



# EMPLOYMENT-BASED IMMIGRATION VISAS FOR DACA RECIPIENTS

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## I. Introduction

With the fate of the Deferred Action for Childhood Arrivals (DACA) program hanging by a thread due to ongoing litigation, it is crucial for legal advocates to ensure that they screen DACA recipients for other immigration options in case DACA is terminated in the future.

Some advocates generally focus on humanitarian or family-based immigration options when screening DACA recipients or other undocumented individuals for other immigration eligibility. This practice advisory describes common employment-based immigration strategies that may be additional tools for this population.

Understanding that many advocates might not have in-house expertise to take on employment-based immigration cases, this advisory seeks to provide a general overview of common employment-based immigration options and a broad understanding of eligibility for adjustment of status and consular process with a specific eye on common issues that DACA recipients often face.

## II. Overview of Employment-Based Temporary Immigration Options

### A. Assessing Possibility of Temporary Immigration Status Through Employment

There will be times when an employer wants to support a DACA recipient, but lawful permanent residence through an employment-based immigration petition is not possible right now. For example, this will happen when the individual does not qualify for adjustment of status under INA §§ 245(a) or 245(i) or is subject to a ground of inadmissibility like the three- or ten-year unlawful presence bars under INA § 212(a)(9)(B) and the person is not eligible for a waiver of these bars. These issues and possible ways to overcome them for lawful permanent residence are discussed in Section IV in more detail below. When obtaining lawful permanent residence through an employer-sponsored immigration petition is not immediately possible, consider a temporary status through employer sponsorship. This can help persons obtain a different status and as discussed in Section IV, can sometimes help them obtain lawful permanent residence in the future.

One of the most common temporary employment-based status is the H-1B Specialty Occupation Worker nonimmigrant visa that is available for professional-level jobs that require at least a bachelor's degree or equivalent in a particular field. The H-1B, unlike many temporary visas, does not require "temporary intent." In other words, a person on an H-1B can have an intent to permanently reside in the United States after their H-1B visa expires. This is very important for DACA recipients who have lived in the United States most of their lives. As a practical matter, nonimmigrant statuses that do not require temporary intent, such as the H-1B (and L-1 discussed below), are some of the best options to consider first.

Various types of jobs can qualify as a specialty occupation for an H-1B, but generally the position must require a U.S. bachelor's or higher degree or its equivalent. The H-1B visa is initially valid for up to three years, with the option to renew for another three years, totaling a

maximum validity period of six years. If an employer plans to support an employee's application for lawful permanent residence by the end of the fifth year under the H-1B status, the employer can seek to extend the H-1B beyond the standard six-year limit.

An important requirement for H-1Bs is that the job and the degree must match – that is the concept of a “specialty occupation.” For example, an English major who is talented with computers, but only has limited academic or work experience, will likely not be eligible for an H-1B if they are applying for a job as a computer scientist, even if they are a better programmer than a person with a computer science major. Generally, United States Citizenship & Immigration Services (USCIS) will look to the degrees held by others with similar jobs at the same company, and across the industry, to decide whether an H-1B is appropriate.

For an H-1B, the employer is the petitioner, and must make successive filings with the Department of Labor (DOL) and then with USCIS. The employer must “attest” (promise) that it will pay the prevailing wage for that job in that geographic area, as well as disclose the actual wage paid at the company for others in the same job, among other attestations. The employer must be engaged in this process to make it work, and by law the employee cannot pay the legal or filing fees nor have those fees deducted from salary.

Once the employer receives the DOL attestation, the employer files a petition for H-1B status to USCIS. After the petition is approved, the file is sent electronically to U.S. consulates around the world. At that point, if the employee is inside the United States, the employee can then choose to leave and apply at a consulate abroad for a passport visa stamp to return in valid H-1B status.

Importantly, there is an H-1B “cap,” or a numerical limitation on H-1B visas available each fiscal year. Currently, the numerical limit is 65,000, with an additional 20,000 H-1Bs for graduates with at least a master’s degree from a U.S. institution of higher education. In practice, USCIS usually receives far more H-1B petitions than available visas. In this case, there is a random selection process known as a “lottery.” Recently, the selection rate in the H-1B lottery has been the lowest ever, with only about 10% of those entering the lottery getting H-1B status. The Biden administration has proposed regulations to improve the H-1B lottery, but even if these changes take effect, it is likely that the yearly selection rate will continue to be low.<sup>1</sup>

