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Immigration Law 101

April 7, 2020

80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208-3494
TEL: 518-472-5888 FAX: 518-445-2303
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Immigration Law 101
April 7, 2020

Agenda

3:30pm – 4:30pm

Intro and Understanding the Immigration System
Immigration Laws and Policies
- INS v. DHS
- Immigration Agencies and their roles
  - Mary Armistead, Esq.

Determining Immigration Status
- Citizenship
- Immigration status: Immigrant, Nonimmigrant, Undocumented
- Immigrant: family, employment, diversity, humanitarian
- Nonimmigrant: employment, student, visitor, and others
  - Michelle Lee, Esq.
  - Jon Lemelin

The Immigration Process
- Admission
- Inadmissibility and Deportability
  - Mary Armistead, Esq.

4:30pm – 5:30pm

Understanding Immigration Enforcement Who can enforce immigration laws
- Where and how does immigration enforcement occur
- Removal Proceeding basics
  - Mary Armistead, Esq.
  - Michelle Lee, Esq.

Obtaining Lawful status
- Family-based
- Humanitarian-based
  - Isabelle Thacker, Esq.

Immigration Related Developments and Policy
- Executive orders
- Regulatory changes
  - Prof. Ava Ayers

IMMIGRATION LAW 101
April 7, 2020

SPEAKER BIOGRAPHIES

MARY ARMISTEAD, ESQ., works at The Legal Project as an Equal Justice Works Crime Victims Justice Corps Fellow providing direct representation to and building community capacity regarding victims of human trafficking. Mary also teaches Immigration Law as an Adjunct Professor of Law at her alma mater, Albany Law School, where she graduated summa cum laude. Mary clerked at the New York State Court of Appeals for one year before working as the Staff Attorney of the Immigration Law Clinic at Albany Law School, both supervising students and maintaining a personal docket representing clients eligible for humanitarian immigration relief. In her positions at Albany Law School and The Legal Project, she developed the Special Immigrant Juvenile Pro Bono Attorney panel, wherein she connects clients to and supervises attorneys in providing pro bono representation to vulnerable immigrant children. Her undergraduate degree is from Queens University of Charlotte in North Carolina. She is admitted to practice in New York.

AVA AYERS, ESQ., graduated first in her class from Georgetown Law in 2005. She then clerked for the Honorable Sonia Sotomayor, now a U.S. Supreme Court Justice, during her term on the U.S. Court of Appeals for the Second Circuit. She also clerked for the Honorable Gerard Lynch on the U.S. District Court for the Southern District of New York. After clerking, Ava worked for nine years in the office of the New York Attorney General, where she was a Senior Assistant Solicitor General. She served both as a supervisor and as lead counsel in various high-profile cases involving immigration law, states' rights, constitutional rights, environmental law, and other issues. Since November 2016, Ava has served as Director of the Government Law Center. She is also an Assistant Professor at Albany Law School. Ava is the author of *A Student's Guide to Law School*, published by the University of Chicago Press, as well as articles on legal ethics, immigration law, federalism, and other subjects. Her undergraduate degree is from Vassar College. She is admitted to practice in New York.

MICHELLE LEE, ESQ., is a Staff Attorney in The Legal Project's immigration unit. Prior to practicing immigration law, she practiced foreclosure defense here in the Capital Region and eviction defense in San Francisco. An immigrant from Canada, Michelle graduated from McGill University and the University of California, Berkeley, School of Law. She is admitted to practice in New York.

JON LEMELIN works as a part-time Paralegal in The Legal Project's Immigration Practice. He is a U.S. Department of Justice Accredited Representative, which enables him to practice immigration law under the direct supervision of a practicing attorney. In this capacity, Jon has had the opportunity to assist his clients with a variety of immigration matters, including applications for Green Cards and Employment Authorization. He is currently working under a grant to help develop immigration-related

training for the Albany County Sheriff's Department. He also was involved with a project that helped represent asylum-seekers who were detained at the Albany County Jail. Prior to joining The Legal Project, Jon was a volunteer at the U.S. Committee for Refugees and Immigrants (USCRI) in Albany and a Partner at Deloitte Consulting. He has a B.S. in engineering from the University of Connecticut (1984) and an M.B.A. from UCLA (1989).

MARIEN A. LEVY, ESQ., is a Staff Attorney at the Legal Project. She has been an immigration attorney since 2014, previously working at the Legal Aid Society of Northeastern New York. Marien has represented clients in a variety of immigration matters, including citizenship applications, family-based petitions, Violence Against Women Act applications, and U Nonimmigrant applications. Marien speaks Spanish. She is a graduate of Haverford College and William & Mary Law School. She is admitted to practice in New York.

ISABELLE THACKER, ESQ., is a Supervising Attorney at The Legal Project in Albany, NY. She handles a variety of immigration cases, with an emphasis on helping survivors of domestic violence and human trafficking with immigration remedies. She was a staff attorney at the U.S. Committee for Refugees and Immigrants before joining The Legal Project. Before moving to the Capital Region in June 2016, Isabelle was the Director of the Steps to Justice Program at The Second Step, a multi-service domestic violence agency in Newton, MA. She has also worked for Greater Boston Legal Services (in the Latinas Know Your Rights Program), Tri-CAP, and the Georgia Legal Services Program. Over the course of her legal career, she has represented clients in a variety of matters including immigration, family law, domestic violence, public benefits, housing, and education issues. Isabelle graduated from Middlebury College with a B.A. in Spanish and political science with High Honors and obtained a J.D. with Honors from the University of North Carolina School of Law. She is admitted to practice in New York.

Immigration Law 101

APRIL 7, 2020

MARY ARMISTEAD, ESQ.
MICHELLE LEE, ESQ.
JON LEMELIN, DOJ ACCREDITED REP.
ISABELLE THACKER, ESQ.
PROFESSOR AVA AYERS, ESQ.
MARIEN LEVY, ESQ.

The Legal Project
Capital District Women's Bar Association

NEW YORK STATE OF OPPORTUNITY. Office for New Americans

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Immigration Laws and Policies

- **Statute**: The Immigration And Nationality Act ("INA")
  - Codified at 8 U.S.C. § 1101
- **Code of Federal Regulations (CFR)**: Codified at Title 8
- **Caselaw**: Administrative (USCIS and EOIR) and Judicial Opinions (US federal courts)
- **Other**: Agency Manuals, Policy Memos and Executive Orders, etc.

The Immigration System

- **Pre 9/11**: Immigration and Nationality Service (INS) and Executive Office for Immigration Review (EOIR)
  - INS and EOIR were both housed within the Department of Justice

- **Post 9/11**: United States Citizenship and Immigration Services (USCIS), Immigration and Custom Enforcement (ICE), Customs and Border Patrol (CBP), and EOIR
  - USCIS, ICE, and CBP are housed in the newly-created Department of Homeland Security (DHS) along with other components (FEMA, TSA, etc)
    - Conflates immigration with issues of security
  - EOIR is still housed in the DOJ

Immigration Agencies and Their Roles

- **Executive Office for Immigration Review (EOIR)**: institutional home of Immigration Courts (ICs), wherein immigration judges (IJs) preside over removal hearings, and the Board of Immigration Appeals (BIA), which reviews IJ decisions & administrative decisions by DHS officers
- **Immigration and Customs Enforcement (ICE)**: responsible for locating, arresting, and charging individuals who are within the US without documentation
- **Customs and Border Protection (CBP)**: responsible for patrolling the border to ensure it is secure, including counterterrorism, customs, immigration, trade, and agriculture
- **United States Citizenship and Immigration Services (USCIS)**: oversees lawful immigration to the US and is charged with processing immigrant visa petitions, naturalization petitions, and asylum and refugee applications

Determining Immigration Status

JON LEMELIN AND MICHELLE LEE

US Immigration Status Overview

Immigrant Status
- Family
- Employment
- Refugee/Asylee
- Humanitarian
- Diversity Lottery

Non-Immigrant Visas
- Visitor
- Student
- Employment

Undocumented
- Entered Without Inspection
- Status Expired or was Violated

Lawful Permanent Resident (Green Card)

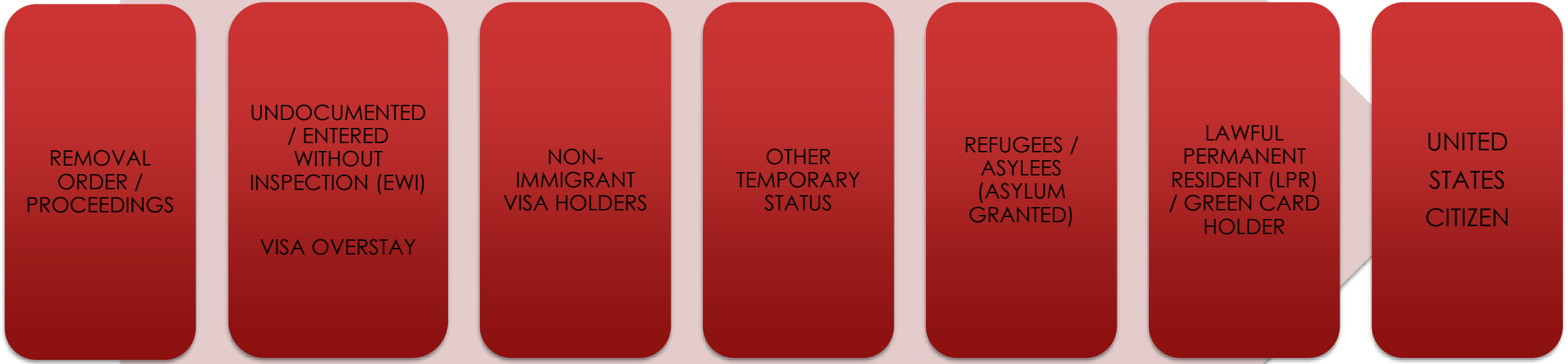
United States Citizen

Protected from Removal
- Temporary Protected Status
- Deferred Action

Immigrant v. Nonimmigrant

- Immigrant: a person who has an intent to make the US their permanent place of residence
  - Application for a green card can be done from abroad (consular processing) or from within the U.S. (adjustment of status)
- Nonimmigrant: a person who wishes to be in the United States for a period of time for a specific purpose (i.e. visit, study, or work), but does not intend for the US to be their permanent home

Security Continuum



Less Secure
Few Rights

More Secure
More Rights

This chart shows a way to visualize various immigration statuses that immigrants may have on a continuum from the least secure to the most secure. It is important to remember that a person's immigration status may change over time.

Removal Order / Proceedings

- People with a removal order or in removal proceedings are at greatest risk of being “removed”

Undocumented

- People who Entered Without Inspection ("EWI")
- People who have overstayed their visas
- If encountered by Immigration and Customs Enforcement (ICE), could be placed in removal proceedings
- There may be forms of immigration relief available to some undocumented people

Non-immigrant Visa Holders / Status

- For example:
  - Tourists
  - Business travelers
  - Students
  - Fiancés
  - Certain Employment-based visas
  - U status – victims of certain crimes
  - T status – victims of trafficking

Other Temporary Status

- For example:
  - Parolees
  - Temporary Protected Status
  - Deferred action
    - DACA – Deferred Action for Childhood Arrivals
    - Medical Deferred Action
    - VAWA Deferred Action
  - Special Immigrant Juvenile Status

Refugees / Asylees

- Refugees – screened abroad, enter U.S. with refugee status
- Asylees – applied after arrival in U.S., have asylum status after their applications are granted
- Refugees and Asylees can apply to adjust status to Legal Permanent Residence

Lawful Permanent Residents

- From abroad: People apply for Immigrant Visas
  - For example:
    - Family-based petitions
      - Immediate relatives vs. "preference categories"
    - Certain employment-based petitions
    - Diversity Lottery
    - Special Immigrant Visas
- From within the United States: Adjustment of Status
- LPRs can be subject to deportation; LPR status can be deemed abandoned

Citizens

- By operation of law: birth, acquisition, derivation
- By Naturalization - from LPR status
- Most secure; voting, jury duty, run for office, leave and re-enter

The Immigration Process

Applying for Status; Inadmissibility and Deportability

MARY ARMISTEAD

Who grants immigration status?

- USCIS and rarely Immigration Courts (ICs)
  - **USCIS**: handles initial stages of visa processing (further screening by Dept. of State abroad); AOS to LPR; humanitarian relief, including asylum, VAWA, T and U Visas, and Special Immigrant Juvenile Status
  - **ICs**: can grant only specific forms of relief and only to those in removal proceedings; some AOS (after application filed with USCIS), asylum, and withholding/deferral/cancellation of removal (various grounds)
- Can lawful status be obtained for the first time from inside the US?
  - Yes, but it is more common for process to happen outside US
    - Entrance to the US without a visa is a ground of "inadmissibility"
  - However, most forms of humanitarian relief can only be granted if in the US

Inadmissibility and Deportability

- Immigration divides non-citizens into 2 categories: those seeking "admission" and those already admitted
- Inadmissibility: ground that prevents one from being "admitted" to the US
  - Waivers available
- Deportability: ground for taking away lawful status already obtained
  - Limited waivers/defenses available
- Burden of proof: admissibility falls on immigrant; deportability falls on government
- New York Regional Immigration Assistance Centers: https://www.ils.ny.gov/content/regional-immigration-assistance-centers

Inadmissibility Grounds

- Health-related (i.e., communicable diseases, vaccinations, physical or mental disorder, drug/alcohol abuse or addict)
- Criminal-related (i.e., admit to or convicted of crimes involving moral turpitude (CIMT), controlled substances, prostitution, gambling, reason to believe drug trafficker, etc.)
- National Security-related (i.e., espionage, sabotage, terrorist activities, etc.)
- Public Charge-related (i.e., "likely at any time to become a public charge…")
- Illegal Immigrants and Immigration Violators-related (i.e., present without authorization, failure to attend hearing, fraud or willful misrepresentation, false claim to US citizenship, etc.)
- Documentation Requirement-related (i.e., not in possession of valid immigration-related documents)
- Unlawful Presence-related (i.e., 3- and 10-year bar)
- Others: draft evaders; polygamists; international child abduction; unlawful voters; renounced US citizen for tax evasion

Deportation Grounds

- Inadmissible at Time of Entry or Adjustment of Status or Violates Status (i.e., unlawful entry, marriage fraud, smuggling, etc.)
- Criminal-related (i.e., aggravated felony, crime involving moral turpitude (CIMT), controlled substances, firearm-related convictions, domestic violence, stalking, crimes against a child and violations of orders of protection, high speed flight, failure to register as a sex offender, etc.)
- Failure to Register and Classification of documentation (i.e., false documents, false claim of US citizenship, etc.)
- Security-related (i.e., terrorist and national-security grounds)
- Public Charge-related (i.e., deportable within 5 years of admission)
- Unlawful Voters

Admission to the US

- Admission usually occurs at the border: CBP determines whether a non-citizen/LPR who presents themselves at a port of entry (POE) is admissible
- However, it is also be a legal fiction for those:
  - within the US seeking to change or extend their status (e.g. an individual seeking to change from a student visa to a family visa)
  - who entered without inspection ("EWI"ed) and are applying for status within the US
  - seeking adjustment of status (AOS) to Lawful Permanent Resident (LPR)

    *In all three, above, USCIS determines admissibility
- There are grounds for waiving certain (but not all) inadmissibility grounds, often based on the reason for seeking entrance
- Note: If inadmissibility is undetected at time of admission, the individual becomes deportable pursuant to INA §237(a)(1)(A)

Are LPRs seeking admission?

- Lawful Permanent Residents (LPRs) are generally considered to have already been admitted

- However, LPRs are deemed to be seeking admission if they have (INA §101(a)(13)(c)):
  - abandoned or relinquished LPR status
  - been absent for continuous period of more than 180 days
  - engaged in illegal entry abroad
  - departed the US while in removal proceedings
  - committed an offense identified in INA §212(a)(2)
  - entered at an undesignated time and place (i.e. not a Port of Entry [POE])

If Determined Inadmissible

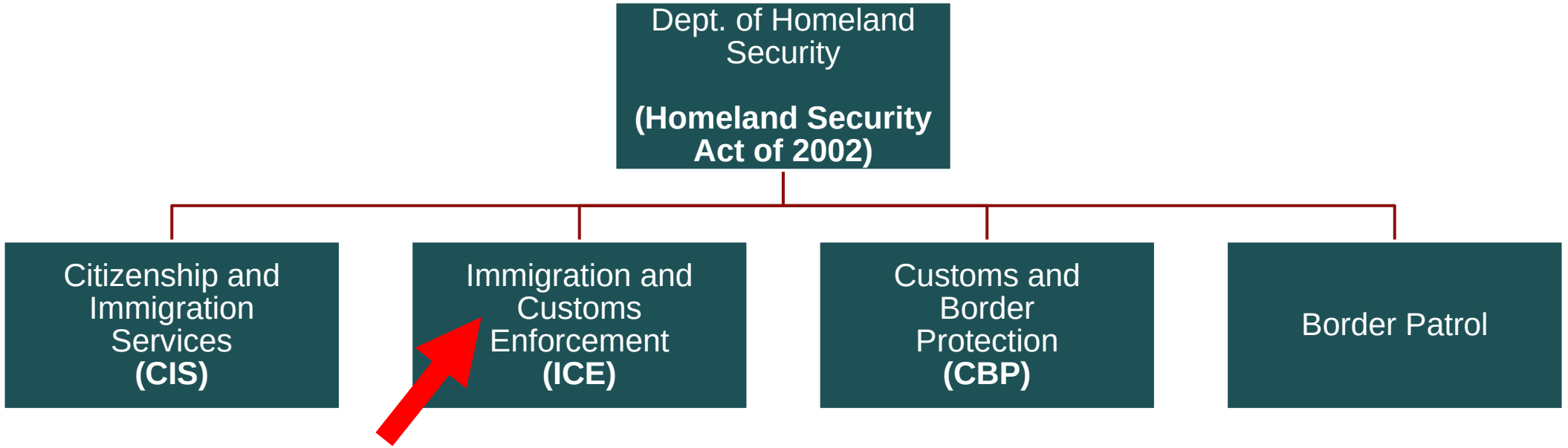
- Withdraw Application For Admission: Ask to withdraw application for admission without referral for removal.
- Deferred Inspection: Permitted to enter US but will be later inspected by US CBP or to US CIS (discretionary when documentation of status not available)
- Parole Status: Permit physical entry into the US without granting any lawful immigration status to applicant (discretionary: may be granted for humanitarian reasons)
- Charged With Removal: Charged with inadmissibility (INA §212)
  - Credible Fear Interview: Fear of persecution.
- Expedited Removal: Ordered removed without a hearing (INA §235)

Immigration Enforcement

Immigration and Customs Enforcement Activity and Placement into Removal Proceedings

MICHELLE LEE AND MARY ARMISTEAD

WHO IS AUTHORIZED TO ENFORCE US IMMIGRATION LAWS**?**



ICE arrests and issues "Notice to Appear" (NTA) for inadmissible/deportable aliens.

U.S. Department of Homeland Security

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: [redacted] FINS #: 1168563354 File No: A206 [redacted]

DOB: [redacted] Event No: MCS1406000204

In the Matter of:

Respondent: [redacted] currently residing at:

(Number, street, city and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.

☒ 2. You are an alien present in the United States who has not been admitted or paroled.

☐ 3. You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of EL SALVADOR and a citizen of EL SALVADOR ;
3. You entered in the United States at or near Hidalgo, TEXAS, on or about June 3, 2014;
4. You were not then admitted or paroled after inspection by an Immigration Officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who entered in the United States at any time or place other than as designated by the Attorney General.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.30(f)(2) ☐ 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

AT A PLACE TO BE SET

(Complete Address of Immigration Court, including Room Number, if any)

on a date to be set (Date) at a time to be set (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

[redacted] SUPERVISORY BORDER PATROL AGENT

(Signature and Title of Issuing Officer)

Date: June 04, 2014 Weslaco, Texas

(City and State)

See reverse for important information

Form I-862 (Rev. 08/01/07) N

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to one of the offices listed in 8 CFR 241.16(a). Specific addresses on locations for surrender can be obtained from your local DHS office or over the internet at http://www.ice.gov/about/dro/contact.htm. You must surrender within 30 days from the date the order becomes administratively final, unless you obtain an order from a Federal court, immigration court, or the Board of Immigration Appeals staying execution of the removal order. Immigration regulations at 8 CFR 241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Act.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to a 10-day period prior to appearing before an immigration judge.

Before: [redacted]

(Signature and Title of Immigration Officer)

X [redacted]

(Signature of Respondent)

Date: 6/4/14

Certificate of Service

This Notice To Appear was served on the respondent by me on June 04, 2014, in the following manner and in compliance with section 239(a)(1)(F) of the Act.

☒ in person ☐ by certified mail, returned receipt requested ☐ by regular mail

☐ Attached is a credible fear worksheet.

☒ Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the Spanish language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

X [redacted]

(Signature of Respondent if Personally Served)

[redacted] BORDER PATROL AGENT

(Signature and Title of officer)

Form I-862 Page 2 (Rev. 08/01/07) N

State Enforcement of Immigration Laws

- New York state and local authorities are not authorized by New York law to arrest people for civil immigration violations
  - (People ex rel. Wells v DeMarco, 168 AD3d 31 [2d Dept 2018])
  - Exception: INA § 287(g) agreements between local law enforcement and ICE
    - Secretary of Homeland Security is authorized to enter into agreements with state and local law enforcement agencies for the purpose of delegating immigration enforcement functions to select officers.
      - Allows a qualified state or local law enforcement officer to be designated as an "immigration officer" for the purposes of enforcing federal immigration law
      - Authority to investigate, identify, apprehend, arrest, detain, transport, and conduct searches

National Security Databases

CLASS	DOS Consular Lookout and Support System – flag dangerous and other inadmissible persons
IBIS	CBP's Interagency Border Inspection System – consolidates records from 20+ federal law enforcement and intelligence for "interoperability" (i.e., more extensive screening at admission)
TSC	(2003) FBI'S centralized Terrorist Screening Center
ASC	CIS Application Support Centers (digital fingerprints/photos)
APIS	Advance Passenger Information System for airlines/vessels
NSEERS	"Special registration" for new arrivals and "call-in registration"
US-VISIT	Visitor and Immigrant Status Indicator Technology to create an automated entry and exit control system at POEs
SEVIS	Student and Exchange Visitor Information System that monitors students and exchange visitors (F, J and M) from time of receiving documents to time of graduating and leaving school

Immigration within the Criminal Justice System

- From arrest to conviction to probation, ICE may get notice of individual's inadmissibility or deportability and issue a Notice to Appear
- Immigration Detainer: 8 C.F.R. Sec. 287.7
  - ICE request to a state or local jail or prison that such agency advise ICE, prior to release of the alien, so that ICE can "arrange to assume custody, in situations when gaining immediate custody is either impracticable or impossible." Additional period of custody *cannot exceed 48 hours*, excluding Saturdays, Sundays, and holidays.
  - NOT MANDATORY (*See Liranzo v. United States*, 690 F3d 78, 82 [2d Cir 201)])
  - See NYSDA Advisory, "Immigration Detainers: What You Need to Know" at http://www.nysda.org/docs/PDFs/CIDP/NYSDA%20DETAINER%20ADVISORY.pdf

NTA Policy Memo

- On June 28, 2018, USCIS issued a new Notice to Appear (NTA) policy memorandum by USCIS for denied applications.
- Starting Oct. 1, 2018, USCIS authorized to issue NTAs on denied status-impacting applications, including, Application for Permanent Residence and Application to Extend/Change Nonimmigrant Status.
- Starting Nov. 19, 2018, USCIS authorized to issue NTAs based on denials of humanitarian-based forms of immigrations relief.
- USCIS will not implement the June 28, 2018, NTA Policy Memo with respect to employment-based petitions at this time. Existing guidance for these case types will remain in effect.

Removal

- Expedited Removal
  - Statutorily allowed for any immigrant who an immigration officer (ICE or CBP) determines is undocumented or has committed fraud or misrepresentation in the US, and has been physically present in the US for less than 2 years
  - Under Obama and earlier administrations, limited (e.g. Obama 2 weeks and within 100 miles of border), but Trump administration expanded to full statutory allowance
  - Immigration officer makes decision re: removability
  - Review by an Immigration Judge only if:
    - Claim of asylum (i.e., claim of fear of persecution/torture); or
    - Claim of LPR, refugee, asylee status or U.S. citizen
- Removal Proceedings
  - Allows for due process wherein an immigrant believed to be removable is allowed to present his/her case before an immigration judge in an adjudicatory proceeding

Removal Proceeding Basics

- Administrative proceeding to determine an individual's removability under United States immigration law.
- Conducted in Immigration Court by an Immigration Judge.
- The immigrant charged with removability is called the respondent.
- Commenced by a Notice to Appear (next slide).
- Must Admit or Deny allegations in NTA

Right to Counsel

- Respondents have the right to be represented at no expense to the Government by counsel of the alien's choosing who is authorized to practice in such proceedings (see INA §240(b)(4)(A)).

- If respondent cannot afford legal counsel - must be informed of free legal services in the area (see 8 C.F.R. §240.10(a)(2)).

Bond Eligibility

- Some individuals are subject to "Mandatory Detention"
- ICE makes the initial determination whether to:
  - Grant "conditional parole" (i.e. bond with no monetary requirements)
  - Grant bond at no lower than $1,500
  - Deny bond
- Individual can accept ICE decision **or** make a request for judicial review
  - Judge can't grant bond if mandatory detention is required and can't grant parole—only bond
  - Must show not a danger to people or property and not a flight risk
- If a judicial determination has been made, an individual can only make an additional bond request if "circumstances have materially changed"

OBTAINING LAWFUL STATUS

ISABELLE THACKER

TOPICS

- Employment
- Diversity Visa
- Family Based
- Humanitarian
  - Refugee/Asylum
  - Violence Against Women Act (VAWA)
  - U/T Non-Immigrant Status
  - Special Immigrant Juvenile Status
  - DACA
  - Temporary Protected Status

EMPLOYMENT

- There are many types of employment visas.
- Some lead to being able to apply for a Green Card/Permanent Resident Card.
- All are tied to employment/employer.

DIVERSITY VISA PROGRAM

- Department of State administers the Diversity Visa Program.
- Open to people from countries with a historically low rate of immigration.
- Department of State lists countries that are eligible each year.
- 55,000/year, must meet education/work requirement, free to enter lottery, and runs from beginning of October-November each year.
- If chosen, must pay fees and consular process and be admissible.
- Must enter the US by a certain date.

FAMILY BASED: Petitions for Family Members in the US

- Petitioner establishes qualifying relationship for US immigration purposes
  - Petitioner must be US citizen or lawful permanent resident
  - US citizen may apply for:
    - Spouse or fiancé
    - Parents, if US citizen is over 21
    - Children (unmarried and under 21)
    - Married sons and daughters
    - Adult brothers and sisters
  - Lawful permanent resident may apply for:
    - Unmarried Sons and daughters (over 21)
    - Spouses
    - Children (unmarried and under 21)

FAMILY BASED: Adjustment of Status or Consular Process

- Adjustment of Status:
  - Certain family members with an approved petition may become a Lawful Permanent Resident without leaving the US.
    - Must be an immediate relative (spouse, parent, unmarried child) of a US citizen;
    - Must have own approved petition, may not be a derivative;
    - Must have entered the US lawfully, even if out of status now.
- Consular Processing:
  - Certain family members with an approved petition must have interview at a consulate abroad.
    - Immediate relatives who entered without inspection (will likely need a waiver of 3-10 Yr. Bar)
    - Spouses and children of LPRs
    - Sons & daughters (married or unmarried over 21)
    - Siblings of USC
  - There is a statutory limit to the number of visas permitted each year; depending on category and country (Preference Category), wait times can be many, many years.
    - Spouses and children of LPRs from Mexico who are now receiving visas waited 22+ years

Why Don't They Just Wait In Line?

- Wait times depend on preference category and county of origin
- Spouse or Child (unmarried and under 21) of U.S. Citizen –> no wait
- Unmarried Sons/Daughters (21 or over) of U.S. Citizen have been waiting
  - From Europe -> 6 years
  - From India or China -> 6 years
  - From Mexico -> 22 years
- Married Sons/Daughters (any age) of U.S. Citizen have been waiting
  - From Europe -> 12 years
  - From China -> 12 years
  - From Mexico -> 23 years

Why Don't They Just Wait In Line? (Cont.)

- All family preference categories
  - 3.9 million people in line
  - Drives even longer wait times in the future (estimated)

- Married child of U.S. Citizen entering process **now** will wait:
  - From Mexico -> 62-102 years
  - From Philippines -> 61-98 years
  - From everywhere else ->21-23 years
- Brothers and Sisters of U.S. Citizen
  - From Mexico -> 97 years
  - From Philippines -> 32 years

FAMILY BASED: Public Charge

- On February 24, 2020 the new public charge rule took effect.
- The new public charge rule requires the petitioner (US citizen or LPR) and the beneficiary (immigrant) to show that they have greater financial resources and abilities than had been required for the previous 20 years.
- Public charge is a ground of inadmissibility for most family members looking to immigrate or gain status in the US.

HUMANITARIAN PROGRAMS

"USCIS [US Citizenship and Immigration Services] provides a number of humanitarian programs and protection to assist individuals in need of shelter or aid from disasters, oppression, emergency medical issues and other urgent circumstances." uscis.gov

REFUGEE

INA §101(a)(42)

- Any person who is **outside their country** of nationality, or if none the country of last habitual residence,
- who is **unable or unwilling** to avail themselves of the protection of that country because…
- of **persecution** or a **well-founded fear of persecution** on account of **race**, **religion**, **nationality**, **membership in a particular social group**, **or political opinion**…

REFUGEE

- Refugee:
  - Is located outside of the United States;
  - Is of special humanitarian concern to the United States;
  - Demonstrates that they were persecuted or fear persecution due to **race**, **religion**, **nationality**, **political opinion**, or **membership in a particular social group** ;
  - Is not firmly resettled in another country; and
  - Is admissible to the United States.

ASYLUM APPLICANT:

- A person *may* be granted asylum if they:
  - Are a **refugee** within the meaning of INA§101(a)(42)
  - Filed for asylum within **one year of arrival** in the US (some exceptions)
  - Warrant a favorable exercise of discretion
  - Are not subject to statutory bars
- Once an asylum applicant is granted asylum they become an asylee.

- Refugees/Asylees:
  - Can work legally in the US;
  - Can apply to bring family members over; and
  - Can apply for Green Card after being in US for one year as a refugee or asylee.

VIOLENCE AGAINST WOMAN ACT: VAWA

- WHO QUALIFIES TO FILE A VAWA SELF-PETITION?
  - Spouse of abusive USC or LPR
  - Spouse (not abused) of a USC or LPR if child abused
  - Child of an abusive USC or LPR
  - Parent of an abusive USC

VAWA SELF-PETITION BY SPOUSE

- Elements:
  - Legal status of abuser (LPR or USC)
  - Valid marriage
  - Good-faith marriage
  - Joint residence
  - Battery or extreme cruelty
  - Good moral character

I-751 BATTERED SPOUSE WAIVER

- If a person receives a green card through a marriage that is less than two years old when the case is approved, they will only receive a two-year conditional card. Before the card expires, the couple must file together to remove the conditions. If the petitioner spouse has abused the immigrant spouse, the immigrant spouse can file alone and request a waiver of their spouse's signature.
- Must prove battery or extreme cruelty, similar to VAWA.
- Other waiver grounds: divorce, petitioner death, hardship

U VISA/STATUS:

- **What is U nonimmigrant status?**
  - Available to noncitizen victims of certain crimes
  - Lasts 4 years
  - Provides work authorization
  - Allows family reunification
  - Creates pathway to lawful permanent residence (i.e., green card) after 3 years of nonimmigrant status

U Eligibility

- **Statutory elements (INA § 101(a)(15)(U))**
  (1) Victim of qualifying criminal activity
  (2) Crime occurred in the U.S. or violated U.S. law
  (3) Possesses information about qualifying criminal activity
  (4) Helpful to law enforcement, court, or investigative body with investigating or prosecuting qualifying criminal activity
  (5) Suffered substantial physical or mental abuse as a result of a qualifying crime (may be two different qualifying crimes); and
  (6) Not inadmissible

U VISA CHALLENGES

- In order to file a "U Visa" application, one must get law enforcement to sign a Certification saying applicant cooperated in investigation of crime. Some law enforcement agencies are more willing to sign than others.
- There is an annual cap of 10,000 U Visas/year. There is currently approximately a 5 year wait before a case is reviewed and if approvable placed on a wait list, and eligible for work authorization. There is then an additional 7 year wait before application adjudicated.

T VISA/STATUS

- **What is T nonimmigrant status?**
  - Available to noncitizen victims of sex or labor trafficking
  - Lasts 4 years
  - Provides work authorization
  - Allows family reunification
  - Creates pathway to lawful permanent residence (i.e., green card) after 3 years of having nonimmigrant status or if investigation/prosecution of trafficking done, whichever comes first

T ELIGIBILITY

- 5,000 visas per year for persons who are:
  - Victim of a "severe form of trafficking in persons";
  - "Physically present on account of" trafficking in persons;
  - Complied with any "reasonable request" for assistance in an investigation or prosecution of acts of trafficking, except
    - 18 years or younger; or
    - Unable to cooperate due to physical or psychological trauma; and
  - Would suffer "extreme hardship involving unusual and severe harm upon removal."

SPECIAL IMMIGRANT JUVENILE STATUS: SIJS

- Special Immigrant Juveniles Status (SIJS)
  - Children (under 21 and unmarried) in the US without legal status;
  - Abused, abandoned or neglected by a parent; not in best interests to return to home country;
  - State Court makes special findings about abuse, abandonment, or neglect;
  - USCIS decides if juvenile eligible for SIJS;
  - Juvenile that granted SIJS may apply for Lawful Permanent Residence; and
  - Juvenile cannot then petition for either parent, even if parent did not abuse, abandon or neglect child.

DEFERRED ACTION FOR CHILDHOOD ARRIVALS: DACA

- June 2012 President Obama announces DACA
  - USCIS began to accept applications from individuals who met requirements
  - Approximately 800,000 people currently have DACA
- September 2017 (former) Attorney General Sessions announced termination of DACA
- January 2018, federal courts issued injunctions and USCIS started accepting renewals of DACA
- Currently no new DACA applications are being accepted

TEMPORARY PROTECTED STATUS: TPS

- Temporary Protected Status:
  - The Secretary of the Department of Homeland Security may designate TPS if temporary conditions in a country make it unsafe for the country's nationals to return safely, like:
    - Civil War;
    - Natural Disaster (earthquake, hurricane, etc.); or
    - Epidemic.
  - People granted TPS:
    - Cannot be removed from the US;
    - Can obtain employment authorization;
    - Can be granted travel authorization; but
    - Cannot be granted a Green Card based on TPS alone.

TPS

- Countries with TPS designation: lots of injunctions and litigation pending
  - El Salvador
  - Haiti
  - Honduras
  - Nepal
  - Nicaragua
  - Somalia
  - Sudan
  - South Sudan
  - Syria
  - Yemen

Current Events

PROFESSOR AVA AYERS

Border restrictions

- **Family separation**
- **Metering**: a form of "asylum turnback" that involves limiting the number who can apply for asylum per day at specific points of entry
  - (Injunction stayed)
- **The "Migrant Protection Protocols" aka "Remain in Mexico"**: Once you apply for asylum, you're sent to wait in Mexico, sometimes far from where you enter
  - (Injunction stayed)
- **The Asylum Transit Ban** (denying asylum-seekers who passed through a third country)
  - (Enjoined by the 9th Circuit)

Coronavirus-related restrictions

- **ICE enforcement**: back to priorities
- **Proclamations limiting entry** from countries overseas (China; Iran; Schengen Area; UK and Ireland
- **Border closures**
  - Asylum-seekers turned away
- **Lawsuits seeking release** for detainees' safety
- **Processing offices closed**

Deferred Action for Childhood Arrivals

- SCOTUS cases pending: Trump v. NAACP, McAleenan v. Vidal, and Department of Homeland Security v. Regents of the University of California.
- Currently, DHS is accepting renewals only
- DACA recipients are eligible for unemployment benefits in NY, and those benefits will not be counted for purposes of the new Public Charge rule.

Public Charge

- Denial of a visa or green card for anyone deemed likely to become a "public charge."
- The new rule significantly expands how this determination is made.
- Current state: in effect since Feb. 24, 2020, after SCOTUS stayed the injunctions.

Driver's Licenses: The Green Light Law

- New York's Green Light law: L. 2019, ch. 37.
  - Eligibility for a driver's licenses no longer depends on immigration status; and
  - DMV generally can't share information with immigration authorities.
- Lawsuits by county clerks:
  - Dismissed on standing grounds.

Questions?

- The Legal Project: 518-435-1770
  - Mary Armistead, marmistead@legalproject.org
  - Michelle Lee, mlee@legalproject.org
  - Jon Lemelin, jlemelin@legalproject.org
  - Isabelle Thacker, ithacker@legalproject.org
  - Marien Levy, mlevy@legalproject.org

- Albany Law School Government Law Center: 518-445-2329
  - Professor Ava Ayers, aayer@albanylaw.edu

OVERVIEW OF THE DEPORTATION PROCESS

A Guide for Community Members & Advocates

By Em Puhl

The immigration system is very complex and opaque, containing many intricate moving parts. Most decisions that result in an individual's deportation take place behind closed doors or in remote geographic locations by a variety of government officials. Additionally, the laws, regulations, policy memos, executive orders, and international treaties that regulate immigration detention, relief from deportation, and due process for noncitizens are complex and, at times, contradictory. It is a Kafkaesque system that is prone to human error and requires strong advocacy by community members and advocates to protect a noncitizen's rights along the way.

This advisory[1] gives an orientation to the deportation[2] process and breaks it down into four steps that typically happen in an immigrant's experience with the deportation system. The amount of time that each step takes for an individual noncitizen varies; the entire process may occur in a matter of hours or one step could take years or decades. Additionally, some individuals may not ever reach the end of the process because they are granted immigration status, the government decides not to deport the person, or international protections do not allow the person to be deported to their country.

The immigration system is made up of an alphabet soup of agencies across multiple Executive Branch departments, each with distinct roles. Below is a list of agencies that are involved in the deportation system in the United States:

Department of Homeland Security

- Immigration and Customs Enforcement (ICE)
- Customs and Border Protection (CBP)
- U.S. Citizenship and Immigration Services (USCIS)

Department of Justice

- Executive Office of Immigration Review (EOIR):
  - Immigration Judges (IJs)
  - Board of Immigration Appeals (BIA)

Department of Health and Human Services

- Office of Refugee Resettlement (ORR):
  - oversees detention of unaccompanied minors (UACs)

[1] Thanks to Aruna Sury and Grisel Ruiz for their help with this advisory.
[2] After 1996, deportation orders are officially referred to as "removal orders." However, much of the immigration advocate community refers to the physical removal of a noncitizen as "deportation." This advisory uses both of these terms interchangeably.

Step 1: ICE Finds a Person Who is Potentially Deportable

ICE cannot try to remove someone until they find a person whom they want to try to deport.[3] Although the constitution prohibits ICE from arresting and detaining a person because of their perceived ethnicity or because they speak a particular language, ICE officers often use these factors to identify potential noncitizens.[4] Below are some common situations when ICE may attempt to interact with a person and put them into the deportation process:

A. AN INDIVIDUAL IS STOPPED AND ARRESTED BY ICE/CBP AGENTS

CBP and ICE agents routinely stop and ask individuals for proof that they were not born in the United States or do not have a lawful immigration status. This can happen at the border or almost anywhere inside the United States,[5] including:

- Courthouses
- Amtrak trains, Greyhound buses, and stations
- Traffic stops
- Homes and workplaces

If a person shares information that they were born outside of the United States or have no immigration status, ICE or CBP can arrest them and begin the deportation process. To avoid this, it is important for individuals to assert their Fourth Amendment right to remain silent when they are stopped by DHS officers.

B. LOCAL LAW ENFORCEMENT GIVES ARREST INFORMATION TO ICE

A variety of laws, policies, and memoranda facilitate cooperation between ICE and local law enforcement, including police, sheriffs, highway patrol, and public transit agencies.[6] Some policies allow local law enforcement to share information about people whom they have arrested and detained or allow ICE to physically look for people inside of a local jail or state prison. Other policies allow local law enforcement to act as ICE officers and arrest people for violations of immigration law. This cooperation can cause people to be physically transferred by local law enforcement to ICE facilities, or allow ICE officers to apprehend a person at the moment that they are released from criminal custody.

C. USCIS DENIES AN APPLICATION FOR IMMIGRATION STATUS

Many people voluntarily give information about their nationality and immigration history when they apply for some form of lawful immigration status, including applications to become a permanent resident (green card holder) or to become a citizen. When USCIS denies an application, the agency can notify ICE that the person violated an immigration law or does not have any lawful status.[7]

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[3] For an overview of ICE enforcement activities and how to organize against it, see ILRC and United We Dream, *Ending Local Collaboration with ICE: A Toolkit for Immigrant Advocates* (August 2015), https://www.ilrc.org/sites/default/files/resources/toolkit_final.compressed.pdf [hereinafter *Ending Local Collaboration*].

[4] Individuals who are arrested by ICE due to racial profiling may be able to file a motion to suppress if they are in removal proceedings. For more information, see ILRC, *Motions to Suppress Supplement: Developments in Circuit Case Law* (December 2017), https://www.ilrc.org/sites/default/files/resources/motion_to_suppress-update-2017.pdf.

[5] ICE has a policy limiting enforcement activity in sensitive locations such as schools and churches. For more information, see U.S. Immigration and Customs Enforcement, *FAQ on Sensitive Locations and Courthouse Arrests*, https://www.ice.gov/ero/enforcement/sensitive-loc (last visited December 18, 2018).

[6] See *Ending Local Collaboration*, at 2-6.

[7] USCIS may also decide to put someone in immigration court proceedings by issuing a Notice to Appear (NTA). See U.S. CITIZENSHIP & IMMIGRATION SERV., PM-602-0050.1, UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS (June 28, 2018), https://www.uscis.gov/news/alerts/uscis-begin-implementing-new-policy-memorandum-notices-appear.

