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ATTORNEY GENERAL

*No. 22-006*  
STATE OF NEBRASKA  
OFFICIAL

AUG 19 2022

DEPT. OF JUSTICE

SUBJECT: Employee eligibility to participate in retirement systems administered by PERB and NPERS; Interpretation of Neb. Rev. Stat. §§ 4-108(1) and (3), 23-2306(3), 24-703.01, 79-915(2), 81-2016(1), 84-1307(3), and 84-1504(8).

REQUESTED BY: Mr. Randy Gerke, Director  
Nebraska Public Employee Retirement Systems

WRITTEN BY: Douglas J. Peterson, Attorney General  
Lynn A. Melson, Assistant Attorney General

### INTRODUCTION

You have requested our opinion on the interpretation of the eligibility requirements for the retirement systems administered by the Nebraska Public Employees Retirement Board ["PERB"] and Nebraska Public Employees Retirements Systems ["NPERS"] contained in the following Nebraska statutes: Neb. Rev. Stat. §§ 4-108(1) and (3) (2012), 23-2306(3) (Cum. Supp. 2020), 24-703.01 (2016), 79-915(2) (Cum. Supp. 2020), 81-2016(1) (2014), 84-1307(3) (Cum. Supp. 2020), and 84-1504(8) (2014).

In 2009, the Legislature adopted Legislative Bill 403 ("LB403") which specifically limited eligibility for participation in "retirement systems" administered by PERB and NPERS to an employee who is either (a) a U.S. citizen or (b) "a qualified alien under the federal Immigration and Nationality Act ["INA"], 8 U.S.C. 1101 *et seq.*, as such existed on January 1, 2009, and is lawfully present in the United States."<sup>1</sup> Then, in 2010, the

<sup>1</sup> 2009 Neb. Laws LB 403, § 2(3) (codified at Neb. Rev. Stat § 4-108(3)).

Legislature adopted Legislative Bill 950 (“LB950”) which applied the same eligibility language from LB403 to all five retirement systems offered by the State of Nebraska.<sup>2</sup>

While the statutes all refer to a qualified alien under the INA, you point out in your request letter that the INA does not contain a definition of “qualified alien.” Given this lack of definitional language, you ask whether the Nebraska statutes should be interpreted to limit eligibility to citizens and individuals identified as qualified aliens under other federal statutes or should be interpreted to not limit the eligibility of certain visa holders with work authorization. It is our understanding that your agency has received inquiries concerning eligibility from certain nonimmigrants, including H-1B visa holders who have been authorized to work in the United States in specialty occupations. 8 U.S.C. § 1101(a)(15)(H)(i)(b).<sup>3</sup> Those provisions include regulations which entitle H-1B workers to, and require all employers to provide, wages and fringe benefits on the same basis and under the same criteria afforded to U.S. workers of the same or similar status. See 20 C.F.R. § 655.731(c)(3). The crux of our analysis hinges on what the Legislature meant by the term “qualified alien” in LB403 and LB950, codified in the aforementioned statutes, and the scope of the State’s authority to limit eligibility for state public benefits. There is no Nebraska caselaw addressing the meaning of the term “qualified alien,” or which classes of non-U.S. citizens remain eligible to participate in state-administered retirement systems.

At the outset, we note that Congress has plenary power to regulate immigration and alienage status within the United States. See U.S. Const., Art. I, § 8, cl. 4; *E.M. v. Nebraska Dep’t of Health & Hum. Servs.*, 306 Neb. 1, 11, 944 N.W.2d 252, 261 (2020) [*E.M.*] (“[T]he federal government has broad, undoubted power over immigration and the status of aliens”). Federal authority to regulate immigration “rests, in part, on the National Government’s constitutional power to ‘establish a uniform Rule of Naturalization,’ U.S. Const., Art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations.” *Arizona v. United States*, 567 U.S. 387, 394–95 (2012). Therefore, while your opinion request is limited to our interpretation of Nebraska law, to properly interpret the scope of Nebraska’s power to regulate within the field of alienage classifications and the resulting eligibility for public benefits, we must first interpret the

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<sup>2</sup> See 2010 Neb. Laws LB950, § 1 (codified at Neb. Rev. Stats. §§ 23-2306(3) (County Employees Retirement Act); § 9 (codified at Neb. Rev. Stat. § 24-703.01 (Judges Retirement Act); § 13 (codified at Neb. Rev. Stat. § 79-915(2) (School Employees Retirement Act); § 19 (codified at Neb. Rev. Stat. § 81-2016(1) (Nebraska State Patrol Retirement Act); § 21 (codified at Neb. Rev. Stat. § 84-1307(3) (State Employees Retirement Act); and § 28 (codified at Neb. Rev. Stat. § 84-1504(8) (deferred compensation plan).

