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DACA and NY Bar Eligibility

Janet Calvo
CUNY School of Law

Shirley Lung
CUNY School of Law

Alizabeth Newman
CUNY School of Law

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DACA AND NY BAR ELIGIBILITY

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Our latest *Footnote Forum* installation comes from Professors Janet M. Calvo, Shirley Lung, and Elizabeth Newman.¹ (#fn-869-1)

NEW YORK BAR ADMISSION OF LAW SCHOOL GRADUATES AFFORDED DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)

*Janet M. Calvo, Shirley Lung, Elizabeth Newman*² (#fn-869-2)

Non-citizens who are afforded Deferred Action for Childhood Arrivals (DACA) qualify for New York State bar membership. Over four hundred thousand young people in the United States have been approved for DACA, a program for non-citizens who came to the United States as children.³ (#fn-869-3) Approximately one percent of DACA-eligible non-citizens have pursued graduate education,⁴ (#fn-869-4) including law school. The admission of those approved for DACA to the bar is supported by New York statutes and the constitutional jurisprudence of the United States Court of Appeals for the Second Circuit and the New York Court of Appeals. The New York Judiciary Law explicitly precludes alienage as a basis for denial of bar admission. New York has a history of routinely admitting non-citizens to the bar; there is no categorical exclusion from bar admission of any particular category of law graduates based on immigration status. An individual's immigration category does not determine whether he or she possesses the skills, competence, and moral character to serve as an advocate in the courts of New York and to ethically represent the best interests of clients.

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I. Deferred Action for Childhood Arrivals (DACA) Permits a Non-citizen to Reside in the U.S. and Affords Employment Authorization

On June 15, 2012, the Department of Homeland Security announced DACA.⁵ (#fn-869-5) The United States Citizenship and Immigration Services (USCIS) considers applications for DACA. DACA can be requested for two years and may be renewed. Those afforded DACA are not removable from the U.S. based on immigration status.⁶ (#fn-869-6) They are eligible for authorization to work⁷ (#fn-869-7) and are given an “Employment Authorization Document.”⁸ (#fn-869-8) They then may obtain a Social Security card⁹ (#fn-869-9) and a New York State driver’s license.¹⁰ (#fn-869-10)

DACA is a form of deferred action and is similar to other immigration categories of non-citizens. Deferred action has been available to non-citizens for many years.¹¹ (#fn-869-11) Any period of time in deferred action qualifies as a period of stay authorized by the Secretary of Homeland Security. Further, there is a long-standing federal regulation that allows employment authorization to those granted deferred action.¹² (#fn-869-12) (#_ftn11)

The Department of Homeland Security through USCIS issued guidelines for DACA applicants.¹³ (#fn-869-13) Applicants must be under the age of 31 as of June 15, 2012, have come to the U.S. before age 16, lived in the U.S. continuously since June 15, 2007, and have graduated or be currently enrolled in school, or received a General Education Development (GED) certificate, or have been honorably discharged from the military. DACA applicants cannot have been convicted of a felony, a significant misdemeanor, three or more other misdemeanors, or otherwise pose a threat to national security or public safety. Additionally, all applicants must provide biometrics and undergo background checks.¹⁴ (#fn-869-14) Nationwide, of those eligible to apply for DACA, one percent hold advanced degrees, five percent have bachelors degrees and twenty-two percent are in college.¹⁵ (#fn-869-15) As of August 2013, twenty nine thousand individuals from New York State applied for DACA.¹⁶ (#fn-869-16) (#_ftn15)

DACA eligible non-citizens are in an immigration category associated with broader employment options and longer continuing presence in the United States than some other non-citizens who are routinely admitted to the bar. Non-citizens afforded DACA have two-year renewable permission to be in the United States. The work authorization afforded those with DACA is continuous and allows any type of employment. In contrast, LL.M. student graduates, who are admitted to the bar, are often on student visas that allow them to remain for only one year of postgraduate practical work experience, and it is not renewable.¹⁷ (#fn-869-17) Moreover, many other non-citizen visas, such as H-1B,¹⁸ (#fn-869-18) are specifically tied to performing a particular kind of work. The Second Circuit has determined that even non-citizens with temporary permission to reside in the United States with limited work authorization are eligible for professional licenses in New York.¹⁹ (#fn-869-19) DACA status confers privileges to eligible individuals that are greater than or similar to those of non-citizens with temporary visas who are routinely admitted to the bar.

