# ADVISING AND SCREENING DACA RECIPIENTS FOR PRESENT AND FUTURE OPTIONS

By Veronica Garcia

The Deferred Action for Childhood Arrivals (DACA) policy has been fraught with uncertainty in the last couple of years. Since its creation in 2012, DACA has been able to offer protection from deportation and work authorization to thousands of individuals who arrived in the United States as youth. Despite the many advantages of this program for young people who have grown up in the United States, DACA continues to suffer attacks by conservative entities who argue that DACA was an overreach of executive power. As of this writing, DACA recipients and advocates are awaiting a decision from the Southern District Court of Texas regarding the legality of the recent final regulation implementing DACA. A decision from this court may ultimately have an enormous impact on who will be able to access DACA or even if DACA will exist in the future.

Because of this pending decision, it is important to consider what other options DACA recipients have and what benefits they can acquire while maintaining their DACA deferred action. This practice advisory will first go over the current status of DACA and what DACA recipients can do now to prepare. This will be followed a discussion on options to consider when screening DACA recipients, like some new developments in deferred action grants, and how it is important to screen for parent immigration petitions and applications.

## I. The Current Status of DACA and Pending Litigation

Currently, only DACA recipients who have unexpired DACA or had DACA that expired less than one year ago, can access DACA renewals because of the court injunction entered as part of the pending litigation currently before the Southern District of Texas.[1] This litigation will decide the fate of DACA as it pertains to the recently introduced DACA final regulation. Despite the promulgation of the new DACA rule, which partially went into effect on October 31, 2022, the current injunction and partial stay in the pending litigation only allows for the approval of DACA renewals, but not new initial DACA applications.[2]

[1] USCIS, *Consideration of Deferred Action for Childhood Arrivals Frequently Asked Questions*, available at https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions.
[2] *Id*.

The legality of the final DACA rule is being reviewed by the Southern District Court of Texas in *Texas v. United States*.[3] This case was previously heard by Judge Hanen of that court in 2021, and he issued a decision stating that the 2012 memorandum creating DACA was unlawful. The judge vacated the 2012 DACA memorandum and issued a permanent injunction prohibiting the government from continuing to administer DACA, but stayed his decision regarding DACA renewals.[4] The government filed an appeal to the Fifth Circuit Court of Appeals, and on October 5, 2022, the Fifth Circuit Court of Appeals issued a decision in *Texas v. United States*.[5] In its decision, the Fifth Circuit agreed with the plaintiff states who had initiated the litigation, and found that the DACA policy is unlawful but sent the case back to the Southern District of Texas to consider the recently issued DACA regulation.

The Texas court will now revisit the DACA case and decide if the issuance of a final rule overcame the substantive and procedural challenges. A proposed court schedule has given both parties until April 6, 2023, to submit responses and motions, which could mean that Judge Hanen will issue a decision sometime in April or May. Since Judge Hanen has previously sided with arguments made by the plaintiff states, it is likely that he will once again find that DACA is unlawful. The plaintiff states, in their motion for summary judgment, have asked Judge Hanen to end DACA but have agreed to a two-year wind-down period, which could give enough time for appeals to be filed and heard.[6] It will not be clear what legal pathways will exist for DACA until an order is issued by Judge Hanen. In the meantime, it is important that DACA recipients explore all other immigration options they might have and remain informed of changes to DACA.

## II. Considerations for DACA Recipients and Preparing for the Future

The uncertainty surrounding DACA has left many advocates and DACA recipients with questions about what they can do to prepare in case there is an order ending DACA. In the immediate future, it is important for DACA recipients to continue to renew their DACA deferred action. Even if there is a negative decision from the court, it is likely that those who have DACA will be able to continue with their current grant of DACA and work authorization, at least, until their last period expires. In the long term, it is important for DACA recipients to learn about and get screened for long-term immigration solutions, as well as to take advantage of the opportunities they may now have.

