S202512

IN THE SUPREME COURT OF CALIFORNIA

In Re Sergio C. Garcia On Admission

Bar Miscellaneous 4186

OPENING BRIEF OF APPLICANT SERGIO C. GARCIA

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Applicant for Admission

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

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OPENING BRIEF OF APPLICANT SERGIO C. GARCIA

I. INTRODUCTION

The Committee of Bar Examiners has recommended Sergio Garcia for admission to practice because Garcia meets all the requirements for admission to practice law in California. 8 U.S.C. section 1621(c) does not preclude his admission. As recognized by this Court in *Martinez v. The Regents of the University of California* (2010) 50 Cal.4th 1277, 1288 [117 Cal.Rptr.3d 359, 367, 241 P.3d 855, 862], *cert. denied,* (U.S. 2011) 131 S.Ct. 2961 [180 L.Ed.2d 245], section 1621(c) does not totally preempt state regulation of undocumented immigrants. As recognized by *Gadda v. Ashcroft* (9th Cir. 2004) 377 F.3d 934, the United States immigration statutes do not preempt the regulation of attorneys by the states. Therefore, there is no legal impediment to this Court's admitting Garcia as an active member of the State Bar.

An undocumented immigrant can legally earn a living in the U.S., although not as a conventional employee in a traditional employer–employee relationship. Sergio Garcia has spent over two decades learning how to legally earn a living in this country. There is no reason to speculate that, if admitted to practice law, he will do otherwise.

If 8 U.S.C. section 1621(c) did apply to this court's admission of attorneys, the Supreme Court is not a "state agency" and is thus not regulated by 8 U.S.C. section 1621(d). Thus, no additional state legislation is needed to exempt admission of attorneys by the states. On the other hand, if legislation is necessary, Cal. Bus. & Prof. C section 6060.6 meets the requirements of 8 U.S.C. section 1621(d).

Under present federal public policy, Garcia is in a class of undocumented immigrants who are left alone unless they come to the attention of criminal authorities. His entry into this county, as a minor brought by his parents, was not a crime. *Plyler v Texas* (1982) 457 U.S. 202, 220; 102 S.Ct. 2382. Garcia's continued presence in this country is a civil infraction, not criminal behavior.

Furthermore, "Congress is prohibited by the Tenth Amendment from passing laws requiring states to administer civil immigration law. (*City of New York v. United States* (2d Cir.1999) 179 F.3d 29, 33–35.)." *Sturgeon v. Bratton* (2009) 174 Cal.App.4th 1407, 1412 [95 Cal.Rptr.3d 718, 723]. California public policy supports immigrants such as Sergio Garcia. In accord with 8 U.S.C. section 1153(a)(2)(A), he is waiting patiently for a visa to become available under the quota system. From his stated intention and

1994 application to become a permanent resident in the U.S.A., to his proven record of self-sufficiency, he exemplifies the sort of immigrant who has helped make this country great.

The State Bar has found that Garcia has met all of the requirements in Cal. Bus. & Prof. C section 6060, including demonstration of his good moral character. Sergio Garcia has done everything that the State Bar required of him in accord with this Court's policies. He should be admitted to practice law in California.

(continued next page)

II. ISSUES PRESENTED

The briefing order in this case asks the following questions:

1. Does 8 U.S.C. section 1621, subdivision (c) apply and preclude this court's admission of an undocumented immigrant to the State Bar of California? Does any other statute, regulation, or authority preclude the admission?

2. Is there any state legislation that provides — as specifically authorized by 8 U.S.C. section 1621, subdivision (d) — that undocumented immigrants are eligible for professional licenses in fields such as law, medicine, or other professions, and, if not, what significance, if any, should be given to the absence of such legislation?

3. Does the issuance of a license to practice law impliedly represent that the licensee may be legally employed as an attorney?

4. If licensed, what are the legal and public policy limitations, if any, on an undocumented immigrant's ability to practice law?

5. What, if any, other concerns arise with a grant of this application?

III. STATEMENT OF THE FACTS

We believe that the following facts are uncontested.

Sergio Garcia was born in Mexico on March 1, 1977. He was a baby --17 months old -- when his family first brought him to California. His parents took him back to Mexico in 1986 and brought him back to California in 1994, at age 17. Garcia's father filed an immigration visa petition (Form I-130) for him on November 18, 1994. The petition was approved on January 31, 1995, in accord with 8 U.S.C. section 1153(a)(2)(A).

According to the United States Immigration and Citizen Services division of the U.S. Department of Homeland Security ("USCIS") website, the "USCIS processes Form I-130, Petition for Alien Relative, as a visa number becomes available. Eligible family members must wait until there is a visa number available before they can apply for an immigrant visa or adjustment of status to a lawful permanent resident." See Exhibit A. Garcia has been waiting in line for a visa number to become available for almost 18 years.

Garcia has lived in the U.S.A. for over 20 years. He has no criminal record. He has gone to school, paid his taxes, served his community. He has made every effort to comply with the law. He paid his own way through college and law school. He has remained self-employed since 2004 so as not to implicate any employer in any legal violation. His is the story we want to tell others as the example of what hard-working, self sufficient immigrants contribute to this great country.

