



## **DACA LEGAL SERVICES TOOLKIT**

**Practice Advisory 5 of 7**

### **DACA-RECIPIENTS' ELIGIBILITY FOR EMPLOYMENT-BASED VISAS (IMMIGRANT AND NON-IMMIGRANT)**

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## **A Note from the Executive Director**

The Center for Human Rights and Constitutional Law is a non-profit, public interest legal foundation dedicated to furthering and protecting the civil, constitutional, and human rights of immigrants, refugees, children, prisoners, and the poor. Since its incorporation in 1980, under the leadership of a board of directors comprising civil rights attorneys, community advocates and religious leaders, the Center has provided a range of legal services to vulnerable low-income victims of human and civil rights violations and technical support and training to hundreds of legal aid attorneys and paralegals in the areas of immigration law, constitutional law, and complex and class action litigation.

The Center has achieved significant victories in numerous major class action cases in the courts of the United States and before international bodies that have directly benefited hundreds of thousands of immigrants and other disadvantaged communities.

This practice advisory is part of a *DACA Legal Services Tool Kit* produced by the Center for Human Rights and Constitutional Law including seven practice advisories addressing deportation defense, educational and other government services, employment rights, employment and family-based visa eligibility, individual deferred action status applications, and a potential legislative fix for DACA recipients.

This practice advisory is an overview of how DACA recipients may be granted legal status through employment-based petitions. The discussion is divided between those who may be eligible for Permanent Resident Status or those who may be eligible for employment-based non-immigrant visas which, following a lawful entry as a non-immigrant, may then lead to an approvable application for Permanent Resident Status.

Manuals prepared by the Center are routinely reviewed for improvements and updates to reflect current policies and practices. This manual was researched and written by Staff Attorney Helene Hoffman. Please feel free to email me at [pschey@centerforhumanrights.org](mailto:pschey@centerforhumanrights.org) to suggest corrections, updates or edits to this practice advisory.

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## **I. DACA AND ITS RECISSION**

In 2012, an Executive Order established the DACA program giving legal status to qualified youth who were living in the U.S. The United States Citizenship and Immigration Services (commonly referred to as USCIS) was instructed to:

. . . establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, by deferring action against individuals who meet the . . . criteria and are at least 15 years old, for a period of two years, subject to renewal, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States. . . For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.

Janet Napolitano, Secretary, Department of Homeland Security, Memorandum, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (6/15/2012).

On September 5, 2017, President Trump rescinded the DACA program:

The September 5, 2017 memorandum rescinded the June 15, 2012 memorandum and directed DHS personnel to take all appropriate actions to execute a wind-down of the DACA program. . . Will reject all DACA initial requests and associated applications for Employment Authorization Documents filed after the date of this memorandum

. . . Will not terminate the grants of previously issued deferred action or revoke Employment Authorization Documents solely based on the directives in this memorandum for the remaining duration of their validity periods.

Notice of Memorandum Of Rescission Of Deferred Action For Childhood Arrivals (DACA), 82 Fed. Reg. 43556 (09/18/2017).

This practice advisory is an overview of how DACA recipients can be granted legal status pursuant to other programs. In order for a person to be considered legally present in the U.S., the person has to have been granted a legal status permitting them to stay here. 8 U.S. Code § 1226(a) states: "On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. . ."

DACA legal status is valid for two years at most. Once it expires, if DACA recipients have no other valid legal status, they will be considered to be in the United States illegally, and they will no longer be to work legally:

It is unlawful for a person or other entity—

(a)(1)(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . . with respect to such employment, or . . . (a)(2) . . . after hiring an alien for employment . . . to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

8 U.S. Code § 1324a

## **II. INTRODUCTION TO OBTAINING NON-DACA LEGAL STATUS**

Most of the petitions discussed in this advisory are employment-based petitions. They are divided between those for which USCIS grants Permanent Residency status (also called a ‘Green Card’), or a visa which provides a temporary legal status.

The process always begins with the filing of a petition, which is accompanied by a fee. The petition and other required documentation are mailed to USCIS.

There are different forms which must be completed, depending on the type of petition being filed. One example is Form I-129: “A United States employer seeking to classify an alien as an H-1B, H-2A, H-2B, or H-3 temporary employee must file a petition on Form I-129, Petition for Nonimmigrant Worker . . . “ 8 CFR Section 214.2h(2)(i)(A).

In addition, many of the laws allow an immigrant who is granted legal status to also have the immigrant’s spouse and children accompany the immigrant. See, for example, 8 U.S. Code § 1101 (15) (J), which permits this for an immigrant who is granted a J-1 visa.

### **IMMIGRANTS WHO HAVE COMMITTED CRIMES**

DACA recipients who want to file applications for any non-DACA legal status, and have committed a crime, should be aware that this may bar them from being granted their desired legal status.