Below is a discussion of some considerations and helpful actions that DACA recipients and advocates should contemplate taking now as they await the court decision and any subsequent appeals. Being prepared for the future will assist DACA recipients to access other benefits and status within the immigration system.

[3] *State of Texas, et al., v. United States of America, et al.,* 1:18-CV-00068, (S.D. Texas).
[4] *State of Texas, et al., v. United States of America, et al.,* 1:18-CV-00068, (S.D. Texas July 16, 2021).
[5] *Texas et al. v. United States of America et al.,* No. 21-40680 (5th Cir. 2022).
[6] Law360, *GOP States Seek 2-Year DACA Winddown in Texas Suit*, Feb. 1, 2023, available at https://www.law360.com/articles/1571860/gop-states-seek-2-year-daca-wind-down-in-texas-suit.

## A. Renewing DACA

The pending litigation has left people wondering whether they should renew their DACA deferred action as soon as possible. The decision as to whether to renew sooner rather than later will ultimately be a discussion for the DACA recipient and the advocate, but a few things to consider when having those conversations with recipients include: (1) the time that it is taking the U.S. Citizenship and Immigration Service (USCIS) to process DACA renewals and (2) the possibility that DACA renewals will continue until the end of the litigation appeals process, and the possibility of a two-year wind-down period after a final order is issued.

While USCIS will accept and will process renewal applications submitted early, it presently might not be worth renewing early for those with significant time left in their current period of DACA. Early renewals will potentially result in early grants that will result in the loss of time left on a current grant since the approval will be from date granted not date of expiration. Currently USCIS is approving DACA renewals in a timely manner. Practitioners have noted that DACA applications are being processed very quickly by USCIS. Some advocates have reported that many DACA applications have been granted in a matter of weeks, the earliest to date reported to have been approved in about two weeks. A few others have taken approximately two to three months to renew. Many DACA recipients have continued to wait until they are 150 days to six months from expiration to renew their DACA deferred action and have received timely grants of DACA for another two years.

Based on prior decisions, and the fact that Judge Hanen partially stayed his decision to allow DACA renewals, there is a possibility that DACA renewals will continue while the case is appealed. Any decision from the Southern District of Texas will be appealed, either to the U.S. Supreme Court or the Fifth Circuit Court of Appeals. Also, based on the summary judgment motion from the states challenging DACA, even in the face of a negative decision, DACA could be allowed a two-year wind-down period where recipients could continue to access DACA benefits for those two years. As a result, it might not be necessary for all individuals to file for renewals of their DACA deferred action at this time.

## B. Advance Parole

Advance parole travel authorization continues to be a viable opportunity for DACA recipients, and the pending litigation has not impacted this benefit. Individuals who have DACA can request to travel on advance parole for either humanitarian, educational, or employment reasons.[7] Individuals are able to request travel authorization for a humanitarian purpose like visiting a sick relative, attending a funeral service, or to obtain medical treatment; for educational purposes to study abroad or do academic research; or for employment purposes for overseas assignments, interviews, conferences, trainings or meetings with overseas clients.[8] These are only the few examples that USCIS lists, but DACA recipients have been approved to travel for many other reasons. Advocates have successfully requested advance

[7] USCIS, *Deferred Action for Childhood Arrivals Frequently Asked Questions*, Q59, available at: https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#travel.
[8] *Id*.

parole for educational or humanitarian purposes, such as participating in a short-term language study program, or visiting an elderly family member they have not seen in a long time. For more information on advance parole travel authorization, how to request it, and what documents are needed, see ILRC's Practice Advisory on Advance Parole[9] and visit the ILRC DACA page for more resources on advance parole.[10] Please see **Part III** of this practice advisory for a discussion on how advance parole can help DACA recipients adjust status.