II. The New York Judiciary Law States that Alienage Cannot be a Cause for Refusing Admission to Practice Law

There is no law in New York that prohibits non-citizens from being admitted to the bar or requires a particular immigration status for admission.²⁰ (#fn-869-20) To the contrary, the New York Judiciary Law explicitly states, “alienage... shall constitute no cause for refusing any person examination or admission to practice.”²¹ (#fn-869-21) Thus, the plain meaning of the language of the statute makes it clear that an alien category cannot be a basis to refuse bar admission. Under the canons of statutory construction, the judiciary gives effect to the plain meaning of the language of a statute.²² (#fn-869-22) As New York law provides, “statutory language is generally construed according to its natural and most obvious sense.”²³ (#fn-869-23)

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Further, the language in the judiciary law differs significantly from specific provisions of other New York statutes related to the licensing of non-citizens for other occupations and other endeavors. These statutes demonstrate that the New York legislature knew how to impose alien status criteria, particularly for licensing, when it wanted.²⁴ (#fn-869-24) For example, the education law states that, for a physician's license, a non-citizen applicant must be "lawfully admitted for permanent residence" or have obtained a three year waiver from the board of regents to practice in a medically underserved area and that the waiver can be extended for a non-citizen who holds an H-1b or O-1 or equivalent visa or a non-citizen actively pursuing permanent resident status.²⁵ (#fn-869-25) In contrast, other provisions of the education law, such as the provision regulating licenses for pharmacists,²⁶ (#fn-869-26) require that a non-citizen applicant be a legal permanent resident, without any waivers or exceptions for non-citizens with specific visas.

Additionally, a provision of the education law related to eligibility for certain awards and loans makes other specific distinctions based in alien status requiring that a non-citizen be either an individual of a class of refugees paroled by the attorney general of the United States or an alien lawfully admitted for permanent residence.²⁷ (#fn-869-27) Further, the statute related to licensing of persons to appear before the Workers' Compensation Board also demonstrates the legislature's distinction of the qualifications for attorneys as versus other licensed professionals. The statute requires that "other than an attorney", a non-citizen licensed to appear before the board must be an alien lawfully admitted for permanent residence.²⁸ (#fn-869-28) (#_ftn26)

Thus, under another canon of statutory construction, it is clear that the legislature precluded any alien status as a requirement for bar admission. New York law provides, "where a law expressly describes a particular act...or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded."²⁹ (#fn-869-29) It is evident that the legislature knew how to impose an alien category requirement when it intended to do so.³⁰ (#fn-869-30) The New York legislature omitted any citizen or alien category criteria for admission to the bar, while including various alien category criteria for occupational licensing and other endeavors.

III. New York Law and Court Rules Allow the Admission of Non-citizens who are Domestic and Foreign Law Graduates

The New York State Legislature has authorized the Court of Appeals to regulate professional licensing of the legal profession in New York.³¹ (#fn-869-31) The criteria for bar admission include various education and/or experience requirements, passing the New York bar Examination and Multistate Professional Responsibility Examination unless exempted through experience, approval by the relevant character and fitness committee, and completion of a pro bono requirement.³² (#fn-869-32) (#_ftn30)

New York routinely admits non-citizens to the bar, including: non-citizens with J.D. degrees from U.S. law schools, certain graduates of foreign law schools without degrees from a U.S. law school,³³ (#fn-869-33) and those who complete a LL.M. degree³⁴ (#fn-869-34) without first receiving a J.D. from a U.S. law school.³⁵ (#fn-869-35) Further, non-citizens admitted to the New York bar do not need to have permanent resident status or employment authorization or be in any particular immigration category. For example, LL.M. students often only have student visas that allow employment in only limited circumstances and include an option for practical training for only a one-year, non-renewable time period.³⁶ (#fn-869-36) (#_ftn34)

