Electronically Filed 05/20/2013 02:44:19 PM ET

RECEIVED, 5/20/2013 14:48:36, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

Case No.: SC 11-2568

Florida Board of Bar Examiners_____)
Re: Question as to Whether Undocumented)
Immigrants Are Eligible for Admission to)
The Florida Bar _____)
_____

BRIEF OF PETITIONER FLORIDA BOARD OF BAR EXAMINERS IN RESPONSE TO SUPREME COURT OF FLORIDA'S APRIL 18, 2013 ORDER

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STATEMENT OF THE CASE

The Florida Board of Bar Examiners filed a Petition for an Advisory Opinion relating to whether undocumented immigrants may become members of The Florida Bar. On April 18, 2013, the Court entered an Order directing the Florida Board of Bar Examiners to file a Brief addressing five issues relating to the Board's Petition. Those five issues are as follows:

1. How does executive branch policy, including the deferred action policy, affect federal law?
2. Does 8 U.S.C. section 1324-1324a, prohibit an undocumented immigrant from working in the United States for compensation?
3. Do the provisions of 8 U.S.C. section 1621 (2011) prohibit the issuance of a professional license by appropriated funds of a state to immigrants not authorized to work under federal law? Further, does 8 U.S.C. section 1621(c) apply and preclude this Court's admission of an undocumented immigrant to The Florida Bar? Does any other statute, regulation or authority preclude the admission?
4. Under the Executive Branch's deferred action policy, how can state government entities determine whether an undocumented immigrant is fully authorized to be employed? Would an undocumented immigrant,

who has been authorized for employment pursuant to the policy, have an "employment authorization card" or similar documentation?

5. What is meant by the statement on a Social Security card "valid for work only with DHS authorization"? Does the phrase demonstrate that an undocumented immigrant is fully authorized to work in the United States? Or does the phrase indicate that there are matters that might necessitate further consideration by the Department of Homeland Security before the person is completely authorized to engage in employment?

The Board provides this Brief in response to the Court's Order of April 18, 2013.

SUMMARY OF THE BOARD'S RESPONSES

As to the first issue, executive branch policy, including the deferred action policy, does not have the force and effect of law. Executive branch policy thus makes no substantive change to federal law.

The deferred action policy was issued by the Department of Homeland Security (DHS) to provide guidance with respect to the exercise of prosecutorial discretion in the enforcement of the immigration laws. Under the deferred action policy, DHS considers a deferred action recipient to be lawfully present in the United States on a temporary basis and thus not subject to removal during the

period of deferred action. However, DHS can terminate or renew deferred action at any time, at the agency's discretion; and deferred action does not confer lawful status upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence.

As to the second issue, the provisions of 8 U.S.C. § 1324-1324a do prohibit an employer from employing an undocumented immigrant for compensation in the United States. Violations may subject the employer to criminal and civil penalties, depending on the particular circumstances. However, the statutory provisions do not impose criminal sanctions on undocumented immigrants who only seek work without using fraudulent means or who are merely engaged in unauthorized work; rather, federal law imposes some civil penalties. For example, with exceptions, unauthorized aliens who accept unlawful employment are not eligible to have their status adjusted to that of a lawful permanent resident.

As to the third issue, the provisions of 8 U.S.C. § 1621 do prohibit the issuance of a professional license by appropriated funds of a state to immigrants not authorized to work under federal law unless the immigrant is in one of a number of specific categories that meet the definition of a "qualified alien," as the term is defined in the statute. Further, it appears that 8 U.S.C. § 1621, subdivision (c) applies and would preclude the Court's admission of an undocumented immigrant (who is not a "qualified alien" under the statute) to The Florida Bar.

The Board is not aware of any other statute, regulation or authority that would preclude the admission.

As to the fourth issue, under the executive branch's deferred action policy, it appears that a state government entity would use the Form I-9 employment verification process that is used by employers to verify employment authorization of potential employees under the federal immigration laws. Deferred action recipients are issued an Employment Authorization Document (EAD) card which is one of the documents that may be relied upon by employers when completing Form I-9. Thus, state government entities should be able to rely upon the EAD card to determine whether a deferred action recipient is fully authorized to be employed.

