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August 7, 1991

Marilyn T. Shuler, Director
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450 W. State Street
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**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Statutory Prohibitions Against the Issuance to Non-Citizens
of Licenses to Sell Liquor or Beer at Retail

Dear Ms. Shuler:

You have requested legal guidance on the question of whether two specific Idaho statutes, which prohibit issuance of licenses to non-citizens, violate the equal protection clause of either the U.S. Constitution or of Article 1, Section 2, of the Constitution of the State of Idaho. The Attorney General does not generally rule on questions of the constitutionality of duly enacted state laws. That is normally a matter for the courts, and the Attorney General may be called upon to defend such laws against constitutional challenge. We are willing, however, to review the statutes in question and to outline the legal test to which they would be subjected, should a court challenge be made.

The two statutes in question are Idaho Code § 23-910(a), which governs licenses to sell liquor by the drink at retail, and § 23-1010(2)(d), which pertains to licenses for the sale of beer at retail. They read in pertinent part:

23-910. Persons not qualified to be licensed. - No license shall be issued to: a. An individual who is not a citizen of the United States . . .; or to a partnership unless all members thereof are citizens of

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the United States . . . ; or to a corporation or association . . . unless the principal officers and the members of the governing board are citizens of the United States.

23-1010. License to sell beer at retail - Application procedure and form - showing of eligibility for license and disqualifications. - (1) Every person who shall apply for a state license to sell beer at retail shall . . . file written application for license with, the director. . . (2) The application shall affirmatively show: . . . (d) That the individual applicant, or each partner of a partnership applicant, is a citizen of the United States; or with respect to a corporation or association, . . . that the person who is or will be the manager of the corporation's or association's business of selling beer at retail is a citizen; . . .

Clearly, the statutes in question do preclude non-citizens from obtaining these licenses despite their compliance with all other licensing criteria.

The regulation and control of the sale of intoxicating liquors, is vested in the Idaho Legislature through the twenty-first amendment to the U.S. Constitution and art. 3, sec. 26, of the Idaho Constitution. Licensing regulations for the retail sale of liquor "are enacted by the legislature for the protection, health, welfare and safety of the people of the state of Idaho and for the purpose of promoting and encouraging temperance in the use of alcoholic beverages within said state of Idaho." Idaho Code § 23-901.

Regulatory authority is not unfettered however. In State v. Cantrell, 94 Idaho 653, 655-56, 496 P.2d 276, 278-279 (1972), the Idaho Supreme Court noted that although the regulation of retail liquor outlets was for a legitimate stated public purpose, the regulatory classifications of the licensing act must nevertheless reasonably relate to the accomplishment of that purpose. The Court said:

Some discrimination is inherent in any legislative attempt to limit the number of retail outlets for liquor by the drink, and because any legislation is presumed to be constitutional [footnote omitted], a mere showing of discrimination has been held insufficient to defeat the regulatory scheme. [Footnote omitted.] Nevertheless, to comply with the equal protection requirement of the federal and state constitutions, the discriminatory classification must reflect a reasonably conceivable, legitimate public

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purpose [footnote omitted] and it must relate reasonably to that ascribed purpose. [Footnote omitted.]

Idaho law has long recognized equal protection limitations. In the 1963 case of Weller v. Hopper, 85 Idaho 386, 379 P.2d 792 (1963), the Idaho Court said that Idaho Code § 23-910(d) violated both federal and state constitutions by setting up an "unreasonable, arbitrary and discriminatory classification." It prevented a person who was convicted of a felony while holding a retail liquor license from obtaining a license, while one convicted of a felony who did not hold such a license could obtain a license within five years. This classification was subjected to a "reasonable basis" test and failed to meet that standard.

The classification which you question--between citizens and non-citizens--has been the subject of several federal lawsuits. While the courts have not always used identical terminology in making their analyses, it is clear that statutes which discriminate against aliens are subjected to greater scrutiny than the "reasonable basis" test used for distinctions among felons in Weller.

Federal case law is instructive for determining how an Idaho court would review the classification in question. In Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948), for example, the Court ruled that a California statute barring issuance of fishing licenses to persons "ineligible to citizenship," was unconstitutional. The Court stated at 420 that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." Id. 334 U.S. at 420.

