

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

RYAN KOHUT
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

Jan I. Goldsmith
CITY ATTORNEY

October 1, 2012

**REPORT TO THE PUBLIC SAFETY
AND NEIGHBORHOOD SERVICES COMMITTEE**

LEGAL ISSUES RELATED TO THE IMMIGRATION STATUS OF PEDICAB OPERATORS

INTRODUCTION

On March 14, 2012, the Public Safety and Neighborhood Services Committee requested a report on legal issues that may be encountered should the City elect to impose additional requirements within the City's Pedicab Ordinance making J-1 visa holders ineligible to obtain a Pedicab Operator Permit. The San Diego Municipal Code requires all who wish to operate a pedicab for hire to possess a pedicab operator permit (Pedicab Operator Permit(s)). According to City staff, many of these permit holders are foreign students who operate a pedicab to earn money while they are visiting the United States. The United States Department of State (State Department) has recently clarified what types of employment are deemed appropriate for J-1 visa holders visiting the U.S. while participating in the Exchange Visitor Program and specifically that program sponsors are prohibited from placing J-1 visa participants into employment as pedicab operators. In addition, on June 25, 2012, the United States Supreme Court issued a ruling in the *Arizona vs. United States* case. This case explains the interaction between the Constitutional powers of the United States in the area of immigration and the general powers of the States to provide for the health, safety, and welfare of their residents.

QUESTIONS PRESENTED

1. Does federal law in the area of immigration preempt the City from amending the Pedicab Ordinance to make J-1 visa holders ineligible to receive a Pedicab Operator Permit?
2. Do the State Department prohibitions on sponsors placing J-1 Exchange Visitor Program participants into employment as pedicab operators require the City to prohibit or screen Pedicab Operator Permit applicants to ensure that J-1 visa holders are not granted permits?

SHORT ANSWERS

1. No. Federal law does not preempt the City from amending the Pedicab Ordinance to make J-1 visa holders ineligible to receive a Pedicab Operator Permit as Congress has not

evidenced an intent to occupy the field of immigration, and such a requirement would not be an obstacle to federal law.

2. No. The federal government cannot compel the City to enforce a federal regulatory program.

DISCUSSION

I. FEDERAL LAW DOES NOT PREEMPT A CITY REQUIREMENT PROHIBITING J-1 VISA HOLDER FROM RECEIVING A PEDICAB OPERATOR PERMIT.

States, and by extension local authorities such as the City, can enact laws in areas where the federal government has taken interest as long as the subject is not in a field where Congress, acting in its proper authority, has determined must be regulated by its exclusive governance, and where the state or local law is not in conflict with federal law. *Arizona v. United States*, 132 S. Ct. 2429, 2501 (2012). These two types of federal preemption are known as field preemption and obstacle preemption.

A. Congress Has Not Reserved Exclusive Authority To Regulate The Field Of Immigration.

Field preemption exists where Congress occupies an entire field of law to the extent that even complimentary state regulation is impermissible and reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards. *Id.* at 2502. The question is whether the federal government has elected to occupy the field of immigration to such an extent that a City requirement denying Pedicab Operator Permits to those with J-1 visa status is barred under the field preemption doctrine.

There are certain areas related to immigration where the federal government has exclusively reserved authority. “The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.” *Id.* at 2498. However not every state enactment which deals with aliens is a regulation of immigration and thus preempted. “[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” *DeCanas v. Bica*, 424 U.S. 351, 355 (1976). Therefore a state or local regulation on who may receive a Pedicab Operator Permit would not be expressly preempted by federal law unless there was a statute that expressly stated the intent of Congress to preclude regulation by state and local authorities.

In 1986, Congress adopted the Immigration Reform and Control Act (IRCA), which was created to regulate immigration and the employment of aliens in the United States. The IRCA

made it unlawful to knowingly hire, recruit, or refer for a fee an unauthorized alien. 8 U.S.C. § 1324 (a)(A). The IRCA also contained an express provision preempting “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” 8 U.S.C. § 1324 (h)(2). Local regulations suspending an employer’s business license if an employer knowingly or intentionally hired unauthorized aliens or mandating that employers use a system to verify the immigration status of aliens have been upheld using the savings provision for “licensing and similar laws.” *See Chamber of Commerce of the United States v. Whiting*, U.S. 131 S. Ct. 1968 (2011); *Keller v. City of Fremont*, 853 F. Supp.2d 959 (2012).