As to the fifth issue, a Social Security card that states "Valid for Work Only with DHS Authorization" gives no indication about whether or not the individual whose name appears on the card is fully authorized to work in the United States. The card may only be used to establish identity, not employment authorization. The phrase also does not indicate that there are further matters that need to be considered by DHS before the individual is authorized to work. Rather, as explained above, the question of whether the individual is authorized to work depends on whether the individual has an unexpired EAD card.

ARGUMENT

I. HOW DOES EXECUTIVE BRANCH POLICY, INCLUDING THE DEFERRED ACTION POLICY, AFFECT FEDERAL LAW?

Executive branch policy is a source of guidance to executive branch officials and employees in their implementation of federal law, but such policy does not have the force and effect of "law," nor does it make any substantive change to federal law. As stated by the Court in *Wos v. E.M.A. ex. rel. Johnson*, 133 S. Ct. 1391 (U.S. 2013), "[i]nterpretations such as those in opinion letters - like interpretations contained in policy statements, agency manuals, and enforcement guidelines … [all] lack the force of law … ." *Id*. at 1402 (quoting *Christensen v. Harris County*, 529 U.S. 576 (2000)). *See also Dolphin LLC v. WCI Communities, Inc.*, No. 12-14068, 2013 WL 1877124, at *3 (11th Cir. May 1, 2013) (because Department of Housing and Urban Development (HUD) enforcement guidelines for Interstate Land Sales Full Disclosure Act are not published regulations subject to the rigors of the Administrative Procedures Act, they "lack the force of law").

The "deferred action policy" is a policy that relates to the exercise of prosecutorial discretion in the enforcement of the immigration laws. The Supreme Court, in *Arizona v. United States*, 132 S. Ct. 2492 (U.S. 2012), acknowledged that a "principal feature of the removal system is the broad discretion exercised by immigration officials." *Id*. at 2499. The concept of "deferred action" is not new.

In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (U.S. 1999), the Court explained as follows:

> At each stage the Executive has discretion to abandon the endeavor, and at the time [the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)] was enacted the INS had been engaging in a regular practice (which had come to be known as "deferred action") of exercising that discretion for humanitarian reasons or simply for its own convenience.[footnote omitted] As one treatise describes it:
>
> > "To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated as deferred action. A case may be selected for deferred action treatment at any stage of the administrative process. Approval of deferred action status means that, for the humanitarian reasons described below, no action will thereafter be taken to proceed against an apparently deportable alien, even on grounds normally regarded as aggravated." 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure § 72.03 [2][h] (1998).

Id. at 483-484. *See generally* Shoba Sivaprasad Wadhia, The Role of Prosecutorial Discretion in Immigration Law, 9 Conn. Pub. Int. L.J. 243 (2010) (discussing history of use of deferred action by Immigration and Naturalization Service and Department of Homeland Security).

On June 15, 2012, Janet Napolitano, Secretary of Homeland Security, issued a Memorandum to David V. Aguilar, Acting Commissioner, U.S. Customs and

Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services (USCIS), and John Morton, Director, U.S. Immigration and Customs Enforcement (ICE), titled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children." Memorandum by Janet Napolitano, Secretary of Homeland Security, United States Department of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [hereinafter Napolitano Memorandum]. The Napolitano Memorandum set forth how prosecutorial discretion should be exercised in cases involving certain young people who arrived in the United States as children and know only the United States as home. *Id*. As stated by Secretary Napolitano, "these individuals lacked the intent to violate the law and our ongoing review of pending removal cases is already offering administrative closure to many of them."[1]

Pursuant to the guidelines set forth by Secretary Napolitano, the individuals who meet all the following criteria can pursue deferred action:

- Be under the age of 31 as of June 15, 2012;
- Have come to the United States before reaching their 16th birthday;

[1] A copy of the Napolitano Memorandum is included in the Appendix to this Brief, at Tab "A."

