



DePaul Law Review

Volume 63

Issue 3 *Spring 2014: Symposium - Great Lakes:
Emerging Issues for Freshwater Resources*

Article 6

Barred from Practice?: Undocumented Immigrants and Bar Admissions

Tara Kennedy

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Tara Kennedy, *Barred from Practice?: Undocumented Immigrants and Bar Admissions*, 63 DePaul L. Rev. 833 (2014)

Available at: <https://via.library.depaul.edu/law-review/vol63/iss3/6>

This Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

BARRED FROM PRACTICE? UNDOCUMENTED IMMIGRANTS AND BAR ADMISSIONS

INTRODUCTION

Jose Godinez-Samperio and his parents entered the United States from Mexico on tourist visas when he was nine years old.¹ They overstayed their visas, and his father—formerly a doctor in Mexico—found work milking cows on a dairy farm while his mother—formerly a dentist in Mexico—worked at a factory making sliding glass doors.² Jose, who is now twenty-six years old, has successfully graduated from high school,³ college, and Florida State University College of Law.⁴ Jose’s status as an undocumented immigrant is not unusual,⁵ but his application to the Florida Bar is.⁶ Jose passed the exam portion of the bar, and the Florida Board of Bar Examiners found that nothing in his background disqualified him with respect to the moral character and fitness test.⁷ Even in light of Jose’s impressive achievements, it is difficult to ignore the fact that he resides in the country illegally, an issue that prompted the Board of Bar Examiners to submit his case to the Florida Supreme Court for an advisory opinion.⁸ The Florida Supreme Court held after two years of consideration that undocumented

1. Miranda Leitsinger, *Florida Bar: Illegal Alien Meets Moral Fitness Test*, NBC NEWS (Aug. 9, 2012), http://usnews.nbcnews.com/_news/2012/08/09/13201048-florida-bar-illegal-immigrant-meets-moral-fitness-test?lite; see also *Undocumented Immigrant Can Be Lawyer, Florida Bar Says*, FOX NEWS LATINO (Aug. 8, 2012), <http://latino.foxnews.com/latino/news/2012/08/08/undocumented-immigrant-not-disqualified-from-florida-bar> [hereinafter *Undocumented Immigrant*].

2. *Undocumented Immigrant*, *supra* note 1.

3. Impressively, Jose graduated high school in 2004 as valedictorian. Douglas Stanglin, *Can an Undocumented Immigrant Be Admitted to the Florida Bar?*, USA TODAY (Apr. 16, 2012), <http://content.usatoday.com/communities/ondeadline/post/2012/04/can-an-undocumented-immigrant-be-admitted-to-florida-bar/1#UHeYQY4csqY>.

4. *Undocumented Immigrant*, *supra* note 1.

5. The Pew Research Center estimated that 11.7 million unauthorized immigrants resided in the United States in 2012. Jeffrey S. Passel et al., *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed*, PEW RES. CENTER (Sept. 23, 2013), <http://www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed/>.

6. See *Undocumented Immigrant*, *supra* note 1.

7. Leitsinger, *supra* note 1.

8. See Stanglin, *supra* note 3. Stanglin also notes that many people view the issue of Jose’s illegal status with some degree of hostility. For example, political groups that oppose amnesty for undocumented immigrants view Jose’s choice to remain in the United States after he turned eighteen as evidence of contempt for American law, and argue that this should prevent him from ever practicing law. See *id.*

individuals cannot be admitted to the state bar absent legislation specifically allowing their admission.⁹ Similar cases have arisen in California and New York.¹⁰

Immigration reform has become one of the biggest issues confronting Congress, and there is no disputing that United States immigration policy is in dire need of reform.¹¹ Jose's situation is one example of the complications that can arise under the current immigration system. He was legally able to complete three levels of U.S. education, yet he is barred from gaining employment and from making meaningful contributions to society due to his undocumented status.¹²

In *Plyler v. Doe*, the Supreme Court decided that undocumented children could not be denied the benefit of free primary and secondary education.¹³ The Court stated that children should not be punished for the wrongdoings of their parents and found that depriving undocumented children of education would put them at a disadvantage and create a subclass of illiterate people.¹⁴ However, stories like Jose's highlight the contradiction that the *Plyler* decision has created for these undocumented children—they receive the education provided for by *Plyler*, yet are denied the opportunity to put it to practical use.¹⁵ The undocumented children protected by *Plyler* often continue on to complete college and, in many states, even receive the

9. Fla. Bd. of Bar Exam'rs Re Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, 134 So. 3d 432, 437 (Fla. 2014) (per curiam).

10. See, e.g., Opening Brief of the Committee of Bar Examiners of the State Bar of California Re: Motion for Admission of Sergio C. Garcia to the State Bar of California at 1–2, *In re Garcia*, 315 P.3d 117 (Cal. 2014) (No. S202512) [hereinafter Bar Exam'rs Brief]; Jennifer Medina, *Allowed to Join the Bar, but Not to Take a Job*, N.Y. TIMES (Jan. 2, 2014), <http://www.nytimes.com/2014/01/03/us/immigrant-in-us-illegally-may-practice-law-california-court-rules.html>; Leitsinger, *supra* note 1.

11. See, e.g., Marisa Silenzi Cianciarulo, *Can't Live with 'Em, Can't Deport 'Em: Why Recent Immigration Reform Efforts Have Failed*, 13 NEXUS J. OP. 13, 14–15 (2008) (stating that Congress continually fails to pass much needed immigration reform, leaving the United States with “a broken immigration system that jeopardizes border security, creates an underclass of exploitable workers, . . . and impedes family unity”). See generally Kristina M. Campbell, *Imagining a More Humane Immigration Policy in the Age of Obama: The Use of Plenary Power to Halt the State Balkanization of Immigration Regulation*, 29 ST. LOUIS. U. PUB. L. REV. 415 (2010).

12. See Leitsinger, *supra* note 1; see also Stanglin, *supra* note 3.

13. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

14. See *id.*

15. See Laura A. Hernández, *Dreams Deferred—Why In-State College Tuition Rates Are Not a Benefit Under the IIRIRA and How This Interpretation Violates the Spirit of Plyler*, 21 CORNELL J.L. & PUB. POL'Y 525, 527–29 (2012); see also J. Austin Smithson, Comment, *Educate Then Exile: Creating a Double Standard in Education for Plyler Students Who Want to Sit for the Bar Exam*, 11 SCHOLAR 87, 88–90 (2008).

benefit of in-state college tuition.¹⁶ This has created a new subclass comprised of graduates from American colleges who consider themselves American but are legally considered citizens of countries they have never truly lived in.

While immigration is federally regulated,¹⁷ admission to the bar is controlled by each state individually.¹⁸ Those who oppose admitting undocumented applicants to the bar rely on 8 U.S.C. § 1621.¹⁹ The statute provides that undocumented immigrants are generally not eligible to receive state benefits.²⁰ Such benefits include professional licenses provided by a state agency or supplied by appropriated funds.²¹ While there is some debate over whether a law license is in fact provided by a state agency or supplied by appropriated funds,²² the two state supreme courts that have addressed the issue have both held that law licenses fall within the statute.²³ However, even if the statute does prohibit providing a law license to an undocumented immigrant, states are given express permission to legislate around the restriction.²⁴

Bar admission guidelines vary from state to state, which furthers confusion regarding undocumented immigrants' ability to join the bar.²⁵ Some states require proof of citizenship while others do not, which may lead undocumented applicants to believe their status is not relevant to admission in certain states.²⁶ In a state that does not require proof of citizenship or immigration status, undocumented applicants may wonder why they would be denied admission after passing

16. See Ann Morse, *In-State Tuition and Unauthorized Immigrant Students*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=13100> (last revised Dec. 23, 2013).

17. U.S. CONST. art. I, § 8, cl. 4; see also AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, *IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE* § 1:5.2 (4th ed. 2001).

18. It is widely recognized that the power to admit and discipline attorneys rests solely with the state's highest court. See *In re Griffiths*, 413 U.S. 717, 722–23 (1973); see also, e.g., *Hoover v. Ronwin*, 466 U.S. 558, 569 & n.18 (1984); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

19. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 411, 110 Stat. 2105, 2268–69 (codified at 8 U.S.C. § 1621 (2012)).

20. 8 U.S.C. § 1621(a).

21. *Id.* § 1621(c).

22. See *infra* notes 150–161 and accompanying text. Compare Bar Exam'rs Brief, *supra* note 10, at 9–16, with Application and Proposed Brief for Amicus Curiae the United States of America at 5–16, *In re Garcia*, 315 P.3d 117 (Cal. 2014) (No. S202512) [hereinafter U.S. Amicus Brief].

23. See *In re Garcia*, 315 P.3d at 126; Fla. Bd. of Bar Exam'rs Re Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Fla. Bar, 134 So. 3d 432, 437 (Fla. 2014) (per curiam).

24. 8 U.S.C. § 1621(d).

25. See generally NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N, *COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2012* (Erica Moeser & Claire Huismann eds., 2012).

26. See *id.* at 1–3.

both the exam and the moral character test. The recent implementation of “Deferred Action for Childhood Arrivals” (DACA)²⁷—which assures certain individuals that they will not be deported for two years and confers the ability to apply for work authorization—further the contradictions in this area.²⁸

In light of the new DACA guidelines and cases such as Jose’s, it is critical that states clarify the effect of unlawful status on admission to the bar. Further, considerations of fairness and the potential societal benefits from admitting these individuals to the bar show that banning them based solely on status is not a prudent approach. This Comment addresses a small number of individuals—current estimates place undocumented law school graduates at fewer than one hundred.²⁹ Preventing this specific group of individuals from practicing law deprives the United States of their potential contributions and deprives the individuals of the freedom to live and work in the nation they view as their home. While admitting these individuals to the bar is the first necessary step, providing them with the ability to work legally is the only way to provide them with the full benefits of a legal license. This Comment argues that a new visa category should be created to provide legal status and work authorization for undocumented individuals otherwise eligible for bar admission. This new visa category would be modeled after DACA requirements combined with the approach of 8 U.S.C. § 1101, which provides for a certain number of nonimmigrant visas for professionals employed in specialty occupations.³⁰

Part II of this Comment provides an overview of case history, federal law, state law, and immigration policy that affect undocumented applicants to the bar.³¹ Part III notes complications with federal law, addresses whether undocumented immigrants are morally unfit, and suggests two possible approaches to provide qualified undocumented immigrants with work authorization: (1) an annual allotment of visas for individuals who meet certain strict criteria and are otherwise eligible for the bar, but are lacking legal status, or (2) if no visas are allotted, these individuals should receive a specialized category of

27. Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Boarder Prot., et al. (June 15, 2012) [hereinafter Napolitano Memorandum], available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>; see also *Deferred Action for Childhood Arrivals*, DEP’T OF HOMELAND SECURITY, <https://www.dhs.gov/deferred-action-childhood-arrivals> (last visited Apr. 13, 2014).

