



**TO:** Professional Practice Committee  
Higher Education Committee

**FROM:** Douglas E. Lentivech   
John L. D'Agati 

**SUBJECT:** Proposed Amendment to Sections 59.4 and 80-1.3 of the Regulations of the Commissioner of Education Relating to Citizenship

**DATE:** February 16, 2016

**AUTHORIZATION(s):** 

### SUMMARY

#### **Issue for Discussion**

Should the Board of Regents amend Sections 59.4 and 80-1.3 of the Regulations of the Commissioner of Education relating to citizenship for the professions and teaching and educational leadership service?

#### **Reason(s) for Consideration**

Review of Policy and Case Law.

#### **Proposed Handling**

The proposed amendment will be presented to the Joint Committees of Professional Practice and Higher Education as a discussion item at the February 2016 Regents meeting.

#### **Procedural History**

A Notice of Proposed Rule Making will be published in the State Register on March 9, 2016. A copy of the proposed amendment is attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

## **Background Information**

Federal law, 8 U.S.C. § 1621[a], [d], prohibits States from issuing any State or local public benefit including professional licenses to any individual that is not a qualified alien [as defined in 8 U.S.C. §1641][, a nonimmigrant under the Immigration and Nationality Act [[8 U.S.C. §1101](#) et seq.], or an alien who is paroled into the United States under section 212(d)(5) of such Act [[8 U.S.C. §1182\(d\)\(5\)](#)] for less than one year. **However, since 1996 this federal prohibition does not apply if the State enacts a State law expressly authorizing the licensing of such undocumented aliens.**

Currently, individuals granted deferred action childhood arrivals (DACA) relief under Federal Executive Order and are allowed to continue to be lawfully present in the United States without fear of deportation are not eligible for State licensure in the professions or those seeking their professional teaching certification under the Regulations of the Commissioner. However, New York enables hundreds of thousands of undocumented students, including DACA students, to receive education through the state's public school system and graduate with New York high school diplomas. Yet their futures historically have been circumscribed by current federal law restricting the issuance of professional licenses based on immigration status and State laws and/or regulations that imposed citizenship requirements for professional licensing in certain professions and for certification as a teacher or school leader. These young people generally derive their immigration status from their parents. If their parents are undocumented, most of these individuals have no mechanism to obtain legal residency, even if they have lived most of their lives in the United States.

However, the case law on the citizenship requirements for State licensure has been evolving over the past decade and recent case law dictates that it is time for a change.

## **State law and the Dandamudi Case**

Prior to 2012, New York State law prohibited individuals from receiving licenses in 13 of the Title VIII professions (including medicine, pharmacists, engineers, etc.) unless the individual was a U.S. citizen or permanent lawful resident. These statutes were struck down by the U.S. Second Circuit Court of Appeals as unconstitutional in [Dandamudi v Tisch](#), 686 F.3d 55 (2012) and in violation of the Equal Protection Clause of the U.S. Constitution.

- Following this decision, the Department revised its application forms for all licensed professions under Title VIII of the Education Law to require any applicant, including temporary immigrant aliens, to become licensed provided they fall within one of the immigration statuses set forth in 8 USC § 1621. This was done to comply with that federal law.

The Department also advanced Regents priority legislation last session that would repeal the statutes in the 13 professions that were declared unconstitutional by the Second Circuit and expressly authorize individuals in DACA status to be licensed in all of the professions under Title VIII of the Education Law.

Recent case law described below appears to authorize the Board of Regents to fulfill the requirement for an exception to the federal prohibition against professional licensure of undocumented aliens under 8 U.S.C. § 1621 [d] based on State law enacted after August 22, 1996 by using their broad authority to adopt regulations governing licensure in the Title VIII professions (Education Law §§6501 and 6506) and the certification of teachers and school leaders (Education Law §§3001 and 3003) to expressly authorize the licensure of undocumented aliens in regulation, as opposed to State statute.

### **Vargas Decision (2015 WL 3479561)**

In June 2015, the Appellate Division, Second Department issued a decision on whether the federal law (8 U.S.C. § 1621[a], [d]) prohibits an alien in DACA status from receiving bar admission. The U.S. Department of Justice submitted an amicus brief opposing the applicant's admission to the bar based on the federal law. The NY Attorney General submitted a brief arguing that the license should be issued despite the federal law. The Second Department stated that "a narrow reading of 8 USC § 1621(d), so as to require a state legislative enactment to be the sole mechanism by which the State of New York exercises its authority granted in 8 USC § 1621(d) to opt out of the restrictions on the issuance of licenses imposed by 8 USC § 1621(a), unconstitutionally infringes on the sovereign authority of the state under the Supremacy Clause (10<sup>th</sup> Amendment) to divide power among its three coequal branches of government.