IV. THE ISSUES PRESENTED IN THE BRIEFING ORDER

1. DOES 8 U.S.C. SECTION 1621(C) APPLY AND PRECLUDE THIS COURT'S ADMISSION OF AN UNDOCUMENTED IMMIGRANT TO THE STATE BAR OF CALIFORNIA? DOES ANY OTHER STATUTE, REGULATION, OR AUTHORITY, PRECLUDE THE ADMISSION?

1-A. Summary.

The answer to both questions is no. There are several reasons. We discuss each in detail below. In summary:

** Section 1621(c) applies to executive branch state agencies, not to this Court.

**Admission of attorneys to the California State Bar does not utilize appropriated State funds.

** Section 1621(c) does not preempt the State Supreme Courts' regulation of attorney admission and discipline.

**Under the Tenth Amendment to the United States Constitution, the states cannot be called upon to enforce civil federal immigration statutes.

1-B. 8 U.S.C. section 1621(c) applies to executive branch state agencies, not to this court.

The relevant language in 8 U.S.C. section 1621(c)(1)(A) is as follows **(emphasis added)**

> (c) "State or local public benefit" defined
>
> > **(1)** Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term "State or local public benefit" means--
> >
> > > **(A)** 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. . . .

The phrase "an agency of a State" is not defined in the statute; see 8 U.S.C. section 1101. Thus, the courts look to the common law definitions. *Community for Creative Non–Violence v. Reid* (1989) 490 U.S. 730, 739–740, 109 S.Ct. 2166, 104 L.Ed.2d 811, cited with approval and followed in, *Metropolitan Water Dist. of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 500 [9 Cal.Rptr.3d 857, 863, 84 P.3d 966, 971].

Common law defines an agency of the state as one in the executive branch of the government. The U.S. Supreme Court recognizes that " ... it is well settled that there are wide differences between administrative agencies and courts. *Shepard v. N.L.R.B.* (1983) 459 U.S. 344, 351 [103 S.Ct. 665, 670, 74 L.Ed.2d 523], citing, *Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134, 141-144, 60 S.Ct. 437, 440-442, 84 L.Ed. 656.

Under Cal. Gov. C section 11405.30, a California state "Agency" is part of the Executive Branch of the government. Under federal law, "agency" excludes, inter alia, the courts. Thus, 5 U.S.C. section 551 begins:

> For purposes of this subchapter
>
> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--
>
> (A) the Congress;
>
> (B) the courts of the United States;
>
> (C) the governments of the territories or possessions of the United States ***"

Attorney discipline is not subject to action by executive branch agencies. In *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 338–339, 178 Cal.Rptr. 801, 636 P.2d 1139, this Court rebuffed an effort by an executive branch agency to discipline an attorney, reiterating that admissions and discipline belong exclusively with this Court:

> In California, the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI courts. Indeed, every state in the United States recognizes that the power to admit and to discipline attorneys rests in the judiciary. (citations and footnotes omitted). *Husted,* at 336-337.

Congress chose to apply the prohibition in section 1621(a) to agencies of a state and not to the State governments themselves. This Court has cautioned, in its recent decision construing section 1621, "against reading into a statute language it does not contain or elements that do not appear on its face," especially when Congress has "shown it knows how to add the element in express terms when it wishes to do so." *Martinez*, at 1295-1296.

1-C. Attorney admission in California does not use "appropriated funds of a State or local government" as prohibited by 8 U.S.C. 1621(c)(1)(A).

Fees collected from applicants and members are not "appropriated funds" within the meaning of 8 U.S.C. section 1621(c)(1)(A). The term "appropriated funds" refers to tax revenue. See, e.g. *Mandel v. Myers* (1981) 29 Cal.3d 531, 539 [174 Cal.Rptr. 841, 845, 629 P.2d 935, 939]. The State Bar does not use tax revenue.

This Court has previously held that interim "[l]icense fees imposed by this court to fund an attorney disciplinary system would be imposed solely upon licensed attorneys, would not be imposed for general revenue purposes, would not become part of the state's General Fund, and would not be appropriated by the Legislature." *In re Attorney Discipline System*, 19 Cal.4th at 597. Application fees are not imposed for general revenue purposes, but rather to fund the Bar's review of an applicant's fitness to practice law. They are not part of the state's General Fund and are not appropriated by the Legislature. *Accord,* Cal. Bus. & Prof. C section 6144 ("All fees shall be paid into the treasury of the State Bar, and, when so paid, shall become part of its funds."). Cal. Bus. & Prof. C section 6144 ("All fees shall be paid into the treasury of the State Bar, and, when so paid, shall become part of its funds.").

No state-appropriated funds are used to fund the State Bar.

1-D. Congress did not intend to preempt attorney admissions and discipline by enacting Section 1621(c).