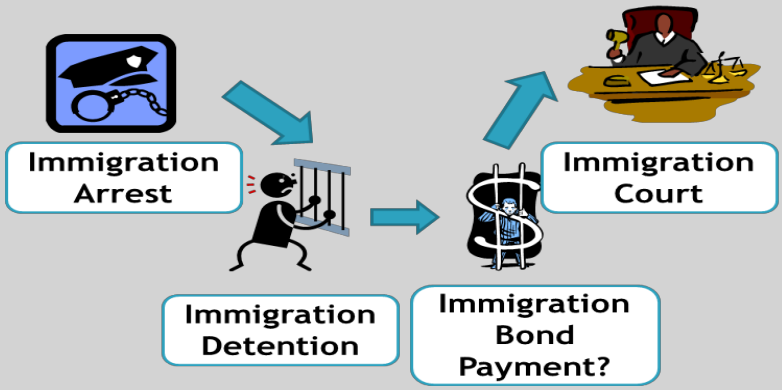
USCIS can also give this information to ICE before they deny an application. In some cases, ICE may arrest an individual even before USCIS denies an application.

D. A PERSON SEEKS TO ENTER THE UNITED STATES AT THE BORDER

When a person arrives at an airport or a land border crossing, they must show documents allowing them to enter the United States, such as a U.S. passport, visa, or lawful permanent resident (LPR) card, or advance parole document. CBP may decide that the person is deportable when it reviews its databases or interviews the person at the time of attempted entry. A person who fears persecution in their country of citizenship can also tell a CBP officer that they want to apply for asylum if they do not have any documents to enter the country. This person will likely be interviewed by an asylum officer to see if they qualify for asylum or other protection.[8] However, some people whose case have humanitarian considerations may instead be paroled into the United States without going through this interview.

NOTE: Federal law allows DHS to detain any individual while they determine whether the person is a noncitizen and deportable. This person may stay in detention for their entire immigration court proceedings, and the law even requires some people to be detained during this process. However, DHS always has the discretion to release most people on their own recognizance or on parole. In this case, DHS may instead decide to give the person a Notice to Appear (NTA)[9] or give them an appointment for Deferred Inspection.[10]

Detained individuals who are not released by DHS can request a bond be set by ICE or an immigration judge, or ask a federal court to order their release.[11] Some courts have limited the detention of vulnerable groups for long periods of time, such as children and people with mental health issues.[12]



DHS may hold the person in a processing facility, holding facility, or field office. They may also be detained for long periods of time in a private detention center, county jail or state or federal prison.[13]

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[8] This is also known as the credible fear process. For more information, see Human Rights First, *Credible Fear: A Screening Mechanism in Expedited Removal* (February 2018), https://www.humanrightsfirst.org/sites/default/files/Credible_Fear_Feb_2018.pdf.

[9] A Notice to Appear is a charging document issued by DHS that initiates removal proceedings under section 240 of the Immigration and Nationality Act (INA). 8 C.F.R. § 1003.14.

[10] See U.S. Customs and Border Protection, *Deferred Inspection*, https://www.cbp.gov/contact/deferred-inspection/overview-deferred-inspection (last visited December 18, 2018).

[11] For more information about bond hearings, see ILRC, *Representing Clients in Bond Hearings: An Introductory Guide* (September 2017), https://www.ilrc.org/sites/default/files/resources/bond_practice_guide-20170919.pdf.

[12] For more information about limits to detention of immigrants with mental health conditions, see American Civil Liberties Union, *Franco v. Holder*, https://www.aclusocal.org/en/cases/franco-v-holder.

[13] For more information about immigration detention in the United States see: https://www.freedomforimmigrants.org/detention-statistics/.

Step 2: DHS Decides Whether It Must Start a Removal Proceeding or Can Immediately Deport the Person

Once DHS finds a person who is not a citizen and may be deported, DHS must decide which process it must use to legally deport the person. The agency must also decide whether it is a priority to deport the person. DHS always has prosecutorial discretion, which means that, even if an ICE agent finds someone who can be deported, this agent can choose not to continue the deportation process because of agency priorities. Sometimes this is referred to as "deferred action."[14] Note that prosecutorial discretion is less common under the current administration, due to an executive order declaring that every person who violates immigration laws should be a priority for removal.[15]

If ICE decides that the person is a priority for deportation, it may do one of three things:

A. START A REMOVAL CASE IN IMMIGRATION COURT

Most noncitizens who are encountered by ICE inside of the United States have the right to appear in front of an immigration judge. This legal process is called "removal proceedings," which are started when DHS files an NTA with an immigration court. Once a person is in immigration court, they can present a defense to being deported, either because they are a U.S. citizen or have not violated the immigration laws. Some individuals who have violated immigration laws can apply for immigration status that allows them to stay in the United States.[16] See Step 3 for more information about the immigration court process.

> **CAUTION!** ICE tries to intimidate or confuse people into agreeing to give up the right to see an immigration judge and many are deported without the opportunity to fight their case in immigration court. Therefore, a person who is arrested by ICE should **never sign any document** before consulting with an attorney. Many people have legal options to avoid deportation but do not know about these options until they speak with an attorney.

B. GIVE THE PERSON AN "EXPEDITED" REMOVAL ORDER

Under the immigration laws, people who are arrested by CBP on the border and do not have a valid visa or asylum claim can be deported within hours without ever going in front of a judge.[17] Many people who crossed the border without permission have received an expedited removal order when they were caught by CBP and taken back to Mexico or another country. It is important for people stopped on the border to request their records from CBP to confirm whether they have received an expedited removal order, as this may affect their immigration options in the future.

[14] Deferred Action for Childhood Arrivals (DACA) is an example of this use of prosecutorial discretion.

[15] For more information about current DHS enforcement priorities, see American Immigration Council, *Summary of Executive Order "Enhancing Public Safety in the Interior of the United States"* (May 19, 2017), https://www.americanimmigrationcouncil.org/immigration-interior-enforcement-executive-order.

[16] For an overview of defenses in removal proceedings, see ILRC, *Removal Defense*, https://www.ilrc.org/removal-defense (last visited December 18, 2018).

[17] For an overview of the expedited removal process, see American Immigration Council, A PRIMER ON EXPEDITED REMOVAL (February 3, 2017): https://www.americanimmigrationcouncil.org/research/primer-expedited-removal.

C. ENFORCE A PRIOR REMOVAL ORDER

If a person already has a removal or deportation order, they generally do not have the option to go to immigration court. Instead, DHS can use the removal order to deport the person almost immediately. If the person has re-entered the United States without permission after being officially deported (or leaving after receiving a deportation order), DHS can "reinstate" this original removal or deportation order and use it to deport the person over and over again.

> **NOTE:** A person who has a reinstated removal order can still ask for protection from removal if they fear harm or torture in their home country.[1] These individuals will still have a removal order, but they can live in the United States because international law does not allow the United States to transport them back to their home country. During this process, the person may be detained by ICE without the right to an immediate bond hearing.
>
> Additionally, some people may be able to restart their case in immigration court through a motion to reopen. This may be an option if the person did not know they were in removal proceedings, or the reason they were initially ordered deported is no longer valid. Individuals with a removal or deportation order should speak to an immigration expert about their legal options.

Step 3: The Court System Decides Whether the Person Can Legally be Deported

If a person is eligible to fight their case before an immigration judge and has not given up this right, they will go through removal proceedings in immigration court. Although the person in proceedings[18] has a right to be represented by an attorney, the government does not provide an attorney to most people in immigration court.[19] However, ICE is represented by an attorney who prosecutes the case.

Removal proceedings in immigration court are a two-step process:[20]

1. THE COURT HOLDS A "MASTER" HEARING (OR MULTIPLE MASTER HEARINGS)

During this stage, DHS must prove that the person can be deported because they are not a U.S. citizen and have violated immigration laws. For individuals who do not currently have a lawful immigration status, DHS must only prove the country where the person was born, also referred to as their "alienage."[21] The immigration judge may also take away a person's previous immigration status, such as a visa or LPR status.[22] A person might be ordered deported in this hearing if they ask to be deported, or do not have any applications to file to stay in the United States.

2. THE COURT HOLDS AN "INDIVIDUAL/MERITS" HEARING

If the immigration judge decides that the person is not, in fact, a U.S. citizen and can be deported, the person has an opportunity in an individual hearing to apply for immigration status that allows them to stay in the United States.[23] In this hearing, the person presents evidence that they are eligible for immigration status, such as based on a family relationship, fear of persecution, or length of time in the United States.[24]

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[18] A person who has a case in immigration court is called a "respondent."

[19] For more information about appointed counsel in Immigration Court, see American Civil Liberties Union, *Franco v. Holder*,: https://www.aclusocal.org/en/cases/franco-v-holder (last visited December 19, 2018).

[20] Advocates and individuals can call the EOIR Hotline (1-800-898-7180) for information about the current stage of a respondent's case.

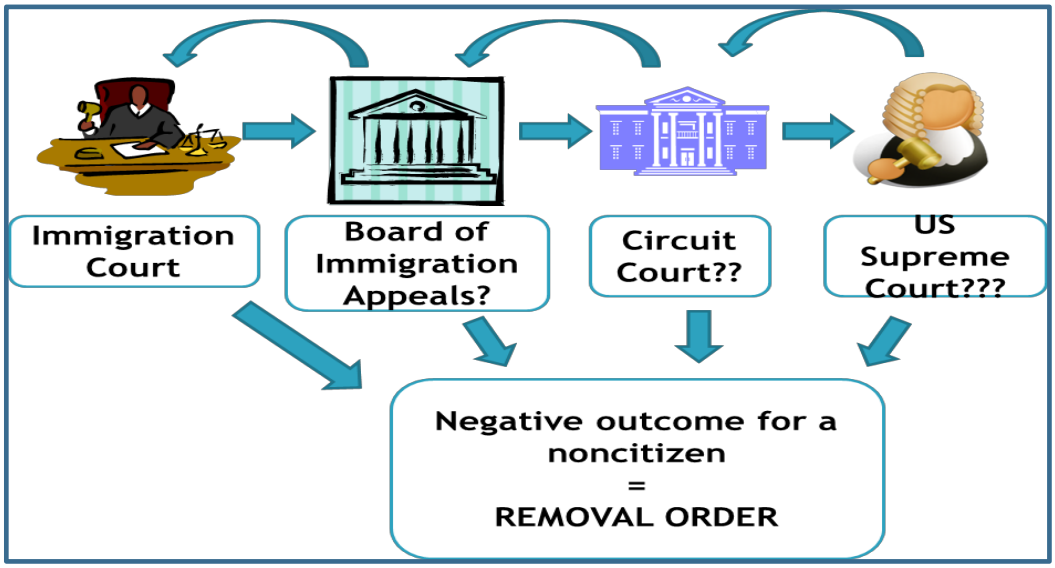
[21] 8 C.F.R. § 1240.8(c).

[22] Note that only a final order of removal can terminate a person's lawful permanent resident status. *Matter of Lok*, 18 I. & N. Dec. 101, 105 (BIA 1981).

[23] While individual hearings often involve decisions on applications for relief from removal, the immigration judge may also hold an individual hearing to decide other evidentiary issues, such as whether the person's arrest by ICE was lawful or whether a marriage was bona fide.

[24] For summaries of options for relief from removal, see ILRC, *Immigration Relief Toolkit For Criminal Defenders: How to Quickly Spot Possible Immigration Relief For Noncitizen Defendants* (January 2016), https://www.ilrc.org/sites/default/files/resources/n.17_questionnaire_jan_2016_final.pdf.

If the noncitizen wins in either step of these proceedings, then the person is allowed to remain in the United States. However, if the noncitizen loses their case at the end of the individual hearing (or decides not to apply for relief from removal), the immigration judge signs a removal order, which allows DHS to remove the person from the United States. Both DHS and the noncitizen have the right to appeal the immigration judge's decision to the Board of Immigration Appeals (BIA), so the immigration judge's decision may not be the final word. If the noncitizen loses at the BIA, they can appeal to the Federal Circuit Court of Appeals, and possibly to the U.S. Supreme Court. If a court finds that the immigration judge issued an incorrect decision, then the case will be sent back to redo the decision, and possibly redo the entire case. Because of this, the court process may take mere weeks, or could last for more than a decade. However, if the last court to decide the case agrees that the person can be deported, the person will have a "final removal order" that allows the government to deport the person.



Step 4: ICE Decides Whether It Can Physically Return the Person to Another Country

Once a person has a final removal order, DHS can legally remove the person from the United States at any time. However, a country must accept the person in order for DHS to deport them. Therefore, not everyone who has a removal or deportation order is actually deported from the United States. It may take a long time to arrange transportation to the person's country of citizenship because of limited DHS resources or the complexity of travel to that particular country. Additionally, individuals may be unable to get a travel document (such as a birth certificate or a passport) from their home country, possibly because of political conflict or a lack of infrastructure in the country to provide confirmation of citizenship. Finally, some governments will not actually allow the United States to deport people back to the country, especially if that government believes the individuals are political dissidents or not citizens of the country at all. As a result, it may be impossible to actually deport a person from the United States, even though U.S. law allows it.

If ICE cannot physically deport a person from the United States, it has three options:

1. DETAIN THE PERSON WHILE ICE ARRANGES TO PHYSICALLY DEPORT THEM

Federal law allows ICE to detain people for up to 180 days after receiving a final removal order, so the person must remain in detention during this time if ICE decides not to release them. After the first 90 days, ICE does a "post-order custody review" to decide whether the person would be a danger to the community or a flight risk (meaning that they would not appear for future appointments with ICE). After 180 days, the person has the right to file a habeas corpus

petition with a federal court and ask to be released. Additionally, people in some parts of the country may be eligible to ask for bond from an immigration judge.[25]

2. RELEASE THE PERSON WHILE ICE ARRANGES TO PHYSICALLY DEPORT THEM

ICE always has the discretion to release a person until they can be deported. This may happen during the immigration court proceedings or after the person is ordered removed by an immigration judge. Typically, people who are released are given an order of supervision, which may include a work permit (Employment Authorization Document) that allows them to lawfully work in the United States. An order of supervision requires a person to check in with ICE periodically so that ICE can decide if it wants to detain the person again or try again to deport them.

3. DELAY DEPORTATION FOR HUMANITARIAN REASONS

Finally, even if ICE can deport the person to a country, ICE can decide to give the person a stay of removal because it is important that the person continue living in the United States. Some reasons for a stay of removal include supporting U.S.-citizen family members, having a serious medical condition, or violence in the country of removal. People who are granted a stay of removal typically also have an order of supervision and a work permit.[26] While many people received a stay of removal in the past, ICE has been revoking many of these in recent years, in a concerted effort to deport as many people as possible.

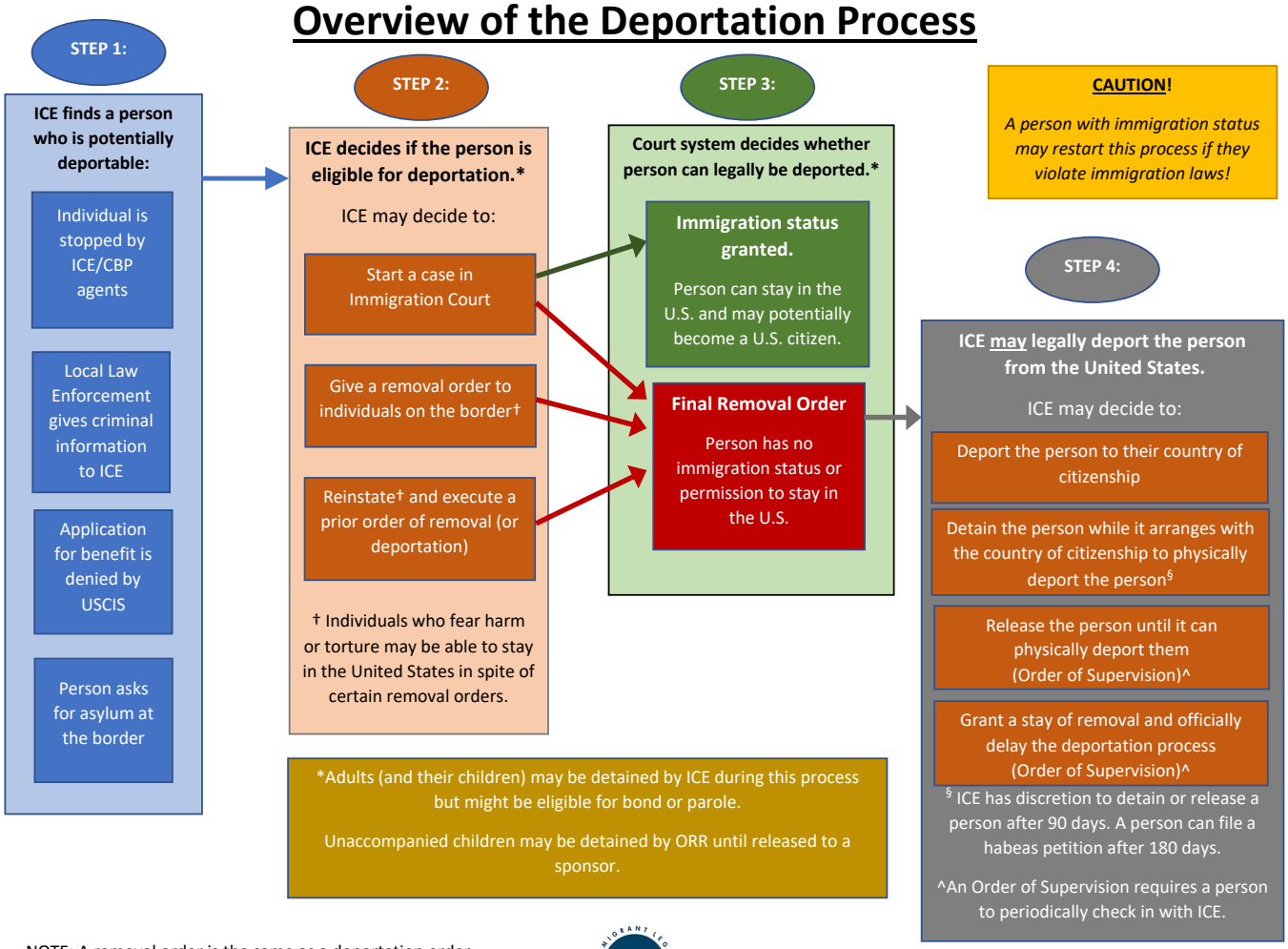
Conclusion

The immigration system is a confusing and opaque structure that is difficult to navigate by immigrants and new advocates alike. This advisory attempts to provide a basic orientation to the deportation process, to help noncitizens and their advocates understand their options and create strategies for the future. See the attached flow-chart for an illustration of the process described in this advisory. For more in-depth information, please consult the sources cited in this advisory, as well as ILRC's removal defense resources: https://www.ilrc.org/removal-defense.

[25] For more information about such bond hearings in the Ninth Circuit, see Van Der Hout, Brigagliano & Nightingale LLP, et al., *Prolonged Detention Bond Hearings in the Ninth Circuit under Aleman Gonzalez v. Sessions* (June 7, 2018), https://centrolegal.org/wp-content/uploads/2018/06/2018.06.07_Aleman-Gonzalez_Practice-Advisory_FINAL.pdf.

[26] For a general overview of judicial and DHS stays of removal, see Catholic Legal Immigration Network, Inc., *Stays of Removal for DACA Recipients with Removal Orders* (March 9, 2018), https://cliniclegal.org/sites/default/files/Stay-PA_1.pdf.

Overview of the Deportation Process



NOTE: A removal order is the same as a deportation order (the official term changed to "removal" in 1997)

December 2018

San Francisco
1458 Howard Street
San Francisco, CA 94103
t: 415.255.9499 f: 415.255.9792

Washington D.C.
1015 15th Street, NW, Suite 600
Washington, DC 20005
t: 202.777.8999 f: 202.293.2849

ilrc@ilrc.org www.ilrc.org

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.

Employment-Based Visa Categories in the United States

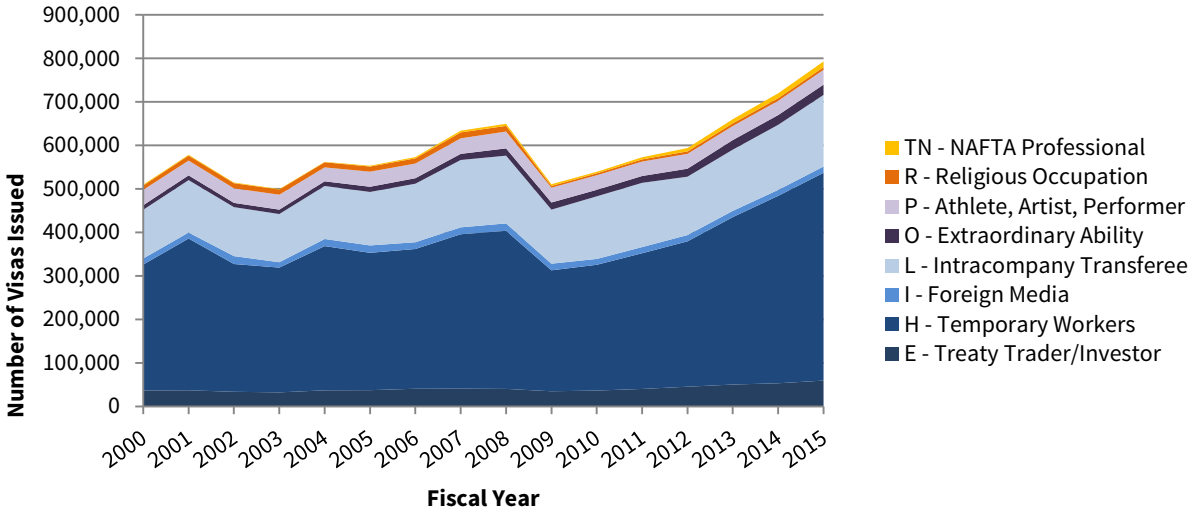
One of the key principles guiding the U.S. immigration system has been admitting foreign workers with skills that are valuable to the U.S. economy. Current U.S. immigration law provides several paths for foreign workers to enter the United States for employment purposes on a temporary or permanent basis. This fact sheet provides basic information about how the employment-based U.S. immigration system works.

Temporary Employment-Based Visa Classifications

There are many different temporary employment-based visa classifications.[1] Most of the classifications are defined in section 101(a)(15) of the Immigration and Nationality Act (INA), and the visa classifications are referred to by the letter and numeral that denotes their subsection of that law. Temporary employment-based visa classifications permit employers to hire and petition for foreign nationals for specific jobs for limited periods. Most temporary workers must work for the employer that petitioned for them and have limited ability to change jobs.[2] In most cases, they must leave the United States if their status expires or if their employment is terminated.

Overall, the total number of temporary employment-based visas issued has increased since Fiscal Year (FY) 2000, with a slight peak in Fiscal Years 2007-8 and a steady increase since FY 2009 (Figure 1).

Figure 1. Nonimmigrant Visas Issued By Select Classifications FY 2000-2015 Note: Totals include spouses and children of primary beneficiaries.



Note: Totals include spouses and children of primary beneficiaries.
Source: U.S. Department of State, "Classes of Nonimmigrants Issued Visas (Including Border Crossing Cards)," Report of the Visa Office, 2000-2015, https://travel.state.gov/content/visas/en/law-and-policy/statistics.html.

The visa classifications vary in terms of their eligibility requirements, duration, whether they permit workers to bring dependents, and other factors. Table 1 includes information on several of the most common temporary employment-based visa classifications.

Table 1: Characteristics of Common Temporary Employment-Based Visa Classifications

	H-1B	H-2A	H-2B	L-1A & L-1B
Who is eligible?	Certain foreign professionals in "specialty occupations."[3]	Temporary agricultural workers from certain designated countries.[4]	"Seasonal" non-agricultural temporary workers.[5]	Certain foreign workers employed by certain entities abroad that are related to U.S. employers, whose services are being sought by their employers in the United States.[6]
Are there any numerical annual limits?	65,000 per year, plus 20,000 more for foreign professionals with a U.S. master's or higher degree.[7]	No annual limit.[8]	66,000 per year.[9]	No annual limit.
Duration	Initially admitted for a period of up to three years; may be extended for up to six years total.[10]	Initially admitted for period of approved employment; may be renewed for qualifying employment in increments of one year each for a maximum stay of three years.[11]	Initially admitted for a period of up to one year; may be renewed twice for a total of up to three years.[12]	Initially admitted for a period of up to three years; may be extended for up to five (L-1B) or seven (L-1A) years.[13]
Employer requirements	The employer must attest that employment of the H-1B worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.[14] Employers must comply with wage requirements.[15]	The employer must attest that no qualified U.S. workers who can fill the position are available.[16] Employers must comply with recruitment, wage, benefits, housing, transportation, and other requirements.[17]	The employer must attest that no qualified U.S. workers who can fill the position are available.[18] Employers must comply with wage, housing, transportation, and other requirements.[19]	No requirements regarding adverse effects, wages, housing, etc.
May the foreign workers bring their spouses and children under 21?	Yes, spouses and children under 21 may enter on an H-4 visa, and certain spouses are allowed to work.[20]	Yes, spouses and children under 21 may enter on an H-4 visa but may not work.[21]	Yes, spouses and children under 21 may enter on an H-4 visa but may not work.[22]	Yes, spouses and children under 21 may enter on an L-2 visa, and spouses are allowed to work.[23]

Employers must pay filing fees and may need to pay additional fees in order to petition for foreign workers. Table 2 provides information on the various fees associated with key visa classifications. Processing employers' petitions can take several months. Most employers may file a Request for Premium Processing Service (Form I-907) and pay a filing fee of $1,225[24] for petition processing within fifteen days of U.S. Citizenship and Immigration Services (USCIS) receiving the petition.[25] The election of the premium processing service does not provide the petitioner with any advantage with regard to categories with annual numerical limits.

Table 2: Required Fees for Common Temporary Employment-Based Visa Classifications

H-1B	H-2A	H-2B	L-1A & L-1B
$460 filing fee. Employers may be required to pay an additional anti-fraud fee of $500. Employers with at least 50 employees, more than half of whom are in H-1B or L-1 status, may be required to pay an additional fee of $4,000. Certain employers must pay an additional fee of $750 or $1,500 to fund programs to address skill shortages in the U.S. workforce.	$460 filing fee.	$460 filing fee plus $150 anti-fraud fee.	$460 filing fee. Employers may be required to pay an additional anti-fraud fee of $500. Employers who have at least 50 employees, more than half of whom are in H-1B or L-1 status, may be required to pay an additional fee of $4,500.

Source: USCIS, "Instructions for Petition for Nonimmigrant Worker," January 17, 2017, 25-26, https://www.uscis.gov/sites/default/files/files/form/i-129instr.pdf; USCIS, "New Law Increases H-1B and L-1 Petition Fees," last updated January 12, 2016, https://www.uscis.gov/news/alerts/new-law-increases-h-1b-and-l-1-petition-fees.

Permanent Employment-Based Immigration

Lawful permanent residency allows a foreign national to work and live lawfully and permanently in the United States. Lawful permanent residents (LPRs) are eligible to apply for nearly all jobs (*i.e.*, jobs not legitimately restricted to U.S. citizens) and can remain in the country even if they are unemployed. Immigrants who acquired lawful permanent resident status through employment may apply for U.S. citizenship after five years.[26]

The adjustment of status to permanent residency based on employment generally involves a three-step process:

1. First, employers seeking to petition on behalf of foreign workers are commonly required to obtain certification from the Department of Labor (DOL),[27] establishing that there are no U.S. workers available, willing, and qualified to fill the position at a wage that is equal to or greater than the prevailing wage generally paid for that occupation in the geographic area where the position is located. [28]

2. Second, the employer is required to petition USCIS for the foreign worker.[29] Immigrants can petition for themselves under limited circumstances.[30]

3. Third, a foreign worker who is already in the United States in a temporary visa classification may apply for "adjustment of status" to permanent residence upon the approval of the employer's petition, if there is a visa number available.[31] If these conditions have been met and the individual is outside the United States, or is in the United States but chooses to apply for an immigrant visa at a U.S. Embassy or Consulate abroad, the individual files an immigrant visa application, which is processed by a U.S. consular officer.[32]

Most foreign nationals who obtain permanent residency are already in the United States. In FY 2014, 86 percent of employment-based LPRs adjusted to LPR status and 14 percent arrived from abroad.[33]

The overall numerical limit for permanent employment-based immigrants is 140,000 per year.[34] This number includes the immigrants plus their eligible spouses and minor children, meaning the actual number of employment-based immigrants is less than 140,000 each Fiscal Year. The 140,000 visas are divided into five preference categories, detailed in Table 3.

Table 3: Permanent Employment-Based Preference System

Preference Category	Eligibility	Yearly Numerical Limit
1: Priority Workers	"Persons of extraordinary ability" in the arts, science, education, business, or athletics; outstanding professors and researchers; multinational managers and executives.	40,000* or 28.6%
2: Professionals with Advanced Degrees or Exceptional Ability	Members of the professions holding advanced degrees, or persons of exceptional abilities in the arts, science, or business.	40,000** or 28.6%
3: Skilled Workers, Professionals, and Unskilled Workers	Skilled workers with at least two years of training or experience, professionals with college degrees, or "other" workers for unskilled labor that is not temporary or seasonal.	40,000*** or 28.6% "Other" unskilled laborers restricted to 5,000
4: Certain Special Immigrants	Certain "special immigrants" including religious workers, employees of U.S. foreign service posts, translators, former U.S. government employees, and other classes of noncitizens.	10,000 or 7.1%
5: Immigrant Investors	Persons who will invest $500,000 to $1 million in a job-creating enterprise that employs at least 10 full-time U.S. workers.	10,000 or 7.1%
Total Employment-Based Immigrants		140,000 for principals and their dependents

*Plus any unused visas from the 4th and 5th preferences

**Plus any unused visas from the 1st preference

***Plus any unused visas the 1st and 2nd preference

Source: William A. Kandel, *Permanent Legal Migration to the United States* (CRS Report No. R42866) (Washington, DC: Congressional Research Service, 2014), 4, https://www.fas.org/sgp/crs/homesec/R42866.pdf.

Numerical limits and Per-Country Limits

In addition to the annual numerical limit on the number of employment-based immigrant visas, each country is limited to seven percent of the worldwide level of U.S. immigrant admissions, otherwise known as per-country limits.[35] Because of numerical and per-country limits, and because in some preference categories there are more petitions each year than visas available, some individuals must wait a significant period of time to apply for adjustment of status (in the U.S.) or an immigrant visa (abroad) even after the employer's petition is approved by USCIS.

As of September 2016, most preference categories were current for most countries, meaning that visas are available as petitions are received. However, for some employment-based preference categories, there are backlogs for petitions for individuals born in certain countries with high annual levels, such as India, China, Mexico, and the Philippines.[36]

Endnotes

1. Currently there are over twenty-two different types of temporary employment classifications. *See* USCIS, "Temporary (Nonimmigrant) Workers," accessed June 1, 2016, https://www.uscis.gov/working-united-states/temporary-nonimmigrant-workers.

2. Some nonimmigrant visa classifications permit foreign workers to work in the United States without an employer having first filed a petition on the foreign worker's behalf. These include such nonimmigrant classifications as the E-1, E-2, E-3, and TN classifications. *See* USCIS, "Temporary (Nonimmigrant) Workers," accessed June 12, 2016, https://www.uscis.gov/working-united-states/temporary-nonimmigrant-workers.

3. 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1184(i).

4. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188. *See also* Andorra Bruno, *Agricultural Guest Workers* (CRS Report No. R43161) (Washington, DC: Congressional Research Service, 2013), http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R43161.pdf. *See also* USCIS, "H-2A Temporary Agricultural Workers," accessed June 1, 2016, https://www.uscis.gov/working-united-states/temporary-workers/h-2a-temporary-agricultural-workers.

5. USCIS, "H-2B Temporary Non-Agricultural Workers," accessed July 11, 2016, https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers.

6. 8 U.S.C. § 1101(a)(15)(L); *see also* USCIS, "L-1A Intracompany Transferee Executive or Manager," accessed September 8, 2016, https://www.uscis.gov/working-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager; USCIS, "L-1B Intracompany Transferee Specialized Knowledge," accessed September 8, 2016, https://www.uscis.gov/working-united-states/temporary-workers/l-1b-intracompany-transferee-specialized-knowledge.

7. 8 U.S.C. § 1184(g)(1)(A), (g)(5)(C). USCIS also must separately allocate H-1B1 visa numbers under the U.S.-Chile and U.S.-Singapore free trade agreements and subtract that allocation from the 65,000 H-1B annual limit. 8 U.S.C. § 1184(g)(8). Not all H-1B visa numbers are subject to the 65,000 numerical limit. 8 U.S.C. § 1184(g)(5). H-1B workers in the Commonwealth of the Northern Mariana Islands and Guam also are exempt from this limit if the intended employer files the petition before December 31, 2019. USCIS, "H-1B Fiscal Year 2017 Cap Season," accessed June 1, 2016, https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2017-cap-season.

8. 8 U.S.C. § 1188. *See also* Andorra Bruno, *Agricultural Guest Workers* (CRS Report No. R43161) (Washington, DC: Congressional Research Service, 2013), 2, http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R43161.pdf.

9. 8 U.S.C. § 1184(g)(1)(B). 33,000 of the H-2B visas are allocated for the first half of the fiscal year (October–March) and 33,000 for the second half (April–September). 8 U.S.C. § 1184(g)(10). *See* USCIS, "H-2B Temporary Non-Agricultural Workers," accessed June 1, 2016, https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers.

10. 8 U.S.C. § 1184(g)(4); 8 C.F.R. § 214.2(h)(15)(ii)(B)(1). Extensions beyond the sixth year are available if certain requirements are met when the H-1B worker is in the process of becoming a permanent resident (for a green card). *See* § 106 of the American Competitiveness in the Twenty-First Century Act (P.L. 106-313, as amended by P.L. 107-273).

11. 8 C.F.R. §§ 214.2 (h)(5)(viii)(B), (h)(15)(ii)(C); USCIS, "H-2A Temporary Agricultural Workers," accessed June 1, 2016, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=889f0b89284a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=889f0b89284a3210VgnVCM100000b92ca60aRCRD.

12. 8 C.F.R. §§ 214.2(h)(6)(ii)(B), (h)(15)(ii)(C); USCIS, "H-2B Temporary Non-Agricultural Workers," accessed June 1, 2016, https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers.

13. 8 U.S.C. § 1184(c)(2)(D); 8 C.F.R. §§ 214.2(*l*)(11)-(12). USCIS, "L-1A Intracompany Transferee Executive or Manager," accessed June 1, 2016, https://www.uscis.gov/working-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager. *See also* USCIS, "L-1B Intracompany Transferee Specialized Knowledge," accessed August 15, 2016, https://www.uscis.gov/working-united-states/temporary-workers/l-1b-intracompany-transferee-specialized-knowledge.

14. 8 U.S.C. § 1182(n)(1)(A)(i)-(ii).

15. 8 U.S.C. § 1182(n)(1)(A)(i). Employers must pay the foreign worker the higher of the prevailing wage level for the occupational classification in the area, or the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment. *See also* U.S. Department of Labor, "Fact Sheet #62G: Must an H-1B worker be paid a guaranteed wage?," accessed June 16, 2016, https://www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62G.pdf.

16. 8 U.S.C. § 1188(a). USCIS, "H-2A Temporary Agricultural Workers," accessed June 1, 2016, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=889f0b89284a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=889f0b89284a3210VgnVCM100000b92ca60aRCRD.

17. 8 U.S.C. § 1188(a).To demonstrate that no U.S. workers are available, the employer must, at a minimum, (1) advertise the position in a newspaper on two separate days, (2) contact any U.S. workers from the previous year and solicit their return, and (3) conduct additional

recruitment. The employer is required to provide or pay for housing, meals or facilities that allow the foreign worker to prepare meals, and transportation. The employer must also provide tools, equipment, and supplies. Upon the completion of 50 percent of the work contract, the employer is required to reimburse the worker for travel expenses, including meals, and lodging expenses where it is necessary. *See* U.S. Department of Labor, "Employer Guide to Participation in the H-2A Temporary Agricultural Program," accessed June 15, 2016, https://www.foreignlaborcert.doleta.gov/pdf/H-2A_Employer_Handbook.pdf.

18. USCIS, "H-2B Temporary Non-Agricultural Workers," accessed June 1, 2016, https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers.
19. The employer may also have to provide tools, equipment, and supplies. The employer may be required to pay for the foreign worker's lodging expenses. Upon the completion of 50 percent of the work contract, the employer is required to reimburse the worker for travel expenses, including meals, and lodging expenses where it is necessary. Department of Labor, "Office of Foreign Labor Certification 2015 H-2B Interim Final Rule (IFR) Job Order Content Checklist," accessed June 15, 2016, https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Job_Order_Checklist.pdf; *see also* 20 C.F.R. § 655.20.
20. USCIS, "DHS Extends Eligibility for Employment Authorization to Certain H-4 Dependent Spouses of H-1B Nonimmigrants Seeking Employment-Based Lawful Permanent Residence," accessed June 1, 2016, https://www.uscis.gov/news/dhs-extends-eligibility-employment-authorization-certain-h-4-dependent-spouses-h-1b-nonimmigrants-seeking-employment-based-lawful-permanent-residence.
21. USCIS, "H-2A Temporary Agricultural Workers," accessed June 1, 2016, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=889f0b89284a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=889f0b89284a3210VgnVCM100000b92ca60aRCRD.
22. USCIS, "H-2B Temporary Non-Agricultural Workers," accessed June 1, 2016, https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers.
23. USCIS, "L-1A Intracompany Transferee Executive or Manager," accessed June 1, 2016, https://www.uscis.gov/working-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager; *See also* USCIS, "L-1B Intracompany Transferee Specialized Knowledge, " accessed August 15, 2016, https://www.uscis.gov/working-united-states/temporary-workers/l-1b-intracompany-transferee-specialized-knowledge.
24. USCIS, "I-907, Request for Premium Processing Service," accessed June 1, 2016, https://www.uscis.gov/i-907.
25. USCIS, "How Do I Use the Premium Processing Service?" accessed June 1, 2016, https://www.uscis.gov/forms/how-do-i-use-premium-processing-service.
26. Ruth Ellen Wasem, *U.S. Immigration Policy on Permanent Admissions* (CRS Report No. RL32235) (Washington, DC: Congressional Research Service, 2010), 5, https://www.fas.org/sgp/crs/homesec/RL32235.pdf (citing 8 U.S.C. § 1151). A worker may be able to apply earlier than 5 years if he or she qualifies under a different naturalization provision.
27. *See* 8 U.S.C. § 1153(b)(3)(C).
28. *See* 8 U.S.C. § 1182(a)(5)(A).
29. *See* 8 C.F.R. § 204.5(a). If a labor certification is required, the petition must be filed within 180 days of the certification. 20 C.F.R. § 656.30(b).
30. Persons of extraordinary ability and persons of exceptional ability seeking a national interest waiver may self-petition. 8 C.F.R. §§ 204.5(h)(1); 204.5(k)(1).
31. Ruth Ellen Wasem, *U.S. Immigration Policy on Permanent Admissions* (CRS Report No. RL32235) (Washington, DC: Congressional Research Service, 2012), 1, https://www.fas.org/sgp/crs/homesec/RL32235.pdf.
32. Ibid.
33. Carla N. Argueta, *Numerical Limits on Permanent Employment-Based Immigration: Analysis of the Per-country Ceilings* (CRS Report No. R42048) (Washington, DC: Congressional Research Service, 2016), 6, https://www.fas.org/sgp/crs/homesec/R42048.pdf.
34. 8 U.S.C. § 1151(d); U.S. Department of State, "Employment-Based Immigrant Visa," accessed June 1, 2016, https://travel.state.gov/content/visas/en/immigrate/employment.html.
35. Ruth Ellen Wasem, *U.S. Immigration Policy on Permanent Admissions* (CRS Report No. RL32235) (Washington, DC: Congressional Research Service, 2012), 5, https://www.fas.org/sgp/crs/homesec/RL32235.pdf, (citing 8 U.S.C. § 1152).
36. U.S. Department of State Bureau of Consular Affairs, "Immigrant Numbers for September 2016," accessed September 14, 2016, 4, https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_September2016.pdf.

The Diversity Immigrant Visa Program: An Overview

Diversity is a core American value, and in 1990, the Diversity Immigrant Visa Program (diversity visa program) was established to encourage immigration to the United States from a broader variety of countries. By creating more diversity in our immigration pool, the program helps balance the current U.S. immigration system's tendency to favor individuals who have close relationships with family members or employers in the United States.[1] People who do not have U.S.-based eligible family members or employers able to sponsor their visas have very few opportunities for permanent, legal immigration to the United States—even if they have other promising attributes that could benefit the country.

This fact sheet provides an overview of the diversity visa program, the requirements and security checks currently in place, and demographic information about recipients.

What Is a Diversity Visa?

Congress established the diversity visa program through the Immigration Act of 1990 in an effort to promote immigration from countries underrepresented in the United States.[2] The number of diversity visas is limited by law to 55,000 per fiscal year, but the annual cap has been reduced to 50,000 since fiscal year 2000.[3] While Congress called this cap a "temporary reduction," it does not have an expiration date. As of 2017, the U.S. government states that this reduction will remain in effect as long as needed, including for 2019.[4]

The diversity visa program makes up to 50,000 visas available each year to natives of eligible countries. The program is well known as the "diversity lottery," since potential visa recipients are randomly selected from the pool of qualified entries.[5] Yet, being randomly selected—or "winning" the lottery—does not guarantee admission to the United States but rather provides the individual an opportunity to apply for the Diversity Visa. The odds of being selected for this opportunity are very small, with an average of 13.3 million people submitting applications each year.[6]

Who Is Eligible for a Diversity Visa?

Only nationals of low-admission countries—defined as any country with fewer than 50,000 natives admitted to the United States in the previous five years—are eligible to enter the diversity lottery. Natives of countries that traditionally send large numbers of immigrants to the United States, such as Mexico, India, and China, are generally not eligible.[7]

Eligible countries are grouped into six geographic regions: Europe; Africa; Asia; Oceania; North America (excluding Mexico); and South America, Mexico, Central America, and the Caribbean.[8] U.S. Citizenship and Immigration Services (USCIS) calculates each region's annual diversity visa allotment using a specific formula and recent immigration statistics. The allocation formula, which is recalculated every year, gives fewer visas to "high-admission" regions, or any region that accounted for more than a sixth of all immigrant admissions to the United States in the previous five years.[9] Additionally, no more than 7 percent of the year's available visas may go to natives of any one country.[10]

To be eligible for a diversity visa, applicants must be admissible to the United States under the Immigration and Nationality Act (INA) and have either a high-school education (or its equivalent) or at least two years of recent qualifying work experience.[11] The applicant or the applicant's spouse must be a native of one of the countries that qualify for the diversity visa program.