28. See Napolitano Memorandum, *supra* note 27, at 1–3.

29. Raquel Aldana et al., *Raising the Bar: Law Schools and Legal Institutions Leading to Educate Undocumented Students*, 44 ARIZ. ST. L.J. 5, 6 (2012).

30. See 8 U.S.C. § 1101(a)(15)(H) (2012).

31. See *infra* notes 37–148 and accompanying text.

prosecutorial discretion tailored to their circumstances.³² Part IV considers the effects and implications of allowing bar admission to undocumented immigrants.³³

II. BACKGROUND

Due to the complexities of immigration law it is necessary to have an understanding of different areas of the law in order to assess whether undocumented immigrants should be admitted to the bar and granted permission to work as attorneys. Starting with the landmark case of *Plyler v. Doe* the federal government has treated undocumented immigrants who enter the United States as children permissively.³⁴ This approach has continued in the states, many of which allow these individuals to complete college with the benefits of in-state tuition and financial aid.³⁵ However, admission to the bar for noncitizens has been an area of differing caselaw, a fact that has been further complicated by the development of DACA.³⁶ This Part discusses this wide range of topics and how they affect undocumented immigrants seeking admission to the bar.

A. Defining “Undocumented Immigrant”

Before considering the complexities of undocumented immigrants and bar admission, it is necessary to define what the term “undocumented immigrant” means under federal law.³⁷ There are many different status categories for immigrants and other noncitizens present in the United States. An “alien” is defined under the Immigration and Nationality Act (INA) as “any person not a citizen or national of the United States.”³⁸ The INA goes on to distinguish between “immi-

32. See *infra* notes 149–228 and accompanying text.

33. See *infra* notes 229–234 and accompanying text.

34. See *infra* notes 56–71 and accompanying text.

35. See *infra* notes 72–77 and accompanying text.

36. See *infra* notes 78–148 and accompanying text.

37. While the terms “illegal alien” and “undocumented immigrant” are synonymous, this Comment will use the term undocumented immigrant. There are scholarly and popular concerns regarding the use of the term illegal alien, specifically that the term is “racially loaded, ambiguous, imprecise, and pejorative.” Beth Lyon, *When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 576 (2004) (footnotes omitted). Use of the term undocumented immigrants alleviates these concerns. See Aldana et al., *supra* note 29, at 6 n.8. But see Jon Feere, *Language in the Immigration Debate: Associated Press Pushes Back Against Illegal Alien Activists*, MEMORANDUM (Ctr. For Immigration Studies, Wash., D.C.), Oct. 2012, at 1, 1, available at <http://cis.org/sites/cis.org/files/feere-language-ap.pdf> (stating that the term undocumented immigrant is legally inaccurate and misrepresents the status of these individuals).

38. 8 U.S.C. § 1101(a)(3) (2012).

grant” and “nonimmigrant” aliens.³⁹ Nonimmigrant aliens have been admitted into the United States, but only on a temporary basis.⁴⁰ Examples of nonimmigrant aliens include students, tourists, business visitors, foreign government officials, and temporary workers.⁴¹ Most of the nonimmigrant categories require nonimmigrants to show that they do not intend to abandon their residence in a foreign country and that they have some specific purpose in the United States.⁴² Any legal entrant who does not fall under a nonimmigrant category is considered an immigrant, including permanent resident aliens, who are lawfully admitted into the United States and legally allowed to reside permanently in the United States.⁴³

In order to qualify for admission into the United States as an immigrant, rather than a nonimmigrant, a person must also fall within certain statutory categories.⁴⁴ The three main qualifying categories are family-sponsored immigrants,⁴⁵ employment-based immigrants,⁴⁶ and diversity immigrants.⁴⁷ An illegal or undocumented immigrant is an immigrant “without any valid documentation or lawful immigration status.”⁴⁸ Undocumented immigrants “enter the United States unlawfully, overstay their nonimmigrant visas, or otherwise violate the specific terms of their admission or some more general provision of the immigration law.”⁴⁹ This Comment focuses on individuals classified as illegal or undocumented immigrants.⁵⁰

39. See *id.* § 1101(a)(15). All aliens are immigrants other than those who fall into a list of certain enumerated classes; any who fall into these classes are nonimmigrant aliens. *Id.*

40. Smithson, *supra* note 15, at 93 (citing STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 9 (4th ed. 2005)); *Definition of Terms*, DEP’T OF HOMELAND SECURITY, <https://www.dhs.gov/definition-terms> (last visited Feb. 15, 2014) (defining “nonimmigrant”).

41. See *Definition of Terms*, *supra* note 40.

42. See, e.g., 8 U.S.C. § 1101(a)(15)(F)(i) (“[A]n alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student . . . and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study”); *Definition of Terms*, *supra* note 40.

43. See 8 U.S.C. § 1101(a)(15), (20); see also *Definition of Terms*, *supra* note 40 (defining “permanent resident alien”).

44. See 8 U.S.C. § 1153. These immigrant preference categories also have strict criteria and most are capped at a certain level per year. See *id.*

45. *Id.* § 1153(a).

46. *Id.* § 1153(b).

47. *Id.* § 1153(c).

48. Smithson, *supra* note 15, at 95 (quoting LEGOMSKY, *supra* note 40, at 193).

49. *Id.* (quoting LEGOMSKY, *supra* note 40, at 238).

50. Even when an immigrant lacks legal status to be present in the United States, it is difficult for any state agency to definitively say that an immigrant is deportable because so much of immigration law is discretionary and because of the complexity of state and federal interaction on immigration law offenses. See, e.g., Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L.

B. Introducing a New Visa Category

Because this Comment suggests the creation of a new visa category it is necessary to briefly address how a new visa category might be enacted. Visa categories are found in the Immigration and Nationality Act, which is the section of U.S. Code addressing immigration laws.⁵¹ Thus, a visa category is a federal statute and follows the same path to enactment as any other legislation. First the visa category must be included in a bill introduced to the House of Representatives or the Senate.⁵² The visa category bill must then make it through congressional committees to make it to the floor where it will be voted on.⁵³ If the bill was able to pass one house it would have to make it through committee and vote in the other house before being presented to the President who must sign or veto the bill.⁵⁴ Passing new visa legislation would take considerable efforts by political interests groups that support these undocumented immigrants as well as congressmen to back and support the bill.⁵⁵ Thus, creating a new visa category faces the same path and obstacles as any new legislation.

*C. Undocumented Immigrants and Post-Secondary Education:
Beyond Plyler v. Doe*

Under current law, no legal barrier prevents undocumented immigrants from completing undergraduate degrees or law school.⁵⁶ In fact, many states encourage undocumented students to continue their education, despite their illegal status, by enacting in-state tuition legislation.⁵⁷

In the landmark case *Plyler v. Doe*, the Supreme Court recognized the right of undocumented children to receive free primary and second-

REV. 1819, 1819 (2011). Given these complexities, the bar admissions process seems an inappropriate place to address the legal issues surrounding an individual's status.

51. *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/laws/immigration-and-nationality-act> (last visited May 22, 2014).

52. WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 25 (4th ed. 2007)

53. *Id.*

54. *Id.*

55. *See generally id.* at 48–65.

56. Aldana et al., *supra* note 29, at 9; *see also* Smithson, *supra* note 15, at 96 (“Under the current system of government, many undocumented immigrants are provided a path to college and even law school. . . . Many students are able to apply to colleges so long as they have a driver’s license as a form of identification. Some institutions accept undocumented immigrant students as international students, while others do not even ask.” (footnotes omitted)).

57. *See, e.g.,* Morse, *supra* note 16.

dary public education.⁵⁸ *Plyler* involved a class action suit seeking to permanently enjoin Texas school districts from denying free elementary and secondary public education to undocumented children.⁵⁹ The Court first noted that undocumented immigrants are protected under the Equal Protection Clause of the Fourteenth Amendment because they constitute persons, even if they are not citizens.⁶⁰ It emphasized that, because undocumented children cannot affect their parents' choices and have no control over their status, penalizing them for the actions of their parents "does not comport with fundamental conceptions of justice."⁶¹ While the Court found that undocumented immigrants were not a suspect class⁶² and that education was not a fundamental right, the importance of education prompted the use of strict scrutiny.⁶³ Under a strict scrutiny analysis, the State had to prove its classification furthered a substantial state interest.⁶⁴ The Court found that denying education furthered no substantial interest, as it would impose "a lifetime hardship on a discrete class of children not accountable for their disabling status."⁶⁵ Further, "[b]y denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."⁶⁶

58. *Plyler v. Doe*, 457 U.S. 202, 230 (1982) ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.").

59. *Id.* at 206. Specifically, the case involved a Texas statute that authorized school districts to deny enrollment in public schools to undocumented children. *Id.* at 205.

60. *Id.* at 210–15.

61. *Id.* at 219–20.

62. The first case to hold that alienage is a suspect classification subject to close scrutiny was *Graham v. Richardson*, 403 U.S. 365, 376 (1971), which held state statutes that denied aliens welfare benefits based on lack of citizenship violated the Equal Protection Clause. While the appellees in that case had legal status, unlike the undocumented immigrants at issue in this Comment, the *Graham* Court stated that alienage was a suspect classification and laid the framework for future protection of immigrant rights. *Id.*

63. *Plyler*, 457 U.S. at 223–24 ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population. . . . In light of the [] countervailing costs [of denying children a basic education], the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.").

64. *Id.* at 224.

65. *Id.* at 223.

66. *Id.*

The State's economic arguments did not persuade the Court.⁶⁷ Charging tuition to undocumented children was a "ludicrously ineffectual attempt" at stopping the influx of illegal immigrants into the State.⁶⁸ Therefore, it was "difficult to understand precisely what the State hope[d] to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."⁶⁹ Additionally, educating undocumented children was not merely a drain on state funds, because many would become citizens or gain legal status.⁷⁰

While *Plyler* ensured undocumented children's right to free elementary and secondary public education, it also led to a new subclass of undocumented immigrants commonly referred to as "*Plyler* students."⁷¹ *Plyler* students have completed elementary and high school education but have limited higher education options and cannot find gainful employment post-high school.⁷²

Although *Plyler* has never been extended to cover post-secondary education, no legal barrier prevents *Plyler* students from attending college or law school, and recent in-state tuition legislation has made higher education increasingly accessible.⁷³ The legitimacy of these statutes was strengthened in June 2011 when the U.S. Supreme Court declined to review a California supreme court case upholding a law allowing long-term unauthorized immigrant students to receive in-state tuition if they meet certain requirements.⁷⁴ Fifteen states now have similar statutes allowing in-state tuition for undocumented immigrant students, with eligibility typically conditioned on attending and

67. In fact, the Court determined that illegal immigrants actually contribute to the economy. *Id.* at 228.

68. *Id.* (quoting *Doe v. Plyler*, 458 F. Supp. 569, 585 (E.D. Tex. 1978)).

69. *Plyler*, 457 U.S. at 230.

70. *See id.* ("[T]he record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States.")