In *Martinez*, this Court reasoned that preemption would be automatic only if the state statute involves a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain. *Martinez*, at 1288. The decision of this Court to admit Sergio Garcia to practice law does not determine whether he shall be admitted into the United States. Nor does this Court's decision determine whether he shall remain in the United States. Therefore, there is no "structural and automatic" preemption of admission to practice by 8 U.S.C. section 1621(c).

There is no statutory or case law change since that date to indicate any different result today.

Martinez is consistent with *Gadda v. Ashcroft* (9th Cir. 2004) 377 F.3d 934, involving discipline by that Court of an attorney who practiced law in the immigration court system. In *Gadda,* at page 944, the Ninth Circuit Court of Appeals stated "[w]e apply a presumption against federal preemption unless the state attempts to regulate an area in which there is a history of significant federal regulation. *See Ting v. AT&T,* 319 F.3d 1126, 1136 (9th Cir.2003)." The *Gadda* court explains, "The Supreme Court of the United States has long recognized that the several states have an important interest in regulating the conduct of the attorneys whom they license. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 434, 102

S.Ct. 2515, 73 L.Ed.2d 116 (1982); *see also Theard,* 354 U.S. 278, 281, 77 S.Ct. 1274, 1 L.Ed.2d 1342 (1957) ("The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over their officers.") ... ."

Further, the historic police powers of the States are not preempted unless there is a clear purpose shown by Congress, *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407, cited with approval in, *Farmers Bros. Coffee v. Workers' Comp. Appeals Bd.* (2005) 133 Cal.App.4th 533, 538 [35 Cal.Rptr.3d 23, 26]. Admission and discipline of attorneys is a "core of the State's power to protect the public," and "essential to the primary governmental function of administering justice." *Hoover v. Ronwin* (1984) 466 U.S. 558, 569 [104 S.Ct. 1989, 1996, 80 L.Ed.2d 590] (internal quotes and citations omitted). Accord, *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 361, 97 S.Ct. 2691, 2697, 53 L.Ed.2d 810.

In *Farmers Bros.*, supra, the Court declined to apply Section 1621 to California workers compensation benefits, because "California law has expressly declared immigration status irrelevant to the issue of liability to pay compensation to an injured employee." *Farmer Bros*, at page 540.

This Court has expressly declared that citizenship is irrelevant to the admission of attorneys. *Raffaelli v. Committee of Bar Examiners* (1972) 7 Cal.3d 288 [101 Cal.Rptr. 896]. Therefore, immigration status is irrelevant to admission as an attorney.

Application of 8 U.S.C. section 1621(c) to an admissions case would also violate long-standing state and federal law that the courts decide who practices law, not the legislature. Historically, the courts, alone, have controlled admission, discipline and disbarment of persons entitled to practice before them. *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 600 [79 Cal.Rptr.2d 836, 846, 967 P.2d 49, 59]. "[T]he legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions." (*citations omitted.*) *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 338 [178 Cal.Rptr. 801, 636 P.2d 1139].

Moreover, "... legislative enactments relating to admission to practice law are valid only to the extent they do not conflict with rules for admission adopted or approved by the judiciary. When conflict exists, the legislative enactment must give way." *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 728–729, 147 Cal.Rptr. 631, 581 P.2d 636.

Admission and discipline are controlled by this court. *In re Attorney Discipline System*, supra. This Court has plenary power over admissions. *Greene v. Zank* (1984) 158 Cal.App.3d 497, 505 [204 Cal.Rptr. 770, 776].

If Section 1621 applies to attorneys, it would effectively defeat the exercise of this Court's ability to control admission and discipline. Those are core areas in which the State has primary interest. Under immigration law, those functions are permitted to the State under *Martinez* and *Gadda.* 8 U.S.C. section 1621(c) does not purport to regulate the practice of law, and it cannot attempt to do so without a clear and express statement in the statute itself.

1-E. Citizenship is an irrelevant criterion for refusing an applicant admission to practice law.

Any qualification for the practice of law must have a rational connection with the applicant's fitness or capacity to practice law. *Schware v. Bd. of Bar Exam. of State of N.M.* (1957) 353 U.S. 232, 239, 77 S. Ct. 752, 756, 1 L.Ed. 2d 796. Citizenship is an irrelevant criterion. *Application of Griffiths* (1973) 413 U.S. 717, 724, 93 S.Ct. 2851. Alienage is irrelevant to high professional standards, *id.*, at 727. The holdings in *Raffaelli* and *Griffiths* indicate that neither permanent residency nor citizenship is a relevant criterion for admission to practice law. Garcia's application for permanent residency has been pending for years.

Many of the same arguments that can be made against an undocumented immigrant are the same as those rejected in *Raffaelli* at pp. 295 et seq., such as, an alien might be deported; an alien might move to another country; a lawyer must remain accessible to his clients; a lawyer must be subject to the control of the bar; the practice of law is a privilege, not a right; a lawyer is an officer of the court. As *Raffaelli* discusses at length, many problems may befall many people, and there is no reason to assume that a noncitizen who is an attorney will be any less prepared to protect his or her clients, than any citizen who is not an attorney.