- Have continuously resided in the United States since June 15, 2007, up to the date of filing;

- Have been physically present in the United States on June 15, 2012, and at the time of making the request for consideration of deferred action with USCIS;

- Have entered without inspection before June 15, 2012, or had a lawful immigration status that expired as of June 15, 2012;

- Be currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or be an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and

- Not have been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

Id. Individuals who meet the guidelines above are eligible for consideration to receive deferred action for a period of two years, subject to renewal. *Id*. The deferred action process is open only to those who satisfy the guidelines.[2]

Individuals who apply for deferred action for childhood arrivals must submit their request to USCIS through the consideration form, along with a form requesting employment authorization. Specifically, these forms include:

- Form I-821D, *Consideration of Deferred Action for Childhood Arrivals*,

[2] Information concerning the requirements for individuals who wish to seek deferred action for childhood arrivals can be found on numerous websites for the USCIS and DHS. The guidelines cited above, as well as the requirements for a deferred action application, can be found at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD>

which is used to request that USCIS consider deferring action, on a case-by-case basis, based on the guidelines set forth in Secretary Napolitano's June 15, 2012 memorandum;

- Form I-765, *Application for Employment Authorization,* which is used to apply for employment authorization;

- Form I-765, *Worksheet,* which is used to establish economic necessity for employment. Individuals are to concurrently file the Form I-821D, the Form I-765, and the I-765 Worksheet (I-765WS) with the appropriate fees to request consideration of deferred action for childhood arrivals.

The Napolitano Memorandum also states that "[f]or individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action."*Id*. Those individuals seeking deferred action for childhood arrivals must apply for an Employment Authorization Document ("EAD") by completing Form I-765, *Application for Employment Authorization* with appropriate fees. An EAD is the document USCIS issues to individuals granted temporary employment authorization in the United States. The validity period is two years, not to exceed the expiration date of the approval of deferred action. Although individuals seeking deferred action for childhood arrivals must apply for an EAD regardless of whether they have economic necessity, an EAD will not be approved without a showing of economic necessity. Individuals must demonstrate economic necessity by completing the I-765 Worksheet.

However, as with other similar enforcement guidelines, the deferred action

policy does not have the force and effect of law. As observed by Justice Alito in his concurring opinion in *Arizona v. United States*, the Department of Homeland Security's deferred action policy is "not law," and is "nothing more than agency policy," which is always subject to change. 132 S. Ct. at 2527 (Alito, J., concurring).

Additionally, the U.S. Citizenship and Immigration Services has published answers to frequently asked questions (FAQ), which reflect the views of the USCIS regarding the relationship between the deferred action policy and federal law. U.S. Citizenship and Immigrations, FAQ: Consideration of Deferred Action for Childhood Arrivals Process, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD (last visited May 20, 2013).[3] The FAQ was updated as of January 18, 2013, and it states in part as follows:

> ***New* - Q1: What is deferred action?**
>
> A1: Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. For purposes of future inadmissibility based upon **unlawful presence**, *an individual whose case has been deferred is not considered to be unlawfully present during the period in which deferred action is in effect.* An individual who has received deferred action is authorized by the Department of Homeland Security (DHS) to be present in the

[3] A copy of the FAQ published by the U.S. Citizenship and Immigration Services is attached hereto as Appendix "B."

United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. *However, deferred action does not confer* ***lawful status*** *upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence*.

Under existing regulations, an individual whose case has been deferred is eligible to receive employment authorization for the period of deferred action, provided he or she can demonstrate "an economic necessity for employment." *DHS can terminate or renew deferred action at any time, at the agency's discretion*.

*** * * ***

New **- Q5: Do I accrue unlawful presence if I have a pending request for consideration of deferred action for childhood arrivals?**

A5: You will continue to accrue unlawful presence while the request for consideration of deferred action for childhood arrivals is pending, unless you are under 18 years of age at the time of the request. If you are under 18 years of age at the time you submit your request, you will not accrue unlawful presence while the request is pending, even if you turn 18 while your request is pending with USCIS. If action on your case is deferred, you will not accrue unlawful presence during the period of deferred action. However, having action deferred on your case will not excuse previously accrued unlawful presence.

New **- Q6: If my case is deferred, am I in lawful status for the period of deferral?**

A6: No. Although action on your case has been deferred and you do not accrue unlawful presence (for admissibility purposes) during the period of deferred action, *deferred action does not confer any lawful status*.