71. Smithson, *supra* note 15, at 92; *see also* Paulo Edmundo Ochoa, Note, *Education Without Documentation: As Plyler Students Reach New Heights, Will Their Status Make Them Morally Unfit to Practice Law?*, 34 T. JEFFERSON L. REV. 411, 418 (2012).

72. *See* Ochoa, *supra* note 71, at 418; *see also* Smithson, *supra* note 15, at 92.

73. *See* Smithson, *supra* note 15, at 96; *see also* Morse, *supra* note 16. For more on undocumented immigrants continuing on to law school, *see* Aldana et al., *supra* note 29, at 6 (estimating the number of undocumented students attending law schools as of 2012 to be around one hundred).

74. *Martinez v. Regents of Univ. of Cal.*, 131 S. Ct. 2961 (2011), *denying cert. to* 241 P.3d 855 (Cal. 2010); *see also* Morse, *supra* note 16.

graduating from a state high school.⁷⁵ Only five states have gone the opposite route and enacted legislation to explicitly deny undocumented students in-state tuition benefits.⁷⁶ Some states have further encouraged undocumented students to pursue post-secondary education by enacting state DREAM Acts, which provide undocumented students with state-funded financial aid to pursue their college education.⁷⁷

D. *Deferred Action for Childhood Arrivals (DACA)*

One way for undocumented immigrants to obtain work authorization and the possibility of legal status is through prosecutorial discretion. Law enforcement agencies—including immigration authorities—have the power of prosecutorial discretion, which allows them to “decide whether to exercise [their] enforcement powers against someone.”⁷⁸ In the immigration context, a beneficiary of prosecutorial discretion avoids removal proceedings and, in some cases, may become eligible to apply for work authorization.⁷⁹ This is an important tool for immigration authorities because the United States simply does not have the resources to deport every undocu-

75. The fifteen states are California, Colorado, Connecticut, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oregon, Texas, Utah, and Washington. Morse, *supra* note 16. The statutes in these states permit undocumented immigrant students to become eligible for in-state tuition “if they graduate from state high schools, have two to three years residence in the state, and apply to a state college or university.” *Id.* In some states, the students may be required to sign an affidavit promising that they will seek legal immigration status. *Id.*

76. The five states that deny undocumented students eligibility for in-state tuition are Alabama, Arizona, Georgia, Indiana, and South Carolina. *Id.*

77. See, e.g., 15 ILL. COMP. STAT. 505/16.5 (2012); see also Pepe Lozano, *Illinois Governor Signs State DREAM Act Into Law*, PEOPLE’S WORLD (Aug. 1, 2011), <http://www.peoplesworld.org/illinois-governor-signs-state-dream-act-into-law>; Cindy Von Quednow, *California Dream Act Creates New Hope for Undocumented People Across the State*, VENTURA COUNTY STAR (Sept. 29, 2012), <http://www.vcstar.com/news/2012/sep/29/california-dream-act-creates-new-hope-for-people>.

78. The former Immigration and Naturalization Service provided this definition in 2000. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246 (2010) [hereinafter Wadhia, *Prosecutorial Discretion*] (quoting U.S. DEP’T OF JUSTICE, IMMIGRATION AND NATURALIZATION FACT SHEET ON PROSECUTORIAL DISCRETION GUIDELINES 1 (2000)). See also *id.* at 244 (“Prosecutorial discretion extends to decisions about which offenses or populations to target; whom to stop, interrogate, and arrest; whether to detain or to release a noncitizen; whether to initiate removal proceedings; whether to execute a removal order; and various other decisions.”); Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action & Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 6 (2012) [hereinafter Wadhia, *Sharing Secrets*] (“A favorable exercise of ‘prosecutorial discretion’ identifies the Department of Homeland Security’s authority to not assert the full scope of the agency’s enforcement in each and every case.”).

79. Wadhia, *Prosecutorial Discretion*, *supra* note 78, at 246.

mented immigrant.⁸⁰ Prosecutorial discretion aims to focus limited law enforcement resources on prosecuting those who are an actual threat to the United States, and not low-priority individuals.⁸¹ Deferred action is one of the most common forms of prosecutorial discretion and is predominantly based on humanitarian considerations.⁸² Recently, Immigration and Customs Enforcement (ICE) issued a memorandum that included an extensive list of nonexclusive criteria that ICE agents should consider when exercising prosecutorial discretion, many of which are particularly relevant to undocumented students seeking to gain admission to the bar.⁸³ Historically, immigration enforcement agencies have used deferred action under a veil of secrecy,⁸⁴ but in 2012 the Obama Administration created a new and very transparent policy for deferred action with the Deferred Action for Childhood Arrivals program.⁸⁵

The Obama Administration published an official memo through the Department of Homeland Security outlining guidelines for prosecutorial discretion regarding certain young people brought into

80. See Wadhia, *Sharing Secrets*, *supra* note 78, at 6 (“According to the agency’s own statistics, Immigrations and Customs Enforcement (ICE) has the resources to remove less than 4% of the total undocumented population.”).

81. See *id.* at 15; see also Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Directors et al. 2 (June 17, 2011) [hereinafter Morton, Enforcement Priorities Memorandum] (noting that ICE has limited resources and must prioritize enforcement).

82. See Wadhia, *Prosecutorial Discretion*, *supra* note 78, at 248 (“Deferred action. In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category.” (quoting (LEGACY) IMMIGRATION AND NATURALIZATION SERV. OPERATIONS INSTRUCTIONS, O.I. § 103.1(a)(1)(ii) (1975))).

83. See Morton, Enforcement Priorities Memorandum, *supra* note 81, at 4. Such relevant criteria include: length of the alien’s presence in the United States; circumstances of the alien’s arrival, particularly if the alien came to the United States as a young child; the alien’s pursuit of an education in the United States, with particular consideration given to high school graduates and those who have “successfully pursued or are pursuing a college or advanced degree at a legitimate institution of higher education in the United States”; the alien’s contributions to the community; and the alien’s ties to her home country. *Id.*

84. See Wadhia, *Sharing Secrets*, *supra* note 78, at 4 (“[W]hile deferred action is one of the very few discretionary remedies available for noncitizens with compelling equities, it currently operates as a secret program accessible only to elite lawyers and advocates.”); see also Wadhia, *Prosecutorial Discretion*, *supra* note 78, at 265 (“While the agency’s historical application of prosecutorial discretion has in many cases been legitimately driven by resource and humanitarian considerations, the absence of oversight, accountability and transparency by the agency has negatively impacted undocumented noncitizens and their families.”).

85. See *Deferred Action for Childhood Arrivals: A Q&A Guide (Updated)*, AM. IMMIG. POL’Y CENTER, <http://www.immigrationpolicy.org/just-facts/deferred-action-childhood-arrivals-qa-guide-updated> (last updated Aug. 17, 2012); see also Napolitano Memorandum, *supra* note 27; *Deferred Action for Childhood Arrivals*, *supra* note 27.

the country illegally as children.⁸⁶ Under the DACA program, the requirements to receive deferred action are that an individual: (1) came to the United States under the age of sixteen; (2) is not above the age of thirty and had no valid immigration status on June 15, 2012; (3) has continuously resided in the United States for at least five years preceding the date of the memorandum and is present in the United States on the date of the memorandum; (4) is currently in school, graduated from high school, obtained a GED, or was honorably discharged from the Armed Forces; and (5) has not been convicted of a felony, a “significant” misdemeanor, or three or more other misdemeanors, and does not otherwise pose a threat to national security or public safety.⁸⁷

The purpose of DACA is to avoid low-priority cases and, specifically, to avoid deporting “productive young people to countries where they may not have lived or even speak the language.”⁸⁸ Those eligible for DACA will be protected from removal proceedings for two years and eligible to apply for a two-year work permit.⁸⁹ DACA does *not* provide lawful immigration status or a path to a green card or citizenship; it merely temporarily prevents deportation and provides the potential for work authorization.⁹⁰ Because the DACA program stems from executive power and not legislation, it can be changed or revoked by the Executive Branch at any time, making it an unstable solution.⁹¹ The criteria for DACA are clearly drawn from the DREAM Act⁹² and attempt to give some respite from fear of deportation to students who would be eligible for relief under the DREAM

86. Napolitano Memorandum, *supra* note 27.

87. *Id.* at 1; *see also* Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All ICE Employees (June 15, 2012) [hereinafter Morton, Childhood Entrants Memorandum].

88. Napolitano Memorandum, *supra* note 27, at 1–2 (noting that these young people were brought to the United States as children and “know only this country as home”).

89. *See Deferred Action for Childhood Arrivals*, *supra* note 27.

90. *See* Napolitano Memorandum, *supra* note 27, at 3 (“This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.”).

91. *See id.* (“It remains for the executive branch . . . to set forth policy for the exercise of discretion within the framework of existing law.”); *see also* Morton, Childhood Entrants Memorandum, *supra* note 87, at 2 (stating that the memorandum may be “modified, superseded, or rescinded at any time without notice”).

92. The Development, Relief, and Education for Alien Minors (DREAM) Act is a bill that would provide a path to legal status for certain undocumented youths. Development, Relief, and Education for Alien Minors (DREAM) Act of 2011, S. 952, 112th Cong. (2011). For additional information on the DREAM Act, *see DREAM Act*, DREAMACTIVIST, <http://www.dreamactivist.org/text-of-dream-act-legislation/> (last visited Feb. 7, 2014) (“It is critical to note that the DREAM Act is not law.”).

Act.⁹³ Many of the undocumented students who end up eligible for admission to the bar are likely eligible for DACA as well.⁹⁴ For example, Jose Godinez-Samperio has qualified under DACA.⁹⁵ While eligibility under DACA would provide undocumented bar applicants with legal work authorization and two years of safety from deportation, the uncertainty and temporary nature of this relief does not provide a clear solution to the issue of whether they can or should be admitted to the bar.⁹⁶

E. Federal Immigration Law as Applied to State Bar Admissions

Although federal law generally controls immigration,⁹⁷ states have authority in certain areas stemming from their traditional police powers.⁹⁸ One such area of state control is bar admissions, which is controlled by the supreme court of each state.⁹⁹ One federal law, 8 U.S.C. § 1621, is particularly relevant when considering the legality of admitting an undocumented immigrant to the bar.¹⁰⁰ This statute provides that certain categories of unqualified aliens are not eligible for any state or local public benefit.¹⁰¹ Such benefits include “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.”¹⁰² The statute allows a state to grant unlawful aliens such benefits, but only through the enactment of a state law affirmatively providing for eligibility.¹⁰³ The argument over

93. See S. 952 § 3(b).

94. See Katherine Tianyue Qu, Current Development, *Passing the Legal Bar: State Courts and the Licensure of Undocumented Immigrants*, 26 GEO. J. LEGAL ETHICS 959, 972 (2013) (noting that while some individuals—like Sergio Garcia—are ineligible for DACA, “the vast majority of affected applicants will become DACA beneficiaries.”).