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1-F. An applicant who has applied for permanent residency should be treated in the same way that applicants who *intended* to apply for citizenship were admitted through 1933.

There is ample legal precedent for this Court to treat a bona fide applicant for permanent residence in the same way it treated bona fide applicants for citizenship prior to 1933, when California law was amended to require U.S. citizenship. That is, in that era, intent to become a citizen was the criterion, not citizenship itself. Similarly, the intent to become a permanent resident should be the criterion today.

In *Brydonjack v. State Bar of California* (1929) 208 Cal. 439, this Court held that a bona fide *intention* to seek citizenship was sufficient to qualify for admission to the State Bar. The principle of intent was reiterated in *Howden v. State Bar of Cal.* (1929) 208 Cal. 604, 605 [283 P. 820, 821], and in *Telegdi v. State Bar of Cal.* (1929) 208 Cal. 793, 793 [283 P. 821, 821].

That policy held until this Court upheld the citizenship statute, *Agg Large v. State Bar of California* (1933) 218 Cal. 334, 335-36 [23 P.2d 288, 288-89]. *Agg Large* overruled *Howden*, but then *Agg Large* was overruled in *Raffaelli v. Committee of Bar Examiners* (1972) 7 Cal.3d 288 [101 Cal.Rptr. 896]. The intent principle is no longer relevant to citizenship but should be relevant to permanent residency.

Raffaelli indicates that the applicant took the Bar exam in 1969 and became a legal permanent resident in September 15, 1971, supra, at page 291. The basis for the court's ruling was, that the State Bar should have certified him

for admission when he applied (in 1969), since he had already applied to become a legal permanent resident. Contrast the applicants in *Brydonjack*, *Howden*, and *Telegedi*, who had not even applied for citizenship, who had simply expressed an intention to do in the future.

1-G. 8 U.S.C. section 1621(c) is an improper attempt to compel the states to enact a federal regulatory program.

"The Federal Government may not compel the States to enact or administer a federal regulatory program." *Printz v. United States*, 117 S. Ct. 2365, 2383, 521 U.S. 898 (1997). If 8 U.S.C. section 1621 is applied to Bar Applicants and attorneys, then the Supreme Court and the State Bar will be required to become an arm of the USCIS.

Sturgeon, supra, at page 1412, describes the process of a state's role in administering civil immigration laws. There must be a written agreement with the state or one of the state's political subdivisions. The state agents must act under the supervision of the U. S. Attorney General. There is no such agreement in place. Furthermore, any such supervision by the Attorney General would violate long-standing case law that the federal government does not regulate the practice of law in a given state.

Sturgeon goes on to describe the proper role of California authorities in immigration matters. First, they can only act on criminal activity, not civil offenses. Furthermore, "...they are powerless to take direct action against an individual they believe to be in this country illegally." *Id.*, at 1412.

Lest there be any doubt, "The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, § 3, personally and through officers whom he appoints ... ." *Printz at page* 922. As discussed in *Printz* at page 916, the validity of an older law that permitted states to administer certain immigration laws was based on the state first agreeing to do so. Congress cannot compel this Court to become an arm of the USCIS and administer immigration laws to attorneys.

1-H. The Federal government cannot require the States to enforce civil immigration laws.

"The federal government has the exclusive authority to enforce the civil provisions of federal immigration law relating to issues such as admission, exclusion and deportation of aliens. (citation omitted) **As such, Congress is prohibited by the Tenth Amendment from passing laws requiring states to administer civil immigration law.** (*City of New York v. United States* (2d Cir.1999) 179 F.3d 29, 33–35.)" *Sturgeon v. Bratton* (2009) 174 Cal.App.4th 1407, 1412. (**emphasis added.**)

Garcia did not commit any criminal offense when his parents brought him into the country as a child. *Plyler v Texas (1982)* 457 U.S. 202, 220; 102 S.Ct. 2382. [Minors bear no responsibility for their parents' entry into the country in violation of the law.] His presence in the Untied States is not a criminal act. If Immigration orders him to leave, he could be subject to a civil penalty, if he does not obey the order, 8 U.S.C. section 1253(b). This Court cannot take any adverse action based on his civil immigration status.

1-I. Sergio Garcia is not in the class of immigrants targeted by 8 U.S.C. section 1621.

8 U.S.C. section 1621 was enacted by Public Law 104–193 (August 22, 1996). It is entitled "PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996." As it pertains to immigrants, the legislative intent is set forth at 8 U.S.C. section 1601. As relevant to this case, it reads:

> "The Congress makes the following statements concerning national policy with respect to welfare and immigration:
>
> (1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.
>
> (2) It continues to be the immigration policy of the United States that-
>
> > (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and ...."

Sergio Garcia has been self-sufficient. He has never applied for or received any public benefits. He paid his own way through college and law school. He has always relied on his own capabilities and resources.