. . . any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime, or (II) a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is inadmissible.

8 U.S.C. § 1182(h)(2)(A)(i)

### **III. EMPLOYMENT-BASED PETITIONS FOR PERMANENT LEGAL STATUS**

Immigrants may be granted “immigrant visas for entrance into the United States in order to engage in permanent employment. . . “ 20 CFR 656.1(a). However, there are various requirements which must be met.

One of these requirements is that, for most of these applicants:

. . . the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:

- (1) There are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and
- (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

Id. (Commonly referred to as the ‘Department of Labor Certification’).

There are several types of Employment-based Petitions for which USCIS grants Permanent Residency status, commonly referred to as Eb-1, Eb-2, Eb-3, Eb-4, and Eb-5 visas. Among these visas, if qualified, DACA recipients would most likely fulfill the requirements for the Eb-3 visa.

The requirements for the Eb-1 Visa are as follows:

(i) the alien has extraordinary ability in the sciences, art, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation . . . (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and (iii) the alien's entry into the United States will substantially benefit prospectively the United States.  
8 U.S.C. section 1153(b)(1)(A) (emphasis added)

This visa includes “Outstanding professors and researchers. . . “  
8 U.S.C. section 1153(b)(1)(B), as well as “Certain multinational executives and managers . . . “ defined as:

an alien . . . in . . . the 3 years preceding the time of the alien's application . . . employed for at least 1 year by a firm or corporation or other legal entity . . . and the alien seeks to enter the United States in order to continue to render services to the same employer . . . in a capacity that is managerial or executive.  
8 U.S.C. section 1153(b)(1)(C) (emphasis added)

“No labor certification is required for this classification.” 8 U.S.C. section 1153(b)(1)(5).

The requirements for the Eb-2 Visa:

. . . qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.  
8 U.S.C. section 1153(b)(2) (emphasis added)

Pursuant to 8 U.S.C. section 1153(b)(2) (B) (ii), Eb-2 visas are also available to immigrant physicians who meet the stated requirements.

The requirements for the Eb-3 Visa include the following classes of immigrants:

- (i) Skilled workers . . . Qualified immigrants who are capable. . . of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.
  - (ii) Professionals . . . Qualified immigrants who hold baccalaureate degrees and who are members of the professions.
  - (iii) . . . Other qualified immigrants . . . capable . . . of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.
- 8 U.S.C. section 1153(b)(3) (emphasis added)

As for ‘skilled worker’, “. . . Relevant post-secondary education may be considered as training for the purposes of this provision.” 8 CFR 204.5(1)(2),

As explained, Eb-3 applications must be accompanied by a Department of Labor certification. An exception is for professions listed on what is called ‘Schedule A’, defined as those occupations in which:

. . . there are not sufficient United States workers who are able, willing, qualified, and available for the occupations listed below on Schedule A and the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens. . .  
20 CFR 656.5(a)

Schedule A lists “. . . physical therapists. . .” and “nurses”. . .  
20 CFR 656.5(a)(1), (2)(emphasis added).

Eb-4 Visas cover “. . . classification of an alien as a special immigrant religious worker. . . “8 U.S.C. section 1153 (m)( emphasis added).

## Eb-5 Visas

Congress established the EB-5 Program in 1990 to bring new investment capital into the country and to create new jobs for U.S. workers. . . immigrants who invest their capital in job-creating businesses and projects in the United States receive conditional permanent resident status in the United States for a two year period. USCIS Policy Memorandum, May 30, 2013, EB-5 Adjudications Policy

The required amounts of capital are as follows:

. . . (2) Targeted employment area. The amount of capital necessary to make a qualifying investment in a targeted employment area within the United States is five hundred thousand United States dollars (\$500,000).

(3) High employment area. The amount of capital necessary to make a qualifying investment in a high employment area within the United States, as defined in section 203(b)(5)(C)(iii) of the Act, is one million United States dollars (\$1,000,000).

8 CFR § 204.6 (f)

## **APPLICATION PROCESS FOR PERMANENT LEGAL STATUS**

DACA recipients should realize that an application for one of these visas can be a lengthy and arduous process, and can also be costly for the employer. For most of these visas, the immigrant does not submit the visa; it must be . . . “submitted by an employer” 20 CFR 656.3. The immigrant “. . . is applying for a job opportunity for which an employer has filed an Application for Permanent Employment Certification.” Id.

The employer must is required to provide much documentation; he must : “. . . certify to the conditions of employment” 20 CFR 656.10(c); “. . . request a PWD. . . “(prevailing wage determination) “from the NPC” (National Processing Center)” 20 C.F.R. § 656.40 (a); and, in most cases “. . . attest to having conducted . . . recruitment prior to filing the application.” 20 CFR 656.17(e).