There are several exemptions to the H-1B cap. For example, all colleges and universities, related or affiliated nonprofits, and governmental or nonprofit research organizations are exempt. USCIS also recently added general guidance toward the same goal of clarifying H-1B cap exemptions.<sup>2</sup> Additionally, the Biden administration has proposed amending the regulations to further expand the types of entities that qualify for these exemptions.<sup>3</sup> For now,

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<sup>1</sup> See 88 FR 72870 (the Biden administration has proposed regulations to bring numerous changes to the H-1B program. One of those changes would ensure that each person entering the lottery is only counted in the selection process once, regardless of whether they are seeking H-1B petitions by multiple companies. Additionally, the proposed regulation would clarify that employers are prevented from submitting multiple registrations for the same person).

<sup>2</sup> USCIS, Letter in Response to H-1B Cap Exemption Questions, Oct. 18, 2023, <https://www.uscis.gov/sites/default/files/document/foia/H-1BCapExemptions-Baker.pdf>.

<sup>3</sup> See 88 FR 72870.

any employee of a nonprofit should encourage the employer to discuss whether that entity may be exempt from the H-1B lottery so that their visa can be approved irrespective of the numerical limitation.

For more information about H-1Bs and DACA, see the National Immigration Forum's resource, <https://immigrationforum.org/article/adjustment-of-status-through-work-visas-for-daca-recipients-explainer/>

Another common temporary employment-based status is the L-1 Intracompany Transferees visa, which like the H-1B does not require "temporary intent." The L-1 requires working for a full year abroad, and then being transferred to the United States to work for a related or affiliated employer. The L-1 applies to employees who are managerial or executive level, or who have "specialized or advanced knowledge" (a phrase that generally means that the person has knowledge that is not commonly held throughout their industry). Generally, like the H-1B, employees on an L-1 can be allowed to stay in the United States for a period of up to three years with a possibility to extend it for an additional two years.

**Example:** a DACA recipient could consider accepting a job abroad working for a multinational company that is also incorporated in the United States. After a year, it is possible that the company could petition for L-1 status to transfer them to the United States. The L-1 is one more tool in the toolbox to consider for DACA beneficiaries who work for an international employer and can work a full year abroad.

As mentioned previously, other types of temporary employment status require temporary intent, meaning the individual must show they intend to return to their home country after their temporary visa in the United States ends. These include R-1 (religious worker), TN (for Canadians and Mexicans under the US Mexico Canada Agreement, formerly NAFTA), H-1B1 or E-3 free trade status for citizens of Australia, New Zealand, Chile or Singapore, and E-1 or E-2 status for those working for a company that is owned by citizens of a country that maintains a treaty of commerce and navigation. For many DACA recipients who have resided in the United States for a long time, a consular officer could deny the visa based on these statuses based on a subjective finding that the individual plans to stay in the United States permanently. Such cases should be evaluated carefully, including the applicable guidance on temporary intent.

## B. Assessing the Three- and Ten-Year Unlawful Presence Bars

After the employer files a petition for either an H-1B or an L-1, the next step is to evaluate whether a DACA recipient should depart the United States to consular process. In doing that, advocates should ensure they do a thorough investigation into all issues, such as potential grounds of inadmissibility that could bar them from returning into the United States. Although we don't go over every ground of inadmissibility that could be an issue in a person's case, in this practice advisory, we focus on the three- and ten-year unlawful presence bars found at INA § 212(a)(9)(B), as they are some of the most common grounds of inadmissibility. Here is an overview of these bars:

- **Three-year bar.** Persons who (a) beginning on April 1, 1997, are unlawfully present in the United States for a continuous period of more than 180 days but less than one year,

and (b) then voluntarily depart the United States without permission before any immigration proceedings commence are inadmissible for a period of three years from the date of departure.<sup>4</sup>

- **Ten-year bar.** Persons who (a) beginning on April 1, 1997, are unlawfully present in the United States for a continuous period of one year or more, and (b) leave the United States voluntarily or by deportation/removal are inadmissible for a period of ten years from the date of departure or removal.<sup>5</sup>

Importantly, INA § 212(a)(9)(B)(iii) lists several exceptions to accruing unlawful presence for purposes of the three- and ten-year bars, including those who are under eighteen years of age. Moreover, persons are not considered to be accruing unlawful presence during the period in which they have DACA.<sup>6</sup> This means that many DACA recipients might not have to worry about either of these bars. This is because they might not have more than 180 days or one year or more of unlawful presence and therefore could depart the United States to consular process and obtain a nonimmigrant visa without having to worry about triggering either the three- or ten-year bar.