A City prohibition against J-1 visa holders obtaining Pedicab Operator Permits would not likely be governed by the IRCA, as a prospective pedicab operator applicant is seeking to operate a pedicab within the City and is not seeking to “employ or recruit, or refer for a fee for employment.” A City prohibition against J-1 visa holders working as pedicab operators might also fall within the “licensing and similar laws” exception of the IRCA. Therefore, the IRCA would not likely apply nor would 8 U.S.C. § 1324 (h)(2) expressly preempt a City pedicab operator regulation.

B. A City Requirement Prohibiting The Granting Of Pedicab Operator Permits To Those Holding J-1 Visas Would Not Be An Obstacle To The Purposes And Objectives Of Congress.

A City requirement prohibiting holders of J-1 visas from obtaining Pedicab Operator Permits could still be preempted under federal law if it were to serve as an obstacle to the “accomplishment and execution of the full purposes and objectives of Congress.” *Arizona* 132 S. Ct. 2505, *quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1940). The State Department, as authorized by the Fulbright-Hays Act, administers the Exchange Visitor Program to allow foreign students to visit the United States to promote cultural exchange. 22 U.S.C. 2451 *et seq.* In furtherance of the Exchange Visitors Program, the State Department has established a body of regulations on how foreign visitors and their sponsors may participate in the program. Recent changes to these regulations have clarified the types of employment for which a sponsor may place a J-1 visa program participant. Sponsors are now prohibited from placing participants into employment as “pedicab or rolling chair drivers or operators.” 22 C.F.R. § 62-32(h).

State laws mandating compliance with federal immigration laws and regulations cannot be said to stand as an obstacle to the accomplishment and execution of federal law. *In re Jose C.*, 45 Cal. 4th 534, 554 (2009). In creating the Exchange Visitors Program and appointing the State Department to administer the program, Congress was aware that rules and regulations would be created to execute the cultural exchange objectives of the program. An amendment to the City’s Pedicab Ordinance making J-1 visa holders ineligible to obtain a Pedicab Operator Permit would be consistent with the State Department’s decision to prevent J-1 visa holders from working as

pedicab operators. Therefore, it is unlikely that a City J-1 visa prohibition for pedicab operator applicants would be preempted as an obstacle to federal law.

II. STATE DEPARTMENT RESTRICTIONS ON SPONSORS PLACING J-1 EXCHANGE VISITOR PROGRAM PARTICIPANTS INTO EMPLOYMENT AS PEDICAB OPERATORS DO NOT REQUIRE THE CITY TO PROHIBIT OR SCREEN PEDICAB OPERATOR PERMIT APPLICANTS TO ENSURE THAT J-1 VISA HOLDERS ARE NOT GRANTED PERMITS.

The federal government may not “commandeer” the states or a local agency like the City to enact and enforce a federal regulatory program. *New York v. United States*, 505 U.S. 144 161 (1992), *see also Printz v. United States*, 521 U.S. 898, 900 (1997). The decision to establish a City requirement prohibiting J-1 visa holders from obtaining a Pedicab Operator Permit is a matter of City policy. The City may enact an immigration status requirement for Pedicab Operator Permits but is not compelled by federal law to do so.

CONCLUSION

The federal government has broad powers over the subject of immigration. However, the states have retained some authority in areas unrelated to the admission and expulsion of aliens. A state or local regulation would not be preempted as long as Congress has not expressly foreclosed any state or local regulation in the area, and where the state or local regulation does not serve as an obstacle to the purposes or objectives of Congress.

While the City may elect to create a requirement that Pedicab Operator Permit applicants be compliant with federal immigration law, the City is under no legal obligation to do so. The federal government may not compel the City to assist with the administration of a federal regulatory program.

Respectfully submitted,

JAN I. GOLDSMITH, City Attorney

By: /s/ Ryan Kohut
Ryan Kohut
Deputy City Attorney