### 1. Risks of Travelling with Pending Litigation

Even though DACA advance parole is still available, there are some concerns with sending DACA recipients abroad due to the pending litigation. Advocates and DACA recipients fear that if DACA is terminated, individuals who are traveling abroad could be left without an avenue to return. Like previously stated, it is unknown what will happen with the litigation and if DACA will be allowed to continue. With that said, there are a few knowns that could ease a bit of the worry. First, applicants have continued to be successfully granted advance parole and have successfully travelled and returned on advance parole. Second, based on the previous court decision, DACA renewals have been allowed to continue while the litigation proceeds. While there are grants of DACA renewals and individuals are in a period of valid DACA deferred action, they should be able to continue to use advance parole to travel and be paroled back into the United States.

## III. Exploring Alternative Immigration Options for DACA Recipients

DACA has always been a short-term immigration option for recipients, which is technically a "deferral of action" e.g. a deferral of removal, as an act of prosecutorial discretion. USCIS has always been clear that DACA is not a legal "status," though individuals with DACA do not, by USCIS policy, accrue "unlawful presence" in the United States while in a period of DACA deferred action. This makes it important for DACA recipients to explore all alternative options, both short and long-term for other immigration benefits and legal status and they should be screened and re-screened regularly, as life circumstances often change, causing immigration opportunities to arise or end as well.

The following is a discussion on a few options and considerations to keep in mind as you screen and discuss immigration options with DACA recipients. It is important to note that this is not a complete list on what immigration options a DACA recipient could be eligible for, rather a discussion on newer developments and possibilities that should not be overlooked.

[9] ILRC, *Requesting Advance Parole and Traveling Outside the United States Under Deferred Action* (September 2021), available at https://www.ilrc.org/resources/requesting-advance-parole-and-traveling-outside-united-states-under-deferred-action.
[10] ILRC, *DACA,* https://www.ilrc.org/daca (2023).

## A. Eligible DACA Recipients Can Access U Visa Deferred Action

U nonimmigrant status, more commonly known as a "U visa" in the community, is a nonimmigrant status that allows noncitizens who are survivors of certain listed crimes that occurred in the United States to apply for and be granted temporary status for four years. U visas give eligible immigrants the opportunity to obtain employment authorization, apply for lawful permanent residence status after three years with U visa status, and help certain family members obtain immigration status as well.[11] U visa petitions include the opportunity to apply for a generous waiver of inadmissibility grounds (ineligibility) that is not available for most other applicants for visas leading to permanent immigration status. For example, the U Visa waiver allows applicants to request a waiver for having made false claims of U.S. citizenship and for the "permanent bar" related to past unlawful presence in the United States -- which are grounds of inadmissibility that often cannot be waived through other immigration applications.[12] Establishing eligibility to apply for the U visa also leads to almost immediate eligibility for many public benefits, which do not in turn have a negative impact on future permanent residency acquired through the U visa process.

However, due to the high number of applicants and the set number of U visas available each year (10,000), often times U visa applicants have a very long wait before their applications are finally adjudicated and they receive legal status. After the yearly cap of the allocation of 10,000 U visas was first reached a number of years ago, USCIS established a "wait list" of pending U visa petitions that were adjudicated as approvable but needed to wait in line for a number under the cap. Those individuals are provided "deferred action" and employment authorization. Until the applicant made it onto the wait list and received deferred action, there was no clear protection from removal and deportation. The recently instituted "Bona Fide Determination" (BFD) process, allows those individuals who have not yet had their petitions fully adjudicated to receive a preliminary adjudication and be accorded deferred action protection and work authorization much sooner than they would otherwise based on the wait list.

For many years USCIS had taken the position that a DACA recipient who was granted deferred action through the U Visa process was no longer eligible to renew DACA. USCIS had decided that no individual could hold two types of deferred action. This affected people who had DACA who were also eligible for a U visa because once placed on the wait list and granted U visa deferred action, they could no longer access DACA benefits, such as traveling on advance parole. Recently, USCIS changed their position. Beginning in April 2021, USCIS no longer denied DACA renewals for recipients who were also granted deferred action under the U visa waitlist or the new BFD process.

