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July 22, 1999

FORMAL LEGAL OPINION

Thomas Sanchez
Chief of Police
Denver Police Department
1331 Cherokee Street
Denver, CO 80204

Re:

Dear Chief Sanchez:

This letter is in response to your recent request for a legal opinion regarding the issues presented below.

RESTRICTIONS ON USE OF OPINIONS

Under the City Charter § A10.1-2, it is the duty of the City Attorney to serve as legal advisor to the Mayor, the City Council, the Auditor, and the various departments and agencies of the City with respect to any legal matters affecting the City's interest. Such legal advice is provided on a case-by-case basis in response to specific inquiries made by specific City officials or agencies. Such advice is given solely for the benefit and use of these requesting officials or agencies.

The legal opinions expressed in this letter are distinctive to the extent that they are dependent upon specific facts and circumstances provided by the City official or agency requesting the formal opinion. The opinions are also subject to any qualifications or restrictions set forth in the letter. Under a different set of facts or circumstances, the legal opinions offered could likewise be different or made subject to different qualifications or restrictions, in order to properly portray the applicable law.

The legal opinions expressed in this letter are solely for the review and guidance of the City official or agency requesting the formal opinion. The distribution of this letter to any third party without the express permission of the City Attorney is not authorized nor is any representation to any third party that the opinions contained in this letter are representative of any legal or policy position of the City or the City Attorney's Office.

Thomas Sanchez

July 22, 1999

Page 2

The City and the City Attorney's Office assumes no responsibility or liability for any reliance placed upon the opinions contained in this letter by any third party, including any private or public entity or individual.

QUESTIONS PRESENTED

1. What effect does Executive Order No. 116 have on the Denver Police Department procedures and proposed procedures for the arrest and detention of undocumented aliens?
2. What powers of arrest and detention does the Denver Police Department have over undocumented aliens?

CONCLUSIONS

1. Executive Order No. 116 has no impact on the arrest policies and procedures regarding undocumented aliens as presently written and as proposed.
2. Police officers have the authority to arrest and detain undocumented aliens for criminal violations of the Immigration and Naturalization Act (INA). The present policies and procedures regarding the arrest and detention of undocumented aliens recognizes the authority to arrest for criminal violations of the INA, but does not allow police action to be initiated solely for that purpose. The proposed policy and procedure regarding undocumented aliens also recognizes the authority to arrest for criminal violations, but restricts the exercise of that power to arrest to those instances where prior approval is obtained by a supervisor or commander. Both the existing and proposed policies and procedures for the arrest and detention of undocumented aliens are compatible with Executive Order No. 116 and the INA.

INTRODUCTION

This request was generated because the Denver Police Department is in the process of developing a more comprehensive policy and procedure pertaining to undocumented aliens. The question of whether Executive Order No. 116 impacts the present and proposed arrest and detention procedures is dependent upon the interpretation placed upon the executive order. Second, the department's relationship with the Immigration and Naturalization Service (INS) is determined by federal law. Both of these aspects will be explored in the opinion.

ANALYSIS

EXECUTIVE ORDER NO. 116 IS A LIMITED COOPERATION ORDINANCE

A limited cooperation ordinance recognizes that illegal or undocumented aliens are present in the United States in great numbers. Such limited cooperation ordinances recognize the immigration problem and offer a solution by making adjustments for the benefit of public safety. For example, New York City Executive Order No. 124, issued in 1988, provides for the health and well-being of the citizens of New York. The order protects undocumented aliens who use city services that are necessary for their health and safety. Undocumented aliens may seek help from the city when they become ill, fear for their safety or when they wish to educate their children. Executive Order No. 124 protects illegal aliens, but it also protects the citizens of New York from the diseases or crimes they may face without the order's protection, 7 B.U. Pub. Int. L.J. 93, pgs. 100-101. Similarly, Executive Ordinance No. 116 protects undocumented aliens.

