

Assessing Employment-Based Visa Options for Persons in Precarious Statuses

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INTRODUCTION

This practice advisory provides a general overview of key issues and potential pathways for individuals in precarious immigration statuses—such as those with Deferred Action for Childhood Arrivals (DACA), temporary protected status (TPS), parole, or undocumented status—to secure employment-based visas. While this advisory does not cover the specific qualifications for each type of employment-based immigration option, it addresses common challenges for securing an employment-based visa for populations in precarious statuses, and strategies for how to address them.

COMMON EMPLOYMENT-BASED OPTIONS FOR INDIVIDUALS WITH PRECARIOUS STATUSES

The ability of persons in precarious statuses to pursue an employment-based green card depends on their eligibility for adjustment of status or their ability to pursue consular processing. As outlined in the sections below, some may qualify for adjustment under INA §§245(a) or 245(i), while others might need to complete consular processing with an I-601A waiver if they have unlawful presence or I-601 for other immigration violations.

For nonimmigrant visas, the most viable options typically include the H-1B (for individuals with at least a bachelor’s degree or its equivalent in a specialty occupation), the L-1 (for managers and executives transferring from a foreign affiliate of a U.S. company), and the O-1 (for individuals with extraordinary ability or achievements). These visa categories benefit from the dual intent

doctrine, which allows applicants to pursue permanent residency without jeopardizing their nonimmigrant status. Additionally, individuals with certain immigration violations may still qualify for these visas with a “D-3 waiver,” as discussed below.

COMMON IMMIGRATION CHALLENGES FOR INDIVIDUALS WITH PRECARIOUS STATUSES – AND HOW TO OVERCOME THEM

The following is a list of common immigration issues that these individuals face and a summary of how to overcome them.

Nonimmigrant Visas

Temporary Intent

Most nonimmigrant visas require applicants to demonstrate that their stay in the United States is temporary. For individuals in precarious statuses, proving temporary intent can be challenging due to their long-term residence in the country. However, certain nonimmigrant visa categories permit “dual intent,” allowing applicants to pursue lawful permanent residence while in temporary status. As discussed in the previous section, the most common dual intent visas are the H-1B (for individuals with at least a bachelor’s degree or its equivalent in a specialty occupation) and the L-1 (for managers and executives transferring from a foreign affiliate of a U.S. company). This is because INA §214(b) expressly permits applicants for these visa categories to intend to remain in the United States permanently.

Although the statute is silent on allowing dual intent for O-1 non-immigrant visas, reserved for persons with extraordinary ability or achievements in particular fields, there is promising language in the Foreign Affairs Manual (FAM). 9 FAM 402.13-5(B) states that “the approval of a permanent labor certification or the filing of a preference petition shall not be a basis for denying classification as an O-1 or O-3 dependent.” Similarly, 9 FAM 402.13-10 states that an O-1 visa applicant “does not have to have a residence abroad which they do not intend to abandon. Further, as explained in 9 FAM 402.13-5(B) above, ‘dual intent’ is permissible for O-1 visa holders.” In fact, in recent months, multiple formerly undocumented persons and DACA beneficiaries have successfully transitioned to O-1 non-immigrant visas based on the FAM guidance.

Entry Without Inspection & Failure to Maintain Lawful Status

Under INA §212(a)(6), persons who are present in the United States without admission or parole are inadmissible. However, as explained in 9 FAM 302.9-2(B), this ground of inadmissibility does not apply to persons applying for a nonimmigrant visa or lawful permanent residence through consular processing.

Additionally, to change to another immigration status within the United States, INA §248 requires that the individual must have been lawfully admitted and – with some exceptions – must have continued to maintain nonimmigrant status since their lawful admission. Humanitarian parole and DACA are not “status” per se, so it is not possible to change status within the United States for those with only DACA or humanitarian parole. However, DACA recipients, undocumented

individuals, and humanitarian parolees can still secure employment-based nonimmigrant visas through consular processing.

In contrast, TPS is a nonimmigrant status, so change of status within the United States might be an option for someone who holds TPS. Persons with TPS who initially entered the United States without inspection can travel abroad and re-enter with TPS travel authorization to secure a lawful admission and demonstrate they have continued to maintain nonimmigrant status since their lawful admission.

Three and Ten-Year Unlawful Presence Bars

One of the most common issues with persons in precarious statuses are the three- and ten-year bars found at INA §212(a)(9)(B). Because undocumented individuals with and without DACA and humanitarian parolees must consular process to secure a nonimmigrant visa, those who have accrued more than 180 days of unlawful presence will trigger a three- or ten-year bar when departing the United States for their consular visa interview.

Under INA §212(a)(9)(B)(iii), unlawful presence starts accruing at age eighteen. Importantly, DACA beneficiaries and parolees do not accrue unlawful presence during the period in which they have deferred action or parole.¹ For that reason, it is important to count how many days of unlawful presence a person accrued on or after their eighteenth birthday, including any lapses between a person's DACA renewal(s) or parole. Many DACA recipients and parolees who have continuously maintained DACA or parole since their eighteenth birthday have not accrued any unlawful presence.