95. Gary Blankenship, *Citizenship Should Not Factor in Bar Admissions*, FLA. BAR NEWS (Aug. 15, 2013), <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/ed3eef34539e98f385257bba00635d2b!OpenDocument>.

96. For additional criticisms of DACA as a remedy for undocumented individuals seeking admission to the bar, see Adam Wright, Note, *Federal Constraints on States' Ability to License an Undocumented Immigrant to Practice Law*, 19 MICH. J. RACE & L. 177, 180–81 (2013).

97. See U.S. CONST. art. I, § 8, cl. 4.

98. For an in-depth analysis of the traditional state police power regarding bar admission and federal preemption issues when it comes to immigration, see Qu, *supra* note 94, at 964–65.

99. See NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N, *supra* note 25, at 1; see also *supra* note 18 and accompanying text.

100. 8 U.S.C. § 1621 (2012).

101. *Id.* § 1621(a).

102. *Id.* § 1621(c)(1)(A).

103. *Id.* § 1621(d) (“A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.”).

this statute's effect on undocumented immigrants' eligibility for bar admissions focuses on definitions of the terms "state agency" and "appropriated funds."¹⁰⁴

F. Admission Requirements for State Bars

Each state individually controls the decision of who to admit or restrict from joining its bar.¹⁰⁵ While a state has some control over individual requirements, every state requires an applicant to pass the exam portion and a moral fitness and character test.¹⁰⁶ The two bar admission requirements that may prevent undocumented immigrants from admission are requests for proof of immigration status and passing the moral character and fitness test.¹⁰⁷ Bar admission requirements with respect to undocumented immigrants were addressed in *In re Griffiths*¹⁰⁸ and *LeClerc v. Webb*.¹⁰⁹

In *In re Griffiths*, the United States Supreme Court held that rules allowing a person's alien status to be the sole basis for their disqualification from the bar unconstitutionally discriminated against aliens.¹¹⁰ The plaintiff in *In re Griffiths* was a citizen of the Netherlands married to a U.S. citizen who was denied permission to sit for the Connecticut bar solely because she was not a U.S. citizen.¹¹¹ The Court noted that "[c]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny" and thus applied heightened scrutiny to the case.¹¹² While each state has a constitutionally supported interest in determining whether an applicant is of proper moral character and fitness to practice law, where there is no question of an applicant's fitness and the sole disqualifying factor is citizenship there is no ground for denying admission.¹¹³

104. See *infra* notes 149–161 and accompanying text.

105. See NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N, *supra* note 25, at 1 (showing that bar admissions in each state are controlled by the supreme court of that state and, in some states, the legislature as well).

106. See *id.* at vii–x.

107. Aldana et al., *supra* note 29, at 18–19.

108. *In re Griffiths*, 413 U.S. 717 (1973).

109. *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005).

110. See *In re Griffiths*, 413 U.S. at 718–19, 729.

111. *Id.* at 718 & n.1. Notably, the plaintiff had gained resident status through her marriage to a U.S. citizen but expressed no intent to become a U.S. citizen herself. *Id.*

112. *Id.* at 721 (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)).

113. *Id.* at 722–23. The court found various arguments by the Connecticut State Bar Examining Committee unpersuasive. *Id.* at 724–25. Of particular note, the argument that an alien would have conflicting duties and not be able to faithfully represent clients was rejected by the court for lack of any relevance between immigration status and ability to execute one's duties as an attorney. *Id.*

The Court held that citizenship is not a requirement to sit for the bar exam and that exclusion based solely on citizenship is unconstitutional as violating the Equal Protection Clause.¹¹⁴ While this case made large strides for the rights of immigrants, it applied specifically to a permanent resident alien and did not address undocumented immigrants.¹¹⁵ However, the Court failed to define the term “resident alien” explicitly and “simply held that a state can not [sic] make a *citizenship* requirement for applicants that want to take the state’s bar examination.”¹¹⁶ Because *In re Griffiths* is not explicitly limited to resident aliens, there is room for broad interpretation of the decision.¹¹⁷

The second case, *LeClerc v. Webb*, addressed the constitutionality of a Louisiana bar admission rule making *nonimmigrant aliens* ineligible to sit for the bar.¹¹⁸ The plaintiffs were nonimmigrant aliens, with no permanent residency, who had graduated from foreign law schools and sought to sit for the Louisiana bar, which required applicants to be either a citizen or resident alien.¹¹⁹ Despite the holding in *In re Griffiths* granting heightened scrutiny to aliens generally, the Fifth Circuit Court of Appeals found the level of constitutional protection afforded nonimmigrant aliens was different from that afforded permanent resident aliens.¹²⁰ It noted that nonimmigrant aliens are distinct from permanent resident aliens because they have only a temporary connection to the United States and thus only receive rational-basis review.¹²¹

The court held that under rational-basis review the requirement did not violate the Equal Protection Clause, because its classification bore a rational relationship to Louisiana’s legitimate and substantial state

114. *Id.* at 729.

115. *Id.* at 718.

116. Smithson, *supra* note 15, at 111.

117. *Id.* at 111, 113 (“[I]f the Court meant for *In re Griffiths* to be binding solely on permanent resident aliens, then it would have used language signifying its desire.” (quoting Kristin L. Beckman, Comment, *Banned from the Bar: Classification of the Temporary Alien in Louisiana*, 51 LOY. L. REV. 139, 157 (2005))).

118. *LeClerc v. Webb*, 419 F.3d 405, 410 (5th Cir. 2005). As a refresher, nonimmigrant aliens have been admitted to the United States on a temporary basis (e.g., students, tourists, and business visitors). *See supra*, notes 40–41 and accompanying text.

119. *Id.* Resident alien was defined as an alien who had “attained permanent resident status in the United States.” *Id.* (quoting *In re Bourke*, 819 So. 2d 1020, 1022 (La. 2002)).

120. *See id.* at 415 (“Despite some ambiguity in Supreme Court precedent, we conclude that because Section 3(B) affects only nonimmigrant aliens, it is subject to rational basis review.”).

121. *See id.* at 415 & nn.22–23.

interest in regulating the practice of those it admits to its bar.¹²² The state bar's "ability to monitor, regulate, and . . . discipline and sanction members of the Bar require[d] that it be able to locate lawyers under its jurisdiction."¹²³ The court determined it would be more difficult to locate nonimmigrant aliens who are not residents of the United States and thus the statute was rationally related to assuring "continuity and accountability in legal representation."¹²⁴

In re Griffiths and *LeClerc* left states with ambiguous interpretations regarding how far states can go in limiting eligibility for the bar based on alien status. However, it is clear that while a state cannot restrict admission based on U.S. citizenship alone, they may restrict admission for nonimmigrant aliens who lack more permanent ties to the United States, at least in the Fifth Circuit.¹²⁵

G. Cases Requesting Bar Admission for Undocumented Immigrants in Florida and California

The cases of Jose Godinez-Samperio in Florida and Sergio Garcia in California, two undocumented immigrants applying to the bar, have been widely publicized and are instructive on how other states are likely to approach the issue. In Florida, the Board of Bar Examiners submitted the case of Jose Godinez-Samperio to the Florida Supreme Court on December 13, 2011, seeking an advisory opinion on whether his undocumented status should preclude his admission.¹²⁶ On March 15, 2014, the Florida Supreme Court issued its advisory opinion stating that unauthorized immigrants are ineligible for admission to the Florida Bar.¹²⁷ First, the court noted Florida's requirement that applicants present either proof of citizenship or a document that shows their immigration status.¹²⁸ The court was also careful to clarify that "[i]n the present case, the issue is not the admission of a particular

122. *Id.* at 421 ("Section 3(B)'s classification bears a rational relationship to legitimate state interests—Louisiana's substantial interest in regulating the practice of those it admits to its bar.").

123. *Id.*

124. *LeClerc*, 419 F.3d at 421. For example, in the case of a nonimmigrant lawyer returning to his country of origin, Louisiana would not only have trouble tracking him down, but also would have questionable jurisdiction over the attorney. *Id.*

125. See generally *In re Griffiths*, 413 U.S. 717 (1973); *LeClerc*, 419 F.3d 405.

126. Reply to Bar Applicant's Response to the Board's Petition for Advisory Opinion at 6, Fla. Bd. of Bar Exam'rs Re Question as to Whether Undocumented Immigrants are Eligible for Admission to the Fla. Bar, 134 So. 3d 432 (Fla. 2014) (No. SC11-2568) [hereinafter Reply to Applicant's Response]; see also Past ABA Presidents' Motion for Leave to File Amicus Curiae Brief in Support of the Applicant and Brief of the Amici, Fla. Bd. of Bar Exam'rs, 134 So. 3d 432 (No. SC11-2568) [hereinafter ABA Presidents' Amicus Brief].

127. Fla. Bd. of Bar Exam'rs, 134 So. 3d 432 (per curiam).

128. *Id.* at 433.

applicant, it is a request for an advisory opinion regarding a clearly stated question. The separate issue of the current applicant's admission is not before the Court."¹²⁹ Addressing the issue of whether 8 U.S.C. § 1621 applied to law licenses, the court determined that because the court is funded through appropriations, law licenses fall within the prohibited professional licenses under the statute.¹³⁰

Although the court took note of the exception in § 1621 allowing a state to pass legislation specifically allowing issuance of the license to undocumented immigrants, the court stated that no such law exists in Florida and thus the argument was not persuasive.¹³¹ The court concluded that absent legislative action to allow issuance of professional licenses to undocumented immigrants in Florida, they "are ineligible for admission to the Florida Bar. Applicants are required to demonstrate that they are legally present in the United States."¹³² The concurrence reluctantly agreed that the statutory interpretation was correct in light of Florida Bar requirements and federal law, but urged the Florida legislature "to act on this integral policy question and remedy the inequities that the unfortunate decision of this Court will bring to bear."¹³³

A similar case was decided in California regarding Sergio C. Garcia, who passed the state bar examination and the moral character and fitness test.¹³⁴ Garcia is undocumented but was approved for and has been waiting to receive a green card for nineteen years.¹³⁵ California's Committee of Bar Examiners submitted a motion to the California Supreme Court requesting admission of Garcia to the bar on November 9, 2011.¹³⁶ At oral argument, the court stated that it "had no law that authorized [it] to grant [Garcia] an attorney's license."¹³⁷ The court made it clear that absent legislative action, its hands were

129. *Id.* at 433 n.1.

130. *Id.* at 434.

131. *Id.* at 435 ("Thus, there is no current State law that meets the requirements of section 1621(d) and permits this Court to issue a law license to an unauthorized immigrant.").

132. *Id.* at 437.

133. *Fla. Bd. of Bar Exam'rs*, 134 So. 3d at 437–38 (Labarga, J., concurring) (per curiam).

134. *In re Garcia*, 315 P.3d 117, 122 (Cal. 2014); see also U.S. Amicus Brief, *supra* note 22, at 5; Bar Exam'rs Brief, *supra* note 10, at 1. For a detailed description of Garcia's story, see Qu, *supra* note 94, at 959–60.

