



## **PRACTICE ADVISORY<sup>1</sup>**

September 5, 2017

### **SCREENING POTENTIAL DACA REQUESTORS FOR OTHER FORMS OF RELIEF**

By Patrick Taurel

---

#### **September 5, 2017 Update**

---

On September 5, 2017, the Trump administration announced the end to the Deferred Action for Childhood Arrivals (DACA) program. Specifically, the Acting Secretary of Homeland Security rescinded the 2012 memorandum creating DACA and stated that as of September 5, 2017, the government will no longer process any new DACA applications. Individuals who currently have DACA will be permitted to retain their status until the current expiration date listed on the Employment Authorization Document (EAD). DACA recipients whose EADs expires before March 5, 2018 will be permitted to apply for renewal, but the renewal application must be filed before October 5, 2017. DACA recipients with an EAD that expires after March 5, 2018, will not be permitted to renew their status. At this point, we understand the announcement to mean that after March 5, 2018, when DACA recipients' EAD expires, they will return to whatever unauthorized status they possessed at the time they acquired DACA.

For attorneys representing individuals who were previously protected under DACA, this guide—originally intended for attorneys screening individuals for an initial DACA application—may serve to screen current or former DACA recipients who may be eligible for other forms of relief. Individuals who may not have been eligible for alternate forms of relief when initially granted DACA may now be eligible due to changed circumstances (such as travel on advanced parole). For this reason, attorneys are strongly encouraged to assess whether other forms of relief are now available, even if the DACA recipient was screened when he or she initially applied for DACA.

---

<sup>1</sup> Copyright (c) 2014, 2017 American Immigration Council. Originally published August 27, 2014. Click [here](#) for information on reprinting this practice advisory. This practice advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. Patrick Taurel, the American Immigration Council's DACA Legal Services Fellow, authored this practice advisory. The author gratefully acknowledges the invaluable assistance of Emily Creighton, Melissa Crow, Kristen Jackson, Laura Lichter, Patricia Malone, Gail Pendleton, Carl Shusterman, Margaret Stock, and Beth Werlin.

This advisory is designed to assist attorneys without significant expertise in immigration law in determining whether individuals seeking Initial Deferred Action for Childhood Arrivals (DACA) or DACA Renewal<sup>2</sup> might be eligible for immigration benefits that are more lasting and concrete than DACA.<sup>3</sup> While DACA affords recipients a temporary reprieve from deportation, it is not a panacea. What DACA recipients receive, in essence, is a decision by immigration officials that no enforcement action will be taken against them for the two-year duration of the DACA grant, which is subject to renewal.<sup>4</sup> In other words, DACA recipients are not to be deported as long as they have DACA. A DACA grant, however, does not lead to lawful permanent resident status (also known as a “green card”) or a path to citizenship, and may be rescinded, modified or withdrawn in the future. For these and other reasons, it is worthwhile to investigate whether your client, who may be interacting with a lawyer for the very first time in his or her life, is eligible for immigration relief other than DACA.<sup>5</sup> The options identified here are those forms of relief most likely to apply to potential DACA requestors, but are not exhaustive.<sup>6</sup> In many situations, your client may wish to pursue DACA and other immigration benefits for which he or she may qualify, either concurrently or serially.

---

<sup>2</sup> This practice advisory will use “potential DACA requestors” to refer to individuals seeking Initial DACA and DACA Renewal.

<sup>3</sup> For an in-depth discussion of DACA and its eligibility requirements, please see [Deferred Action for Childhood Arrivals](#), a practice advisory co-issued by the American Immigration Council, the American Immigration Lawyers Association and the National Immigration Project of the National Lawyers Guild.

<sup>4</sup> DACA recipients are eligible to receive work authorization and a social security number. They also are eligible for driver’s licenses in the overwhelming majority of states and may apply for [permission to travel abroad](#). Moreover, DACA recipients do not accrue unlawful presence for the duration of their DACA grants. For more information about benefits available to DACA recipients, see [Deferred Action for Childhood Arrivals](#); the National Immigration Law Center’s [DACA resources page](#) (containing, among other things, a breakdown of state driver’s license policies for DACA recipients); and Educators For Fair Consideration and Curran & Berger LLP’s guide, [Got DACA, Now What? What To Know When Your Deferred Action For Childhood Arrivals Request Is Approved](#).

<sup>5</sup> Numerous attorneys across the country have reported that many individuals seeking legal advice to request DACA discovered that they were eligible for other relief. Kirk Semple, *Young Immigrants, Seeking Deferred Action Help, Find Unexpected Path*, New York Times, March 22, 2013, available at <http://nyti.ms/WJBUJ8>.

<sup>6</sup> This practice advisory does not address eligibility for immigration benefits predicated on an individual’s relationship to a family member who qualifies for an immigration benefit (known as “derivative eligibility”), or forms of relief available to noncitizens only in immigration court. It is particularly important that individuals in removal proceedings consult an experienced immigration lawyer as soon as possible because they may face imminent removal from the United States. For a directory of members of the American Immigration Lawyers Association, visit [www.aialawyer.com](http://www.aialawyer.com). For a directory of nonprofit organizations that provide free or low-cost immigration legal services, visit <http://www.immigrationadvocates.org/nonprofit/legaldirectory/>.

The appendix to this practice advisory contains a series of questions designed to elicit potential eligibility for the benefits discussed below. If you encounter an individual who may qualify for a form of relief other than DACA, he or she should be encouraged to consult an immigration lawyer.

