish were a natural resource of the state which it had the right to protect and that it had made a reasonable classification in denying the privilege of fishing to aliens. The Court struck down the law as unconstitutional holding (334 U.S. at 420):
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> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under nondiscriminatory laws."

In Purdy and Fitzpatrick v. State, 456 P. 2d. 645 (Cal. 1969), the Supreme Court of California struck down a law prohibiting the employment of aliens on public works as arbitrarily discriminatory under the Fourteenth Amendment. It specifically rejected an argument that the state has the right to protect its own citizens from competition from aliens, even where the disbursement of public funds is involved. The objective of favoring citizens of the United States is not a valid compelling state interest which permits such discrimination.

The most recent Supreme Court decision on the subject is Graham v. Richardson, 403 U.S. 365 (1970) which struck down statutes (including the Pennsylvania statute) denying welfare benefits to aliens. The Court construed Takahashi as casting doubt on the continuing validity of the special state interest doctrine in all contexts. It held that the justification of limiting costs to the state invalid and unreasonable. As to the issue of whether welfare is a privilege rather than a right, and thus not subject to the same protection, it dismissed the issue reaffirming earlier holdings that constitutional determination no longer turn on this distinction. Sherbert v.

Verner, 374 U.S. 398, 404 (1963).

Finally, we note the very recent case of Dougall v. Sugarman, 40 Law Week 2304 (S.D.N.R. 1971) holding invalid a New York law prohibiting aliens from civil service positions. The justifications raised to support constitutionality - loyalty and efficiency - were rejected. The Court also rejected the argument that citizens were more likely to remain in the civil service as career employees, thus saving the cost of retraining and held that even if this were so, it could not justify the discrimination in face of the Fourteenth Amendment.

Despite these cases, there still remain many statutes in all states imposing restrictions upon aliens. These have been justified by the proprietary interest and police power of the state, but they are clearly based on a prejudiced mistrust of aliens and a desire to protect citizens from competition. This can be seen from a review of one decision which did strike down such a restriction. In State v. Ellis, 184 P. 2d. 860 (Ore. 1947), the Court held that a citizenship requirement to be a barber was unconstitutional, following an earlier Michigan case which had ruled similarly. Templar v. State Board of Examiners, 90 N.W. 1058 (Mich. 1902). The significance of Ellis, however, is not so much what it did (in view of the Takahashi decision), but the distinction it attempted to make from older decisions holding citizenship requirements to be constitutional. It distinguished cases preventing aliens from engaging in occupations subject to possible abuses or attended by harmful tendencies, such as pool rooms or peddlers, Ohio ex rel. Clarke v. Deckenbach, 274 U.S. 392 (1927); Comm. v. Hana, 81 N.E. (mass. 1907) or involving public safety, such as pharmacists or lightning rod salesmen, Sashihara v. State board of Pharmacy, 46 P 2d. 804 (Cal. 1935); State v. Stevens, 99 A. 723 (N.H. 1916). rather than noting the rejection of the rationales in those cases, the Court in Ellis continued to reflect a prejudice to aliens which is inimical to the Fourteenth Amendment by attempting to distinguish those cases.

> The validity of any of the justifications and of the cited cases was, however, cast into doubt even before the Court's statement in Graham v. Richardson, 403 U.S. at 374-376, in an excellent Note, "Constitutionality of Restriction on Aliens' Right to Work," 57 Columbia Law Rev. 1012 (1957). The authors of the Note observed that exclusions from the professions continue even though some changes have been brought about in other areas such as barbers. They conclude that no justification in the professional areas exists (57 Columbia Law Rev. at 1026):
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> > "The connection between citizenship and medical competency, for example, is not at all clear. Although the rationalization for such statutes is in the inferiority of foreign education of the inability to accurately check an alien's qualifications, there has been no convincing show of reasonableness in such legislation since standards adequate to protect the public could be set up for the admission of foreign physicians."
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> We note, parenthetically, that not even that justification exists in the current case where the applicant has been trained

at the only, and, perforce, the best, school of veterinary medicine in the Commonwealth of Pennsylvania, has passed the examination, and complied with the other prerequisites for licensure.