For individuals who trigger the three- or ten-year-year bars upon departing the United States, there is a discretionary inadmissibility waiver available under INA §212(d)(3) for nonimmigrant visas, also known as the “D–3 waiver.” The waiver request must be submitted at the consular interview; it cannot be submitted in advance. A consular interview will initially review the D-3 waiver request and can recommend it for approval. D-3 waiver requests that are recommended for approval are forwarded to the Customs and Border Protection (CBP) Admissibility Review Office (ARO) office which will adjudicate the request. In adjudicating the request, the officer will consider the following non-exhaustive factors:

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

¹ See USCIS DACA Frequently Asked Questions, Q6, www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions; USCIS Unlawful Presence and Inadmissibility, www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-inadmissibility#:~:text=Unlawful%20presence%20is%20any%20period,stays%20in%20the%20United%20States.

Updated FAM guidance issued in July 2024, clarified that officers should consider graduates of U.S. colleges who will return to work for U.S. companies to have a positive effect on the U.S. public interest, and officers should request expedited approval of the D-3 waiver for such individuals. More specifically, the updated FAM provision states that that officers should consider that “where the applicant has graduated with a degree from an institution of higher education in the United States, or has earned credentials to engage in skilled labor in the United States, and is seeking to travel to the United States to commence or continue employment with a U.S. employer in a field related to the education that the applicant attained in the United States, to have a positive effect on U.S. public interests.”² Several undocumented individuals with and without DACA have successfully obtained D-3 waivers under the updated FAM guidance and been able to transition to H-1B or O-1 status.

Note that while U.S. Citizenship and Immigration Services (USCIS) may not consider a departure on advance parole and subsequent re-entry in a different status to trigger the three- or ten-year bars under *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), the U.S. Department of State (DOS) may still require a D-3 waiver for persons who depart on advance parole. Anecdotally, we know some DOS officers have granted employment-based visas for DACA recipients without the need for a waiver, even though the FAM seems to require both a departure and a return to the United States with advance parole, rather than returning in a different status (such as H-1B). Therefore, for persons who travel on advance parole to apply for an employment visa at a consulate abroad, it is good practice to argue that they have not triggered the INA §212(a)(9)(B)(i) bars but to have a waiver request in hand in case an officer disagrees.

Employment-Based Green Cards

Entry without Inspection

INA §245(a) generally requires a lawful parole or admission to adjust status. However, persons in precarious statuses who are grandfathered under INA §245(i) can adjust their status through employment-based green cards, even if they entered without inspection. INA §245(i) permits certain principal or derivative beneficiaries of an I-130, I-140, I-360, I-526, or labor certification filed on or before April 30, 2001, and that was approvable at the time of filing, to adjust their status. Some persons in precarious statuses had such petitions or applications filed for their parents when they were children. While they might not directly benefit from these past petitions, they can still be “grandfathered,” allowing them to adjust status through a new petition, such as an employment-based green card petition.

Failure to Continuously Maintain Lawful Status Since Admission

INA §245(a) will generally not help persons who are undocumented or have DACA or parole to adjust their status for employment-based green cards.³ This is true even if they meet the threshold

² 9 FAM 305.4-3.

³ 8 CFR §245.1(d)(1)(v) sets forth that “parole status which has not expired, been revoked or terminated” is considered to be in lawful immigration status for purposes of the INA § 245(c)(2) bars, so someone who entered with parole might be eligible to adjust under any family-based petition. However, INA § 245(c)(7) bars the applicant from adjustment of status as the beneficiary of an employment-based petition. *See* 7 USCIS-PM B.5(E).

requirement of being inspected and admitted or paroled. This is because INA §245(c) bars certain persons from adjusting their status under INA §245(a), including persons who are in unlawful immigration status on the date they file their adjustment of status application, who failed to continuously maintain lawful status since they entered the United States, or who engaged in unauthorized employment prior to filing their adjustment of status application.

While individuals applying for immediate relative family-based petitions are exempted from these bars, those seeking employment-based green cards are not. At a minimum, undocumented persons and individuals with DACA or parole will face barriers for not having lawful status at the time of adjustment.

However, as explained in the previous section, TPS is considered a lawful status.⁴ INA §245(k) also exempts persons from the INA §245(c) bars for failing to maintain lawful status, engaging in unauthorized employment, or violating the terms and conditions of their nonimmigrant visa if they are adjusting their status based on EB-1, EB-2, EB-3, EB-5 employment-based green cards.

To qualify for the §245(k) exemption, persons must be physically present in the United States on the date they file their adjustment of status application pursuant to a lawful admission and the person must not have committed the immigration violation for more than an aggregate period of 180 days maximum. Importantly, the 180 days are measured from the most recent lawful admission.⁵ This means that any violations related to the §245(c) bars committed prior to the most recent lawful admission are not counted.