The diversity visa program only accepts applications submitted electronically within a short timeframe designated each year. Eligible applicants are limited to one entry per registration period and will be disqualified for submitting multiple entries.[12]

What Security Measures Are in Place for the Diversity Visa Program?

Diversity lottery "winners" have a short period of time to file the necessary paperwork and undergo extensive screening before a visa will be issued, including multiple identity confirmations using biometrics, criminal and security background checks, cross-checks with various watch-lists, and in-person interviews.[13] These requirements and security procedures also apply for any family members (spouses and minor children) whom the lottery winner petitions to bring to the United States as derivatives.

An individual may be issued a visa and admitted into the United States only after passing all electronic and in-person screenings. If visa processing for a lottery winner or an eligible family member is not completed before the end of the fiscal year, the U.S. government will deny the application, and the person loses the opportunity to immigrate to the United States through that year's diversity visa program.[14] While the individual may be eligible to enter the diversity lottery in future years, the chances of again being randomly selected to apply for the visa are slim.

Who Has Received a Diversity Visa?

Each year, diversity visa recipients make up between 4 and 5 percent of all individuals granted Lawful Permanent Resident (LPR) status, or a "green card."[15] In 2015, the year with the most recent available data, there were 47,934 green cards issued to diversity visa recipients and their families. Of those, 25,108 were principal applicants, 11,051 were spouses of principal applicants, and 11,775 were their children.[16] Overall, just over half of diversity visa recipients in 2015 were male, and three-quarters (75 percent) were 20 years of age and older.[17]

The educational and skilled worked experience requirements for the diversity visa program are evident: in 2015, the greatest shares of diversity visa recipients had professional or management-related occupations (37 percent), or were students or children (36 percent).[18]

Which Countries Are Represented among Diversity Visa Recipients?

Each year, USCIS determines visa allocations following the statutory requirements. These parameters help maintain the intended purpose of the Diversity Visa Program—counterbalancing the tendency of the U.S. immigration system to favor certain countries and immigrants.[19] The national origins of diversity visa recipients show that underrepresented areas of the world receive the largest percentage of the visas.[20]

Diversity Visa Recipients Adjusting to Lawful Permanent Resident (LPR) Status
By Region of Country of Birth, Fiscal Year 2015

Native Region	LPRs - all admission categories		LPRs - Admitted under Diversity Visa	
	Total	Percent	Total	Percent
ALL REGIONS	1,051,031	100.0%	47,934	100.0%
Africa	101,415	9.6%	19,659	41.0%
Asia	419,297	39.9%	14,562	30.4%
Europe	85,803	8.2%	11,425	23.8%
North America	366,126	34.8%	667	1.4%
Oceania	5,404	0.5%	721	1.5%
South America	72,309	6.9%	878	1.8%
Unknown	677	0.1%	22	0.0%

Source: American Immigration Council analysis of U.S. Department of Homeland Security data. *2015 Yearbook of Immigration Statistics*, Table 10: Persons Obtaining Lawful Permanent Resident Status By Broad Class Of Admission And Region And Country Of Birth: Fiscal Year 2015.

In Fiscal Year 2015, the single largest number of visas went to Nepal (3,471 visas), followed by Egypt (2,890), the Democratic Republic of Congo (2,596), Ethiopia (2,507), Iran (2,377), and Uzbekistan (2,318).[21]

Endnotes

1. American Immigration Council, "How the United States Immigration System Works," August 12, 2016, https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works.
2. Immigration and Nationality Act § 203(c), Pub. L. 101-649, 104 Stat. 4978 (1990).
3. Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105-100, 111 Stat. 2160 (1997).
4. U.S. Department of State, "Instructions for the 2019 Diversity Immigrant Visa Program (DV-2019)," accessed November 2017, https://travel.state.gov/content/visas/en/immigrate/diversity-visa/instructions.html.
5. U.S. Citizenship and Immigration Services (USCIS), "Green Card Through the Diversity Immigrant Visa Program," last updated February 14, 2014, https://www.uscis.gov/greencard/diversity-visa.
6. Between FY2007 and FY2015, the number of entries received during each annual registration period averaged 13.3 million. American Immigration Council calculation using Department of State Diversity Visa Program Statistics. "DV Statistics: 2007-2009, 2010-2012, 2013-2015," Table: Number of Entries Received During Each Online Registration Period by Country of Chargeability, accessed November 2017, https://travel.state.gov/content/visas/en/immigrate/diversity-visa/diversity-visa-program-statistics.html.
7. U.S. Department of State, "The Diversity Visa Process," accessed November 2017, https://travel.state.gov/content/visas/en/immigrate/diversity-visa/entry.html.
8. 8 U.S.C. § 1153(c)(1)(F).
9. 8 U.S.C. § 1153(c). *See also* Andowah A. Newton, "Injecting Diversity into U.S. Immigration Policy," 1053-1056.
10. Ibid.
11. A high school education or its equivalent is defined as successful completion of a 12-year course of formal elementary and secondary education. Qualifying work experience is defined as having at least two years of work experience within the past five years in an occupation that requires at least two years of training or experience to perform. Immigration and Nationality Act § 203(c), Pub. L. 101-649, 104 Stat. 4978 (1990).
12. U.S. Department of State, "Instructions for the 2019 Diversity Immigrant Visa Program (DV-2019)," accessed November 2017, 2-8, https://travel.state.gov/content/dam/visas/Diversity-Visa/DV-Instructions-Translations/DV-2019-Instructions-Translations/New_DV-2019_Restart_Plain_Language_Instructions_and_FAQs_.pdf.
13. *See* Ibid.; USCIS, "Green Card Through the Diversity Immigrant Visa Program."
14. Ibid.
15. Diversity Visa Program admissions represented, on average, 4.8 percent of new LPRs between 2010 and 2015. American Immigration Council analysis of data from the U.S. Department of Homeland Security (DHS) Office of Immigration Statistics. *See* "U.S. Lawful Permanent Residents," *Annual Flow Reports* 2012 and 2015, available at https://www.dhs.gov/immigration-statistics/lawful-permanent-residents.
16. DHS Office of Immigration Statistics, "Table 7: Persons Obtaining Legal permanent Resident Status by Type and Detailed Class of Admission: FY 2015," published December 15, 2016, https://www.dhs.gov/immigration-statistics/yearbook/2015/table7.
17. DHS Office of Immigration Statistics, "Table 9: Persons Obtaining Legal Permanent Resident Status by Broad Class of Admission and Selected Demographic Characteristics: FY 2015," published December 15, 2016, https://www.dhs.gov/immigration-statistics/yearbook/2015/table9.
18. Ibid.
19. *See* USCIS, "Green Card Through the Diversity Immigrant Visa Program."; U.S. State Department, "Instructions for the 2019 Diversity Immigrant Visa Program."
20. DHS Office of Immigration Statistics, "Table 10: Persons Obtaining Legal Permanent Resident Status by Broad Class of Admission and Region and Country of Birth: FY 2015," published December 15, 2016, https://www.dhs.gov/immigration-statistics/yearbook/2015/table10.
21. Ibid.

HUMANITARIAN FORMS OF RELIEF PART I: U, T, VAWA

By Veronica Garcia

Noncitizen victims of violence, serious crimes, and persecution may be eligible for certain forms of immigration protection and status. These options are often referred to as Humanitarian Forms of Relief. They include: T nonimmigrant status, U nonimmigrant status, VAWA self-petition, asylum, and special immigrant juvenile status.

This practice advisory is one of two that will give an overview of these options, their eligibility requirements, and some factors to consider before applying. This advisory is meant to be an introduction to humanitarian forms of relief: U nonimmigrant status, T nonimmigrant status, and VAWA self-petition. This advisory should be used as general guidance, to identify potential eligibility, and to understand the processes and benefits of each form of relief. For a more detailed analysis on issues related to humanitarian forms of relief, please visit the Immigrant Legal Resource Center website at: https://www.ilrc.org/u-visa-t-visa-vawa.

I. U Nonimmigrant Status:

U nonimmigrant status, often referred to as the "U visa," is available to noncitizens who have been victims of serious crimes in the United States that resulted in substantial physical or mental harm. Individuals granted U status can remain lawfully in the United States, obtain employment authorization, and eventually apply for lawful permanent residence. The U visa was created so that noncitizen victims of crimes would not be afraid to report those crimes.

Law:

The law for U nonimmigrant status can be found in the INA at § 101(a)(15)(U) [definition of U nonimmigrant] and INA § 214(p) [miscellaneous U nonimmigrant requirements], and in the regulations at 8 CFR §§ 212.17, 214.14.

A. Eligibility for U Nonimmigrant Status:

1. Been the victim of a qualifying criminal activity;
2. Have suffered substantial physical or mental abuse as a result of having been the victim of qualifying criminal activity;
3. Possess information concerning that criminal activity;
4. Have been helpful, are being helpful, or are likely to be helpful in the investigation or prosecution of the criminal activity;
5. Have certification from a federal, state, or local law enforcement authority certifying their helpfulness in the detection, investigation, or prosecution of the criminal activity; and

6. The criminal activity violated the laws of the United States or occurred in the United States.

The key requirements for U nonimmigrant status are discussed in greater detail below.

Practice Note: U visas are capped at 10,000 per year, meaning no more than 10,000 can be granted per year. Many more U visa applications are currently pending beyond this limit, so there is an extensive backlog of U visa cases. Current estimated processing times for a U visa is about 10 years.

1. Victim of qualifying criminal activity:

A noncitizen may be eligible to apply for U nonimmigrant status if they have been a **victim of certain criminal activity**.

Qualifying criminal activity: Only individuals who have been victims of one of the crimes listed at INA § 101(a)(15)(U)(iii) or substantially similar crimes will be eligible to apply for a U visa. Some of the qualifying crimes include abusive sexual contact, domestic violence, involuntary servitude, kidnapping, manslaughter, obstruction of justice, rape, sexual exploitation, trafficking, witness tampering, and felonious assault.

The statue also allows for "other related crimes" to be considered, where the crimes are substantially similar. This is a recognition that not all state statutes classify crimes in the same way, so crimes with the same or substantially similar elements as those listed in the statute may still qualify for U eligibility, even if they are classified differently by a particular state.[1] There is no requirement that the crime be a felony (with the exception of felonious assault).

Victim: An applicant may be eligible to apply for U nonimmigrant status if they can show they were either a "direct" or "indirect" victim of a qualifying crime.[2]

> **Note**: There are some overlaps between the different forms of relief discussed in this advisory. For example, someone who is a trafficking victim might also be eligible for T nonimmigrant status (discussed below). Remember that individuals can apply for multiple forms of relief and advocates do not have to pick just one. It is important to evaluate what the needs of the applicant, as well as facts, and see what option might be best for them.

A **direct victim** is an individual who is harmed as a direct result of the criminal activity.[3] In limited cases, U.S. Citizenship & Immigraiton Services ("USCIS") will consider an individual who can be classified as a "bystander victim" as a direct victim. A "bystander victim" is someone who experiences a direct harm because of the criminal activity, even if the act was not directed at them. The most common example USCIS uses to explain who a bystander victim is that of a woman who suffers a miscarriage as a result of witnessing a homicide or other serious, qualifying crime.

An **indirect victim** is the family member of a direct victim who is incompetent, incapacitated, or deceased. This includes spouses, unmarried children under 21 years of age, parents if the victim was under 21 years of age, and siblings under the age of 18, if the victim was under 21 years of age.[4] The applicant will have to prove that the direct victim was incompetent or incapacitated in order for them to qualify as an indirect victim. USCIS will determine on a case-by-case basis if the direct victim was indeed incapacitated or incompetent. USCIS has stated that a minor victim (under age 18) is considered legally incompetent for this purpose, although in recent years the Vermont Service Center[5] has been more restrictive in this determination. Indirect victimization can be an important way for parents of U.S. citizen (USC) children who have been victimized to qualify for this relief. It is important to screen when the USC child is harmed to see if the undocumented parent would qualify.

Example: David's wife Dana was killed during a home invasion robbery. Although David wasn't the victim of the murder, he is the spouse of a murder victim and can therefore be considered an indirect victim and apply for U nonimmigrant status so long as he meets all the requirements.

Example: Hortencia's 4-year-old son Elias was the victim of abusive sexual contact by another family member. Elias is a U.S. citizen so does not need to and cannot qualify for U nonimmigrant status. However, if Hortencia is helpful with the investigation and shows the harm she suffered from her son's victimization, she may qualify for U nonimmigrant status as an indirect victim because her son, the direct victim, lacks capacity due to his young age.

2. Substantial physical or mental abuse:

An applicant for U nonimmigrant status will need to show they have **suffered substantial physical or mental abuse** as a result of having been a victim of qualifying criminal activity. In determining if the abuse suffered was "substantial," USCIS will consider the severity of the injury suffered and the abuse inflicted. Some factors that will be considered include: nature of injury, severity of the perpetrator's conduct, severity of the harm suffered, duration of infliction of harm, and permanent or serious harm to appearance, health, physical, or mental soundness.[6] No single factor will be used in determining the severity of the harm and a victim's past harm is taken into consideration when evaluating the current harm suffered. For example, a domestic violence victim's past abusive relationship can be considered when determining the impact of the recent domestic violence they suffered. Abuse will be considered in its totality, and USCIS recognizes that abuse may involve a series of acts or occur repeatedly over a period time.[7] A victim's declaration will be key in showing the harm suffered, in addition to any medical records and case manage/social worker letters.

3. Cooperation with law enforcement:

An applicant will also have to show that they have been helpful, are being helpful, or are likely to be helpful in the investigation or prosecution of the criminal activity.[8] It is important to note that there is no requirement for the criminal investigation to lead to the prosecution of the perpetrator and it is enough that someone helped in the detection (i.e. reporting).[9] A victim who is under 16 years of age, incompetent, or incapacitated does not have to meet this requirement.[10] Age is determined for the victim on the day that the qualifying criminal activity occurred.[11]

An applicant must submit a signed certification from a law enforcement agency.[12] This has to be on Form I-918 Supplement B, U Nonimmigrant Certification, signed by the head of the agency or an official designated by the head at a federal, state, or local enforcement authority.[13] Unlike T nonimmigrant status (discussed below in section II), secondary evidence of cooperation is not accepted; the I-918 Supplement B certification is a mandatory requirement for all U applicants. Form I-918 Supplement B will need to state information concerning the qualifying criminal activity, how the victim was helpful, and a brief description of the harm suffered. Note that certifications are only valid for 180 days, therefore once a department returns the signed certification, applicants will only have six months to complete and submit their application, or else they will have to get a new signed certification.

B. Benefits of U Nonimmigration Status:

An applicant who is granted U nonimmigrant status will be in lawful status in the United States for four years[14], be eligible for a work permit (employment authorization document, or "EAD"), and have access to public benefits. The time at which they become eligible for public benefits will depend on the state in which they reside.[15]

Deferred Action: If USCIS determines the applicant meets the basic U nonimmigrant eligibility requirements, they will place the applicant on a waitlist until a U visa becomes available, as many more people apply for U visas each year than the 10,000-annual cap on U visas. Some advocates refer to this as "conditional approval," because it does not guarantee that the applicant will ultimately be granted U nonimmigrant status, simply that the applicant has been found prima facie

eligible. Individuals on the U visa waitlist, however, are eligible for deferred action and a work permit, under category (c)(14).[16] At the time of writing this advisory, U nonimmigrants are being approved for deffered action 4-5 years after submitting their application.

Deferred action is not lawful status[17] and does not count towards the three years that are required before a U nonimmigrant can apply for lawful permanent residence. Deferred action is a determination that the applicant is a low priority for removal.

Derivatives: Applicants can include certain family members in their application as derivatives. Who they can include will depend on the applicant's age at the time of filing:

- If the applicant is under 21, they can include their spouse, unmarried children under 21, parents, and unmarried siblings under 18;
- If the applicant is 21 or older, they can include their spouse and unmarried children under 21.

Derivatives do not age out. A derivative's age is determined at the time the principal applicant files their application. Derivatives must remain unmarried until the U nonimmigrant status is granted.

Note: Principal U applicants can add derivatives after they have filed their U application and even after they have been granted U nonimmigrant status by submitting a derivative application with proof of the principal's U nonimmigrant filing.[18]

Waivers: Applicants for U nonimmigrant status will have to show they are admissible into the United States or demonstrate they are eligible for a public interested waiver of any applicable inadmissibility ground. A waiver is available under INA § 212(d)(14) that allows USCIS to grant the waiver if in the "public or national interest." A U nonimmigrant applicant may apply for a waiver of any of the inadmissibility grounds except for those in INA § 212(a)(3)(E), related to perpetrators and participants of Nazi persecution, genocide, acts of torture or extrajudicial killing.[19] U nonimmigrant applicants can also apply for a general waiver under INA § 212(d)(3).

Pathway to Lawful Permanent Residence: Individuals can apply for lawful permanent residence after three years in U nonimmigrant status. To apply, they will need to show that they have been physically present in the United States for a continuous period of at least three years in U nonimmigrant status, did not unreasonably refuse to provide assistance to law enforcement, are not inadmissible under INA § 212(a)(3)(E), and their continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.[20]

The rest of the inadmissibility grounds under INA § 212(a) do not apply to U nonimmigrants at time of adjustment of status, however USCIS might still consider negative factors as a matter of discretion. Therefore, in cases with negative factors, such as criminal issues or immigration violations, it is important to provide evidence of positive equities to counterbalance.

C. Considerations Before Applying for U Nonimmigrant Status:

- There is no requirement for the victim and the perpetrator to be related to one another, or that the perpetrator have immigration status. Compare with VAWA (discussed in section III of this advisory), where the perpetrator must be a U.S. citizen or LPR and have a specific relationship with the victim.
- There is no deadline for applying; so long as the crime was reported and law enforcement certifies, an applicant can submit a U nonimmigrant status petition at any time, even years after the crime occurred.
- Wait time for U nonimmigrant status is extremely long—as of June 2019 the wait for initial review was four years or longer. This initial determination may result in an applicant being granted deferred action and issued work authorization while they wait for a final decision on their case (which takes years, as well).

- Given the cap on U visas and the long waitlist, it may be worthwhile to consider applying for T nonimmigrant status instead of U nonimmigrant status, as there is some overlap of qualifying criminal activity between these two forms of relief.

II. T Nonimmigrant Status:

T nonimmigrant status, often referred to as the "T visa," is a nonimmigrant status that allows noncitizen survivors of severe forms of human trafficking to remain lawfully in the United States, obtain employment authorization, and eventually apply for lawful permanent residence. The T visa was created to combat human trafficking and provide immigration relief for persons who were trafficked into the United States.

Law:

The law for T visas can be found in the Immigration and Nationality Act (INA) at INA § 101(a)(15)(T) [definition of T nonimmigrant] and INA § 214(o) [miscellaneous T nonimmigrant requirements] and the implementing regulations at 8 CFR §§ 212.16, 214.11.

A. Eligibility Requirements for T nonimmigrant status:

Eligibility Requirements for T nonimmigrant status:[21]

1. Is or has been the victim of a severe form of trafficking;
2. Is physically present in the United States, a U.S. territory,[22] or at a port of entry on account of trafficking. This includes a survivor who was allowed to enter the United States to participate in the investigative or judicial processes associated with the trafficking;
3. Can demonstrate that they complied with any reasonable request for assistance in the federal, state, or local investigation or prosecution of acts of trafficking or the investigation of a crime where acts of trafficking are at least a central reason for the commission of that crime UNLESS they qualify for an exemption or exception to this requirement;
4. Would suffer extreme hardship involving unusual and severe harm upon removal from the United States.

Each of these requirements is discussed in greater detail below.

1. Severe form of trafficking:

An individual is considered to be a victim of human trafficking if they have been induced to participate by "force, fraud, or coercion" in either of the following:

- **Sex Trafficking**: a commercial sex act induced by force, fraud, or coercion OR in which the person induced to perform such an act is under 18 years of age;[23]
- **Labor Trafficking**: recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[24]

Note that commercial sex acts involving minors do not need a showing of force, fraud, or coercion. This is not the case for labor trafficking cases, regardless of age.

When proving trafficking, it is important to outline the process used, the means used, and the end results. Consider the following questions:

- **Process**: was it done by recruiting, harboring, transporting, providing, or obtaining a person for labor?
- **Means:** was force, fraud, or coercion used against the survivor?

- **Purpose:** was the objective the survivor's involuntary servitude, peonage, debt bondage, slavery, or commercial sex?

  Example: Jiachiang left Fujian province in China with a smuggler, known as a "snakehead," with the understanding that he would have work in New York City. He began to work at a Chinese restaurant in New York City, where he slept in the back. The owners demanded long hours and only paid him $100 a week. When he said he wanted to quit, they threatened to hurt his family members back in China if he left and throw him in jail if he said anything to anyone. Here, Jiachiang might be eligible for T nonimmigrant status due to labor trafficking because he became subject to involuntary servitude when he was coerced into staying at a job because of the threats made to him and his family.

2. Physically present on account of the trafficking:

T nonimmigrant applicants must be physically present in the United States, a U.S. territory, or a port of entry "on account of the trafficking." The applicant must also be physically present in the United States at the time the application is received by U.S. Citizenship and Immigration Services (USCIS).[25] "On account of" is interpreted to include those individuals currently in a trafficking situation, those who have been released from trafficking situations, and those who escaped a trafficking situation. It is important to note that USCIS is heavily scrutinizing this element and it can be harder for applicants who have been here for many years after escaping the trafficking incident to prove that they are still present "on account of" the trafficking situation. A departure, even if it is brief and to visit a family member, will break the applicant's "physical presence" in the United States. Individuals who return to the United States will have to show that their return is related to the trafficking (either re-victimization, victim of a new incident, or to help in the investigation).[26]

There is a common misconception that only individuals who were trafficked into the country are eligible for this relief. However, crossing an international border is not required to demonstrate that someone is a victim of a severe form of human trafficking. Some survivors of trafficking came to the country on their own, either on a visa or without status, and were trafficked once inside the United States.

> **Example:** Mai came to the U.S. as a young girl with her family and has no immigration status. Mai's boyfriend began pimping her out when she was 16 years old. He said with the money she earned they could start a life together. When she didn't want to do it anymore, he threatened to tell everyone that she was a "slut." He also threatened to break up with her and warned her that his buddies in the gang were depending on her to help earn them some money.
>
> Mai could potentially be eligible as a victim of sex trafficking. Mai came to the United States many years ago with her parents and was later pimped by her boyfriend. Mai is present in the United States as an individual who is currently being trafficked by her boyfriend. It does not matter that she entered for another reason.

3. Complied with a reasonable request made by law enforcement agency:

To qualify for T nonimmigrant status, a victim must show that they contacted law enforcement regarding the trafficking, unless an exception applies, and have complied with any reasonable request from law enforcement. They need only show they reached out to law enforcement, not that law enforcement responded or acted on the information. A person who never contacted law enforcement regarding the trafficking will not be eligible unless they meet exceptions outlined below.[27] USCIS will look at several factors when determining if a request was reasonable. This includes, but is not limited to, general law enforcement agency practices, nature of the victimization, specific circumstances of the victim, severity of trauma suffered or whether the request would cause further trauma.[28]

Unlike the process for U nonimmigrant status, certification of cooperation by a law enforcement agency is not required to prove cooperation but when possible, it is good to try and obtain certification. Instead, or in addition, applicants can

show cooperation through their efforts to contact law enforcement officials, their own declaration stating who they attempted to contact, email correspondence, photocopies of business cards of law enforcement officials, declarations by case managers and other witnesses of efforts to cooperate with law enforcement.[29]

An applicant must comply with any reasonable request by a law enforcement agency from the time of the initial application through the time they apply for lawful permanent residence (also referred to as "LPR" status or a "green card") through adjustment of status.

Exceptions:

a. Minors: applicants who are under 18 years of age are exempt from complying with reasonable request for cooperation.[30]
b. Trauma: applicants over the age of 18 who are unable to cooperate due to physical or psychological trauma may qualify for an exception from this requirement.[31] An applicant will need to submit evidence of the trauma to meet this requirement. For example, a declaration describing the trauma, a signed statement from a doctor or case worker describing their mental state or a psychological evaluation, and/or medical records documenting the trauma.[32]

4. Extreme hardship upon removal:

Lastly, applicants for T nonimmigrant status will have to show that they will suffer extreme hardship involving unusual and severe harm if removed. Some factors that will be considered include: age, maturity, and personal circumstances of the applicant; physical or psychological issues of the applicant that necessitate medical or psychological care not reasonably available in the foreign country; nature and extent of the physical and psychological consequences of the trafficking; impact of loss of access to the United States court system; social practices or customs in the foreign country that would punish the applicant for having been trafficked; likelihood of re-victimization; and vulnerability to harm by the trafficker.[33]

Applicant declarations are key to show the extreme harm that would be suffered if removed. Additionally, applicants can use medical records, affidavits from witnesses, and statements from case managers, social workers, or family members. Applicants should also include documentation on country conditions to illustrate the lack of access to resources or support as well as any stigma that might exist from being a victim of trafficking.

B. Benefits of T Nonimmigrant Status:

T nonimmigrant status lasts for four years[34] and allows a grantee to apply for work authorization. T nonimmigrants also have access to both state and federal public benefits.[35] Additionally, T nonimmigrants can apply for lawful permanent residence after three years in T nonimmigrant status.

Derivatives: Applicants for T nonimmigrant status can include certain family members as derivatives in their application. Who they can include will depend on the applicant's age:

- Applicants who are under 21 can include their spouse, unmarried children under 21, parents, and unmarried siblings under 18.
- Applicants who are 21 or older can include their spouse and unmarried children under 21.

Applicants can also include certain family members, regardless of the applicant's age, if these family members are in present danger of retaliation as a result of escaping trafficking or cooperating with law enforcement:

- Parents;
- Unmarried siblings under 18 years of age; and

- Children of any age or marital status of qualifying family members who have been granted derivative T nonimmigrant status.

Waivers: T nonimmigrant applicants must also be "admissible," meaning that they do not fall under any of the applicable grounds of inadmissibility at INA § 212(a) or if they do, they have been granted a waiver. The public charge ground of inadmissibility at INA § 212(a)(4) does not apply to T nonimmigrants,[36] so no waiver is needed for this ground. For the grounds that do apply, many are waivable for T nonimmigrant applicants if they can show it was incident to or caused by the victimization and if in the national interest. The only grounds that cannot be waived are security-related, international child abduction, and renunciation of U.S. citizenship to avoid taxation.[37] T nonimmigrants can apply for two different waivers: a T-specific waiver, at INA § 212(d)(13), and a general nonimmigrant waiver, at INA § 212(d)(3).

Pathway to Lawful Permanent Residence: Individuals granted T nonimmigrant status are eligible to apply for lawful permanent residence after three years under INA §245(l). To apply for a green card based on T nonimmigrant status, they will have to show that they have been physically present in the United States for a continuous period of at least three years in T nonimmigrant status,[38] are a person of good moral character, complied with any reasonable request from law enforcement (or meet one for the exemptions), and are admissible to the U.S.[39] Applicants will need to show they are not inadmissible under INA § 212(a). Applicants may have been granted a waiver for certain grounds at the T application phase and may seek a waiver when adjusting status for any ground that has not already been waived.

C. Considerations Before Applying for T Nonimmigrant Status:

- Remember, a person does not have to been trafficked *into* the U.S. in order to qualify for the T Visa—a person can also be trafficked within the U.S. after entering the country and be eligible for T nonimmigrant status.
- A trafficked individual's initial consent is irrelevant—a person who initially consents may be considered to have been trafficked because of the trafficker's coercive or deceptive conduct and the subsequent exploitation.
- There are no filing deadlines for victims trafficked after October 28, 2000. USCIS will accept an application for T nonimmigrant status even if the applicant was victimized years ago.
- Applicants can include various kinds of evidence to show cooperation with law enforcement, as a formal law enforcement certification is not required. Furthermore, minors do not need to meet the cooperation requirement.
- There is a 5,000-visa cap for T nonimmigrant status that has never been reached and thus there is no wait (beyond the amount of time it takes to adjudicate the application) at this time. This is in stark contrast to the U nonimmigrant status, see section I.

III. VAWA self-petition:

The Violence Against Women Act (VAWA), first enacted in 1994, was created to address a widespread problem of abused noncitizens staying with their abusers because the abuser held a key role to the victim attaining lawful immigration status in the United States. The VAWA self-petition process mirrors the family-based process but frees the victim from having to rely on the abuser's cooperation to petition for them, as they can proceed with the family-based immigration process without the abuser's knowledge or involvement. Under VAWA an abused spouse or child of a lawful permanent resident (LPR) or U.S. citizen (USC), or an abused parent of a USC son or daughter (age 21 or older), can submit a self-petition on their own behalf.

Law:

The law for a VAWA self-petition can be located in INA § 204(a)(1)(A) and in the regulations at 8 CFR § 204.1.

A. Eligiblity for VAWA Self-Petition:

VAWA self-petitions can benefit abused men *and* women, abused children and parents, and abused spouses, including same sex couples who are legally married.

The eligibility requirements for VAWA self-petition:[40]

1. They are the abused spouse or child of a USC or LPR, or an abused parent of a USC son or daughter;
2. The abuser was an LPR or USC;
3. They were the victim of battery or extreme cruelty;
4. They resided with the abuser in the United States at some point;
5. They can demonstrate good moral character; and
6. Self-petitioning spouses must show they entered into the marriage in good faith.

See below for a discussion of the main requirements.

1. Qualifying family relationship:

Unlike other forms of relief described in this advisory, VAWA self-petitioners must show a familial relationship to the abuser and that the abuser had status. Spouses and children of LPRs or USCs and parents of adult USCs are eligible to self-petition. It is important to understand how these terms are defined in immigration law before applying.

Spouses: Abused spouses of USCs or LPRs can qualify to submit a VAWA self-petition.[41] The abused spouse will have to prove that the abuser is or was a USC or LPR, that they are legally married (or were married and are recently divorced, in some circumstances, see below), and that the marriage was entered into in "good faith."[42]

Status of Abuser: The abuser must be an USC or LPR for the applicant to qualify for VAWA. If the abuser lost their status because of the abuse, the self-petitioner can still qualify so long as they submit the self-petition within two years of the abuser's loss of status.[43] The abuse to the noncitizen could have been before the abuser gained status *BUT* note that the abuser has to have gained status before a divorce is finalized in order for the individual to be eligible to self-petition.

Marriage: The abused individual must be legally married to the USC or LPR abuser. A marriage is considered legal if it is valid in the place where the ceremony was performed. This includes both common law marriages, where recognized,[44] and same sex marriages. An applicant could be divorced from the abuser and still qualify so long as they can show the divorce was connected in some way to the abuse and they file their self-petition within two years of the divorce[45] (this can also include annulments[46]). Applicants cannot remarry until their self-petition is approved.

In the case of the abusive spouse's death, an abused spouse of a USC can still file their self-petition within two years of the abuser's death.[47] This is *not* the case for the spouse of an LPR, unless the petition was already pending when the abuser passed away.[48] An abused spouse who thought they were legally married but in fact were not, such as in the case when the abuser was already legally married to someone else and the self-petitioner was unaware of the other marriage, can still self-petition.

Example: Maribel's husband abused her for years before she was finally able to flee to a friend's house. Maribel later learns that he became an LPR. Though Maribel no longer lives with her abuser, she may qualify for a VAWA self-petition because she is married to an LPR; it does not matter that she was abused by him when he was undocumented. The abuser need not be an LPR during the abuse (although the abuse must have taken place during the marriage), *but* the applicant must be married to the abuser at time of filing or have been a spouse of an LPR within the past 2 years, if now divorced. Maribel was

abused and is still the spouse of an LPR, therefore she may qualify to file a VAWA self-petition if she meets all the other requirements.

Marriage Entered Into in Good Faith: The marriage must have been entered into in good faith and not solely for the purpose of obtaining immigration status. Although there is no exact definition for what makes a good faith marriage, courts have identified some factors like whether the couple intended to establish a life together at the time of the marriage.[49]

It is important to note that a *non-abused* spouse of a USC or LPR, whose child was abused by the USC or LPR spouse, can also qualify to file a self-petition under VAWA.[50]

Children: For a child to be eligible to self-petition, they must show that they meet the definition of a "child" in immigration law. A "child" is defined as unmarried and under 21 years of age.[51] There are other requirements, having to do with whether the child was born in wedlock or legitimated, and whether the child is a step-child or adopted child, that can be located at INA § 101(b)(1). An abused child of an LPR or USC can submit a VAWA self-petition.[52] The self-petitioning child does not have to be in the abuser's legal custody at the time of the VAWA self-petition and any changes in parental rights will not affect the child's ability to self-petition.[53]

A child who is over 21 and was eligible to self-petition but did not, can still file a VAWA self-petition so long as they do so before turning 25 and are unmarried at the time the self-petition is filed. They will have to show that the abuse was "at least a central reason" for the filing delay.[54] Additionally, the self-petitioner must have met all the qualifying factors for filing a VAWA self-petition before they turned 21. If the abuse took place after they turned 21, they do not qualify for VAWA as an abused "child."

A non-abused child of an abused spouse or child qualifies for VAWA if they are listed on the abused spouse's or child's self-petition as a derivative.[55]

Parents: An abused parent of a USC son or daughter (a "son or daughter" is defined as a child who is now 21 years or older) may also qualify to submit a VAWA self-petition.[56] The parent will need to show that the qualifying relationship existed at the time of the abuse and at the time of filing.[57] Unlike spouse and children VAWA self-petitions in which the abuser can be either a USC *or* an LPR, parents are only eligible to submit a VAWA self-petition if their abuser is a USC, because that is the only situation in which an adult child could file a petition for their parent (as an immediate relative); there is no visa category for an LPR son or daughter to petition for their parent and thus the abused parent of an LPR son or daughter cannot self-petition under VAWA—recall that VAWA does not create any new visa categories, it just allows abused family members to assume the role that the abusive petitioner could have occupied.[58] If the abusive USC son or daughter lost status or died, the parent can submit a petition within two years of the loss of status or death.[59]

2. Subjected to "battery or extreme cruelty":

For VAWA, an applicant needs to show that they were the victim of battery or extreme cruelty. However, unlike U and T nonimmigrant status, law enforcement need not have been involved or contacted regarding the abuse. There is no set list of factors to determine what battery or extreme cruelty is. In fact, the definition of abuse is flexible and broad enough to include physical, sexual, and psychological acts, as well as economic coercion.[60] Battery can include, but is not limited to, an act of violence that results in injury. This can also include threats of violence, even if they do not result in physical harm.[61] When evaluating what is battery or extreme cruelty, USCIS can take into consideration acts that might amount to battery or extreme cruelty when viewed as part of an overall pattern of violence, even if they might seem minor in isolation.[62] There is no exhaustive list of acts that are considered "battery or extreme cruelty" and examples can include social isolation; accusations of infidelity; incessantly calling, writing, or contacting the victim; interrogating the victim's friends; threats; economic abuse including not allowing the victim to work and controlling all their money; and degrading the victim.

Example: Jon is married to Dany, a U.S. citizen. Dany promised Jon that he would help him get a green card. Dany began to fill out the forms for Jon, but he never filed them. For the past year, Dany has been isolating Jon from his friends and family. He does not allow Jon to have any money without his permission and forbids him to leave the house without him. About a month ago, while Dany was at work, Jon went to help a sick friend. Dany came home early and was waiting at the house when Jon returned. He yelled at him, threatening to turn him in to immigration authorities and have him deported. Dany kicked Jon's beloved dog severely several times until Jon begged him to stop. This is not the first time Dany has mistreated his dog. Because of his husband's controlling behavior and mistreatment, Jon became depressed and despondent. Dany's behavior should qualify as extreme cruelty to Jon, potentially allowing Jon to file a VAWA self-petition.

3. Residence Requirements:

An applicant for VAWA must have lived with the abuser at some point, either inside or outside the United States. There is no specific timeframe for how long the victim has to live with the abuser in order to qualify; an applicant can qualify even if they only lived with the abuser for a short time.[63] There is also no requirement that the self-petitioner continue to live with the abuser to be eligible for VAWA.

Example: Marta married Jose in Venezuela. Jose is a lawful permanent resident. Marta went to the United States to live with Jose, but he subjected her to domestic abuse, and she fled to a friend's house shortly after joining Jose in the United States. Marta can self-petition, even though she no longer lives with Jose because she suffered domestic violence while living with him in the United States.

In addition to having lived with the abuser at some point, a VAWA self-petitioner does not have to presently reside in the United States in order to be able to file a VAWA self-petition, but the abuse generally must have occurred while in the United States (unless the abusive spouse is an employee of the U.S. government or a member of the U.S. armed services).[64]

4. Good moral character:

An applicant for VAWA must establish that they are a person of "good moral character" for the three years prior to filing their self-petition.[65] There is no clear definition in immigration law for good moral character but there is a list of acts that would bar a person from establishing good moral character at INA § 101(f). Some of the things that would bar someone from establishing good moral character are things like being declared a habitual drunk, engaging in prostitution, smuggling people into the country, certain drug convictions, and being incarcerated for an aggregate period of 180 days or more as a result of a conviction.[66] A person is only barred if they fall within any of these for the time period for which they are required to show good moral character. However, there are special exceptions for VAWA self-petitioners to these good moral character bars if the act or conviction is waivable with respect to the self-petitioner for purposes of determining whether the self-petitioner is admissible or deportable or the act or conviction was connected to the abuse suffered by the self-petitioner.[67]

The applicant's declaration, in which they detail their eligibility for VAWA, is their primary evidence of good moral character. In addition, applicants should submit police clearances from each place where they resided for six months or more during the past three years.

Children under 14 years of age are presumed to have good moral character and will not be required to submit evidence of good moral character.[68] If the child is 14 or older, the rules are the same as for an adult self-petitioner.

B. Benefits of VAWA Self-Petition:

A self-petitioner who meets the basic eligibility requirements will get a notice of "prima facie" eligibility within a few months of filing which they can use to access public benefits like Medicare.

Generally, an applicant whose VAWA self-petition is granted will be given deferred action while they wait to complete the process for lawful permanent residence and will be eligible for a work permit (EAD) and public benefits.

Derivatives: A self-petitioning spouse or child can include their children who are unmarried and under 21 years of age, including adopted children and stepchildren, as derivatives. [69] It does not matter for derivatives that they were not actually abused. Once a child is included, they will not lose VAWA benefits when they turn 21 years old. Instead, when they turn 21 they become self-petitioners in their own right and their visa category will change from that of an "unmarried child" to one of an "unmarried son or daughter."[70] Similarly, if a child of a USC abuser marries, they will automatically move to the third preference visa category for married sons or daughters of U.S. citizens.[71] This mirrors the regular family-based visa categories and movement between categories.

Self-petitioning parents of USCs *cannot* include derivatives.

Waiver: A VAWA self-petitioner does not need to establish that they are admissible when they file their self-petition. However, once a VAWA self-petitioner goes on to file their application for permanent residence—which they may be able to do at the same time as filing the self-petition if they are an immediate relative[72], otherwise they need to wait for their preference petition to be current—they must establish that they are not inadmissible under any of the applicable inadmissibility grounds or else eligible for a waiver. In addition to the standard waivers available for various grounds of inadmissibility at INA 212(h) and INA 212(i), there are special VAWA waivers, exceptions, or exemptions for some of the grounds of inadmissibility.[73]

Pathway to Lawful Permanent Residence: A VAWA self-petitioner will be eligible to apply for lawful permanent residence through adjustment of status under INA § 245(a), or consular processing. Similar to a family petition, a self-petitioner can submit their application for LPR status when an immigrant visa becomes available for their family-based classification, either as an immediate relative or one of the preference categories. This may be immediately for spouses, children (unmarried and under 21), and parents (whose USC sons or daughters are 21 or older) of USCs or may take several years for spouses and children of LPRs. Self-petitioners can use the State Department's Visa Bulletin to calculate when a visa is likely to become available for their preference category.[74]

As mentioned above in the discussion of VAWA waivers, at time of applying for lawful permanent residence, applicants must prove that they are not inadmissible under INA § 212(a). There are certain VAWA-specific waivers as well as general waivers that an applicant can submit to waive some of the grounds of inadmissibility.

C. Considerations Before Filing a VAWA Self-Petition:

- Applicants must have a familial relationship to the abuser—i.e. a legal marriage to the abuser, be the parent of the abuser, or the child of the abuser. A U visa might be an option where there is no legal relationship to the abuser.
- The abuser must be an LPR or USC. If they lost that status, the applicant must submit their self-petition within two years of the abuser losing their status. U nonimmigrant status might be an option where the abuser had no status or only a form of temporary status.
- Unlike with the U or T nonimmigrant status, with VAWA there is no requirement that the victim cooperate with or even contact law enforcement. A self-petitioner's detailed declaration may be sufficient proof, by itself, of the abuse.

- VAWA self-petitioners can apply to adjust under INA § 245(a), even if they were not inspected and admitted or paroled.
- The bars to adjustment under INA § 245(c), such as failure to maintain lawful status or working without authorization, do not apply to VAWA self-petitioners.[75]

IV. Conclusion

The above is only a brief overview of what makes a person eligible for these humanitarian forms of relief. It is important to research each immigration option thoroughly before submitting an application and to consult immigration experts for any complex cases, especially in light of recent changes in policy and procedure within the Department of Homeland Security and Immigration Courts. Below is a list of resources to support advocates in exploring and pursuing these legal options with clients.