For those who would trigger either of these bars upon departure, INA § 212(d)(3) authorizes a consular officer to issue a discretionary waiver for a nonimmigrant visa even if a person has triggered most grounds of inadmissibility, including mostly importantly here, the three- or ten-year bar. This is known as a d3 waiver. The State Department's Foreign Affairs Manual explains how d3 should be reviewed. Many DACA individuals could be eligible for a d3 waiver where a consular officer conducts a balancing test based on the following factors:

- (1) The recency and seriousness of the activity or condition causing the applicant's ineligibility;
- (2) The reasons for the proposed travel to the United States; and
- (3) The positive or negative effect, if any, of the planned travel on U.S. public interests.
- (4) Whether there is a single, isolated incident or a pattern of misconduct; and
- (5) Evidence of reformation or rehabilitation.<sup>7</sup>

**Example:** Factor (1) for DACA recipients is usually related to an overstay or unlawful entry to the United States as a child. Along with making the argument that the events that made a DACA recipient become ineligible are not recent (e.g., overstay or unlawful entry occurred as a child), factor (3) also provides an opportunity to show positive equities for the DACA individual including education, experience, volunteering, or other positive factors. In this balancing test, most DACA recipients will do well. Note that factors (4) and (5) are generally for more serious issues, such as having criminal records or other issues. Remember, triggering these factors alone won't make the person ineligible for a d3 waiver, since it is a balancing test, but persons would need to show additional positive equities in those cases.

The H-1B or L-1 nonimmigrant visas coupled with the d3 waiver is not commonly known with employers, so if an employer is interested and a d3 waiver is needed, the employee may need

<sup>4</sup> INA § 212(a)(9)(B)(i)(I).

<sup>5</sup> INA § 212(a)(9)(B)(i)(II).

<sup>6</sup> USCIS, Frequently Asked Questions, Question 1, <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions> (last updated Sep. 18, 2023).

<sup>7</sup> 9 FAM 305.4-3(C)(U) Factors to Consider When Recommending a Waiver.

to explain this option to the employer or find an attorney to help. After the employer petitions for either status in the United States, and the petition is approved, the file is then sent electronically to U.S. consulates around the world. At that point, the employee can then choose to leave and apply at a consulate abroad for a passport visa stamp to return in valid nonimmigrant status. It is not until that visa application is reviewed at a U.S. consulate that the employee can request the d3 waiver.

In considering the d3 waiver option, please keep in mind that the d3 waiver is a short-term solution that can lead to more options. Obtaining lawful permanent residence will require a separate plan, as explained in Section IV below, or action by Congress.<sup>8</sup> However, getting a temporary nonimmigrant visa avoids the uncertainty of the discretionary DACA program that could end in the future and could provide the option to transition to other immigration statuses. For example, re-entering on a temporary nonimmigrant visa like an H-1B or L-1 could help some persons obtain lawful permanent residence based on employment-based visas in the future.

Keep in mind that although the d3 waiver could waive the three- and ten-year bars for nonimmigrant visas, advocates would need to do a separate analysis when applying for lawful permanent residence. One advantage of re-entering on an H-1B or L-1 is that recent USCIS policy clarified that the three- and ten-year bars for unlawful presence can be served in the United States after a person has triggered either bar by departing and re-entering.<sup>9</sup>

Lastly, as explained in Section V below, DACA beneficiaries could try to apply for advance parole to attend their consulate interview to avoid triggering the three- and ten-year bars. Although there is no current general USCIS policy on the matter, the San Francisco USCIS Field Office has stated that if a person's consular processing appointment/travel date was fast approaching, the field office would consider a request for emergency advance parole on a case-by-case basis.

### III. Overview of Employment-Based Green Cards

There are a variety of employer-sponsored green card categories, including:

- EB-1: Priority workers that have extraordinary ability, are outstanding professors or researchers, or are managers and executives.
- EB-2: Workers with advanced degrees or have an exceptional ability.

<sup>8</sup> The DREAM Act is a federal bill that, if passed, would provide a pathway towards citizenship to certain persons, including many DACA recipients. Various versions have been proposed in Congress, but none have passed. One version of the DREAM Act would require, in part, for the person to be “physically present in the United States for at least five years immediately preceding the date of enactment,” but could allow for brief breaks in presence, but not “for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days,” with only limited and compelling exceptions – illness or death of a close relative, for instance. If such a bill became law, persons might still be eligible for relief after a short trip abroad to secure a d3 waiver and H-1B visa. However, we do not know precisely how the DREAM Act will be worded if it is passed, or how it would be interpreted.