### **Is your client eligible to obtain lawful permanent residence?**

U.S. immigration law essentially provides for five categories of non-citizens who can acquire lawful permanent resident (LPR) status in the United States. They are: (1) family-sponsored immigrants; (2) employment-based immigrants; (3) diversity immigrants; (4) refugees; and (5) a select group of vulnerable immigrants including certain juveniles and crime victims that cooperate with law enforcement. In the interest of focusing on those forms of relief most frequently encountered within the community of potential DACA requestors, this practice advisory will not address employment-based immigration or the diversity lottery system.

Adjustment of status is the process by which an individual may acquire LPR status while in the United States. LPR status is preferable to DACA as it is a recognized lawful status which—barring removal—is permanent. LPRs are permitted to indefinitely reside and work in the United States,<sup>7</sup> are on a path to citizenship,<sup>8</sup> and may have the opportunity to apply for various government benefits<sup>9</sup> and sponsor certain relatives for immigration benefits.<sup>10</sup>

Broadly speaking, there are several sets of individuals who are not in a lawful status—like DACA-eligible individuals—who nonetheless may be eligible to apply for LPR status without departing the United States. **The general rule** is that only individuals who were “inspected and admitted or paroled” into the United States by an immigration officer may apply for LPR status from inside the United States.<sup>11</sup> Many of those who were not “inspected and admitted or paroled” into the United States (*i.e.* those that crossed the border without passing through an official checkpoint) have to leave the country to have their paperwork processed by the U.S. consulate in the immigrant’s place of last residence abroad to obtain LPR status.<sup>12</sup> This departure

---

<sup>7</sup> Immigration and Nationality Act (INA) § 101(a)(20); 8 C.F.R. § 274a.12(a)(1).

<sup>8</sup> The general rule is that an LPR may apply for U.S. citizenship five years after acquiring LPR status. INA § 316. Spouses of U.S. citizens and certain other individuals may naturalize before the five-year mark. *See, e.g.*, INA §§ 319(a); 328.

<sup>9</sup> For information about immigrant eligibility for federal programs, visit [https://www.nilc.org/issues/economic-support/table\\_ovrw\\_fedprogs/](https://www.nilc.org/issues/economic-support/table_ovrw_fedprogs/).

<sup>10</sup> INA § 204(a)(1)(B)(i)(I) (LPRs may petition for spouses and unmarried sons and daughters).

<sup>11</sup> INA § 245(a).

<sup>12</sup> 22 C.F.R. § 42.61(a). Consular processing is the process by which prospective immigrants who are not in the United States apply for lawful permanent resident status at a U.S. consular post outside the United States. As noted, this advisory is designed for lawyers without significant expertise in immigration law in determining whether individuals seeking Deferred Action for Childhood Arrivals (DACA) request – who will invariably be located within the United States – may qualify for an alternative form of relief. Given the myriad adverse consequences that may attach, only an experienced practitioner should advise an individual to depart the United States. Therefore, this practice advisory does not explore consular processing.

can trigger harsh penalties that can strand immigrants abroad for months, years, decades, and sometimes forever.<sup>13</sup> Fortunately, there are **some exceptions to the general rule** that only those “inspected and admitted or paroled” are able to acquire LPR status without departing the United States.

What follows are categories of individuals who are potentially eligible to become LPRs without leaving the country, notwithstanding the fact that they entered the United States without valid entry documents or their lawful status has expired. In addition to falling into one of the categories identified below, to apply for LPR status an individual must be admissible to the United States under section 212(a) of the Immigration and Nationality Act (INA). The inadmissibility grounds identify a wide range of classes of noncitizens ineligible to receive visas and ineligible to be admitted to the United States. Some individuals are rendered inadmissible based on their own prior conduct<sup>14</sup> while others may be inadmissible based on their status.<sup>15</sup> Depending on the provision or provisions of law under which the noncitizen is seeking LPR status, certain inadmissibility grounds may not apply or may be amenable to waiver.

All individuals must have a visa “immediately available” to be able to immigrate. The INA provides for an annual worldwide limit of immigrant visas, which are intended for those who plan to live indefinitely and permanently in the United States. Those immigrant visas are allocated to individuals immigrating to the United States to work for a particular employer or to reunite with a family member.

Family-based immigrants are admitted to the United States either as *immediate relatives* of U.S. citizens, in which case they are not subject to the numeric limitations mentioned above, or through the family preference system after waiting in the appropriate ‘line.’ Immediate relatives are defined as the spouses, children (unmarried and under 21), and parents of U.S. citizens, provided that the petitioning citizen is 21 or older.<sup>16</sup> Certain family members of U.S. citizens or green card holders who are not immediate relatives are processed through the family preference system. An individual’s place within that system depends on the immigration status of the petitioner (e.g., U.S. citizen or LPR) as well as the familial tie of the beneficiary to the petitioner (e.g. sibling, parent, spouse). Employment-based immigrants are also subject to a preference system, though there the beneficiary’s preference category is determined by the employee’s qualifications. What awaits the immigrant at the conclusion of the ‘line’ is not a visa but the opportunity to apply for a visa, which has become “immediately available.”<sup>17</sup>

---

<sup>13</sup> See INA § 212(a)(9).

<sup>14</sup> See, e.g., INA §§ 212(a)(2) (criminal inadmissibility grounds); (a)(9) (previous removals).

<sup>15</sup> See, e.g., INA § 212(a)(1)(A)(i) (individuals afflicted with certain communicable diseases).

<sup>16</sup> INA § 201(b)(2)(A)(i).

<sup>17</sup> The public can monitor the visa queue by consulting the State Department’s [Visa Bulletin](#), a monthly-updated chart indicating visa availability. An individual has a visa “immediately available” if he or she is the beneficiary of a visa petition whose priority date is current, according to the Visa Bulletin. A person’s priority date is listed on the visa petition (Form I-130 or I-140) approval notice.