[11] For more information about the requirements for U nonimmigrant status and how someone can apply for this option, please visit ILRC's U visa page at https://www.ilrc.org/u-visa-t-visa-vawa.

[12] U applicants, including derivatives, under INA § 212(d)(14), may apply for a waiver of all inadmissibility grounds except those listed in INA § 212(a)(3)(E) [participating in Nazi persecutions, genocide, torture, or extrajudicial killing]. The statute authorizes USCIS to grant a waiver when it would be in the "public or national interest." *See* INA § 212(d)(14).

## 1. Bona Fide Determination

The U nonimmigrant Bona Fide Determination (BFD) is a new process announced by USCIS to address the massive U Visa backlog and limitations of the 10,000 annual statutory cap, by allowing certain individuals who have filed a U visa to receive employment authorization and deferred action while they wait for final U nonimmigrant adjudication and the availability of a number under the cap.

The BFD process applies to all applicants who have a pending Form I-918 or I-918A U visa petition, and all those who will file a Form I-918 or I-918A in the future. This process went into effect on June 14, 2021, and pending U visa petitions that have not been placed on the waitlist are being granted work authorization and protection from deportation under this process. This includes DACA recipients.

## 2. Eligibility for Bona Fide Determination

All individuals who have a pending U visa petition and are present in the United States, could be eligible for BFD. In order to be considered for a BFD, an individual will need to have filed a complete I-918, Form 1-918 Supp B law enforcement certification, and their declaration describing the facts of the crime and harm suffered. Derivative relative beneficiaries of U visa petitioners will be considered for BFD if the principal is granted BFD and if they are also present in the United States. The petitioner will also need to have properly filed an I-918A, with evidence of the qualifying family relationship for each derivative. Individuals will also have to complete biometrics to be considered for a BFD. Note that a BFD is a discretionary determination and USCIS will decide as to whether the petitioner and each derivative pose a risk to national security or public safety by reviewing their biometrics results and could deny a BFD as a result.[13]

## 3. Considerations for DACA Recipients Who Obtain Bona Fide Determination

Individuals who are eligible for BFD and DACA receive similar benefits with a few exceptions. Specifically, both DACA recipients and those U visa petitioners who are granted BFD receive protection from deportation and work authorization while they have a valid grant. Individuals are eligible to request renewals of both BFD and DACA when their designation is expiring. Renewals under both DACA and BFD will be granted to those who are still found to be eligible for the benefit.[14]

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[13] For more information on the BFD process, please see ILRC's Practice Advisory *Overview of the New U Nonimmigrant ("U Visa") Bona Fide Determination* available at https://www.ilrc.org/overview-new-u-nonimmigrant-%E2%80%9Cu-visa%E2%80%9D-bona-fide-determination.

[14] *See* USCIS Policy Manual, Volume 3, Ch. 5, Section 6 and *see* USCIS, Considerations of Deferred Action for Childhood Arrivals (DACA), Frequently Asked Questions, Q51 available at https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#renewal.

While DACA and BFD offer similar benefits, there are some differences. DACA is granted for a two-year period. Also, DACA has an employment authorization application filing fee of $410 that must be paid every time an individual submits a renewal, whether or not they actually desire work authorization. On the other hand, a BFD is granted for a four-year period and there is no fee associated with BFD work authorizations. But only DACA recipients can request advance parole and are allowed to travel. Travel is not an option for individuals who are granted BFD and are waiting for the final adjudication of their U Visa case.