V. Resources

- For technical assistance when filing these applications:
  - T, U, and VAWA: ILRC Attorney of the Day Technical Assistance, https://www.ilrc.org/technical-assistance
  - U and VAWA: ASISTA, http://www.asistahelp.org/en/access_the_clearinghouse/trafficking_and_t_visas/
  - T visas: Coalition to Abolish Slavery & Trafficking (CAST), http://www.castla.org/training
- For U visa certification information, the U Visa Certifier Database created by the Immigration Center for Women and Children (ICWC) gives access to certifier information across the United States. Individuals will need to subscribe in order to get access to the site. More information on how to register can be found at https://www.icwclaw.org/icwc-u-visa-zoho-database.
- To refer clients to free or low-cost legal service providers:
  - National Immigration Legal Services Directory: https://www.immigrationadvocates.org/nonprofit/legaldirectory/
- For information on access to public benefits: the National Immigration Law Center (NILC), www.nilc.org/accesstobens.html
- USCIS has issued various policy memos on U and T nonimmigrant status, as well as VAWA. See the USCIS website at https://www.uscis.gov/
  - Recently, USCIS released a new policy regarding when they will issue Notices to Appear (NTA) for applications that are denied when the applicant has no other lawful status, among other scenarios. For more information on how this new memo impacts U, T, and VAWA cases visit: https://www.ilrc.org/annotated-notes-and-practice-pointers-uscis-teleconference-notice-appear-nta-updated-policy-guidance
- USCIS is planning to make changes fee waivers in the coming months that may make it harder for applicants to apply if they cannot afford to pay the immigration filing fee. Note that although there is no fee for T nonimmigrant and U nonimmigrant applications, there is a fee for the waivers of inadmissibility. Currently, U and T nonimmigrants and VAWA self-petitioners are eligible for a fee waiver for all immigration applications. Visit the ILRC website for up-to-date information on changes to the fee waiver at https://www.ilrc.org/.

End Notes

[1] INA §101(a)(15)(U)(iii).
[2] 8 CFR § 214.14(a).
[3] 8 CFR § 214.14(a)(14).
[4] 8 CFR § 214.14(a)(14)(i).
[5] Vermont Service Center processes U nonimmigrant status applications.
[6] 8 CFR § 214.14(b)(1).
[7] *See* Preamble at Federal Register, Vol. 72, No. 179, p. 53016-53017 (Sept. 17, 2007).
[8] INA §101(a)(15)(U)(i)(II).
[9] U.S. Department of Homeland Security, U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, December 29, 2011 and "Centralization of Interim Relief for U Nonimmigrant Status Applicants," William R. Yates, Assoc. Dir. of Operations, USCIS (Oct. 8, 2003) at p. 4. This memorandum may be found on the USCIS website at www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2003/ucntrl100803.pdf.)
[10] 8 CFR § 214.14(b)(3).
[11] *Id.*
[12] 8 CFR § 214.14(a)(5).
[13] 8 CFR § 214.14(a)(3).
[14] In certain circumstances, applicants are able to extend their nonimmigrant status. For more information on this *see* USCIS Policy Memorandum *Extension of Status for T and U Nonimmigrants (Corrected and Reissued)* (October 2016), available at https://asistahelp.org/wp-content/uploads/2018/02/T-and-U-Extension-October42016.pdf.
[15] Some states will allow U nonimmigrant status applicants to apply for public benefits once they have received deferred action. Others, like California, will allow applicants of U nonimmigrant status to access public benefits once they receive their receipt notice
[16] 8 CFR § 214.13(d)(2).
[17] Deferred action is considered "lawful presence" instead. This means that a U applicant with deferred action will not accrue "unlawful presence" during the period of deferred action. 8 CFR 214.14(d)(3).
[18] 8 CFR § 214.14(f).
[19] INA § 212(d)(14).
[20] INA § 245(m); 8 CFR § 245.24
[21] INA §101(a)(15)(T)
[22] U.S. Territories include American Samoa, or the Commonwealth of the Northern Mariana Islands
[23] TVPA, § 103(8); 22 USC § 7102(9).
[24] *Id*.
[25] 8 CFR § 214.11(g)(1).
[26] 8 CFR § 214.11(g)(2).
[27] 8 CFR § 214.11(h)(1).
[28] 8 CFR § 214.11(h)(2).
[29] 8 CFR § 214.11(h)(3).
[30] TVPRA, § 4(b)(1)(A); INA § 101(a)(15)(T)(III); 8 USC § 1101(a)(15)(T)(i)(III); 8 CFR § 214.11(h)(4)(ii).
[31] INA § 101(a)(15)(T)(iii); 8 CFR § 214.11(h)(4)(i).
[32] 8 CFR § 214.11(h)(4)(i).
[33] 8 CFR § 214.11(i)(2).
[34] In certain circumstances, applicants are able to extend their nonimmigrant status. For more information on this *see* USCIS *Policy Memorandum*: *Extension of Status for T and U Nonimmigrants (Corrected and Reissued)* (October 2016), available at https://asistahelp.org/wp-content/uploads/2018/02/T-and-U-Extension-October42016.pdf.
[35] Note that some states give T applicants access to some public benefits even before they are granted T Nonimmigrant Status. The public benefits they will have access to depends on the state of residency and some states will accept their USCIS receipt notice to allow access.

[36] INA § 212(d)(13)(A).
[37] INA § 212(d)(13)(B)(ii).
[38] Any departures from the USA for more than 90 days or for any periods exceeding 180 days in the aggregate will cut off continuous presence.
[39] INA § 245(l); 8 CFR § 245.23(a).
[40] INA § 204(a)(1)(A)
[41] INA § 204(a)(1)(A)(iii) (spouse of USC) and INA § 204(a)(1)(B)(ii) (spouse of LPR).
[42] INA § 204(a)(1)(A)(iii).
[43] INA § 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb).
[44] Common law marriage is recognized in DC, Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, and Utah.
[45] INA § 204(a)(1)(B)(ii)(II)(aa)(CC)(ccc).
[46] *See* Aleinkoff, Executive Associate Commissioner, Office of Programs, "Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents," (April 16, 1996),
[47] INA § 204(a)(1)(A)(iii)(II)(aa)(CC)(aaa).
[48] INA § 204(l).
[49] *Lutwak v. United States*, 344 U.S. 604, 611 (1953); *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975); *Matter of Soriano*, 19 I&N Dec. 764, 765 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 2-3 (BIA 1983); *Matter of McKee*, 17 I&N Dec. 332, 334 (BIA 1980).
[50] INA § 204(a)(1)(A)(iii) (spouse of USC) and INA § 204(a)(1)(B)(ii) (spouse of LPR).
[51] INA § 101(b)(1).
[52] INA § 204(a)(1)(A)(iv) (child of USC) and INA § 204 (a)(1)(B)(iii) (child of LPR).
[53] 8 CFR § 204.2(e)(1)(ii).
[54] INA § 204(a)(1)(D)(v).
[55] INA § 204(a)(1)(A)(iv) and INA § 204(a)(1)(B)(iii).
[56] INA § 204(a)(1)(A)(vii).
[57] *See* USCIS Policy Memorandum, "Eligibility to Self-Petition as a Battered or Abused Parent of a U.S. Citizen," PM-602-0046, August 30, 2011 [hereinafter USCIS, Parent Memorandum.
[58] INA § 204(a)(1)(A)(vii).
[59] INA § 204(a)(1)(A)(vii)(I).
[60] 8 CFR § 204.2(c)(1)(vi) [abused spouses]; 8 CFR § 204.2(e)(1)(vi) [abused children].
[61] 8 CFR § 204.2(c)(1)(vi).
[62] 8 CFR § 204.2(c)(1)(vi).
[63] INA § 204(a)(1)(A)(iii)(II)(dd) [spouses and intended spouses of U.S. citizens]; INA § 204(a)(1)(A)(iv) [children of U.S. citizens]; INA § 204(a)(1)(B)(ii)(II)(dd) [spouses and intended spouses of lawful permanent residents]; INA § 204(a)(1)(B)(iii) [children of lawful permanent residents].
[64] INA § 204(a)(1)(A)(v) [spouses, intended spouses, and children of U.S. citizens]; INA § 204(a)(1)(B)(iv) [spouses, intended spouses, and children of lawful permanent residents].
[65] The USCIS may also investigate the self-petitioner's background beyond the three-year period to determine good moral character, "*when there is reason to believe* that the self-petitioner may not have been a person of good moral character during that time" (emphasis added). *See* USCIS *Interoffice Memorandum: Determinations of Good Moral Character in VAWA-Based Self-Petitions Purpose* (January 19, 2005) available at https://asistahelp.org/wp-content/uploads/2018/10/USCIS-Memo-Determination-of-GMC-in-VAWA-January2005.pdf.
[66] INA § 101(f).
[67] INA § 204(a)(1)(C).
[68] 8 CFR § 204.2(e)(2)(v).
[69] INA § 204(a)(1)(A)(iii) [children of abused spouses and intended spouses of U.S. citizens]; INA § 204(a)(1)(B)(ii) [children of abused spouses and intended spouses of lawful permanent residents].
[70] INA § 204(a)(1)(D)(i)(III).
[71] INA § 204(a)(1)(D)(i)(I).
[72] INA § 201(b)(2)(A)(i) defines immediate family member as a spouse, unmarried minor child, or parent of a USC.
[73] Though VAWA self-petitioners adjust status under INA § 245(a), the inspected and admitted or paroled requirements do not apply to VAWA self-petitioners.
[74] US Department of State, Visa Bulletin, available at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html.
[75] INA § 245(c).

San Francisco
1458 Howard Street
San Francisco, CA 94103
t: 415.255.9499 f: 415.255.9792

Washington D.C.
1015 15th Street, NW, Suite 600
Washington, DC 20005
t: 202.777.8999 f: 202.293.2849

ilrc@ilrc.org www.ilrc.org

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.

HUMANITARIAN FORMS OF RELIEF PART II: ASYLUM & SIJS

By Veronica Garcia

This practice advisory is the second resource in a two-part series on Humanitarian Forms of Relief for noncitizen victims of violence, serious crimes and persecution. They include: T nonimmigrant status, U nonimmigrant status, VAWA self-petition, asylum, and special immigrant juvenile status. The first advisory focused on giving an overview of VAWA, U, and T Visas. Including, eligibility requirements and some factors to consider before applying. This practice advisory will focus on giving an overview of asylum and special immigrant juvenile status (SIJS), including their eligibility requirements and some factors to consider before applying.

These advisories should be used as general guidance, to identify potential eligibility, and to understand the processes and benefits of each form of relief. For a more detailed analysis on issues related to humanitarian forms of relief, please visit the Immigrant Legal Resource Center website at https://www.ilrc.org/immigrant-youth for more information on SIJS and https://www.ilrc.org/asylum for more information on asylum.

I. Asylum:

Asylum is a form of protection available to individuals who are fleeing persecution or have a fear of persecution in their home country and meet the international definition of "refugee." Individuals granted asylum will be eligible to live permanently in the United States, apply for lawful permanent residence, and petition for derivatives.

Law:

Asylum is incorporated into the Immigration and Nationality Act (INA) at INA § 208 for individuals who are applying for protection inside the country. Persons who are outside the United States must apply for refugee status pursuant to INA § 207. Asylum regulations can be found at 8 CFR § 208.

A. Eligibility for Asylum:

An individual is eligible to apply for asylum if they are physically present in the United States, meet the refugee definition, are not statutorily barred from applying, and merit a favorable exercise of discretion. A refugee is someone who is "unable or unwilling to return to, and is unable or unwilling to avail themselves of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." [1]

The eligibility requirements for asylum are:

1. The harm feared/suffered rises to the level of persecution;
2. The fear is based on:
    a. Past persecution OR
    b. Well-founded fear of future persecution
3. Persecution was or would be *on account of* 1 of 5 enumerated grounds;
4. They could not avail themselves of the protection of their home country; and
5. That they are not barred from asylum protection.

1. Persecution:

Applicants for asylum have to show that the harm feared rises to the level of persecution. The INA does not define persecution, but a definition has been outlined by the Board of Immigration Appeals (BIA). The BIA states that persecution is "a threat to the life or freedom of, or the infliction of suffering or harm upon those who differ in a way regarded as offensive."[2] Physical harm is not necessary to find persecution and courts have used a general definition of persecution that includes many forms of harm beyond physical harm, such as depriving a person of their freedom, food, housing, employment, or other essentials of life.[3]

Without a set definition, determining what constitutes persecution is a fact-intensive inquiry carried out by asylum officers and immigration judges. Adjudicators usually consider the following:

- **The cumulative effect of harm—** Adjudicators will take into consideration the cumulative effect of the abuses committed against the individual and determine whether the combination of those incidents rise to the level of persecution.[4]
- **Applicant's subjective belief's and character must be considered a** finding of persecution will depend in part on the subjective character of the asylum applicant.
- **The persecutor need not intend to harm the applicant—** the persecutor's intent to punish or hurt the victim is not needed to find persecution since some persecutors may have acted to help the asylum seeker or include them in a cultural practice.[5]

Past Persecution refers to harm suffered before the applicant left their country. An applicant who can establish that they were persecuted in the past benefits from a presumption of a well-founded fear of future persecution, and in some cases, can be granted asylum on the basis of severe past persecution alone.

Well Founded Fear of Future Persecution refers to persecution feared by the asylum seeker. The fear must be both subjectively held (genuine) and objectively reasonable (plausible).[6] The fear may stem from harm to their family, or similarly situated individuals.[7] Past persecution can be used to establish likelihood of future persecution.[8]

2. Nexus:

Applicants will have to show that the persecution they suffered was "on account of" 1 of the 5 protected grounds. This is often referred to as the nexus and requires establishing a link between the persecution they experienced or fear and one of the protect grounds in the refugee definition. Proving the persecutor's motivation[9] can be established by either **direct**[10] or **circumstantial**[11] evidence. Whether the persecutor intends to harm the applicant is irrelevant. The applicant will need to show that they were persecuted or will be because of their race, religion, nationality, political opinion, or membership in a particular social group.[12]

> **Example**: After Svetlana's parents saw her kissing and holding hands with one of her girlfriends from school, they interrogated their 17-year-old daughter and told her she would need to seek psychiatric help and possibly other medical treatment if she wished to continue living in their home and attending school. Fearing for her life and safety after a few psychiatric sessions where she was threatened with additional "corrective treatment," Svetlana

ran away from home. The acts that Svetlana would be forced to undergo in order to "correct" her sexual orientation constitutes persecution on account of membership in the particular social group of young lesbians in Russia. To meet the nexus requirement, Svetlana must prove that any emotional, psychological, and even physical harm she might suffer as a result of the "corrective" medical treatment would be motivated by her being a lesbian. She must show a causal link between the persecution she will suffer (corrective medical treatment) and the protected ground that applies to her (the particular social group of young lesbians in Russia).

3. Enumerated Grounds:

In order to qualify for asylum, the applicant must have been persecuted on account of race, religion, nationality, political opinion, or membership in a particular social group.

Political opinion—beliefs about the society in which the applicant lived, "even if they did not participate in organized political activities."[13] To demonstrate a nexus between the harm an applicant suffered and their political opinion, the applicant must prove that they held (or their prosecutor believed that they held) a political opinion and they were harmed because of that opinion.[14]

Membership in a particular social group—a more open-ended ground that requires the applicant to define it. It does not require formal membership but rather refers to a "group of persons who share a common characteristic other than their risk of being persecuted OR who are perceived as a group by society."[15]

In defining particular social group, the BIA has held that three elements must be present:

(1) Members of a social group must share an "**immutable characteristic"** or a fundamental characteristic that the group cannot or should not be required to change. The characteristic must be "one that the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences."[16]
(2) The group must be defined with "**particularity."** The core question is "whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a **discrete class of persons.**"[17]
(3) The social group must be "**socially distinct**" or recognizable within the society in question.[18]

Note on *Matter of L-E-A-*: In July 2019, Attorney General William Barr issued an opinion in *Matter of L-E-A-*,[19] which called into question whether "a nuclear family" will constitute a particular social group for purposes of asylum eligibility. The AG stated that a categorical rule that any nuclear family could be a cognizable PSG is inconsistent with both asylum law and BIA precedent[20] and that asylum adjudicators must look at the whether the specific family is distinct from other persons within the society in some significant way.[21]

For more information on this decision and strategies advocates can use when filing these claims, see the Catholic Legal Immigration Network, Inc. (CLINIC) Practice Pointer *Matter of L-E-A-,* 27 I&N Dec. 581 (A.G. 2019), August 2, 2019, https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/Litigation/L-E-A-Practice-Pointer-8-2-2019-Final.pdf.

Religion—can implicate the right to hold a belief or the right to practice one's belief, or both. This can include the protection of the "right to freedom of thought, conscience and religion, which includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship, and observance"[22]

Nationality & Race—there is significant overlap between cases that argue persecution based on race and nationality. The term nationality can refer to citizenship, but also encompasses ethnic and linguistic groups. Race also refers to members of an ethnic or minority group.[23]

4. Persecutor State versus Non-State Actor:

An applicant for asylum will have to show that they are unable or unwilling to avail themselves of the protection of their home country. An applicant can be unwilling to seek protection because of fear of harm or unable because the government cannot or will not offer protection.[24] When proving this, applicants will have to show that the harm was inflicted by a "state actor" or a "non-state actor" who the government was unable to unwilling to control. A "state actor" is an individual or group who is part of the government. When the state actor is the persecutor, the applicant will not need to show they attempted to report the persecution to the police or to explain why the persecution was not reported.[25] A "non-state" actor includes all private individuals and groups, including family members. When the non-state actor is inflicting the harm, applicants may have to show that they sought the protection of the state but did not receive it. It is not essential to report harm to authorities when country conditions information indicates that reporting would have been dangerous or futile.[26]

Note on *Matter of A-B-*: In June 2018, the U.S. Attorney General Sessions (AG) issued *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), which threatens the viability of asylum claims of domestic violence survivors and others who have faced persecution by a private actor. The AG deemed persecution by non-governmental actors as suspect questioning the validity of the asylum claims. This decision raises concerns for applications based on other protected grounds where a private actor carried out the persecution, specifically raising concerns about the likelihood of succeeding with claims of persecution based on domestic violence and gang violence. The AG decision gives a higher standard for satisfying the element of the government being "unable or unwilling," stating that inaction alone is insufficient to satisfy the element and that applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims. It is important to note that the language of the decision does not alter the legal framework underlying asylum claims, but ICE and USCIS has incorporated the decisions' language into policy memoranda and implementing new policy when evaluating these cases.

There are resources available on how to argue these cases and strategies when filing asylum claims. For more information about Matter of A-B- and related practice materials, see https://cgrs.uchastings.edu/A-B-Action and ILRC's Practice Advisory *Matter of A-B- Consideration* available at https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf.

5. Bars to Asylum Protection:

Applicants for asylum must not be statutorily barred. These statutory bars only apply to applicants who file for asylum after April 1, 1997. One of the most common is the one-year filing deadline that states an applicant who failed to file within one year of entry is barred from asylum.[27] There are some exceptions to meeting the one year filing deadline for "changed circumstances" and "extraordinary circumstances" at 8 CFR § 208.4. Changed circumstances refer to situations directly affecting the applicant's eligibility for asylum, like a change in the applicant's home country.[28] Extraordinary circumstances refer to factors related to missing the 1-year filing deadline. Applicants will have to show they did not intentionally fail to file because of their own actions or inactions.[29]

Other bars include having an application previously denied, reentering after removal, conviction of a particular serious crime, committing a serious nonpolitical crime in home country, or persecution of others. A complete list of bars can be found in the regulations at 8 CFR § 208.4.

B. Benefits of Asylum:

If an asylum application remains pending for a period of 150 days without a decision or applicant-caused delay, the applicant will be eligible to apply for a work permit (EAD). Also, applicants may be eligible for some public benefits depending on the state they live in.

Applicants who are granted asylum are given lawful status indefinitely. Asylum never expires and if an applicant chooses to, they can remain in this status. Asylees are able to work legally in the United States and apply for lawful permanent residence after 1 year of being granted asylum. Furthermore, they will be eligible for several public benefits, like health and medical services, cash assistance, food stamps and others.

Derivatives: Applicants can include their spouses and unmarried children under 21 years of age in their asylum application and, if the application, is approved, they will be granted asylum as well. An asylee is able to petition derivatives, even after being granted asylum, whether they live in the United States or abroad, so long as they do so within two years of receiving asylum.

Waiver: An asylee who is applying for adjustment of status must also show they are not inadmissible to the United States under the grounds of inadmissibility at INA § 212(a). There are some grounds of inadmissibility that do not apply to asylees, like the public charge. Asylees are eligible to apply for a waiver under INA § 209(c) for inadmissibility grounds that do apply. This waiver is more generous than the regular waivers under the various sections of INA § 212, as it allows USCIS to approve such a waiver "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."

Pathway to Lawful Permanent Residence: An asylee will be able to apply for lawful permanent residence one year after being granted asylum. Asylees adjust status under INA § 209. Asylees are eligible to adjust status if they are in status, have been physically present in the United States for one-year, have not otherwise acquired LPR status, and are not inadmissible.

Although asylees are not required to file for adjustment, since their status will never expire, they are encouraged to, so that they can access other benefits, naturalize, and ensure they do not lose their protection.

Travel: Asylees can apply for a refugee travel document for international travel. However, asylees cannot travel back to their country of origin and generally should not do so, unless there is an emergency, until they become U.S. Citizen.

C. Considerations Before Applying for Asylum Status:

- Every asylum application requires either an interview with an asylum officer or a hearing before an immigration judge.
- Asylum cases that are not granted at the asylum office are referred to immigration court.
- There have been recent cases decided by the Attorney General and BIA attempting to limit many types of asylum claims—including claims based on domestic violence, gang violence, and the nuclear family. Despite this, asylum law has not changed, and adjudicators still have to analyze on a case by case basis.[30]
- Affirmative asylum applications- those filed by people who do not have an active case in immigration court- are processed on a 'last in, first out' basis. Therefore, someone who applies will likely have an interview within a few weeks of submitting their application.
- While asylees can travel internationally with a refugee travel document, they should not travel back to their country of origin.

II. Special Immigrant Juvenile Visa (SIJS):

Special Immigrant Juvenile Status (SIJS) is a form of immigration relief available to undocumented children and youth who have been abandoned, neglected, or abused by one or both parents AND who have been found to be dependent upon a juvenile court or placed in the custody of an agency, entity, or individual appointed by the court. Individuals granted SIJS will be eligible to apply for Lawful Permanent Status once a visa is available.

Law:

The law for SIJS can be located at INA § 101(a)(27)(J) and the regulations are located at 8 CFR § 204.11.

Note that the regulations have not been updated to reflect changes made to SIJS by the Trafficking Victims Protection and Reauthorization Act (TVPRA) of 2008. It is important that individuals working on these cases use the Statute and Regulations with the new USCIS policy guidance available at: https://www.uscis.gov/policymanual/HTML/PolicyManual.html -I-360: Volume 6 (Immigrants), Part J (Special Immigrant Juveniles).

Furthermore, SIJS depends on the law of the State in which the findings are made.

A. Eligibility for SIJS:

The eligibility requirements for SIJS[31]:

1. Declared dependent of a juvenile court ***or*** placed under the custody of a state agency or individual or entity appointed by the state or court;
2. Reunification with one ***or*** both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and
3. Not in youth's best interest to be returned to country of origin.
4. Under 21 years of age;[32]
5. Unmarried;

Before filing with USCIS, an applicant will have to obtain an order from a juvenile court with jurisdiction over the applicant where the judge finds that they meet the above requirements. These are referred to as "SIJS Findings." The SIJS findings must find that the child meets all of the eligibility requirements listed above.

1. Dependent of a juvenile court or placed under the custody of a state agency/individual/entity:

In order to be eligible to apply for SIJS, the applicant must be declared a dependent of a juvenile court or the court must have legally committed the child to, or placed them under the custody of, an agency or department of a state or an individual or entity appointed by a state or juvenile court.[33] A juvenile court is any court located in the United States that has jurisdiction under the state law to make judicial determinations about the custody of juvenile.[34]

Dependency refers to the process by which decisions are made about the custody and care of a child who has come into the child welfare system because they are "dependent" upon government intervention to ensure their adequate care. When a juvenile court accepts jurisdiction to make a decision about the care and custody of a child, the child is dependent on a juvenile court and therefore the court can make SIJS findings.[35] This includes dependency court (child welfare), probate court (guardianship), fa mily court (custody), and delinquency court (alleged violations of law by youth)[36].

Note for Applicants 18-21 years old—State laws vary as to how long a child can remain under juvenile court jurisdiction. Some states end dependency at 18 while others extend it until 21. This is in direct conflict with the statute which allows any person under 21 to apply. Because of this tension, there is a class of youth who are effectively barred from applying because no state court can take jurisdiction of them.

Additionally, recently USCIS has begun denying cases for youth who obtained a SIJS finding after they turned 18 years old. USCIS stated that state courts do not have power or authority to make these finding since they do not have the power to give custody back to the parents once the child turns 18. A class action lawsuit has been filed in New York and California challenging USCIS's denial of cases. *R.F.M. et al v. Nielsen et al*, No. 1:18-cv-05068 (S.D.N.Y. filed June 7, 2018); *J.L. et al v. Cissna et al*, No. 5:18-cv-04914 (N.D. Cal. filed Aug. 14, 2018).

Recently, the United States District Court of Southern District of New York issued a decision on the *R.F.M. et al v. Nielsen et al*, finding that the Government violated the law for all people like the plaintiffs (individuals whose application was based on New York Family Court Special Findings Order issued between their 18th and 21st birthday after January 1, 2016). For more information on the class action visit https://www.uscis.gov/legal-resources/legal-settlement-notices/class-notice-rfm-v-nielsen-118-cv-5068-sdny.

Visit the ILRC https://www.ilrc.org/immigrant-youth and Kids in Need of Defense (KIND) at https://supportkind.org/ for general information on this matter.

2. Reunification with one or both parents is not viable due to abuse, neglect, or abandonment:

Applicants for SIJS will need a state court to find that reunification with one ***or*** both parents is not viable due to abuse, neglect or abandonment.

Reunification not viable: A state court must make a determination that reunification with one or both parents is not viable. This finding must happen under state law and without this a child cannot apply for SIJS.[37] This does not require a formal termination of parental rights or a determination that reunification will never be possible. In fact, it is possible that future reunification can happen without making a child ineligible, **BUT** separation should be significant and more than just short term.[38] Furthermore, the child does not need to be separated from both parents to be eligible for SIJS. In one-parent SIJS cases, where a child is in the custody of one parent, a court can still issue SIJS findings.

Abuse, neglect, or abandonment: A state court must find that reunification was not possible because of the abuse, neglect, or abandonment (or similar state law).[39] Abuse, neglect, and abandonment are defined under the law of the state where the child resides when filing for SIJS. There is no requirement that the abuse, neglect, or abandonment took place in the United States for the child to be eligible. This also does not require that formal charges of abuse, neglect, or abandonment be levied against that parent(s).

> **Example**: Daniel, a 13-year-old boy from Honduras, was detained when entering the United States. He was later reunified with his mother in Fresno. Daniel had not seen his mother since he was eight, when she came to the United States to work and send money home to provide for Daniel. Daniel was raised by his maternal grandparents in Honduras. Daniel's father has not had any contact with him since he was three years old nor has he provided any financial or emotional support. Daniel's maternal grandparents cared for him in Honduras, but they were unable to protect him from gang violence and threats as he grew older.
>
> Here, Daniel would be eligible to seek SIJS even though he is living with his mother because his father abandoned him when he was three years old. Moreover, it would not be in Daniel's best interest to return to Honduras because his grandparent's, who cared for him, were unable to shield him from danger in his home country and his mother would be able to care for him here.

3. Not in the youth's best interest to be returned to country of origin:

The court has to determine that it is not in the child's best interest to return to their home country. This can be shown through documentation about how the child is best supported by staying in the United States. For example, applicants can speak to their support network as well as their access to education, justice systems, and medical attention. In addition, country conditions information about their home country and the lack of resources or poor living conditions there can bolster their claim. For example, applicants can describe how they do not have a family member that can care for them in their home country or protect them from harm.

B. Benefits of SIJS:

Applicants who are granted SIJS will be eligible to apply for LPR status once a visa becomes available. Once they adjust status, they will be able to access public benefits and work lawfully.

Even though most locations do not allow access to public benefits until SIJS applicants adjust status, some states and localities do make certain benefits available to these minors. Other states provide general access for all minors to certain benefits regardless of immigration status.

Derivatives: SIJS applicants cannot include derivatives and while they can petition certain family members once they are LPRs or USCs through the regular family- based system, they are prohibited from ever petitioning their parents.

Waiver: There are many grounds of inadmissibility that do not apply to SIJS-based adjustment of status. There is no need to file for a waiver for those grounds, even if the child has triggered them. In addition, SIJS-based adjustment of status applicants are eligible for a waiver under INA § 245(h)(2)(B) for "humanitarian purposes, family unity, or when it is otherwise in the public interest" for the grounds that do apply to them.

As for March 2009, the following grounds of inadmissibility automatically do not apply to SIJS-based adjustment of status applicants and no application for a waiver is needed: public charge; aliens present without admission or parole; misrepresentation, including false claim to USC; stowaways; immigrants not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document; and unlawful presence (though minors do not accrue unlawful presence).

Most of the remaining grounds of inadmissibility may be "waived" for SIJS[40]: health related grounds; prostitution and commercialized vices; failure to attend removal proceedings; smugglers; previous removals.

Pathway to Lawful Permanent Residence: An individual with an approved SIJS petition will be able to apply to adjust status when a visa becomes available. Depending on the country of origin of the minor, it may be possible to apply for adjustment concurrently or the individual may be subject to a waiting list. Once the applicant submits their application to adjust status, they will be issued a work permit. SIJS recipients are subject to the Employment-Based Preference Category 4. Minors from El Salvador, Guatemala, Honduras, and Mexico are subject to wait list while minors from any other country are immediately eligible to adjust status. Applicants can refer to the Visa Bulletin to estimate when their visa will be available at: https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-june-2019.html.

C. Considerations Before Applying for SIJS Status:

- There are some discrepancies between states on when a child can be declared dependent on a court making it hard for some applicants between the ages of 18-21 years old to apply for SIJS despite the statute allowing for children who are under 21 to apply;
- Recently USCIS has been denying cases for youth who received their SIJS findings after turning 18 years old. Previously, cases in which the youth was over 18 were routinely approved but it has been reported that

changes in policy have resulted in massive denials of these cases. There have been class action lawsuits filed in New York and California and advocates should visit the ILRC at https://www.ilrc.org/immigrant-youth, and Kids in Need of Defense (KIND) at https://supportkind.org/ for up to information and resources on the matter;[41]

- An applicant who is divorced or has children will not be barred from eligibility BUT an applicant will be ineligible if they are married. Applicants must remain unmarried until they are granted LPR;
- SIJS visas are given under the 4th preference category of employment-based visas (E4)—these have been recently oversubscribed for immigrants from El Salvador, Guatemala, Honduras, and Mexico. Applicants from these countries will have to wait until a visa is available before they can submit their application for adjustment.
- SIJS applicants are prohibited from ever petitioning their parents, even once they are USCs.

III. Conclusion:

The above is only a brief overview of what makes a person eligible for these humanitarian forms of relief. It is important to research each immigration option thoroughly before submitting an application and to consult immigration experts for any complex cases, especially in light of recent changes in policy and procedure within the Department of Homeland Security and Immigration Courts. Below is a list of resources to support advocates in exploring and pursuing these legal options with clients.

IV. Resources:

- For technical assistance when filing these applications:
  - ILRC Attorney of the Day Technical Assistance at https://www.ilrc.org/technical-assistance
  - Kids in Need of Defense (KIND) for assistance on youth filings at https://supportkind.org/resources/
  - Center for Gender and Refugee Studies (CGRS) for Asylum at https://cgrs.uchastings.edu/request-assistance/requesting-assistance-cgrs
- To refer clients to a free or low-cost, trusted legal service provider:
  - National Immigration Legal Services Directory: https://www.immigrationadvocates.org/nonprofit/legaldirectory/
- The National Immigration Law Center for resources on access to public benefits at www.nilc.org/accesstobens.html.
- USCIS released a new policy regarding when they will issue Notices to Appear (NTA) for applications that are denied, and the applicant has no other lawful status. For more information on how these impact these cases visit: https://www.ilrc.org/annotated-notes-and-practice-pointers-uscis-teleconference-notice-appear-nta-updated-policy-guidance
- There will be changes to the fee waiver in the coming months that may make it harder for applicants to apply because of application costs. Visit the ILRC website for up to date information on changes to the fee waiver at https://www.ilrc.org/.

End Notes

[1] INA § 101(a)(42)(A).
[2] *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).
[3] *See* In re T-Z-, 24 I&N Dec. 163, 171 (BIA 2007) (quoting H.R. Rep. No. 95-1452, at 5, as reprinted in 1978 USCCAN 4700, 4704, 1978 WL 8575 ("House Report")).
[4] See, e.g., *Bracic v. Holder*, 603 F.3d 1027, 1035-36 (8th Cir. 2010) (finding past persecution where respondent described numerous incidents of mistreatment by police and individuals dressed in police uniform, credible threats and beatings from soldiers, police and spy groups that had the authority to execute Muslims); *Javhlan v. Holder*, 626 F.3d 1119, 1123 (9th Cir. 2010) (detainment for four to five hours plus many threats to life resulting in partial stroke cumulatively constituted persecution); *Maldonado v. Att'y Gen.*, 188 Fed. Appx. 101 (3rd Cir. 2006) (finding that a gay man from Argentina had experienced persecution even though he had never suffered serious physical injuries, because he had been arrested and detained at least twenty times after coming out of a gay club); see also *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998) ("We find that these incidents constitute more than mere discrimination and harassment. In the aggregate, they rise to the level of persecution as contemplated by the Act"); *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998) ("The key question is whether, looking at the cumulative effect of all the incidents petitioner has suffered, the treatment she received rises to the level of persecution").
[5] *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996).
[6] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987).
[7] *Chen v. INS*, 195 F.3d 198, 203 (4th Cir. 1999); *Kourouma v. Holder*, 588 F.3d 234, 240 (4th Cir. 2009); *Huaman-Cornelio v. BIA*, 979 F.2d 995, 999 (4th Cir. 1992).
[8] *Salari v Ashcroft*, 114 F.App'x 815, 816 (9th Cir. 2004).
[9] *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).
[10] Direct Evidence of Motivation—statements made by either the persecutor or the applicant, notes left by the persecutor.
[11] Circumstantial Evidence of Motivation—overly severe punishment, flyers for hate groups left by the persecutor, anonymous threats and calls
[12] In *INS v. Elias-Zacaris* the "Court held that an asylum applicant must show proof of the persecutor's motivation and demonstrate that the persecutor harmed the applicant "on account of" one of the enumerated grounds.
[13] *Meza-Menay v. INS*, 139 F.3d 759, 763 (9th Cir. 1998); see also *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (finding applicant's belief that armed forces could not be restrained from their brutality constituted a political opinion even where the applicant "camouflaged" her belief and did not participate in politics), overruled on other grounds by *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (*en banc*).
[14] *Antonyan v. Holder*, 642 F.3d 1250, 1254 (9th Cir. 2011) (pre-REAL ID Act application).
[15] UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 7, 2002, at ¶ 29, 7, available at www.unhcr.org/en-us/publications/legal/3d58ddef4/guidelines-internationalprotection-1-gender-related-persecution-context.html (last visited: June 11, 2019).
[16] *Matter of Acosta*, 19 I&N Dec. at 233.
[17] *Matter of S-E-G*, 24 I&N Dec. 579, 584 (BIA 2008) (emphasis added).
[18] See *Matter of M-E-V-G, Respondent*, 26 I&N Dec. 227, 237 (BIA 2014); see also *Matter of W-G-R-, Respondent*, 26 I&N Dec. 208 (BIA 2014) (review granted in part and vacated on other grounds by *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016).
[19] *Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019).
[20] *Id.* at 591.
[21] *Id.* at 594 (emphasis original).
[22] UN Handbook at ¶ 71, 16.
[23] UN Handbook at ¶ 74, 16.
[24] *Navas v. INS*, 217 F.3d at 655-56.
[25] *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004) ("Only where non-governmental actors are

responsible for persecution do we consider whether an applicant reports the incidents to police, because in such cases a report of this nature may show governmental inability to control the actors").

[26] *In re S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000) (explaining that reporting is unreasonable in certain circumstances, e.g., where the applicant's persecutor is family who continues to closely monitor her every action).

[27] 8 CFR § 208.4(a)(2).

[28] 8 CFR § 208.4(a)(4)(i).

[29] 8 CFR § 208.4(a)(5)(i).

[30] *See* Immigrant Legal Resource Center's Practice Advisory *Matter of A-B- Considerations* available at https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf and the Center for Refugee and Gender Studies Matter of A-B- Resources available at https://cgrs.uchastings.edu/A-B-Action for more information on strategies for filing cases.

[31] INA § 101(a)(27)(J).

[32] TVPRA provided an age out protection for SIJS, beginning in Dec. 23, 2008 so long as an applicant is under 21 years of age on the date on which an SIJS petition is properly filed, USCIS cannot deny SIJS to a person based on age. (Special Immigrant Juvenile Petitions 76 Fed. Reg. 54978 (sept. 6, 2011)).

[33] INA § 101(a)(27)(J)(i).

[34] 8 CFR 204.11(a).

[35] See, *e.g., In re Y.M.*, 207 Cal. App. 4th 892 (4th Dist. 2012).

[36] Note that that in other states juvenile courts may have different names and different types of qualifying proceedings (e.g., Surrogates Court, or "destitute child" proceedings in NY).

[37] INA § 101(a)(27)(J).

[38] *USCIS Policy Manual* Vol. 6, Part J, Ch. 2(D)(2) available at https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2.

[39] INA 101(a)(27)(J)(i).

[40] *See* INA § 245(h)(2)(B), as amended by the Miscellaneous and Technical Corrections Act of 1991 § 301(d)(2); USCIS Memorandum, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions*, HQOPS 70, 8.5, 4–5 (Mar. 24, 2009) [hereinafter *Neufeld Memorandum*]; 7 USCIS-PM F(7)(C)(4).

[41] Liz Robbins, *A Rule is Changed for Young Immigrants, and Green Card Hopes Fade*, N.Y. TIMES, Apr. 17, 2018, https://www.nytimes.com/2018/04/18/nyregion/special-immigrant-juvenile-status-trump.html. This change occurred without USCIS issuing any public announcement about a change in policy or otherwise announcing a changed interpretation of the SIJS eligibility requirements. Soon thereafter, *Politico* reported on a "clarification" by the USCIS chief counsel's office—never announced publicly—"which called in February for the agency to reject pending applications in cases where applicants could not be returned to the custody of a parent." Ted Hesson, *USCIS Explains Juvenile Visa Denials*, POLITICO, Apr. 25, 2018, https://www.politico.com/newsletters/morning-shift/2018/04/25/travel-ban-at-scotus-182935. Since most courts cannot place a child back into the custody of their parent once the child reaches the age of majority, according to the new USCIS interpretation, those state courts "do not have power and authority to make the reunification findings for purposes of SIJ eligibility." *Id.* At the time of writing, class action lawsuits have been filed in New York and California challenging USCIS's denial of cases based on this unannounced policy change. M. et al v. Nielsen et al, No. 1:18-cv-05068 (S.D.N.Y. filed June 7, 2018); J.L. et al v. Cissna et al, No. 5:18-cv-04914 (N.D. Cal. filed Aug. 14, 2018). However, in the meantime, it seems clear that USCIS intends to deny many cases in which the SIJS findings were obtained after the youth turned eighteen, though this may depend to some extent on state law

San Francisco
1458 Howard Street
San Francisco, CA 94103
t: 415.255.9499 f: 415.255.9792

Washington D.C.
1015 15th Street, NW, Suite 600
Washington, DC 20005
t: 202.777.8999 f: 202.293.2849

ilrc@ilrc.org www.ilrc.org

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.

U VISA IMMIGRATION RELIEF FOR VICTIMS OF CERTAIN CRIMES

An Overview for Law Enforcement

As a law enforcement official, you play an important role in the application process for U nonimmigrant status (also known as a U visa). The U visa can be a key tool to support your case. The U visa can help certain crime victims feel safer reporting crimes, so that they may be more willing to work with you, even if they do not have lawful immigration status.

If approved, the U visa provides the victim with:

- temporary immigration status including work authorization;
- temporary immigration status for qualifying family members of the victim; and
- the possibility of lawful permanent resident status.

U VISA ELIGIBILITY

U.S. Citizenship and Immigration Services (USCIS), within the Department of Homeland Security (DHS), decides if a person is eligible for a U visa. Law enforcement does not determine who is eligible for a U visa; however, law enforcement provides information so that USCIS can determine if the person:

- is a victim of a qualifying crime or criminal activity;
- has information about the crime or criminal activity; and
- is, was, or is likely to be helpful in the detection or investigation of the qualifying crime or criminal activity, or the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity.

THE ROLE OF LAW ENFORCEMENT

To qualify for a U visa, a victim must submit a signed certification from a law enforcement official. This certification (known as USCIS Form I-918, Supplement B, U Nonimmigrant Status Certification) is evidence in support of the petition to USCIS for U nonimmigrant status. Victims may ask you to complete this certification. The certification gives USCIS basic information about the criminal activity perpetrated against the victim and the victim's willingness to assist in the detection, investigation, prosecution, conviction, or sentencing. You may also encounter victims who could qualify for a U visa but do not know about it. Providing them with information about the U visa may enable them to feel more comfortable working with you.

WHAT CONSTITUTES A QUALIFYING CRIME OR CRIMINAL ACTIVITY?

The following table lists the criminal activities that are considered "qualifying criminal activities" for purposes of U visa eligibility. These are general categories of crimes and it is important to note that any similar criminal activities that violate Federal, state, or local laws may also be considered "qualifying criminal activities" for purposes of U visa eligibility.

- Abduction
- Abusive Sexual Contact
- Being Held Hostage
- Blackmail
- Domestic Violence
- Extortion
- False Imprisonment
- Felonious Assault
- Female Genital Mutilation
- Fraud in Foreign Labor Contracting
- Incest
- Involuntary Servitude
- Kidnapping
- Manslaughter
- Murder
- Obstruction of Justice
- Peonage
- Perjury
- Prostitution
- Rape
- Sexual Assault
- Sexual Exploitation
- Slave Trade
- Stalking
- Torture
- Trafficking
- Witness Tampering
- Unlawful Criminal Restraint

Qualifying crimes include any similar activity where the nature and elements of the crime are substantially similar to one of the crimes listed. Attempt, conspiracy, or solicitation to commit any of the crimes listed above may also count as a "qualifying criminal activity."

