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The New D3 Waiver Process: A Tool to Help Over One Million Dreamers

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In June 2024, the Biden administration announced that it would ease the pathway to long-term immigration status for Dreamers (people who were brought to the United States as children). In July 2024, the Department of State (DOS) updated its Foreign Affairs Manual, clarifying that Dreamers and other U.S. college graduates can qualify for expedited processing of waivers[1] under section 212(d)(3) of the Immigration and Nationality Act (INA) (D3 waivers).[2]

The D3 waiver is an established part of the immigration statute that offers a waiver of the 3- or 10-year unlawful presence bars for nonimmigrant visa purposes (unlike the better-known I-601 waiver for immigrant visa purposes). It has historically been underutilized by the undocumented community due in part to long processing times, which would necessitate waiting many months or even years abroad. In other words, this waiver that is supposed to prevent extended separation could not be obtained without enduring much of that very separation.

The recently announced guidance on expedited processing would speed up and streamline this process, making it a newly viable option for undocumented individuals to obtain work authorization and protection from deportation. The importance of the enhanced D3 waiver process is significant. This is the first time that immigration attorneys have had a new tool for Dreamers since the Deferred Action for Childhood Arrivals (DACA) program started in 2012. The DACA program may soon end, either through litigation or by a termination under a future President. This would leave thousands of DACA recipients without work authorization and, more critically, at risk of being removed from the United States. In addition, due to DACA's minimum age requirement and its near-continuous closure to new applicants since 2017, very few Dreamers under the age of 22 currently hold DACA. Many others never would have qualified for DACA in the first place, for example if they entered the United States after 2007. On a case-by-case basis, we can now help DACA recipients and others ineligible for DACA move into lawful status or advise them how to work in the field they studied.

The authors are part of a grant-funded program at Cornell Law School called Path2Papers that helps attorneys, employers, and DACA recipients understand employer-sponsored visa pathways. Since February, we have conducted almost 500 consultations with DACA recipients, met with dozens of employers, and provided training and mentoring for immigration attorneys and nonprofit legal services providers. Over half of the DACA recipients we have met have a viable employment-based visa option. Moreover, many who might not qualify for an employment-based option now might benefit in the future if they obtain a new job or academic degree.

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[1] Technically, D3 is not a waiver, but authorization provided by Customs and Border Protection's Admissibility Review Office for a State Department consular office to issue a nonimmigrant visa outside the United States. Given the widespread use of the term waiver, however, we refer to this initiative as a "D3 waiver."

[2] For a general discussion of D3 waivers, see 2 Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, Immigration Law and Procedure § 12.05.

Immigration is fundamentally a game of categories, so it's crucial to evaluate all available options to provide the best legal advice. Employment-based visa options are often unexplored within this population and should be considered alongside family-based and humanitarian routes to ensure comprehensive legal advice.

Some individuals might be hesitant to engage with a new program, especially with an election soon approaching. Attorneys may recall similar conversations about the DACA program when it was first announced in 2012. Two of our authors laid out the argument then for considering applying for DACA,[3] recognizing that each person's situation and risk tolerance is unique.

This article explains how the enhanced D3 program works and recommends that it be discussed with and considered for all Dreamers with or considering a college degree.

DACA and DACA Advance Parole Are Under Threat, and Beneficiaries Should Understand All Options Before It's Too Late

There are two imminent threats to DACA: (1) the possibility of a second Trump administration; and (2) the possibility that the U.S. Supreme Court could overturn DACA.

If Donald Trump is elected in November, he might try to terminate DACA and eliminate DACA advance parole, which is an essential safety net for any DACA beneficiary who travels abroad to apply for an H-1B or other nonimmigrant visa with a D3 waiver. Alternatively, the U.S. Supreme Court could terminate DACA as soon as the summer of 2025.

Lawyers who discount the D3 process for Dreamers as too uncertain fail to properly weigh the importance of the new D3 expedite process as an essential pathway for over 500,000 DACA beneficiaries who may lose their jobs and their protection from removal in the next few years.

Approximately 40% of DACA Beneficiaries Are Eligible to Consular Process Already Without Any Waivers

While many DACA beneficiaries who apply for H-1B or other nonimmigrant work visas will likely need to apply for the new expedited D3 waiver, younger DACA beneficiaries, which constitute an estimated 40% of all DACA recipients, do not need a D3 waiver.[4] We hope that publicity around the D3 waiver initiative will encourage all DACA recipients to get screenings and learn about pathways to status.

While it's fairly certain that these younger DACA beneficiaries can travel abroad to obtain a work visa with little risk, there is no guarantee that a visa will be approved. Many DACA beneficiaries are understandably concerned about traveling, and do not pursue work visas unless they have advance parole as a safety net.[5] It's essential for these DACA beneficiaries to consider temporary visa petitions before DACA and/or DACA advance parole is eliminated.

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[3] https://cbkimmigration.com/wp-content/uploads/2017/07/lexisnexis-emerging-issues-analysis-daca.pdf.

[4] Congressional Research Service, Deferred Action for Childhood Arrivals (DACA): By the Numbers 13 (Apr. 14, 2021), https://sgp.fas.org/crs/homesec/R46764.pdf [hereinafter CRS Report].