The fact that you are not accruing unlawful presence does not change whether you are in lawful status while you remain in the United States. However, although deferred action does not confer a lawful immigration status, your period of stay is authorized by the Department of Homeland Security while your deferred action is in

> effect and, for admissibility purposes, you are considered to be lawfully present in the United States during that time.
>
> *Apart from the immigration laws, "lawful presence", "lawful status" and similar terms are used in various other federal and state laws. For information on how those laws affect individuals who receive a favorable exercise of prosecutorial discretion under DACA, please contact the appropriate federal, state or local authorities*.
>
> *** * * ***
>
> **Q8: Does deferred action provide me with a path to permanent residence status or citizenship?**
>
> A8: *No. Deferred action is a form of prosecutorial discretion that does not confer lawful permanent resident status or a path to citizenship*. Only the Congress, acting through its legislative authority, can confer these rights.

U.S. Citizenship and Immigration Services, "Consideration of Deferred Action for Childhood Arrivals Process," at Tab B (emphasis by italics added).

Moreover, Secretary Napolitano expressly acknowledges, in the Napolitano Memorandum that "[t]his memorandum confers no substantive right, immigration status or pathway to citizenship." Napolitano Memorandum, at 3. Accordingly, executive branch policy, including the deferred action policy, does not have the force of law and thus makes no substantive change to federal law. The deferred action policy provides guidance relating to executive branch enforcement of federal immigration law.

II. DOES 8 U.S.C. SECTION 1324-1324a, PROHIBIT AN UNDOCUMENTED IMMIGRANT FROM WORKING IN THE UNITED STATES FOR COMPENSATION?

In 1986, Congress enacted the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a ("IRCA") to create "a comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 147 (2002). IRCA thus makes it unlawful for employers to knowingly hire, recruit, refer, or continue to employ an "unauthorized alien." *See* 8 U.S.C. §§ 1324a (a)(1)(A) and (a)(2) (2012). The term, "unauthorized alien" means "with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." *See* 8 U.S.C. §1324a(h)(3).[4]

The Act also requires employers to verify the employment authorization status of prospective employees. *See* 8 U.S.C. § 1324a(a)(1)(B) and (b); 8 C.F.R. § 274a.2 (2013). These requirements are enforced through criminal penalties for a "pattern" of violations and an escalating series of civil penalties tied to the number

[4] The term "hire" means the "actual commencement of employment of an employee for wages or other remuneration. 8 C.F.R. § 274a.1 (c) (2013). The term "employee" means "an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors … ." 8 C.F.R. § 274a.1(f).

of times an employer had violated these provisions. *See* 8 U.S.C. §§ 1324a(e), (f) (2012); 8 C.F.R. § 274a.10 (2013).

IRCA thus "made combating the employment of illegal aliens central to '[t]he policy of immigration law' … by establishing an extensive 'employment verification system,' § 1324a(a)(1), designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States, § 1324a(h)(3)." *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 147. IRCA also makes it a crime for an unauthorized alien "to subvert the employer verification system by tendering fraudulent documents" in an effort to be employed. *Id*. at 148 (citing 18 U.S.C. § 1324c(a) (2012)). Aliens who do so are subject to fines and criminal prosecution. *Id*. (citing 18 U.S.C. § 1546(b) (2012)). Thus,

> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.

Id. at 148.

It should be noted, however, that IRCA does not impose criminal sanctions on unauthorized aliens who only seek work without using fraudulent means or who are merely engaged in unauthorized work; rather, federal law imposes some civil

penalties. For example, with exceptions, unauthorized aliens who accept unlawful employment are not eligible to have their status adjusted to that of a lawful permanent resident. *See* 8 U.S.C. §§ 1255(c)(2) and (c)(8) (2012).

In *Arizona v. United States*, 132 S. Ct. at 2504, the Supreme Court, in commenting on IRCA, stated:

> The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment. A commission established by Congress to study immigration policy and to make recommendations concluded these penalties would be "unnecessary and unworkable." [citation omitted]. Proposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting IRCA. [citation omitted]. But Congress rejected them. *See, e.g.*, 119 Cong. Rec. 14184 (1973) (statement of Rep. Dennis). In the end, IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives. [citation omitted].