If the application is for a professional occupation . . . the employer . . . must conduct the recruitment steps. . . (i) (A) a job order and two print advertisements . . . (B) in newspaper or professional journals . . . “ 20 CFR 656.17(e). Moreover, “(ii) The employer must select three additional recruitment steps . . .” which may be anything from “A) Job fairs. . .” to “(E) Trade or professional organizations. . .” 20 CFR 656.17(e)(1) (emphasis added). . . If the application is for a nonprofessional occupation, the employer must . . . place a job order and two newspaper advertisements. . .” and nothing more. CFR 656.17(e)(2) (emphasis added).

There are strict limitations on giving the immigrant any advantages in being hired by himself, or by an employer who filed an application. The Employment must be: “(1) Permanent, full-time work by an employee for an employer other than oneself.” 20 CFR 656.3.

If the immigrant beneficiary is already employed by the employer who submitted the application:

. . . in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. 20 CFR 656.17(h)(4)(i)

USCIS makes the application process more difficult if the immigrant is related to the employer or company officials:

. . . if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers,  
20 CFR 656.17(l)

Finally, DACA recipients must realize that there is a finite number of visas granted each year:

Preference allocation for employment-based immigrants. Aliens subject to the worldwide level specified in section 1151(d) of this title for employment-based immigrants in a fiscal year shall be allotted visas. . .

8 U.S. Code § 1153 (b)

#### **IV. PETITIONS FOR TEMPORARY LEGAL STATUS**

Just as for Permanent Employment-Based Petitions, there are different Nonimmigrant Petitions for Temporary Visas. There are visas permitting the holders to work, as well as non-work visas, which do not allow them to work.

DACA recipients should be aware that one requirement common to all who apply for temporary visas is that each immigrant must maintain a “. . . residence in

a foreign country which he has no intention of abandoning, . . . “ 8 U.S. Code § 1101 (15)(F) (i) (the example cited is directed to immigrants applying for F-1 (student) visas). This standard is commonly referred to as “Nonimmigrant intent”.

## **TEMPORARY NON-WORK VISAS**

### **B-1 and B-2 Visas**

B-1 visas are intended for immigrants intending to visit the U.S. for business; B-2 visas for pleasure, which includes “. . . medical treatment. . .” 22 CFR § 41.31. Holders of these Visas must adhere to strict requirements. One of these is that these visas have termination dates:

Any B-1 visitor for business or B-2 visitor for pleasure may be admitted for not more than one year and may be granted extensions of temporary stay in increments of not more than six months each . . .

8 CFR § Sec. 214.2(b)

These visa holders are also limited in the kinds of activities they can do. The term “business,” . . . does not include local employment or labor for hire. . . “22 CFR § 41.31 (b) (1). An important one is that B-1 and B-2 visa holders are not permitted to be employed, or be enrolled in studies.

An alien who is admitted as . . . a B-1 or B-2 nonimmigrant . . . violates the conditions of his or her B-1 or B-2 status if the alien enrolls in a course of study. Such an alien who desires to enroll in a course of study must either obtain an F-1 or M-1 nonimmigrant visa . . .

8 CFR § Sec. 214.2(b) (7).

## **TEMPORARY WORK VISAS**

. . . an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer.

8 CFR § Sec. 214.2(h) (1) (i)

As with applications for permanent work visas: “The employer must file a petition with the Service for review of the services or training and for determination of the alien's eligibility for classification as a temporary employee or trainee” Id.

There is a myriad of different kinds of temporary work visas, categorized based on the type of work the employer wants the immigrant to do. As with permanent work visas, there are only a finite number granted: “During each fiscal year, the total number of aliens who can be provided nonimmigrant classification is limited.” 8 CFR 214.2(h)(8)(i)

This advisory only discusses the temporary work visas that most pertain to DACA recipients.

### **H-1B VISAS – Specialty Occupations**

These visas “are available to nonimmigrant immigrants in specialty occupations or certain fashion models from any country. . . .” 20 CFR 655.700(a) (emphasis added).

. . . specialty occupation means an occupation that requires theoretical and practical application of a body of specialized knowledge, and attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty as a minimum for entry into the occupation in the United States. The nonimmigrant in a specialty occupation shall possess the following qualifications:

(i) Full state licensure to practice in the occupation, if licensure is required for the occupation; (ii) Completion of the required degree; or (iii) Experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

8 U.S.C. 1184(i)(1) and (2).

The procedure for an employer to apply for these visas can be lengthy. “. . . [r]equires an employer seeking to employ H-1B nonimmigrants to file a labor condition application . . . and have it certified by the Department of Labor (DOL) . . .” 20 CFR 655.700(a)(3).

H-1B visa holders also have a limit on their stays:

An H-1B alien in a specialty occupation or an alien of distinguished merit and ability who has spent six years in the United States may not seek extension, change status, or be readmitted to the United States.