WHICH LAW ENFORCEMENT AUTHORITIES ARE ELIGIBLE TO CERTIFY?

The following law enforcement authorities are eligible to complete the USCIS Form I-918, Supplement B, U Nonimmigrant Status Certification:

- Any Federal, state, or local law enforcement authority (including prosecutors and judges) that has responsibility for the detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity.
- If more than one qualifying law enforcement authority is involved in the case, such as a Federal agency and a local agency, any one of them may complete the certification. The law enforcement authority that completes and signs the certification will be considered the "certifying agency" and, therefore, the point of contact for USCIS should any questions about the certification arise.
- Law enforcement authorities with criminal investigative jurisdiction in their respective areas of expertise, including but not limited to child protective services, the Equal Employment Opportunity Commission, and the Department of Labor may also complete the certification.

WHO CAN SIGN A CERTIFICATION?

- The head of the certifying agency.
- Any person in a supervisory role who is specifically designated by the head of the agency to sign.
- A Federal, state, or local judge.

IS ANY LAW ENFORCEMENT AUTHORITY REQUIRED TO COMPLETE A CERTIFICATION?

The decision whether to complete Supplement B is atthe discretion of the certifying agency. **However, keep in mind that a victim's U visa petition will be denied without this certification.**

DOES THE VICTIM AUTOMATICALLY RECEIVE A U VISA BECAUSE A CERTIFICATION HAS BEEN SIGNED?

No. The certification by itself does not grant any immigration benefit. USCIS reviews all of the evidence submitted along with the certification to determine whether a victim is eligible for a U visa. USCIS also conducts a thorough background check of each U visa petitioner (as well as each included family member).

AT WHAT STAGE IN A CRIMINAL CASE CAN A LAW ENFORCEMENT AUTHORITY SIGN A CERTIFICATION?

Law enforcement may sign a certification at any time, including after detection of the criminal activity or while an investigation or prosecution is pending. Keep in mind:

- Law enforcement may sign a certification even after the case is over.
- Law enforcement may sign a certification regardless of how the case turns out. A conviction, prosecution, or arrest is *not* necessary for a victim to be eligible for relief.
- The victim may be eligible for a U visa even if the perpetrator is acquitted or convicted of a different crime.
- Law enforcement may also withdraw the certification if the victim stops cooperating with the investigation or prosecution.

TIPS FOR COMPLETING THE CERTIFICATION

- Find the certification form and instructions at uscis.gov/i-918.
- Use blue ink (preferably) for the signature.
- Submit an original ("wet") signature—not a photocopy or scan.
- Make sure that Supplement B is completed entirely by the certifying agency.
- Give the completed certification to the petitioner—do not submit it directly to USCIS.

WHO IS RESPONSIBLE FOR PREVENTING U VISA FRAUD?

The USCIS Fraud Detection and National Security Directorate works to ensure that individuals seeking to defraud our immigration system are not granted a U Visa.

WHERE CAN I FIND ADDITIONAL INFORMATION?

Please consult the U and T Visa Law Enforcement Resource Guide:
dhs.gov/publication/u-visa-law-enforcement-certification-resource-guide

USCIS Form I-918, Petition for U Nonimmigrant Status and Instructions: uscis.gov/i-918

For technical assistance: USCIS Office of Policy and Strategy (202) 272-1470

For information about upcoming trainings for law enforcement:
Email the USCIS Public Engagement Division at T_U_VAWATraining@uscis.dhs.gov

For more information about other immigration benefits that may be available to victims, including T nonimmigrant status (T visa) and Violence Against Women Act (VAWA) relief:
uscis.gov/humanitarian

YOUR CERTIFYING OFFICIAL IS:

The Dream Act, DACA, and Other Policies Designed to Protect Dreamers

With the attempted rescission of the Deferred Action for Children Arrivals (DACA) initiative in September of 2017, there has been renewed pressure on Congress to pass federal legislation known as the Dream Act to protect young immigrants who are vulnerable to deportation. This fact sheet provides an overview of the Dream Act[1] and other similar legislative proposals, explains changes made to DACA on March 13, 2019, and provides information about policies at the state level that support Dreamers.

History of the Dream Act

The first version of the Development, Relief, and Education for Alien Minors (DREAM) Act was introduced in 2001.[2] As a result, young undocumented immigrants have since been called "Dreamers." Over the last 18 years, at least ten versions of the Dream Act have been introduced in Congress. While the various versions of the Dream Act have contained some key differences, [3] they all would have provided a pathway to legal status for undocumented youth who came to this country as children. Some versions have garnered as many as 48 co-sponsors in the Senate and 152 in the House.[4]

Despite bipartisan support for each bill, none has become law.[5] The bill came closest to full passage in 2010 when it passed the House of Representatives but fell just five votes short of the 60 necessary to proceed in the Senate.[6]

In July 2017, versions of the Dream Act were introduced in the Senate by Senators Lindsay Graham (R-SC) and Richard Durbin (D-IL) and in the House by Rep. Lucille Roybal-Allard (D-CA) and Rep. Ileana Ros-Lehtinen (R-FL).[7] That year, members of the House of Representatives introduced several other legislative proposals to address undocumented youth, most of which were variants of the Dream Act.[8] Although some of these bills drew significant support, none became law.

Current Federal Legislative Proposals

The most recent version of the Dream Act, H.R. 2820, was introduced in May 2019 in the House by Rep. Roybal-Allard.[9] H.R. 2820 was passed by the House Judiciary Committee on May 22, 2019, and the bill was subsequently combined with H.R. 2821, the American Promise Act of 2019, to form H.R. 6, the American Dream and Promise Act of 2019.[10] H.R. 6 would provide permanent legal status for Dreamers as well as beneficiaries of two humanitarian programs: Temporary Protected Status (TPS) and Deferred Enforced Departure (DED). H.R. 6 passed the House on June 4, 2019, by a vote of 237 to 187.

What Does the Dream Act do?

The American Dream and Promise Act of 2019 would provide current, former, and future[11] undocumented high-school graduates and GED recipients a three-step pathway to U.S. citizenship through college, work, or the armed services.

STEP 1: CONDITIONAL PERMANENT RESIDENCE

An individual is eligible to obtain conditional permanent resident (CPR) status for up to 10 years, which includes work authorization, if the person:[12]

- entered the United States under the age of 18;
- entered four years prior to enactment and has since been continuously present;
- has been admitted to an institution of higher education or technical education school, has graduated high school or obtained a GED, or is currently enrolled in secondary school or a program assisting students to obtain a high school diploma or GED;
- has not been convicted of any "crime involving moral turpitude" or controlled substance offense, any crime punishable by more than one year in prison, or three or more offenses under state or federal law. There is an exception for offenses which are essential to a person's immigration status;
- has not been convicted of a crime of domestic violence unless the individual can prove the crime was related to being the victim of domestic violence, sexual assault, stalking, child abuse, neglect in later life, human trafficking, battery, or extreme cruelty.

Under the terms of the bill, the Secretary of Homeland Security can issue waivers for humanitarian purposes, for family unity, or when the waiver is otherwise in the public interest. In addition, anyone who has DACA would be granted a swift path to CPR status.[13]

STEP 2: LAWFUL PERMANENT RESIDENCE

Anyone who maintains CPR status can obtain lawful permanent residence (LPR status or a "green card") by satisfying one of the following requirements:[14]

- Higher education: Has completed at least two years, in good standing, of higher education or of a program leading to a certificate/credential from an area career and technical education school;
- Military service: Has completed at least two years of military service with an honorable discharge, if discharged; or
- Work: Can demonstrate employment over a total period of three years and at least 75 percent of the time that the individual had employment authorization, with exceptions for those enrolled in higher education or technical school.

Individuals who cannot meet one of these requirements can apply for a "hardship waiver" if the applicant is a person with disabilities, a full-time caregiver of a minor child, or for whom removal would cause extreme hardship to a spouse, parent, or child who is a national or lawful permanent resident of the United States.

STEP 3: NATURALIZATION

After maintaining LPR status for five years, an individual can generally apply to become a U.S. citizen through the normal process.

According to the Migration Policy Institute, as many as 2.31 million individuals would qualify for conditional permanent resident status under the 2019 version of the Dream Act, putting them on a path to citizenship. The bill would also provide a path to citizenship for an estimated 429,000 people who are current or former beneficiaries of TPS or DED.[15]

Deferred Action for Childhood Arrivals

On June 15, 2012, then-Secretary of Homeland Security Janet Napolitano created Deferred Action for Childhood Arrivals (DACA). DACA is an exercise of prosecutorial discretion, providing temporary relief from deportation (deferred action) and work authorization to certain young undocumented immigrants brought to the United States as children.[16] DACA has enabled almost 800,000 eligible young adults to work lawfully, attend school, and plan their lives without the constant threat of deportation, usually to an unfamiliar country.[17] Unlike federal legislation, however, DACA does not provide permanent legal status to individuals and must be renewed every two years.

On September 5, 2017, Acting Secretary of Homeland Security Elaine Duke rescinded the 2012 DACA memorandum and announced a "wind down" of DACA.[18] Effective immediately, no new applications for DACA would be accepted. DACA beneficiaries whose status was due to expire before March 5, 2018, were permitted to renew their status for an additional two years if they applied by October 5, 2017.[19] Any person for whom DACA would have expired as of March 6, 2018, would no longer have deferred action or employment authorization.[20]

On January 9, 2018, a federal judge in California blocked the Trump administration's termination of DACA and continued to allow renewal requests.[21] Similarly, on February 13, 2018, a federal judge in New York issued a preliminary injunction preventing the administration from abruptly ending the DACA program.[22] As of August 2019, individuals with DACA or those who have had DACA in the past can continue to renew their benefits on a two-year basis. However, first-time applications are no longer being accepted.[23]

State Policies that Protect Dreamers

States cannot legalize the status of undocumented immigrants, but they may address collateral issues that stem from being undocumented. Most notably, numerous states have enacted legislation that helps overcome barriers to higher education faced by many undocumented youth. Pursuant to some state laws and policies, undocumented students may be able to attend state universities and qualify for in-state tuition.

Colleges and universities each have their own policies about admitting undocumented students; some deny them admission, while others allow them to attend. Even when undocumented students are allowed to attend college, however, the tuition is often prohibitively expensive. If students cannot prove legal residency in a state, they must pay the much higher out-of-state or international-student tuition rates. Further, undocumented students do not qualify for federal student loans, work study, or other financial assistance. As a result, it is extremely difficult for undocumented students to afford to attend public universities.[24]

To help undocumented students afford college, at least 19 states have passed laws that provide them with the opportunity to receive in-state tuition. California, Colorado, Connecticut, Florida, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Texas, Utah, Virginia, and Washington permit undocumented students who have attended and graduated from the state's primary and secondary schools to pay the same college tuition as other state residents.[25] The laws generally require undocumented students to attend a school in the state for a certain number of years and graduate from high school in the state.[26]

Endnotes

1. Although the first "DREAM" act was known by its acronym in all capital letters, subsequent proposals have adopted the title "Dream."

2. S. 1291, 107th Cong. (2001).

3. For example, prior versions of the Dream Act have varied in their treatment of potential beneficiaries who are abroad, the treatment of close family members of potential beneficiaries, and in the duration of the conditional status to be conferred.

4. S. 1545, 108th Cong. (2003); H.R. 1648, 108th Cong. (2003).

5. S. 1291, 107th Cong. (2001); S. 1545, 108th Cong. (2003); H.R. 1648, 108th Cong. (2003); S. 2075, 109th Cong. (2005); H.R.5131, 109th Cong. (2005); S.2205, 110th Cong. (2007); H.R. 1275, 110th Cong. (2007); H.R. 5241, 111th Cong. (2010); S. 729, 111th Cong. (2010); S. 3992, 111th Cong. (2010); H.R. 1842, 112th Cong. (2011); S. 952, 112th Cong. (2011); H.R. 1468, 115th Cong. (2017); H.R. 3591, 115th Cong. (2017). The comprehensive immigration reform bill S. 744, which passed the Senate in 2013 with bipartisan support from 68 Senators, included special legalization provisions for Dreamers.

6. H.R. 5241, 111th Cong. (2010); 12/18/2010 Cloture on the motion to agree to House amendment to Senate amendment not invoked in Senate by Yea-Nay Vote. 55 – 41.

7. S. 1615, 115th Cong. (2017); H.R. 3440, 115th Cong. (2017).

8. For example, Rep. Carlos Curbelo (R-FL) proposed the Recognizing America's Children (RAC) Act, which contained a more restrictive path to legalization than the Dream Act bill currently pending in the Senate and House. H.R. 1468, 115th Cong. (2017). Rep. Luis Gutierrez (D-IL) introduced the American Hope Act, which had a more generous path to legalization than any of the Dream Act bills. H.R. 3591, 115th Cong. (2017). In addition, Rep. Mike Coffman (R-CO) introduced the Bar Removal of Individuals who Dream and Grow our Economy Act (BRIDGE Act), that would not create a permanent legal status for Dreamers, but instead would provide deferred action from deportation to Dreamers for only three years. H.R. 496, 115th Cong. (2017).

9. H.R. 2820, 116th Cong. (2019).

10. H.R. 6, 116th Cong. (2019).

11. Ibid. at Section 102(b)(1)(D).

12. Ibid. at Section 102(b)(1).

13. Ibid. at Section 102(b)(2).

14. Ibid. at Section 105(a).

15. Julia Gelatt, "More than a DREAM (Act), Less than a Promise" (Washington, DC: Migration Policy Institute, March 2019), https://www.migrationpolicy.org/news/more-dream-act-less-promise.

16. To be eligible, DACA applicants have had to meet the following requirements:
    - Arrived in the United States before turning 16, and were under the age of 31 on June 15, 2012;
    - Continuously resided in the United States from June 15, 2007, to the present;
    - Were physically present in the United States on June 15, 2012, as well as at the time of requesting deferred action;
    - Entered without inspection before June 15, 2012, or any previous lawful immigration status expired on or before June 15, 2012;
    - Are either in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are honorably discharged veterans of the U.S. Coast Guard or the U.S. Armed Forces; and
    - Have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors occurring on different dates and arising out of different acts, omissions, or schemes of misconduct, and do not otherwise pose a threat to national security or public safety.

17. "Number of Form I-821D,Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status Fiscal Year 2012-2017," U.S. Citizenship and Immigration Services, last updated March 31, 2017, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr2.pdf.

18. Memorandum from Elaine Duke, Acting Sec., Department of Homeland Security, to James McCament, Acting Director, U.S. Citizenship and Immigration Services, Thomas Homan, Acting Director, U.S. Immigration and Customs Enforcement, Kevin McAleenan, Acting Commissioner, U.S. Customs and Border Protection, Joseph Maher, Acting General Counsel, Ambassador James Nealon, Assistant Secretary International Engagement, Subj: Memorandum on Recession of Deferred Action for Childhood Arrivals (DACA) (September 5, 2017) https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca.

19. Ibid.

20. Ibid.

21. See *Regents of U. of California v. U.S. Dept. of Homeland Sec*., 279 F. Supp. 3d 1011, 1020 (N.D. Cal. 2018), aff'd sub nom. *Regents of the U. of California v. U.S. Dept. of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018); Michael D. Shear, "Trump Must Keep DACA Protections for Now," *New York Times*, January 9, 2018, https://www.nytimes.com/2018/01/09/us/trump-daca-improper.html.

22. *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 407 (E.D.N.Y. 2018).

23. Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction," U.S. Citizenship and Immigration Services, last updated February 22, 2018, https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction.

24. Roberto G. Gonzales, *Wasted Talent and Broken Dreams: The Lost Potential of Undocumented Students* (Washington, DC: Immigration Policy Center, American Immigration Law Foundation, October 2007), p. 2, https://www.americanimmigrationcouncil.org/research/wasted-talent-and-broken-dreams-lost-potential-undocumented-students.

25. "Undocumented Student Tuition: Overview," National Conference of State Legislatures, last updated October 29, 2015, http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx; "US States that Offer In-State Tuition Rates to Undocumented Students (and What to Do if Your State Isn't One of Them)," University of the People, https://www.uopeople.edu/blog/us-states-that-offer-in-state-tuition-rates-to-undocumented-students-and-what-to-do-if-your-state-isnt-one-of-them/.

26. Ibid.

Temporary Protected Status: An Overview

Temporary Protected Status (TPS) is a temporary immigration status provided to nationals of certain countries experiencing problems that make it difficult or unsafe for their nationals to be deported there.[1] TPS has been a lifeline to hundreds of thousands of individuals already in the United States when problems in a home country make their departure or deportation untenable. This fact sheet provides an overview of how TPS designations are determined, what benefits TPS confers, and how TPS beneficiaries apply for and regularly renew their status.

What is Temporary Protected Status?

Congress created Temporary Protected Status (TPS) in the Immigration Act of 1990.[2] It is a temporary immigration status provided to nationals of specifically designated countries that are confronting an ongoing armed conflict, environmental disaster, or extraordinary and temporary conditions.[3] It provides a work permit and stay of deportation to foreign nationals from those countries who are in the United States at the time the U.S. government makes the designation.[4]

For what reasons can a country be designated for TPS?

A country may be designated for TPS for one or more of the following reasons:[5]

- An ongoing armed conflict, such as a civil war, that poses a serious threat to the personal safety of returning nationals;
- An environmental disaster, such as an earthquake, hurricane, or epidemic, that results in a substantial but temporary disruption of living conditions, and because of which the foreign state is temporarily unable to adequately handle the return of its nationals; or
- Extraordinary and temporary conditions in the foreign state that prevent its nationals from returning to the state in safety (unless the U.S. government finds that permitting these nationals to remain temporarily in the United States is contrary to the U.S. national interest).

Who has the authority to designate a country for TPS?

The Secretary of Homeland Security has discretion to decide when a country merits a TPS designation.[6] The Secretary must consult with other government agencies prior to deciding to designate a country—or part of a country—for TPS.[7] Although these other agencies are not specified in the statute, these consultations usually involve the Department of State, the National Security Council, and occasionally the Department of Justice

(DOJ). The Secretary's decision as to whether or not to designate a country for TPS is not subject to judicial review, according to immigration law.

How long are TPS designations?

A TPS designation can be made for 6, 12, or 18 months at a time.[8] At least 60 days prior to the expiration of TPS, the Secretary must decide whether to extend or terminate a designation based on the conditions in the foreign country.[9] Decisions to begin, extend, or terminate a TPS designation must be published in the Federal Register.[10] If an extension or termination decision is not published at least 60 days in advance of expiration, the designation is automatically extended for six months.[11] The law does not define the term "temporary" or otherwise limit the amount of time for which a country can have a TPS designation.

Who is eligible for TPS?

In order to qualify for TPS, an individual must:[12]

- Be a national of the foreign country with a TPS designation (or if stateless, have last habitually resided in a country with a TPS designation);
- Be continuously physically present in the United States since the effective date of designation;
- Have continuously resided in the United States since a date specified by the Secretary of Homeland Security; and
- Not be inadmissible to the United States or be barred from asylum for certain criminal or national security-related reasons, such as individuals who have been convicted of any felony or two or more misdemeanors.

Nationals of a designated country do not automatically receive TPS, but instead must register during a specific registration period and pay significant fees. In addition, an individual's immigration status at the time of application for TPS has no effect on one's eligibility, nor does the previous issuance of an order of removal.

What does TPS authorize a noncitizen to do?

An individual who is eligible for TPS must register by submitting an application to U.S. Citizenship and Immigration Services (USCIS), an agency of the Department of Homeland Security (DHS).[13] If a person demonstrates eligibility and USCIS grants TPS, that person receives a temporary stay of deportation and temporary authorization to work in the United States.[14] TPS beneficiaries are also eligible for advance parole, which provides permission to travel abroad and return to the United States, but they must apply for it separately.[15] Beneficiaries are not eligible for any public assistance by virtue of their TPS status.[16]

Which countries have TPS?

As of February 2020, the following 10 countries were designated for TPS and the designation had not expired:[17]

- *El Salvador (Extended until January 4, 2021)[18]
- *Haiti (Extended until January 4, 2021)[19]
- *Honduras (Extended until January 4, 2021) [20]
- *Nepal (Extended until January 4, 2021) [21]
- *Nicaragua (Extended until January 4, 2021) [22]
- Somalia (Extended until September 17, 2021)[23]
- South Sudan (Extended until November 2, 2020)[24]
- *Sudan (Extended until January 4, 2021)[25]
- Syria (Extended until March 31, 2021)[26]
- Yemen (Extended until September 3, 2021)[27]

**As of May 2019, these TPS designations had been terminated by DHS but will not go into effect until further notice, contingent upon rulings in at least two lawsuits, including: Bhattarai v. Nielsen (Honduras and Nepal) and Ramos v. Nielsen (El Salvador, Haiti, Nicaragua, and Sudan).*

Which countries have had TPS in the past?

Since TPS was created, the following countries or parts of countries have had TPS designations that are now terminated:

- Angola (Expired March 29, 2003)[28]
- Bosnia-Herzegovina (Expired February 10, 2001)[29]
- Burundi (Expired May 2, 2009)[30]
- Guinea (Expired May 21, 2017)[31]
- Guinea-Bissau (Expired September 10, 2000)[32]
- Province of Kosovo (Expired December 8, 2000)[33]
- Kuwait (Expired March 27, 1992)[34]

- Lebanon (Expired April 9, 1993)[35]
- Liberia (Expired May 21, 2017)[36]
- Montserrat (Expired August 27, 2004)[37]
- Rwanda (Expired December 6, 1997)[38]
- Sierra Leone (Expired May 21, 2017)[39]

Does TPS create a path to permanent residence or citizenship?

TPS does not provide beneficiaries with a separate path to lawful permanent residence (a green card) or citizenship.[40] However, a TPS recipient who otherwise is eligible for permanent residence may apply for that status.[41]

Generally, a person who entered the United States without inspection is not eligible to apply for permanent residence. As of May 2019, three federal appellate circuits had ruled on this issue:

- Two federal appellate circuits (the Ninth and Sixth Circuits) ruled that a person with valid TPS status could adjust status to lawful permanent residence if otherwise eligible through a family-based or employment-based petition, even if he or she entered the United States without inspection.[42]
- The Eleventh Circuit ruled that a TPS recipient who entered without inspection is not eligible to adjust to permanent residence.[43]

DHS' position, applicable in all other circuits, is that a TPS holder is not eligible to adjust status within the United States. In order to gain permanent resident status, a TPS recipient must instead depart the country to have a visa processed at a consular post. For many TPS holders who originally entered the United States without inspection, a departure to have a visa interview would trigger bars to re-entry for up to 10 years.

Alternatively, some TPS recipients may be eligible to adjust status if they were granted advance permission from USCIS (referred to as advance parole), traveled abroad, and were paroled back into the United States.

What happens to a TPS beneficiary when a TPS designation ends?

TPS beneficiaries return to the immigration status that the person held prior to receiving TPS, unless that status has expired or the person has successfully acquired a new immigration status.[44] TPS beneficiaries who entered the United States without inspection and who are not eligible for other immigration benefits, for example, would return to being undocumented at the end of a TPS designation and become subject to removal.

How are "Deferred Enforced Departure" and "Extended Voluntary Departure" related to TPS?

Deferred Enforced Departure (DED) is very similar to TPS but derives from the President's foreign policy authority rather than from a specific law.[45] As of February 2020, the only country designated for DED was Liberia, effective until March 30, 2020.[46]

- There are no explicit criteria for making DED decisions or for determining who would be eligible for DED once a designation is determined.
- Just like TPS holders, DED beneficiaries receive a work permit and stay of deportation; however, they are not permitted to travel abroad.[47]

While employment authorization for Liberians under DED will expire on March 30, 2020, Liberians covered by DED may be eligible for permanent resident status under Section 7611 of the National Defense Authorization Act for Fiscal Year 2020,[48] Liberian Refugee Immigration Fairness (LRIF).[49] Under the LRIF as enacted on December 20, 2019, certain Liberian nationals have been given a one-year window to pursue permanent residency in the U.S.[50]

Extended Voluntary Departure (EVD) was the predecessor to TPS prior to the Immigration Act of 1990. It was a discretionary authority used by the Attorney General (at a time when the Immigration and Naturalization Service was housed in DOJ) to give nationals of certain countries experiencing turbulent country conditions temporary permission to remain in the United States. Congress eliminated EVD with the creation of TPS.

Endnotes

1. 8 U.S.C. § 1254a.
2. Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).
3. Ibid.
4. Ibid.
5. 8 U.S.C. § 1254a(b). Note that TPS designations based on an environmental disaster also require the foreign state to officially request designation. This request is not required for TPS designations for other reasons.
6. 8 U.S.C. § 1254a.
7. Ibid.
8. 8 U.S.C. § 1254a(b). Occasionally, the Secretary will re-designate a country for TPS, which is different from an extension in that it updates the physical presence requirement to allow those foreign nationals who have arrived in the United States since the previous designation to apply for TPS.
9. Ibid.
10. 8 *C.F.R.* § 244.19.
11. Ibid.
12. 8 *C.F.R.* § 244.
13. Ibid. § 244.7.
14. 8 U.S.C. § 1254a(a).
15. 8 *C.F.R.* § 244.15.
16. 8 U.S.C. § 1254a(f).
17. U.S. Citizenship and Immigration Services (USCIS), "Countries Currently Designated for TPS," last updated January 17, 2020, https://www.uscis.gov/humanitarian/temporary-protected-status. TPS programs designated for termination amount to 98% of the people covered by the program; Elise Foley, "Trump Tells 57,000 Honduran Immigrants to Leave or Risk Deportation," *Huffington Post*, May 4, 2018, https://www.huffingtonpost.com/entry/tps-honduras_us_5ae0d15fe4b02baed1b5d2bf.
18. Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan, 84 Fed. Reg. 59403 (Nov. 4, 2019), https://www.federalregister.gov/documents/2019/11/04/2019-24047/continuation-of-documentation-for-beneficiaries-of-temporary-protected-status-designations-for-el.
19. Ibid.
20. Ibid.
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Presidential Proclamation on Novel Coronavirus

Visa Announcement

March 14, 2020

Presidential Proclamation on Novel Coronavirus

On Friday, January 31, President Trump signed a proclamation suspending entry into the United States of aliens who were physically present in the People's Republic of China, excluding the Special Administrative Regions of Hong Kong and Macau, within the 14 days preceding entry or attempted entry into the United States. The proclamation took effect Sunday, February 2. This action followed the declaration of a public health emergency in the United States related to the novel coronavirus outbreak in Wuhan, China.

On Saturday, February 29, President Trump signed a second proclamation suspending entry into the United States of aliens who were physically present in Iran within the 14 days preceding entry or attempted entry into the United States. This proclamation took effect as of Monday, March 2.

On Thursday, March 11, President Trump signed a third proclamation suspending entry into the United States of aliens who were physically present in any of the 26 countries that make up the Schengen Area within the 14 days preceding their entry or attempted entry into the United States. The Schengen Area consists of Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland. This proclamation is in effect as of 11:59 p.m., March 13, 2020.

On March 14, President Trump signed a fourth proclamation that restricts travel to the United States of foreign nationals who were physically present in the United Kingdom and Ireland within the 14 days

preceding their entry or attempted entry into the United States. This proclamation is in effect as of 11:59 p.m. eastern daylight time on March 16, 2020.

U.S. citizens are not subject to the proclamations. All three proclamations provide exceptions to the restrictions for lawful permanent residents of the United States. Some exceptions include, but are not limited to: foreign diplomats traveling to the United States on A or G visas and certain family members of U.S. citizens or lawful permanent residents including; spouses, children (under the age of 21), parents (provided that his/her U.S. citizen or lawful permanent resident child is unmarried and under the age of 21), and siblings (provided that both the sibling and the U.S. citizen or lawful permanent resident are unmarried and under the age of 21). There is also an exception for air and sea crew traveling to the United States on C, D or C1/D visas. For the full list of exceptions please refer to the proclamations.

The full text of the presidential proclamations are available on the White House website at:

China: https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/

Iran: https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-coronavirus/

Schengen Area: https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-2019-novel-coronavirus/

United Kingdom and Ireland: https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-coronavirus-2/

Federal Register
Vol. 85, No. 51
Monday, March 16, 2020

Presidential Documents

Title 3—

The President

Proclamation 9993 of March 11, 2020

Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus

By the President of the United States of America A Proclamation

On January 31, 2020, I issued Proclamation 9984 (Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmit- ting 2019 Novel Coronavirus and Other Appropriate Measures To Address This Risk). I found that the potential for widespread transmission of a novel (new) coronavirus (which has since been renamed ''SARS–CoV–2'' and causes the disease COVID–19) (''SARS–CoV–2'' or ''the virus'') by in- fected individuals seeking to enter the United States threatens the security of our transportation system and infrastructure and the national security. Because the outbreak of the virus was at the time centered in the People's Republic of China, I suspended and limited the entry of all aliens who were physically present within the People's Republic of China, excluding the Special Administrative Regions of Hong Kong and Macau, during the 14-day period preceding their entry or attempted entry into the United States, subject to certain exceptions. On February 29, 2020, in recognition of the sustained person-to-person transmission of SARS–CoV–2 in the Islamic Republic of Iran, I issued Proclamation 9992 (Suspension of Entry as Immi- grants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus), suspending and limiting the entry of all aliens who were physically present within the Islamic Republic of Iran during the 14-day period preceding their entry or attempted entry into the United States, subject to certain exceptions.

The Centers for Disease Control and Prevention (CDC), a component of the Department of Health and Human Services, has determined that the virus presents a serious public health threat, and CDC continues to take steps to prevent its spread. But CDC, along with State and local health departments, has limited resources, and the public health system could be overwhelmed if sustained human-to-human transmission of the virus occurred in the United States on a large scale. Sustained human-to-human transmission has the potential to cause cascading public health, economic, national security, and societal consequences.

The World Health Organization has determined that multiple countries with- in the Schengen Area are experiencing sustained person-to-person trans- mission of SARS–CoV–2. For purposes of this proclamation, the Schengen Area comprises 26 European states: Austria, Belgium, Czech Republic, Den- mark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland. The Schengen Area currently has the largest number of confirmed COVID–19 cases outside of the People's Republic of China. As of March 11, 2020, the number of cases in the 26 Schengen Area countries is 17,442, with 711 deaths, and shows high continuous growth in infection rates. In total, as of March 9, 2020, the Schengen Area has exported 201 COVID–19 cases to 53 countries. Moreover, the free flow of people between the Schengen Area countries makes the task of managing the spread of the virus difficult.

The United States Government is unable to effectively evaluate and monitor all of the travelers continuing to arrive from the Schengen Area. The potential for undetected transmission of the virus by infected individuals seeking to enter the United States from the Schengen Area threatens the security of our transportation system and infrastructure and the national security. Given the importance of protecting persons within the United States from the threat of this harmful communicable disease, I have determined that it is in the interests of the United States to take action to restrict and suspend the entry into the United States, as immigrants or nonimmigrants, of all aliens who were physically present within the Schengen Area during the 14-day period preceding their entry or attempted entry into the United States. The free flow of commerce between the United States and the Schengen Area countries remains an economic priority for the United States, and I remain committed to facilitating trade between our nations.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigra- tion and Nationality Act, 8 U.S.C. 1182(f) and 1185(a), and section 301 of title 3, United States Code, hereby find that the unrestricted entry into the United States of persons described in section 1 of this proclamation would, except as provided for in section 2 of this proclamation, be detri- mental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions. I therefore hereby proclaim the following:

Section 1. *Suspension and Limitation on Entry.* The entry into the United States, as immigrants or nonimmigrants, of all aliens who were physically present within the Schengen Area during the 14-day period preceding their entry or attempted entry into the United States is hereby suspended and limited subject to section 2 of this proclamation.

Sec. 2. *Scope of Suspension and Limitation on Entry.*

(a) Section 1 of this proclamation shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any alien who is the spouse of a U.S. citizen or lawful permanent resident;

(iii) any alien who is the parent or legal guardian of a U.S. citizen or lawful permanent resident, provided that the U.S. citizen or lawful perma- nent resident is unmarried and under the age of 21;

(iv) any alien who is the sibling of a U.S. citizen or lawful permanent resident, provided that both are unmarried and under the age of 21;

(v) any alien who is the child, foster child, or ward of a U.S. citizen or lawful permanent resident, or who is a prospective adoptee seeking to enter the United States pursuant to the IR–4 or IH–4 visa classifications;

(vi) any alien traveling at the invitation of the United States Government for a purpose related to containment or mitigation of the virus;

(vii) any alien traveling as a nonimmigrant pursuant to a C–1, D, or C–1/D nonimmigrant visa as a crewmember or any alien otherwise traveling to the United States as air or sea crew;

(viii) any alien

(A) seeking entry into or transiting the United States pursuant to one of the following visas: A–1, A–2, C–2, C–3 (as a foreign government official or immediate family member of an official), E–1 (as an employee of TECRO or TECO or the employee's immediate family members), G– 1, G–2, G–3, G–4, NATO–1 through NATO–4, or NATO–6 (or seeking to enter as a nonimmigrant in one of those NATO categories); or

(B) whose travel falls within the scope of section 11 of the United Nations Headquarters Agreement;

(ix) any alien whose entry would not pose a significant risk of introducing, transmitting, or spreading the virus, as determined by the Secretary of Health and Human Services, through the CDC Director or his designee;

(x) any alien whose entry would further important United States law enforcement objectives, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees, based on a recommendation of the Attorney General or his designee;

(xi) any alien whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their designees; or

(xii) members of the U.S. Armed Forces and spouses and children of members of the U.S. Armed Forces.

(b) Nothing in this proclamation shall be construed to affect any individ- ual's eligibility for asylum, withholding of removal, or protection under the regulations issued pursuant to the legislation implementing the Conven- tion Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, consistent with the laws and regulations of the United States.

Sec. 3. *Implementation and Enforcement.* (a) The Secretary of State shall implement this proclamation as it applies to visas pursuant to such proce- dures as the Secretary of State, in consultation with the Secretary of Home- land Security, may establish. The Secretary of Homeland Security shall implement this proclamation as it applies to the entry of aliens pursuant to such procedures as the Secretary of Homeland Security, in consultation with the Secretary of State, may establish.

(b) Consistent with applicable law, the Secretary of State, the Secretary of Transportation, and the Secretary of Homeland Security shall ensure that any alien subject to this proclamation does not board an aircraft traveling to the United States.

(c) The Secretary of Homeland Security may establish standards and proce- dures to ensure the application of this proclamation at and between all United States ports of entry.

(d) An alien who circumvents the application of this proclamation through fraud, willful misrepresentation of a material fact, or illegal entry shall be a priority for removal by the Department of Homeland Security.

Sec. 4. *Termination.* This proclamation shall remain in effect until terminated by the President. The Secretary of Health and Human Services shall rec- ommend that the President continue, modify, or terminate this proclamation as described in section 5 of Proclamation 9984, as amended.

Sec. 5. *Effective Date.* This proclamation is effective at 11:59 p.m. eastern daylight time on March 13, 2020. This proclamation does not apply to persons aboard a flight scheduled to arrive in the United States that departed prior to 11:59 p.m. eastern daylight time on March 13, 2020.

Sec. 6. *Severability.* It is the policy of the United States to enforce this proclamation to the maximum extent possible to advance the national secu- rity, public safety, and foreign policy interests of the United States. Accord- ingly:

(a) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this proclamation and the application of its provisions to any other persons or circumstances shall not be affected thereby; and

(b) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements to conform with existing law and with any applicable court orders.

Sec. 7. *General Provisions.* (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

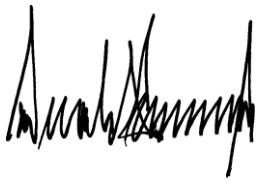
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this eleventh day of March, in the year of our Lord two thousand twenty, and of the Independ- ence of the United States of America the two hundred and forty-fourth.



PROCLAMATIONS

Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus

HEALTHCARE

Issued on: **January 31, 2020**

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The United States has confirmed cases of individuals who have a severe acute respiratory illness caused by a novel (new) coronavirus ("2019-nCoV") ("the virus") first detected in Wuhan, Hubei Province, People's Republic of China ("China"). The virus was discovered in China in December 2019. As of January 31, 2020, Chinese health officials have reported approximately 10,000 confirmed cases of 2019-nCoV in China, more than the number of confirmed cases of Severe Acute Respiratory Syndrome (SARS) during its 2003 outbreak. An additional 114 cases have been confirmed across 22 other countries; in several of these cases, the infected individuals had not visited China. More than 200 people have died from the virus, all in China.

Coronaviruses are a large family of viruses. Some cause illness in people and others circulate among animals, including camels, cats, and bats. Animal coronaviruses are capable of evolving to infect people and subsequently spreading through human-to-human transmission. This occurred with both Middle East Respiratory Syndrome and SARS. Many of the individuals with the earliest confirmed cases of 2019-nCoV in Wuhan, China had some link to a large seafood and live animal market, suggesting animal-to-human transmission. Later, a growing number of infected individuals reportedly did not have exposure to animal markets, indicating human-to-human transmission. Chinese officials now report that sustained human-to-human transmission of the virus is occurring in China. Manifestations of severe disease have included severe pneumonia, acute respiratory distress syndrome, septic shock, and multi-organ failure.

Neighboring jurisdictions have taken swift action to protect their citizens by closing off travel between their territories and China. On January 30, 2020, the World Health Organization declared the 2019-nCoV outbreak a public health emergency of international concern.

Outbreaks of novel viral infections among people are always of public health concern, and older adults and people with underlying health conditions may be at increased risk. Public health experts are still learning about the severity of 2019-nCoV. An understanding of the key attributes of this novel virus, including its transmission dynamics, incubation period, and severity, is critical to assessing the risk it poses to the American public. Nonetheless, the Centers for Disease Control and Prevention (CDC) has determined that the virus presents a serious public health threat.

The CDC is closely monitoring the situation in the United States, is conducting enhanced entry screening at 5 United States airports where the majority of travelers from Wuhan arrive, and is enhancing illness response capacity at the 20 ports of entry where CDC medical screening stations are located. The CDC is also supporting States in conducting contact investigations of confirmed 2019-nCoV cases identified within the United States. The CDC has confirmed that the virus has spread between two people in the United States, representing the first instance of person-to-person transmission of the virus within the United States. The CDC, along with state and local health departments, has limited resources and the public health system could be overwhelmed if sustained human-to-human transmission of the virus occurred in the United States. Sustained human-to-human transmission has the potential to have cascading public health, economic, national security, and societal consequences.

During Fiscal Year 2019, an average of more than 14,000 people traveled to the United States from China each day, via both direct and indirect flights. The United States Government is unable to effectively evaluate and monitor all of the travelers continuing to arrive from China. The potential for widespread transmission of the virus by infected individuals seeking to enter the United States threatens the security of our transportation system and infrastructure and the national security. Given the importance of protecting persons within the United States from the threat of this harmful communicable disease, I have determined that it is in the interests of the United States to take action to restrict and suspend the entry into the United States, as immigrants or nonimmigrants, of all aliens who were physically present within the People's Republic of China, excluding the Special Administrative Regions of Hong Kong and Macau, during the 14-day period preceding their entry or attempted entry into the United States. I have also determined that the United States should take all necessary and appropriate measures to facilitate orderly medical screening and, where

appropriate, quarantine of persons allowed to enter the United States who may have been exposed to this virus.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(f) and 1185(a), and section 301 of title 3, United States Code, hereby find that the unrestricted entry into the United States of persons described in section 1 of this proclamation would, except as provided for in section 2 of this proclamation, be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions. I therefore hereby proclaim the following:

Section 1. Suspension and Limitation on Entry. The entry into the United States, as immigrants or nonimmigrants, of all aliens who were physically present within the People's Republic of China, excluding the Special Administrative Regions of Hong Kong and Macau, during the 14-day period preceding their entry or attempted entry into the United States is hereby suspended and limited subject to section 2 of this proclamation.

Sec. 2. Scope of Suspension and Limitation on Entry.

(a) Section 1 of this proclamation shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any alien who is the spouse of a U.S. citizen or lawful permanent resident;

(iii) any alien who is the parent or legal guardian of a U.S. citizen or lawful permanent resident, provided that the U.S. citizen or lawful permanent resident is unmarried and under the age of 21;

(iv) any alien who is the sibling of a U.S. citizen or lawful permanent resident, provided that both are unmarried and under the age of 21;

(v) any alien who is the child, foster child, or ward of a U.S. citizen or lawful permanent resident, or who is a prospective adoptee seeking to enter the United States pursuant to the IR-4 or IH-4 visa classifications;

(vi) any alien traveling at the invitation of the United States Government for a purpose related to containment or mitigation of the virus;

(vii) any alien traveling as a nonimmigrant under section 101(a)(15)(C) or (D) of the INA, 8 U.S.C. 1101(a)(15)(C) or (D), as a crewmember or any alien otherwise traveling to the United States as air or sea crew;

(viii) any alien seeking entry into or transiting the United States pursuant to an A-1, A-2, C-2, C-3 (as a foreign government official or immediate family member of an official), G-1, G-2, G-3, G-4, NATO-1 through NATO-4, or NATO-6 visa;

(ix) any alien whose entry would not pose a significant risk of introducing, transmitting, or spreading the virus, as determined by the CDC Director, or his designee;

(x) any alien whose entry would further important United States law enforcement objectives, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees based on a recommendation of the Attorney General or his designee; or

(xi) any alien whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their designees.

(b) Nothing in this proclamation shall be construed to affect any individual's eligibility for asylum, withholding of removal, or protection under the regulations issued pursuant to the legislation implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, consistent with the laws and regulations of the United States.

Sec. 3. Implementation and Enforcement. (a) The Secretary of State shall implement this proclamation as it applies to visas pursuant to such procedures as the Secretary of State, in consultation with the Secretary of Homeland Security, may establish. The Secretary of Homeland Security shall implement this proclamation as it applies to the entry of aliens pursuant to such procedures as the Secretary of Homeland Security, in consultation with the Secretary of State, may establish.

(b) Consistent with applicable law, the Secretary of State, the Secretary of Transportation, and the Secretary of Homeland Security shall ensure that any alien subject to this proclamation does not

board an aircraft traveling to the United States.

(c) The Secretary of Homeland Security may establish standards and procedures to ensure the application and implementation of this proclamation at United States seaports and in between all ports of entry.