In addition to the benefits offered by both policies, advocates often ask if DACA recipients should renew their DACA once they are granted BFD, whether they should travel after being granted BFD and if they can opt out of a DACA work authorization. First, travel for DACA recipients after being granted BFD should not hurt a recipient's eligibility for U visa status. The concerns expressed are whether travel on advance parole will trigger new unlawful presence grounds of inadmissibility for DACA recipients that might then need to be waived; or if travel will break continuous presence for U status. These issues should not be of concern to DACA recipients who have BFD, since travel on advance parole will not be considered a departure for purposes of the unlawful presence inadmissibility bars. In 2012, the BIA ruled in *Matter of Arrabally and Yerrabelly* that travel on advance parole is not a "departure" for purposes of inadmissibility under INA § 212(a)(9)(B)(i).[15] Because travel on advance parole will generally not trigger new inadmissibility grounds nor adversely impact any waiver that might have been submitted with the U visa petition, the DACA recipient will not need to amend a pending U visa waiver request. In addition, there is no continuous presence requirement that needs to be met for a pending U visa petition. It is important to note that while travel on advance parole is not considered a departure for the unlawful presence bars, DACA recipients who have final orders of removal could face challenges later on as this departure might be considered to have executed an order. Please see the ILRC DACA Advance Parole practice advisory for a complete discussion on this issue.[16] Second, DACA recipients should consider renewing their DACA deferred action even after obtaining BFD through the U visa petition process, to ensure they can maintain their DACA status in case they are denied a U visa at the time of final adjudication. This is important especially now since only DACA recipients who have current DACA or had DACA that expired less than a year ago can access DACA protections. Third, advocates have wondered if DACA recipients can opt out of renewing their work authorization under DACA, once issued BFD work authorization. Unfortunately, at the moment, this is not allowed since DACA applications have to be filed in a "bundle." And according to the new regulation, in order for a DACA request to be considered complete, an applicant must file for both deferred action and work authorization.[17]

[15] *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012).
[16] ILRC, *Requesting Advance Parole and Traveling Outside the United States Under Deferred Action* (September 2021), available at https://www.ilrc.org/resources/requesting-advance-parole-and-traveling-outside-united-states-under-deferred-action.
[17] USCIS, *Consideration for Deferred Action Childhood Arrivals (DACA) Frequently Asked Questions*, Q8, available at https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions.

## B. Family and Employment Based Employment Petitions and Applications

Many DACA recipients are eligible for family or employment-based immigration options, based on petitions which have been filed or could be filed by U.S. citizen or lawful permanent resident (LPR) family members or employers. Some individuals, determined to be at the top of their professions, may even be able to self-petition. Such petitions by family members or through employment constitute only the first step in the process of becoming an LPR. Ultimately the visa petition beneficiary faces additional challenges. Apart from those who are considered "immediate relatives" as described in the next section, they must reach their "place in line" or "priority date" due to the limitation or quota on the numbers of family and employment-based immigrants allowed to become permanent residents every year. The current priority dates are maintained in the U.S. Department of State's "Visa Bulletin" which is updated monthly.[18] In addition, family and employment-based applicants must also qualify to become an LPR by proving they are "admissible" to the United States.[19] DACA recipients should be screened for both family and employment immigration possibilities.

### 1. Eligibility for LPR Status Through a Family Member

U.S. citizens can petition for their spouses and their sons and daughters of any age or marital status, though there is a significant limit and resulting wait for the immigration of adult (over 21) and married children. Adult (age 21 or older) U.S. citizens may also petition for their parents and siblings. LPRs may petition their spouses and unmarried sons and daughters of any age. Spouses, parents, and unmarried, minor children (under 21) of U.S. citizens are in a special category called "immediate relatives," and are not subject to the visa bulletin priority dates, quotas or numerical limitations. For some of these relationships and petitions, it will take many years or even more than a decade to reach the "front of the line" and actual eligibility to finally apply for LPR status. For others, such as "immediate relatives" of U.S. citizens, the only wait is the paper processing with USCIS and sometimes, the Department of State (DOS). The second step, either consular processing abroad for an immigrant visa (LPR), or adjustment of status to LPR here within the United States, is much more complex. Not everyone who has a relative that is eligible to petition for them is actually eligible to become an LPR, and this second step must also be considered and analyzed to determine eligibility prior to the filing of a first step visa petition. For an in-depth discussion of family-based immigration, see ILRC's related manuals.[20]