Under the recent cases, the citizenship requirement in The Veterinary Law cannot stand. Though none of the cases deal with this specific question, in our opinion they mandate this decision a fortiori. If a state may not withhold from aliens its tax revenues for welfare (Graham v. Richardson), public works (Purdy and Fitzpatrick), and civil service expenditures (Dougall v. Sugarman), nor its resources from lawful exploitation (Takahashi), then it may certainly not deny to an alien the right to practice his lawful profession for which he is otherwise qualified.

The citizenship requirement discriminates unjustifiably. It protects no valid interest of this Commonwealth. It does nothing to further the public welfare. It is not related to any valid licensing requirement. It does not result in better veterinary standards. As an attempt to prevent competition it is clearly invalid. As an attempt to protect the public, which is the only real justification, it is still invalid. The safeguards of education and examination are sufficient to cover this valid policy. Citizenship adds nothing. The mere fact that the state may legitimately regulate licensure does not mean that it may do so on the basis of improper classification.

It should also be pointed out that lack of citizenship is no bar to service in the Armed Forces of the United States Government. The Selective Service Law provides that male aliens entering the United States must register for the draft (32 CFR Section 1611 et seq.) and it is common for alien doctors to be drafted for medical service with the Armed Forces. Under such circumstances, it would be anomalous, to say the least, to require that doctors who treat horses must be citizens, but doctors who treat men need not.

Although the above is sufficient to lay the basis of our decision, we note that the cases have also relied on the supremacy of federal action involving aliens. In other words, Congress under the authority of the U.S. Constitution (Article I, Section 8), has relegated to itself the regulation of aliens through the enactment of comprehensive immigration laws, 8 USC Section 1101 et seq. Federal law, therefore, determines who will be allowed a visa to work in this country. Indeed, preference is given to "qualified immigrants who are members of the professions." 8 USC Section 1153(a)(3). In addition, federal law determines employment disiderata. 8 USC Section 1184. In light of the federal occupation of the area of law, state restrictions on ability to obtain certain types of employment and welfare have been stricken down on the additional ground that such restrictions improperly interfere with the federal power. "State laws which impose discriminatory burdens upon the entrance of residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration,

> and have accordingly be held invalid." Takahashi v. Fish and Game Commission, 334 U.S. 410, 419 (1947). See also Graham v. Richardson, 403 U.S. 365, 377-379 (1971), Traux v. Raich, 239 U.S. 33 (1915); Purdy and Fitzpatrick v. State, 456 P. 2d. 645, 649-653 (1969); 42 USC Section 1981-1983.

We would also note that in addition to two lower court decisions on the constitutionality of the citizenship requirement included in the Colorado and Texas real estate broker's laws, both of which struck down the citizenship requirements of those jurisdictions, the Indiana real estate broker's law requiring citizenship as a prerequisite for licensure, was declared unconstitutional by the Supreme Court of the United States in Indiana Real Estate Commission v. Satoskar, 417 U.S. 938 (1974), wherein the court affirmed a lower court decision holding that the requirement of citizenship as a prerequisite to licensure as a real estate broker was unconstitutional. We might also mention that in consideration of that case the court relied on the holding in the case of In Re Griffiths, 413 U.S. 717 (1973), wherein it was held that similar requirements were unconstitutional as applying to lawyers seeking licensure.

Accordingly, and in view of the overwhelming administrative and judicial precedent establishing that requirements based on citizenship as a prerequisite to licensure for the subject occupation and similar occupations, we must recognize that subsection 2 of Section 43-23-08 of the North Dakota Century Code, requiring specifically that " * * an applicant * * * shall be a citizen of the United States.", would undoubtedly not survive a judicial challenge as to constitutionality.

For these reasons, we are therefore of the opinion that the citizenship requirement in subsection 2 of Section 43-23-08 of the North Dakota Century Code, is unconstitutional, such restriction having previously been declared unconstitutional by the United States Supreme Court, and you are therefore advised not to refuse licensure for a real estate broker to the particular applicant mentioned in your letter of inquiry and to any other non-citizen applicants who meet all other requirements of law.

In conclusion, we would note that perhaps the best solution to the matter is to suggest that legislation amending the specific requirements be introduced to the next legislative assembly in an effort to clarify the requirements and bring the same within the confines of constitutional limitations.

Sincerely,

ALLEN I. OLSON

Attorney General