



Commonwealth of the Northern Mariana Islands
Office of the Attorney General

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Sen. Arnold Palacios

Misc. Comm. No. 20-48

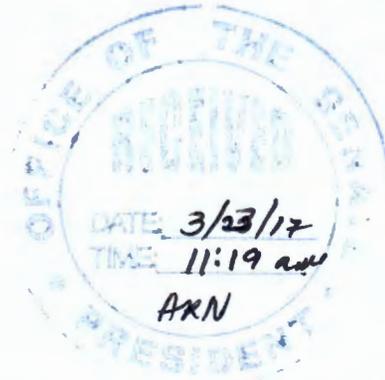
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March 22, 2017

OAGSB: 2017-07

Hon. Justo S. Quitugua
Chairperson
Committee on Education and Youth Affairs
The Senate
20th Northern Mariana Islands Legislature
Commonwealth Legislature
Saipan, MP 96950



Re: Senate Bill 20-08: "To enable the CNMI to participate in the Western Interstate Commission for Higher Education's Professional Student Exchange Program; and for other purposes."

Dear Chairperson Quitugua:

Thank you for requesting the comments of the Office of the Attorney General on Senate Bill 20-08 (the Bill). After reviewing the Bill and applicable law, my Office has identified several legal and practical issues that should be addressed.

I. Legal Issues

There are three areas that could open up the Bill to legal challenge: (1) the U.S. citizenship requirement; (2) the registered voter requirement; and (3) the three-year residency requirement.

The first area that will open the Bill to legal challenge is the restriction of scholarship benefits to U.S. citizens. States and territories are generally prohibited from discriminating on the basis of alienage unless the law survives "strict scrutiny." *Bernal v. Fainter*, 467 U.S. 216, 219 (1984). To survive strict scrutiny, "the law must advance a compelling state interest by the least restrictive means available." *Id.* This is an extremely difficult test to satisfy, especially since the federal government has already enacted legislation that restricts the public benefits available to various classes of aliens. See 8 U.S.C. §§ 1621, 1641. Section 1621 restricts federal and State public benefits to "qualified aliens," and § 1641 defines qualified aliens extremely narrowly to include permanent residents, and groups such as refugees and asylees. In order to pass strict scrutiny, the Commonwealth would need to show that there is a compelling interest in further restricting scholarship benefits to U.S. citizens alone. The Committee should recommend either that the U.S. citizenship requirement be stricken, or that the legislative

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findings be supplemented extensively to justify the exclusion of otherwise qualified aliens under federal law.

The second area that will open the Bill to legal challenge is the requirement that the recipient be registered to vote in the Commonwealth. This implicates the U.S. and Commonwealth Constitutions' prohibition on arbitrary and capricious laws. Importantly, as the voter registration requirement does not implicate a suspect classification or a fundamental right, the law will be upheld if there is any rational basis to uphold the legislation. While this is a relatively easy test to pass, the voter registration requirement is questionable. No other State in the Western Interstate Commission for Higher Education's Professional Student Exchange Program conditions a scholarship award on voter registration in that State. While every State considers voter registration a factor in determining whether an individual is domiciled in that state (and therefore eligible for benefits), no State makes voter registration an absolute requirement. It is difficult to see why voter registration would take precedence over other forms of establishing domicile, such as having a driver's license or registering one's vehicle in the jurisdiction. Ultimately, the voter registration requirement is of questionable relevance, and the Committee should recommend that either the voter registration requirement be stricken, or that the legislative findings be supplemented to justify the voter registration requirement.

The third area that will open the Bill to legal challenge is the three-year residency requirement. This again implicates the U.S. and Commonwealth Constitutions' prohibition on arbitrary and capricious laws. Residency requirements for tuition purposes have been upheld when the required period is up to one year. See *Polaski v. Clark*, 973 P.2d 381 (Or. Ct. App. 1999); *Ravindranathan v. Virginia Com. University*, 519 S.E.2d 618 (Va. 1999). It is difficult to see how a three-year residency requirement serves any greater purpose than a one-year residency requirement would. Furthermore, while tuition residency has been upheld under the rational basis test, a three-year residency requirement threatens to implicate the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution by penalizing movement to the Commonwealth from another jurisdiction. While the courts have thus far refused to extend the Privileges or Immunities Clause to State residency requirements such as those for tuition, the three-year requirement is so much greater than even the strictest residency requirements of other States that a Court may be inclined to view the requirement as penalizing U.S. citizens that move to the Commonwealth from elsewhere. Ultimately, a potential legal challenge can be avoided by changing the three-year residency requirement to a one-year residency requirement, or, alternatively, by adding language allowing a potential scholarship recipient the opportunity to demonstrate that he or she is a bona fide resident. The Committee should therefore suggest that the residency requirement be reduced to one year, or, in the alternative, suggest that the Bill include language that would allow an individual the opportunity to demonstrate that he or she is a bona fide resident of the Commonwealth and therefore eligible for a scholarship award.