<sup>3</sup> Provisions of federal statutes and regulations governing H-1B employees will be discussed more fully in section D, *infra*.

correlating federal law that has authorized states to make such determinations on alien eligibility for state public benefits.<sup>4</sup>

## ANALYSIS

### A. “Lawfully Present”

As a prerequisite to eligibility for participation in the retirement systems operated by the PERB and NPERs, Nebraska law requires an employee to be “lawfully present in the United States.” See Neb. Rev. Stat. §§ 4-108(3), 23-2306(3), 24-703.01, 79-915(2), 81-2016(1), 84-1307(3), and 84-1504(8). In *E.M.*, the Nebraska Supreme Court discussed the term “lawfully present” used in Neb. Rev. Stat. § 4-108 in the context of determining eligibility of certain noncitizen applicants for an extended foster care program as follows:

“The Nebraska act does not define ‘lawfully present.’ But one section requires an applicant to verify lawful presence by attesting that he or she is either (1) a U.S. citizen or (2) a qualified alien under the INA and is lawfully present. [See § 4-111(1).] This requirement makes it clear that ‘lawfully present’ refers to an individual’s citizenship or alien immigration status. Because the federal government has broad, undoubted power over immigration and the status of aliens, we turn to the PRWORA [Personal Responsibility and Work Opportunity Reconciliation Act of 1996] for guidance.” *E.M.*, 306 Neb. at 11, 944 N.W.2d at 261.

As noted by the Court, § 1621(a) of the PRWORA identifies certain classes of aliens who are ineligible for state public benefits. This subsection provides:

#### (a) In general

Notwithstanding any other provision of law and except as provided in subsections (b) and (d), an alien who is *not*—

- (1) a qualified alien (as defined in section 1641 of this title),
- (2) a nonimmigrant under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.], or

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<sup>4</sup> As noted in your opinion request, specific questions involving the implementation of Nebraska law are likely to surface based on possible interpretations of the statutes at issue. A notable consideration you identify involves compliance with federal tax law if alienage status changes for a state employee. The resulting impact on Nebraska’s legal capacity, as an employer, to distribute retirement benefits to unqualified aliens is an understandable concern. However, the Tax Code’s “Exclusive Benefit Rule” is not addressed here. The case-specific analysis of tax compliance is beyond the scope of the analysis of this opinion.

(3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. 1182(d)(5)] for less than one year,

is not eligible for any State or local public benefit (as defined in subsection (c)). (emphasis added).

Section 1621(d) of the PRWORA, however, “create[s] an exception allowing states to extend state and local public benefits to” aliens who are “not lawfully present.” *E.M.*, 366 Neb. at 10, 944 N.W.2d at 260. The Court reasoned that “the context of § 1621 shows clear intent by Congress to equate those ineligible under § 1621(a) with aliens not ‘lawfully present.’” *Id.* at 12, 944 N.W.2d at 262. “Therefore, aliens who do not fall within one of those categories are not ‘lawfully present’” for the purpose of State or local public benefits.” *Id.* (citing *Arizona ex rel. Brnovich v. Maricopa CCCDB*, 243 Ariz. 539, 416 P.3d 803 (2018)). The Court concluded that “[f]or the purposes of state or local public benefits eligibility under § 4-108, ‘lawfully present’ means the alien classifications under § 1621(a)(1), (2), and (3).” *E.M.*, 306 Neb. at 12, 944 N.W.2d at 262.<sup>5</sup>

## B. “Qualified Alien”

We must also consider the Legislature’s use of the term “qualified alien” in the Nebraska statutes at issue. As noted above, Nebraska law expressly limits eligibility to lawfully present (a) U.S. Citizens, and (b) qualified aliens under the INA. Neb. Rev. Stat. §§ 4-108(3), 23-2306(3), 24-703.01, 79-915(2), 81-2016(1), 84-1307(3), and 84-1504(8). As the federal INA does not define the term “qualified alien,” you suggest in your opinion request that the definition of “qualified alien” at 8 U.S.C. § 1641(b) of the PRWORA could be used in interpreting the Nebraska statutes.