135. *In re Garcia*, 315 P.3d at 121; see also Emily Green, *Calif. Law Allows Undocumented Immigrants to Practice Law*, NPR (Oct. 8, 2013), <http://www.npr.org/2013/10/08/230320902/calif-law-allows-undocumented-immigrants-to-practice-law>.

136. Bar Exam'rs Brief, *supra* note 10, at 2.

137. Bob Egelko, *Bill Would Let Undocumented Immigrants Be Lawyers*, SFGATE (Sept. 15, 2013, 10:16 PM), <http://www.sfgate.com/news/article/Bill-would-let-undocumented-immigrants-be-lawyers-4816911.php>.

ted on the matter.¹³⁸ In response, Assembly Bill 1024 was drafted, debated, and passed by both the state assembly and state senate and signed into law by California's governor on October 5, 2013.¹³⁹ The law allows undocumented applicants to be admitted as attorneys¹⁴⁰—explicitly authorizing the Supreme Court of California to “admit as an attorney at law ‘an applicant who is not lawfully present in the United States [who] has fulfilled the requirements for admission to practice law.’”¹⁴¹ The law went into effect on January 1, 2014, and on the next day, the Supreme Court of California held that it would admit Garcia to the California state bar.¹⁴² Garcia now has his law license, but he still does not have work authorization (unlike Godinez-Samperio who has work authorization but no law license).

The court noted that it authorized the bar, and that while each state has control over bar admissions rules, any state laws are subject to applicable federal laws or constitutional principles.¹⁴³ The court held that the newly passed California statute satisfied the federal requirements set out in 8 U.S.C. § 1621(d),¹⁴⁴ but declined to further address interpretations of § 1621(c)(1)(A) regarding whether a law license is a professional license “provided by an agency of a State or local government” in light of the state statute.¹⁴⁵ In considering whether there was any reason under state law to deny Garcia or other qualified undocumented immigrants admission to the bar, the court identified unlawful

138. *See id.*

139. A.B. 1024, 2013–2014 Assemb., Reg. Sess. (Cal. 2013); *see also* Egelko, *supra* note 137; Green, *supra* note 135.

140. CAL. BUS. & PROF. CODE § 6064 (West 2014); *see also* Press Release, Office of Governor Edmund G. Brown Jr., Governor Brown Signs Immigration Legislation (Oct. 5, 2013), *available at* <http://gov.ca.gov/news.php?id=18253>.

141. *In re Garcia*, 315 P.3d 117, 124 (Cal. 2014) (alterations in original) (quoting CAL. BUS. & PROF. CODE § 6064(b)).

142. *Id.* at 134.

143. *See id.* at 125 (“[E]ven with respect to matters that ordinarily and historically are an appropriate subject of state regulation—such as a state’s granting or denial of a license to practice law in the state—when the federal government has enacted a law restricting the right of a non-United States citizen to obtain such a professional license, under the supremacy clause the applicable federal statute will necessarily take precedence and prevail over any conflicting state law.”).

144. *Id.* at 129. Specifically, the court found that

by explicitly authorizing a bar applicant ‘who is not lawfully present in the United States’ to obtain a law license, the statute expressly states that it applies to undocumented immigrants—rather than conferring a benefit generally . . . and thus ‘affirmatively provides’ that undocumented immigrants may obtain such a professional license so as to satisfy the requirements of section 1621(d). Accordingly, . . . this enactment removed any obstacle to Garcia’s admission to the State Bar that was posed by section 1621(a) and 1621(c)(1)(A).

Id. (citation omitted).

145. *Id.* at 127–28.

presence and ineligibility for legal employment as the two most relevant obstacles.¹⁴⁶ The court determined that undocumented presence in itself does not make an individual ineligible and is not tantamount to a criminal offense, and further noted that under current immigration policy these individuals are extremely unlikely to be deported or sanctioned.¹⁴⁷ The court was not concerned by undocumented immigrants' inability to be employed legally and found that as a group this makes them similar to foreign law students who are not authorized to work in the United States.¹⁴⁸ Thus, inability to be legally employed is not a justifiable reason for denying bar admission in the opinion of the Supreme Court of California.

While this case was a victory for Garcia and undocumented applicants in California, it did not address many of the issues surrounding this debate. Unless a state passes a statute explicitly allowing the courts to admit undocumented immigrants in that state, it will still be unclear whether these individuals are barred by § 1621 or other considerations. However, based on the Florida Supreme Court's determination that § 1621 includes law licenses, it seems the trend will likely be towards denying bar admission for undocumented immigrants absent specific state legislation allowing it. States that wish to admit these deserving individuals should attempt to pass statutes like California's in order to ensure bar eligibility. However, the likelihood of such statutes being passed is contingent on a variety of factors and not at all certain. Thus, a visa that would grant legal status and employment eligibility to these individuals would prevent § 1621 from being an obstacle, as the individuals would no longer be undocumented and thus would not fall under the purview of the statute.

III. ANALYSIS

A. Admitting Undocumented Immigrants to the Bar Does Not Necessarily Violate Federal Law

While federal law does cover the issuance of professional licenses to undocumented immigrants due to potential ambiguity of the statutory text and a clause expressly allowing states to legislate around the federal prohibition, admitting undocumented immigrants to the bar does not necessarily violate federal law. Although states traditionally control bar admissions, federal statute 8 U.S.C. § 1621 may restrict states'

146. *Id.* at 129–34.

147. *In re Garcia*, 315 P.3d at 129–31.

148. *Id.* at 131–34.

ability to grant law licenses to undocumented immigrants.¹⁴⁹ Section 1621 provides that unlawful aliens may not receive state or local benefits, including “any grant, contract, loan, *professional license*, or commercial license provided by an agency of the State or local government or by appropriated funds of a State or local government.”¹⁵⁰ While a law license is a professional license, two key clauses of the statute determine whether § 1621 applies to undocumented immigrants seeking law licenses.

The first question is whether the issuing authority is “an agency of the State or local government,”¹⁵¹ but § 1621 does not provide any text or legislative history defining “agency.”¹⁵² Other federal statutes define agency as expressly excluding the courts,¹⁵³ and Supreme Court precedent supports this interpretation.¹⁵⁴ Absent any federal statutes or other relevant sources defining agency as including state supreme courts, the term should be interpreted consistently with its use in other federal statutes.

Section 1621 also prohibits benefits to undocumented immigrants that are provided by “appropriated funds of a State or local government.”¹⁵⁵ Thus, the second question is whether the issuing of a law license is funded by appropriated means—a question that turns largely on interpretation of the word “appropriated.” There were a number of interpretations of the word appropriated offered by both sides in the Garcia case and the Godinez-Samperio case.¹⁵⁶ However, based on the California Supreme Court’s determination that it could not admit Garcia absent legislative action¹⁵⁷ and the Florida Supreme Court’s advisory opinion stating undocumented immigrants cannot be

149. See *supra* notes 100–104 and accompanying text.

150. 8 U.S.C. § 1621(c)(1)(A) (2012) (emphasis added).

151. *Id.*

152. Bar Exam’s Brief, *supra* note 10, at 9–10. See generally 8 U.S.C. § 1621.

153. 5 U.S.C. § 551(1) (2012) (stating that the term “agency” does not include “the courts of the United States”).

154. See, e.g., *Hubbard v. United States*, 514 U.S. 695, 699–700 (1995) (“In ordinary parlance, federal courts are not described as ‘departments’ or ‘agencies’ of the Government. As noted by the Sixth Circuit, it would be strange indeed to refer to a court as an ‘agency.’ . . . This common-sense reading is bolstered by the statutory definitions of ‘department’ and ‘agency’ set forth at 18 U.S.C. § 6.”).

155. 8 U.S.C. § 1621(c)(1)(A).

156. For an in-depth analysis of the arguments asserted by the Department of Justice and supporters of Sergio Garcia regarding interpretation of 8 U.S.C. § 1621 and the meaning of appropriated, see Wright, *supra* note 96, at 182–89. For an opposing argument that § 1621 does not include law license based on statutory interpretation and congressional intent, see Qu, *supra* note 94 at 962–66. However, in light of the developments in Florida and California that happened after Qu’s article was published, it seems most persuasive that the statute does apply.

157. See *supra* notes 134–148 and accompanying text.

admitted to the Florida Bar unless the legislature acts,¹⁵⁸ it seems likely that subsequent state supreme courts will also find that law licenses are supplied through appropriated funds and thus fall under § 1621.

As previously noted, even if § 1621 prevents undocumented immigrants from being issued law licenses on its face, the statute allows states to legislate around the prohibition.¹⁵⁹ States are free to provide law licenses to undocumented immigrants if they so choose.¹⁶⁰ To avoid ambiguity or confusion, any state that wishes to issue law licenses to qualified undocumented individuals should attempt to pass legislation explicitly authorizing the practice. For example, Assembly Bill 1024 allows the Supreme Court of California to license lawyers regardless of their immigration status.¹⁶¹ Enacting such legislation falls within the legal rights provided by § 1621 and would work as a safeguard for undocumented applicants in the event of challenges to their eligibility under federal law.

B. State Bar Admission Requirements Do Not Preclude Admission

It is also necessary to determine whether any state bar admission laws prohibit admitting undocumented immigrants to the bar. States vary regarding specific admission requirements, but those rules that are common to every state do not necessarily preclude undocumented immigrants.¹⁶² The exam requirement provides no particular hurdle for undocumented immigrants who have graduated from American law schools. They are in the same position regarding the exam portion as any other law school graduate. The two areas most likely to prevent bar admission for an undocumented student are requests for immigration status or social security numbers and the character and fitness test.¹⁶³

1. State Bar Admissions and Citizenship Requirements

The immigration status required for bar admission is largely unclear and varies state by state.¹⁶⁴ The precedents established in *In re Grif-*

158. See *supra* notes 126–133 and accompanying text.

159. 8 U.S.C. § 1621(d).