Thus, in direct response to the Court's question, IRCA makes it unlawful for an employer to hire for compensation, and retain as an employee, an undocumented immigrant who has not received authorization to work (i.e., "unauthorized alien").[5]

[5] As outlined in Section I of this Brief, DHS and USCIS have developed a process for undocumented immigrants to request authorization to work for compensation in the United States during the period of deferral under the Napolitano Memorandum. Questions have been raised about the *statutory* authority to grant employment authorization under the deferred action policy. *See* Robert J. Delahunty & John C. Yoo, Dream On: The Obama Administration's Nonenforcement of Immigration

III. DO THE PROVISIONS OF 8 U.S.C. SECTION 1621 (2011) PROHIBIT THE ISSUANCE OF A PROFESSIONAL LICENSE BY APPROPRIATED FUNDS OF A STATE TO IMMIGRANTS NOT AUTHORIZED TO WORK UNDER FEDERAL LAW? FURTHER, DOES 8 U.S.C. SECTION 1621, SUBDIVISION (c), APPLY AND PRECLUDE THIS COURT'S ADMISSION OF AN UNDOCUMENTED IMMIGRANT TO THE FLORIDA BAR? DOES ANY OTHER STATUTE, REGULATION, OR AUTHORITY PRECLUDE THE ADMISSION?

In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("the Act"). As part of the Act, 8 U.S.C. § 1621 (2012) prohibits certain categories of aliens from obtaining certain types of State or local public benefits, unless a State enactment provides otherwise.[6]

Laws, the DREAM Act and the Take Care Clause, 91 Tex. L. Rev. 781, 791 (2013). There is a federal regulation that may support the issuance of employment authorization to deferred-action recipients. *See* 8 C.F.R. § 274a.12 (c)(14) (2013) (stating that "[a]n alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority," must apply for work authorization based on a showing of economic necessity, but upon approval by DHS, "may accept employment subject to any restrictions stated in the regulations or cited on the employment authorization document."). Regardless of the legal question of *statutory* authority for issuance of work authorization, however, as a practical matter DHS and USCIS have issued Employment Authorization Document (EAD) cards to deferred action recipients pursuant to the deferred action policy. The Applicant/Respondent has filed a Notice with the Court that he has received deferred action and an EAD. *See* Respondent's "Notice of Filing of Additional Information and Motion for Admission," filed on January 16, 2013.

[6] For purposes of 8 U.S.C. § 1621, an "alien" is "any person not a citizen or national of the United States." *See* 8 U.S.C. § 1101(a)(3) (2012).

A. General Prohibition on Issuance of Professional Licenses

> Section 1621(a) provides, in pertinent part, as follows:
>
> Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an alien who is not –
>
> (1) a qualified alien (as defined in section 1641 of this title),
> (2) a nonimmigrant under the Immigration and Nationality Act, or
> (3) an alien who has been paroled in the United States under the Immigrant and Nationality Act for less than one year,
>
> is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

8 U.S.C. § 1621(a).

The term "qualified alien" is defined in Section 1641(b) to mean a person who falls within one of seven categories of individuals. The seven categories are: (1) an alien who is "*lawfully admitted for permanent residence;*" (2) an alien who is "*granted asylum,*" (3) a "*refugee* who is admitted to the United States" under 8 U.S.C. § 1157, (4) an alien "who is *paroled into the United States*" under 8 U.S.C. § 1182(d)(5) for a period of at least 1 year, (5) an alien "whose *deportation is being withheld*" under certain provisions, (6) an alien "who is *granted conditional entry"* pursuant to 8 U.S.C. § 1153(a)(7); or (7) "an alien who is a *Cuban and*

Haitian entrant" as defined in the Refugee Education Assistance Act of 1980. *See* 8 U.S.C. § 1641(b) (2012) (emphasis added).[7]

Any person who is not a "qualified alien" is ineligible to receive any "State or local public benefit." 8 U.S.C. § 1621 (a). State benefits include "any … *professional license* … provided by an agency of a State or local government or by appropriated funds of a State or local government." 8 U.S.C. § 1621 (c)(1)(A) (emphasis added).[8]

Accordingly, where a professional license would be issued by appropriated funds, Section 1621(a) would preclude issuance of the license to an immigrant who has not been authorized to work under federal law, unless the immigrant falls within one of the categories of "qualified aliens" identified in 8 U.S.C. § 1641.