<sup>9</sup> USCIS, Policy Memorandum: INA 212(a)(9)(B) Policy Manual Guidance (June 24, 2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220624-INA212a9B.pdf>. This new guidance has been incorporated in the USCIS Policy Manual (USCIS-PM) at 8 USCIS-PM O.6.

- EB-3: Skilled workers, professionals, or other workers.
- EB-4: Certain special immigrants and religious workers.
- EB-5: Certain investors.

Generally, most persons pursuing either an EB-2 or EB-3 need a Labor Certification (also known as PERM), a process by which an employer may sponsor an employee for lawful permanent residence. Almost all full-time, non-temporary jobs might qualify. The goal of the Labor Certification is to protect U.S. workers, and the U.S. Department of Labor (DOL) is the gatekeeper agency that runs the first and most difficult part of the process. Labor Certification will be granted if there are no U.S. workers “able, willing, qualified and available” to accept the job at the prevailing wage for that occupation in the area of intended employment, and that employment of the employee will not adversely affect the wages and working conditions of similarly employed U.S. workers.

The first and most important step in the process is a conference between the attorney and employer (and occasionally the employee) to establish job duties, minimum requirements, and advertising strategy for a test of the labor market. For basic PERM Labor Certifications, two Sunday print ads in a newspaper of general circulation in the area are required, along with three additional forms of advertising. PERM applications may be subject to “audit” based upon DOL “red flag” criteria or random selection. If the case is audited, the DOL will ask for evidence of recruitment, the recruitment report, all resumes received and reasons for disqualification, and/or further information on the sponsoring-employer. If the DOL finds the documentation satisfactory, the case should be approved. Importantly, the employee cannot pay for the DOL processing nor take the costs out of the employee’s salary.

PERM is the first step in a three-step process to lawful permanent residence. The employer is only directly involved in the first two steps of the process – the last step is an application for the employee and each dependent family member with USCIS.

For more information about PERM, see Immigrants Rising’s webinar and resources, <https://immigrantsrising.org/resource/getting-a-perm/>

## IV. Assessing Adjustment of Status for Employment-Based Green Cards

### A. Assessing INA § 245(i) Adjustment of Status Eligibility

INA § 245(i) allows persons who did not enter the United States with inspection and admission or parole as required by INA § 245(a) and/or who failed to continuously maintain lawful status since their entry, ever worked without authorization, or are otherwise barred under INA § 245(c) to be eligible to adjust their status.

Persons are generally eligible for adjustment of status under INA § 245(i) if:

- They are the principal or derivative beneficiary of a visa petition (Form I-130, I-140, I-360, I-526) or application for labor certification (Form ETA-750) that was approvable when it was filed on or before April 30, 2001;

- The principal beneficiary was physically present in the United States on Dec. 21, 2000, if the petition was filed between January 15, 1998 and April 30, 2001;
- They have an immigrant visa immediately available to them;
- They are admissible or eligible for a waiver;
- They pay a \$1,000 penalty fee (in addition to all the other adjustment of status fees);
- They are physically present in the United States at the time they file for adjustment of status; and
- They warrant a favorable exercise of discretion.

Even if the petition filed on or before April 30, 2001 was ultimately withdrawn, denied, revoked, or still pending, persons who are otherwise eligible under INA § 245(i) can adjust their status under a new immigration petition filed today so long as the original petition was “approvable when filed.”<sup>10</sup> Importantly, derivative beneficiaries who were the spouse or child (unmarried and under 21) of the principal beneficiary at the time the petition was filed can benefit under INA § 245(i) even if they were not listed on the original petition or application.<sup>11</sup> This provision also allows persons who are no longer a child or a spouse of the principal beneficiary to continue to be eligible for adjustment of status under INA § 245(i) so long as the relationship existed when the petition was filed.<sup>12</sup>

DACA recipients who are eligible for an employment-based immigration green card can qualify to adjust their status under INA § 245(i) without even knowing it. This is because many DACA recipients were children when the original petition was filed, may not have access to a copy of that petition, or simply forgot about it because the beneficiaries never obtained lawful status from that petition. For this reason, it is important to ask not only DACA recipients but their family members as well to ascertain whether a petition was in fact filed on or before April 30, 2001. In many cases, filing a Freedom of Information Act to obtain a copy of the original petition might be necessary.

