



5-2018

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### BYU ScholarsArchive Citation

Truman, Madeleine (2018) "Undocumented Immigrants and the US Professional Licensing Problem," *Brigham Young University Prelaw Review*: Vol. 32 , Article 11.

Available at: <https://scholarsarchive.byu.edu/byuplr/vol32/iss1/11>

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## UNDOCUMENTED IMMIGRANTS AND THE US PROFESSIONAL LICENSING PROBLEM

*Madeleine Truman<sup>1</sup>*

*After years of study and preparation, the day Cesar Vargas passed the New York State bar exam should have been one of the most rewarding of his life . . . There was just one problem; Cesar Vargas is an undocumented immigrant.*

After years of study and preparation, the day Cesar Vargas passed the New York State bar exam should have been one of the most rewarding of his life. After studying all throughout his time at St. Francis College in Brooklyn, preparing for the LSAT, spending countless mind-numbing hours saving up money to go to law school, being admitted and studying at New York School of Law, studying for the bar exam and passing it on the first try, he was finally ready to begin practicing as a lawyer. There was just one problem; Cesar Vargas is an undocumented immigrant. He was brought to the United States at the age of five when his mother crossed the border from Mexico. He and his family have lived in Staten Island ever since, and the United States is really the only home he has ever known.<sup>2</sup>

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- 1 Maddy Truman is a senior at BYU graduating with a BS in Sociology. She will attend BYU Law in the fall and is grateful for the opportunity to have been an author for the Prelaw Review. She would like to thank her amazing editor Jake Jensen, a junior majoring in Political Science, for his amazing work and dedication to this paper.
  - 2 "Uncertain future awaits undocumented law students", American Bar Association For Law Students, American Bar Association, Law Student Division (2017), <https://abaforlawstudents.com/2017/03/01/uncertain-future-awaits-undocumented-law-students/>.

That was in 2011. After applying for admission to the bar and being denied due to his undocumented status, Cesar began a four-year fight during which time his application was referred to the Appellate Division of the Supreme Court of the State of New York.<sup>3</sup> The court deliberated Cesar's unique position as a highly-skilled "Dreamer" (or young, undocumented arrival to the United States), and in 2015 the court voted unanimously to grant his bar application. In February of 2016, Cesar Vargas was sworn in as one of the first undocumented immigrants in New York immigrants to be allowed entry to the New York State bar.

Cesar's persistence to pursue an advanced degree and a career in a highly-skilled field, despite the challenges posed to him by his legal status, has peaked public attention. Many Dreamers and DACA recipients feel trapped by their unique position as undocumented immigrants. These individuals were brought to the United States as young children by parents who crossed the border illegally. They themselves never chose to break the law, and are therefore currently protected from deportation, though that protection is not guaranteed. They can attend school and obtain driver's licenses, but they are still prevented from receiving public benefits such as receiving financial aid or, as in Cesar Vargas's case, obtaining a professional license.

DACA recipients are members of the millennial generation, and many could soon be in the same position as Cesar Vargas. They had to have been under 16 years of age when brought to the United States and couldn't have been more than 30 when the Deferred Action for Childhood Arrivals (DACA)

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3 Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York (June 3, 2015), <https://law.justia.com/cases/new-york/appellate-division-second-department/2015/2013-10725on-application.html>.

policy was enacted in 2012.<sup>4</sup> Many have attended high school, have entered or completed college, and are seeking to join the workforce as productive members of society. They have the potential to greatly benefit the United States economy if they were free to use the skills they have cultivated. In this paper we will argue that any individual who obtains the education and training necessary to be competitive in a high-skilled field should be allowed to work in that field, documented or not. That is why we propose that 8 U.S. Code § 1621 which deals with public benefits for aliens, including professional licenses, be amended to allow for undocumented immigrants to receive professional licenses at the discretion of the licensing body.

Part I will explain the overarching problem of immigrant “brain drain” in the United States and highlight the potential that immigrants have, including Dreamers, to help reduce that “drain” through their potential contributions to the US economy.

Part II will discuss the current federal standard for aliens and public benefits as found in 8 U.S. Code § 1621 with an explanation of section (d) which discusses State authority over alien eligibility for public benefits.