Current federal enforcement of laws pertaining to undocumented immigrants places people like Sergio Garcia as the least likely to be targeted for deportation. Last June, ICE (U.S. Immigration and Customs Enforcement, division of the U.S. Department of Homeland Security), issued a memo

pertaining to the factors to be considered in apprehending and removal of aliens. A copy is at Exhibit D.

Garcia is classified as one of the undocumented immigrants least likely to be deported under ICE's own policies. Mr. Garcia's positive factors, that is, factors that place him low on the list of low priority people to deport, include: his length of time in the USA; the fact that he was brought here as a child; the fact that he has a high school, undergraduate, and law degree; his contribution to the community; the fact that he is likely to be granted permanent resident status.

2. IS THERE ANY STATE LEGISLATION THAT PROVIDES - AS SPECIFICALLY AUTHORIZED BY 8 U.S.C. SECTION 1621(D) - THAT UNDOCUMENTED IMMIGRANTS ARE ELIGIBLE FOR PROFESSIONAL LICENSES IN FIELDS SUCH AS LAW, MEDICINE, OR OTHER PROFESSIONS, AND, IF NOT, WHAT SIGNIFICANCE, IF ANY, SHOULD BE GIVEN TO THE ABSENCE OF SUCH LEGISLATION?

2-A. Summary.

Cal. Bus & Prof C section 6060.6 meets the requirement of 8 U.S.C. section 1621(d). However, given the distinction between executive branch licensing and the judicial branch regulation of the practice of law, 8 U.S.C. section 1621(d) would not apply to the practice of law unless it expressly said so.

2-B. Section 1621(d) on its face shows that Congress did not intend to preempt all State laws regarding benefits to undocumented aliens.

Section 1621(d) reads:

> 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.

At page 1297 of *Martinez*, this Court has held that Section 1621(d) demonstrates that Congress did not intend a field preemption of state law by enacting 8 U.S.C. section 1621(c). There has been no statutory or case law change since that date to indicate any different result today.

There are " ... four ways in which Congress may preempt state law: express, conflict, obstacle, and field preemption." (*internal cite omitted*) *Martinez v. The Regents of the University of California* (2010) 50 Cal.4th 1277, 1288 [117 Cal.Rptr.3d 359, 367, 241 P.3d 855, 862] *cert. denied,* (U.S. 2011) 131 S.Ct. 2961 [180 L.Ed.2d 245].

In enacting Section 1621(d), Congress did not expressly state the intention to preempt state law on undocumented aliens. Instead, it expressly permitted the States to enact legislation modifying its provisions after August 22, 1996, *id.,* at 1297.

Nor is there implicit or implied intent to preempt state law, by occupation of the field or comprehensive regulation of the subject matter; section 1621(d)

expressly permits the state to legislate in the field, *id,* at 1297. The same rationale is true of the *obstacle* to congressional intent and purpose doctrine.

2-C. Cal. Bus & Prof C 6060.6 meets the requirements of 8 U.S.C. section 1621(d).

In 2005, California enacted a new section of the State Bar Act, Cal. Bus & Prof C section 6060.6. It provides:

> Notwithstanding Section 30 of this code and Section 17520 of the Family Code, the Committee of Bar Examiners may accept for registration, and the State Bar may process **for an original or renewed license to practice law**, an application from an individual containing a federal tax identification number, or other appropriate identification number as determined by the State Bar, in lieu of a social security number, **if the individual is not eligible for a social security account number at the time of application** and is not in noncompliance with a judgment or order for support pursuant to Section 17520 of the Family Code. (emphasis added)

20 CFR 422.103 requires an applicant for a social security number to fill out form SS-5, which is the federal "Application for a Social Security Card." A copy is attached at Exhibit B. According to that application, in order to secure a social security number, one must be a U.S. Citizen, or an immigrant authorized to work in the United States, or an immigrant with a student visa.

As another court explained, " ... it appears that the majority of those whose immigration status prevents them from obtaining SSNs are not authorized by federal law to be present in the United States." *Lauderbach v. Zolin* (1995) 35 Cal.App.4th 578, 582 [41 Cal.Rptr.2d 434]. Thus, Bus & Prof 6060.6 permits undocumented immigrants the ability to use an alternative

identification to register with the State Bar, take the first year bar exam, take the final bar exam, be admitted to practice law, and renew their law licenses. If indeed a statute is required to exempt bar admissions from Section 1621, this is it.

The State Bar has enacted Rule 4.16(B) to carry out Bus & Prof 6060.6. As relevant here, the applicant is required by law either to provide the Committee with a Social Security Number or to request an exemption because of ineligibility for a Social Security Number in accord with Cal. Bus. & Prof. C section 6060.6.

Furthermore, the State Bar has posted on its website, forms and information to certain applicants, that call attention to this exemption. See, Exhibit C, the instructions for the First Year Student Bar Exam, which Garcia would have had to read and comply with back when he took the exam. The instructions state that there is no requirement of residency or citizenship, and make no reference to immigration status. Sergio Garcia committed himself to years of costly education and hard work to pay his own way, in reliance on the State Bar's rules on admission. He did everything that was required of him to meet all the criteria.