**1. Individuals whose last entry into the United States was effectuated after inspection and admission or parole by an immigration officer and who have a visa immediately available.**

Under INA §245(a), noncitizens who were “inspected and admitted or paroled” into the United States, and who meet certain other requirements, including that they have a visa immediately available, are eligible to apply for LPR status from inside the United States.<sup>18</sup> A variety of different types of entries satisfies the “inspected and admitted” language. Perhaps the most common case is where the noncitizen arrives at an official port of entry and presents his or her valid visa to the inspecting immigration officer who then permits the noncitizen to enter the United States. But case law has recognized two other entry narratives, which also meet the “inspected and admitted” requirement.

- “Wave through” entries even where the noncitizen lacks proper entry documents. A noncitizen who physically presents himself or herself for inspection, makes no false claim to U.S. citizenship, and is permitted to enter the United States (*i.e.*, waved through), is deemed to have been “inspected and admitted,” even if the inspecting officer asks no questions and even if the noncitizen lacks proper entry documents.<sup>19</sup>
- *Entry gained upon fraud or misrepresentation (other than false claim to U.S. citizenship).* The majority of circuit courts and the Board of Immigration Appeals treat a noncitizen

---

<sup>18</sup> Admission is the “lawful entry of [a noncitizen] into the United States after inspection and authorization by an immigration officer.” INA § 101(a)(13)(A). Parole is the authority DHS may exercise to permit a noncitizen who lacks a valid visa or other entry document to enter the United States temporarily “for urgent humanitarian reasons or [for] significant public benefit[.]” INA § 212(d)(5). Note that DACA recipients themselves are eligible to apply for advance parole, which is parole “requested and authorized in advance [of a planned trip abroad] based on an expectation that the [noncitizen] will be presenting himself for inspection without a valid visa in the future.” *Matter of Arrabally & Yerrabelly*, 25 I&N Dec. 771, 777 (BIA 2012) (citing 8 C.F.R. § 212.5(f)). DACA recipients who return to the United States under advance parole have been “paroled into the United States” for purposes of adjustment of status under section 245(a) of the INA. Practitioners have reported successfully obtaining LPR status for their DACA clients paroled into the United States who are the immediate relatives of U.S. citizens. For a discussion of advance parole and DACA, please see the American Immigration Council and CLINIC’s practice advisory, [Advance Parole for Deferred Action for Childhood Arrivals \(DACA\) Recipients](#). If your DACA client is ineligible for advance parole but could qualify for adjustment of status if he or she could cure a prior unlawful entry through parole, you may wish to explore whether your client qualifies for “parole in place” as the spouse, child, or parent of an active or past member of the U.S. Armed Forces or Selected Reserve of the Ready Reserve. USCIS Policy Memorandum, “Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i),” PM-602-0091 (Nov. 15, 2013), available at <http://1.usa.gov/1bh0MyI>. Screening questions for parole in place eligibility are included in the chart located in the appendix.

<sup>19</sup> See *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980); *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010).

who has been inspected and allowed to enter as someone who has been “inspected and admitted” even if the admission was gained through fraud, misrepresentation or the use of false documents, provided the noncitizen did not falsely claim U.S. citizenship.<sup>20</sup>

A noncitizen who is allowed to enter the United States after making a false claim to U.S. citizenship has *not* been “admitted.”<sup>21</sup> Likewise, noncitizens who enter the United States by circumventing a port of entry do not satisfy the “inspected and admitted” requirement.

Immigration lawyers often screen for eligibility for adjustment of status by inquiring about the immigration status of the client’s family members and by soliciting information about the manner of the client’s last entry into the United States.

For an in-depth discussion about the term “admission” in the immigration laws, please see the American Immigration Council’s practice advisory, [Inspection and Entry at a Port of Entry: When is There an Admission?](#)

**2. Certain individuals who are the beneficiaries of visa petitions filed by family members or employers on or before April 30, 2001 and who have a visa immediately available.**

Your DACA client may be able to apply for LPR status from inside the United States if a family member or an employer filed certain petitions<sup>22</sup> on behalf of your client or your client’s spouse or parent on or before April 30, 2001, and a visa is immediately available for your client.<sup>23</sup> A noncitizen may adjust status under this provision of law even if he or she entered without inspection, although he or she will have to pay a statutory fine (\$1,000) in most cases.<sup>24</sup> INA § 245(i) does not waive grounds of inadmissibility. Thus, if your DACA client is inadmissible, then he or she may be precluded from pursuing adjustment under INA § 245(i). Immigration lawyers often screen for this relief by asking whether anyone ever filed documents with the immigration authorities for the client or the client’s parents and, if so, when.

---

<sup>20</sup> See, e.g., *Emokah v. Mukasey*, 523 F.3d 110, 118 (2d Cir. 2008); *Martinez v. Attorney General*, 693 F.3d 408, 414 (3d Cir. 2012); *Borrego v. Mukasey*, 539 F.3d 689, 693 (7th Cir. 2008); *Yin Hing Sum v. Holder*, 602 F.3d 1092, 1097-99 (9th Cir. 2010); but see *Ramsey v. INS*, 14 F.3d 206, 211 n.6 (4th Cir. 1994).

<sup>21</sup> *Reid v. INS*, 420 U.S. 619, 624-25 (1975); *Matter of Pinzon*, 26 I&N Dec. 189, 191-92 (BIA 2013).

<sup>22</sup> [I-130](#) (Petition for Alien Relative); [I-140](#) (Immigrant Petition for Alien Worker); [I-360](#) (Petition for Amerasian, Widow(er), or Special Immigrant); [I-526](#) (Immigrant Petition by Alien Entrepreneur); or labor certification. Labor certification is the process by which a noncitizen’s potential employer establishes that there are no domestic workers available to perform such work and that the entry of the noncitizen will not adversely affect the wages and working conditions of similarly employed U.S. workers. INA § 212(a)(5).