II. Practical Issues

There are two practical issues, relating to the registered voter requirement and the need for a definition of residency.

The requirement that only registered voters be qualified to receive sponsorship under the Bill poses a significant practical problem. Specifically, an individual that is residing in another State may inadvertently register to vote in that State, for example, by applying for that State's driver's license. Inadvertently registering to vote in another State will result in the individual automatically losing their voter registration in the Commonwealth. 1 CMC § 6206(a)(8). Therefore, an individual may take action that, unbeknownst to them, renders him or her ineligible for continued support under the Bill. Removing voter registration as a requirement, and instead making it a criterion for determining domicile would remove this problem.

A second practical problem raised by the Bill is the use of the term "resident" and "residency." It is unclear whether the Bill's intent is to grant assistance to individuals that are *domiciled* in the Commonwealth or merely *reside* in the Commonwealth. A person's residence is where they live. A person's domicile, by contrast, is "[t]he place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." Black's Law Dictionary (10th Ed. 2014). The Bill's "residency" requirement, like tuition domicile requirements elsewhere, appears to ensure that the recipient of financial aid is a bona fide member of the State or, as here, Commonwealth.

Replacing the term "residence" with "domicile" will clarify this ambiguity, and demonstrate that the Bill's intent is to provide scholarships to individual's that are part of the Commonwealth's community. Importantly, it may be easier for bona fide members of the Commonwealth community who apply for the scholarship to prove domicile instead of residency. Indeed, it may be prohibitively difficult to establish residency for the purposes of this Bill. This is because individuals that will be seeking this scholarship will most likely have immediately completed a bachelor's degree outside of the Commonwealth, requiring them to reside outside the Commonwealth for approximately four years. While such a student's *residency* would change as a result of attending school elsewhere, his or her *domicile* would be the Commonwealth so long as he or she considered the Commonwealth home and intended to return after completing his or her studies. The Committee should recommend that the term "residence" and residency" be replaced with "domicile," and further recommend that the Bill include criteria for determining domicile. Useful criteria for determining domicile are found in the Commonwealth's election law:

Criteria for determining a person's domicile includes [sic] but is [sic] not limited to the following:

- (a) Whether the person maintains a permanent residence or permanent place of abode in a place outside the Commonwealth; or
- (b) Whether the person's presence in the Commonwealth results from his own public or private employment or that of a person on whom he is economically dependent; or

- (c) Whether he or the person on whom he is economically dependent receives housing or pay differentials for housing or living allowance as a consequence of employment in the Commonwealth; or
- (d) Whether the person maintains contacts with a place outside the Commonwealth, such as supporting a spouse or family who reside in the place, maintaining a driver's license issued by the place, holding a postal address at the place, continuing affiliations with the professional, religious or fraternal life in the place or paying taxes in the place; or
- (e) Whether the person has expressed an intention not to be domiciled in the Commonwealth; or
- (f) Whether the person registered or voted in a place outside the Commonwealth during the preceding year; or
- (g) Whether the person who immediately prior to becoming a member of the military service was not domiciled in the Commonwealth and who is in the military service residing in a military reservation or provided housing or a housing allowance; or
- (h) Whether the person's presence or residency in the Commonwealth is based on a work order or contract with the Commonwealth Government, its subdivisions or its agencies; or
- (i) Whether the person's presence or residency in the Commonwealth is based on a work order or contract in the private sector.

1 CMC § 6203. Note that adoption of such criteria would solve the possible legal and practical issues raised by the registered voter requirement. Replacing the term "residence" with "domicile," and including criteria for domicile similar to those found in Commonwealth election law would resolve the ambiguity inherent in the Bill's current form.

III. Conclusion

The Bill has the laudable objective of joining WICHE's Professional Student Exchange Program. However, there are three legal and two practical issues that need to be addressed. To cure the Bill of legal shortcomings, the Committee should suggest: (1) that the U.S. citizenship requirement be removed, (2) that the requirement that the scholarship recipient be registered to vote be removed, and (3) that the length of residency either be shortened to one year or language added allowing an individual the opportunity to demonstrate that he or she is a bona fide resident of the Commonwealth. To cure the practical problems raised by the Bill, the Committee should suggest: (1) removing the requirement that scholarship recipients be registered voters, (2) clarify whether the Bill seeks to grant

scholarships based on residence or domicile, and (3) include factors for determining residence or domicile. Once these issues are addressed, the Bill should be ready for further action by the legislature.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward Manibusan", with a long horizontal flourish extending to the right.

EDWARD MANIBUSAN

Attorney General

cc: Deputy Attorney General
Members, The Senate