B. Admission to The Florida Bar

The question of whether Section 1621(c) precludes someone who is not a "qualified alien" under Section 1621(a) from being admitted to The Florida Bar depends upon: (i) whether admission to The Florida Bar is considered to be the

[7] Section 1641(c) also provides that certain aliens who have been the victim of domestic abuse, or whose children have been victimized, are "qualified aliens." 8 U.S.C. § 1641 (c) (2012).

[8] Although 8 U.S.C. §1621(c)(1) defines a "public benefit" to include a "professional license," subsections (2) and (3) provide exceptions to subsection (1). Among other things, the term "public benefit" does not include "the issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States." 8 U.S.C. § 1621(c)(2)(C).

granting of a "professional license," (ii) whether (a) the Florida Supreme Court is "an agency of" the State of Florida, or alternatively, (b) admission to The Florida Bar is "provided by appropriated funds," and (iii) whether "the enactment of a State law" in Florida has "affirmatively provid[ed]" eligibility for a disqualified alien to apply for admission to The Bar.

1. Professional License

As to whether admission to The Florida Bar would be considered the granting of a professional license, the term "profession" is defined in 8 U.S.C. §1101(32) as follows:

> The term "profession" shall include but not be limited to architects, engineers, *lawyers*, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

8 U.S.C. § 1101(32) (emphasis added).[9] Accordingly, admission to The Florida Bar would be considered the granting of a "professional license" for purposes of Section 1621(c).

2. State Agency or Appropriated Funds

The decision to admit persons to the practice of the profession of law in Florida is made by this Court. *See* Art. V, § 15, Fla. Const. (Supreme Court of

[9] Section 1641 of title 8 is the definitional section applicable to Section 1621. Section 1641(a) states that: "Except as otherwise provided in this chapter, the terms used in this chapter have the same meaning given such terms in section 101(a) of the Immigration and Nationality Act [8 U.S.C.A. § 1101(a)]."

Florida has exclusive jurisdiction regarding the admission of attorneys to The Florida Bar); Fla. Bar Admiss. R. 5-11 ("If the court is satisfied with the qualifications of each applicant recommended, an order of admission will be made and entered in the minutes of the court.").

The Florida Supreme Court would not be considered an "agency of the State" of Florida for purposes of Section 1621(c). Although the phrase "agency of a State" in Section 1621(c) is not defined, *see* 8 U.S.C. § 1641 and 8 U.S.C. § 1101, the term "agency" does not ordinarily refer to the judiciary for purposes of federal law. *See Hubbard v. United States*, 514 U.S. 695, 699 (1995) ("In ordinary parlance, federal courts are not described as 'departments' or 'agencies' of the Government," and "it would be strange indeed to refer to a court as an 'agency.'").

Although the Court would not be considered an "agency" of the State of Florida, the Court is funded by appropriated funds of the State of Florida. *See* Art. V, § 14(a), Fla. Const.; § 29.001, Fla. Stat. Accordingly, a law license would constitute a "State or local public benefit" within the meaning of 8 U.S.C. § 1621. Thus, absent enactment of a state law in accordance with 8 U.S.C. § 1621(d), the general prohibition of Section 1621 would appear to apply to admission of an attorney to The Florida Bar.

3. Enactment of a State Law

Subsection (d) of Section 1621 provides States with the authority to make an exception to the general prohibition in subsection (a) of the statute. Section 1621(d) provides as follows:

> 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*.

8 U.S.C. § 1621(d) (emphasis added). The Florida Legislature has not enacted any law to affirmatively provide that an undocumented immigrant is eligible to apply for admission (and, if qualified, to be admitted) to The Florida Bar.