For a more thorough discussion on INA § 245(i), see ILRC’s practice advisory, *245(i): Everything You Always Wanted to Know but Were Afraid to Ask* (ILRC 2023).

**Example:** Siri’s uncle Jesus, a U.S. citizen, filed a family-based immigration petition for Siri’s mother Martha on January 24, 2001 (Jesus’s sister). Siri was 16 years old at the time. Martha forgot to write Siri’s name on the form when they filed the petition. Years passed and Martha ended up obtaining her green card by filing for a U Visa in 2010. In 2012, Siri applied for and received DACA. Siri’s employer now wants to file an employment-based green card for him and wants to know if Siri is eligible for adjustment of status under INA § 245(i).

<sup>10</sup> See 7 USCIS-PM C.2(B)(2). An immigration visa petition or labor certificate application is deemed to be “approvable when filed” if the petition or application was properly filed, meritorious in fact, and non-frivolous.

<sup>11</sup> Note USCIS suggests that to be independently grandfathered as a derivative beneficiary, the qualifying relationship had to come into existence before the petition was filed, even though *Matter of Estrada*, 26 I&N Dec. 180, 184 (BIA 2013) states that derivative beneficiaries may qualify so long as the qualifying relationship came into existence on or before April 30, 2001.

<sup>12</sup> *Id.*



Siri seems to be eligible for adjustment of status based on INA § 245(i) because the petition filed by Jesus on behalf of Siri's mother Martha was filed on or before April 30, 2001. It does not matter that Martha did not write Siri's name on the petition filed, that Martha obtained a U Visa, or that Siri is no longer considered a child (since he is now over 21). So long as Siri was Martha's child when the petition was filed on or before April 30, 2001, Siri can adjust his status through his employment-based immigration green card through INA § 245(i).

## B. Assessing INA § 245(a) Adjustment of Status Eligibility

Under INA § 245(a), persons who entered the United States after being inspected and admitted or paroled are eligible to adjust their status in the United States. INA § 245(c), however, bars certain persons from being eligible for adjustment of status under INA § 245(a).<sup>13</sup> Specifically, INA § 245(c) bars the following people from adjusting their status under INA § 245(a):

- **INA § 245(c)(1)**: crewman (e.g., persons who entered as a D-1 or D2 nonimmigrant).
- **INA § 245(c)(2)**: persons who are in unlawful immigration status on the date they file their adjustment of status application OR who failed to continuously maintain lawful status since they entered the United States OR who engaged in unauthorized employment prior to filing their adjustment of status application.
- **INA § 245(c)(3)**: persons admitted in transit without a visa.
- **INA § 245(c)(4)**: persons admitted as a nonimmigrant without a visa under a visa waiver program.
- **INA § 245(c)(5)**: persons admitted as a witness or informant.
- **INA § 245(c)(6)**: persons who are deportable due to involvement in terrorist activity or group.
- **INA § 245(c)(7)**: persons seeking adjustment of status based on an employment-based category and who are not in lawful nonimmigrant status.
- **INA § 245(c)(8)**: persons who have violated the terms of their nonimmigrant visa OR who have engaged in unauthorized employment.

Persons with DACA might not be eligible to adjust their status under INA § 245(a) for several reasons, including the fact that many of them might have never been inspected and admitted or paroled into the United States. To try to remedy the threshold INA § 245(a) inspection and admission or parole requirement, DACA recipients who are ineligible are often encouraged to travel on advance parole. This is because when re-entering the United States with advance parole, DACA recipients are deemed to have been paroled into the United States.<sup>14</sup> Although this would satisfy the basic INA § 245(a) requirement, advocates must still assess the INA § 245(c) bars.

INA §§ 245(c)(2), (c)(7), and (c)(8) are the most common bars that DACA recipients may face. Depending on the INA § 245(c) bar, certain persons might be exempted. For example, neither §§ (c)(2), (c)(7), or (c)(8) apply to persons who are adjusting their status through a family-

<sup>13</sup> INA § 245(c).

<sup>14</sup> See 7 USCIS-PM B.2(A)(3).

based petition as immediate relatives.<sup>15</sup> While persons seeking to adjust their status as an immediate relative do not have to worry about these bars, persons adjusting their status based on an employment-based petition do.

