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US IMMIGRATION & NATIONALITY LAW

CAN AN UNDOCUMENTED LAWYER PRACTICE IMMIGRATION LAW?

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All eyes are focused on whether the California Supreme Court will grant an undocumented lawyer a law license in the case of Sergio Garcia. If an undocumented lawyer like Garcia is granted a license, what would happen if he chooses to practice immigration law? In the past, undocumented lawyers who practiced immigration law have been disciplined by bar counsel within the immigration agencies. The same fate should not befall future undocumented lawyers if they choose to practice immigration law after the state has granted them a license to practice law.

The first question is whether an undocumented lawyer can be granted a law license by the relevant state. The Department of Justice has arguedthat 8 USC §1621 prohibits a state from granting a public benefit to an undocumented alien, which also includes a professional license. At the oral argument last Wednesday, September 4, the judges seemed to agree with the DOJ's position. However, 8 USC §1621 also allows a state to bypass §1621 by enacting specific legislation that could grant a benefit to an undocumented alien. Thus, even if the California Supreme Court rules against Garcia, the California legislature has passed specific legislation, AB 1024, that would authorize the granting of law licenses to undocumented aliens. This legislation, if signed by the governor, will moot the case in the California Supreme Court, but the DOJ is likely to make the same argument in other states.

The DOJ's hypertechnicalargument clearly goes against the spirit of the Obama Administration's deferred action for childhood arrivals (DACA) policy, although Garcia was too old to take advantage of it. The DOJ has also argued in a similar case in Florida that §1621 precludes a state from granting a law licenses to a person who has since received work authorization under DACA. It boggles the

mind as to why the DOJ would read §1621 so broadly so as to oppose the granting of a license to a lawyer who has been authorized to remain in the US and work under DACA.

There are compelling arguments why an undocumented lawyer should be granted a law license. A law license should be separated from the ability to work in the US. There are many foreign lawyers who get law licenses in this country even though they may not be eligible to work in the US. They have entered the US on student or tourist visas, and take the state bar exam. While they may not be able to remain in the US longer than their visa and plan to return to their countries, they are nevertheless granted a license based on their competence and fitness to be lawyers. Such lawyers can practice US law in their own countries, and even apply their knowledge of such law, when they legitimately visit the US for business purposes.

With respect to an undocumented lawyer who may remain in the US, he or she need not be employed by an employer in violation of federal immigration law. Such a lawyer could potentially work as an independent contractor or perform pro bono work as a volunteer without potentially violating the employer sanction laws. The DOJ in its brief cites *Matter of Tong*, 16 I&N Dec. 593 (BIA 1978) to argue that self-employment qualifies as working without authorization. But *Matter of Tong* was decided long before the Immigration Reform and Control Act of 1986, which made it unlawful for an employer to hire a person who is not authorized to work in the US. *Matter of Tong* only held that an alien who engages in self-employment, when otherwise not authorized to work, cannot adjust status under INA §245. It does not prohibit self-employment, and in any event, an undocumented person is ineligible to adjust status.

So, what would happen if an undocumented lawyer is granted a license, which is about to happen in California, and then decides to practice immigration law? The DOJ's brief in the Sergio Garcia case cites instances of disciplinary action taken against licensed attorneys who were not authorized to work in the United States by disciplinary counsel within the USCIS and the EOIR . See *Matter of Ravindra Singh Kanwal*, D2009-053 (OCIJ July 8, 2009) and *Matter of Noel Peter Mpaka Canute*, D2020_124 (OCIJ March 16, 2001). In both the cases, the attorneys had work authorization and then fell out of status, but never contested the charges and consented to the order of discipline. They were indefinitely suspended, but could apply for reinstatement if they could demonstrate that they had lawful immigration status or were granted

employment authorization. Both of these attorneys were then reciprocally disciplined by their state bars in New Yorkand Coloradoand other states where they were admitted as attorneys.

Despite the groundswell of support for granting licenses to undocumented attorneys, bar counsel within the immigration agencies could potentially start disciplinary actions against them if they practice immigration law based on the prior precedents. When a state has granted a law license to an undocumented lawyer, knowing fully well that the lawyer is undocumented, one is hard pressed to think about the ethical basis to discipline a lawyer who decides to practice immigration law. Under 8 CFR 1.1 and 1001.1, both the DHS and EOIR must recognize an attorney "who is eligible to practice law in and is a member in good standing of the bar of the highest court of any State, possession, territory, or Commonwealth of the United States, or the District of Columbia, and is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him in the practice of law." An undocumented attorney who falls under this definition is recognized under federal law to engage in the practice of immigration law.