<sup>23</sup> See INA § 245(i); 8 C.F.R. § 245.10.

<sup>24</sup> *Id.*

**3. Certain spouses, children and parents of U.S. citizens or LPRs who have been subjected to battery or extreme cruelty by the U.S. citizen or LPR family member, even if the individual entered without being inspected and admitted by an immigration officer.**

The Violence Against Women Act (VAWA) allows battered immigrants to petition for legal status in the United States without relying on abusive U.S. citizen or LPR spouses, parents or children to sponsor their adjustment of status applications. The noncitizen must demonstrate that he or she resided with the U.S. citizen or LPR spouse or parent; was battered or subjected to extreme cruelty during the marriage (or, in the case of a child self-petitioner, the child was battered or subjected to extreme cruelty); the marriage was entered into in good faith; the spouse or child is otherwise eligible for immediate relative or family preference status; and the spouse or child has good moral character. The Code of Federal Regulations provides a non-exhaustive list of examples of conduct that can amount to battery or extreme cruelty.<sup>25</sup> Those eligible to self-petition under VAWA are:

- *Spouse.* The current and, in some cases, former abused spouses of U.S. citizens or LPRs.<sup>26</sup>
- *Parent.*
  - The parent of a child who has been abused by the parent's U.S. citizen or LPR spouse.
  - The parent of a U.S. citizen where the U.S. citizen child has abused the parent.<sup>27</sup>
- *Child.* Unmarried children under 21 who have been abused by a U.S. citizen or LPR parent (including certain adoptive parents).<sup>28</sup>
- *Certain sons and daughters under 25.* Individuals between the ages of 21 and 24 who qualified as abused children on the day before they turned 21.<sup>29</sup>

Qualified individuals may apply for LPR status even if they entered without being inspected.<sup>30</sup> Immigration lawyers often screen for VAWA eligibility by sensitively asking the potential client whether, inside the United States, he or she endured physical or emotional cruelty or harm at the hands of a family member who is or was a U.S. citizen or LPR.

**4. Certain unmarried individuals under 21 years of age where a juvenile court has found that the child's reunification with his or her parent(s) is not viable due to abuse, neglect, abandonment or a similar basis under State law, even if the individual entered without being inspected and admitted by an immigration officer.**

Special Immigrant Juvenile Status (SIJS) is a humanitarian form of relief available to noncitizens under the age of 21 who seek the protection of a state juvenile court due to abuse, neglect, or

---

<sup>25</sup> 8 C.F.R. § 204.2(c)(vi).

<sup>26</sup> INA §§ 204(a)(1)(A)(iii)-(iv), (a)(1)(B)(ii)-(iii).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> INA § 204(a)(1)(D)(v).

<sup>30</sup> Adjudicator's Field Manual (AFM) § 23.5(l), available at <http://1.usa.gov/IUrtcl>. For more information about VAWA, you may wish to visit the [ASISTA clearinghouse](#).

abandonment. It provides eligible young people with a means of legalizing their immigration status in the United States.

An individual is eligible for SIJS if he or she:

- Is under 21 years of age;
- Is unmarried;
- Is the subject of an order issued by a juvenile court (*i.e.*, juvenile court, probate court, family court) that finds:
  - The child is dependent on the court or legally committed to or under the custody of an agency or department of a State, or an individual or entity appointed by a State or juvenile court;
  - The child's reunification with his or her parent(s) is not viable due to abuse, neglect, abandonment or a similar basis under State law; and
  - It is not in the child's best interest to be returned to his or her country of nationality or last habitual residence or that of his or her parent(s).<sup>31</sup>

SIJS is available to noncitizens who entered the United States in any manner—including without inspection and by way of a false claim to U.S. citizenship.<sup>32</sup> If your DACA client is under 21, unmarried, and has been the victim of abuse, neglect, abandonment or similar mistreatment by one or both parents, it may be in your client's best interest to open a juvenile court case—if one is not open already—and pursue SIJS in lieu of or in addition to DACA.<sup>33</sup> To screen for SIJS eligibility, immigration lawyers explore their client's age, marital status, and home life.

### **Does your client have a viable asylum claim?**

If an individual is unable or unwilling to return to his or her home country because of persecution or a well-founded fear of future persecution on account of the individual's race, religion, nationality, political opinion, or membership in a particular social group, that individual may be eligible for asylum.<sup>34</sup> The burden of establishing asylum eligibility falls on the applicant.<sup>35</sup>

Asylum law protects only a subset of individuals who have been harmed or who reasonably fear harm in their home country. The past or feared future mistreatment must rise to the level of persecution.<sup>36</sup> Moreover, the persecution must be motivated at least in part by the asylum

---

<sup>31</sup> See INA § 101(a)(27)(J); 8 CFR § 204.11(c); AFM § 22.3(q).

<sup>32</sup> All Special Immigrant Juveniles are deemed paroled into the United States for purposes of adjustment of status under INA § 245(a), and multiple inadmissibility grounds, including misrepresentation grounds, are inapplicable to them. See INA § 245(h).

<sup>33</sup> In some states, children may not open probate guardianship proceedings after reaching the age of 18. See, e.g., Cal. Prob. Code §§ 1510, 1600(a); see also Cal. Family Code §6500.

<sup>34</sup> INA § 101(a)(42).

<sup>35</sup> INA § 208(b)(1)(B)(i). An applicant for asylum bears the additional burden of demonstrating that he or she deserves asylum as a matter of discretion. INA §208(b)(1)(A).