In 1996, Congress passed the PRWORA, Pub. L. 104–193, 110 Stat. 2105 (1996), which “restrict[ed] public benefits for aliens, based on the rationale that aliens should ‘not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations.’” *Korab v. Fink*, 797 F.3d 572, 575 (9<sup>th</sup> Cir. 2014) [“*Korab*”] (citing 8 U.S.C. §§ 1601(2)(A)). Congress declared the reforms to be ‘a compelling government interest’ that is ‘in accordance with national immigration policy.’” *Id.* (quoting § 1601(5)-(6)).

Under 8 U.S.C. § 1641(b), a “qualified alien” is as an alien who is:

- (1) an alien who is lawfully admitted for permanent residence under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.],
- (2) an alien who is granted asylum under section 208 of such Act [8 U.S.C. 1158],

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<sup>5</sup> As explained more fully in section D, *infra*, H-1B visa holders are a type of nonimmigrant under the INA and are, thus, lawfully present.

- (3) a refugee who is admitted to the United States under section 207 of such Act [8 U.S.C. 1157],
- (4) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. 1182(d)(5)] for a period of at least 1 year,
- (5) an alien whose deportation is being withheld under section 243(h) of such Act [8 U.S.C. 1253] (as in effect immediately before the effective date of section 307 of division C of Public Law 104–208) or section 241(b)(3) of such Act [8 U.S.C. 1231(b)(3)] (as amended by section 305(a) of division C of Public Law 104–208),
- (6) an alien who is granted conditional entry pursuant to section 203(a)(7) of such Act [8 U.S.C. 1153(a)(7)] as in effect prior to April 1, 1980,
- (7) an alien who is a Cuban and Haitian entrant (as defined in section 501(e) of the Refugee Education Assistance Act of 1980), or
- (8) an individual who lawfully resides in the United States in accordance with a Compact of Free Association referred to in section 1612(b)(2)(G) of this title, but only with respect to the designated Federal program defined in section 1612(b)(3)(C) of this title (relating to the Medicaid program).

8 U.S.C. § 1641(b).<sup>6</sup> Stated more succinctly, “qualified aliens” are “legal permanent residents, asylees, refugees, certain parolees, and aliens who fall within other limited categories specified in the statute.” *Korab*, 797 F.3d at 575.

Nonimmigrant visa holders with work authorization do not appear to fit within this definition of qualified alien. However, in looking at this question, we must also consider those provisions of the PRWORA which authorize the states to determine the eligibility for state public benefits of those classes of aliens who are considered lawfully present and remain eligible for benefits under 8 U.S.C. § 1621(a). See section A, *supra*. Those categories include not only qualified aliens, but nonimmigrants under the INA. The PRWORA provides:

Notwithstanding any other provision of law and except as provided in subsection (b), a State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien (as defined in section 1641 of this title), a nonimmigrant under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.], or an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. 1182(d)(5)] for less than one year.

8 U.S.C. § 1622(a). Under the PRWORA, “Congress emphasized that a state that ‘follow[s] the Federal classification in determining the eligibility of ... aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in

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<sup>6</sup> Certain categories of “battered aliens” also fall within the definition of “qualified aliens.” See 8 U.S.C. § 1641(c).

accordance with national immigration policy.” *Korab*, 797 F.3d at 575 (citing 8 U.S.C. § 1601(7)).<sup>7</sup>

Returning to our initial inquiry, what did the Nebraska Legislature mean when it restricted alien eligibility for state retirement benefits to “qualified aliens” under the INA? The fundamental rule is that “[s]tatutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.” *J.S. v. Nebraska Dep’t of Health & Hum. Servs.*, 306 Neb. 20, 33, 944 N.W.2d 266, 276 (2020). The technical nature of the term “qualified alien,” however, is left somewhat ambiguous in the Nebraska statutes at issue. Presumably, the Legislature intended to follow the federal classification, but did so referencing the INA, which does not define the term “qualified alien.” “In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation....” *E.M.*, 306 Neb. at 10–11, 944 N.W.2d at 261.