[18] U.S. Department of State, *The Visa Bulletin,* available at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html.
[19] For more information on obtaining LPR status through family petitions, see ILRC's manual, *Families & Immigration: A Practical Guide*, 6th edition (2021).
[20] *Id.*

## 2. Advance Parole Could Help Some DACA Recipients Adjust Status

It is important that DACA recipients explore alternative options that could lead to permanent immigration status. One such option for DACA recipients are immigrant visa petitions filed by eligible close family members, filed together with applications for adjustment of status to LPR. Travel with advance parole could provide an enormous benefit to some DACA recipients who could be eligible to be petitioned through the family-based process or employment-based process. Becoming an LPR through a family member is a two-step process, as is discussed above.[21] If not eligible for adjustment of status within the United States, an applicant for LPR status through a visa petition must travel abroad for consular processing. Consular processing is riskier than adjustment of status, as there is no appeal of consular decisions denying immigrant visa (LPR) applications and there is a risk of the applicant being stuck outside the United States far from home for a long period of time. An additional waiver for unlawful presence may also be required for applicants undergoing consular processing. On the other hand, if denied adjustment of status, an applicant can renew their application before an immigration judge in the United States, and further file appeals of any negative decisions.[22]

One of the threshold requirements for eligibility to adjust status within the United States is that the adjustment applicant has to have been "inspected and admitted or paroled "upon entry to the United States.[23] A DACA recipient who last entered the United States without inspection at a port of entry, and who subsequently travels with advance parole, will then be "inspected and paroled" and meet that threshold requirement for adjustment of status. While there are other requirements for adjustment of status, including not falling within the adjustment bars set out in INA § 245(c) and not being "inadmissible,"[24] often having that most recent lawful entry can significantly change the prospects for a DACA recipient now eligible for family-based immigration. This is especially true for someone who previously last entered the United States without inspection (commonly referred to as "EWI") and who might not be able to travel safely for consular processing.

One caveat to travel on advance parole, is that it is primarily beneficial only for applicants who would be considered an "immediate relative" family[25] member of a U.S. citizen. It is important to note that advance parole will not ordinarily help other family members who are eligible to immigrate as "preference beneficiaries."[26] This is because the latter group cannot usually

[21] Sometimes an applicant is eligible to have both steps (visa petition and adjustment application) filed concurrently.
[22] The necessity for the "conditional unlawful presence" waiver of inadmissibility would likely also be avoided by the ability to adjust status in the United States. See INA § 212(a)(9)(B) and ILRC, *Understanding Unlawful Presence Under INA 212(a)(9)(B) and Waivers of Unlawful Presence, I-601 and I-601A* (March 2019)
[23] See INA § 245(a).
[24] Individuals are eligible to adjust status in the United States under INA § 245(a) if they (1) were admitted or paroled into the United States, (2) properly filed an adjustment of status application, (3) are be physically present in the United States, (4) are eligible to receive an immigrant visa and an immigrant visa is immediately available, (5) are admissible to the United States or eligible for a waiver, and (6) cannot be barred under 245(c).
[25] Immediate Relatives are parents of adult (age 21 or older) U.S. citizens, spouses of U.S. citizens, and minor (under age 21) unmarried children of U.S. citizens.
[26] Family preference beneficiaries are spouses and unmarried minor children of LPRs (F2A preference), adult unmarried sons and daughters of LPRs (F2B), adult (over 21) unmarried sons and daughters of U.S. citizens (F1), married children of U.S. citizens (F3) and siblings of U.S. citizens (F4).

adjust status, even after travel on advance parole because one or both of the most common bars to adjustment found in INA § 245(c) bars likely apply to them – (1) having been out of legal status in the United States, or (2) having worked without authorization in the United states. These two bars to adjustment do not apply to immediate relatives of U.S. citizens. But they do apply to family preference visa petition beneficiaries.[27]

DACA recipients who entered without inspection may be able to adjust status as immediate relatives, if they successfully request, are granted, and travel on advance parole and subsequently are paroled back into the United States. This has already been a successful route for many former DACA recipients in attaining a more permanent solution and long-term immigration status.