This Court has exclusive jurisdiction regarding the admission of attorneys to The Florida Bar. *See* Art. V, § 15, Fla. Const. However, the particular language used in Section 1621(d) would appear to require a *legislative* enactment to make a state benefit available to an otherwise disqualified undocumented immigrant. For instance, in *Department of Health v. Rodriguez,* 5 So.3d 22 (Fla. 1st DCA 2009), the First District Court of Appeal addressed the question of whether an undocumented immigrant was prohibited by 8 U.S.C. § 1621 from receiving benefits under Florida's Brain and Spinal Cord Injury program. In addressing the issue, the court stated as follows:

> Having determined that BSCI Program services constitute state public benefits under PRWORA, the question becomes *whether the Florida*

> *Legislature*, pursuant to section 1621(d) of the Act, has affirmatively provided that illegal aliens are eligible for such services. We conclude that it has not. The Legislature created the BSCI Program in 1994. *See* Ch. 94-324, §§ 32-35, at 2342-43, Laws of Fla. It renumbered the pertinent statutes in 1999 and subsequently amended certain provisions in 2000. *See* Ch. 99-240, §§ 17-23, at 2170-75, Laws of Fla; Ch. 00-153, § 10, at 639, Laws of Fla.; Ch. 00-367, § 18, at 4160, Laws of Fla. *At no time since August 22, 1996, the date provided for in section 1621(d), has the Legislature enacted a law specifying that illegal aliens are eligible* for the BSCI Program. While the Legislature is certainly free to do so in the future, the law as it currently stands does not affirmatively provide for such eligibility.

Id. at 26 (emphasis added).

Accordingly, as to any immigrant who is not a "qualified alien" (as defined by 8 U.S.C. § 1641(b)), it appears that the effect of the restriction in 8 U.S.C. § 1621 is to preclude the Court from admitting that unqualified alien to The Florida Bar.

C. Other Statute, Regulation or Authority

The Board is not aware of any other statute, regulation or authority that would preclude admission of an undocumented immigrant to The Florida Bar.

IV. UNDER THE EXECUTIVE BRANCH'S DEFERRED ACTION POLICY, HOW CAN STATE GOVERNMENT ENTITIES DETERMINE WHETHER AN UNDOCUMENTED IMMIGRANT IS FULLY AUTHORIZED TO BE EMPLOYED? WOULD AN UNDOCUMENTED IMMIGRANT, WHO HAS BEEN AUTHORIZED FOR EMPLOYMENT PURSUANT TO THE POLICY, HAVE AN "EMPLOYMENT AUTHORIZATION CARD" OR SIMILAR DOCUMENTATION?

As discussed above, all employers are required by federal law to verify the employment authorization status of prospective employees. *See* 8 U.S.C. §1324a (a)(1)(B) and (b); 8 C.F.R. § 274a.2. In order to comply with these requirements, employers must complete and retain a Form I-9, *Employment Eligibility Verification,* for each employee. The I-9 Form includes lists of documents that employers may accept to verify identity and employment authorization of prospective employees. For instance, a Social Security card establishes employment authorization unless the card includes a restriction (such as "NOT VALID FOR EMPLOYMENT" or "VALID FOR WORK ONLY WITH INS AUTHORIZATION" or "VALID FOR WORK ONLY WITH DHS AUTHORIZATION"). Additionally, an Employment Authorization Document card (EAD) issued by the USCIS that contains a photograph (Form I-766) establishes both identity and employment authorization.

Additionally, as outlined above, the Napolitano Memorandum directed that individuals who apply for consideration of Deferred Action for Childhood Arrivals

are also eligible to apply for work authorization. *See* Napolitano Memorandum. Individuals whose cases are deferred and who are granted work authorization are issued an Employment Authorization Document (EAD) card. The individual is authorized to work pursuant to the EAD card for the period of time that the individual continues to be on deferred action.

The USCIS has issued a Guidance for Employers relating to verification of employment authorization of individuals who have received deferred action and been issued an EAD. U.S. Citizenship and Immigration Services, Guidance for Employers regarding Consideration of Deferred Action for Childhood Arrivals (Nov. 10, 2012), http://www.uscis.gov/USCIS/Humanitarian/Deferred%20Action%20for%20Childhood%20Arrivals/DACA-Fact-Sheet-I-9_Guidance-for-employers_nov20_2012.pdf.[10] The Guidance states that "[i]f a deferred action recipient presents an unexpired EAD to complete the Form I-9, the employer should accept it."

