S T A T E O F T E N N E S S E E
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Opinion No. 07-76

Qualifications for individuals seeking commission as a Notary Public.

QUESTIONS

1. Would it be constitutional to require those seeking the office of notary public to provide documentation establishing their lawful permanent residence status?

2. Would it be constitutional to require those seeking the office of notary public to provide documentation establishing their identity and eligibility for employment in accordance with the verification procedures set out in federal I-9 Employment Eligibility Verification form?

OPINIONS

1. Yes. While Tenn. Code Ann. § 8-16-101 currently does not require that notaries public be "lawful permanent residents," the statute may be amended to require notary applicants to be lawful permanent residents without violating the United States Constitution, as long as there is a rational basis for such legislation.

2. No. Form I-9 has no application in this context because individuals seeking commission as a notary public are not seeking employment. Furthermore, Form I-9 and the information contained therein may be used only for enforcement of the Immigration and Nationality Act and 18 U.S.C. §§ 1001, 1028, 1546, or 1621.

ANALYSIS

1. Part 1, Chapter 16 of the Tennessee Code outlines the qualifications necessary for a commission as a Notary Public. Tennessee Code Annotated section 8-16-101 reads:

> (a) There shall be elected by the members of the county legislative body as many notaries public as they may deem necessary. Notwithstanding the provisions of § 8-18-101, United States citizenship is not a requirement for a person to hold the office of notary public. At the time of their election, all notaries must be residents of the county, or have their principal place of business in the county, from which they were elected. If an individual's principal place of business is in any county in the state of Tennessee, the individual is eligible for election as a notary in that county, although the individual may reside in a state other than Tennessee.

> (b) Nothing contained within the provisions of § 5-5-102(c)(2), or any other law, shall be construed to prohibit a member of a county legislative body from also serving as a notary public; provided, that such member complies with the requirements established within this part.
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> (c) In addition to any other eligibility requirements, each person applying for election as a notary public shall certify under penalty of perjury that such person:
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> (1) Has never been removed from the office of notary public for official misconduct;
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> (2) Has never had a notarial commission revoked or suspended by this or any other state; and
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> (3) Has never been found by a court of this state or any other state to have engaged in the unauthorized practice of law.

There is no requirement in the statute, as currently written, that an individual seeking a commission as a notary public be a "lawful permanent resident," and there is no requirement that the individual provide documentary evidence of "lawful permanent residence status." The statute only requires that "all notaries must be residents of the county, or have their principal place of business in the county . . .." There is no definition provided for the term "resident," and there is no indication in the statute that the term "resident" is used as a term of art.

> The term "resident" is defined in Black's Law Dictionary, Fifth Edition, as follows:
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> Any person who occupies a dwelling within the State, has a present intent to remain within the State for a period of time, and manifests the genuineness of that intent by establishing an ongoing physical presence within the State together with indicia that his presence within the State is something other than merely transitory in nature. The word "resident" when used as a noun, means a dweller, habitant or occupant; one who resides or dwells in a place for a period of more, or less, duration; it signifies one having a residence, or one who resides or abides.

The term "resident" is not defined as one who is a lawful permanent resident. Indeed, the definition of the term does not make distinction between those individuals who are in the country lawfully as opposed to those in the country unlawfully. The statute alone identifies the qualifications necessary to hold a commission as a notary public. The statute is a creature of the legislature, and any change in the statute must be enacted by the legislature through proper legislation. As written, the statute does not require an applicant to be a lawful permanent resident.

The statute may be amended, through proper legislation, to require that those seeking commission as a notary public possess "lawful permanent resident status." The Supreme Court has previously rejected a claim that illegal aliens are members of a suspect class. *See Plyler v. Doe*, 457 U.S. 202, 219, 102 S.Ct. 2382, 2396 n. 19. (1982). Consequently, "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Federal Communications Commission v. Beach*

Communications, Inc., 508 U.S. 307, 313, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993). *See also League of United Latin American Citizens (LULAC), et al. v. Bredesen, et al.*, No. 3:04-0613, 2004 WL 3048724, *3 (M.D. Tenn. Sept. 28, 2004). Under rational basis review, a classification bears a "strong presumption of validity . . . and those attacking the rationality of the legislative classification have the burden 'to negate every conceivable basis which might support it.'" *LULAC,* 2004 WL 3048724 at *5 (quoting *Beach* 113 S.Ct. at 2102). Thus, as long as there is a rational basis for the legislation, it is likely to be upheld as constitutional.

2. Individuals seeking commission as a notary public are not seeking employment. Accordingly, form I-9 is inapplicable in this context. The I-9 process was introduced through legislation in the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-63, 8 U.S.C. § 1324a. The legislation introduced the employment eligibility verification requirements (the I-9 process) and specified employer sanctions for violation of the verification process. However, information contained in the I-9 form may be used only to enforce the Immigration and Nationality Act and 18 U.S.C. §§ 1001, 1028, 1546, and 1621. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Furthermore, the United States Code mandates that "[t]he system may not be used for law enforcement purposes, other than enforcement of this chapter or sections 1001, 1028, 1546, and 1621 of Title 18." 8 U.S.C. § 1324a(d)(2)(F). The United States Attorney General enforces and prosecutes violations of this statute. *See* 8 U.S.C. § 1324a(e). The states may not enforce this federal law and may not impose civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens. 8 U.S.C. § 1324a(h)(2).

Individuals seeking commission as a notary public are not seeking employment. Accordingly, the I-9 form is not applicable and may not be used.

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