(continued next page)

3. DOES THE ISSUANCE OF A LICENSE TO PRACTICE LAW IMPLIEDLY REPRESENT THAT THE LICENSEE MAY BE LEGALLY EMPLOYED AS AN ATTORNEY?

3-A. Summary.

The answer is no. But since there are legitimate ways for to make a living as an attorney without being an employee, there is no reason to speculate that an undocumented immigrant, admitted to practice law in California would break the law in order to do so.

There is a distinction between State Bar membership and an immigrant's eligibility for a work permit to work as an employee in a conventional employer-employee relationship. An attorney who is an undocumented immigrant cannot work as an "employee" until he obtains a work permit or his visa and permanent residency. But there are many other ways of practicing law recognized under the State Bar Act, Rules of Professional Conduct, and federal law regarding payment of taxes by resident aliens. There is no reason to speculate that an undocumented immigrant, admitted to practice law in California, would break the law in order to do so. Lawyers are presumed to follow the law. *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, rehearing denied, review denied, certiorari denied, 118 S.Ct. 347, 522 U.S. 937, 139 L.Ed.2d 270).

3-B. Undocumented immigrants may not be "employees" as that term is defined in the law.

" 'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed ... ." Cal. Lab. C, section 3351.

This is the same test used in federal law. "In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Community for Creative Non-Violence v. Reid* (1989) 490 U.S. 730, 739-40 [109 S.Ct. 2166, 2172, 104 L.Ed.2d 811]. Accord, *Metropolitan Water Dist. of Southern California v. Superior Court* (2004) 32 Cal.4th 491, 500-01 [9 Cal.Rptr.3d 857, 862-63, 84 P.3d 966, 971]

Thus, if the Court's question is purposely limited only to a formal employer-employee relationship, we assume that an undocumented immigrant would be prevented from lawfully working as an employee attorney.

However, if the question used employment in the broader sense, then yes, there are ways for an undocumented immigrant attorney to earn a living without violating state or federal law.

3-C. An undocumented immigrant can earn a living in the USA without being an employee

Under the Internal Revenue Code, employee income is taxed under 26 U.S.C. section 61(a)(1), "Compensation for services, including fees, commissions, fringe benefits, and similar items." That code section goes on to list 14 other categories of income that would not apply to an employee.[1] Among them are categories under which a duly admitted attorney could reasonably use to earn a living: " (2) Gross income derived from business; ... (6) Royalties; (7) Dividends; ... (13) Distributive share of partnership gross income;

Thus, Sergio Garcia could establish a law corporation and receive dividends, 26 U.S.C. section 61(a)(7) and 26 U.S.C. section 861(a)(2)(A). Law

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[1] (a) General definition. -- Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
(1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

Corporations are a recognized feature of California law practice. Rule 1-100(B)(5) of the State Bar Rules of Professional Conduct.
Mr. Garcia can be a sole proprietor under 26 U.S.C. section 61 (a)(2)(39).
Mr. Garcia could write articles or books and receive royalties – 26 U.S.C. section 61(a)(6) and 26 U.S.C. section 861(a)(s)(A)(4).

Cal. Corp C section 16101(14) recognizes limited liability partnerships for the practice of law, and 16101(6) recognizes that a California lawyer may be part of an LLP that is registered in a another state or country. Each of the foregoing creates opportunities to earn a living without being an employee.

And of course, an attorney may represent clients *pro bono*, without charging a fee. Attorneys may engage in other, non-law related occupations to earn a living, while doing *pro bono* law practice.

3-D. An attorney's residence can change. Bar admission should not be denied to an undocumented immigrant who is present in this country.

Once admitted to practice, a person may practice California law from anywhere in the world, from Dunsmuir to Denmark, from California to Connecticut. *Birbrower, Montalbano, Condon & Frank v. Superior Court* 17 Cal.4th 119 (1998). Thus, his immigration status today should not bar Garcia admission, any more that it would bar the admission of an immigrant with a student or tourist visa who met all other requirements for admission.

There is no reason to speculate that, if an attorney cannot be legally employed as an attorney, he would violate the law. See *Wolfgram, supra.* This principle applies especially to Sergio Garcia, who has made a concerted effort to avoid illegal employment since his early adult days.

4. IF LICENSED, WHAT ARE THE LEGAL AND PUBLIC POLICY LIMITATIONS, IF ANY, ON AN UNDOCUMENTED IMMIGRANT'S ABILITY TO PRACTICE LAW?

4-A. Introduction.

The legal limitation is that an undocumented immigrant cannot be an "employee" in a conventional employer – employee relationship. There are no public policy limitations on an undocumented immigrant such as Sergio Garcia.

4-B. Legal Limits.

As discussed in section 3 above, an undocumented immigrant cannot work as an employee.

4-C. Current immigration policy leaves persons such as Sergio Garcia alone.

As discussed above, Garcia is classified as the type of undocumented immigrant least likely to be deported under ICE's own policies, as shown in Exhibit D.