New York uses broad criteria to determine an applicant's requisite character and fitness.³⁷ (#fn-869-37) Immigration status is not a designated criterion.³⁸ (#fn-869-38) An applicant must file affidavits of persons attesting to his or her good moral character and general fitness.³⁹ (#fn-869-39) The character committee may consider various factors.⁴⁰ (#fn-869-40) However, individual assessments are made. Even a felony

conviction, alone, is insufficient to prohibit an applicant's entry to the bar.⁴¹ (#fn-869-41)

(#_ftn39)

IV. Discrimination Based on Immigration Category is Unconstitutional According to the Second Circuit and the New York Court of Appeals

Providing bar membership to non-citizens who are DACA eligible is consistent with the determinations of the United States Circuit Court for the Second Circuit and the New York Court of Appeals. Both courts applied a strict scrutiny equal protection analysis and have found distinctions based in immigration category unconstitutional for non-citizens who are afforded permission to live temporarily in the United States.

The Second Circuit has explicitly held that non-citizens with permission to live and work in the U.S. cannot be denied professional licenses merely because of their immigration status. In *Dandamudi v. Tisch*,⁴² (#fn-869-42) the Second Circuit held unconstitutional a section of the New York Education Law that restricted professional licenses to only citizens or legal permanent residents. The statute's restrictions were challenged by non-citizens in temporary immigration categories, including H-1B⁴³ (#fn-869-43) and "TN"⁴⁴ (#fn-869-44) who sought pharmacist licenses.⁴⁵ (#fn-869-45) The court first applied an equal protection analysis under the Fourteenth Amendment to the United States Constitution. The court stated, "(t)here is no question that the Fourteenth Amendment applies to *all* aliens."⁴⁶ (#fn-869-46) It determined that discrimination against non-citizens who were allowed to reside and work in the United States temporarily was subject to strict scrutiny and that the New York statute was not narrowly tailored to further a compelling government interest. The court responded to the state's asserted interest in protecting against the transience of non-citizens who were not permanent residents. It stated:

“ *Citizenship and Legal Permanent Residency carry no guarantee that a citizen or LPR professional will remain in New York (or the United States for that matter), have funds available in the event of malpractice, or have the necessary skill to perform the task at hand . . . (T)here are other ways (i.e., malpractice insurance) to limit the dangers of potentially transient professionals.*⁴⁷ (#fn-869-47)

The court also held that the New York state law was preempted by federal immigration law and unconstitutional under the Supremacy Clause. The state statute stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, i.e., providing work capacity to non-citizens, by imposing an additional burden not sanctioned by Congress.⁴⁸ (#fn-869-48)
(#_ftn46)

Further, the Second Circuit rejected the argument that federal law contemplates allowing states to deny eligibility for licenses based on non-citizen category. The court stated:

“ *The state's argument misunderstands the nature of this licensure provision. Federal law recognizes that states have a legitimate interest in ensuring that an individual applicant has the necessary educational and experiential qualifications for the position sought. But that traditional police power cannot morph into a determination that a certain subclass of immigrants is not qualified for licensure merely because of their immigration status.*⁴⁹ (#fn-869-49)

The Second Circuit's approach to discrimination based on immigration category is consistent with the New York Court of Appeals. In *Aliessa v. Novello*,⁵⁰ (#fn-869-50) the New York Court of Appeals concluded that a New York statute violated the Equal Protection Clauses of the United States and New York State Constitutions because it

afforded Medicaid to certain categories of non-citizens in the U.S. with the knowledge and permission of federal immigration authorities, but not to others.⁵¹ (#fn-869-51) (#_ftn49)

Like the Second Circuit, the New York Court of Appeals analyzed the equal protection claim by applying strict scrutiny, thereby requiring that the statute further a compelling state interest by the least restrictive means.⁵² (#fn-869-52) The court reasoned that, as a class, aliens are a prime example of a discrete and insular minority since they can be shut out of the political process and thereby have historically been inhibited in their ability to protect their interests.⁵³ (#fn-869-53) (#_ftn51)

The Court of Appeals rejected the State's contentions that the appropriate level of scrutiny would be a rational relationship to a legitimate state purpose and that the state statute promoted a compelling state interest. The State argued that the state statute was constitutional in that it did only what the federal statute authorized it to do with regard to federal immigration policy.⁵⁴ (#fn-869-54) The court rejected this assertion and noted, "(g)iven our system of separation of powers, a lawmaking body may not legislatively declare that a statute meets constitutional criteria."⁵⁵ (#fn-869-55) (#_ftn53)