<sup>36</sup> Persecution is a broad term that is not defined in the INA. According to the Board of Immigration Appeals, persecution is the infliction of harm or suffering to overcome a



applicant's race, religion, nationality, political opinion, or membership in a particular social group.<sup>37</sup> The persecutor must be the government or persons or organizations that the government is unable or unwilling to control.<sup>38</sup> Asylum law does not generally offer protection to those fleeing generalized lawlessness and violence.<sup>39</sup>

An asylum grant confers a variety of benefits that a DACA recipient is not afforded. Asylees are permitted to apply for LPR status one year after obtaining asylum.<sup>40</sup> Asylees who obtain LPR

---

characteristic of the victim. *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996). Ninth Circuit case law “characterizes persecution as an extreme concept, marked by the infliction of suffering or harm...in a way regarded as offensive.” *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (en banc) (internal quotations marks omitted). While the level harm must be more than trivial, persecution encompasses more than threats to life or freedom. *INS v. Stevic*, 467 U.S. 407 (1984). Persecution can take a multitude of forms, including physical violence, detention, mental harm, substantial economic deprivation, and more. The analysis is cumulative and fact-specific.<sup>37</sup> INA § 208(b)(1)(B)(i). Some potential DACA applicants may qualify for asylum based on their “membership in a particular social group.” The law governing the contours of the “particular social group” asylum ground is in a state of flux and is currently the subject of disagreement between the Board of Immigration Appeals and some Courts of Appeals. *Compare Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014) (asylum applicant seeking relief based on membership in a particular social group must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question); *with Valdiviezo-Galdamez v. Att’y Gen. of U.S.*, 663 F.3d 582, 608 (3d Cir. 2011) (rejecting “particularity” and “social visibility,” a precursor to the BIA’s “socially distinct” requirement), *and Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (holding that the BIA’s interpretation of “social visibility” is inconsistent with previous decisions and “makes no sense”); *see also Pirir-Boc v. Holder*, 750 F.3d 1077, 1085 (9th Cir. 2014) (leaving open whether the BIA’s construction of “particular social group” is reasonable). Particular social groups have been construed to include married women in Guatemala who are unable to leave their relationship, *Matter of A-R-C-G- et al.*, 26 I&N Dec. 388 (BIA 2014); Cuban homosexuals, *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990); gay men with female sexual identities in Mexico, *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); young women who belong to a specific Togolese tribe who have not been subjected to female genital mutilation and who oppose the practice, *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); and Filipinos of Chinese ancestry, *Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997), among others.

<sup>38</sup> The BIA and federal courts have recognized claims based on persecution by various nongovernmental actors. *See, e.g., Matter of H-*, 21 I&N Dec. 337 (BIA 1996) (rival clan in Somalia); *Krotova v. Gonzales*, 416 F.3d 1080 (9th Cir. 2005) (skinhead gangs); *Arboleda v. U.S. Att’y Gen.*, 434 F.3d 1220 (11th Cir. 2006) (Revolutionary Armed Forces of Colombia, or “FARC”).

<sup>39</sup> *Rostomian v. INS*, 210 F.3d 1088, 1089 (9th Cir. 2000) (asylum denial affirmed where Armenian Christian petitioners failed to establish that past assault was “anything more than an act of random violence during a period of significant strife”).

<sup>40</sup> 8 C.F.R. § 209.2(a).

status have an expedited path to U.S. citizenship.<sup>41</sup> Asylees are also eligible to receive certain benefits related to job training, English classes, and health care.<sup>42</sup> Moreover, asylees may petition for relatives to join them in the United States.<sup>43</sup>

There are a variety of bars to asylum. Perhaps the most important bar to be aware of is the one-year filing requirement. Absent exceptional or extraordinary circumstances, individuals who fail to file an asylum application within the first year of their last arrival in the United States are barred from receiving asylum,<sup>44</sup> though they may be eligible for related forms of relief from removal.<sup>45</sup> Other bars to asylum include certain criminal convictions,<sup>46</sup> terrorist and national security concerns,<sup>47</sup> and prior persecution of others.<sup>48</sup>

Noncitizens physically present in the United States may apply for asylum in one of two different contexts: affirmatively (with USCIS) or defensively (as a shield against removal). Where an individual affirmatively applies for asylum and the asylum officer does not grant the application, by regulation, the asylum applicant must be referred to immigration court for removal proceedings if he or she is inadmissible or deportable, unless the applicant is maintaining a valid immigration status or parole.<sup>49</sup> For these and other reasons, only those with strong asylum claims should file an affirmative asylum application after consultation with an attorney well-versed in this area of law.

---

<sup>41</sup> Asylees who successfully adjust status may backdate the year of LPR status acquisition by one year. 8 C.F.R. § 209.2(f); *see also* note 8, at 2, *supra*.

<sup>42</sup> *See* INA § 412 (authorization for creation of refugee resettlement programs and assistance); 45 C.F.R. § 400 *et seq.* (authorizing grants to States and other private and public non-profit agencies to provide social services to asylees).

<sup>43</sup> INA § 208(b)(3).

<sup>44</sup> INA §§ 208(a)(2)(B), (D). If you are representing a minor, note that the regulations acknowledge that “legal disability (*e.g.*, the applicant was an unaccompanied minor...) during the 1-year period after arrival” may constitute an “extraordinary circumstance[.]” excusing failure to timely apply for asylum. 8 C.F.R. §208.4(a)(5)(ii).