As such, persons with TPS who have traveled on or after August 20, 2020, with a travel authorization document should be able to take advantage of the §245(k) exemptions to be eligible for adjustment of status under §245(a) since those re-entries are considered admissions.⁶

Similarly, formerly undocumented individuals, including those with and without DACA and humanitarian parolees, may also overcome §245(c) bars through the 245(k) exemptions if they last entered the United States in a lawful nonimmigrant status, such as H-1B.

Three and Ten-Year Unlawful Presence Bars

As previously stated, one of the most common issues with persons in precarious statuses are the three-and ten-year bars found at INA §212(a)(9)(B). Individuals who have accrued more than 180 days of unlawful presence and who depart the United States to consular process may trigger the three- or ten-year bars upon departure. To overcome an unlawful presence ground of inadmissibility for employment-based green cards, the person will need an I-601/I-601A waiver. To qualify for an I-601 waiver, the person must demonstrate that refusal of their green card will cause extreme hardship to their U.S. citizen or lawful permanent resident spouse or parent. U.S. citizen children are not considered qualifying relatives for extreme hardship purposes.

⁴ *Id.*

⁵ See 7 USCIS-PM B.8(E).

⁶ Generally, individuals with TPS who traveled before August 20, 2020, did so using advance parole. As a result, their re-entry was considered a parole rather than an admission, preventing them from benefiting from the §245(k) exemptions.

Many persons in precarious status may not be eligible for an I-601/I-601A waiver due to lack of a qualifying relative. However, individuals who last departed the United States on advance parole can make the argument that they did *not* trigger the three- or ten-year bars upon departure pursuant to *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012). This case involved adjustment of status applicants who traveled on advance parole while their applications were pending. Since then, U.S. Department of Homeland Security (DHS) clarified that the case applies in other instances as well, such as when a DACA recipient travels on advance parole.⁷

However, *Matter of Arrabally and Yerrabelly* concerned applicants who left on advance parole and returned to the United States on the same status. For example, a DACA recipient who travels on advance parole and returns to the United States with DACA does not trigger these bars. What is less certain is whether a person who leaves on advance parole and is seeking to re-enter on a different status (e.g. H-1B, O-1, etc.) also avoids triggering the INA §212(a)(9)(B)(i) bars.

Even if DOS required a D-3 waiver for a nonimmigrant visa based on a person triggering the INA §212(a)(9)(B)(i) bars, advocates can file an immigrant petition with USCIS and argue that persons traveling on advance parole do not trigger these bars under USCIS's interpretation of *Matter of Arrabally and Yerrabelly*, and that DOS incorrectly applied the *Matter of Arrabally and Yerrabelly* decision.

As of April 30, 2025, one of this article's authors has assisted with filing multiple I-485 adjustment of status applications with USCIS based on the legal theory that a person who departed on advance parole and returned on a nonimmigrant visa does not trigger the three- or ten-year bars. There are no final decisions yet on any of those pending applications. However, in at least one nonprecedential decision, the USCIS Administrative Appeals Office has found that the ten-year bar is not triggered, as long as an applicant departs the United States pursuant to a valid advance parole document, even if they are subsequently admitted to the United States in H-1B status.⁸

For more strategies to overcome the three- and ten-year unlawful presence bars for persons in precarious status seeking employment-based green cards, see *Adjustment of Status Guide for Former DACA Beneficiaries with a D3 Waiver Due to a three- or ten-year Bar*.⁹

CONCLUSION

⁷ DHS Directive to Provide Consistency Regarding Advance Parole, Dated November 20, 2014.

⁸ See *Matter of M-S-A-R-*, ID# 100569 (AAO June 7, 2017) (The Texas Service Center erred when it denied an I-485 application and "found that the Applicant triggered the unlawful presence inadmissibility because he was admitted as an H-1B nonimmigrant upon his return in February 2014 instead of being paroled using his advance parole document. The Director appears to have conflated the Applicant's manner of departure with the Applicant's manner of subsequent admission. The Applicant's admission to the United States as an H-1B nonimmigrant in February 2014 is not disqualifying; rather, we look at whether the Applicant departed from the United States pursuant to advance parole. The record demonstrates that the Applicant had obtained an advance parole document prior to leaving the United States for Canada and, therefore, he did "not thereby make a 'departure . . . from the United States' within the meaning of section 212(a)(9)(B)(i)(II) of [the Act]." Id. at 771. Accordingly, we withdraw the Director's determination that the Applicant is inadmissible to the United States for having accrued unlawful presence.")

⁹ Cornell Law School's Path2Papers, *Adjustment of Status Guide for Former DACA Beneficiaries with a D3 Waiver Due to a 3- or 10-year Bar*, available at www.path2papers.org.

As recent updates to the FAM have eased the process for individuals in precarious statuses to secure employment-based visas, this article evaluates common challenges and strategies for TPS holders, DACA recipients, and humanitarian parolees seeking employment-based visas. Circumstances are vastly different for each, and each case must be carefully analyzed according to each individual's circumstances. With so many policy developments and changes to immigration processes and procedures occurring on a regular basis, practitioners should use this article as a guide only.