Sec. 214.2(h)(10)(13)(iii)

### **H-2A Visas – Agricultural Work**

“An H-2A classification applies to an alien who is coming temporarily to the United States to perform agricultural work of a temporary or seasonal nature.” 8 CFR 214.2(h)(1)(ii)(C)

### **H2B Visas - Nonagricultural Work**

An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor without displacing qualified United States workers available to perform such services or labor and whose employment is not adversely affecting the wages and working conditions of United States workers.

8 CFR 214.2 (6) (i) (A) (emphasis added).

“Temporary” is defined as “. . . a limited period of time. . . Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years.” 8 CFR 214.2 (6)(ii)(B).

Also, these visas are limited to immigrants who are only from certain nations. “H-2B petitions may be approved for nationals of countries that the Secretary of Homeland Security has designated as participating countries. . . “ 8 CFR 214.2 (6)(i)(E)(1).

### **H-3 Visas – immigrants invited to participate in training program**

The H-3 trainee is a nonimmigrant who seeks to enter the United States at the invitation of an organization or individual for the purpose of receiving training in any field of endeavor . . . or the professions, as well as training in a purely industrial establishment. This category shall not apply to physicians,

8 CFR 214.2(h)(7)(i)

The visa terminates for a holder:

. . . who has spent 18 months in the United States . . . unless the alien has resided and been physically present outside the United States for the immediate prior 6 months.

8 CFR 214.2(h)(13)(iv)

### **F-1 Visa – Academic Student Visa:**

an alien . . . who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study . . . at an established college, . . . academic high school, elementary school, or other academic institution or in an accredited language training program in the United States, . . . an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, . . . except that the alien’s qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico. . .

8 U.S. Code § 1101 (15)(F) (i)

### **J-1 Visas – exchange program visitors for teaching or study**

an alien . . . who is a bona fide student, scholar, trainee, teacher, . . . or leader in a field of specialized knowledge or skill, . . . who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or . . . studying, . . . or . . . if he is coming to the United States to participate in a program under which he will receive graduate medical education or training. . .

8 U.S. Code § 1101 (15) (J) (emphasis added)

### **L-1 Visas – Immigrants Transferred by Their Companies**

. . . an alien who within the preceding three years has been employed abroad for one continuous year by a qualifying organization may be admitted temporarily to the United States to be employed by a parent, branch, affiliate, or subsidiary of that employer in a managerial or executive capacity, or in a position requiring specialized knowledge

. . .

8 CFR § Sec. 214.2(l) (emphasis added)

**M-1 Visas – Vocational or other Non-Academic Students;  
Commuters for Programs in the U.S.**

an alien . . . who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him . . . and (iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, . . . except that the alien's course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

8 U.S. Code § 1101 (15) (M) (i) (emphasis added)

**O-1 Extraordinary Ability Individuals**

. . . an alien who has extraordinary ability in the sciences, arts, education, business, or athletics, or who has a demonstrated record of extraordinary achievement in the motion picture or television industry. . . an alien . . . may be classified as an accompanying alien who is coming to assist in the artistic or athletic performance of an alien admitted under section 101(a)(15)(O)(i) of the Act.

8 CFR 214.2(o)(1)(emphasis added)

**P-1, P-2, P-3 Internationally-Recognized Artists, athletes,  
and entertainers**

an alien who is coming to the United States to perform services as an internationally recognized athlete, individually or as part of a group or team, or member of an internationally recognized entertainment group . . . who is coming to perform as an artist or entertainer under a reciprocal exchange program; . . . as an alien who is coming solely to perform, teach, or coach under a program that is culturally unique . . .

8 CFR 214.2(p)(1)(i)

### **Q-1 Cultural Exchange Program**

alien . . . who is coming temporarily (for a period not to exceed 15 months) . . . as a participant in an international cultural exchange program . . . for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers. . .  
8 U.S.C. section 1101(a)(15)(q).

### **R-1 Religious Worker**

. . . an alien, . . . who— (i) for the 2 years immediately preceding the time of application for admission, has been a member of a religious denomination . . . . .  
and (ii) seeks to enter the United States for a period not to exceed 5 years . . .  
8 U.S.C. section 1101(a)(15)(R)

### **TN Visas – Business Activities pursuant to NAFTA**

Citizens of Canada or Mexico seeking temporary entry under NAFTA to engage in business activities at a professional level . . . shall be provided confirming documentation and shall be admitted . . . for a period not to exceed three years. . .  
8 C.F.R. § 214.6(e)

## **V. CONCLUSION**

It is important that DACA recipients investigate whether they fulfill requirements for any other legal status. Once their DACA legal status expires, their work permits will, as well.

If DACA recipients have any questions, they should consult with an immigration attorney