The United States government continues its public policy of accepting undocumented immigrants into our midst. Thus, on June 15, 2012, the Department of Homeland Security issued another memo, specifically aimed at undocumented immigrants who came to this country as children. Exhibit E. Under the newly announced policies, minors who meet the criteria are not to be prosecuted absent some other reason. As the memo recites, "Our nation's immigration laws must be enforced in a strong and sensible manner, they are not designed to be blindly enforced without consideration given to the individual circumstance of each case."

The ICE policy is not the first time that the federal government has knowingly allowed undocumented immigrants to stay in the U.S.A. In the 1930's, Secretary of Labor Frances Perkins admitted over 230,000 foreign visitors on tourist visas, " ... knowing full well that many would quietly stay on in safety, and indeed, some people managed to disappear within the United States once they arrived." Downey, *The Woman Behind the New Deal* (Anchor Books 2009). Excerpt at F.

4-D. Public Policy does not otherwise limit an undocumented immigrant such as Sergio Garcia.

Public policy limitations must be fundamental, grounded in the positive law of the state. *General Dynamics Corp v Superior Court* (1994) 7 Cal.4th 1164, 1180.

As discussed above, citizenship is not a proper qualification for the practice of law. *Raffaelli, supra*, and *Griffiths, supra.* There is no fundamental reason to change that principle. There is no positive law that would require a change in that principle. *Griffiths*, at page 722 recites the positive public policies for ignoring citizenship, such as paying taxes and supporting the economy, attributes that Sergio Garcia has demonstrated.

Public policy supports a person obtaining an education and an advanced college degree, other attributes that Sergio Garcia has demonstrated.

Garcia exemplifies another public policy – family values. He lives in the community where his parents raised him, and where they continue to live. By creating a category of "family sponsored immigrant," Congress has shown an intent to support that policy.

California has recognized the value of intent to become naturalized with respect to prospective admittees, as discussed above.

There is no public policy that would permit concern about deportation. The " ... [S]tate cannot realistically determine that any particular undocumented

(child) will in fact be deported until after deportation proceedings have been completed. *Plyler,* 457 U.S. at 226, 102 2382." *In re B. Del C.S.B.* (9th Cir. 2009) 559 F.3d 999, at 1013. *Raffaelli,* supra, at 295, also rejects as irrelevant, the fact that a noncitizen may be deported.

There is no adverse moral character implication when a person stays in this country after being brought here as a minor. The civil infraction is far less than the behavior deemed acceptable in *Hallinan v. Committee of Bar Examiners of State Bar* (1966) 65 Cal.2d 447, 459.

California has enacted statutes that favor certain undocumented immigrants, thereby indicating a public policy in their favor. Cal. Educ. C section 68130.5, upheld by this Court in *Martinez,* supra, exemplifies California public policy in regard to undocumented immigrants who have applied or intend to apply for permanent residency and/or citizenship, by allowing them to pay tuition at the same rate as California residents. The California Dream Act – Part 1, Cal. Educ. C section 66021.7, which became effective this year, permits undocumented college students who were brought to this country as children to apply for private scholarships at State colleges and universities. The Dream Act – Part 2, Cal. Educ. C section 66021.6, which becomes operative in January, 2013, permits such students to apply for State-funded grant programs.

The Court stated in *Griffiths*, supra, the federal case that abolished citizenship as a test for state lawyer admissions, "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State

bear a heavy burden when it deprives them of employment opportunities." *Application of Griffiths* (1973) 413 U.S. 717, 722 [93 S.Ct. 2851, 2855, 37 L.Ed.2d 910].

Garcia is a resident alien as defined in 26 U.S.C. section 7701(b)[2]: He meets the "substantial presence test under 26 U.S.C. section 7701(b) (1)(A)(ii) and (3). Thus, Sergio Garcia is a nonresident alien, part of the very group referred to in *Griffiths*. The rationale as to citizenship applies to him too.

And finally, we note as part of California's public policy, the award for the "Public Lawyer of the Year," made by the Public Law Section of the State Bar. The 1998 award went to Peter Belton. His acceptance speech,

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[2] (b) Definition of resident alien and nonresident alien.--
(1) In general.--For purposes of this title (other than subtitle B)--
(A) Resident alien.--An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii):
(i) Lawfully admitted for permanent residence.--Such individual is a lawful permanent resident of the United States at any time during such calendar year.
(ii) Substantial presence test.--Such individual meets the substantial presence test of paragraph (3).
(iii) First year election.--Such individual makes the election provided in paragraph (4).
(B) Nonresident alien.--An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States (within the meaning of subparagraph (A)).
***
(3) Substantial presence test.--
(A) In general.--Except as otherwise provided in this paragraph, an individual meets the substantial presence test of this paragraph with respect to any calendar year (hereinafter in this subsection referred to as the "current year") if--
(i) such individual was present in the United States on at least 31 days during the calendar year, and
(ii) the sum of the number of days on which such individual was present in the United States during the current year and the 2 preceding calendar years (when multiplied by the applicable multiplier determined under the following table) equals or exceeds 183 days ***

downloaded from the State Bar's website at Exhibit G, recites his work as Justice Mosk's law clerk, working on *Raffaelli*, supra. It emphasizes the positive reasons for abolition of citizenship as a requirement for admission to the Bar. Ironically, Sergio Garcia entered college a short time after Belton received the award.