(d) An alien who circumvents the application of this proclamation through fraud, willful misrepresentation of a material fact, or illegal entry shall be a priority for removal by the Department of Homeland Security.

Sec. 4. Orderly Medical Screening and Quarantine. The Secretary of Homeland Security shall take all necessary and appropriate steps to regulate the travel of persons and aircraft to the United States to facilitate the orderly medical screening and, where appropriate, quarantine of persons who enter the United States and who may have been exposed to the virus. Such steps may include directing air carriers to restrict and regulate the boarding of such passengers on flights to the United States.

Sec. 5. Termination. This proclamation shall remain in effect until terminated by the President. The Secretary of Health and Human Services shall, as circumstances warrant and no more than 15 days after the date of this order and every 15 days thereafter, recommend that the President continue, modify, or terminate this proclamation.

Sec. 6. Effective Date. This proclamation is effective at 5:00 p.m. eastern standard time on February 2, 2020.

Sec. 7. Severability. It is the policy of the United States to enforce this proclamation to the maximum extent possible to advance the national security, public safety, and foreign policy interests of the United States. Accordingly:

(a) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this proclamation and the application of its provisions to any other persons or circumstances shall not be affected thereby; and

(b) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the

relevant executive branch officials shall implement those procedural requirements to conform with existing law and with any applicable court orders.

Sec. 8. General Provisions. (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this thirty-first day of January, in the year of our Lord two thousand twenty, and of the Independence of the United States of America the two hundred and forty-fourth.

DONALD J. TRUMP

Policies Affecting Asylum Seekers at the Border:

The Migrant Protection Protocols, Prompt Asylum Claim Review, Humanitarian Asylum Review Process, Metering, Asylum Transit Ban, and How They Interact

For decades, adults, families, and unaccompanied children have been arriving at the U.S.-Mexico border to seek protection from harm in their home countries. U.S. law allows any noncitizen who is in the United States, or at the border, to apply for protection.[1] However, the Trump administration has instituted a number of new policies, many being challenged in court, designed to deter families from seeking asylum at the U.S. southern border. Policies like the Migrant Protection Protocols (also known as "Remain in Mexico"), metering, the Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP) programs, and a ban on asylum for individuals who transited through Mexico before arriving at the U.S.-Mexico border have reshaped the state of asylum at the border in 2019 and 2020.[2] This fact sheet explains the complicated interplay and application of protection and border processing policies.

How has the process for seeking asylum at the border changed?

As of late January 2020, there are four significant new Trump administration policies affecting asylum seekers in effect across the southern border, all of which have a significant impact in shaping the current state of the border. These policies do not apply to asylum applicants at the U.S. northern border with Canada.

Metering and asylum turnbacks

Throughout 2018, as asylum-seeking families began arriving at the border in large numbers, immigration officials told asylum seekers they should go to ports of entry and request asylum, rather than crossing the border between the ports of entry to ask for asylum.[3] But at the same time, the administration effectively closed off the ports of entry to asylum seekers. Due to a practice known as "metering" (or "queue management"), asylum seekers at ports of entry are often turned back and required to wait for months in Mexico just for the opportunity to start the asylum process.

Under "metering," U.S. Customs and Border Protection (CBP) limits the number of individuals who are permitted to access the asylum process each day at ports of entry across the border. Metering was used as early as February 2016, primarily at the San Ysidro port of entry.[4] Metering is one of many tactics used by CBP officers to turn away asylum seekers at the U.S.-Mexico border, in a general practice of "asylum turnbacks."[5] In late April 2018, the administration ordered ports of entry across the U.S.-Mexico border to meter asylum seekers.[6]

The effect of metering has been significant. In November 2019, the Strauss Center estimated that more than 21,000 individuals were waiting in border cities across Mexico just for the opportunity to start the asylum process.[7] Wait times varied from a low of one to three days at the ports of entry between Reynosa, Tamaulipas and McAllen, Texas, to a high of six months at the ports of entry between Ciudad Juárez, Chihuahua and El Paso, Texas.[8]

In most locations, asylum seekers turned away by CBP must place themselves on a "list" maintained by a person or group on the Mexican side of the border.[9] Each day, CBP contacts the person or entity in charge of the list and informs them of how many people can be admitted and processed in order to request asylum.[10] At that point, as discussed below, CBP may then subject the asylum seeker to the Migrant Protection Protocols (MPP) program and send them back to Mexico. At some ports of entry, multiple days pass with no people called off the list.[11]

CBP has said that Mexicans and unaccompanied children are not subject to metering.[12] However, reports have repeatedly shown that Mexicans and unaccompanied children have been forced to wait in Mexico under metering or have simply been turned back without being permitted to apply for asylum.[13] The Office of Inspector General at the Department of Homeland Security (DHS) has suggested that metering or turnbacks are a direct cause of some asylum seekers choosing to cross *between* ports of entry, rather than wait months in Mexico in limbo, with no guarantee of ever being permitted to access asylum at ports of entry.[14]

The "Migrant Protection Protocols"

In December 2018, the administration announced the creation of a new program called the "Migrant Protection Protocols" (MPP)[15]—often referred to as the "Remain in Mexico" program. Under MPP, individuals who arrive at the southern border and ask for asylum (either at a port of entry or after crossing the border between ports of entry) are given notices to appear in immigration court and sent back to Mexico.[16] They are instructed to return to a specific port of entry at a specific date and time for their next court hearing.[17]

As of January 2020, the federal government is using MPP at seven U.S. border towns:[18]

1. San Ysidro, CA
2. Calexico, CA (individuals sent back here must travel to the San Ysidro port of entry for hearings)
3. Nogales, AZ (individuals sent back here must travel to the El Paso port of entry for hearings)
4. El Paso, TX
5. Eagle Pass, TX (individuals sent back here must travel to the Laredo port of entry for hearings)
6. Laredo, TX
7. Brownsville, TX

Individuals may be sent to Mexico under MPP at a location far from where they arrived at the border. For example, some families who cross the border near Yuma, Arizona, have been transported by CBP to the Calexico port of entry and sent back under MPP.[19] Similarly, individuals who cross in the Border Patrol's Big Bend Sector are transported hundreds of miles and sent back under MPP in El Paso.[20]

In San Diego and El Paso, individuals who return for court hearings arrive at the port of entry and are transferred into the custody of Immigration and Customs Enforcement (ICE) for transport to the local immigration court.[21] In Laredo and Brownsville, individuals who return for court hearings are taken to "tent courts" built next to the port of entry, where they appear in front of immigration judges through video teleconferencing equipment.[22]

According to the U.S. government's "guiding principles" for MPP, certain groups are considered exempt from the process:[23]

- Unaccompanied children
- Citizens or nationals of Mexico
- Individuals processed for expedited removal
- Individuals in "special circumstances," including:
    - Individuals with "known physical/mental health issues"
    - Individuals with criminal records or a history of violence
- Individuals determined by an Asylum Officer to be "more likely than not" to face torture or persecution in Mexico on the basis of race, religion, nationality, political opinion, or membership in a particular social group

The decision to send a person or family back under MPP is discretionary and is made by individual CBP officers or Border Patrol agents. Individuals who cross the border at the same time may be treated differently, with one person sent back under MPP and the other person admitted to seek asylum through the normal process. In some situations, this has led to families being separated at the border, with one parent sent back to Mexico and the other parent and the child allowed to enter the United States.[24]

CBP also retains discretion to take any individual out of MPP on a case-by-case basis.[25] In addition, CBP has stated that it does not subject individuals to MPP from countries where Spanish is not the primary language (for example, Brazil, Cameroon, or India), although nothing in the MPP "guiding principles" requires their exclusion.[26] In December 2019, Acting CBP Commissioner Mark Morgan threatened to end this exemption and send individuals from non-Spanish-speaking countries back to Mexico under MPP, emphasizing that the policy could be changed at any moment.[27] On January 29, 2020, DHS officially announced that it had expanded MPP to Brazilian nationals.[28]

CBP has implemented these "guiding principles" inconsistently across the border, with consistent reports of CBP officers sending back individuals with serious medical issues in violation of the guidelines.[29]

Under MPP, CBP officers do not ask asylum seekers if they are afraid of returning to Mexico. A person who fears harm in Mexico is required to "affirmatively" assert that fear if they want to be taken out of MPP.[30] If an asylum seeker does so, the person must be referred to an Asylum Officer for an interview about their fear.[31] Individuals

generally are held in CBP custody for these interviews and are not allowed access to an attorney.[32] Some individuals report being handcuffed throughout the interview process.[33]

Government estimates of the number of people who pass these interviews range from 1% to 13%.[34] Since MPP began, some Asylum Officers who conduct these interviews have spoken out about pressure to deny people and send them back to Mexico, calling the interviews "lip service."[35] The labor union representing Asylum Officers filed an amicus brief with the Ninth Circuit Court of Appeals asking the court to strike down MPP as a directive that is "fundamentally contrary to the moral fabric of our nation and our international and domestic legal obligations."[36]

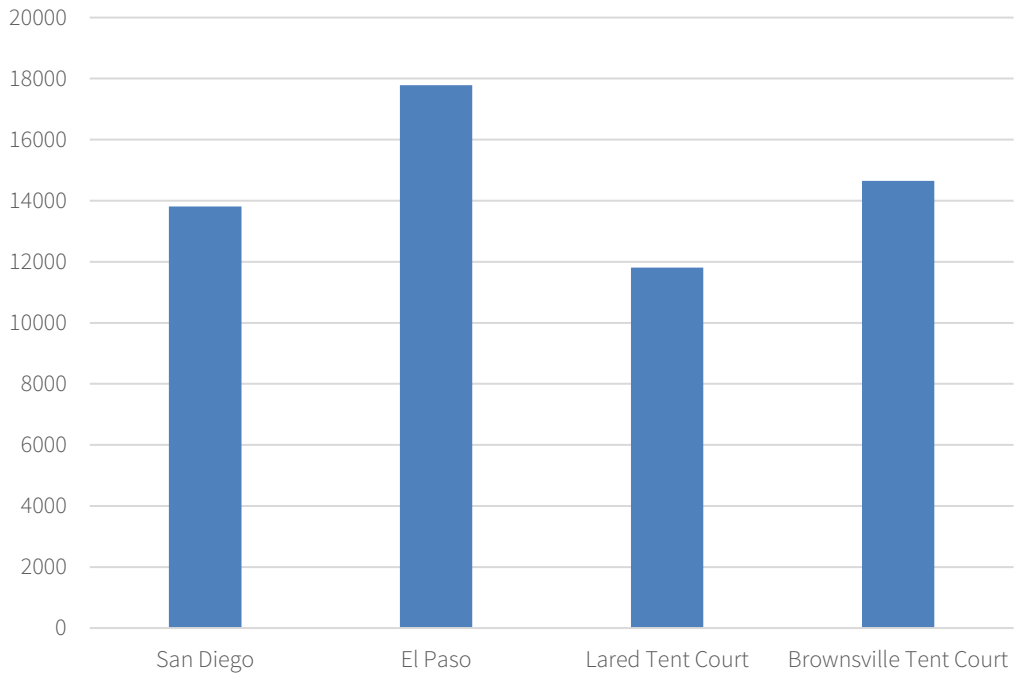
In November 2019, reports emerged that internal DHS analysis of the program had found serious flaws in the screening process that call into question whether asylum seekers are consistently provided even the limited protections available under MPP. These flaws include CBP's reported use of "a pre-screening process that preempts or prevents a role for USCIS to make its determination," and reports that "CBP officials pressure USCIS [Asylum Officers] to arrive at negative outcomes."[37]

These findings are supported by a study of 607 people sent back to Mexico under MPP, which determined that just 40.4% of asylum seekers who expressed a fear of returning to Mexico to CBP were actually given the required fear-screening interview.[38]

From January 2019, when the MPP process began, through January 2020, somewhere between 57,000 and 62,000 people have been have been returned to Mexico to await court hearings. The exact number of people sent back under MPP is unclear. Syracuse University's TRAC center analyzed immigration court data to determine that 59,241 MPP cases had been filed through December 31, 2019,[39] while Mexico's immigration agency asserted that 62,144 people had been returned under MPP through December 31, 2019.[40] By comparison, DHS informed reporters in mid-January that just more than 57,000 MPP cases had been filed.[41] No clear explanation has been provided as the reasons for the discrepancy between these figures.

As of December 2019, according to TRAC, the largest number of MPP cases had been filed in the El Paso Immigration Court (see Figure 1), where there are only four MPP dockets.[42]

Figure 1: People sent back under MPP, by court through December 31, 2019



Source: Transactional Records Access Clearinghouse, *Details on MPP Proceedings*, https://trac.syr.edu/phptools/immigration/mpp/.

Data on all MPP court cases through the end of December 2019 shows that of the 29,309 cases that have been completed, just 187 people had been granted relief in immigration court, compared to 19,401 people who had been issued orders of removal.[43]

Under MPP, many individuals will be forced to wait many months to have their asylum case decided.[44] During the time these asylum seekers remain in Mexico, it is extremely difficult to obtain counsel. According to an independent analysis of data obtained from the Executive Office for Immigration Review (the office that oversees the immigration courts), less than 5% of asylum seekers in MPP have a lawyer.[45] Through the end of December 2019, just 2,765 people subject to MPP had secured lawyers out of 59,241 people who had been placed in court proceedings.[46]

Many asylum seekers placed into MPP are in danger in Mexico. Individuals sent to the Laredo or Brownsville courts must reside or pass through the Mexican state of Tamaulipas, which the State Department classifies as the same level of danger as Syria, Afghanistan, and Yemen.[47] Many asylum seekers and families have been kidnapped and assaulted after having been sent back to Mexico, sometimes within hours of crossing back over the border.[48]

According to Human Rights First, through January 21, 2020, there were more than 816 publicly documented cases of rape, kidnapping, assault, and other crimes committed against individuals sent back under MPP.[49] Multiple people, including at least one child, have died after being sent back to Mexico under MPP and attempting to cross the border again.[50]

The U.S. government provides no support to individuals sent back to Mexico, leaving people to fend for themselves. Many are homeless during their time in Mexico.[51] In some locations on the border, the Mexican government has created shelters that can house some—but not all—of the people sent back.[52] Private shelters also provide housing for some individuals sent back under MPP. In Matamoros, as of November 2019, more than 2,000 asylum seekers resided in a tent camp along the Rio Grande river in squalid conditions with no running water or electricity.[53]

Given these issues, thousands of people subject to MPP have not been able to return to the border for a scheduled court hearing and have been ordered deported for missing court.[54] Some have missed hearings because the danger and instability of the border region forced them to abandon their cases and go home.[55] Others have missed hearings because they were the victims of kidnapping, or were prevented from attending because robbers stole their court paperwork.[56]

Complicating matters, the Mexican government and the United Nation's International Organization for Migration provide buses traveling from the U.S.-Mexico border to the Mexico-Guatemala border for individuals who choose to abandon their cases and go home. However, multiple reports have indicated that some individuals sent back under MPP have been coerced onto these buses and end up hundreds of miles from the border with no way to get back for their court dates.[57]

Asylum Transit Ban

On July 16, 2019, the Trump administration announced a ban on asylum for any individuals who enter the United States at the "southern land border" after transiting through another country after leaving their home.[58] It applies to all who cross after that date, regardless of immigration status and how they enter. Even tourists or international students who travel from the United States to Mexico and back through the border could find themselves permanently banned from asylum. There are exceptions to the ban for victims of a "severe form of trafficking in persons" or individuals who applied for protection in another country and had their applications denied.[59]

The Asylum Transit Ban makes no exceptions, however, for unaccompanied children; even though the Immigration and Nationality Act provides special paths to asylum for unaccompanied children, who are allowed to apply for asylum outside of the immigration court process.[60] It also has been applied to individuals who tried to apply for asylum at the border before July 16, 2019 but instead were turned back to Mexico and made to wait a lengthy period to seek asylum, although this is the subject of a pending legal challenge.[61]

The Asylum Transit Ban applies to people at different stages of the asylum process. For individuals sent back under MPP or released into the United States from the border with a notice to appear in immigration court, the Asylum Transit Ban applies at the end of the process, when an immigration judge makes a decision on an application for humanitarian protection.

For people not sent back under MPP, the Asylum Transit Ban applies at the beginning of the process, when asylum seekers are put through an alternative fast-track removal process called "expedited removal."[62] These

individuals are given an initial screening interview by an Asylum Officer after arriving at the border and expressing a fear of returning to their home country.[63]

If the officer determines that the Asylum Transit Ban applies, the officer will make a determination that the individual is ineligible for asylum and instead screen the person to determine whether they have a "reasonable fear" of persecution or torture.[64] If the applicant passes this heightened screening and the officer determines their fear is "reasonable," they are placed into full removal proceedings in immigration court.[65]

Importantly, individuals subject to the Asylum Transit Ban are eligible for two very limited forms of protection against deportation, known as withholding of removal and protection under the Convention Against Torture (CAT).[66] These forms of relief are more difficult to win than asylum and provide fewer benefits. A person who wins asylum can eventually acquire a green card and later become a citizen.[67]

Unlike asylum, winning withholding of removal or CAT protections does not provide any permanent status in the United States.[68] Both forms of relief can be taken away in the future if circumstances change in a person's home country. A person who wins withholding or CAT can never leave the United States without losing the status.[69] In addition, a person who wins asylum can bring their family to the United States from their home country, but individuals who win withholding or CAT are not permitted to do so.[70] This can leave families permanently separated.

Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP) Programs

Individuals who are not subject to MPP are generally placed in "expedited removal" at the border. Under this process, people who express a fear of returning to their home country are generally sent to ICE detention, where they are interviewed by an Asylum Officer to determine if they have a "credible fear" of persecution.[71] While awaiting this interview, individuals are permitted by law to gather evidence, contact an attorney, and consult with anyone of their choice so long as that would not unreasonably delay the process.[72]

If the officer determines that an asylum seeker's fear is credible, they are placed into removal proceedings where they can file an asylum application in front of an immigration judge. If the asylum officer determines that a person does not have a credible fear of persecution, that decision can be appealed in front of an immigration judge. Individuals determined not to have a credible fear of persecution may then be deported to their home country.[73]

In late October 2019, CBP began two pilot programs in El Paso: the Prompt Asylum Claim Review (PACR) program[74] and the Humanitarian Asylum Review Process (HARP).[75] Under these programs, individuals are never transferred to ICE detention. Instead, they remain locked in CBP short-term detention facilities throughout the entire expedited removal process. The HARP program applies to Mexican nationals, and the PACR program applies to non-Mexican nationals.[76] Although they bear different names and apply to different populations, the programs operate almost identically.

People put through the programs are given only 30 minutes to an hour to contact a lawyer or family members before the credible fear interview and are not permitted any further phone calls outside of CBP detention.[77] If they do not pass the credible fear interview, the immigration judge appeal occurs over the telephone.

Although CBP is not supposed to hold anyone in custody for more than 72 hours, individuals put through the PACR and HARP programs are often held for a week or longer. During this time, individuals may be forced to sleep on the floor for days at a time in freezing cells with limited access to hygiene and inadequate food and water.[78]

In general, the brief phone call is the only opportunity asylum seekers are given to contact anyone for support. Lawyers who represent people placed into these programs say that they are not permitted to talk to their clients during this process, unless their client manages to contact them during the brief window where they are permitted to use the telephone.[79] Asylum seekers may also be unable to access evidence in their belongings, which are generally locked up while they remain in CBP custody.

On December 31, 2019, the PACR and HARP programs were expanded to the Rio Grande Valley Sector.[80] The program is set to expand to the rest of the border in early February 2020.[81] DHS indicated at the end of December that more than 1,000 people had already been put through the programs.[82]

How does the Asylum Transit Ban interact with MPP?

Because the Asylum Transit Ban and MPP both apply to individuals arriving at the southern border, asylum applicants may be subjected to either policy or both policies. In addition, thousands of people may have been forced to wait months in Mexico due to metering before they even enter this process. Figure 2 shows how these two policies intersect for individuals subject to either MPP, the Asylum Transit Ban, or both. Figure 3 then details exactly who is subject to these policies, at least in principle.

Figure 2: Consequences of Being Subject to MPP and the Asylum Transit Ban

	Subject to MPP	Exempt From MPP
Subject to the Asylum Transit Ban	Blocked from entering the United States to seek humanitarian protection and must wait in Mexico for immigration court hearings. Ineligible for asylum and may only apply for withholding of removal and protection under the Convention Against Torture.	Permitted to enter the United States to seek humanitarian protection. Ineligible for asylum and may only apply for withholding of removal and protection under the Convention Against Torture. May be subject to heightened screenings at the start of the process for seeking protection.

Exempt from the Asylum Transit Ban	Blocked from entering the United States to seek humanitarian protection and must wait in Mexico for immigration court hearings. May apply for asylum as well as withholding of removal and protection under the Convention Against Torture.	Permitted to enter the United States to seek humanitarian protection. May apply for asylum as well as withholding of removal and protection under the Convention Against Torture.

Figure 3: MPP vs. the Asylum Ban—Who Is Subject and Who Is Exempt

	Subject to MPP	Exempt From MPP
Subject to the Asylum Transit Ban	Non-Mexican adults and families from Brazil or a country where Spanish is a primary language who lack any special circumstances that would exempt them from MPP, who: ▪ Entered after July 16, 2019; and ▪ Do not qualify for an exception to the Asylum Transit Ban	Individuals who entered **after July 16, 2019** who are exempt from MPP and do not qualify for an exception to the Asylum Transit Ban, including: ▪ Unaccompanied children; ▪ Individuals in "special circumstances"; ▪ Asylum seekers from countries where Spanish is not a primary language, except for Brazil; or ▪ Individuals who an Asylum Officer determines are more likely than not to be persecuted in Mexico
Exempt from the Asylum Transit Ban	Non-Mexican adults and families from Brazil or a country where Spanish is a primary language, who: ▪ Entered **before July 16, 2019**;[†]	Mexican citizens and nationals who entered at any time. Individuals who entered **before July 16, 2019** who meet one of the exemptions under the MPP guiding principles, including:

	▪ Are the victim of "a severe form of trafficking in persons"; or ▪ Previously applied for asylum in another country and were denied †Although DHS has said that people put into MPP before July 16, 2019 should not be subject to the Asylum Transit Ban, this is a legal determination that can only be made by judges hearing MPP cases who may disagree. As a result, this remains an open legal question.[83]	▪ Unaccompanied children; ▪ Individuals in "special circumstances" ▪ Asylum seekers from countries where; Spanish is not a primary language, except for Brazil ▪ Individuals who an Asylum Officer determines are more likely than not to be persecuted in Mexico; or Individuals who meet one of the exemptions under the MPP guiding principles who entered at any time, who: ▪ Are the victims of "a severe form of trafficking in persons"; or ▪ Previously applied for asylum in another country and were denied

Have there been any direct legal challenges to these programs?

At the time of publication, legal challenges have been filed against both MPP[84] and the Asylum Transit Ban.[85] Although these challenges met initial success at the lower level, injunctions stopping the programs are currently on hold.[86] Thus, the policies remain in effect across the U.S.-Mexico border while the appellate process continues in those cases. A legal challenge has also been filed against PACR and HARP, but no decision has been issued in that case as of January 2020.[87]

Metering has also been challenged in court.[88] Plaintiffs in that lawsuit have sought a preliminary injunction preventing the government from applying the Asylum Transit Ban to any individual who was subject to metering prior to July 16, 2019.[89] On December 12, 2019, the District Court granted that injunction, but that decision is currently on hold as of January 2020.[90]

Endnotes

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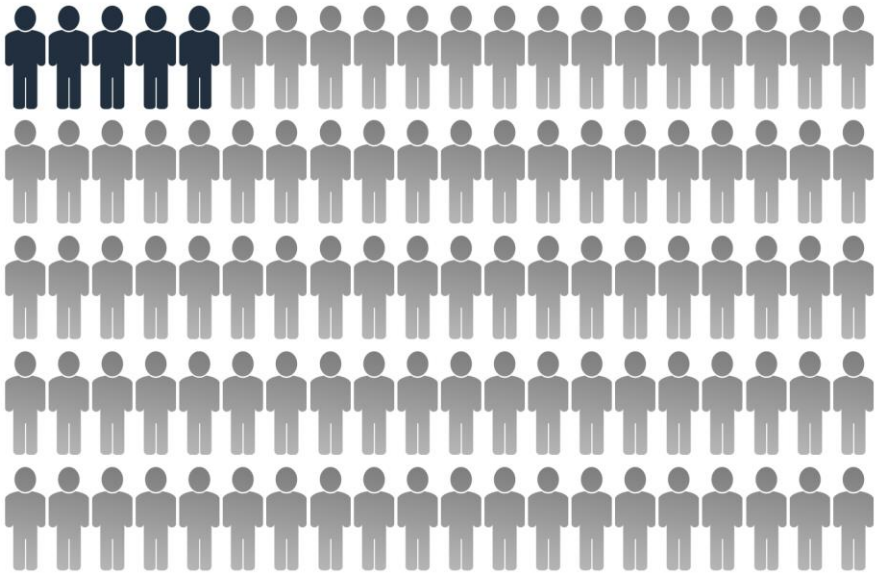
THE 1-YEAR IMPACT OF THE MIGRANT PROTECTION PROTOCOLS

Remain in Mexico has undermined the rule of law and stripped people seeking asylum of due process.

5/100

JUST 2,765 OUT OF 59,241 PEOPLE SUBJECT TO MPP AND PLACED IN COURT PROCEEDINGS HAD A LAWYER.



SOURCE: TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, "DETAILS ON MPP (REMAIN IN MEXICO) DEPORTATION PROCEEDINGS (THROUGH DECEMBER 2019)" (SYRACUSE, NY: SYRACUSE UNIVERSITY), HTTPS://TRAC.SYR.EDU/PHPTOOLS/IMMIGRATION/MPP/

American Immigration Council

WWW.IMMIGRATIONCOUNCIL.ORG

U.S. Department of
Homeland Security

Deferred Action for Childhood Arrivals (DACA)

Important Information About DACA Requests

Due to a federal court order, USCIS has resumed accepting requests to renew a grant of deferred action under DACA. USCIS is not accepting requests from individuals who have never before been granted deferred action under DACA. Until further notice, and unless otherwise provided in this guidance, the DACA policy will be operated on the terms in place before it was rescinded on Sept. 5, 2017. For more information, visit Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction (https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction) .

On June 15, 2012, then-Secretary of Homeland Security Janet Napolitano issued a memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," creating a non-congressionally authorized administrative program that permitted certain individuals who came to the United States as juveniles and meet several criteria—including lacking any current lawful immigration status—to request consideration of deferred action for a period of two years, subject to renewal, and eligibility for work authorization. This program became known as Deferred Action for Childhood Arrivals (DACA).

The Obama administration chose to deploy DACA by Executive Branch memorandum—despite the fact that Congress affirmatively rejected such a program in the normal legislative process on multiple occasions. The constitutionality of this action has been widely questioned since its inception.

DACA's criteria were overly broad, and not intended to apply only to children. Under the categorical criteria established in the June 15, 2012 memorandum, individuals could apply for deferred action if they had come to the U.S. before their 16th birthday; were under age 31; had

continuously resided in the United States since June 15, 2007; and were in school, graduated or had obtained a certificate of completion from high school, obtained a General Educational Development (GED) certificate, or were an honorably discharged veteran of the Coast Guard or Armed Forces of the United States. Significantly, individuals were ineligible if they had been convicted of a felony or a significant misdemeanor, but were considered eligible even if they had been convicted of up to two other misdemeanors.

The Attorney General sent a letter to the Department on September 4, 2017, articulating his legal determination that DACA "was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch." The letter further stated that because DACA "has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA."

Based on this analysis, the President was faced with a stark choice: do nothing and allow for the probability that the entire DACA program could be immediately enjoined by a court in a disruptive manner, or instead phase out the program in an orderly fashion. On September 5, 2017, Acting Secretary of Homeland Security Duke issued a memorandum (1) rescinding the June 2012 memo that established DACA, and (2) setting forward a plan for phasing out DACA. The result of this phased approach is that the Department of Homeland Security will provide a limited window in which it will adjudicate certain requests for DACA and associated applications for Employment Authorization Documents meeting parameters specified below.

On June 22, 2018, Secretary Nielsen issued a memorandum clarifying the Department's position (/publication/memorandum-secretary-kirstjen-m-nielsen-rescission-deferred-action-childhood-arrivals) .

- Please see the USCIS website (https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction) for the latest information about DACA.

Additional Information (#)

- June 22, 2018: Memorandum from Secretary Kirstjen M. Nielsen on the Rescission Of Deferred Action for Childhood Arrivals (DACA) (/publication/memorandum-secretary-kirstjen-m-nielsen-rescission-deferred-action-childhood-arrivals)
- Update: Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction (https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-

2018-preliminary-injunction) (USCIS.gov).

Archived Information (#)

- Fact Sheet: Rescission Of Deferred Action For Childhood Arrivals (DACA) (/news/2017/09/05/fact-sheet-rescission-deferred-action-childhood-arrivals-daca) (September 5, 2017 - Archived)
- Frequently Asked Questions: Rescission Of Deferred Action For Childhood Arrivals (DACA) (/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca) (September 5, 2017 - Archived)
    - Preguntas frecuentes: Anulación de la acción diferida para los llegados en la infancia (DACA) (/news/2017/09/05/preguntas-frecuentes-anulaci-n-de-la-acci-n-diferida-para-los-llegados-en-la) (September 5, 2017 - Archived)

- Press Release: Rescission Of Deferred Action For Childhood Arrivals (DACA) (/news/2017/09/05/rescission-deferred-action-childhood-arrivals-daca) (September 5, 2017 - Archived)
    - Anulación de la acción diferida para los llegados en la infancia (DACA) (/news/2017/09/05/anulaci-n-de-la-acci-n-diferida-para-los-llegados-en-la-infancia-daca) (September 5, 2017 - Archived)

- Statement from Acting Secretary Duke on the Rescission Of Deferred Action For Childhood Arrivals (DACA) (/news/2017/09/05/statement-acting-secretary-duke-rescission-deferred-action-childhood-arrivals-daca) (September 5, 2017 - Archived)
- Memorandum on the Rescission Of Deferred Action For Childhood Arrivals (/news/2017/09/05/memorandum-rescission-daca) (DACA) (September 5, 2017 - Archived)
- Letter from Attorney General Sessions to Acting Secretary Duke on the Rescission of DACA (/publication/letter-attorney-general-sessions-acting-secretary-duke-rescission-daca) (September 4, 2017 - Archived)

Last Published Date: September 23, 2019

DACA

On June 15, 2012, the U.S. Department of Homeland Security (DHS) announced that it would not deport certain undocumented youth who came to the United States as children. Under a directive from the DHS secretary, these youth may be granted a type of temporary permission to stay in the U.S. called "deferred action." The Obama administration called this program **Deferred Action for Childhood Arrivals**, or DACA. This page provides guidance on how to apply for DACA, renew DACA, and other important information on DACA.

IMPORTANT NOTICE — *PLEASE READ* (June 28, 2019)

JUNE 28, 2019 — The U.S. Supreme Court announced on June 28, 2019, that it will grant the Trump administration's request that it review the federal court cases challenging Trump's termination of

renewal applications remain in effect, and U.S. Citizenship and Immigration Services (USCIS) is **still accepting DACA renewal applications from anyone who has previously had DACA**.

RENEWAL APPLICATIONS ARE STILL BEING ACCEPTED. On January 13, 2018, USCIS **announced** that it is once again accepting DACA renewal applications, because of an **order issued by a U.S. district court in California**. The court order was issued in a case challenging the Trump administration's termination of the DACA program. A frequently-asked-questions document authored by NILC and United We Dream and based on the Jan. 13 announcement is available below.

USCIS **stopped accepting *first-time* DACA applications** (that is, applications from people who didn't already have DACA) as of October 6, 2017. Under the government's DACA-termination memo, **people who already had DACA** and whose work permits would expire between Sept. 5, 2017, and March 5, 2018, were eligible to apply for a two-year renewal if they applied by Oct. 5, 2017. Court orders in the California case and a similar case in New York, along with USCIS's Jan. 13 announcement, have **made it possible, again, for people who have DACA now or who've had it in the past to submit DACA *renewal* applications**.

FIRST-TIME DACA APPLICATIONS ARE *NOT YET* BEING ACCEPTED. On April 24, 2018, a U.S. district court in the District of Columbia issued a ruling requiring USCIS to resume accepting *first-time* DACA applications — **but this order did not go into effect immediately, and on August 17, 2018, the court stayed this order**.

SUMMARY. At the present time USCIS is *not* accepting DACA applications *from people who have not obtained DACA previously*. If you want to apply to *renew* your DACA under the latest policy (based on USCIS's Jan. 13 announcement), we encourage you to **speak first with an immigration attorney or a Board of Immigration Appeals–accredited representative**. If you decide to proceed with an application, **we urge that you be represented** by an attorney or accredited representative (a **Form G-28** should be filed with your application).

DACA Information Litigation

DACA and Dream–related Legislation
See **Dream Act, Dreamers, and Related**

Status Reports
What We Know About DACA Renewals *(Center*

Explainer Video: What Is Next for DACA?

FAQ: USCIS Is Accepting DACA Renewal Applications *(updated Aug. 1, 2019)*

Top 5 Things to Know about DACA Renewals Now That the Supreme Court Has Decided to Review the DACA-related Federal Court Cases *(June 2019 – English & Spanish)*

ALERT: Supreme Court Grants Cert in Three DACA Cases

ALERT: U.S. District Court in Texas Denies Texas Request to Stop DACA Renewals

State and Local Advocacy to Support DACA Recipients and Other State Residents

Frequently Asked Questions on DACA Termination *(English, Spanish)*

About DACA and Employment *(answers to frequently asked questions — English, Korean, Portuguese, Spanish)*

#DefendDACA: Stories in Defense of Deferred Action for Childhood Arrivals

Getting and Renewing DACA

FAQ: The Obama Administration's Deferred Action for Childhood Arrivals (DACA)

FAQ: Deferred Action for Childhood Arrivals (DACA) Renewal Process

Four Top Tips for When You Renew Your DACA

DACA Renewal Calculator: Calculate When Would Be the Best Time to Submit Your DACA Renewal Application to USCIS

Steps to Take if Your DACA Renewal Is Delayed

(report by NILC, CAP, UWD, and Tom K. Wong of UCSD, 9/19/19)

Amid Legal and Political Uncertainty, DACA Remains More Important Than Ever *(report by NILC, CAP, UWD, and Tom K. Wong of UCSD, 8/15/18)*

Ending DACA Would Have Wide-Ranging Effects, but Immigrant Youth Are Fired Up and Politically Engaged *(report by NILC, CAP, UWD, and Tom K. Wong of UCSD, 8/23/18)*

DACA Recipients' Economic and Educational Gains Continue to Grow *(report by NILC, CAP, UWD, and Tom K. Wong of UCSD, 8/28/17)*

New Study of DACA Beneficiaries Shows Positive Economic and Educational Outcomes *(report by NILC, CAP, UWD, and Tom K. Wong of UCSD, 10/18/16)*

Results from a Nationwide Survey of DACA Recipients Illustrate the Program's Impact *(report by NILC, CAP, and Tom K. Wong of UCSD, 7/9/15)*

DACA at the Two-Year Mark: A National and State Profile of Youth Eligible and Applying for Deferred Action *(Migration Policy Institute, 8/14)*

Information & Resources from Partner Organizations

Home Is Here

Informed Immigrant

Center for American Progress

Immigrant Legal Resource Center

Background

FAQ: Exclusion of Youth Granted "Deferred Action for Childhood Arrivals" from Affordable Health Care

FAQ: DACA and Your Workplace Rights

FAQ: DACAmented and Undocumented Immigrants and the Obamacare Tax Penalty

Taxes and DACA: What Do I Need to Know? (webinar)

Individuals Who Came to the United States as Children (June 15, 2012, PDF)

DHS press release announcing a deferred action process for undocumented youth (June 15, 2012, PDF)

Questions and answers about the administration's announcement regarding relief for individuals who came to the United States as children (June 15, 2012, PDF)

Memo from U.S. Immigration & Customs Enforcement director John Morton (June 15, 2012, PDF)

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National Immigration Law Center
@NILC

"My community needs me by their side, and so does my family." As a community organizer, a co-plaintiff in the case before #SCOTUS, and a mother, @elianadreams needs #DACA to continue supporting her communities. Now, and always, Eliana's #HomeIsHere https://twitter.com/MaketheRoadNY/status/1243605455190065156

Mar 27, 2020

National Immigration Law Center
@NILC

Replying to @NILC

There has never been a time when our interdependence on each other's health and wellbeing has been so clear. We urge all members of Congress to include immigrant families in any future relief packages. All of our health and wellbeing depends on it.

Mar 27, 2020

National Immigration Law Center
@NILC

Replying to @NILC

In New York City alone, more than half of all frontline workers are immigrants. At a time like this, it is both reckless from a public health perspective, and deeply inhumane to exclude immigrant families from the relief that everyone needs in the face of this pandemic.

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CONTENTS

We understand that the COVID-19 (the new coronavirus) pandemic is causing more stress on an already difficult immigration filing process for those seeking to renew their Deferred Action for Childhood Arrivals (DACA) status. DACA recipients especially are facing new challenges as they try to renew their DACA protection from deportation and their work authorization with the United States Citizenship and Immigration Services (USCIS) before the United States Supreme Court announces a decision on whether the program can continue. Please see below for updates on how COVID-19 may impact DACA renewals and up to date information on any action the Supreme Court may take. As always, we're committed to supporting you in any way possible. We will work on updating this page as new information surfaces.

Supreme Court COVID-19 Update

Oral Arguments Suspended. On March 16, 2020, the Supreme Court announced (https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20) that, in keeping with public health precautions, it will be postponing the oral arguments currently scheduled (March 23-25 and March 30-April1) to a later time. The Court intends to still hold regularly scheduled business and is expanding remote working capabilities.

Potential Decision. This change in schedule for oral arguments and expansion of remote working capabilities, at least as of now, does not delay the Supreme Court's issuance of opinions (decisions). **Therefore, the Supreme Court's decision on the pending DACA case may still be released at any time from now until June 2020**.

DACA Renewal Clinics

Our Clinic Tracker (https://www.informedimmigrant.com/daca-clinics/). We are working on updating our clinic tracker, which tracks organizations across the U.S. that are hosting DACA renewal assistance events. The clinic tracker will reflect the clinics that are changing and will add any new virtual and in-person clinics, as well as those that get cancelled altogether. We highly recommend also reaching out

to the hosting organization for the status of the event.

Virtual Clinics. During the pandemic, many clinics are switching from in-person to virtual appointments.

Keep safe. If your trusted renewal clinic host can only accommodate in-person renewals, urge them to practice the Center for Disease Control's suggestions for groups of people to be fewer than 10 and with at least six feet of distance between each person. We recommend that if you are attending an in-person clinic, that you take the necessary precautions for your health.

USCIS Offices

As of March 18, USCIS suspended all routine in-person services until at least April 1 (https://www.uscis.gov/about-us/uscis-response-coronavirus-disease-2019-covid-19).

Biometrics appointments at USCIS have been rescheduled until further notice. When USCIS again resumes normal operations, USCIS will automatically reschedule Application Support Center appointments due to the office closure. According to USCIS, if you do not receive a new appointment notice by mail within 90 days, call 800-375-5283 (https://www.uscis.gov/about-us/uscis-response-coronavirus-disease-2019-covid-19).

Application processing. USCIS staff may continue to perform duties that do not involve contact with the public, such as processing centers. Currently, it is unclear if any cases are still being processed, including DACA renewals. We will work on updating this as soon as new information is released from USCIS. If you are awaiting your DACA renewal and will be experiencing a lapse in work authorization, we encourage you to reach out to a legal service provider (https://www.informedimmigrant.com/service-organization-search/). Additionally, as always, with or without DACA you have rights (https://www.informedimmigrant.com/guides/know-your-rights/).

If you have not yet renewed, we encourage you to renew your DACA as quickly as possible despite the USCIS offices being closed.

Unemployment Eligibility for DACA recipients

DACA recipients who live within the states of California, Colorado, New York, and Texas are eligible for unemployment benefits. These benefits will not be counted against you based on the new Public Charge regulation.

Social Distancing and Precautionary Steps

If you can, please practice social distancing and follow CDC guidelines (https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html) to take as many precautionary steps to avoid contracting or spreading COVID-19.

- Clean your hands often
- Avoid close contact with people who are sick
- Stay home if you're sick
- Clean and disinfect your home

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U.S. Citizenship and Immigration Services

Public Charge

Alert: USCIS encourages all those, including aliens, with symptoms that resemble Coronavirus 2019 (COVID-19) (fever, cough, shortness of breath) to seek necessary medical treatment or preventive services. Such treatment or preventive services will not negatively affect any alien as part of a future Public Charge analysis.

The Inadmissibility on Public Charge Grounds final rule is critical to defending and protecting Americans' health and its health care resources. The Public Charge rule does not restrict access to testing, screening, or treatment of communicable diseases, including COVID-19. In addition, the rule does not restrict access to vaccines for children or adults to prevent vaccine-preventable diseases. Importantly, for purposes of a public charge inadmissibility determination, USCIS considers the receipt of public benefits as only one consideration among a number of factors and considerations in the totality of the alien's circumstances over a period of time with no single factor being outcome determinative. To address the possibility that some aliens impacted by COVID-19 may be hesitant to seek necessary medical treatment or preventive services, USCIS will neither consider testing, treatment, nor preventative care (including vaccines, if a vaccine becomes available) related to COVID-19 as part of a public charge inadmissibility determination, nor as related to the public benefit condition applicable to certain nonimmigrants seeking an extension of stay or change of status, even if such treatment is provided or paid for by one or more public benefits, as defined in the rule (e.g. federally funded Medicaid).