Further, the court held, in light of this State's allocation of authority to the Judiciary to regulate the granting of professional licenses to practice law (see Judiciary Law § 53[1]), that the Judiciary may exercise its authority as the state sovereign under the Supremacy clause to opt out of the restrictions imposed by section 1621(a) to the limited extent that those restrictions apply to the admission of attorneys to the practice of law in the State of New York. As a result, the Court ordered that Vargas receive his law license, provided he met certain other licensure requirements.

While the Vargas decision is based on an intrusion on the role of the judiciary over bar admissions in violation of the Supremacy Clause, we believe that the Court's reasoning applies equally to the adoption of regulations having the force and effect of law by an administrative agency that is part of the executive branch of New York government, another one of the three coequal branches of government under the New York Constitution. In concluding that requiring the State Legislature to have enacted a State law after August 22, 1996 authorizing professional licensure in order to qualify for the exception under 8 USC §1621(d) would be unconstitutional, the Second Department ruled that:

"[W]e hold that the processes by which a state chooses to exercise, by one of its coequal branches of government, the authority granted by the federal legislation is not a legitimate concern of the federal government."

The Board of Regents, as the head of the State Education Department, has been granted broad authority under Education Law §§207 and 6506 to supervise the admission to the professions under Title VIII of the Education Law, including the authority to adopt rules related thereto. The Commissioner of Education and the Department have similarly been granted broad authority under Education Law §6507 to administer the admission of the professions, and to adopt regulations related thereto subject to approval by the Board of Regents pursuant to §207. In the case of teaching, Education Law §3001(3), which itself has been amended subsequent to 1996, explicitly authorizes the Commissioner to adopt regulations exempting alien teachers from the citizenship requirement and permitting their employment. Collectively, these statutes provide the Board of Regents and the Commissioner with the requisite authority to adopt regulations on this subject.

In addition, the New York Court of Appeals in the Matter of Aliessa v. Novello, (96 NY2d 418), a case involving Medicaid benefits for legal aliens, relying upon the Supreme Court decision in Graham v. Richardson, ruled that the federal law impermissibly authorizes states to disqualify otherwise eligible aliens from Medicaid—indicating that Congress cannot authorize a violation of equal protection.

Based on the rationale in the above-referenced cases, the Department recommends that the Board of Regents use its broad authority over the granting of licenses in the Title VIII professions and the certification of teachers to promulgate regulations expressly authorizing otherwise qualified aliens who are not unlawfully present in the U.S. and who meet all other licensure requirements except citizenship to become licensed or certified.

### **Recommendation**

Not applicable.

### **Timetable for Implementation**

It is anticipated that the proposed amendment will be adopted at the May 2016 Regents Meeting. If adopted at the May meeting, the proposed amendment will become effective as a permanent rule on June 1, 2016.

## AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 210, 215, 305, 3001, 3003, 3009, 6504 and 6506 of the Education Law.

1. Section 59.4 of the Regulations of the Commissioner of Education is repealed a new section 59.4 is added to the Regulations of the Commissioner of Education, effective June 1, 2016, to read as follows:

### §59.4 Citizenship

Notwithstanding any other provision of this Title to the contrary, no otherwise qualified applicant shall be denied a license, certificate, limited permit or registration pursuant to this Title by reason of his or her citizenship or immigration status, unless such applicant is otherwise ineligible for a professional license under 8 USC §1621 or any other applicable federal law. Provided, however that pursuant to 8 USC §1621(d), no otherwise qualified alien shall be precluded from obtaining a professional license under this Title if an individual is not unlawfully present in the United States, including but not limited to individuals granted Deferred Action for Childhood Arrivals relief or similar relief from deportation.

2. Section 80-1.3. of the Regulations of the Commissioner of Education is repealed and a new section 80-1.3 of the Regulations of the Commissioner of Education is added, effective June 1, 2016, to read as follows:

### §80-1.3 Citizenship.

(a) Notwithstanding any other provision this Part to the contrary, no otherwise qualified applicant shall be denied a certificate under this Part, or registration pursuant to this Title by reason of his or her citizenship or immigration status, unless such applicant is otherwise ineligible for a professional license under 8 USC §1621 or any other applicable federal law. Provided, however that pursuant to 8 USC §1621(d), no otherwise qualified alien shall be precluded from obtaining a professional license under this Title if an individual is not unlawfully present in the United States, including but not limited to applicants granted Deferred Action for Childhood Arrivals relief or similar relief from deportation.

(b) The requirements of subdivision (a) of this section shall not preclude a candidate who is not a citizen of the United States from qualifying for a permit or other authorization to teach in the public schools of New York State, in accordance with specific provisions of the Education Law that authorize such teaching service by a candidate who is not a citizen of the United States, such as section 3005 of the Education Law.