5. WHAT, IF ANY, OTHER CONCERNS ARISE WITH A GRANT OF THIS APPLICATION?

Some cases express concern about "the 'deleterious effects' of a massive influx of illegal immigrants." See e.g., *Plyler, supra*, at 249 [102 S.Ct. 2382, 2412, 72 L.Ed.2d 786]. This is a false concern with applicants such as Sergio Garcia.

Not all undocumented immigrants are the same. As this Court recognized in *Martinez*, supra, "The term "undocumented immigrant" is vague and is not used in the relevant statutes." *Martinez* at page 1288. The proper nomenclature for Sergio Garcia is a "family sponsored immigrant" under 8 U.S.C. section 1153(a)(2)(A). The use of that nomenclature does not advance Garcia's place in line, nor give him any immunity. However, it does signify that there are distinctions among undocumented immigrants, and there cannot be one public policy that encompasses all of them.

The child brought to this country as a minor is not the same as the adult who commits a crime by crossing the border without inspection. The worker who pays taxes is not the same as the person in the underground economy. The

person who documents his presence by registering in the INS is not the same as the person who avoids all contacts with government officials. Current federal public policy gives a "family sponsored immigrant" a direct path to citizenship by statute, and by ICE policy, treats him with benign neglect as long as he does not get involved with the criminal authorities.

Modern California public policy is favorable toward the undocumented immigrant who gets an education and contributes to the public good – people like Sergio Garcia.

This court should not try to divine one public policy for all undocumented immigrants in this case. Rather, it should describe the public policy for immigrants who share the basic characteristics of Sergio Garcia – he entered the county without committing a crime; he does not commit a crime by remaining in the country; he has lived openly and made every effort to comply with the laws of this country; he has obtained an education; he is self sufficient and has paid his own way. In spite of the hurdles of his position, he has secured a college degree and a law degree. He has passed the California State Bar Exam. He has been given a positive moral character determination by the Committee of Bar Examiners, after a most rigorous investigation.

(continued next page)

V. CONCLUSION

Sergio Garcia is the sort of immigrant who has helped make this country great. In an era of entitlement, a self sufficient, industrious person seeks admission to practice law. He has been the subject of a most rigorous moral character investigation and passed with flying colors. He has learned how to earn a legal living over years of effort and will continue to do if admitted to practice law.

VI. PRAYER

Sergio Garcia requests that this Court admit him to practice law in California.

V. CONCLUSION

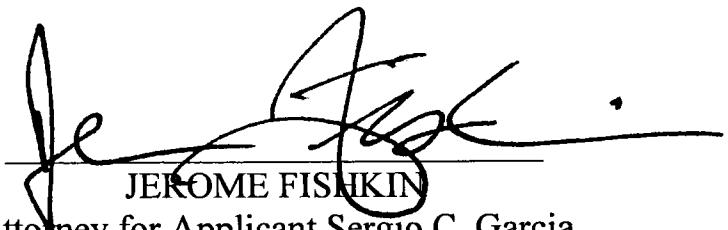
Sergio Garcia is the sort of immigrant who has helped make this country great. In an era of entitlement, a self sufficient, industrious person seeks admission to practice law. He has been the subject of a most rigorous moral character investigation and passed with flying colors. He has learned how to earn a legal living over years of effort and will continue to do if admitted to practice law.

VI. PRAYER

W H E R E F O R E Applicant Sergio Garcia requests that this Court admit him to practice law in California.

Word Count Certification:

Pursuant to Cal. Rules of Court, Rule 8.204(c), I certify that this Opening Brief of Applicant Sergio C. Garcia contains fewer than 8,250 words.



JEROME FISHKIN
Attorney for Applicant Sergio C. Garcia

DECLARATION OF SERVICE BY OVERNIGHT DELIVERY

I am employed in Contra Costa County, California. I am over the age of 18 years, and I am not a party to the within action. My business address is 1575 Treat Blvd., Suite 215, Walnut Creek, CA 94598. On this date, I served the

OPENING BRIEF OF APPLICANT SERGIO C. GARCIA

EXHIBITS TO OPENING BRIEF OF APPLICANT SERGIO C. GARCIA

REQUEST FOR JUDICIAL NOTICE

PROPOSED ORDER TAKING JUDICIAL NOTICE

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by placing a true copy in a sealed envelope designated by Federal Express for overnight delivery, with delivery fees fully paid, addressed to:

Rachel Simone Grunberg Office of the General Counsel, State Bar of California 180 Howard Street San Francisco, CA 94105-1639	Committee of Bar Examiners of the State Bar of California 1149 S. Hill Street Los Angeles, CA 90015

and then depositing the envelope in a box regularly maintained by Federal Express.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

June ___, 20112

SAMUEL C. BELLICINI