Part III will examine the precedent cases of Cesar Vargas, José Godinez-Samperio, and Sergio Garcia, all undocumented Dreamers granted their bar licensure by the states of New York, Florida, and California respectively. We will use these precedents as a standard supporting our argument that DACA recipients should be granted professional licenses in accordance with their qualifications

Part IV will address the American Bar Association’s resolution from August of last year and how it demonstrates a call for the amendment we are proposing. Our paper will conclude reaffirming the need for DACA recipients to have

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4 Cullinane, Susannah, Tal Kopan, and Catherine E. Shoichet. “US immigration: DACA and Dreamers explained”, CNN Politics (2017), <http://www.cnn.com/2017/09/04/politics/daca-dreamers-immigration-program/index.html>.

full access to professional jobs where they are qualified with implications of the benefits our proposal will create.

### I. THE BRAIN DRAIN PROBLEM AND THE NEED FOR A SOLUTION

Immigrant “brain drain” is the phenomena of persons being unable to work in a position for which they are qualified due to their legal status. Cesar Vargas ran the risk of being included in “brain drain” when it was unclear whether he would be able to practice law due to his undocumented status, even though he met all other qualifications to do so. This phenomena, experienced by Cesar and others, not only hurts the immigrants in question, but prohibits potential growth of the US economy. By not allowing qualified individuals to contribute to the economy by working in their field of choice, their “brain power” is wasted and their economic potential goes down the drain.

Factors that contribute to the problem include that immigrants are undocumented and hence not legally permitted to work, they have difficulty getting their credentials to transfer over from their home country, and some US employers are hesitant to hire skilled immigrants over native-born citizens. Our proposal addresses the first of these issues—that undocumented immigrants are either not permitted to work or are not permitted to receive a professional license and therefore cannot contribute to the nation’s economy to their fullest potential. Their skills and education are thereby wasted and become part of the “brain drain” problem.

About 1.9 million of these undocumented immigrants are eligible for DACA.<sup>5</sup> These are individuals who were brought to the United States as children and who have lived here since 2007.<sup>6</sup> The DACA program was started under President Barack Obama

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5 Glum, Julia. “DACA by the Numbers: 15 Facts About the Youth Immigration Program Trump Could Soon Shut Down”, *Newsweek* (8 August, 2017), <http://www.newsweek.com/dreamers-daca-statistics-trump-deadline-657201>.

6 *Id.* at 4.

back in 2012 with the purpose of taking the threat of deportation away from innocent young people who never made the choice to enter the country illegally.<sup>7</sup> It gives recipients protection from removal proceedings if they renew their deferred action status every two years. Though DACA and a similar Act called the DREAM Act allow these young people to remain in the country and go to school freely, they are not considered legal permanent residents and are not on a path to citizenship. When surveyed, the Center for American Progress found that 72 percent of DACA recipients enrolled in school are “pursuing a bachelor’s degree or higher.”<sup>8</sup> Over the coming years, that percentage will likely increase as DACA recipients and Dreamers grow up. They will receive a quality education and become ready to competitively enter the American workforce in a professional capacity. Their qualifications and years of preparation, however, will be for naught if they remain limited by their undocumented status.

## II. BACKGROUND

As it now stands, 8 U.S. Code § 1621 (a) states that aliens, a group that includes DACA recipients and Dreamers, are not eligible for “any State or local public benefit” such as “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.”<sup>9</sup> This statute was originally included

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7 Remarks by the President on Immigration (June 15, 2012), <https://obamawhitehouse.archives.gov/blog/2012/06/15/president-obama-delivers-remarks-immigration>.

8 Jawetz, Tom, Adam Luna, Henry Manning, Patrick O’Shea, Adrian Reyna, Greisa Martinez Rosas, Philip E. Wolgin, Tom K. Wong. “DACA Recipients’ Economic and Educational Gains Continue to Grow”, Center for American Progress (28 August, 2017), <https://www.american-progress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/>.

9 Aliens who are not qualified aliens or nonimmigrants ineligible for State and local public benefits, 8 U.S. Code § 1621 (1997), <https://www.law.cornell.edu/uscode/text/8/1621>.

in Title VI of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, and the policy statements at the start of Title VI reveal that Congress was predominantly concerned with alien self-reliance and government welfare and not so much the granting of professional licenses.<sup>10</sup> 8 U.S. Code § 1621 (d) allows for States to “provide that an alien who is not lawfully present in the United States [be] eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.”<sup>11</sup> Aliens can become eligible for public benefits then, but only if the state in which they reside has passed a law opting out of section (a). Federal immigration law determines who can enter and legally work in this country. State licensure laws determine who can receive a professional or commercial license in each state. It is at the intersection of these two domains in 8 U.S. Code § 1621 that undocumented childhood arrivals find themselves as they prepare to enter certain professional fields.