**Example:** Joanna came to the United States crossing the border without inspection when she was 13 years old. When she was 15, Joanna began working without authorization. At age 17, she applied for and received DACA and has maintained it ever since. As a DACA recipient, she was granted advance parole in 2022 and was able to travel and re-enter the United States using her parole document. Joanna is now married to a U.S. citizen and is currently employed. Joanna is exploring whether she is eligible for adjustment of status under INA § 245(a) through a petition filed by her spouse or her employer who wants to sponsor her.

Although Joanna originally entered without being inspected and admitted or paroled when she crossed the border at age 13, Joanna was paroled after re-entering the United States when she traveled on advance parole. This allows her to meet the threshold INA § 245(a) requirement of having been inspected and admitted or paroled. However, Joanna must still assess whether any of the INA § 245(c) bars would cause a problem.

Since Joanna entered the United States without inspection and DACA is not considered a lawful immigration status<sup>16</sup>, Joanna would have issues with INA § 245(c)(2) for being in unlawful immigration status when she files her application for adjustment of status and failing to maintain continuous lawful status since she entered the United States, and INA § (c)(8) for having worked without authorization.

If she were to pursue an adjustment of status application under INA § 245(a) through her U.S. citizen spouse, she would be considered an immediate relative and would not have to worry about either INA §§ 245(c)(2) or (c)(8). However, if Joanna is seeking to adjust her status under INA § 245(a) through her employer, she would have to deal with both bars for the same violations, and in addition INA § 245(c)(7) which bars persons seeking adjustment of status based on an employment-based category if they are not in lawful nonimmigrant status.

To assess whether Joanna could be exempted from these bars for her employment-based petition, she would have to do a separate analysis under INA § 245(k) explained in the following section.

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<sup>15</sup> Immediate relatives are spouses of a U.S. citizen, unmarried children under 21 years of a U.S. citizen, or a parent of a U.S. citizen (if the U.S. citizen is 21 years or older).

<sup>16</sup> USCIS, Frequently Asked Questions, Question 6, <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions> (last updated Sep. 18, 2023) states that “[a]lthough action on your case has been deferred and you do not accrue unlawful presence (for admissibility purposes) during the period of deferred action, deferred action does not confer any lawful immigration status.”

### C. Assessing INA § 245(k) Exemption to the INA § 245(c) Bars

INA § 245(k) exempts persons from the INA §§ 245(c)(2), (c)(7), and (c)(8) bars for failing to maintain lawful status, engaging in unauthorized employment, or violating the terms and conditions of their nonimmigrant visa if they are adjusting their status based on certain employment-based immigration categories. Specifically, INA § 245(k) exempts persons from these bars if they are seeking to adjust their status under the following categories:

- **EB-1:** Persons of extraordinary ability, outstanding professors and researchers, and certain multinational managers and executives;
- **EB-2:** Persons who are members of the professions holding advanced degrees or persons of exceptional ability (EB-2);
- **EB-3:** Skilled workers, professionals, and other workers;
- **EB-5:** Qualified immigrant investors; or
- Religious workers.

To qualify for the INA § 245(k) exemption, persons must be physically present in the United States on the date they file their adjustment of status application pursuant to a lawful admission and the person must not have committed the immigration violation for more than an aggregate period of 180 days maximum. Importantly, the 180 days are measured from the most recent lawful admission.<sup>17</sup> This means that any violations related to the INA § 245(c) bars committed prior to the most recent lawful admission are not counted.

One of the biggest barriers for DACA recipients to meet eligibility for INA § 245(k) is having a recent lawful admission. Unfortunately, those who initially entered with a lawful admission likely have immigration violations under INA §§ 245(c)(2), (c)(7), and/or (c)(8) that is more than an aggregate 180 days. Although the 180 days is measured from the most recent lawful admission, returning on advance parole with DACA is considered a parole entry and not a lawful admission.<sup>18</sup>

As such, to qualify for INA § 245(k), DACA recipients would need to find another way outside of DACA to obtain a lawful admission and ensure that they are otherwise eligible for adjustment of status. For example, as discussed in Section II above, DACA recipients could be eligible for a temporary nonimmigrant status, like an H-1B or L-1 nonimmigrant status. When a person re-enters the United States on their H-1B nonimmigrant status, they would have a lawful admission and any prior violations related to INA § 245(c) before the new entry would not count if they were to pursue adjustment of status through an employment-based category previously mentioned. Similarly, persons who have Temporary Protected Status and are

<sup>17</sup> See 7 USCIS-PM B.8(E).