The rule requires USCIS to consider the receipt of certain cash and non-cash public benefits, including those that may be used to obtain testing or treatment for COVID-19 in a public charge inadmissibility determination, and for purposes of a public benefit condition applicable to certain nonimmigrants seeking an extension of stay or change of status. The list of public benefits considered for this purpose includes most forms of federally funded Medicaid (for those over 21), but does not include CHIP, or State, local, or tribal public health care services/assistance that are not funded by federal Medicaid. In addition, if an alien subject to the public charge ground of inadmissibility lives and works in a jurisdiction where disease prevention methods such as social distancing or quarantine are in place, or where the alien's employer, school, or university voluntarily shuts down operations to prevent the spread of COVID-19, the alien may submit a statement with his or her application for adjustment of status to explain how such methods or policies have affected the alien as relevant to the factors USCIS must consider in a public charge inadmissibility determination. For example, if the alien is prevented from working or attending school, and must rely on public benefits for the duration of the COVID-19 outbreak and recovery phase, the alien can provide an explanation and relevant supporting documentation. To the extent relevant and credible, USCIS will take all such evidence into consideration in the totality of the alien's circumstances.

Inadmissibility on Public Charge Grounds Final Rule

On Feb. 24, 2020, USCIS implemented the Inadmissibility on Public Charge Grounds final rule nationwide, including in Illinois. USCIS will apply the final rule to all applications and petitions postmarked (or, if applicable, submitted electronically) on or after that date. For applications and petitions sent by commercial courier (for example, UPS, FedEx, or DHL), the postmark date is the date reflected on the courier receipt. USCIS will reject any affected application or petition that does not adhere to the final

rule, including those submitted by or on behalf of aliens living in Illinois, if postmarked on or after Feb. 24, 2020.

Background

Self-sufficiency has long been a basic principle of U.S. immigration law since our nation's earliest immigration statutes. Since the 1800s, Congress has put into statute that aliens are inadmissible to the United States if they are unable to care for themselves without becoming public charges. Since 1996, federal laws have stated that aliens generally must be self-sufficient. On Aug. 14, 2019, DHS published a final rule regarding how DHS determines if someone applying for admission or adjustment of status is likely at any time to become a public charge.

This final rule also requires aliens seeking to extend their nonimmigrant stay or change their nonimmigrant status to show that, since obtaining the nonimmigrant status they seek to extend to change, they have not received public benefits (as defined in the rule) over the designated threshold.

The Statutory Basis of the Inadmissibility on Public Charge Grounds Final Rule

The primary immigration law today is the Immigration and Nationality Act of 1952 (the INA, or the Act), as amended.

Section 212(a)(4) of the INA (8 U.S.C. § 1182(a)(4)): "Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible[…] In determining whether an alien is excludable under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's-(I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills . . . ."

Section 213 of the INA (8 U.S.C. § 1183): "An alien inadmissible under [section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4)] may, if otherwise admissible, be admitted in the discretion of the Attorney General (subject to the affidavit of support requirement and attribution of sponsor's income and resources under section 1183a of this title) upon the giving of a suitable and proper bond . . . ."

Section 214(a)(1) of the INA (8 U.S.C. § 1184(a)(1)): "The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States."

Section 248(a) of the INA (8 U.S.C. § 1258(a)): "The Secretary of Homeland Security may, under such conditions as he may prescribe, authorize a change from any nonimmigrant classification to any other nonimmigrant classification in the case of any alien lawfully admitted to the United States as a nonimmigrant who is continuing to maintain that status and who is not inadmissible under section 1182(a)(9)(B)(i) of this title (or whose inadmissibility under such section is waived under section 1182(a)(9)(B)(v) of this title) . . . ."

8 U.S.C. § 1601 (PDF)(1): "Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes."

8 U.S.C. § 1601 (PDF)(2)(A): "It continues to be the immigration policy of the United States that – aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations."

8 U.S.C. § 1601 (PDF) (2)(B): It is also the immigration policy of the United States that "the availability of public benefits not constitute an incentive for immigration to the United States."

The DHS Inadmissibility on Public Charge Grounds Final Rule

Timeline of the Rule's Implementation

On Aug. 14, 2019, the U.S. Department of Homeland Security (DHS) published the Inadmissibility on Public Charge Grounds final rule that codifies regulations governing the application of the public charge inadmissibility grounds. See section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).

On Oct. 2, 2019, DHS issued a corresponding correction document, which contains provisions that are effective as if they had been included in the final rule published on Aug. 14, 2019.

On Oct. 10, 2018, DHS issued a Notice of Proposed Rulemaking, which was published in the Federal Register for a 60-day comment period. DHS received and considered over 266,000 public comments before issuing the final rule. The final rule provides summaries and responses to all significant public comments.

The Purpose of the Rule

The final rule enables the federal government to better carry out provisions of U.S. immigration law related to the public charge ground of inadmissibility.

The final rule clarifies the factors considered when determining whether someone is likely at any time in the future to become a public charge, is inadmissible (under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4)) and, therefore, ineligible for admission or adjustment of status.

The final rule also requires aliens in the United States who have a nonimmigrant visa and seek to extend their stay in the same nonimmigrant classification or to change their status to a different nonimmigrant classification to demonstrate, as a condition of approval, that they have not received, since obtaining the status they seek to extend or change, public benefits for more than 12 months, in total, within any 36-month period.

The final rule does not create any penalty or disincentive for past, current or future receipt of public benefits by U.S. citizens or aliens whom Congress has exempted from the public charge ground of inadmissibility.

Applicability and Exemptions

The final rule applies to applicants for admission and aliens seeking to adjust their status to that of lawful permanent residents from within the United States. The final rule also applies to applicants for extension of stay and change of status.

The final rule does not apply to:

- U.S. citizens, even if the U.S. citizen is related to a noncitizen who is subject to the public charge ground of inadmissibility; or
- Aliens whom Congress exempted from the public charge ground of inadmissibility, such as:
- Refugees;
- Asylees;
- Afghans and Iraqis with special immigrant visas;
- Certain nonimmigrant trafficking and crime victims;
- Individuals applying under the Violence Against Women Act;
- Special immigrant juveniles; and
- Those to whom DHS has granted a waiver of public charge inadmissibility.

Public Benefits that DHS Will Not Consider

Benefits received by U.S. service members. Under the final rule, DHS will not consider the receipt of public benefits (as defined in the final rule) by an alien who (at the time of receipt, or at the time of filing or adjudication of the application for admission, adjustment of status, extension of stay, or change of status) is enlisted in the U.S. armed forces, or is serving in active duty or in any of the Ready Reserve components of the U.S. armed forces

Benefits received by spouse and children of U.S. service members. DHS also will not consider the receipt of public benefits by the spouse and children of such service members (described above).

Benefits received by children born to, or adopted by, U.S. citizens living outside the United States. The rule further provides that DHS will not consider public benefits received by children, including adopted children, who will acquire U.S. citizenship under section 320 of the INA, 8 U.S.C. 1431, or children, residing outside the United States, of U.S. citizens who are entering the United States for the purpose of attending an interview under section 322 of the INA, 8 U.S.C. 1433.

Certain Medicaid benefits. DHS will not consider the Medicaid benefits received:

- For the treatment of an "emergency medical condition;"
- As services or benefits provided in connection with the Individuals with Disabilities Education Act;
- As school-based services or benefits provided to individuals who are at or below the oldest age eligible for secondary education as determined under State or local law;
- By aliens under the age of 21; and
- By pregnant women and by women within the 60-day period beginning on the last day of the pregnancy.

Benefits received on behalf of a legal guardian. DHS will only consider public benefits received directly by the applicant for the applicant's own benefit, or where the applicant is a listed beneficiary of the public benefit. DHS will not consider public benefits received on behalf of another as a legal guardian or pursuant to a power of attorney for such a person. DHS will also not attribute receipt of a public benefit by one or more members of the applicant's household to the applicant unless the applicant is also a listed beneficiary of the public benefit.

Q. When does the final rule go into effect?

Q. What does the final rule change?

Q. Who is subject to the public charge inadmissibility ground?

Q. Who is exempt from this rule?

Q. Which benefits are considered for the purposes of this rule?

Q. What amount/duration of public benefits matters?

Q. Whose receipt of benefits is considered under this rule?

Q. Which benefits are not considered?

Q. How will DHS determine whether someone is likely at any time to become a public charge for admission or adjustment purposes?

Q. What factors weigh heavily in favor of a determination that someone is likely at any time to become a public charge?

Q. What factors weigh heavily against a determination that someone is likely at any time to become a public charge?

Q. How can I learn more about public charge?

Last Reviewed/Updated: 03/27/2020

CHANGES TO PUBLIC CHARGE:
ANALYSIS AND FREQUENTLY ASKED QUESTIONS

Updated February 24, 2020

Two federal agencies' regulations on the public charge grounds of inadmissibility went into effect on February 24, 2020. Department of Homeland Security (DHS) regulations will apply to U.S. Citizenship and Immigration Services processing in the U.S. of applications for adjustment to Lawful Permanent Resident (LPR) status submitted electronically or postmarked on or after February 24th. State Department regulations apply immediately to applications for visas and LPR status processed at U.S. consulates outside of the country.

Not every immigrant is subject to the public charge test. Refugees, asylees and many other categories of humanitarian immigrants are exempt.

For a community-facing FAQ and other community education documents, please go to https://protectingimmigrantfamilies.org/know-your-rights/.

View our Public Charge Dictionary for common terms used when discussing immigrant eligibility for public programs.

Brief Overview of How Public Charge Policy Has Changed

The public charge ground of inadmissibility has been a part of U.S. immigration policy since the late 1800s. Historically, a public charge has been interpreted to mean a person who is primarily dependent on the government for subsistence. Individuals may be denied a visa to come to the U.S. or the ability to become a Lawful Permanent Resident (LPR, also called getting a green card) if they are deemed likely to become a public charge in the future. In determining whether individuals are likely to become a public charge, immigration officials review their current situation and characteristics, codified as a "totality of the circumstances" test at 8 USC §1182(a)(4). This test requires officials to consider, at a minimum, an intending immigrant's age, health, family status, income and resources, education and skills, as well as the legal sufficiency of an affidavit of support if the person is required to have one.

The DHS and State Department regulations make three major changes to the meaning and application of public charge policy. The regulations:

- change the definition of a public charge;
- Add to the totality of circumstances factors standards and evidentiary requirements that disadvantage low- and moderate- income applicants;
- Designate essential nutrition, health care and housing benefits, as well as cash assistance for income maintenance, as benefits to be considered in the public charge assessment.

In addition, the DHS regulations introduce a new test for non-immigrants seeking extensions of their visas or a change to another nonimmigrant status (e.g., from a student visa to an employment visa), penalizing those who have used a listed benefit for twelve months in the aggregate out of the 36 months prior to their application.

The regulations introduce significant and harmful changes that will fundamentally alter the immigration system, making it much harder for low- and moderate- income immigrants to obtain LPR status (become a "green card holder") and ultimately citizenship.

The regulations caused significant harm even before they took effect. Fear and confusion - known as the "chilling effect" - have been causing people to disenroll from programs or to forgo benefits for which they are eligible. According to a December 2018 nationwide survey, about one in seven adults in immigrant families reported a chilling effect where individuals did not participate in a government program for fear of risking future green card status. Several states have reported drops in participation. The potential impact is far-reaching, given that 13.7 percent of the U.S. population is foreign-born and one in four children in the U.S. has at least one foreign-born parent.

Definition of Public Charge

Part of federal immigration law for over a hundred years, the "public charge" inadmissibility test was designed to identify people who may depend on the government as their primary source of support. If the government determines that a person is "likely at any time to become a public charge" in the future, it can deny a person admission to the U.S. or lawful permanent residence (or "green card" status). (Immigration and Naturalization Act section 212(a)(4), 8 USC 1182(a)(4))

The DHS and State Department regulations redefine a "public charge" as a non-citizen who receives or is likely to receive one or more of the specified public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months). The benefits considered are cash assistance for income maintenance from any level of government, SNAP (formerly Food Stamps), public housing, Section 8 housing assistance, and Medicaid (with exceptions for persons under age 21, women during pregnancy and for 60 days after the pregnancy ends and emergency services).

Totality of Circumstances Test: New Standards and Heavily Weighted Factors

NOTE: This summary does not include all of the details in the regulations and should not be considered or used for providing legal advice.

The public charge inadmissibility test is forward-looking. An immigration officer assesses whether a person is likely to become a public charge in the future. This determination is made based on the totality of circumstances assessment that considers the applicant's age, health, family status, income and resources, education and skills, and the validity of any affidavit of support.

The regulations add many factors and evidentiary standards to the totality of circumstances test, and create heavily weighted positive and negative factors.

- **INCOME & ASSETS** | The regulations adopt new income thresholds for households seeking to overcome a "public charge" test, and introduce specific factors to consider.
  Negative factors include:
  - A household income below 125 percent of the Federal Poverty Level ($32,750 for a family of four), unless the household has significant assets.
  - Application for or receipt of one of the benefit programs specified in the rule (after February 24, 2020).
  - Application or receipt of a fee waiver to obtain an immigration status that is subject to the public charge determination (after February 24, 2020).

  Positive factors include:
  - Health insurance that is not classified as a public benefit under the regulations or assets and resources sufficient to cover "any reasonably foreseeable medical costs."
  - Heavily positive weight is applied only to households earning over 250 percent of the Federal Poverty Level ($64,375 annually for a family of 4).

- **AGE** | The regulations:
  - Assign negative weight to persons who are younger than 18 or older than 61.
  - Assign positive weight to persons between the ages of 18 and 61.

- **HEALTH** | The regulations considers:
  - Whether the applicant has been diagnosed with one or more health conditions that could require extensive treatment in the future, or that could affect their ability to work, attend school, or care for themselves. If the applicant has such a condition and does not have health insurance or sufficient resources to pay for 'reasonably foreseeable medical expenses,' heavily negative weight will be assigned.
  - Heavy positive weight is given to persons who have private *unsubsidized* health insurance, which the rule defines as <u>not</u> including ACA plans supported by Advanced Premium Tax Credits.

- **FAMILY STATUS** | The regulations consider:
  - An applicant's household size, including immediate family members as well as anyone else to whom the applicant provides at least half of their support, or who provides the applicant with half of their support, or who lists them as a dependent on their tax returns
    .
- **EDUCATION & SKILLS** | The regulations consider whether the person has:
  - A history of employment (e.g. 3 years of tax returns)
  - A high school degree or equivalent, higher education, occupational skills and certificates or licenses
  - Proficiency in English or in other languages in addition to English

- A role as the primary caretaker of someone in the household who is a child, senior, or a person who is ill or who has disabilities.

- **AFFIDAVIT OF SUPPORT** | An affidavit of support is a contract that a sponsor – usually a family member – signs to accept financial responsibility for an applicant and his/her dependents. In addition to considering the applicant's income or resources, the regulations consider whether the sponsor is likely to support the individual, based on:
  - The sponsor's relationship to the immigrant, including whether the sponsor is residing in the same household as the applicant

Benefits Considered

The regulations expand the types of benefits that could be considered in a "public charge" determination, adding several widely-used programs that help low- and moderate-income working families. These programs that can be counted under the regulations are:

- Any Federal, State, Local or Tribal cash assistance for income maintenance, including TANF, SSI and general assistance programs (considered under the previous rule as well);
- Medicaid (with exceptions including coverage for emergency services, children under 21 years old, pregnant women including 60 days of post-partum services);
- Supplemental Nutrition Assistance Program (SNAP, formerly called "food stamps");
- Federal Public Housing, Section 8 housing vouchers and Section 8 project-based rental assistance.

Use of cash assistance programs or long-term institutional care before February 24, 2020, will be considered in public charge determinations. Use of any amount of the programs listed above for any period of time on or after February 24, 2020, will be considered as a negative factor in the totality of circumstances, with a heavy negative weight assigned to people who use one or more programs for twelve months in the aggregate out of 36 months. Note however that:

- DHS will not consider any benefits not listed in the rule (see table below).
- DHS will not consider benefits received by persons other than the applicant, even if the applicant requested the benefits on their behalf.
- DHS will not consider non-cash programs funded *entirely* by states, localities or tribes.

The regulations also exclude benefits received by active duty servicemembers, members of the Ready Reserve and their spouses and unmarried minor children. (Benefits received by veterans or their families are not excluded).

Benefits received by immigrants while in a status that is exempt from a public charge determination (e.g., while a refugee, VAWA self-petitioner, etc.) will not be considered if they apply for admission into the U.S. or LPR status under a pathway like a family-based visa petition, where public charge applies.

NOTE: ***The regulations are not retroactive***. *This means that benefits -- other than cash or long-term care at government expense -- that were used before the regulations became effective on February 24, 2020, will not be considered in the public charge determination.*

Benefits Included for Public Charge	Benefits Excluded from Public Charge
· Cash Support for Income Maintenance* · Non-Emergency Medicaid** · Supplemental Nutrition Assistance Program (SNAP or Food Stamps) · Housing Assistance (Public Housing or Section 8 Housing Vouchers and Rental Assistance) ** Included under current policy as well;* *** Exception for coverage of children under 21, pregnant women (including 60 days post-partum) adn emergency services*	*ANY benefits not on the included list will not be applied toward the public charge test. Examples include:* · Disaster relief · Entirely state, local or tribal programs (other than cash assistance) · Benefits received by the applicant's family members · CHIP · Special Supplemental Nutrition for Women Infants and Children (WIC) · School Breakfast and Lunch · Energy Assistance (LIHEAP) · Transportation vouchers or non-cash transportation services · Non-cash TANF benefits · Tax credits, including the Earned Income Tax Credit and Child Tax Credit · Advance premium tax credits under the Affordable Care Act · Pell grants and student Loans · Any other program not listed in the left column

Other Notable Issues

Most immigrants who are subject to a public charge inadmissibility assessment are not eligible for the benefits considered under the regulations. A USCIS or consular official will be considering whether a particular applicant is likely to use the specified benefits in the future.

The regulations do not address or change the public charge ground of deportability. Under current law and policy, a person who has become a public charge within 5 years after entering the U.S. for reasons that existed prior to their entry can be deportable, but only in extremely rare circumstances. The Department of Justice may propose regulations that change this policy. To learn more, review our FAQ on Public Charge and Deportation.

Things to Keep in Mind

1. **Some immigrant groups are not subject to "public charge."** Certain immigrants are not subject to "public charge" inadmissibility determinations and would not be affected by these regulations. Exempt immigrants include: refugees; asylees; survivors of trafficking, domestic violence, or other serious crimes (T or U visa applicants/holders); VAWA self-petitioners; special immigrant juveniles and certain other "humanitarian" immigrants.

   Public benefits received while a person is in an exempt status will not be counted negatively if the person later seeks to adjust to LPR status through a non-exempt pathway, such as a family-based petition.

   A public charge assessment is not part of the naturalization process. In addition, there is no public charge assessment when LPRs renew their 'green card'.

2. **Immigration officials must weigh positive factors against negative factors.** The public charge statute requires immigration officials to look at all aspects of a person's situation. Any negative factor, such as having a low income, can be outweighed by positive factors, such as having completed training for a new profession or having college-educated children who will help support the family.

FREQUENTLY ASKED QUESTIONS

THE PUBLIC CHARGE TEST

When is a public charge determination made?

Whether a person is likely to become a public charge is typically assessed when a person: 1) applies for admission to the U.S. (e.g., applies for a visa or undergoes consular processing for a green card from abroad), or 2) applies for lawful permanent resident (LPR) status. A lawful permanent resident who leaves the country for over 180 days and seeks to reenter may also be subject to a public charge determination. There is no public charge assessment when a lawful permanent resident applies to become a naturalized citizen.

Which immigrants are exempt from public charge?

Some categories of noncitizens are not subject to a public charge test, including: refugees; asylees; survivors of trafficking, domestic violence, or other serious crimes (T or U visa applicants/holders); VAWA self-petitioners; special immigrant juveniles and certain other "humanitarian" immigrants.

Does the public charge test apply to renewals of green cards?

A person's lawful permanent residence does not expire when the green card expires. Since there is no new admission when people renew their green card, the public charge ground of inadmissibility would not apply at this stage.

Does the new rule apply to non-immigrants?

The DHS regulations apply a new test to people *in the U.S.* who seek to extend a temporary non-immigrant visa, as well as those seeking to change the category of their non-immigrant visa (e.g., from a student to an employment-based visa). It looks only at whether the person has used a listed benefit for more than a total of 12 months during a 36-month period since the nonimmigrant status was granted. Non-immigrants are generally not eligible for the listed benefits.

Will this rule affect immigrants who are already green card holders or U.S. citizens?

The rule does not affect individuals who have already become U.S. citizens. Lawful permanent residents (green card holders) also are not subject to a public charge inadmissibility determination when they apply to become a U.S. citizen.

However, green card holders who leave the U.S. for more than 180 consecutive days (6 months) may be subject to a determination of admissibility, including a public charge assessment, when seeking to re-enter the U.S. They should consult with an immigration attorney prior to departure.

Does public charge apply to DACA recipients?

There is no public charge assessment when people renew their DACA grants. However, DACA recipients are not exempt from public charge. DACA recipients who have a pathway to becoming an LPR that is not exempt from public charge, such as marriage to a citizen, would be subject to a public charge assessment. If they apply for status through an exempt pathway such as a U visa, they would not be subject to a public charge test.

Who decides whether someone is likely to become a public charge?

For individuals applying to enter the U.S. from abroad or who need to go abroad for their green card interview, consular officials (employed by the State Department) make the public charge determination. For individuals who have their green card application decided in the U.S. or who apply to extend/change their non-immigrant status, U.S. Citizenship and Immigration Services officials make the decision.

Can a public charge determination be retroactive?

The public charge determination is a forward-looking test based on the totality of the applicant's circumstances. DHS and the State Department may consider the past use of certain benefits but their ability to do so is limited by the regulations' effective dates.

- The applicant's use of cash assistance for income maintenance, from any level of government, can be considered without regard to when it was received.

- The applicant's institutionalization for long-term care at government expense can only be considered before February 24, 2020, unless one of the benefits included in the regulations, such as Medicaid, paid for the long-term care.
- Benefits that were previously excluded from the public charge test (benefits other than cash assistance or long-term care) will NOT be considered *unless received after the regulations' effective date (February 24, 2020)*.

Which categories of immigrants are eligible for the benefit programs included in the regulations, and also potentially subject to public charge grounds of inadmissibility?

Although most immigrants who are eligible for the specified benefit programs are not subject to public charge inadmissibility determinations, a small group of individuals could be penalized for using benefits for which they are eligible.

Examples include:

- All programs: Lawful permanent residents (green card holders) who leave the U.S. for more than 6 months and attempt to re-enter the country can be subject to an inadmissibility determination, which could include a public charge test.
- Medicaid/SNAP: Some people granted parole, withholding of removal, and a small subset of Cuban/Haitian entrants *if they seek adjustment based on a family-based visa petition or other non-exempt pathway.*
- SNAP: In addition to the groups listed above, some members of the Hmong and Lao communities that helped the U.S. during the Vietnam War *if they seek adjustment based on a family-based visa petition or other non-exempt pathway*.
- Public Housing or Section 8: Some people granted parole or withholding of removal are eligible for housing programs and would be subject to a public charge test *if they seek adjustment based on a family-based visa petition or other non-exempt pathway.* In addition, Citizens of Micronesia, the Marshall Islands or Palau could be subject to a public charge determination if they leave the U.S. and attempt to reenter, or if they seek a green card through a pathway that isn't exempt from public charge.

How can the rule affect people who aren't eligible for the listed benefits?

Immigration and consular officials will consider whether, in their judgment, the person is likely to use the threshold amount of the specified benefits at any point *in the future*, when they may become eligible. This determination is based on the totality of circumstances factors discussed above.

Are there special rules for members of the U.S. Armed Forces and their families?

The regulations include some special provisions for members of the U.S. Armed Forces and their families. Receipt of public benefits is not counted in the public charge determination if, at the time of receipt of the benefit OR when applying for admission or adjustment of status, the non-citizen who received the benefits is enlisted in the U.S. Armed Forces and serving in active duty or the Ready Reserve, or is the spouse or unmarried minor child of such an individual. In addition, the income threshold under the totality of circumstances test is 100% of the federal poverty level, rather than 125%.

Are there special rules for veterans of the U.S. Armed Forces and their families?
The rule does not make any special provisions for veterans of the U.S. Armed Forces or their families.

The receipt of one or more public benefits for a total of 12 months within the past 36 months is assigned a "heavily negative" weight in the new rule. Does this mean they can look at benefits used prior to February 24, 2020?
Only cash assistance and long-term care used prior to the regulations's effective date can be considered. Receipt of any newly named benefits (Medicaid, SNAP, housing assistance) could not be considered until the rule's effective date, February 24, 2020. Thus, USCIS will not be able to do a complete 3-year look back on the health care, nutrition and housing benefits added by the proposed rule until 3 years after the rule's effective date.

Will the rule consider benefits used for less than 12 months?
Any amount of the specified benefits used after the regulations' effective date, and cash assistance used at any time, can be considered a negative factor in the totality of circumstances.

Does the rule exempt benefits for pregnant women and new mothers?
The regulations explicitly excludes Medicaid received by pregnant women, and for 60 days post-partum. In addition, the rule does not consider labor and delivery services covered by emergency Medicaid. There are no similar exemptions for cash assistance, SNAP or housing programs.

Does the rule exclude children's use of benefits?
The rule excludes Medicaid and any other health benefits received by children under 21 from being considered in the public charge test. It does not exclude cash assistance, housing or SNAP benefits received by immigrant children. These benefits may be taken into account if the child is applying for admission or LPR status.

Is a dependent's use of benefits considered in the immigrant's public charge test (e.g., does a U.S. citizen child's use of SNAP (food stamps) affect a parent's green card application, if the parent wasn't receiving the benefit)?
No. In the regulations, only the applicant's use of benefits is taken into consideration. Receipt of benefits by dependents and other household members would not be considered in determining whether the immigrant applicant is likely to become a public charge. In cases where other members of a household may be eligible for a benefit (such as SNAP or Public Housing), only benefits received by the immigrant applying for status - not their household members - would be considered.

Are advance premium tax credits (subsidies) under the Affordable Care Act counted in the public charge test?
Receipt of advance premium tax credits (subsidies) under the Affordable Care Act (ACA) is **not** counted as receipt of a public benefit. And having subsidized health coverage under the ACA or other private health insurance can help overcome a negative weight based on a person's health condition. But, only private insurance *without subsidies* is weighed as a heavily *positive* factor.

Are state- or local-funded programs counted?

State, local and tribally funded programs cash assistance programs for income maintenance are considered. State, local and tribally funded non-cash programs, such as health care and state-funded housing assistance, are not counted.

In many states, people applying for health insurance on the exchange, or seeking state-funded health insurance, are automatically reviewed for Medicaid eligibility. Is this considered an application for Medicaid? Must it be reported?

Where programs (either under the ACA or state funded health programs) require a Medicaid screening prior to an eligibility determination, this may be considered an application. However, immigrants will also have the opportunity to provide evidence that they were denied these benefits, and why.

Do the regulations establish 125% of the Federal Poverty Level as an income requirement for admission/LPR status? Does having an income of 250% of the Federal Poverty line mean that an immigrant cannot be a public charge?

A household income under 125% percent of the federal poverty level is a negative factor. A household income over 250% of the federal poverty level is a heavily-weighed positive factor. But the public charge test considers all of a person's circumstances, weighing positive factors against any negative factors. Household income carries weight but will not necessarily be dispositive.

How does this rule change the U.S. immigration system?

Drawing upon analysis of U.S. Census Bureau data, MPI researchers applied the administration's expanded "totality of circumstances" test under the proposed rule to immigrants who had received LPR status within the past five years. They found that 69 percent had at least one negative factor under the administration's proposed test, while just 39 percent had income at or above 250 percent of the federal poverty level. MPI finds the new test would have a disproportionate effect on women, children, and seniors. It is also likely to disproportionately exclude immigrants from Latin American countries and favor immigration from Europe. This Administration has sought legislative approval to restrict family-based immigration, and this rule is a back-door attempt to accomplish what Congress has rejected.

Can the DHS rule be stopped with litigation?

At least nine cases challenging the rule are currently pending across the country. Although multiple courts initially prohibited the government from implementing the rule, the Supreme Court allowed it to go into effect while the cases proceed. The rule is likely to be in effect during the next several months at a minimum.

Are refugees and trafficking victims exempt from public charge determinations if they apply to enter the US at consular offices abroad?

Yes. The same categories of humanitarian immigrants who are exempt from the application of the DHS regulations are also exempt from the State Department regulations.

Does the immigration law allow the government to deport lawful permanent residents if they become dependent on public benefits?

Immigration law provides that individuals who have become a public charge within five years of their entry to the U.S., for reasons that existed before they entered the country may become deportable as a public charge. Administrative decisions require that all of the following be present before a person can be deported on public charge grounds:

- The person or their sponsor had a legal obligation to repay the cost of a benefit
- The person or their sponsor received notice of the repayment obligation within five years of the person's last entry to the U.S.
- The benefits-granting agency has obtained a legal judgment requiring repayment of the benefit, and has not received repayment.

The DHS and State Department regulations interpret the public charge grounds of inadmissibility, and do not address the public charge ground of deportability. However, the Department of Justice (DOJ) has been developing public charge regulations, which are expected to address deportation on public charge grounds. The DOJ has not yet posted a proposed rule addressing the public charge ground of deportability.

When would the public charge deportability ground apply?

The public charge ground of deportability applies to people who already have been inspected and admitted to the US, including people granted LPR status. By contrast, the public charge ground of inadmissibility applies to people seeking admission to the United States (including lawful permanent residents who seek reentry after an absence of more than 180 days), an immigrant or nonimmigrant visa at a consulate abroad, or adjustment to lawful permanent resident status. As previously noted, the final DHS rule applies a similar test to nonimmigrants seeking to extend or change nonimmigrant status in the US.

For updates on the expected DOJ proposed rule please stay tuned to www.protectingimmigrants.org. For more information on the existing policy, see Public Charge and Deportation FAQ for Advocates and Community Members.

U.S. Citizenship and Immigration Services

Public Charge Fact Sheet

Final Rule Implementation

DHS implemented the Inadmissibility on Public Charge Grounds final rule beginning on Feb. 24, 2020, including in Illinois. DHS published the rule on Aug. 14, 2019, but, shortly before the final rule was scheduled to go into effect on Oct. 15, 2019, several federal courts enjoined the rule (that is, legally prohibited DHS from implementing it at that time). The U.S. Supreme Court stayed the last remaining injunction on Feb. 21, 2020, and therefore DHS is no longer prevented from implementing the final rule.

USCIS will apply the final rule to all applications and petitions postmarked (or, if applicable, submitted electronically) on or after that date. For applications and petitions sent by commercial courier (for example, UPS, FedEx, or DHL), the postmark date is the date reflected on the courier receipt. USCIS will reject any affected application or petition that does not adhere to the final rule, including those submitted by or on behalf of aliens living in Illinois, if postmarked on or after Feb. 24, 2020.

The final rule requires applicants for adjustment of status who are subject to the public charge ground of inadmissibility and certain applicants and petitioners seeking extension of stay and change of status to report certain information related to public benefits. Due to litigation-related delays in the final rule's implementation, USCIS is applying this requirement as though it refers to Feb. 24, 2020, rather than Oct. 15, 2019. Please read all references to Oct. 15, 2019, as though they refer to Feb. 24, 2020.

Applicants for adjustment of status need not report the application for, certification or approval to receive, or receipt of certain previously excluded non-cash public benefits (for example, the Supplemental Nutrition Assistance Program, Medicaid, and public housing) before Feb. 24, 2020. USCIS will also not weigh heavily in the totality of the alien's circumstances the receipt of certain previously included public benefits (for example, Temporary Assistance for Needy Families, Supplemental Security Income, and General Assistance) if received before Feb. 24, 2020. USCIS will not consider, and applicants and petitioners seeking to extend nonimmigrant stay or change nonimmigrant status need not report, an alien's receipt of public benefits before Feb. 24, 2020.

Introduction

The public charge ground of inadmissibility has been a part of the U.S. immigration law for more than 100 years.

An alien who is likely at any time to become a public charge is generally inadmissible to the United States and ineligible to become a lawful permanent resident. Under the final rule, a public charge is defined as an alien who has received one or more public benefits, as defined in the rule, for more than 12 months within any 36-month period.

However, receiving public benefits does not automatically make an individual likely at any time in the future to become a public charge. This fact sheet provides information about public charge and public benefits to help noncitizens make informed choices about whether to apply for certain public benefits. You may also find information about the rule on our public charge webpage.

The final rule addresses the public charge ground of inadmissibility, the public benefit condition application, classifications exempt from the public charge ground of inadmissibility, and public

charge bonds.

Background

Under section 212(a)(4) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(a)(4), an alien seeking admission to the United States or seeking to adjust status to that of a lawful permanent resident (obtaining a Green Card) is inadmissible if the alien, "at the time of application for admission or adjustment of status, is likely at any time to become a public charge." If an alien is inadmissible, we will not grant admission to the United States or adjustment of status.

Applicability and Exemptions

The final rule applies to two types of applicants:

- Applicants for admission or adjustment of status to that of a lawful permanent resident (such applicants are subject to the rule's public charge ground of inadmissibility unless Congress has exempted them from this ground)
- Applicants for extension of nonimmigrant stay or change of nonimmigrant status (such applicants are subject to the rule's public benefit condition unless the nonimmigrant classification is exempted by law or regulation from the public charge ground of inadmissibility)

Congress has carved out certain exemptions to the public charge ground of inadmissibility, including:

- Refugees;
- Asylees;
- Certain T and U nonimmigrant visa applicants (human trafficking and certain crime victims, respectively); and
- Certain self-petitioners under the Violence Against Women Act.

For a full list of exempt classes of aliens, see 8 CFR 212.23 and the USCIS Policy Manual, Volume 8 – Admissibility, Part G - Public Charge Ground of Inadmissibility [8 USCIS-PM G].

Definition of Public Charge

The final rule defines public charge as an alien who receives one or more public benefits (as defined in the final rule) for more than 12 months, in total, within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).

Under the final rule, "likely at any time to become a public charge" means more likely than not at any time in the future to become a public charge (in other words, more likely than not at any time in the future to receive one or more of the public benefits (as defined in the final rule) for more than 12 months, in total, within any 36-month period, such that, for instance, receipt of two benefits in one month counts as two months).

We determine inadmissibility based on the public charge ground by looking at the factors outlined in 8 CFR 212.22. Our adjudicating officers review the totality of an alien's circumstances when deciding whether an applicant is likely at any time to become a public charge. This means that the adjudicating officer must weigh both the positive and negative factors. As required by section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), and by this final rule, when making a public charge inadmissibility determination, a USCIS officer must consider the applicant's:

- Age;
- Health;
- Family status;

- Assets, resources, and financial status;
- Education and skills;
- Prospective immigration status;
- Expected period of admission; and
- Sufficient Affidavit of Support Under Section 213A of the INA, Form I-864 or Form I-864EZ, when required under section 212(a)(4)(C) or (D) of the INA, 8 U.S.C. 1182(a)(4)(C) or (D).

No single factor makes an alien inadmissible based on the public charge ground, except not filing a sufficient Form I-864 or Form I-864EZ, when required. The determination of an alien's likelihood of becoming a public charge at any time in the future is a prospective determination that is based on the totality of the alien's circumstances and by weighing all of the factors that are relevant to the alien's case.

Benefits Considered

DHS will only consider public benefits as listed in the rule, including:

- Supplemental Security Income;
- Temporary Assistance for Needy Families;
- Any federal, state, local, or tribal cash benefit programs for income maintenance (often called general assistance in the state context, but which may exist under other names);
- Supplemental Nutrition Assistance Program (formerly called food stamps);
- Section 8 Housing Assistance under the Housing Choice Voucher Program;
- Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation);
- Public Housing (under the Housing Act of 1937, 42 U.S.C. 1437 et seq.); and
- Federally funded Medicaid (with certain exclusions).

Benefits Not Considered

DHS will not consider:

- Emergency medical assistance;
- Disaster relief;
- National school lunch programs;
- The Special Supplemental Nutrition Program for Women, Infants, and Children ;
- The Children's Health Insurance Program;
- Subsidies for foster care and adoption;
- Government-subsidized student and mortgage loans;
- Energy assistance;
- Food pantries and homeless shelters; and
- Head Start.

Benefits received by U.S. service members. Under the final rule, DHS will not consider the receipt of public benefits (as defined in the final rule) received by an alien who, at the time of receipt, or at the time of filing or adjudication of the application for admission, adjustment of status, extension of stay, or change

of status, is enlisted in the U.S. armed forces, or is serving in active duty or in any of the Ready Reserve components of the U.S. armed forces.

Benefits received by the spouse and children of U.S. service members. DHS will also not consider the receipt of public benefits by the spouse and children of anyone enlisted in the U.S. armed forces, or is serving in active duty or in any of the Ready Reserve components of the U.S. armed forces.

Benefits received by children born to, or adopted by, U.S. citizens living outside the United States. The rule further provides that DHS will not consider public benefits received by children, including adopted children, who will acquire U.S. citizenship under section 320 of the INA, 8 U.S.C. 1431, or children, residing outside the United States, of U.S. citizens who are entering the United States for the purpose of attending an interview under section 322 of the INA, 8 U.S.C. 1433.

Certain Medicaid benefits. DHS will not consider the Medicaid benefits received:

- For the treatment of an “emergency medical condition;”
- As services or benefits provided in connection with the Individuals with Disabilities Education Act;
- As school-based services or benefits provided to individuals who are at or below the oldest age eligible for secondary education as determined under state or local law;
- By aliens under the age of 21; and
- By pregnant women and by women within the 60-day period beginning on the last day of the pregnancy.

Last Reviewed/Updated: 02/27/2020

Published on *New York DMV* (https://dmv.ny.gov)

The Driver's License Access and Privacy Act, commonly called the 'Green Light law', was enacted on June 17, 2019, and takes effect on December 16, 2019. It allows all New Yorkers age 16 and older to apply for a standard, not for federal purpose, non-commercial driver license or learner permit regardless of their citizenship or lawful status in the United States.

You do not need a Social Security card to apply for a license or permit

Under the Driver's License Access and Privacy Act, driver license applicants who have never been issued a Social Security Number are eligible to apply.

You must sign an Affidavit (sworn statement) of never having been issued a Social Security Number [1] when you apply for a standard driver license

Documents you will need to apply

All Applicants for a standard driver license must show a **combination** of documents that prove 1. name, 2. date of birth, and 3. New York State residency.

In addition to the combination of proofs we currently accept [2], beginning December 16, 2019, we will also accept

- a valid, unexpired foreign passport issued by your country of citizenship
- a valid, unexpired consular identification document issued by a consulate
- a valid foreign driver license that includes your photo, and which is either unexpired or expired for less than 24 months
- Permanent Resident Card, which is either unexpired or expired for less than 24 months
- Employment Authorization Card, which is either unexpired or expired for less than 24 months
- Border Crossing Card
- U.S. Municipal ID Card (e.g. NYC ID) with photo
- foreign marriage or divorce record or court issued name change decree
- foreign birth certificate

Review the standard license and permit guide to see a list of all proofs that will be accepted effective December 16, 2019.

Start Standard License and Permit Document Guide [3]

REAL ID compliance

If you do not have proof that you have a Social Security Number, been issued a Social Security Ineligibility Letter by the Social Security Administration or have proof of your lawful status in the US, your standard driver license will **not** comply with the federal REAL ID Act [4]. In accordance with the law, all licenses that do not meet REAL ID standards are marked "NOT FOR FEDERAL PURPOSES." This also means, after October 1, 2020, you cannot use your license to board a domestic flight (within the United States) or enter some secure federal buildings.

You cannot apply for a Non-Driver ID Card

The Green Light Law does not apply to Non-Driver ID cards.

Your license or permit will not look different from other *standard* New York Driver licenses

All standard New York State driver licenses look the same regardless of the proof documents you provide when you apply. All standard driver licenses will be marked "NOT FOR FEDERAL PURPOSES".

You need to pass tests to get a permit and license

You need to pass a written (knowledge) test to get a driver learner permit and then you must pass a road test before you can get a driver license. Follow the steps below to get your learner permit and driver license.

Step 1: Study the New York State Driver Manual and take practice tests

To prepare for the permit written test, read the online NY State Driver's Manual [5] (or get a paper copy at any DMV office) and take the practice tests for each chapter. If you do not study the Driver Manual, you will not pass the test.

Step 2: Go to a DMV office to apply for a permit and take the test

Some offices, such as the White Plains, Huntington, and License Express offices, do not offer knowledge tests. Find an office location [6] and review the services provided before visiting the office for the knowledge test.

Step 3: Practice driving and take an authorized pre-licensing course

While you have the permit, you must practice driving. You must also take a DMV authorized pre-licensing course. See additional information about getting a permit [7].

Step 4: Schedule and take the road test to get your license

After you pass the knowledge course and feel comfortable driving, you must take and pass a DMV road test to get your license. During this test, you will be in a car with a DMV Road Test Examiner who will ask you to show that you know how to drive safely. Once you pass this test, you will receive a driver license. See additional information about getting a driver license [8].

You cannot apply for a commercial license (CDL) under this law

You can only apply for a non-commercial license under this law.

This law does not allow you to register to vote if you are not eligible

This law does not change your eligibility to register to vote in New York [9]. Only US citizens are eligible to register to vote.

This law does not allow you to become a US Citizen

This law relates only to driving privileges in New York State. It does not provide a pathway to citizenship for applicants who are not already US citizens

Renewing or replacing your license or permit

If you have a New York State driver license that is expired less than two years, you may be eligible to renew. See additional information about renewing a driver license [10].

If you obtained your license without showing proof of a Social Security Number, and you need to renew or replace it, you will need to do so by mail or in person at a DMV office. DMV online services require the user to have a social security number on file.

Language Assistance

All DMV Offices will provide language access assistance to individuals with limited English proficiency.

Privacy Protections

The law provides a number of privacy protections that limit data sharing, including to agencies that primarily enforce immigration laws, and requires disclosure to the license holders when immigration enforcement agencies request data from DMV.

Fees

The fees to apply for a driver license or permit range between $64.50 and $107.50 [11] and can be paid by cash, check or credit/debit card.

Office of New Americans (ONA) Hotline: 1-800-566-7636

The New York State New Americans Hotline [12]is a **toll-free**, multi-lingual hotline that can assist DMV customers with any immigration-related issues or discrimination they experience at a DMV office. The hotline provides live assistance in more than 200 languages. Anyone can call the hotline for information and referrals, regardless of citizenship or documented status. Calls to the hotline are confidential and anonymous.