### III. PRECEDENT CASES

#### *A. Cesar Vargas and the State of New York*

As mentioned previously 8 U.S. Code § 1621 was challenged in the state of New York when the courts made the following decision:

In the matter of application of Cesar Adrian Vargas for admission to the Bar of the State of New York, the Appellate Division of the New York Supreme Court ruled that Cesar Vargas should be admitted to the bar having found that:

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10 Katherine Tianyue Qu, *Passing the Legal Bar: State Courts and the Licensure of Undocumented Immigrants*, 26 GEO. J. LEGAL ETHICS 959, 978 (2013) [http://heinonline.org/HOL/Page?handle=hein.journals/geojlege26&div=50&g\\_sent=1&casa\\_token=&collection=journals](http://heinonline.org/HOL/Page?handle=hein.journals/geojlege26&div=50&g_sent=1&casa_token=&collection=journals).

11 Aliens, *supra* note 8.

Mr. Vargas graduated from and received a juris doctor degree from an approved law school and thereafter passed the New York State bar examination. Having satisfied the eligibility standards equally applicable to those similarly situated, and having been so certified by the New York State Board of Law Examiners, we find no rational basis to conclude that Mr. Vargas' status as an undocumented immigrant reflects adversely on his competence to practice law in the State of New York.<sup>12</sup>

The Court cited New York Judiciary Law § 53[1] in their decision which gives the state judiciary power to grant professional licenses to practice law.<sup>13</sup> Specifically, the court resolved that "the judiciary may exercise its authority as the state sovereign to opt out of the restrictions imposed by section 1621(a) to the limited extent that those restrictions apply to the admission of attorneys to the practice of law in the State of New York."<sup>14</sup> Thus, the State of New York exercised its authority under section 1621(d) to allow an undocumented alien to receive a professional license.

Vargas went to law school with no federal financial aid and was able to pass the bar while his DACA application was still pending. In the review of his application to the bar, the Character Committee found Vargas to have "stellar character" and said that, barring the issue of his immigration status, they would have "no hesitation in recommending Mr. Vargas' admission to the New York Bar."<sup>15</sup> In this instance, Vargas had every

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12 Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York. <https://law.justia.com/cases/new-york/appellate-division-second-department/2015/2013-10725on-application.html>.

13 New York Consolidated Laws, Judiciary Law - JUD § 53. Rule-making power of court of appeals as to admission of attorneys and counselors. <http://codes.findlaw.com/ny/judiciary-law/jud-sect-53.html>.

14 *Id.* at 12.

15 *Id.*



qualification necessary to participate in his chosen profession. His potential to contribute to the legal field and his local economy in 2015 was as high as any US citizen that had likewise graduated from law school and passed their bar examination. The intervention of the State in this case, to opt out of 8 U.S. Code § 1621(a) was the key to unlocking Vargas's potential.

*B. José Godinez-Samperio and the Case in Florida:*

José Godinez-Samperio was brought to the United States in 1995 when his parents left Mexico to escape the country's economic crisis. They entered Dover, Florida on tourist visas and never left. He was nine years old when the US became his home.<sup>16</sup> José went to Armwood High School, where he graduated in 2004 as valedictorian. He received his bachelor's degree in anthropology from New College in Sarasota and studied law at Florida State. He never sought to hide his undocumented status throughout his application process into law school and his application to the Florida State Bar. He passed the bar exam in 2011 but was denied bar admission. In the Florida State Supreme Court ruling prompted by this denial, the Court found that, "it has become increasingly apparent throughout these proceedings that Applicant [Godinez] is an otherwise legally qualified applicant for admission to The Florida Bar and that he is the type of exemplary individual The Florida Bar should strive to add to its membership."<sup>17</sup> The Florida Supreme Court had to grapple with 8 U.S. Code § 1621 to decide whether or not, given his qualifications, Godinez would be allowed to practice law as a member of The

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16 Stockfish, Jerome R. "Undocumented immigrant beats legal maze to practice law in Florida", Times Publishing Inc. (29 November, 2014), <http://www.tbo.com/news/crime/undocumented-immigrant-beats-legal-maze-to-practice-law-in-florida-20141129/>.