<sup>18</sup> See 7 USCIS-PM B.8(E)(3) (“An adjustment applicant who entered the United States on parole is not “lawfully admitted” because parole is not an admission. Therefore, entry or reentry based on parole does not restart the clock for purposes of calculating status or work violations under the exemption.”); 87 FR 53152 C.7 (explaining that DACA recipients who depart the United States and reenter are paroled back in and the entry is not an admission).

granted a travel document are considered to have been lawfully admitted upon re-entry into the United States.<sup>19</sup>

**Example:** Ben entered with a nonimmigrant tourist visa when he was 13 years old and was admitted for six months. Ben was granted DACA 160 days after his authorized stay for his nonimmigrant visa expired. Ben has renewed his DACA ever since. He is now 28 years old, and his current employer wants to sponsor him for an employment-based green card.

Although Ben was granted DACA 160 days after his nonimmigrant visa expired, DACA is not an immigration status. Therefore, Ben has been without lawful immigration status for more than 180 days since his last admission when he entered as a nonimmigrant tourist when he was 13 years old. As such, Ben is ineligible for adjustment of status under INA § 245(a) because he is barred under INA § 245(c)(2).

However, Ben's employer finds out that he can first file an H-1B nonimmigrant visa petition for Ben and apply for an INA § 212(d)(3) waiver for being without lawful immigration status. Ben applies for the INA § 212(d)(3) waiver at a consulate abroad and re-enters on an H-B nonimmigrant visa. His employer then files an employment-based green card petition for Ben. Ben would also be able adjust his status because he qualifies for the INA § 245(k) exemption since he has not committed any immigration violations related to the INA § 245(c) bars since his recent lawful admission as an H-1B nonimmigrant visa holder.

**Note:** INA § 245(k) exempts persons from the INA § 245(c) bars but not for other immigration violations. As such, practitioners would need to assess whether persons have triggered any other violations, such as any potential grounds of inadmissibility.

## V. Assessing the Three- and Ten-Year Unlawful Presence Bars when Pursuing Consular Processing for Employment-Based Green Cards

### A. Overview of the Three- and Ten-Year Unlawful Presence Bars

If a person is ineligible for adjustment of status for an employment-based green card under either INA § 245(a) or INA § 245(i), the next step is to assess whether they could face any potential issues when departing to consular process.

As explained in Section II above, when evaluating whether a DACA recipient should consular process, advocates should ensure they do a thorough investigation into all issues, such as potential grounds of inadmissibility that could bar them from returning into the United States. Although we don't go over every ground of inadmissibility that could be an issue when departing the United States in this practice advisory, assessing the three- and ten-year unlawful presence bars found at INA § 212(a)(9)(B) is crucial when a person is consular processing.

<sup>19</sup> See 7 USCIS-PM B.2(A)(5) (stating that persons traveling with TPS travel authorization on or after July 1, 2022 are deemed to have been admitted upon return to the United States).

Remember that INA § 212(a)(9)(B)(iii) lists several exceptions to accruing unlawful presence for purposes of the three- and ten-year bars, including those who are under eighteen years of age. Moreover, persons are not considered to be accruing unlawful presence during the period in which they have DACA.<sup>20</sup> This means that many DACA recipients might not have to worry about either of these bars because they might not have more than 180 days or one year or more of unlawful presence. Additionally, these grounds of inadmissibility are only triggered by a departure following the accrual of more than 180 days unlawful presence, so if the DACA recipient has not yet left the United States after having accrued more than 180 days unlawful presence, and is eligible to adjust their status, then they may never trigger this ground of inadmissibility. For those who have accrued more than 180 days of unlawful presence and who plan to consular process, they should be aware that they can trigger this ground when they leave the United States to attend their consular interview. In anticipation of this, some people may be able to seek a “provisional unlawful presence waiver” before they leave to consular process as explained in the next section.

**Example:** Mari entered the United States without authorization when she was five years old and has been undocumented since she arrived. When she was eighteen years and 30 days old, she applied for DACA. Mari was approved when she was eighteen years and 100 days. Mari has had DACA ever since. Mari does not qualify for adjustment of status, and her employer wants to submit an employment-based immigration petition for Mari but wants to know if she will trigger either the three- or ten-year bars under INA § 212(a)(9)(B) if she were to depart to consular process.

Even though Mari entered without authorization and was undocumented since she was five years old, the INA § 212(a)(9)(B)(iii) exception applies and Mari only began accruing unlawful presence when she turned eighteen years old. When she received DACA, she had only accrued 100 days of unlawful presence. As such, Mari would not have to worry about triggering either the three- or ten-year bars under INA § 212(a)(9)(B) when she departs to consular process.

