



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

February 24, 1975

Opinion No. 75- 76

Mr. Max Bickford, Executive Officer
Kansas Board of Regents
Suite 1416 - Merchants National
Bank Tower
Topeka, Kansas 66612

Dear Mr. Bickford:

In your letter of January 29, 1975, you state that the Board has traditionally ruled that a foreign student who is in this country on a student visa cannot attain residency so as to qualify for lower tuition. You ask my opinion concerning this practice.

I would refer you to an opinion written by my predecessor, Mr. Kent Frizzell, which deals with this subject, a copy of which is enclosed. Since that opinion was written in 1969, two decisions of United States Supreme Court have been rendered which support his position. Therefore, I would like to update that opinion and offer some guidelines for future determinations.

In Sugarman v. Dougall, 413 U.S. 634, 37 L. Ed 2d 853, 93 S Ct 2842, (1973), the Supreme Court held that aliens were entitled to the full protection offered by the "equal protection" clause of the Fourteenth Amendment unless some "special public interest" is being protected by the discrimination. It would be my opinion that an inflexible rule that student aliens are per se non-residents could not be justified under a "special public interest" test.

This position is consistent with recent decisions concerning equal protection and differential tuition for in-state and out-of-state students. In Vlandis v. Kline, 412 U.S. 441, 37 L. Ed 2d 63, (1973), the United States Supreme Court held it was contrary to the Fourteenth Amendment to create, by statute, a permanent and irrebuttable presumption of non-residency for the entire time a student remains at a university. In Vlandis, the state statute in question required

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that for purposes of tuition, residency was fixed by the student's legal address at the time of his first application to the state university. Once the student's residency was so established, under the statute, it could not be changed by later circumstances. The Supreme Court held this to be a violation of the guarantees of the Fourteenth Amendment.

In your question, it appears that you have traditionally held that a foreign student attending Kansas institutions of higher learning on a student visa are always to be treated as non-residents for purposes of tuition. This approach does not squarely conform with previous opinions from this office or with the above mentioned Supreme Court decisions. The rule is not sufficiently flexible because there are conceivable circumstances in which a foreign student may be able to demonstrate residency; that is, he may be able to show both physical presence and an intention to remain permanently or indefinitely in Kansas. The irrebuttable presumption of non-residence created by the Board's policy may not necessarily be true in fact, and thus may operate arbitrarily and unreasonably. There being reasonable alternatives for determining residence, it is my view that the policy merits reexamination, with a view toward adopting a more flexible criteria of residency in cases of alien students on visa.

Thus, it would appear that the Board should take a somewhat more flexible stand in determining the status of aliens by inquiring into the student's future plans as manifested by his present situation and his statement regarding his intentions.

As regards your second inquiry concerning aliens who marry residents, I would again urge that rather than creating inflexible rules, that the Board create guidelines for determining the actual intent of the student. While it may appear that by marrying a Kansas resident, the student is manifesting an intent to remain permanently in Kansas, this may only be determined by further inquiries with the foreign student, and not be reference to fixed presumptions. As stated in the previous opinion, "The controlling factor is his [the student] present intention as to his own ultimate disposition."

Therefore, it is my opinion that the Board's traditional manner of determining a foreign student's residence should be revised and that more helpful and flexible guidelines be developed to assure

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that a student paying non-resident fees is in fact, a non-resident.
We will be happy to provide any assistance in this regard that you
may desire.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:PAH:kj

Enclosure

November 5, 1969



Mr. Max Bickford
Executive Officer
State Board of Regents
State Office Building
Topeka, Kansas

RE: Resident Status of Aliens

Dear Mr. Bickford:

You have asked whether a foreign national may become a resident of the State of Kansas for fee purposes, and what effect his passport visa status with the federal government has on his Kansas resident status.

As our previous opinions have pointed out, residence -- in Kansas the equivalent of domicile -- has two basic elements. These are physical presence, and the intent to remain in Kansas indefinitely. Most residence cases revolve around the second factor, involving a factual determination of the subject's present intent.

In the case of a foreign national attending a Kansas institution, the sole issue is his intent. His visa status with the United States Department of State is not determinative of this issue, although it may have some evidentiary bearing on the question. Thus, a person with a "student" visa would have a much more difficult burden in establishing that he did not intend to return to his country of origin upon completion of his studies than a person whose visa was "resident."

On the other hand, the mere acquisition of a "resident" visa from the State Department does not conclusively establish that the passport's bearer has the requisite intent to become a bona fide domiciliary.

In short, the passport status of a foreign national may, in some cases, be evidence of its possessor's intent, but cannot be conclusive. A foreign national may be a bona fide resident of the State of Kansas, for the purpose of paying fees and other purposes, and still retain his foreign citizenship. The controlling factor is his present intention as to his own ultimate disposition.

Very truly yours,

KENT PRIZELL
Attorney General

JRF:th