While the Legislature could have been clearer, the reference to “qualified alien” was likely intended to reference the definition found in the PRWORA codified at 8 U.S.C. § 1641(b). We reach this conclusion because, while the INA does not define the term “qualified alien,” the INA provides the basis for the PRWORA categories of “qualified aliens.” See 8 U.S.C. § 1641(b) (every category of qualified alien takes its classification from the INA). Also, in the Nebraska statutes at issue, there is no mention of retirement plan eligibility for nonimmigrants under the INA, or aliens paroled into the United States under § 212(d)(5) of the INA, despite Congressional authorization to provide for such classes. The Legislature, pursuant to the authority given to states under 8 U.S.C. § 1622(a), could have made clear that persons are ineligible for state retirement plans “unless the employee (a) is a United States citizen, (b) qualified alien, (c) nonimmigrant, or (d) paroled alien under the Immigration and Nationality Act,” but it did not. “[T]he legal principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the others), . . . recogniz[es] the general principle of statutory construction that an expressed object of a statute’s operation excludes the statute’s operation on all other objects unmentioned by the statute.” *A & D Technical Supply Co., Inc. v. Nebraska Dep’t of Revenue*, 259 Neb. 24, 31, 607 N.W.2d 857, 863 (2000). “When a challenged statute is susceptible of more than one reasonable construction, a court uses the construction that will achieve the purposes of the statute and preserve the statute’s validity.” *Callan v.*

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<sup>7</sup> With the adoption of the PRWORA, Congress created three broad categories of aliens with respect to eligibility for state benefits. See *Korab*, 797 F.3d at 573–74 (“The first category—full benefits—requires states to provide the same benefits to particular groups of aliens, including certain legal permanent residents, asylees, and refugees, as the state provides to citizens. *Id.* § 1622(b). Recipients in this category also benefit from federal funds. *Id.* § 1612(b)(2). The second category—no benefits—prohibits states from providing any benefits to certain aliens, such as those who are in the United States without authorization. *Id.* § 1621(a). The third category—discretionary benefits—authorizes states to generally determine the eligibility for any state benefits of an alien who is a qualified alien, a nonimmigrant, or a parolee. *Id.* § 1622(a).”)

*Balka*, 248 Neb. 469, 481, 536 N.W.2d 47, 54 (1995). Here, we cannot overlook specific “carve-outs” (i.e., exceptions) in the PRWORA to the scope and type of state public benefits available to aliens that states are able to regulate.

**C. “State Public Benefit”**

Critical to our inquiry is Congress’ definition of “State public benefit.” As discussed above, Nebraska derives its authority to regulate alien eligibility for state public benefits from the PRWORA, which provides that “a State is authorized to determine the eligibility for any *State public benefits* of an alien who is a qualified alien [], a nonimmigrant under the [INA], or an alien who is paroled into the United States under [the INA].” 8 U.S.C. § 1622(a) (emphasis added). Under the PRWORA, a “State or local public benefit” means:

- (A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and
- (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

8 U.S.C. 1621(c)(1)(A–B). Therefore, regulating eligibility for “any retirement” benefit offered by the State or local government generally falls within the parameters of the statute. However, 8 U.S.C. § 1621(c)(2) “acts as a ‘carve out’ to the broad definition of ‘State public benefit.’” *Beltagui v. Nebraska Dept. of Health and Hum. Servs.*, 2018-LCA-00004, \*23 (Nov. 16, 2018) [*Beltagui*]. This is because § 1621(c)(2) provides in pertinent part:

[State public benefit] *shall not apply*—

- (A) *to any contract ... for a nonimmigrant whose visa for entry is related to such employment* in the United States, or to a citizen of a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99–239 or 99–658 (or a successor provision) is in effect;
- (B) *with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act* [8 U.S.C. 1101 et seq.] qualified for such benefits and for whom the United States under reciprocal treaty agreements is required to pay benefits, as

determined by the Secretary of State, after consultation with the Attorney General;. . . .

8 U.S.C. § 1621(c)(2) (emphasis added). Consequently, a plain reading of the PRWORA informs us that the Legislature is not authorized to restrict eligibility for retirement benefits for certain nonimmigrants lawfully admitted to the United States when their admittance is tied to their employment. For example, the employment of a state or local governmental employee on an H-1B nonimmigrant visa is “related to” his or her entry to the United States, as the specialty employment serves as the basis of the H-1B visa.