160. Egelko, *supra* note 137; see also Press Release, Office of Governor Edmund G. Brown Jr., *supra* note 140.

161. A.B. 1024, 2013–2014 Assemb., Reg. Sess. (Cal. 2013); see also Egelko, *supra* note 137; Green, *supra* note 135.

162. See NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N, *supra* note 25, at 1–3.

163. Aldana et al., *supra* note 29, at 18–19.

164. See NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N, *supra* note 25, at 1–3.

fiths and *LeClerc*¹⁶⁵ leave undocumented immigrants seeking bar admission “largely unprotected by the U.S. [C]onstitution.”¹⁶⁶ In *In re Griffiths*, the Supreme Court held that citizenship cannot be a requirement for bar admission but left the issue of an alien’s specific status open to broad interpretation.¹⁶⁷ In *LeClerc*, the Fifth Circuit found Louisiana could deny bar admission to nonimmigrant aliens, but this is a state-by-state decision and the precedent is not binding beyond the Fifth Circuit.¹⁶⁸ Given the outcomes of these cases, it is evident that states have the ability to determine which candidates to find admissible, but there are limitations on what they can use as exclusionary classification.¹⁶⁹

While many states explicitly exclude undocumented students from sitting for the bar through statute or practice, not all do.¹⁷⁰ Several states request information regarding immigration status and automatically bar those who are not nonimmigrants authorized to work in the United States.¹⁷¹ Clearly, those states may refuse admission to an undocumented immigrant because she lacks legal status, and the state is within its constitutional rights to preclude her based on the *LeClerc* precedent.¹⁷² Other states simply ask for the applicant’s citizenship or nationality but do not inquire into actual immigration status.¹⁷³ A few states do not ask about citizenship or immigration status at all.¹⁷⁴

While each state may vary its immigration status requirements, undocumented immigrants should be considered for admission in all states because they are arguably more analogous to the resident alien in *In re Griffiths*, who had sufficient permanency and ties to the United States, than the nonimmigrant aliens in *LeClerc*. The similarity to resident aliens is based on considerations of residency, national loyalties and ties, education, permanency, and the state’s ability to monitor the professional activities of those admitted to the bar. It is

165. See *supra* notes 105–125 and accompanying text.

166. Aldana et al., *supra* note 29, at 17.

167. *In re Griffiths*, 413 U.S. 717, 724 (1973); see also Smithson, *supra* note 15, at 111 (“Nowhere in the opinion does Justice Powell suggest that the term ‘resident alien’ is limited to someone who entered the country and remains here only on a temporary or immigrant visa. . . . The Court’s failure to address the issue relating to the immigration status of the alien leaves room for a broad interpretation of the law in *Griffiths*.”).

168. *LeClerc v. Webb*, 419 F.3d 405, 421 (5th Cir. 2005).

169. See Aldana et al., *supra* note 29, at 17.

170. *Id.*

171. *Id.* at 19.

172. See *id.*

173. *Id.* (listing Alaska, Delaware, and Iowa).

174. *Id.* at 19 (listing California, American Samoa, the District of Columbia, Hawaii, Illinois, Indiana, and Massachusetts as states that do not ask about immigration status).

important to note that the outcome in *LeClerc* is only binding on the Fifth Circuit and seems at odds with the declaration in *In re Griffiths* that classification based on alienage is suspect.¹⁷⁵ Further, because *In re Griffiths* is not explicitly restricted to resident aliens, the Court's reasoning can be extended to undocumented immigrants.¹⁷⁶

Opponents to the admission of undocumented immigrants rely on *LeClerc* when making the argument that because undocumented immigrants are still citizens of another nation and face the potential of deportation proceedings, they are of a transient nature and a state should be able to restrict them from joining the bar.¹⁷⁷ However, in *In re Griffiths*, the Supreme Court downplayed the significance of the alien plaintiff's potentially transient nature and ability to return to her native country at any time.¹⁷⁸

It is true that undocumented immigrants differ from the plaintiff in *In re Griffiths* because they are at risk of deportation; however, considering the actualities of the immigration system in the United States, this risk is no greater than that of any attorney deciding to move out of state.¹⁷⁹ Additionally, the class of immigrants in question is a low priority for deportation proceedings, and the Department of Homeland Security has acknowledged that these individuals are productive members of society and realistically cannot be deported to countries where they have never resided and do not speak the language.¹⁸⁰ Further, aliens in the United States on student visas are permitted to graduate from U.S. law schools and be admitted to the bar—even if they do not intend to practice law in the United States or cannot get approval from immigration authorities to extend their visas.¹⁸¹ Thus,

175. *In re Griffiths*, 413 U.S. 717, 721 (1973).

176. Smithson, *supra* note 15, at 113 (“The law handed down in the *Griffiths* decision is not limited to resident aliens. ‘[I]f the Court meant for *In re Griffiths* to be binding solely on permanent resident aliens, then it would have used language signifying its desire.’ While the *Griffiths* case concerns resident aliens and not illegal aliens, it provides a logical line of reasoning that aids in answering the question of whether undocumented students should be able to sit for the bar exam.” (alteration in original) (footnote omitted) (quoting Beckman, *supra* note 117, at 157–58)).

177. See *LeClerc v. Webb*, 419 F.3d 405, 415 (5th Cir. 2005).

178. See *In re Griffiths*, 413 U.S. at 718 n.1 (noting that the plaintiff had not filed for citizenship status and had no intent of doing so); see also Smithson, *supra* note 15, at 115 (“[T]he governing case law has downplayed the significance of an alien’s transient nature.”).

179. Smithson, *supra* note 15, at 115.

180. Napolitano Memorandum, *supra* note 27, at 1–2.

181. ABA Presidents’ Amicus Brief, *supra* note 126, at 7 (“Upon graduation, a foreign student may take the Florida bar exam and, after passing and demonstrating good character, be admitted to The Florida Bar—even if not intending to practice law in Florida, and even if unable to get approval from immigration authorities to remain in the country.”).

there is little reason to deny admission to an undocumented immigrant who is unlikely to leave the country.¹⁸²

Additionally, concerns of national loyalty and ties to the United States do not apply to the undocumented immigrants in question. Many undocumented immigrants, particularly those who have made it as far as sitting for the bar exam, are equally assimilated into U.S. culture and society as any citizen. These individuals view themselves as Americans and have strong ties and loyalty to the United States.¹⁸³

For the undocumented student who came as a baby or child to the United States and who has been raised exclusively in this society, his or her belonging in U.S. society is indistinguishable, and perhaps even more profound than that of a recently arrived legal resident or even a U.S. citizen who has spent part or most of his life living abroad.¹⁸⁴

Given the unlikelihood of deportation, *Plyler* students should be afforded the same benefit of eligibility for bar admission as resident or nonimmigrant aliens. Further, denying admission based solely on immigration status is problematic because the law and public policy in this area are constantly changing. The only mandatory requirements for bar admission are proper education, passing the bar exam, and good moral character. States should make these the only considerations and not base denial of admission to practice law on “transitory changes in government policy.”¹⁸⁵

2. *Undocumented Status Does Not Necessarily Violate the Character and Moral Fitness Requirement*

All fifty states have character and fitness rules for bar admission.¹⁸⁶ Good moral character is generally defined as “qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the rights of

182. The Supreme Court of California held that undocumented immigrants are akin to foreign students in their recent decision on this issue. *In re Garcia*, 315 P.3d 117, 133 (Cal. 2014) (“[F]oreign law students who have passed the California bar examination and have been certified to this court by the Committee have been admitted to the State Bar, even though such individuals may lack authorization to work in the United States. Although it may be reasonable to assume that most foreign law students, when licensed, will return to their home countries to practice law, . . . [we] do not condition or limit their law licenses. We conclude it is appropriate to treat qualified undocumented immigrants in the same manner.”).

183. Aldana et al., *supra* note 29, at 11 (“[T]hey have built deep cultural and social roots in the United States that we cannot simply ignore today.”).

184. *Id.*

185. Reply Brief of Applicant Sergio C. Garcia at 17–18, *In re Garcia*, 315 P.3d 117 (No. S202512) [hereinafter Reply Brief]. For commentary on the problematic nature of making bar admission contingent on transitory immigration laws and status, see Qu, *supra* note 94, at 977.

186. See generally NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N, *supra* note 25.

others and the judicial process.”¹⁸⁷ The two areas most likely to cause issues for undocumented applicants are respect for and obedience to the law and honesty and candor.

Because undocumented applicants are technically in violation of federal law it is first necessary to address the issue of their illegal status as an act of disobedience against the law. Under federal law, crossing the border without authorization is a civil immigration violation, regardless of a person’s age.¹⁸⁸ However, Congress has recognized that children do not have control over their crossing and does not penalize them until they turn eighteen—and then, only if they remain in the United States.¹⁸⁹ For this reason, when evaluating who entered illegally or overstayed a visa, bar admission committees should evaluate the age and circumstances of the applicant when she entered the United States.¹⁹⁰

Considering the age and circumstances of the offense is the same approach applied to all applicants, and thus should also be applied to undocumented immigrants.¹⁹¹ Thus, although the technical violation of federal law is relevant to a moral character inquiry, it should not be outcome determinative. Based on the fact that both Jose Godinez-Samperio and Sergio Garcia were found morally fit for admission notwithstanding their undocumented status, it seems that this holistic approach is being embraced and accepted by state bar admission boards.¹⁹²

187. Aldana et al., *supra* note 29, at 23 (quoting CAL. STATE BAR R. 4.40(B) (West 2011)) (internal quotation marks omitted).

188. *Id.* at 25.

189. *Id.*

190. *Id.* at 26 (“In evaluating good moral character, . . . Bar Rules and Committees should use age at the time of conduct and recency of conduct to create, at a minimum, a bright line exemption for the unlawful border crossing of those who came to the U.S. as children.”).

191. *See* Qu, *supra* note 94, at 970–71 (“Because the evaluation is a holistic assessment, any potentially adverse evidence is weighed under the totality of the circumstances. While the National Conference of Bar Examiners recommends that revelation of behavior such as unlawful conduct, making of false statements, acts involving dishonesty, and alcohol dependency should be ‘treated as cause for further inquiry,’ bar examiners should also take into account mitigating factors in assigning significance that includes: ‘the applicant’s *age* at the time of the conduct, the *recency* of the conduct, . . . the cumulative effect of conduct or information, the evidence of rehabilitation, the applicant’s *positive social contributions* since the conduct, [and] the applicant’s candor in the admissions process.’” (alterations in original) (quoting NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N, *supra* note 25, at viii–ix)).

192. *Id.* at 971 (“Undocumented attorneys are subject to the same rigorous background checks and professional standards as all lawyers. The California and Florida State Bars have deemed that Garcia and Godinez-Samperio passed their character and fitness evaluations notwithstanding their undocumented status. While their unauthorized presence undoubtedly constituted a factor in the screening, the investigatory bodies found that the positive elements in the men’s applications outweighed any adverse consequences that may have resulted from their immigration violations.” (footnote omitted)).

The second area of the moral character and fitness test that may cause problems for undocumented immigrants is the requirement of honesty and candor. This area is less complex than the question of illegal behavior, as there is no lack of candor where an undocumented applicant openly submits her status for scrutiny. Provided a student divulged her status, thus meeting the requirement of honesty, she should not be found morally unfit based solely on her undocumented status.¹⁹³ However, where an individual has not complied with an order of deportation, denial based on failure to meet moral character and fitness would be reasonable.