17 Florida Board of Bar Examiners Re: Questions as to Whether Undocumented Immigrants are Eligible for Admissions to the Florida Bar (March 6, 2014), <https://law.justia.com/cases/florida/supreme-court/2014/sc11-2568.html>.

Florida Bar. After reviewing 8 U.S. Code § 1621(d) they found that “despite this grant of uncharacteristic authority, the Florida Legislature [had] not chosen to act on this vital policy question”,<sup>18</sup> The Court then denied Godinez his admission to the bar.

Godinez is now protected under DACA status and cannot be deported. Not giving up hope, Godinez and his attorney reached out to the Florida Legislature and found support for his case, including from Republican Sen. Jack Latvala.<sup>19</sup> Latvala helped draft a bill that would undo the Court’s decision. On May 7, 2014, Florida House Bill 755 was signed into law. Included in the bill was the provision that,

Upon certification by the Florida Board of Bar Examiners that an applicant who is an unauthorized immigrant who was brought to the United States as a minor; has been present in the United States for more than 10 years; has received documented employment authorization from the United States Citizenship and Immigration Services (USCIS)...and has fulfilled all requirements for admission to practice law in this state, the Supreme Court of Florida may admit that applicant as an attorney at law authorized to practice in this state.<sup>20</sup>

This bill signed into law met the requirements of 8 U.S. Code § 1621(d) giving the State of Florida the ability to grant a professional license to an undocumented immigrant. José Godinez-Samperio was admitted to the bar in November of 2014, and currently is benefitting his community working as a staff attorney for Gulfcoast Legal Services.<sup>21</sup>

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18 *Id.* at 16.

19 CS/CS/HB 755: Courts, GENERAL BILL by Judiciary Committee, <https://www.flsenate.gov/Session/Bill/2014/755/?Tab=BillText>.

20 *Id.* at 18.

21 Stockfisch, *supra* note 15.

### *C. Sergio Garcia and a California Case:*

Sergio Garcia was born in March of 1977 and brought to California by his parents when he was 17 months old. At age nine his family returned to Mexico until he was 17, at which time they returned to California and have been there ever since. At age 17, in 1994, Garcia's father filed a petition for his son to receive a green card. It would be more than twenty years before that petition was granted. During those twenty years, Garcia went to school, including Cal Northern School of Law. He received his law degree in May of 2009 and passed the July 2009 bar examination for the State of California, all as an undocumented immigrant.<sup>22</sup> When DACA was announced in 2012, Garcia was too old to qualify, though his situation was like that of many DACA recipients. His denial for admission to the bar sparked AB 1024, a California bill expanding immigrants' rights that was signed by Governor Jerry Brown in 2013.<sup>23</sup> The bill gives the California Supreme Court power to admit a fully qualified applicant as an attorney at law regardless of the legality of her presence in the United States.<sup>24</sup>

When the California Supreme Court took up Garcia's case in 2014, they determined that AB 1024, which took effect on Jan 1, 2014, "removed any obstacle to Garcia's admission to the State Bar that was posed by section 1621(a) and 1621(c)(1)(A)."<sup>25</sup> This State law gave California the permission necessary to grant Sergio Garcia a professional license despite federal regulations regarding

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22 In re SERGIO C. GARCIA on Admission, Supreme Court of California (January 2, 2014), <http://www.courts.ca.gov/documents/S202512.PDF>.

23 SENATE JUDICIARY COMMITTEE Senator Noreen Evans, Chair (2013-2014 Regular Session), [http://leginfo.ca.gov/pub/13-14/bill/asm/ab\\_1001-1050/ab\\_1024\\_cfa\\_20130911\\_110056\\_sen\\_comm.html](http://leginfo.ca.gov/pub/13-14/bill/asm/ab_1001-1050/ab_1024_cfa_20130911_110056_sen_comm.html).

24 *Id.* at 22.

25 In re SERGIO C. GARCIA on Admission, Supreme Court of California (January 2, 2014), <http://www.courts.ca.gov/documents/S202512.PDF>.

illegal aliens. Though Garcia is not a DACA recipient or a Dreamer, his case is significant in that it demonstrates an instance in which a state opted out of the restrictions found in section 1621(a).