Executive Order No. 116 refers to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (Welfare Reform Law) and the Balanced Budget Act of 1997. These two laws, along with the Immigration Reform and Immigrant Responsibility Act of 1996, Public Law No. 104-208, 110 Stat. 3009 (Immigration Reform Law), have changed the relationship between the federal government and the states as it relates to immigration. These laws allow state and city employees to turn in illegal immigrants who seek essential social services like police protection, medical care and public education, *supra*, pgs. 102-103. Accordingly, Executive Order No. 116 expresses a clear intent and policy to preserve the rights of residents of the City and County of Denver irrespective of their citizenship. Executive Order No. 116 discourages reporting undocumented aliens who seek essential services.

THE DEPARTMENTAL POLICIES AND PROCEDURES REGARDING UNDOCUMENTED ALIENS ARE NOT IN CONFLICT WITH FEDERAL LAW OR EXECUTIVE ORDER 116

Pursuant to the Immigration and Naturalization Act, 8 U.S.C. §§ 1101 through 1503 (1994 & Supp. II, 1996), immigration is within the exclusive power of the federal government. *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983). The Act provides that undocumented immigrants are subject to both civil and criminal penalties. 8 U.S.C. § 1251(a)(1)(B) (1994); 8 U.S.C. § 1325(a) (1994). However, the Act classifies illegal entry as a criminal violation and illegal presence as a civil violation.

Thomas Sanchez

July 22, 1999

Page 4

Illegal entry occurs when one arrives in the United States without proper documents and is considered both a civil and criminal offense. 8 U.S.C. § 125(a)(1)(B); 8 U.S.C. § 1325(a). Illegal presence is a civil violation under the INA, 8 U.S.C. § 125(1)(a). Illegal presence occurs in one of two ways, either entry to the United States is illegal, but continued presence is not, such as an over-stayed visa, or when illegal entry follows an undocumented stay. Accordingly, illegal entry is a criminal offense which can be enforced by both state and federal officials, whereas illegal presence is a civil offense enforceable only by the INS. *Gonzales v. City of Peoria, supra*, at 475. The *Gonzales* court specifically delineated the authority of state and local officials to enforce the criminal provisions of the INA:

...Furthermore, an arresting officer cannot assume that an alien who admits he lacks proper documentation has violated section 1325. Although the lack of documentation or other admission of illegal presence may be some indication of illegal entry, it does not, without more, provide probable cause of the criminal violation of illegal entry. The arrest must therefore be supported by additional evidence that the arrestee entered without inspection. In implementing the arrest authority granted by state law, local police must be able to distinguish between criminal and civil violations and the evidence pertinent to each. In the future, this may require refinements of both the written policies and officer training programs.

Id., at 476-477.

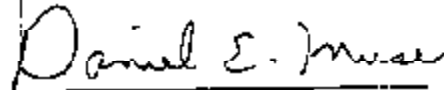
Although the limited cooperation ordinances (like Executive Order No. 116), concern immigration, which is a subject for the exclusive power of the federal government, *DeCanas v. Bica*, 424 U.S. 351, 354-355 (1976), the mere fact that the undocumented are subject to state statutes or local ordinances does not render the ordinance immigration regulations. *DeCanas v. Bica, supra*. Since the courts have strictly limited the enforcement of immigration laws by state and local law enforcement to the criminal provisions, it is clear that state and local law enforcement are under no affirmative duty to gather information on an individual's immigration status or to report a violation. Therefore, limited cooperation ordinances, like Executive Order No. 116, merely codify what the courts have already decided and that is, state and local officials have no jurisdiction to enforce civil provisions of federal immigration laws.

Thomas Sanchez
July 22, 1999
Page 5

The department policies for arrest and detention of foreign nationals 104.52 and the interim operations manual revision § 104.52(3) are not inconsistent with the INA or the federal case law. Both departmental policies recognize that the enforcement of immigration law rests with the INS. Both of these policies also recognize that local law enforcement cannot detain or arrest individuals for civil violations. Moreover, both the present departmental policy 104.5 and the interim policy, § 103.52(3) go further and restrict officers from enforcing even the criminal portions of the INA, without prior approval from a supervisor or commander. Therefore, the policies and procedures do not conflict with the Executive Order No. 116 or the INA.

APPROVED:

Respectfully submitted,



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