The court held that a federal statute cannot constitutionally authorize New York to determine the extent to which it will discriminate against non-citizens for State Medicaid eligibility. Quoting *Graham v. Richardson*,⁵⁶ (#fn-869-56) the Court stated: "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause."⁵⁷ (#fn-869-57) Therefore, the State could not meet the compelling state interest test and the statute violated both the state and federal constitutions.⁵⁸ (#fn-869-58) (#_ftn56)

Based on these decisions, discrimination against a particular group of non-citizens by precluding individuals afforded DACA from bar membership in New York would be subject to strict scrutiny under an equal protection analysis and held unconstitutional. The conditions under which individuals with DACA reside in the state are equal to or more secure and extensive than other non-citizens routinely admitted to the New York bar. Individuals afforded DACA obtain permission to remain in the United States and continuous employment authorization for any type of work and Social Security numbers. In contrast, other non-citizen categories, such as H-IB,⁵⁹ (#fn-869-59) are specifically tied to performing a particular kind of work. Further, LL.M. student graduates are often on student visas that allow them to remain for only one year of postgraduate practical work experience that is not renewable.⁶⁰ (#fn-869-60) There is no compelling state interest (or any legitimate rationale) for discriminating against DACA law graduates. Excluding DACA individuals from the New York bar would violate equal protection under the equal protection analysis of both the Second Circuit and the New York Court of Appeals.

V. Bar Membership for Non-Citizens Afforded DACA is Consistent with Other New York State Policies

New York State supports the higher education of non-citizens regardless of immigration status by providing for in-state tuition for those who attended a New York high school.⁶¹ (#fn-869-61) Under the New York Education Law, a student qualifies for in-state tuition if he or she attended a New York State high school for two or more years, graduated, or received a New York State Graduate Equivalency Diploma (GED).⁶² (#fn-869-62) (#_ftn60)

Additionally, New York State has afforded eligibility for public benefits to non-citizens in a wide variety of immigration categories. For example, New York State provides eligibility for Medicaid to all non-citizens who are "Permanently Residing in the United States Under Color of Law" (PRUCOL).⁶³ (#fn-869-63) PRUCOL includes non-citizens

in a number of immigration categories, including deferred action,⁶⁴ (#fn-869-64) and applicants for various categories.⁶⁵ (#fn-869-65) (#_ftn63)

VI. Conclusion

Non-citizens who are afforded DACA qualify for New York State bar membership pursuant to New York statutes and the constitutional jurisprudence of the United States Court of Appeals for the Second Circuit and the New York Court of Appeals. Permitting non-citizen law graduates to apply for and be admitted to practice law has a strong legal and policy basis in New York State. This is especially true for non-citizens afforded DACA. New York has a history of routinely admitting non-citizens to the bar and there is no categorical exclusion from bar admission of any particular category of law graduates. The New York Judiciary law clearly and plainly states that “alienage . . . shall constitute no cause for refusing any person . . . admission to practice.”⁶⁶ (#fn-869-66) Moreover, both the Second Circuit and the New York Court of Appeals have held New York statutes unconstitutional when they discriminated against non-citizens with temporary permission to reside in the United States; thus denying eligibility to the bar based on DACA status would be a violation of equal protection. Further, New York State educational policies are founded on a principle of inclusion and provide for in state tuition for higher education to high school graduates without regard to immigration category. For these reasons, otherwise eligible non-citizens with DACA are eligible for membership in the New York bar.

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ONE THOUGHT ON “DACA AND NY BAR ELIGIBILITY”



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The Calvo et al article is very good and timely, but the case pending in CA is not DACA-related, as Sergio Garcia, the bar applicant there who is seeking admission, is not DACA-eligible, having aged out. This makes his case substantially different from the NY and FL cases, and others working their way through state systems. It is a harder call when the applicant is undocumented, but CA also just passed a statute addressing this situation, so the CA Supreme Court will likely find him admissible in January, when they take it up again.

I have posted on this at: <http://www.law.uh.edu/ihelg> (<http://www.law.uh.edu/ihelg>)

Michael A. Olivas
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