## B. Family Hardship Waiver for the Three- or Ten-Year Unlawful Presence Bars

Even if a person could trigger either the three- or ten-year unlawful presence bars, that is not the end of the assessment. Persons with certain U.S. citizen and lawful permanent resident family members can apply for a discretionary waiver of the three- or ten-year bar under INA § 212(a)(9)(B)(v). Specifically, DHS can grant a waiver to a person who is the spouse, son, or daughter of a U.S. citizen or lawful permanent resident, if refusing admission to this person would result in extreme hardship to the citizen or permanent resident spouse or parent. Note that the extreme hardship cannot be based on a child who is a U.S. citizen or lawful permanent resident.

Importantly, persons can apply for this waiver in the United States before departing to consular process if unlawful presence is their only ground of inadmissibility. This is called a “provisional

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<sup>20</sup> USCIS, Frequently Asked Questions, Question 1, <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions> (last updated Sep. 18, 2023).

unlawful presence waiver,” and persons can use Form I-601A to apply for this waiver prior to departing the United States. This is helpful for DACA recipients who have a U.S. citizen or lawful permanent resident spouse or parent(s) and who would trigger either the three- or ten-year bar upon departing the United States.

### C. Advance Parole and Consular Processing

Advance parole is an administrative procedure to allow a person inside the United States, who seeks to travel abroad, to receive advance authorization to re-enter the United States (to be “paroled”) upon their return.<sup>21</sup> Parole is the authorization to allow a person to physically proceed into the United States under certain prescribed conditions.<sup>22</sup> DHS has the discretionary authority to parole an individual into the United States for “urgent humanitarian reasons or significant public benefit.”<sup>23</sup>

A benefit of leaving the United States on advance parole is that it can avoid triggering the three and ten-year bars under INA § 212(a)(9)(B)(i).<sup>24</sup> Even if a DACA recipient is eligible for a provisional unlawful presence waiver discussed in the previous section, they should still assess whether they could receive advance parole to attend their consular processing interview. Advance parole would give an extra safety net to return to the United States if any issues at the interview arise. If the green card is granted at the interview, the individual can return to the United States as a green card holder instead of parole.

If the person is not eligible for a waiver of the three and ten-year bars, seeking advance parole can also help. For example, if a DACA recipient is only worried about the three and ten-year bars under INA § 212(a)(9)(B)(i), advance parole would avoid triggering these bars when they leave and would therefore not need a waiver of these grounds. If a person is eligible for a regular I-601 waiver at the consulate (to waive other grounds of inadmissibility other than the three and ten-year bars), advance parole could also allow the person to re-enter the United States while they wait for their I-601 to be adjudicated after their interview.

DACA recipients can request advance parole if the travel abroad is for a humanitarian, educational, or employment purpose.<sup>25</sup> Although USCIS provides some examples to clarify what types of travel may fit within each of the three purposes, these categories are broadly defined.<sup>26</sup> Anecdotally, practitioners have stated that in the past, DACA recipients were

<sup>21</sup> See USCIS Adjudicator’s Field Manual, § 54.1. See *also* USCIS’ definition of “Parolee” and “Advance Parole,” stating that advance parole “may be issued to [noncitizens] residing in the United States in other than lawful permanent resident status who have an unexpected need to travel and return, and whose conditions of stay do not otherwise allow for their readmission to the United States if they depart,” available at <http://www.uscis.gov/tools/glossary/refugee-parolee>.

<sup>22</sup> See INA § 212(d)(5)(A).

<sup>23</sup> *Id.*

<sup>24</sup> See *Matter of Arrabally and Yerrabally*, 25 I&N Dec. 771 (BIA 2012) (holding that leaving on advance parole is not a departure for purposes of INA § 212(a)(9)(B)(i); USCIS Memorandum, Jeh Charles Johnson, “Directive to Provide Consistency Regarding Advance Parole.”

<sup>25</sup> See USCIS, Frequently Asked Questions, Question 59, <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions> (last updated Sep. 18, 2023).

<sup>26</sup> *Id.*

successful in receiving advance parole to attend their consular interviews by claiming that such travel was for a humanitarian purpose. Although there is no current general USCIS policy on the matter, the San Francisco USCIS Field Office has stated that if a person's consular processing appointment and travel date was fast approaching, the field office would consider a request for emergency advance parole in this situation.



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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.