In Graham v. Richardson, 403 U.S. 365, 372 (1971), the Supreme Court concluded:

Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a discrete and insular minority [citation omitted] for whom such heightened judicial solicitude is appropriate.

The case of In Re Griffiths, 413 U.S. 717 (1972), posed a similar question. The appellant in that case was a resident alien who was denied permission to take the Connecticut bar examination solely because of a citizenship requirement imposed by a state court rule. The Supreme Court held that Connecticut's exclusion of aliens from the practice of law violated the equal

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protection clause of the fourteenth amendment. In reaching that conclusion, the Court said:

The Court has consistently emphasized that a State which adopts a suspect classification "bears a heavy burden of justification," McLaughlin v. Florida, 379 U.S. 184, 196 (1964), a burden which, though variously formulated, requires the State to meet certain standards of proof. In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.

Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities.

Id. at 721-722.

It appears clear, therefore, that the two statutes you cite, by creating a suspect classification, would be subjected to close judicial scrutiny if challenged in court. The State would bear a heavy burden of justification for not allowing aliens to obtain licenses. The State would have to identify the interest being served by the exclusion; that purpose would have to be both constitutionally permissible and substantial; and the use of this classification would have to be necessary to the accomplishment of this purpose.

This office cannot predict what justifications could be offered in such a court challenge. We are aware of a case challenging a similar provision in Arizona in which the Arizona Supreme Court ruled that the statutory exclusion of aliens from obtaining liquor licenses constituted a denial of equal protection of the law under the federal and state constitutions. See Arizona State Liquor Board of the Department of Liquor Licenses and Control v. Ali, 550 P.2d 663 (1976). In the Ali case, the Arizona statute read in pertinent part:

Every spirituous liquor licensee, . . . shall be a citizen of the United States . . . If a partnership, each partner shall be a citizen of the United States.
A.R.S. Sec. 4-202(A).

Mr. Ali was a permanent resident alien who met all the licensing requirements other than citizenship status. On that basis alone, he was denied a liquor license for the restaurant he owned. In order to prohibit aliens from obtaining liquor licenses, the Arizona court said that the classification "must not only reasonably relate to the purpose of the law, but the state has the burden of establishing that its use of the classification is necessary to the accomplishment of a legitimate state interest and that the law serves to promote a compelling state interest." Id. 550 P.2d at 669.

The justifications offered by the State of Arizona were to assure that those people who sold liquor:

are sufficiently acquainted with our institutions and way of life to enable them to appreciate the relation of this particular business to our entire social fabric . . . This appreciation, in turn, is necessary in order to minimize the evils attending trafficking in intoxicating liquor. . . [the classification also] reflects legislative judgment that trafficking in intoxicating liquor by aliens presents a greater problem than such trafficking by citizens.

Id. The court did not find these arguments persuasive: "We are unable to comprehend, nor has it been demonstrated to us, why aliens cannot appreciate American institutions. . . It has not been shown that aliens cannot traffic in intoxicating liquors without falling prey to the inherent dangers and vices which have brought about legislation such as A.R.S. Sec. 4-202(A). Appellant has not presented us with any legitimate state purposes that could justify this kind of discrimination." Id. at 670.

Finally, Arizona had argued that the statutory classification passed constitutional scrutiny as necessary to preserve for its citizens a limited state resource, namely, the liquor license. While acknowledging that a state is not required to dedicate its own resources to citizens and aliens alike, the court was not persuaded by this argument either. It was noted that any state legislation, even when aided by the twenty-first amendment, must be shown to have a rational connection with a permissible state purpose. The reasons offered by the State to justify discrimination against aliens fell "far short of establishing either a legitimate or compelling state interest or a reasonable relation to the protection of the state's interests or resources. Id.

Based upon the cases cited above, we believe that a court challenge to these statutes would have a high likelihood of success. An Idaho court would consider non-citizens to be a

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suspect classification for equal protection analysis. The statutory prohibitions would be upheld only if the state were able to show that excluding aliens from obtaining licenses to sell liquor by the drink or beer at retail serves a legitimate and compelling state interest and that such exclusion is necessary for the accomplishment of that purpose. In our opinion, it is unlikely that the state would be able to make such a showing.

Sincerely,

Leslie L. Goddard

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