Although the two published decisions are devoid of details as the immigration attorneys conceded to the disciplinary charges, it is hard to find a disciplinary ground under the federal immigration rules in 8 CFR 1003.102 that would sanction an undocumented attorney who chooses to practice immigration law, especially if such an attorney is not employed in violation of the employer sanction provisions, practices as an independent contractor and otherwise engages in ethical conduct. Moreover, in the unfortunate event that such an attorney does get disciplined by the immigration agencies for merely being undocumented, it would be equally hard for a state disciplinary authority to find a reciprocal disciplinary ground under the various state rules of professional responsibility, which have largely adopted the ABA Model rules. Even ABA Model Rule 8.4(c), which can sanction attorneys who "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" or Rule 8.4(d), which sanctions attorneys who "engage in conduct that is prejudicial to the administration of justice" can hardly apply to an undocumented lawyer who has been granted a license by his or her state bar, and who otherwise does not engage in unethical conduct.

Even from a public policy standpoint, a foreign national lawyer, who is otherwise in H-1B visa status, can fall out of status unbeknownst to him or her

if the employer forgets to timely file an extension of the H-1B status. This lawyer may have also mistakenly received an I-94 authorizing him or her to remain in the US up to a date earlier than the date on the H-1B approval notice, and the lawyer only finds out after it is too late. A lawyer may have also applied for adjustment of status based on marriage to a US citizen, and timely applies for a renewal of the employment authorization document, but may not receive such a document from the USCIS in a timely manner. Lawyers who find themselves in such situations, and while waiting for the government to extricate themselves from this mess, may still wish to engage in a pro bono case for a foreign national client. Should such a lawyer be disciplined for unethical conduct?

The disciplining of an undocumented lawyer also goes against the grain of prevailing policies and attitudes towards undocumented immigrants. There are millions of undocumented people who are waiting for immigration reform, and the Senate has already passed S. 744, which will give them Registered Provisional Status, and then put them along the pathway to permanent residency and eventually citizenship. Indeed, being documented or undocumented is part of the same continuum. A thoroughly undocumented person, when placed in removal proceedings, can seek cancellation of removal under stringent criteria pursuant to INA §240A(b), such as by being physically present in the U.S. on a continuous basis for not less than 10 years, by demonstrating good moral character during this period, by not being convicted of certain offenses and by demonstrating "exceptional and extremely unusual hardship to the alien's spouse, parent, or child," who is a citizen or a permanent resident. Such a person whose visa has long since expired could also possibly get wrapped up in a romantic encounter with a U.S. citizen, marry, and dramatically convert from undocumented to permanent resident within a few months. Until the recent fall of DOMA, a lawyer in a same sex marriage with a US citizen could not even apply for an immigration benefit through that marriage. At times, Congress bestows such permanent residency, as we have already seen, through section 245(i) or the LIFE Act, or a person can obtain Temporary Protected Status (TPS), if a calamity were to befall his or her country such as the recent TPS program and its extension for Haitians after the devastating earthquake on January 12, 2010. Conversely, a documented person, such as one in H-1B status can according to the government also technically be considered not in status, during the pendency of an extension

request, although this position has been successfully challenged.

The following extract from the U.S. Supreme Court's decision in *Plyer v. Doe*, 457 U.S. 202 (1982), which held that undocumented children could not be deprived of a public education, is worth noting:

To be sure, like all persons who have entered the United States unlawfully, these children are subject to deportation. But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in the country, or even become a citizen.

As undocumented immigrants become attorneys, many may want to get involved in some way in the practice of immigration law. Many of them were brought to the US as children and are without status for no fault of their own. They may engage in advocating for the rights of immigrants, for immigration reform and may also perform pro bono work in the immigration field. They can hardly be accused of engaging in unethical conduct by bar counsel within the immigration agencies, especially when their states have granted them licenses after being fully aware of their undocumented status.

(*The view's expressed in this blog are the author's personal views and do not necessarily represent the views of any organization that he is a part of*)