C. Employment Eligibility Is a Significant Concern and Valid Ground for Precluding Bar Admission

Even if undocumented students are not explicitly precluded from the bar based on federal law or state admissions requirements, there are still major policy issues affecting admission of these individuals. The primary concern is that federal law prohibits employers from hiring undocumented workers.¹⁹⁴ Further, admission to the bar in no way provides a permit to work and does not immunize an individual from deportation proceedings or other federal sanctions.¹⁹⁵ Admission to the bar merely certifies that the state has found an individual qualified to work as a lawyer, which each state has the right to do. The fact that an individual licensed as a lawyer cannot legally obtain gainful employment is a valid concern for state bar admissions, as concerns about employability closely resemble the legitimate state interests in the ability to control professionals and to monitor employment in *LeClerc*.¹⁹⁶

While admission to the bar does not confer a legal right to work, some employers and clients might mistakenly presume that it does.¹⁹⁷ Those who unknowingly employ an undocumented immigrant are vulnerable under federal law and may put clients at risk.¹⁹⁸ Additionally, if the bar begins licensing unemployable attorneys, the integrity of the bar may be questioned; it may even be seen as state approval of the unauthorized practice of law. To address this, some suggest that, in theory, licensed undocumented immigrants could work as contractors

193. Ochoa, *supra* note 71, at 442 (“[M]oral character is not inherently flawed based solely on their status, as they demonstrate candor and trustworthiness by honestly revealing their undocumented status.”).

194. 8 U.S.C. § 1324a (2012); *see also* 8 C.F.R. § 274a.10 (2012).

195. *See* Bar Exam’rs Brief, *supra* note 10, at 19–20.

196. *LeClerc v. Webb*, 419 F.3d 405, 421 (5th Cir. 2005).

197. *See* Bar Exam’rs Brief, *supra* note 10, at 19–24.

198. *See* 8 U.S.C. § 1324a; 8 C.F.R. § 274a.10; *see also* U.S. Amicus Brief, *supra* note 22, at 14.

or from another country for clients with business in the state where they are licensed.¹⁹⁹ While theoretically possible, these solutions are very limited and still deny undocumented immigrants the ability to put their legal education and training to practical use.²⁰⁰ Creation of a new visa category for these individuals providing work authorization would entirely solve this issue rather than attempt to find ways around it.

D. Providing Employment Eligibility for Undocumented Bar Applicants

Working under the assumption that eligibility for legal employment as an attorney should be the determinative issue, the next concern is how an undocumented immigrant can obtain employment eligibility. This is an issue even for those like Garcia who are already admitted to the bar because without the ability to be employed legally they cannot put their law license to use. This subpart considers current methods for obtaining legal work authorization and suggests new possibilities.

1. DACA

Currently, DACA is the only means by which an undocumented immigrant may obtain eligibility for employment.²⁰¹ Although DACA is only a temporary fix,²⁰² it does provide undocumented immigrants the opportunity for legal employment in renewable two-year increments.²⁰³ A DACA-qualified immigrant who has met the education, exam, and moral fitness requirements of the bar seemingly should not be precluded from receiving a law license.²⁰⁴ However, as shown in Florida, because DACA does not provide actual legal status²⁰⁵ it is not enough to get around 8 U.S.C. § 1621.²⁰⁶ In California and any other state that chooses to create a legislative exception to § 1621, DACA is a more useful form of relief since it does provide employment eligibil-

199. See, e.g., Qu, *supra* note 94, at 968.

200. For a discussion of the benefits a law license provides undocumented immigrants even where they cannot be legally employed, see Qu, *supra* note 94, at 967–70.

201. See Napolitano Memorandum, *supra* note 27.

202. See *supra* note 90 and accompanying text.

203. Napolitano Memorandum, *supra* note 27, at 2.

204. This is Jose Godinez-Samperio's status, but the Florida Supreme Court determined his undocumented status makes him inadmissible. Fla. Bd. of Bar Exam'rs Re Question as to Whether Undocumented Immigrants are Eligible for Admission to the Fla. Bar, 134 So. 3d 432 (Fla. 2014) (per curiam).

205. See Napolitano Memorandum, *supra* note 27, at 3.

206. Fla. Bd. of Bar Exam'rs, 134 So. 3d at 437 (per curiam).

ity for two years but is still not entirely satisfactory due to its temporary nature.²⁰⁷

2. *Additional Methods of Gaining Employment Eligibility*

While DACA provides a short-term remedy for many undocumented applicants, it does not cover all who are otherwise eligible for bar admission, necessitating other means for employment eligibility.²⁰⁸ Many of the arguments against passing the DREAM Act, and comprehensive immigration reform, focus on not providing incentives to immigrate illegally.²⁰⁹ However, only a handful of undocumented students attend college and then earn law degrees.²¹⁰ Arguments of incentivizing more illegal immigration are also easily countered by the fact that it is highly unlikely many immigrants will enter the United States illegally with the sole intention of getting their children to become lawyers.²¹¹ Additionally, those who graduate from law school have overcome substantial obstacles—language barriers, cultural differences, and inadequate finances—“[i]mposing a blanket ban on their admission to the Bar would be a waste of exceptional talent for [the legal] profession.”²¹²

These humane and social considerations, coupled with the unlikelihood of deportation, evidence the need for additional methods of obtaining employment eligibility. This Comment suggest two new methods to allow a path to legal employment for undocumented immigrants: (1) an additional specialized form of deferred action should be enacted, or (2) Congress should create a new category for allotting professional employment-based visas.

Creating a specified class eligible for deferred action would temporarily provide these individuals with work permits, but like DACA it would not provide a permanent solution. A deferred action program for undocumented law school graduates should enforce the same requirements as DACA but remove the age limit of thirty—as many

207. See Napolitano Memorandum, *supra* note 27.

208. For example, Sergio Garcia was admitted to the bar but did not qualify for DACA due to his age. *In re Garcia*, 315 P.3d 117, 132 n.18 (Cal. 2014).

209. See Ochoa, *supra* note 71, at 438–40.

210. See Aldana et al., *supra* note 29, at 6.

211. Ochoa, *supra* note 71, at 439 (“Although possible, it seems unlikely that a person would risk entering illegally solely so his or her child may practice law.”); *cf.* Plyler v. Doe, 457 U.S. 202, 228 (1982) (“The dominant incentive for illegal entry . . . is the availability of employment; few if any illegal immigrants come to this country . . . in order to avail themselves of a free education.”).

212. ABA Presidents’ Amicus Brief, *supra* note 126, at 6; *see also* Ochoa, *supra* note 71, at 435 (“[M]any undocumented immigrants often overcome extraordinary obstacles to fulfill their dreams of a higher education and have amazing stories of determination and perseverance.”).

individuals take time off between undergraduate education and legal education—and require graduation from law school in the United States. This would allow law graduates who are past the eligible age for DACA to gain work eligibility and other benefits.

The second, more permanent solution is to create a new visa category for undocumented law school graduates otherwise eligible for bar admission. While creating a new visa category may be viewed as a drastic policy decision, in light of the merits of these individuals and the realities of the immigration system a new visa category is the most effective remedy. Given the difficulties of passing wholesale immigration reform, providing a remedy for this small and specific group of undocumented immigrants seems reasonable in light of their distinct circumstances. Graduating from law school is no simple task even for citizens with the full range of government aid and loans available to them. For an undocumented immigrant to graduate law school and proceed to pass the exam portion of the bar indicates an extreme level of perseverance and ability that should not be disregarded. Granting these individuals legal status through an individualized visa program would give them “an opportunity to repay a nation that already invested in their education.”²¹³

The current U.S. visa system seeks to encourage certain talented individuals to enter the United States on nonimmigrant visas. For example, there are nonimmigrant visas available for those with “extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim . . . and seeks to enter the United States to continue work in the area of extraordinary ability.”²¹⁴ There are also nonimmigrant visa categories allowing for professional athletes and fashion models to legally reside in the United States.²¹⁵

Beyond nonimmigrant visas U.S. immigration statutes also provide for employment-based immigration, which means the recipients become legal permanent residents as a condition of receiving the green card. For example, 8 U.S.C. § 1153 provides for a certain number of preference allocated visas for employment-based immigrants.²¹⁶ Section 1153 lists a number of types of employment-based preference but particularly relevant here is the category for aliens who hold advanced

213. Smithson, *supra* note 15, at 118.

214. 8 U.S.C. § 1101(O)(i) (2012).

215. *Id.*; *see also id.* § 1101(a)(15)(H)(i)(1).

216. *Id.* § 1153(b).

degrees.²¹⁷ The statute allots a certain number of visas to “qualified immigrants who are members of the professions holding advanced degrees or their equivalent.”²¹⁸ This immigrant category closely correlates to the skillset of the undocumented immigrants addressed in this Comment. The United States has created these visas in order to encourage certain skilled workers to enter the country. However, the individuals addressed here are equally skilled and seem to be more worthy of receiving legal nonimmigrant status over someone who has never been to the country. Further, a small group of individuals is affected; thus the number of visas set aside for the category would be minimal.²¹⁹

Additionally, the United States has a diversity immigrant visa program, also referred to as the green card lottery. This system allows “up to 50,000 immigrant visas available annually, drawn from random selection among all entries to individuals who are from countries with low rates of immigration to the United States.”²²⁰ As Smithson aptly noted, “[i]f a change in the law is to take place, then what is the difference between allowing these educated and Americanized undocumented immigrants an opportunity to work in the country legally versus the free-for-all distribution of 55,000 green cards in the green card lottery?”²²¹ Creating a new visa category for undocumented law school graduates would require drastic lobbying and legislative changes but it would also allow these individuals to use their United States-funded education to benefit the country. In light of the above considerations and the other visa categories that already exist, a proposed visa category to make these undocumented individuals legal nonimmigrants with work authorization falls reasonably within expectations for immigration statuses.

The visa category this Comment proposes would combine the DACA requirements with the approach of 8 U.S.C. § 1101, which provides for a certain number of nonimmigrant visas for professionals employed in specialty occupations.²²² This specialty occupation non-

217. *Id.* § 1153(b)(2) (providing a preference category for aliens who are members of a profession requiring advanced degrees or of exceptional ability).

218. *Id.* § 1153(b)(2)(A).

219. See Aldana et al., *supra* note 29, at 6.

220. *Green Card Through the Diversity Immigrant Visa Program*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/green-card/other-ways-get-green-card/green-card-through-diversity-immigration-visa-program/green-card-through-diversity-immigrant-visa-program> (last visited May 22, 2014).

221. See Smithson, *supra* note 15, at 125 (internal quotation marks omitted).

222. See 8 U.S.C. § 1101(a)(15)(H).

immigrant visa is commonly referred to as the H-1B category.²²³ The term specialty occupation is defined as an occupation that requires “(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.”²²⁴ These nonimmigrant visas are available for up to three years initially and extendable for a maximum of six years.

Congress should create a preference category with a very small number of visas available for individuals who can prove they: (1) entered the United States before the age of sixteen; (2) have continuously resided in the United States for at least five years preceding enactment of the program; (3) have successfully graduated from a U.S. high school, undergraduate institution, *and law school*; (4) are otherwise fit to gain admission to the bar; and (5) meet the qualification of employment eligibility in a specialty occupation.²²⁵ By providing these individuals with visas and employment eligibility, the government would allow these individuals to put their U.S. education to use without providing any incentives to immigrate illegally. Requiring that they meet the qualification of employment eligibility in a specialty occupation will ensure that this will only cover those applicants who are actually admissible to the bar. This approach could also be expanded to include other professions that require licensing, which would provide an equitable solution for a wider range of accomplished undocumented immigrants. For example, rather than specifically requiring that the individuals graduate from a U.S. law school, the statute could require that the individuals graduate from a U.S. professional school or PhD program.