Additional Resources:

ONA Services and Know Your Rights Flyer [13]

New Americans Hotline [14]

ONA Opportunity Center Locations [15]

Division of Human Rights (DHR) Resources:

DHR Pubic Accommodations Page [16]

DHR Know Your Rights Brochure - English [17]

DHR Know Your Rights Brochure - Spanish [18]

DHR General Poster [19]

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EXPLAINER

Litigation update: Counties sue New York State over driver's licenses

by Kendra Sena*
Updated on September 25, 2019.

Background

In June 2019, New York passed the Driver's License Access and Privacy Act (Green Light NY), a law that would permit undocumented New Yorkers to apply for a state driver's license. The law is set to go into effect in December 2019.

In New York, most Department of Motor Vehicles (DMV) offices are not operated by the state agency directly; instead, independently elected county clerks act as agents of the DMV, and are responsible for issuing driver's licenses in most counties.[1] But many county clerks have expressed their intent to defy the law and refuse to issue licenses to newly eligible immigrants.[2] The consequences to the clerks of refusing to administer the law are potentially severe: the New York State Constitution gives the governor the authority to remove an elected county clerk from office,[3] though the power has not been invoked since 1932.[4]

Litigation

A few weeks after the Green Light NY bill was signed into law, Erie County Clerk Michael Kearns filed a suit in federal court challenging the law as unconstitutional.[5] Shortly thereafter, Rensselaer County Clerk Frank Merola filed a similar suit.[6] In late August, Monroe County Executive Cheryl Dinolfo filed a third suit.[7] Although fourteen states plus Washington, D.C., and Puerto Rico have laws to issue driver's licenses regardless of immigration status,[8] the lawsuits in New York mark the first time local officials have sued a state for issuing driver's licenses to undocumented immigrants.

The lawsuits claim that the Green Light NY law is **preempted by federal law**. Under the Supremacy Clause of the U.S. Constitution, when there is a conflict between a state law and a federal law, the federal law overrides the state law. There are two types of preemption: express and implied. Express preemption occurs when a federal law explicitly states that it supersedes state law. Implied preemption occurs when, despite there being no explicit preemption, either:

- state law and federal law are in conflict;
- state law frustrates federal law; or
- the federal law and regulation in an area is so comprehensive as to occupy the field.

The *Monroe* suit makes an additional claim that the Green Light NY law **violates the Equal Protection Clause** of the U.S. and New York State Constitutions. The Equal Protection Clause guarantees that the government will not unfairly discriminate against classes of people when it passes or enforces laws. To satisfy the Equal Protection Clause, a government classification must be supported by sufficient justification. Depending on the type of classification, courts will apply one of three types of review: strict scrutiny, intermediate scrutiny, or rational basis review. A law that fails to pass equal protection review is unconstitutional.

Each suit asks the court to rule that the Green Light NY law is unconstitutional and to stop its implementation. The following sections explain the specific claims the counties make.

Claims and Analyses

CLAIM

The Green Light NY law directly conflicts with the federal law that makes it a felony to **conceal, harbor, or shield from protection** a person who is unlawfully in the United States (8 U.S.C. § 1324).

This claim is made in Merola, Kearns, *and* Monroe.

Summary and Analysis: Neither Congress nor the federal courts has settled on a single definition of "harboring." In the Second Circuit (the federal jurisdiction that includes New York), there are three elements that must be proved: (1) the noncitizen is unlawfully present in the U.S.; (2) the defendant knew or recklessly disregarded the status of the unlawfully present person; and (3) the defendant took actions that both helped an unlawfully present person to remain in the U.S. *and* prevented authorities from detecting the person's presence.[9]

Most prosecution for harboring arises in the employment context, though mere employment of undocumented workers is not enough. Courts have found employers guilty of harboring when they employ undocumented workers *and* take affirmative actions that shield the person from detection and make it easier for them to remain in the U.S. For example, the Second Circuit found harboring when an employer induced a worker to falsify work authorization documents and to change her name when the employer was under investigation.[10] Litigation also arises in the housing context when, in addition to providing shelter, a person takes actions that help an undocumented person to remain in the U.S. and prevent authorities from detecting them. The Second Circuit found a person liable for harboring when they maintained several houses to provide shelter for large numbers of undocumented people, provided transportation for them to and from work, and helped arrange sham marriages.[11]

The clerks argue that by providing driver's licenses to people who are in the U.S. without authorization, the Green Light NY Law helps people who are unlawfully present in the U.S. to remain in the U.S. And because the law bars the DMV from disclosing applicants' records without a

judicial warrant, the counties argue that the law shields unlawfully present people from detection.

In its motion to dismiss the *Kearns* complaint, the State responds that (1) the Green Light NY law forbids the counties from asking an applicant about their immigration status, and because citizens and lawfully present noncitizens are also eligible for standard (not for federal purposes) licenses under the Green Light NY law, the counties cannot assume that all applicants are undocumented; (2) the issuance of a driver's license is not the kind of conduct prohibited by federal law; even if a driver's license facilitates a noncitizen's continued unlawful presence in the U.S., it is not done specifically to prevent immigration authorities from detecting the noncitizen; (3) the Green Light NY law protects certain *documents* from disclosure, but the federal law is meant to address harboring of *people* not documents; and (4) there is no credible threat of prosecution as no official in any other state that issues driver's licenses to undocumented residents has ever been prosecuted under the harboring statute.

CLAIM

The Green Light NY law frustrates the federal laws that aim to **combat employment of undocumented people** (8 U.S.C. s. 1324a).

This claim is made in Merola *and* Kearns.

Summary and Analysis: Federal law makes it unlawful to knowingly employ unauthorized workers. To be authorized to work, a person must have a valid social security number or other work authorization issued by the federal government. Many types of immigrants are eligible for work authorization, including asylees and refugees, beneficiaries of Deferred Action for Childhood Arrivals (DACA) and Temporary Protected Status (TPS), some student-visa holders, and many others. Undocumented people are not generally eligible for work authorization. Employers who violate the law may be subject to fines and criminal prosecution.

The U.S. Supreme Court has previously struck down government action that frustrates this law. In *Hoffman Plastics*, the Supreme Court reversed an administrative award of back pay for unauthorized workers who had been unlawfully fired for union activity.[13] Back pay—wages that workers would have earned had they not been unlawfully terminated— is a remedy typically available to people with work authorization. But the Court reasoned that without work authorization the workers were "unavailable" to work, and an award of back pay would be inconsistent with the federal laws that aim to curb the employment of unauthorized workers.[14] The Court relied on its analysis in a prior case that held that unauthorized workers were not eligible to be reinstated after they were wrongfully terminated.[15] In *Arizona v. U.S.* the U.S. Supreme Court struck down a state law that aimed to impose criminal sanctions on unauthorized workers for seeking employment—a consequence not imposed by federal law. Reasoning that the federal law intentionally avoided imposing criminal penalties on unauthorized workers,

choosing instead to sanction employers, the Court held that the "state law to the contrary is an obstacle to the regulatory system Congress chose." [16]

The counties claim that the Green Light NY law intentionally interferes with federal efforts to combat the employment of unauthorized workers. In justifying the proposed law extending driving privileges to undocumented New Yorkers, bill sponsors in the Senate and Assembly noted that undocumented people need driver's licenses in order to get to and from work.[17] But because undocumented people are not generally eligible for work authorization, the counties say the New York law encourages the unlawful employment of unauthorized workers and frustrates federal law.

In its motion to dismiss the *Kearns* complaint, the State responds that the federal law deliberately regulates the conduct of *employers* rather than the workers themselves or others who facilitate the unlawful employment. Because the Green Light NY law does not regulate any *employer* conduct, permit employers to hire workers, or confer the license holders with work authorization, the law does not conflict with federal prohibitions on employment of unauthorized workers.

CLAIM

The Green Light NY law expressly conflicts with federal laws under which state and local governments may not prohibit the **sharing of immigration-related information** with the federal government (8 U.S.C. § 1644 & 8 U.S.C. § 1373(a)).

This claim is made in Merola *and* Monroe.

Summary and Analysis: In 1996, Congress passed two laws under which state and local governments may not prohibit communication with the federal government about the immigration status of any person, 8 U.S.C. § 1644 and 8 U.S.C. § 1373. Shortly after the laws were enacted, the City of New York challenged the validity of the laws under the anticommandeering principles of the Tenth Amendment, which prohibit the federal government from compelling states to adopt or enforce federal laws. The city was defending its long-standing executive order that prohibited New York City officials from sharing immigration-status information with federal immigration authorities. The Second Circuit ruled against the city, upholding the federal laws as constitutional. The court reasoned that while the federal government could not *compel* state and local governments take certain actions to administer federal programs, it was constitutional for the federal government to *prohibit* states from taking certain actions that would frustrate federal programs.[18] In response, the city changed its order; rather than prohibit the *sharing* of immigration-status information, the new order (which is still in effect)

prohibits the *gathering* of immigration-related information except in limited circumstances.[19]

But a recent U.S. Supreme Court case has done away with the distinction drawn by the Second Circuit. In *Murphy v. NCAA*, the Supreme Court held unconstitutional a federal statute that prohibited states from authorizing sports gambling.[20] The Supreme Court reasoned that the distinction between an attempt to compel a state to act or to prohibit a state from acting is an empty one; any attempt to dictate what state legislatures may and may not do is a violation of the anticommandeering principles of the Tenth Amendment.[21] In light of this ruling, one federal court in New York has ruled that 8 U.S.C. § 1373 is unconstitutional.[22] The Second Circuit has not ruled on provisions that prohibit the gathering of immigration-related information, nor has it considered whether 8 U.S.C. § 1644 and 8 U.S.C. § 1373 will survive in light of *Murphy*.

The Green Light NY law prohibits the disclosure of any records or information maintained by the state or local agent to immigration enforcement authorities absent a court order or judicial warrant. The county claims that this information-sharing prohibition conflicts with the federal laws.

In its motion to dismiss the *Kearns* complaint,[23] the State responds that (1) because federal law grants states the choice as to whether to report otherwise protected personal information to other state and federal agencies, the Green Light NY law is an exercise of the State's discretion to decide when such permissive disclosures are appropriate; (2) federal law does not create any *affirmative* obligations to disclose immigration status information; and (3) because the Green Light NY law prohibits state and local agents from inquiring about the immigration status of an applicant for a non-federal-use driver's license, government agents will not have any relevant immigration-status information to communicate at all.

CLAIM

The Green Light NY law violates federal law that requires that only U.S. citizens be allowed to **vote** in a federal election (18 USC § 611(a)).

This claim is made in Monroe.

Summary and Analysis: Federal law makes it a crime for a noncitizen to vote "in any election held solely or in part for the purpose of electing a candidate for federal office."[24] A noncitizen who votes in a federal election can be fined, imprisoned, or removed from the United States—even if they did not know they were ineligible to vote.[25] The county argues that because the Green Light NY law permits people who are ineligible to vote in a federal election to obtain a driver's license, and because a driver's license is sufficient documentation to register to vote in New York, that the state law is preempted by the federal law.

The State has yet to respond to this argument, but may reply that (1) the issuance of a driver's license is fairly attenuated to the act of voting; (2) all states routinely issue driver's licenses to people who are ineligible to vote in federal

elections, including people under the age of 18, lawful permanent residents ("Green Card" holders) and other noncitizens, and some people who have been convicted of a felony; and (3) the federal statute at issue criminalizes the actions of a noncitizen voter, not the actions of a state or local government that erroneously accepted a voter registration or permitted an ineligible voter to cast a vote in a federal election.

CLAIM

The Green Light NY law attempts to regulate a field over which the **federal government has exclusive authority**.

This claim is made in Kearns *and* Merola.

Summary and Analysis: A state or local law is preempted when the federal law and regulation in an area is so comprehensive as to occupy the field. Courts have found field preemption in areas where there is a clear and dominant interest in national uniformity, such as nuclear safety regulation,[26] or where Congress has enacted a comprehensive statutory framework that demonstrates its intent to occupy a field, such as with "alien registration."[27] This means that even complementary state or local laws are preempted. For example, the U.S. Supreme Court struck down an Arizona statute that made it a crime under state law for an immigrant to fail to carry their "alien registration document" as required by federal law. Although the state statute mirrored the federal statute in that it imposed a penalty for failing to carry the document, the Court reasoned that "[w]here Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible."[28] But not all state or local laws that have to do with immigrants are field-preempted. The U.S. Supreme Court has upheld state laws that affect immigrants but do not interfere with the comprehensive scheme laid out by federal law. For example, the Court found that a state law that revoked an employer's business license for hiring unauthorized workers was not preempted by federal law.[29]

The counties argue that the federal government has exclusive authority over the field of immigration law, and that the Green Light NY law is therefore preempted.

In its motion to dismiss the *Kearns* complaint, the State responds that (1) only the federal government may bring a claim based on the supremacy clause in the immigration context; (2) the issuance of driver's licenses is not within the field of immigration regulation exclusively governed by federal law; (3) the State has broad authority to govern matters of public safety, including issuing driver's licenses, even if those laws have some effect on immigration; and (4) federal law recognizes that states are permitted to issue driver's licenses without regard to immigration status.

CLAIM

The Green Light NY law violates the **Equal Protection clause** of the U.S. and N.Y. constitutions

This claim is made in Monroe.

Summary and Analysis: The Equal Protection Clause guarantees that the government will not unfairly discriminate against classes of people when it passes or enforces laws. The Equal Protection Clause is applicable when a government action unjustifiably burdens or benefits one group of people but not other similarly situated people. That is not to say that the government may not make distinctions between classes of people; a government classification is lawful so long as it is supported by sufficient justification. Depending on the type of classification, courts will apply one of three types of review: strict scrutiny, intermediate scrutiny, or rational basis review.

The most stringent type of review, strict scrutiny, will apply when the law in question relates to a fundamental right or a suspect classification. Fundamental rights include the right to vote, the right to move freely between the states, and the right to marry. Suspect classifications include race, national origin, religion, and alienage. A law that limits a fundamental right or that involves a suspect classification must pass strict scrutiny; the law must further a "compelling governmental interest," and must be narrowly tailored to achieve that interest. When courts apply strict scrutiny, they almost always strike down the government action being challenged. A court will use intermediate scrutiny to evaluate a law that discriminates by sex or gender. To pass intermediate scrutiny, the law must be substantially related to an important governmental interest. For most all other classifications, courts will use the lesser rational basis standard of review, under which the state need only show that the classification bears a rational connection to a legitimate state interest. Laws that are subject to rational basis review almost always survive challenge.

The county argues that the Green Light NY law violates the Equal Protection Clause because it treats undocumented immigrants better than it treats U.S. citizens and lawful residents. Under the Green Light NY law, people with social security numbers are required to provide their social security number to apply for a driver's license. All U.S. citizens have social security numbers, and so do some, but not all, noncitizens. Noncitizens without social security numbers may submit an affidavit stating that they have not been issued a social security number, and must also provide a valid foreign passport, consular identification document, or foreign driver's license to be eligible for a standard (not for federal purposes) driver's license.

The county argues that the Green Light NY law "requires less intrusive and less reliable proof of identity from" undocumented immigrants who don't have social security numbers than from citizens and immigrants with social security numbers. Because New York shares driver's license data with state and federal agencies, the county claims that

those who have submitted their social security numbers will have their identities shared while those without social security numbers will have their identities shielded.

The State has yet to reply to this argument, but may offer some variation on three replies. First, the State may say that equal protection is irrelevant here because the classes (people with and without social security numbers) are not similarly situated. Under federal law, the state cannot issue the same kinds of driver's licenses to people who have social security numbers and people who do not. People with different kinds of licenses are not similarly situated. Second, the State may argue that equal protection is irrelevant because there is no differential treatment; all driver's licenses and associated identifying information are a part of the same database that is shared with state and federal agencies. Finally, the State may say that even if equal protection does apply, the state satisfies the low burden of rational basis review; the heightened scrutiny required for alienage discrimination does not apply where a party alleges *preferential* treatment for immigrants.

Further Reading

The Government Law Center publishes explainers—short policy papers—designed to help policymakers and others understand the complex laws that apply to state and local governments' choices about immigration policy. Each explainer briefly reviews the law in a specific area, and provides links to further resources. For more information on driver's licenses for undocumented immigrants, and other issues related to state and local governments and immigration law, see the Government Law Center's explainer series, available at: albanylaw.edu/glc/immigration.

Endnotes

* Kendra Sena is the Senior Staff Attorney at the Government Law Center at Albany Law School.

[1] In 51 of the state's 62 counties, the county clerk serves as an agent of the Commissioner of Motor Vehicles and is responsible for operating the Department of Motor Vehicles office and issuing driver's licenses. *See* N.Y.S. Vehicle and Traffic Law § 205. Excepted are the clerks of the counties of Rockland, Albany, Westchester, Suffolk, Nassau, Onondaga, Bronx, Kings, Queens, Richmond, and New York.

[2] Christina Goldbaum, "Rebellion by County Clerks Over N.Y. Licenses for Undocumented Immigrants," THE NEW YORK TIMES, June 21, 2019, https://www.nytimes.com/2019/06/21/nyregion/drivers-licenses-undocumented-ny.html.

[3] N.Y. Const. art. XIII, § 13 states, in part: "The governor may remove any elective sheriff, county clerk, district attorney or register within the term for which he or she shall have been elected; but before so doing the governor shall give to such officer a copy of the charges against him or her and an opportunity of being heard in his or her defense."

[4] The only governor to invoke the power to remove an independently elected official was Franklin D. Roosevelt who, in 1932, removed New York County Sheriff Thomas M. "Tin Box" Farley from office as part of a Tammany Hall scandal. "Farley Is Removed; Unexplained Funds Sole Basis of Action; Roosevelt Rules Sheriff Failed to Meet High Standard Set for Public Officials," THE NEW YORK TIMES, Feb. 25, 1932, www.nytimes.com/1932/02/25/archives/farley-is-removed-unexplained-funds-sole-basis-of-action-roosevelt.html.

[5] *Kearns v. Cuomo, et al.*, No. 19 cv 902 (W.D.N.Y. filed Jul. 8, 2019).

[6] *Merola v. Cuomo, et al.*, No. 19 cv 899 (N.D.N.Y. filed Jul. 24, 2019).

[7] *County of Monroe, et al., v. Cuomo, et al.*, No. 19 cv ___ (W.D.N.Y. filed Aug. 29, 2019).

[8] National Immigration Law Center, "State Laws Providing Access to Driver's Licenses or Cards, Regardless of Immigration Status," (August 2019), https://www.nilc.org/issues/drivers-licenses/state-laws-providing-dl-access/.

[9] *See U.S. v. Kim*, 193 F.3d 567 (2d Cir. 1999) (holding that harboring "encompasses conduct tending substantially to facilitate an alien's remaining in the U.S. illegally and to prevent government authorities from detecting [the immigrant's] unlawful presence") *citing U.S. v. Lopez*, 521 F.2d 437 (2d Cir. 1975), *cert denied* 423 U.S. 995 (1975)).

[10] *Id.*

[11] *See U.S. v. Lopez*, 521 F.2d 437 (2d Cir. 1975), *cert denied* 423 U.S. 995 (1975).

[12] The *Kearns* complaint refers to the Immigration Control and Reform Act of 1986, the parts of which referring to the employment of unauthorized workers are codified in 8 U.S.C. § 1324a.

[13] *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

[14] *Id.*

[15] *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

[16] *See Arizona v. United States*, 567 U.S. 387, 389 (2012).

[17] *See* A.B. 3675, 2019-20 Leg. Sess., Sponsor's memorandum, (NY 2019), *available at* https://www.nysenate.gov/legislation/bills/2019/A3675 *;* S.B. 1747B, 2019-20 Leg. Sess., Sponsor's memorandum (NY 2019), *available at* https://www.nysenate.gov/legislation/bills/2019/s1747.

[18] *See New York v. United States DOJ*, 343 F. Supp. 3d 213 (S.D.N.Y. 2018).

[19] *See* N.Y.C., N.Y., Exec. Order No. 41, ss.1-2 (Sept. 17, 2003), https://www1.nyc.gov/assets/immigrants/downloads/pdf/eo-41.pdf.

[20] *See Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

[21] *Id.* at 1475.

[22] *See New York v. U.S. Dep't of* Justice, 343 F. Supp. 3d 213, 244 (S.D.N.Y. 2019).

[23] Although the *Kearns* complaint does not reference these statutes, the State's motion to dismiss addresses the issue. *See* Motion to dismiss at n.9, *Kearns v. Cuomo, et al.* No. 19 cv 902 (W.D.N.Y. filed Jul. 8, 2019).

[24] 18 USC § 611(a).

[25] *See Fitzpatrick v. Sessions*, No. 15-2204 & 16-1864 (7th Cir. 2017).

[26] *See Va. Uranium, Inc. v. Warren*, 587 U.S. _ (2019).

[27] *See Arizona v. United States*, 567 U.S. 387 (2012).

[28] *Id.*

[29] *See Chamber of Commerce v. Whiting*, 563 U.S. 582, 587 (2011).

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EXPLAINER

When Local Law-Enforcement Officers Become ICE Deputies: 287(g) Agreements

by Kendra Sena*

The Government Law Center's explainers concisely map out the law that applies to important questions of public policy.

This explainer was updated on Mar. 18, 2019.

Introduction

The role of state and local law enforcement in carrying out federal immigration law varies from one municipality to another. Traditionally a federal power, immigration enforcement is increasingly dependent upon willing state and local law enforcement agencies to execute federal priorities. While the vast majority of state and local law enforcement agencies have remained neutral—neither accepting nor declining to enforce federal immigration law—some state and local law enforcement agencies have willingly taken up the charge.

Shortly after his inauguration, President Trump issued two executive orders that expressed his intention to prioritize formal agreements between federal immigration-enforcement officials and state and local law enforcement. One of those programs is known as 287(g).[1] The 287(g) program (named for the section where it appears in the Immigration and Nationality Act) is a formal cooperative agreement that delegates federal authority to local law enforcement agents to carry out specified federal immigration functions. Under the Trump administration, the number of these agreements has increased dramatically.

But questions remain about the 287(g) program and its effect on the local agency. Many jurisdictions that have entered into a 287(g) agreement have done so with the expectation that it will be a financial benefit to the locality. Critics argue that the program erodes trust between law enforcement and the community and ultimately nets few criminals. This Explainer will outline the basic contours of the 287(g) program, the financial impact of the program on the locality, and the potential legal liabilities that it creates.

RESOURCES

The 287(g) program is one of several that operate between federal immigration and state and local law enforcement agencies. For more on these programs, see:

Kandel, William A., Congressional Research Service, "Interior Immigration Enforcement: Criminal Alien Programs," (Sept. 8, 2016), available at: https://fas.org/sgp/crs/homesec/R44627.pdf

I. Background

What is the 287(g) program?

The 287(g) program was created in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act, an act of Congress signed into law by President Clinton, amending the Immigration and Nationality Act. The law creates a way in which a state or local law enforcement agency may enter into a formal agreement with the Department of Homeland Security (DHS) to execute specified immigration enforcement actions. The program is voluntary; the federal government cannot impose a 287(g) agreement upon a local agency, nor can it coerce a local agency to enter into a 287(g) agreement. The agreement is also cancelable; once a local agency enters into a 287(g) agreement, it may be terminated at any time by either party.

Each 287(g) agreement is memorialized in a standardized Memorandum of Agreement between the local agency and Immigration and Customs Enforcement (ICE), a component of DHS. Historically, there have been three types of Memoranda of Agreement: "task force" models, "jail enforcement" models, and "hybrid" models. The task force and hybrid models were suspended in 2012.[2] Under the jail enforcement model, deputized officers of the local agency are authorized to interrogate alleged noncitizens who are being held in the local agency's detention facility, as well as to process them for removal by ICE.

The processing may include the preparation of a Notice to Appear, the charging document that initiates proceedings against an alleged noncitizen in federal immigration court, and other charging documents. Deputized local officers may also issue a detainer request—a document asking the local agency to notify ICE before the person is released from custody and to hold the person for up to 48 hours beyond their release date in order for ICE to take them into custody.[3] There are currently 78 jail-enforcement-model agreements in effect in 20 states.[4]

Notably, the scope of the Memorandum of Agreement only extends to the specified actions of officers while acting in their official capacity at the detention facility. The Memorandum of Agreement does not authorize immigration enforcement outside of the detention facility, and local agencies that engage in immigration enforcement actions outside of their detention facilities—for example, asking about immigration status at a routine traffic stop—are acting outside the scope of the 287(g) Memorandum of Agreement.

II. Financial Implications

What are the costs associated with the 287(g) program?

A number of local agencies have expressed interest in the 287(g) program on the assumption that there is a potential financial gain from becoming deputized. But the Memorandum of Agreement is clear that it covers very few costs. Under the terms of the 287(g) Memorandum of Agreement,[5] ICE agrees to provide instructors and training materials to train the local agents who will participate in the program, and (subject to the availability of funds) a computer and fingerprinting and photographing hardware and software used to execute the agreement. The local agency

agrees to be responsible for all other costs, which have proven to be significant.

The required training consists of a four-week basic training program and a one-week refresher training program (completed every two years), held at the Federal Law Enforcement Training Center ICE Academy in Charleston, South Carolina.[6] The local agency agrees to pay for travel, housing, and per diem for the officers who attend the training, as well as for all salaries and benefits (including overtime) of the officers who attend the training and the officers who will perform the functions of those who will be trained while the latter are away at training. The local agency also agrees to be responsible for any facility requirements, such as cabling, power upgrades, and installation and recurring costs associated with communication lines like the phone and internet required to implement the program. The Memorandum of Agreement even makes clear that the local agency will be responsible for administrative supplies like paper, toner, pens, and pencils. And, the local agency agrees to cover the costs of security equipment such as handcuffs, leg restraints, and flexi cuffs necessary to implement the program.

The costs associated with the 287(g) program have proven insurmountable for some local agencies. Sheriffs in Texas and Wisconsin recently ended their counties' 287(g) programs, stating that they did not have the resources to continue.[7] In North Carolina, two jurisdictions participating in the 287(g) program each spent around $5 million in the first year to implement the program.[8] Maricopa County, Arizona, had created a $1.3 million deficit after implementing the program for only three months.[9] One county in Virginia had to raise property taxes and take money from its rainy-day fund to implement its 287(g) program, which cost $6.4 million in its first year.[10]

The Memorandum of Agreement is clear that ICE will cover only minimal costs and the financial impact has played out across a number of jurisdictions over time. So why might a state or local agency be persuaded that the program provides a financial benefit?

Does entering into a 287(g) agreement increase the likelihood that a local agency will be awarded additional federal grants?

The 287(g) program represents only one of many formal agreements that operate between federal immigration and state and local law enforcement agencies. ICE routinely contracts with local agencies to detain or transport people in ICE custody by entering into an Inter-Governmental Service Agreement under which ICE compensates the local agency for providing the specified service. The 287(g) Memorandum of Agreement states that a cooperating local agency may enter into a separate agreement to provide detention facilities or transportation services for ICE detainees.

While some local agencies that enter into 287(g) agreements also enter into Inter-Governmental Service Agreements, ICE has said that the two are not connected. An ICE official stated that "having a 287(g) program [does not] act as a bridge to a detention contract with ICE. The two processes are distinct and governed separately;" and while "[t]here are facilities with an operational need for both programs, in which ICE has established both a 287(g) [agreement] and a detention contract… in all situations, ICE ultimately makes the determination of all

enforcement actions, to include detention."[11] Indeed, it is quite common for a local agency to have an Inter-Governmental Service Agreement and *not* a 287(g) agreement; the number of Inter-Governmental Service Agreements nationally dwarfs the number of 287(g) agreements,[12] demonstrating that a 287(g) agreement is not a necessary antecedent to an Inter-Governmental Service Agreement.

Local agencies often receive significant funding from the federal government in the form of grants that are *unrelated* to immigration enforcement. These grants cover assistance to victims of crime, training and technical assistance, substance-abuse courts, and other local initiatives. The U.S. Department of Justice recently announced that it will express a preference in making certain law-enforcement-related grants for applicants that cooperate with the federal government—including through programs like 287(g).[13] But that kind of preference has been struck down as unconstitutional in other contexts. Last year, the DOJ announced that it would cut grant funds to state and local governments that failed to meet certain conditions, including complying with detainer requests and permitting DHS to access local detention facilities. But a number of courts have ruled against the U.S. Department of Justice (DOJ), because only Congress (and not the Executive) may condition grants in such a way.[14] Moreover, the DOJ's attempts to bar state and local governments from enacting laws that restrict local communication with DHS have been found to violate the Tenth Amendment, which prohibits the federal government from requiring state and local governments to adopt or enforce federal policies.[15] Litigation is ongoing.

At the time of this writing, the grant applications that express a preference for 287(g) are still open, and no litigation has yet been filed on the issue. But as courts consider the constitutionality of grant-making preferences in other contexts, it seems likely that a preference for 287(g) participation will be subject to judicial review.

RESOURCES

There are a number of pending cases that consider the lawfulness of conditioning federal grants on cooperation with federal immigration enforcement. For a list of these cases, see:

National Immigration Forum, "Case Status of Sanctuary Jurisdiction Litigation," May 2018, *available at*: https://immigrationforum.org/article/case-status-sanctuary-jurisdiction-litigation/

III. Legal Liabilities

Does the 287(g) program subject the local agency to legal liabilities?

Participation in the 287(g) program is not without legal risk. The 287(g) program has been widely criticized for enabling civil-rights violations and a number of local agencies have been subject to litigation based on their actions implementing the program. The 287(g) agreement binds the parties to comply with all federal, state, and local laws, including anti-discrimination laws that prohibit racial profiling. And while all police action is bound in this way, because the program requires that local officers investigate and interpret complex federal immigration laws—likely outside of their typical portfolio—the risk of racial

profiling and other unconstitutional acts increases.[16] DHS itself has raised concerns about its own ability to provide adequate oversight of the program after its rapid expansion in the last year.[17]

In 2011, the DOJ conducted an investigation of the program operating in Maricopa County, Arizona, and found, among other things, systemic constitutional violations under the Fourteenth and Fourth Amendments.[18] The county was found to have engaged in widespread racial profiling, discriminatory treatment both in the field and in the jail, and unreasonable searches and seizures.[19] In light of the DOJ's findings, DHS revoked its 287(g) agreement with Maricopa County.[20]

Sheriff Joe Arpaio, the Sheriff's Office, and the County were all named as defendants in a high-profile suit based on the practices detailed in the DOJ investigation.[21] Although the county was ultimately dismissed as a defendant, as of last year the lawsuits had already cost the municipality $70 million in legal fees and court-ordered monitoring costs, which are ongoing.[22]

In a separate investigation, the DOJ found similar violations in Alamance County, North Carolina, where officers implementing the 287(g) program engaged in discriminatory policing and unreasonable searches and seizures in violation of the U.S. Constitution.[23] Similar results have been found in other 287(g) jurisdictions.[24]

In light of these problems, DHS suspended its "task force" model of 287(g) agreements, in which deputized officers of the local agency were authorized to carry out immigration enforcement in the field, such as questioning and arresting people whom they suspected of having violated federal immigration law.[25] But significant potential for liability remains for jurisdictions that sign a jail-enforcement 287(g) agreement.

Under a 287(g) jail-enforcement agreement, one of the roles for the local agency is to issue and comply with detainer requests. A detainer request communicates to the local agency that DHS intends to take custody of a person held in local custody. A detainer request asks the local agency to notify ICE before the person is released from custody and to hold the person for up to 48 hours beyond their release date in order for ICE to take them into custody.

But detainers are highly controversial and a number of courts have found them to be unlawful under state and federal laws.[26] This is because a detainer specifically requests that the local agency hold an incarcerated person *beyond* the date that they would otherwise be released, usually after having posted bail, been ordered released on recognizance, having completed a sentence, or after criminal charges have been dropped.[27] In other words, it asks the local agency to extend a person's arrest after their legal basis for arrest has expired. A number of courts have found that a detainer violates the Fourth Amendment of the U.S. Constitution because holding someone past their release date constitutes an arrest requiring probable cause, and a detainer does not provide probable cause for arrest.[28]

Local agencies operating 287(g) programs risk violating the law when they comply with a detainer request, particularly in states where courts have ruled on the matter. In Massachusetts, where the highest court ruled that detainers are unlawful under state law, a number of local agencies operating under 287(g) agreements continue to issue

and comply with detainers. They reason that because their officers have been deputized to act as federal immigration officials, they have independent authority to comply with detainers.[29] But this logic has failed in other jurisdictions where courts have been clear that "acting under color of federal law does not provide [officers acting pursuant to 287(g)] an adequate defense to alleged Constitutional violations."[30] Thus, the potential for litigation against local agencies that are merely complying with the terms of the 287(g) Memorandum of Agreement is quite high.

RESOURCES

For a summary of cases that have considered the lawfulness of detainers, see:

Immigrant Legal Resource Center, "Immigration Detainers Legal Update," July 2018, *available at*: https://www.ilrc.org/immigration-detainers-legal-update-july-2018

Conclusion

Federal immigration enforcement is increasingly reliant on willing state and local law enforcement agencies to carry out federal enforcement actions. The number of law-enforcement agencies that have elected to formalize their role by entering into a 287(g) agreement is increasing. But the legal landscape in this area is shifting, and municipalities and law enforcement bodies should carefully consider the financial and legal implications of their decision to devote local resources to federal immigration enforcement.

Endnotes

* Kendra Sena is the Senior Staff Attorney at the Government Law Center at Albany Law School. Research assistance by Mehtasim Mahfuz '19.

1 Executive Order 13767, Border Security and Immigration Enforcement Improvements, January 25, 2017, *available at* https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/ and Executive Order 13768, Enhancing Public Safety in the Interior of the United States, January 25, 2017, *available at* https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/.

2 Under the task force model, deputized officers of the local law enforcement agency were authorized to carry out immigration enforcement in the field, such as questioning and arresting people whom they suspected of having violated federal immigration law. They hybrid model combined both field work and detention work. ICE announced that it would discontinue the task force model at the end of 2012, stating

that, "other enforcement programs… are a more efficient use of resources for focusing on priority cases." U.S. Immigration and Customs Enforcement, News Release, "FY 2012: ICE announces year-end removal numbers, highlights focus on key priorities and issues new national detainer guidance to further focus resources," Dec. 20, 2012, *available at*: https://www.ice.gov/news/releases/fy-2012-ice-announces-year-end-removal-numbers-highlights-focus-key-priorities-and#statement.

[3] *See* 8 C.F.R. § 287.7 (2017); U.S. Immigration & Customs Enf't, Policy Number 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers 2 (2017), *available at*: https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf.

[4] ICE maintains a list of all of the active 287(g) enforcement agreements, available at: https://www.ice.gov/287g.

[5] All 287(g) MOAs are substantively identical. The template is available on ICE's website: https://www.ice.gov/doclib/detention-reform/pdf/287g_moa.pdf.

[6] Id.

[7] James Pinkerton and St. John Barned-Smith, *Sheriff Cuts Ties with ICE Program Over Immigrant Detention*, HOUSTON CHRONICLE, Feb. 21, 2017, *available at:* https://www.houstonchronicle.com/news/houston-texas/houston/article/Sheriff-cuts-ties-with-ICE-program-over-immigrant-10949617.php.

Testimony of Sheriff Eric Severson, "The Effects of Border Insecurity and Lax Immigration Enforcement on American Communities: Hearing Before the Senate Comm. on Homeland Security and Governmental Affairs," 115th Cong. (2017), *available at*: https://www.hsgac.senate.gov/the-effects-of-border-insecurity-and-lax-immigrationenforcement-on-american-communities.

[8] Mai Thi Nguyen and Hannah Gill, *The 287(g) Program: The Costs and Consequences of Local Immigration Enforcement in North Carolina Communities*, (Chapel Hill: University of North Carolina, 2010), 44-45, *available at*: https://isa.unc.edu/files/2012/06/287g_report_final.pdf.

[9] Ryan Gabrielson, *Overtime led to MCSO budget crisis, records show (Reasonable Doubt: Part II)*, EAST VALLEY TRIBUNE, July 10, 2008, *available at*: http://www.eastvalleytribune.com/special_reports/reasonable_doubt/.

[10] Audrey Singer, Jill H. Wilson, and Brooke DeRenzis, (Metropolitan Policy Program at the Brookings Institute), "Immigrants, Politics, and Local Response in Suburban Washington," Feb. 2009, *available at*: https://www.brookings.edu/wp-content/uploads/2016/06/0225_immigration_singer.pdf.

[11] Sean Collins Walsh, *How two ICE programs let sheriffs cash in on immigration crackdown*, AUSTIN AMERICAN STATESMAN, July 15, 2017.

[12] In response to a FOIA lawsuit, ICE provided a list of all its detention facilities operating in 2017, totaling 201 facilities. Detention Watch Network and Center for Constitutional Rights, "New Information from ICE ERO's July Facility List," July 2017, *available at*: https://www.detentionwatchnetwork.org/sites/default/files/DWN%20Spreadsheet%20Memo.pdf.

[13] These grants are: 1) Supporting Innovation: Field-Initiated Programs to Improve Officer and Public Safety; 2) Justice Accountability Initiative (JAI): Pilot Projects Using Data-Driven Systems to Reduce Crime and Recidivism; 3) Gang Suppression Planning: Build Capacity for a Multilateral Data-Driven Strategy to Promote Public Safety; and 4) A Law Enforcement and Prosecutorial Approach To Address Gang Recruitment of Unaccompanied Alien Children program.

The announcement states, "The grants also allow for preferential consideration of a grant application where the applicant plans to use immigration-cooperation tactics to address public safety in their jurisdiction." United States Department of Justice, "Department of Justice Announces New Immigration Compliance Requirements for FY 2018 Grants," June 28, 2018, *available at*: https://www.justice.gov/opa/pr/department-justice-announces-new-immigration-compliance-requirements-fy-2018-grants.

The application form elaborates:

> An applicant may receive priority consideration by explaining how it would address the problem area identified in its application through cooperation with immigration authorities, including compliance with 8 U.S.C. §§ 1373, 1644, and 1324, participation in a **287(g)** or other cooperation program, honoring requests for notice of release, transfers of custody, and/or short term extensions of custody, and providing access to detention centers so federal immigration authorities may conduct interviews.

(*emphasis added). See, e.g.*, Supporting Innovation: Field-Initiated Programs to Improve Officer and Public Safety FY 2018 Competitive Grant Announcement, July 21, 2018, *available at*: https://www.bja.gov/funding/Field18.pdf.

[14] *See, e.g., City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289 (E.D. Pa. 2018); *City of Chicago v. Sessions*, --- F. Supp. 3d. ---, Case No. 17–5720, 2018 WL 3608564, at *5 (N.D. Ill. July 27, 2018); *City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087, 1098 (C.D. Cal. 2018).

[15] *Id.*

[16] *See* American Immigration Council, et al., "Assumption of Risk: Legal Liabilities for Local Governments that Choose to Enforce Federal Immigration Laws," (Mar. 2018), *available at*: http://immigrantjustice.org/AssumptionofRisk.

[17] *See*, Dep't of Homeland Sec., Office of the Inspector Gen., *Lack of Planning Hinders Effective Oversight and Management of ICE's Expanding 287(g) Program*, Sept. 19, 2018, *available at*: https://www.oig.dhs.gov/sites/default/files/assets/2018-09/OIG-18-77-Sep18.pdf.

[18] Letter form Thomas E. Perez, Assistant Attorney General, U.S. Dep't of Justice, to Bill Montgomery, Cty. Attorney, Maricopa Cty., Ariz., (Dec. 15, 2011), *available at*: https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf.

[19] *Id.*

[20] U.S. Dep't of Homeland Security, Statement by Secretary Napolitano on DOJ's Findings of Discriminatory Policing in Maricopa County, (Dec. 15, 2011), *available at*: https://www.dhs.gov/news/2011/12/15/secretary-napolitano-dojs-findings-discriminatory-policing-maricopa-county.

[21] *Ortega Melendres v. Arpaio*, 598 F. Supp. 2d 1025 (D. Ariz. 2009).

[22] Meghan Cassidy, *Taxpayer tab up to $70M in Joe Arpaio racial-profiling case*, THE ARIZONA REPUBLIC, Aug. 17, 2017, *available at*: https://www.azcentral.com/story/news/local/phoenix/2017/08/17/taxpayer-tab-up-70-m-joe-arpaio-racial-profiling-case/576878001/.

[23] Letter form Thomas E. Perez, Assistant Attorney General, U.S. Dep't of Justice, to Clyde B. Albright, Cty. Attorney, Alamance Cty., N.C., (Sept. 18, 2012), *available at*: https://www.justice.gov/iso/opa/resources/171201291812462488198.pdf.

[24] *See* Amanda Armenta, *Between Public Service and Social Control: Policing in the Era of Immigration Enforcement*, 63 SOC. PROBS. 11, 114-23 (2016) (reporting findings from a study of the 287(g) program operating in Nashville, TN), *available at*: https://academic.oup.com/socpro/article/63/1/111/1843255.

[25] U.S. Immigration and Customs Enforcement, News Release, *supra* n.2.

[26] *See People ex rel. Wells v. DeMarco,* 88 N.Y.S.3d 518 (App. Div. 2018) (holding that state law does not permit officers to comply with detainer requests and any such arrests are thus unlawful); *Lunn v. Commonwealth*, 477 Mass. 517, 527 (2017) (same); *Cisneros v. Elder*, No. 18CV30549 (D. Colo., El Paso Cty. Mar. 19, 2018) (same).

[27] *Lunn*, supra n. 26.

[28] *See, e.g.*, *Morales v. Chadbourne*, 996 F.Supp.2d 19 (D.R.I. filed Feb. 12, 2014) (the First Circuit Court of Appeals upheld the district court's finding that detaining someone beyond their release date is an arrest under the Fourth Amendment and requires probable cause; the District Court concluded that the ICE detainer did not provide probable cause); *Vohra v. United States*, 2010 U.S. Dist. LEXIS 34363 (C.D. Cal. 2010) (finding that complying with a detainer constituted a warrantless arrest); *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317 (D. Or. Apr. 11, 2014).

[29] Shannon Dooling, National Public Radio, "Why ICE Detainers Are Still Being Executed In Mass. Almost A Year After SJC Rules Them Unlawful," May 18, 2018, *available at*: http://www.wbur.org/news/2018/05/18/ice-detainers-executed-despite-sjc-ruling.

[30] *Ortega Melendres v. Arpaio*, 836 F. Supp. 2d 959, 990 (D. Ariz. 2011) (citing *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)).