<sup>45</sup> INA § 241(b)(3)(A) (withholding of removal, requiring a showing that it is more likely than not that the noncitizen would be persecuted if removed to the proposed country of removal); 8 C.F.R. § 208.16(c)(2) (deferral of removal under the Convention Against Torture, requiring a showing that it is more likely than not that the noncitizen would be tortured if removed to the proposed country of removal).

<sup>46</sup> INA §§ 208(b)(2)(A)(ii)-(iii), (B)(i).

<sup>47</sup> INA §§ 208(b)(2)(A)(iv)-(v).

<sup>48</sup> INA § 208(b)(2)(A)(i).

<sup>49</sup> 8 C.F.R. § 208.14(b)(2). The regulations do not specify whether applicants with deferred action status shall be referred to an immigration judge for adjudication in removal proceedings. In any case, it is ICE policy to “apply the [DACA] policy, on a case by case basis, to individuals whose cases are pending before the [immigration court] and can demonstrate that they meet the [DACA] criteria.” John Morton, Director, ICE, “Secretary Napolitano’s Memorandum Concerning the Exercise of Prosecutorial Discretion for Certain Removable Individuals Who Entered the United States as a Child” (June 15, 2012), *available at* <http://1.usa.gov/16iv8hV>.

Immigration lawyers often screen for asylum claims by asking potential clients what caused them to immigrate to the United States and by inquiring whether they fear returning to their home country. Where the client indicates that he or she has a fear of returning, immigration lawyers sensitively probe the reasons behind it.

### **Is your client eligible to apply for a temporary visa for certain victims of crimes?**

Certain crime victims who are not in a lawful status, including those who entered without inspection, may be eligible for U or T visas.<sup>50</sup> Both visas afford their own status and can potentially lead to LPR status,<sup>51</sup> making them preferable to DACA. Congress created the T and U visas, in part, to encourage undocumented victims of certain crimes to cooperate with law enforcement in the investigation and/or prosecution of those crimes.<sup>52</sup>

U Visa. U visas are available to noncitizens who have been the victims of certain crimes, suffered substantial physical or mental abuse as a result of having been victims of such crimes, and cooperated with law enforcement in the investigation or prosecution of those crimes.<sup>53</sup>

For U visa purposes, qualifying criminal activity includes the following crimes, as well as “similar activity in violation of Federal, State, or local criminal law”: rape, torture, incest, domestic violence, sexual assault, abusive sexual contact, prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in 18 U.S.C. § 1351); or attempt, conspiracy, or solicitation to commit any of the above-mentioned crimes.<sup>54</sup>

A U visa applicant must also obtain a certification—essentially, a sworn statement—from a law enforcement official affirming that the U visa applicant was indeed the victim of qualifying criminal activity, he or she possesses information about the crime, and has been, is being, or is likely to be helpful in the investigation or prosecution of the crime, and has not unreasonably refused to provide assistance.<sup>55</sup> The certifying law enforcement official can be a judge, prosecutor, police officer, or an officer with another agency having criminal investigative jurisdiction, such as Child Protective Services, the Equal Employment Opportunity Commission, or the Department of Labor.<sup>56</sup>

If your client was or continues to be the victim of qualifying criminal activity, but never reported the crime, he or she may be eligible to pursue a U visa if he or she cooperates with law

---

<sup>50</sup> INA §§ 101(a)(15)(T), (U).

<sup>51</sup> INA §§ 245(l), (m).

<sup>52</sup> 22 U.S.C. § 7101(b) (purposes and findings of Victims of Trafficking and Violence Protection Act of 2000).

<sup>53</sup> INA § 101(a)(15)(U).

<sup>54</sup> INA § 101(a)(15)(U)(iii).

<sup>55</sup> 8 C.F.R. § 214.14(c)(2).

<sup>56</sup> 8 C.F.R. § 214.14(a)(2).

enforcement going forward. Immigration lawyers often screen for U visa eligibility by asking their clients whether they have ever been victimized or needed to contact the police.

T Visa. A T visa is available to a noncitizen who can demonstrate that he or she:

- Is or has been a victim of a “severe form of trafficking in persons,” as defined in 22 U.S.C. § 7102(9);<sup>57</sup>
- Is physically present in the United States, American Samoa, or the Mariana Islands or at a port of entry on account of trafficking;
- Has complied with any reasonable request for assistance in investigating or prosecuting trafficking (if 18 or older); and
- Would suffer extreme hardship involving unusual and severe harm upon removal.<sup>58</sup>

In contrast to U visa applicants, T visa applicants are not required to obtain law enforcement certification. The regulations permit the applicant to establish that he or she was a victim of a severe form of trafficking in persons by presenting, among other options, “sufficient credible secondary evidence, describing the nature and scope of any force, fraud, or coercion used against the victim[.]”<sup>59</sup> Such a showing is not necessary if the person was induced to perform a commercial sex act and is under the age of 18.

A person granted a T visa may receive benefits “to the same extent” as persons admitted as refugees.<sup>60</sup>

Determining whether an individual has ever been the victim of human trafficking can be complex. Immigration lawyers probe for T visa eligibility by seeking out potential indicators of human trafficking, which may include the confiscation of identity documents by the employer, working excessive hours, and participating in the commercial sex industry as a youth, among many others.<sup>61</sup>

### **Is your client, unbeknownst to him or her, already a citizen or a noncitizen national of the United States?**

Some individuals may not realize that they are citizens or noncitizen nationals of the United States.<sup>62</sup> Though it may not seem likely, it is important to rule out this possibility. If your client

---

<sup>57</sup> The definition covers the use of fraud, force, or coercion for sex trafficking as well as involuntary servitude, peonage, debt bondage, and slavery.

<sup>58</sup> INA § 101(a)(15)(T).

<sup>59</sup> 8 C.F.R. § 214.11(f).