Therefore, in direct response to this Court's question, it appears that a state government entity would determine whether an undocumented immigrant is fully authorized to be employed by examination of documents presented by the immigrant that are listed on Form I-9. An unexpired Employment Authorization

[10] The Guidance is attached at Tab "C."

Document (EAD) card issued by the USCIS is one of the documents that establishes employment authorization.[11]

V. WHAT IS MEANT BY THE STATEMENT ON A SOCIAL SECURITY CARD "VALID FOR WORK ONLY WITH DHS AUTHORIZATION"? DOES THE PHRASE DEMONSTRATE THAT AN UNDOCUMENTED IMMIGRANT IS FULLY AUTHORIZED TO WORK IN THE UNITED STATES? OR DOES THE PHRASE INDICATE THAT THERE ARE MATTERS THAT MIGHT NECESSITATE FURTHER CONSIDERATION BY THE DEPARTMENT OF HOMELAND SECURITY BEFORE THE PERSON IS COMPLETELY AUTHORIZED TO ENGAGE IN EMPLOYMENT?

The United States Social Security Administration ("SSA") issues three types of social security cards, all of which display a name and Social Security number. The three types of cards are: (1) shows the name and Social Security number of an individual without restriction, which the SSA issues to United States citizens and individuals lawfully admitted to the United States on a permanent basis; (2) shows the name and Social Security number of an individual and notes "**VALID FOR WORK ONLY WITH DHS AUTHORIZATION[**,]" which, as will be detailed below, the SSA issues to individuals lawfully present in the United States on a temporary basis who have authorization from the DHS to work; and (3) shows the name and Social Security number of an individual and notes "**NOT VALID FOR**

[11] As is reflected in the Respondent's "Notice of Filing of Additional Information and Motion for Admission," filed on January 16, 2013, the Respondent/Applicant has received approval of his request for deferred action and has received an Employment Authorization Document (EAD).

EMPLOYMENT[,]" which the SSA issues to individuals who are lawfully present in the United States without work authorization from DHS, but with a valid non-work reason for needing a Social Security number, or who need a number because of a federal law requiring a Social Security number to get a benefit or service. Social Security Administration, Types of Social Security Cards, http://www.ssa.gov/ssnumber/cards.htm (last visited May 19, 2013); *See also* 20 C.F.R. § 422.107 (2013) (providing various evidence requirements for social security numbers and cards).

On July 26, 2006, the Honorable Jo Anne B. Barnhart, Commissioner of the Social Security Administration, in testimony before the House Ways and Means Committee, testified on the meaning of a Social Security Card that states "Valid for Work only with DHS Authorization." Commissioner Barnhart stated:

> Beginning in September 1992, SSA began issuing cards with the legend "Valid for Work Only with INS Authorization" to non-citizens lawfully in the United States with temporary authorization to work. This legend has been changed to "Valid for Work Only with DHS Authorization" to reflect the change from "INS" (the Immigration and Nationalization Service) to "DHS." In these cases, employers must examine other acceptable documentation for the employment eligibility verification process (Form I-9), normally the non-citizen's DHS documentation.

Statement of Hon. Joe Ann B. Barnhart, Commissioner, Social Security Administration (July 26, 2006), http://www.socialsecurity.gov/legislation/testimony_072606.html.

In the case of an undocumented immigrant who applies for deferred action pursuant to the Napolitano Memorandum, if the undocumented immigrant receives deferred action and an EAD, the individual is then eligible to apply for a Social Security card. The Social Security card issued to the deferred action recipient will have the notation, "VALID FOR WORK ONLY WITH DHS AUTHORIZATION."

Thus, in direct response to this Court's question, a Social Security card that states "Valid for Work Only with DHS Authorization" gives no indication about whether or not the individual whose name appears on the card is fully authorized to work in the United States. The card may only be used to establish identity, not employment authorization. The phrase also does not indicate that there are further matters that need to be considered by DHS before the individual is authorized to work. Rather, the question of whether the individual is authorized to work depends on whether the individual has an unexpired EAD card issued by the USCIS.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this 20th day of May, 2013 to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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