#### **D. H-1B Nonimmigrant Employees**

Federal regulations entitle all H-1B visa workers to *fringe* benefits on the same basis and under the same criteria afforded to U.S. workers of the same or similar status. See 20 C.F.R. § 655.731(c)(3); see also *Gupta v. Compunnel Software Group, Inc.*, ARB No. 12-049, ALJ No. 2011-LCA-45 (ARB May 29, 2014). Employers of H-1B nonimmigrants in a specialty occupation “shall . . . pay the H-1B nonimmigrant the required wage rate.” 20 C.F.R. § 655.731 (emphasis added). “The wage requirement includes the employer’s obligation to offer benefits and *eligibility* for benefits provided as compensation for services to H–1B nonimmigrants on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.” 20 C.F.R. § 655.731(a) (emphasis added). “Benefits and eligibility for benefits provided as compensation for services (e.g., cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; *retirement and savings plans*) shall be offered to the H–1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.” 20 C.F.R. § 655.731(c)(3) (emphasis added).

Considering the implementing regulations of the INA, “the design of the H-1B visa program deprives employers of economic incentives to prefer nonimmigrant professional employees, because their wages and benefits must equal those that would be paid to American workers.” *In the Matter of: Cal Farms Inc.*, 2014-TLC-00085, at \*7 (Apr. 28, 2014). See also *Aleutian Cap. Partners, LLC v. Scalia*, 975 F.3d 220, 231 (2d Cir. 2020) (citing 20 C.F.R. § 655.0(a)(1)) (“Indeed, a primary goal of U.S. non-immigrant foreign worker programs like the H-1B Program is to ensure that ‘the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.’”); and 20 CFR § 655.731(c)(3)(ii) (“The benefits received by the H–1B nonimmigrant(s) need not be identical to the benefits received by similarly employed U.S. workers(s), provided that the H–1B nonimmigrant is offered the same benefits package as those workers but voluntarily chooses to receive different benefits”).

In *Beltagui*, an H-1B visa nonimmigrant worker was denied participation in the state retirement benefits plan and the deferred compensation plan. The Administrative Law Judge (“ALJ”) analyzed whether the exclusion of H-1B employees was permitted under 8 U.S.C. § 1622(a). *Beltagui*, 2018-LCA-00004, at \*2. In *Beltagui*, the DHHS argued that



“the [retirement and deferred compensation] plans are considered State public benefits, as defined under 8 U.S.C. § 1621(c)(1).” *Id.* at \*21. The DHHS further argued that without express eligibility under Nebraska law, the H-1B nonimmigrant worker “was not entitled to receive such Nebraska State public benefits ‘because federal statutory schemes permit states to limit employees eligible to public benefits and contrary federal regulations [e.g. regulations pertaining to required benefits for H-1B visa workers] are preempted.’” *Id.* at \*21 (citing Resp. Br. at 16–18). The ALJ disagreed, stating: “Congress enacted 8 U.S.C. § 1182(n)(2)(C)(viii) as part of the American Competitiveness and Workforce Improvement Act of 1998, which was included in an amendment to the Immigration and Nationality Act of 1952, and addresses an employer’s responsibility for compensating nonimmigrant workers hired under the H-1B visa program. ... [A]n H-1B employer must provide nonimmigrants ‘benefits and eligibility for benefits (including ...the opportunity to participate in retirement and savings plans ...) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.’” *Beltagui*, 2018-LCA-00004, at \*22 (citing 8 U.S.C. § 1182(n)(2)(C)(viii)). Therefore, employees on H-1B visas cannot be excluded from eligibility from the retirement plans administered by NPERs.<sup>8</sup>

The U.S. Supreme Court has stated “[w]hen confronted with two Acts of Congress allegedly touching on the same topic, this Court is not ‘at liberty to pick and choose among congressional enactments’ and must instead ‘strive to give effect to both.’” *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1624 (2018) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Excluding employees with H-1B visas from state retirement plans based on the discretion afforded states in 8 U.S.C. § 1622(a) “would effectively nullify § 1182(n)(2)(C)(viii) of the [INA].” *Beltagui*, 2018-LCA-00004, \*24. Alternatively, “construing 8 U.S.C. § 1622(a) as permitting States to prevent aliens from becoming a drain on the public purse, through use of State public benefits, while also precluding States, acting as H-1B employers, from using the same provision to deny its H-1B nonimmigrant employees benefits or eligibility for benefits as offered to its U.S. employees as required under 8 U.S.C. § 1182(n)(2)(C)(viii), gives effect to both statutory provisions § 1622(a) and § 1182(n)(2)(C)(viii).” *Beltagui*, 2018-LCA-00004, at \*25.