<sup>60</sup> 22 U.S.C. § 7105(b)(1)(A); *see also* Office of Refugee Resettlement, U.S. Dep’t of Health and Human Services, *Services Available to Victims of Human Trafficking: A Resource Guide for Social Service Providers* (2012), available at <http://www.acf.hhs.gov/programs/orr/resource/services-available-to-victims-of-human-trafficking> (identifying the benefits available to T visa holders).

<sup>61</sup> For more information about human trafficking, visit [The Polaris Project](#).

<sup>62</sup> A noncitizen national, though not a citizen, owes permanent allegiance to the United States. INA § 101(a)(22).

falls into this category, he or she need not apply for DACA because U.S. citizens and nationals are not subject to removal.<sup>63</sup> Instead, your client should apply for documentation verifying his or her status as a U.S. citizen, such as a [Certificate of Citizenship](#) or [U.S. passport](#).

Birthright Citizenship (citizenship by birth in the United States or certain incorporated territories). All persons born in the United States or certain incorporated territories, except the sons and daughters of diplomats, are U.S. citizens.<sup>64</sup>

If your client was born in any of the following locations, then he or she acquired either U.S. citizen or national status at birth:

- any of the 50 United States
- Puerto Rico
- the Panama Canal Zone (only if birth occurred prior to October 1, 1979)
- Guam
- the U.S. Virgin Islands
- American Samoa (noncitizen national)
- the Swains Islands (noncitizen national)
- the Commonwealth of the Northern Mariana Islands (depending on date of birth).<sup>65</sup>

Acquired Citizenship (acquisition of citizenship at birth abroad). A child born outside the United States may acquire U.S. citizenship at birth if one or both parents are U.S. citizens.<sup>66</sup> To determine whether such a child's parent or parents transmitted U.S. citizenship to the child at birth, you must consult the law in effect at the time of the child's birth.<sup>67</sup> The following factors are likely to be relevant to the inquiry: whether the child was born in or out of wedlock; whether the child's mother or the child's father held U.S. citizenship; and whether and when the U.S. citizen parent resided in the United States or an outlying possession.<sup>68</sup> Even when your client does not think he or she has a U.S. citizen parent or parents, it is advisable to ask whether his or her grandparents are or were citizens of the United States because a grandparent may have transmitted U.S. citizenship to your client's parent, who may in turn have transmitted citizenship to your client.<sup>69</sup>

---

<sup>63</sup> 8 C.F.R. § 239.2(a)(2).

<sup>64</sup> U.S. Const. amend. XIV § 1; *see also* INA §§ 101(a)(38) (defining the term "United States"); 301(a) (nationals and citizens at birth), (b) (same), (f) (same); 302 (persons born in Puerto Rico); 304-307 (persons born in Alaska, Hawaii, Virgin Islands, Guam).

<sup>65</sup> For the rules governing citizenship acquisition for individuals born in the Commonwealth of the Northern Mariana Islands, *see* 7 Foreign Affairs Manual (FAM) § 1126, *available at* <http://www.state.gov/m/a/dir/regs/fam/>.

<sup>66</sup> INA §§ 301(c)-(e) (nationals and citizens at birth), (g)-(h) (same); 309 (children born out of wedlock).

<sup>67</sup> 7 FAM § 1131.1-2; *U.S. v. Flores-Villar*, 536 F.3d 990, 994-98 (9th Cir. 2008), *affirmed by an equally divided court*, 564 U.S. \_\_\_, 131 S.Ct. 2312 (2011) (mem.) (per curiam).

<sup>68</sup> For helpful charts tracking the evolution of legal requirements for acquisition of U.S. citizenship at birth, consult [Nationality Charts 1 and 2](#) of the USCIS Policy Manual.

<sup>69</sup> This practice advisory does not discuss derivative citizenship, which occurs when a child derives U.S. citizenship through the naturalization of a parent. This benefit generally is limited to

## Conclusion

As this advisory explains, potential DACA requestors may be eligible for other immigration benefits or longer term relief from removal. This advisory discusses some of the most common options for which potential DACA requestors may be eligible, but is not an exhaustive catalogue of all avenues that may be available to your client. Moreover, immigration law is complicated and constantly evolving. Please consult with counsel with expertise in the relevant area of immigration law if your client appears to be eligible for other forms of relief from removal that he or she may be interested in pursuing. Depending on the facts of a particular case, a prior, concurrent or subsequent application for DACA may be strategically advantageous.

## APPENDIX

---

lawful permanent resident children. *See* INA § 320(a)(3) (requiring LPR status for child for derivative citizenship); *see also* INA § 321(a) (1994) (repealed 2000); *Matter of Nwozuzu*, 24 I&N Dec. 609, 612 (BIA 2008) (holding that former section 321(a) required LPR status for derivative citizenship); *U.S. v. Forey-Quintero*, 626 F.3d 1323, 1327 (11th Cir. 2010) (same); *Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1062-63 (9th Cir. 2008) (same); *but see Nwozuzu v. Holder*, 726 F.3d 323, 333 (2d Cir. 2013) (child derives citizenship if, prior to the February 27, 2001 effective date of INA § 320(a) and prior to turning 18 years old, the child’s second parent naturalized and the child began to reside permanently in the United States, as evidenced by “some objective official manifestation of the child’s permanent residence”).

# 14 QUESTIONS TO SCREEN FOR OTHER RELIEF

Do your best to complete the entire checklist. Follow the arrows & numbers. If you do not understand a question, or do not know the answer, mark the "I don't know" column and move on. If you hit a diamond sign **◆**, keep going. A diamond means you may be eligible for something better than DACA & you should speak with a legal service provider.