### 3. DACA Recipients Could be 245(i) Eligible Through Older Family or Employment Based Petitions

One additional opportunity to explore, including with older DACA recipients, is to check for old petitions, or employer labor certifications, filed on their behalf or filed on behalf of their parents. Older family petitions can help DACA recipients not only establish eligibility for applying for lawful permanent status now, but also help to establish eligibility to ultimately apply for LPR status through an adjustment of status application within the United States without having to leave to undergo consular processing abroad. See **Part III.B.2** above for a brief discussion of some of the advantages of adjustment of status. While most family and employer-based applicants for LPR status will need to depart the United States for final consular processing abroad for LPR status, with the attendant risks of leaving the country, INA § 245(i) allows those benefiting from this law to remain inside the United States to apply for LPR status here. This is despite ineligibility for "regular" adjustment of status due to having entered the U.S. without inspection or being subject to the bars for unauthorized employment or overstaying a visa. Remember that the bars to adjustment of status apply to all family and employment immigrants, with the exception of immediate relatives of U.S. citizens.

Petitions or labor certifications that "grandfather" individuals into eligibility for adjusting status within the United States through INA § 245(i) had to have been filed on or before April 30, 2001. DACA recipients who were children of a parent who was a principal beneficiary of a family-based petition or employer labor certification that was filed on or before April 30, 2001, may have been grandfathered by 245(i), and now may have the ability to adjust status even if they have not traveled on advance parole or last entered the United States without inspection.

[27] Two of the INA § 245(c) bars to adjustment state that individuals who have failed to continuously maintain lawful status, are in unlawful immigration status on the date the adjustment application is filed, and/or worked without authorization, cannot adjust status. Other, less commonly applicable bars also exist in this section of the adjustment statute.

**NOTE ON ANALYZING PARENT OPTIONS:** 245(i) petitions are just one type of petition where DACA recipients could still benefit from. It is important to analyze parent cases when screening DACA recipients to check whether the DACA recipient could be included as a derivative or independently benefit from a process. While this is less likely to be possible for older DACA recipients, such situations have still helped some individuals.

### a. Overview of 245(i) Eligibility

Adjustment of status under INA § 245(i) assists individuals who generally were disqualified from the adjustment process because they entered the United States without inspection, fell out of lawful status, worked without authorization or were subject to any of the other bars to adjustment found in INA § 245(c). They are allowed to apply for permanent residence from within the United States nevertheless, by establishing eligibility for 245(i) and paying an additional significant filing fee.[28] To qualify to adjust status under 245(i), a person must be the beneficiary of a visa petition or a labor certification that was "approvable when filed[29]" on or before April 30, 2001.

DACA recipients should explore if they were included or could have been included in any family member's petition or the labor certification or petition by an employer of their parent. If so, they may be grandfathered into 245(i) protections. Beneficiaries eligible for 245(i) treatment include those who qualified as derivative spouses or child beneficiaries of the petition or labor certification and are then considered "grandfathered" under 245(i) permanently. For derivatives, the spouse or the child relationship with the principal petition or labor certification beneficiary had to be in existence on or before April 30, 2001, and the petition or labor certification must have been filed on or before that date as well. The derivative did not have to be actually listed on the petition; they just have to prove that the relationship existed by April 30, 2001. If a DACA recipient is grandfathered under 245(i), not only does this allow them to overcome an unlawful entry and the 245(c) bars, it also allows petition beneficiaries to adjust status even if they are not considered "immediate relatives," but fall within a preference category. This is a huge advantage for preference beneficiaries, since travel with advance parole will not cure 245(c) bars for these individuals.

DACA recipients can use their status as a derivative of an old petition for 245(i) eligibility in conjunction with a newer petition to allow them to adjust status, once the new petition's priority date is "current" or the petition is filed by an "immediate relative." There will be times when the person cannot use the original petition which made them 245(i) eligible to actually become a permanent resident, for a number of reasons. They may no longer be eligible to immigrant

[28] INA § 245(i).