While the H-1B category requires the prospective employer to petition and file a labor condition application,²²⁶ this new visa category should allow the applicants to self-petition given the other strict criteria it would enforce. Allowing these individuals nonimmigrant legal status would open potential pathways to adjusting to legal permanent resident status. Particularly, candidates eligible for the nonimmigrant visa should be allowed to adjust to permanent resident status after a

223. *Understanding H1-B Requirements*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/eir/visa-guide/h-1b-specialty-occupation/understanding-h-1b-requirements> (last visited May 22, 2014).

224. 8 U.S.C. § 1184(i)(1).

225. These requirements are based on the DACA guideline, but remove the age restriction to allow for law students who may have taken time off prior to school. See Napolitano Memorandum, *supra* note 27, at 1.

226. 8 U.S.C. § 1101(a)(15)(H).

certain amount of time. Providing these individuals with nonimmigrant visas rather than legal permanent resident status would strike a balance between perceived incentivizing of illegal immigration and providing a reasonable solution to the limbo that currently exists for these individuals. If they meet the time requirement as nonimmigrants, they can adjust to permanent legal residency—and eventually citizenship—without gaining those benefits immediately.

Incentivizing illegal immigration is avoided through the entry age limitation, minimum number of years of residency, and the educational requirements. These requirements mirror the DACA specifications and would limit eligibility to *Plyler* students. However, by not enforcing the maximum age of thirty, undocumented students that took time off between college and law school would still be eligible for the visa and not precluded as they are with DACA. An individual like Sergio Garcia, who has been present in the United States for a long period of time but happens to be over the DACA age limit, should not be ineligible for routes to legal employment, especially considering his achievements in a professional field. Using the specialty occupation requirements from the H-1B category further ensures that all eligible individuals can contribute positively to the United States. As a non-immigrant category this visa would only provide a green card, not an automatic path to citizenship, thus it strikes a balance between allowing these individuals to become productive members of society and the concerns of many who do not want citizen fast tracks for undocumented immigrants.

Only a very small portion of undocumented immigrants would qualify under these criteria—specifically, those who have arguably earned the right to be legally employed and to gain professional certification. While this solution may be considered extreme, it better utilizes the allotment of nonimmigrant visas available each year by rewarding hard working individuals who have demonstrated their commitment to becoming productive members of U.S. society.²²⁷ Significantly, if this sort of visa were available, qualified undocumented immigrants would no longer be of illegal status and would be eligible for legal employment, thus negating any obstacle to their admission to state bars. For an individual like Sergio Garcia, who has already waited

227. Arguably, these individuals are more worthy of legal status, even as nonimmigrants, than those who enter each year through the U.S. “green card lottery” program. *See* Smithson, *supra* note 15, at 125.

nineteen years for the government to process his green card,²²⁸ this new category would finally allow him to practice law.

IV. IMPACT

While there are several possible objections to allowing undocumented immigrants to become practicing attorneys, if an individual can gain employment eligibility these arguments are no longer causes for concern.

A. Implications for the Legal Profession

Another area of concern is the potential for negative implications regarding the legal profession. The first concern is that the already overcrowded legal profession does not need more attorneys. This concern can easily be overcome by noting that allowing undocumented immigrants admission to the bar will not create a sudden influx of a large number of new attorneys. The estimated number of undocumented individuals who have even attended law school is low, with best estimates around one hundred.²²⁹ Following the idea that these are valuable candidates for entry to the legal profession, providing these individuals with a path to legal status is not a “hand-out.”²³⁰

B. A Chance for State Bars to Take a Stance

Finally, this situation provides an important opportunity for state bars to weigh in on the immigration reform issue. At a time when the Congress is considering vast overhauls of the immigration system state bars have a chance to make their stance clear. By admitting undocumented immigrants, they can choose to indicate to society and the political world that these are worthy, accomplished individuals who deserve to be granted legal status. This would send an important message during this time of immigration reform by supporting undocumented immigrants who are deserving of legal status. It would also show that the bar, historically an exclusive association, is open and available to all qualified candidates, not only select ones. Further, the

228. Robin Abcarian, *Sergio Garcia Will Practice Law, and He Will Make a Killing*, L.A. TIMES (Sept. 6, 2013), <http://www.latimes.com/local/lanow/la-me-ln-sergio-garcia-law-20130906,0,2936482.story?page=1> (“His application for a green card has been pending for the last 19 years, since Nov. 18, 1994. At the rate the feds are processing applications, he thinks he will receive his card in 2019, sometime around his 41st birthday.”).

229. Aldana et al., *supra* note 29, at 6.

230. Smithson, *supra* note 15, at 117–18, 118 n.220 (noting the fact that “this specific group of undocumented immigrants have worked their way to where they are today and enabling them to become legal residents or citizens of the United States would benefit the country” (citing EDUC. SECTOR, REWARD HARD-WORKING IMMIGRANT STUDENTS 1 (2007))).

law may be viewed as a changing, flexible mechanism that adapts with changing societal attitudes in different states. Rules are tools that decision makers can use to help come to what seems like a fair result. Many state bars have consistently held that the only requirements to practice law are “a proper education and good moral character” and have rejected immigration status as a relevant criterion.²³¹ This Comment argues that this would be the ideal approach in all states for the above reasons, but the likelihood of more conservative states allowing undocumented immigrants admission to the bar is low.

While one segment of society feels sympathy for these undocumented immigrants, the other segment may view them as not entitled to admission based on not wanting to provide societal benefits to those here illegally, regardless of circumstances. This value determination of providing or not providing societal benefits is likely an underlying and unstated factor in many state bar decisions on this matter. As stated above, applying a holistic approach in evaluating undocumented applicants for bar admission would be the most equitable approach, and the one all states should apply. California and Florida have already begun to use this holistic consideration process,²³² but the supreme courts in those states have declared that undocumented status prevents them from issuing law licenses to otherwise qualified candidates unless there is state legislation specifically allowing it.²³³

C. *Applying a New Visa Category to the Current Context*

Because of the complex nature of the interplay between undocumented status, employment authorization, 8 U.S.C. § 1621, and individual state immigration requirements for bar admission, an approach that can provide these individuals with legal status is ideal. Under current standards there are three possibilities for undocumented individuals seeking bar admission: (1) in a state that has passed legislation to make § 1621 inapplicable, undocumented applicants should have no issue being admitted to the bar, but may not have work authorization if they do not qualify for DACA; (2) in a state that has not passed legislation to make § 1621 inapplicable but does not have restrictions on immigrant status for admission, the state supreme court likely will not admit undocumented applicants, even if they have work authori-

231. Reply Brief, *supra* note 185, at 29.

232. See *supra* note 192 and accompanying text.

233. *In re Garcia*, 315 P.3d 117, 127–29 (Cal. 2014); Fla. Bd. of Bar Exam'rs Re Question as to Whether Undocumented Immigrants are Eligible for Admission to the Fla. Bar, 134 So. 3d 432, 433–34 (Fla. 2014) (per curiam).

zation; and (3) in states that do restrict admission based on immigration status, undocumented immigrants will not be admissible at all. Under these circumstances, an undocumented bar applicant may be admitted to the bar but not be able to work as an attorney (for example, Sergio Garcia). The other possibility is that an undocumented applicant will have work authorization but will be inadmissible pursuant to § 1621 (for example, Jose Godinez-Samperio).

Because neither of these outcomes properly reconciles the federal government's policy of condoning these individual's presence by providing work authorization with the federal law preventing them from receiving a professional license, a visa that provides both legal status and employment eligibility is necessary. If this new visa was enacted it would allow Jose Godinez-Samperio to be admitted to the Florida Bar even if the state legislature does not choose to enact legislation for the § 1621 exception. Because he already qualified for DACA Jose would have no trouble meeting the age and residency requirements of the visa. He graduated from a U.S. high school, undergraduate college, and law school and he has been found fit for bar admission other than his undocumented status, thus meeting the specialty occupation requirements of the visa. If this visa category were available Jose could have applied for it after graduating from law school and would have met all of the requirements. This would provide him not only with legal employment eligibility, so that he can put his legal license to whatever use he chooses, but also with legal status. Legal status would allow him to be admitted to the Florida Bar even without legislation specifically allowing it, and would eventually provide him with the possibility of permanent legal status. The visa would finally allow Jose Godinez-Samperio to receive the legal license he worked so hard for, and to put it to use.

In the alternative, states should seek to pass legislation specifically allowing issuance of legal licenses to undocumented immigrants to get around § 1621. Once undocumented immigrants are admissible, states should make eligibility contingent on proving legal ability to work rather than on immigration status. This approach would allow those with DACA approval or other prosecutorial discretion benefits to be admitted and work as attorneys.²³⁴ In order to maintain this as an

234. See Qu, *supra* note 94, at 974–75 (“Once a noncitizen is granted deferred action status and a work permit, he may legally remain in the United States and obtain employment. In order for an undocumented lawyer to work in the profession in which he has chosen and trained, he must become a member of the bar in the state where he wishes to practice. By not admitting Godinez-Samperio . . . , the courts would prohibit [him] and other applicants who have received employment authorization from practicing law, even though federal law has legally permitted them to work in any capacity. A denial of the graduates’ bar applications due to their current

appropriate and equitable solution state bars could keep the license active only so long as the undocumented attorney can continue to demonstrate her legal ability to practice as an attorney.

V. CONCLUSION

Undocumented immigrant children are provided with a U.S. education under *Plyler* and then told that they must self-deport at age eighteen or be considered active violators of federal law. This system is contradictory and particularly frustrating for individuals like Jose Godinez-Samperio, who has work authorization but is barred based on status, and Sergio Garcia, who has been admitted to the bar but has no work authorization despite years of waiting for a green card. Rather than being rewarded for perseverance and academic excellence, they are told they may never be able to put their hard-earned skills and professional abilities to use. Such individuals should be able to find gainful employment in their field of expertise. While full-scale immigration reform may take years, feasible solutions for undocumented law school graduates seeking admission to the bar may already exist.

Rather than hinging admission on immigration status, states should instead consider whether an individual can prove her ability to be employed legally. Ideally undocumented applicants should be provided a specialized visa to provide them with legal status and work authorization. Undocumented immigrants who have already graduated from law school deserve the chance to put their education and skills to use.

*Tara Kennedy**

immigration status would create an absurd result by circumventing the aims of federal policy.” (footnotes omitted)).

* J.D. Candidate 2015, DePaul University College of Law; B.A. 2009, DePaul University. I would like to thank the Editorial Board and staff of Volume 63 for their hard work and excellent editing on my Comment. I would also like to thank Aimee Deverall, Professor Anthony Volini, Professor Daniel Morales, and Professor Allison Brownell Tirres for their help in developing this Comment. Finally, I would like to thank my family and friends for their support and encouragement. Any errors are my own.