	Yes	No	Don't Know
<b>1</b> Have you (or your parents, siblings, or children) ever been the victim of a crime in the U.S.?	<input type="checkbox"/> → 1a	<input type="checkbox"/> → 2	<input type="checkbox"/> → 2
a. Did you tell the police or any law enforcement official about it?	<input type="checkbox"/> → 2 ◆	<input type="checkbox"/> → 2	<input type="checkbox"/> → 2
<b>2</b> Has anyone ever filed a petition with immigration for you or your parents?	<input type="checkbox"/> → 2a	<input type="checkbox"/> → 3	<input type="checkbox"/> → 3
a. Was the petition filed on or before April 30, 2001?	<input type="checkbox"/> → 3 ◆	<input type="checkbox"/> → 3	<input type="checkbox"/> → 3
<b>3</b> Do you have a spouse, parent, or child who is in active duty in the U.S. Armed Forces?	<input type="checkbox"/> → 4 ◆	<input type="checkbox"/> → 4	<input type="checkbox"/> → 4
<b>4</b> Inside the U.S., has anyone in your family (like a parent, spouse/partner, or child) ever hit, pushed, choked, or otherwise physically harmed, threatened, insulted, controlled, or otherwise emotionally abused you or your children?	<input type="checkbox"/> → 4a	<input type="checkbox"/> → 5	<input type="checkbox"/> → 5
a. Was the person who harmed you or your children a U.S. citizen or green card holder?	<input type="checkbox"/> → 5 ◆	<input type="checkbox"/> → 5	<input type="checkbox"/> → 5
<b>5</b> Before you came to the U.S., were you, your family or members of a group that you belong to (including LGBT individuals) targeted by people or gangs trying to hurt or scare you?	<input type="checkbox"/> → 6 ◆	<input type="checkbox"/> → 6	<input type="checkbox"/> → 6
<b>6</b> Are you afraid to return to your native country?	<input type="checkbox"/> → 6a	<input type="checkbox"/> → 7	<input type="checkbox"/> → 7
a. Do you believe that if you return to your native country, people or gangs may target you because of your race, religion, national origin, political opinion, or because you belong to a certain group (including LGBT individuals)?	<input type="checkbox"/> → 7 ◆	<input type="checkbox"/> → 7	<input type="checkbox"/> → 7
<b>7</b> Are any of the following statements true for you?	<input type="checkbox"/> → 8 ◆	<input type="checkbox"/> → 8	<input type="checkbox"/> → 8
• You were forced to work incredibly long hours without a break and/or 7 days a week without a break and you were not free to leave.			
• You've been given alcohol or drugs in connection with work.			
• You've been forced, coerced or tricked into having sex or doing sex-industry work like stripping or working as an escort.			
<b>8</b> Are you under 21?	<input type="checkbox"/> → 8a	<input type="checkbox"/> → 9	<input type="checkbox"/> → 9
a. Are you married?	<input type="checkbox"/> → 9	<input type="checkbox"/> → 8b	<input type="checkbox"/> → 9
b. Do you live away from your parent or parents, or would you choose to, because they have abused, abandoned, neglected, or similarly mistreated you?	<input type="checkbox"/> → 9 ◆	<input type="checkbox"/> → 9	<input type="checkbox"/> → 9
<b>9</b> Were you or your parents born in El Salvador or Guatemala?	<input type="checkbox"/> → 9a	<input type="checkbox"/> → 10	<input type="checkbox"/> → 10
a. Did you or your parents enter the U.S. before September 1990?	<input type="checkbox"/> → 10 ◆	<input type="checkbox"/> → 10	<input type="checkbox"/> → 10
<b>10</b> Was your spouse born in El Salvador or Guatemala and entered the U.S before Sep. 1990?	<input type="checkbox"/> → 11 ◆	<input type="checkbox"/> → 11	<input type="checkbox"/> → 11
<b>11</b> Were you born in: The United States; Puerto Rico; Panama Canal Zone; Guam; The U.S. Virgin Islands; American Samoa; Northern Mariana Islands; or Swains Islands	<input type="checkbox"/> → 12 ◆	<input type="checkbox"/> → 12	<input type="checkbox"/> → 12
<b>12</b> Were either of your parents U.S. citizens when you were born?	<input type="checkbox"/> → 13 ◆	<input type="checkbox"/> → 13	<input type="checkbox"/> → 13
<b>13</b> Were any of your grandparents U.S. citizens when your parents were born?	<input type="checkbox"/> → 14 ◆	<input type="checkbox"/> → 14	<input type="checkbox"/> → 14
<b>14</b> Did you last come into the U.S. through an airport, seaport, highway or other official checkpoint? Answer NO if you did not have face-to-face contact with an immigration officer or if you came hidden, walked through the desert, waded in a river, or climbed over/under a fence	<input type="checkbox"/> → 14a	<input type="checkbox"/> → 	<input type="checkbox"/> → 14b
a. Were you allowed to enter because	<input type="checkbox"/> → 14b	<input type="checkbox"/> → 	<input type="checkbox"/> → 14b
• You had a valid visa or other papers saying you could come into the U.S.;			
• You presented fake papers or told the officer you had papers even though you didn't, but you did not say you were a U.S. citizen or show a fake U.S. birth certificate or passport; OR			
• You presented no documents and you did not say you were a U.S. citizen but the officer waved you in anyway			
b. Do you have a U.S. citizen spouse, parent or child (over 21)?	<input type="checkbox"/> → 14c ◆	<input type="checkbox"/> → 14c	<input type="checkbox"/> → 14c
c. Has anyone ever filed a petition with immigration for you or your parents?	<input type="checkbox"/> → ◆	<input type="checkbox"/>	<input type="checkbox"/>