

STATE OF KANSAS

## Office of the Attorney General

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May 31, 1977

ATTORNEY GENERAL OPINION NO. 77-176

The Honorable Leroy A. Hayden  
State Senator  
Post Office Box 458  
Satanta, Kansas 67870

Re: Crimes--Aliens--Employment

Synopsis: An alien who has entered the country illegally, who has been discovered by the Immigration and Naturalization Service, who has been found amenable to deportation proceedings and who has been granted the privilege of voluntary departure from the United States on or before a specific date, is not during the period of such release on parole or "docket control" by the Service, legally present within the territory of the United States, and the employment of such an alien by an employer who knows such person to be illegally present in this country is an offense under K.S.A. 21-4409.

\* \* \*

Dear Senator Hayden:

K.S.A. 21-4409 creates the offense of knowingly employing an alien illegally within the territory of the United States, a class A misdemeanor. The offense is defined as

"the employment of such alien within the state of Kansas by an employer who knows such person to be illegally within the territory of the United States."

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You inquire concerning application of this statute to the circumstances of certain aliens. In particular, you cite the instance of an alien who has entered the United States illegally, has been discovered by the United States Immigration and Naturalization Service, and who has been released on parole for a specific period of time, commonly upon the alien's agreement to depart the United States voluntarily.

Parole of aliens is authorized by 8 U.S.C. § 1182(d)(5), which states thus:

"The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

Thus, by statutory definition, an alien on parole has not been admitted into the United States. In Leng May Mo. v. Barber, 357 U.S. 185, 2 L.Ed.2d 1246, 78 S.Ct. 1072 (1958), the Court stated thus:

"For over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States . . . . It seems quite clear that an alien so confined would not be 'within the United States' for purposes of § 243(h) . . . . Our question is whether the granting of temporary parole somehow effects a change in the alien's legal status. In § 212(d)

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of the [Immigration and Naturalization] Act, . . . the Congress specifically provided that parole 'shall not be regarded as an admission of the alien,' and that after the return to custody the alien's case' shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.' (Emphasis added.)"

In Kaplan v. Tod, 267 U.S. 228, 69 L.Ed. 585, 45 S.Ct. 257 (1925), the Court also considered the status of aliens on parole. There, a minor alien was brought to this country at the age of 10, was certified to be feeble-minded, and ordered to be excluded. Deportation was suspended due to the outbreak of World War I, and she was held for some time at Ellis Island, being later released on parole to a private immigrant aid society, which permitted her to live with her father, who was already in this country. In 1920, her father was naturalized, and when deportation proceedings were begun against her thereafter, she contended she became a citizen by the naturalization of her father while she was a minor and in this country. Justice Holmes, writing for the Court, rejected the argument thus:

"Naturalization of parents affects minor children only 'if dwelling in the United States.' . . . The appellant could not lawfully have landed in the United States in view of the express prohibition of the Act of 1910 . . . and until she legally landed 'could not have dwelt within the United States.' . . . Moreover, while she was at Ellis Island, she was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared. . . . When her prison bounds were enlarged by committing her to the custody of the Hebrew Society, the nature of her stay within the territory was not changed. She was still, in theory of law, at the boundary line, and had gained no foothold in the United States. . . . She never has been dwelling in the United States within the meaning of the act." 267 U.S. at 230.

Thus, under the U.S. Immigration and Naturalization Act, an alien who has entered the United States illegally has not been legally admitted into this country, and despite physical presence, such an alien in the contemplation of the law is not present here.

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K.S.A. 21-4409 prohibits the employment of any alien in this state by an employer "who knows such person to be illegally within the territory of the United States." This provision was enacted, presumptively, at least in part to aid in the enforcement of the immigration laws of this country, and to discourage the presence of illegal aliens in this state by reducing their opportunities for employment. To determine the status of an alien, it is obviously necessary to resort to federal law, for that is the only body of law which governs the admission of aliens to this country. An alien on parole under 8 U.S.C. § 1182(d)(5) is not present at all in this country, in the eyes of the law. Although physically present, a grant of parole does not render the alien legally present. Such an alien has not been lawfully admitted to the country, and the grant of a parole, pending the alien's departure, has no effect upon the legal status of the alien himself or herself.

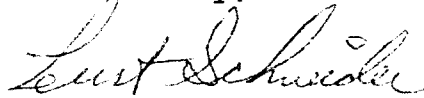
An alien who has entered the country illegally and is thereafter encountered by the Immigration and Naturalization Service may be granted the privilege of voluntary departure from the United States on or before a specific date. Such an alien has been found amenable to deportation proceedings. Under Kaplan v. Tod, supra, and Leng May Mo. v. Barber, supra, it is clear that release on parole does not alter the legal status of the alien's presence. It is the Immigration and Naturalization Act, as interpreted by the United States Supreme Court, which must be applied to identify the legal status of an alien for the purposes of K.S.A. 21-4409. Parole does not constitute an alien a lawfully admitted alien, and such person remains illegally within the country, in my judgment.

Accordingly, I cannot but conclude that an alien who has entered the country illegally, who has been discovered by the Immigration and Naturalization Service, who has been found amenable to deportation proceedings and who has been granted the privilege of voluntary departure from the United States on or before a specific date, is not during the period of such release on parole or on "docket control," an administrative process of the Service for control of illegal status aliens while under removal or deportation proceedings, legally present within the territory of the United States, and the employment of such a person by an employer who knows such person to be illegally present in the country constitutes an offense under K.S.A. 21-4409. I appreciate your concern that this interpretation may work some hardship upon such aliens. However, under the Act and the cited decisions, I cannot justify a contrary conclusion, under the existing language of

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of K.S.A. 21-4409. Additional language in that section is necessary, in my judgment, to permit the knowing employment of such aliens pending their departure from the country.

Yours truly,



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