These cases, though matters of first impression in each respective state, will surely only increase in number. As more and more DACA recipients and Dreamers complete their secondary and post-secondary educations, increasing numbers will seek to receive license to work in their chosen field. As demonstrated in each of these precedent cases, these undocumented individuals may be just as qualified through education and examination as any native-born citizens and may meet every requirement necessary for entry into a professional field other than immigration status.

#### IV. THE ABA PRECEDENT AND OUR EXPANDED PROPOSAL

In response to these three cases, in August of 2017, the American Bar Association (ABA) House of Delegates passed a resolution that would make it easier for other states to follow the examples of New York, Florida, and California when faced with admitting undocumented immigrants to the bar. The resolution reads,

The American Bar Association urges Congress to amend 8 U.S.C. § 1621(d) to insert, at the conclusion of all existing language, the following sentence: A state court vested with exclusive authority to regulate admission to the bar may, by rule, order, or other affirmative act, permit an undocumented alien seeking legal status to obtain a professional license to practice law in that jurisdiction.<sup>26</sup>

This resolution still allows for states to decide whether they

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26 Sara Gonzalez, *American Bar Association passes resolution to allow illegal immigrants to practice law*, THE BLAZE (16 August, 2017), <https://www.theblaze.com/news/2017/08/16/american-bar-association-passes-resolution-to-allow-illegal-immigrants-to-practice-law>.

want to opt out of 8 U.S.C. § 1621(a), but it makes it much easier for the licensing agency, in this instance, the bar, to grant a professional license to an undocumented alien seeking legal status. No longer would it require a state law to be enacted, since any “rule, order, or other affirmative act” would suffice. This would leave the decision of whether an undocumented alien can join the bar, for example, in the hands of the licensing authority, the same as with all U.S. citizens.

Here the ABA is acknowledging that the number of cases in which undocumented aliens, especially DACA recipients, who will be seeking professional licenses to practice law is going to grow. Given the lack of comprehensive immigration reform and the extraordinary backlog for green card applications, such an amendment is the best way to address this growing phenomenon. There will be more Sergio Garcia’s going to school while waiting 10 plus years for a green card. There will be more and more states having to make the same decision as New York, Florida, or California. Not only will more undocumented aliens desire to become legal practitioners, they will seek to become doctors, engineers, teachers, and all sorts of other professionals. That is why we propose that this amendment be expanded to include all professions. We propose that the amendment be expanded to give power to any professional licensing agency or authority to decide whether an undocumented alien can receive said professional license. An expanded version of the ABA amendment would address the professional licensing problem faced by undocumented aliens and DACA recipients and allow them to progress with their lives and careers while we wait on our country to fix its broken immigration system.

## V. CONCLUSION

Undocumented immigrants are here, and are striving to be productive members of society. These are people who already contribute through taxes and low-income jobs, and they can do more. These individuals are not a burden, but

they are currently capped in how much they can contribute by their immigration status and 8 U.S. Code § 1621.

The state currently has the power to remove that cap by choosing to enact a law allowing for undocumented aliens to receive professional licenses. As seen in the cases of Cesar Vargas, José Godinez-Samperio, and Sergio Garcia, with regards to practicing law, there is a growing demand for states to pass these types of laws and allow for immigrants who are as qualified as native-born citizens to receive a professional license. The ABA has proposed an amendment to 8 U.S. Code § 1621 (d) that would allow for the body with authority to regulate admission to the bar to be able to grant admission to undocumented aliens. This would expand the precedent for these types of cases and make it easier for other states to follow the examples of New York, Florida, and California in helping these qualified aliens, many of whom are protected under DACA or the DREAM Act, to receive their license to practice law. Though the ABA amendment signifies progress, it is not enough.

This amendment should be expanded to all professional licensing bodies to allow for similarly qualified aliens in other fields the same privileges as Vargas, Godinez, and Garcia. While we allow Dreamers and DACA recipients to live and study in our country, we should do our best to help them succeed both academically and professionally. We only hurt our own economy by denying them the opportunity to work in fields they have proven they are qualified to participate in. Let us give licensing agencies the discretion to treat these people as they would any qualified applicant, thereby allowing them to reach their economic potential. When we help Dreamers succeed, we reduce our own economic “brain drain” and makes steps towards improving a broken system.