[29] A petition is considered "approvable when filed" if it was properly filed, meritorious in fact, and non-frivolous. This means that the petition must have been signed by the petitioner, submitted with the appropriate filing fee, and postmarked on or before April 30, 2001. Whether it was "meritorious in fact" and "non-frivolous" is assessed based on the circumstances that existed at the time the petition was filed. Circumstances that arose after the petition was filed would not change the "approvable when filed" aspect. For more information on 245(i) eligibility requirements, this please see ILRC's *245(i) Everything You Always Wanted to Know But Were Afraid to Ask* practice advisory available at https://www.ilrc.org/sites/default/files/resources/practice_advisory_245i_july_2021_update_final2.pdf.

through that petition because they aged out, or the principal beneficiary never used that petition to legalize their own status, or the petition was ultimately denied due to a failure to provide sufficient information to USCIS for approval. Despite this, the old petition can still be used to establish 245(i) eligibility and can be combined with a new petition, like that from a spouse, to adjust status. In these cases, the person adjusts status with the new petition, but presents the former petition as proof that they are protected under 245(i).

> **EXAMPLE:** Paula's mother came to the United States without inspection in 1999, bringing then 10-year-old Paula with her. Paula's U.S. citizen grandmother petitioned for Paula's 29-year-old mother in January of 2000. Paula automatically became a "derivative" of the petition filed by her grandmother for her mother, even if they forgot to list her on the petition. The petition also conveyed "245(i)" protection to both Paula and her mother independently, since it was filed on or before April 30, 2001. Paula later "aged out" before she could immigrate through the petition filed for her mother, but later married Pedro, an LPR. Pedro filed a petition for Paula as his spouse. Paula can use her grandmother's old petition to qualify for 245(i) adjustment while immigrating through her spouse, once her priority date is current. The same would be true if Paula's mother had been the beneficiary of a labor certification filed by her employer.

## 4. DACA Recipients Could Be Good Candidates for Employment-Based LPR Status

DACA recipients should be screened for employment-based visas. While many nonprofits do not do work with employment-based visas, there are many private attorneys and firms who might be able to help a DACA recipient determine if they are eligible for an employment-based visa.

Approximately 46% of DACA recipients have a bachelor's degree or higher. More than 75% of the top 25 fortune 500 companies employ DACA recipients. Many are big tech companies, like Google, Twitter, Meta, Microsoft, and Adobe who have come out in support of DACA recipients. Through such employment, as well as through many other types of employment, eligibility for an employment-based visa should be explored. It is possible that an employer would be willing and qualified to petition the employee who presently has work authorization through DACA. The employment-based system, like family-based preference category immigration, allows for a pre-set number or "quota" of immigrants in each of five categories. The first three categories are tied to immigrants' accomplishments, professions, or skills. The fourth involves workers categorized as "special immigrants," while the fifth is an "investment" route.

While an in-depth discussion is outside the realm of this practice advisory, practitioners can learn more about employment-based options for DACA recipients through a recent ILRC webinar which explores employment-visas for DACA recipients. This webinar can be accessed by visiting the ILRC website.[30]

[30] ILRC, *Fundamentals of Employment-Based Visas*, available at https://store.ilrc.org/webinars/fundamentals-employment-based-visas.

## IV. Conclusion

As advocates and DACA recipients wait for a final decision from the DACA litigation, it is important to explore all other options available now or those that might be available in the future. As noted, this practice advisory should be used as a starting point for exploring some options that DACA recipients could have. There are many more options that could be available for DACA recipients that should be explored, like acquisition or derivation of U.S. citizenship, LPR status via T visas, TPS, or VAWA self-petitions to name a few. This is just an overview of options that gave rise from frequently asked questions.

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**About the Immigrant Legal Resource Center**
The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.