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<sup>8</sup> See *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 587 (2011) (citation omitted) (The INA “established a ‘comprehensive federal statutory scheme for regulation of immigration and naturalization’ and set ‘the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.’”); *Toll v. Moreno*, 458 U.S. 1, 11 (1982) (quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948)) (“[States] can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens within the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with th[e] constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.”); *Texas v. United States*, 328 F. Supp. 3d 662, 717 (S.D. Tex. 2018) (“The INA’s statutory scheme intricately and particularly describes groups to whom Congress wished to grant work authorization, delineating precise categories of aliens for whom work authorization *is*, *may be*, or *is not* available. Where Congress has expressed its intent to provide certain groups of aliens with work authorization, it has promulgated specific laws requiring the DHS to do so.”) (emphasis in original).

We generally agree with the ALJ's conclusion in *Beltagui*. In addition, our review of the PRWORA reveals that, while Nebraska has authority to determine eligibility for state or local public benefits under 8 U.S.C. § 1622(a), when one employs the complete definition of state or local benefits found at 8 U.S.C. § 1621(c)(1) and (2), Nebraska does not appear to have discretion to determine the eligibility for retirement benefits for (1) nonimmigrants whose visa for entry is related to such employment in the United States (e.g. H-1B nonimmigrant visa workers), and (2) work authorized nonimmigrants under the INA. Moreover, federal law requires each employer of an H-1B nonimmigrant

to offer to an H-1B nonimmigrant, during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in *retirement and savings plans*; and cash bonuses and noncash compensation, such as stock options (whether or not based on performance)) *on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.*

8 U.S.C. § 1182(n)(2)(C)(viii) (emphasis added).

H-1B nonimmigrant workers are not included in the list of qualified aliens under 8 U.S.C. § 1641, but the employment of an H-1B nonimmigrant state employee is "related to" his or her entry to the United States, as it serves as the basis for the H-1B visa. Therefore, states are not authorized to determine eligibility for retirement plans for state employees who hold an H-1B visa, because H-1B employees must receive the same benefits offered to all U.S. employees in same or similar circumstances.<sup>9</sup> We understand that you may have received inquiries from other visa holders regarding eligibility for participation in the retirement plans administered by the PERB and NPERS. Using the analysis regarding H-1B visa holders, it would be necessary to determine whether other classifications of visa holders are nonimmigrants under the INA, whether they hold visas related to their employment or are work authorized, and whether the federal statutes and regulations governing the type of visa they hold requires that they receive the same fringe benefits as the employer's other workers. Each of those classifications of visa holders would need to be addressed separately on a case-by-case basis.

## CONCLUSION

Based on the foregoing, we interpret the INA and PRWORA to put in doubt the State's authority to limit the eligibility for retirement benefits of certain nonimmigrants who hold federal visas with work authorization. While Nebraska has general authority to regulate eligibility for most state and local public benefits, that term as used in PRWORA


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<sup>9</sup> See C.F.R. § 655.731(c)(3) ("Benefits and eligibility for benefits provided as compensation for services (e.g., cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; retirement and savings plans) must be offered to the H-1B nonimmigrant on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.")

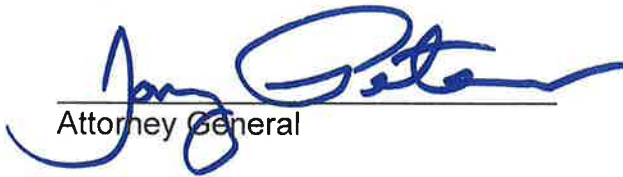
does not apply to some contracts with and benefits for certain classifications of nonimmigrants. And, as shown in *Beltagui*, application of the statutes in question to a particular subset of employees of those employers participating in the retirement plans you administer will likely not be upheld. You may wish to consider requesting legislation to clarify the eligibility for retirement benefits to better correlate with federal law. Rather than make reference only to "qualified aliens" under the INA, the Legislature could adopt language based on the PRWORA to also specifically include, with regard to retirement benefits, those nonimmigrants whose visa for entry is related to their employment in the United States (e.g., H-1B nonimmigrant visa workers), and perhaps other work authorized nonimmigrants under the INA.<sup>10</sup>

Very truly yours,

DOUGLAS J. PETERSON  
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Lynn A. Melson  
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Approved by:

  
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Attorney General

09-828-30

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<sup>10</sup> Minnesota and Arizona provide possible templates for Nebraska lawmakers to consider. See Minn. Stat. § 353.01; Ariz. Rev. Stat. § 1-502.