[5] 96% of DACA recipients reported in a DREAM US Survey that they experience anxiety about their lack of affirmative immigration status. p. 6 at https://www.thedream.us/wp-content/uploads/2024/06/Alumni-Survey_Report2024-Final-WebV2.pdf.

Approximately 60% of DACA Beneficiaries Will Likely Be Required to Obtain D3 Waivers Through the New Enhanced D3 Process

DACA beneficiaries who were 18 ½ or older when their first DACA was approved (or who have gaps between DACA approvals totaling 180 days or more) will likely have 3- or 10-year unlawful presence bars when they leave the United States.[6] For some of these DACA beneficiaries who travel on advance parole, immigration lawyers report that DOS has granted H-1B visas without requiring a waiver.[7]

Therefore, when an older DACA beneficiary who has more than six months of unlawful presence obtains an approved H-1B and leaves the United States to apply for a visa, he or she should consider doing so while DACA advance parole is available. With the new enhanced D3 waiver process, the H-1B / D3 waiver process might be completed in less than a month, so in the unlikely event the D3 waiver is not approved, the applicant can return to the United States with advance parole without impacting their underlying DACA authorization. Since the D3 waiver adjudication process is discretionary and not guaranteed, some DACA beneficiaries may choose to travel for H-1B processing abroad only if they can obtain advance parole first.[8]

What Nonimmigrant Visa Types Will Work?

In general, an employer must enter a lottery for the ability to sponsor an employee for an H-1B visa. This is held in March each year, and has a success rate in the 25% range. As a result, there is a lot of interest in so-called "cap exemptions" -- ways to sponsor an H-1B outside the lottery.

This is a complicated area of law. The guidance is not clear, and the range of types of organizations keeps growing. To start, five situations are relatively straightforward – the following employers do NOT need to go through the lottery and can sponsor an employee for an H-1B visa at any time:

1. Institutions of higher education (nonprofit colleges or universities).

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[6] For a general discussion of unlawful presence, see 2 Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, Immigration Law and Procedure § 63.10[2].

[7] In *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771, 779 (BIA 2012), the BIA held that someone who leaves the United States temporarily pursuant to a grant of advance parole does not make a departure from the United States for purposes of the three- or ten-year unlawful presence bars. USCIS Policy Manual, Volume 7, Part B, Chapter 2, Section A.2, footnote 65 similarly states that "USCIS applies the holding of *Matter of Arrabally and Yerrabelly (PDF)*, 25 I&N Dec. 771 (BIA 2012)—that a noncitizen who leaves the United States temporarily with advance parole does not make a departure from the United States within the meaning of INA 212(a)(9)(B)(i)(II)." Neither the BIA nor the USCIS Policy Manual states that a DACA beneficiary who leaves the United States with advance parole and returns with an H-1B visa triggers the unlawful presence bars. In our experience, some consular officers have issued visas without unlawful presence waivers, relying on these arguments. However, the State Department's Foreign Affairs Manual states that to avoid triggering the unlawful presence bars, a DACA beneficiary must travel and return on advance parole. U.S. Dep't of State, 9 Foreign Affairs Manual (FAM) 302.11-3(B)(2)(d), https://fam.state.gov/FAM/09FAM/09FAM030211.html (last visited Aug. 25, 2024), also available through the Lexis online research services.

[8] Individuals can seek advance parole for humanitarian, educational or employment reasons. In some cases, an NIV appointment at a US consulate has been sufficient as an employment-based reason. And at some USCIS field offices, the advance parole can be approved the same day for an upcoming appointment.

2. Government or nonprofit research organizations.

3. A healthcare practice hiring a doctor who has previously been issued a J-1 waiver for clinical practice for a medically underserved population.

4. An employer hiring a worker who already has an H-1B through another cap exempt employer. The concurrent employment at the cap exempt organization can be part-time so long as the position continues. If the part-time cap exempt H-1B ends, the concurrent H-1B ends.

5. Employment at a cap exempt organization, where the individual is physically working more than 50% of their time on the grounds of that organization. A common example is a private medical practice operating at a nonprofit teaching hospital.

Another situation is more complicated but creates an opportunity for many nonprofits to become cap exempt. A 501(c)(3), (c)4 or (c)6 nonprofit is cap exempt for H-1B purposes if it is affiliated with a cap exempt organization (usually a college or university or research organization). The nonprofit must have a written affiliation agreement, and evidence that there is an active working relationship. Many nonprofits have connections with a college or university by engaging in joint projects or accepting student interns, so establishing a cap exemption that cements this relationship can be mutually beneficial.

Late last year, USCIS proposed an H-1B modernization regulation that would clarify many questions about cap exemptions. Do government entities qualify as nonprofit? How much time must an employee spend physically on a university campus in an era when many employees are remote? We hope that this regulation will be finalized in 2024. It may provide greater clarity for H-1B cap exemptions.

From Risky to More Certain: The New Enhanced D3 Waiver Process Makes Things Faster, Easier and Reviewable

Thanks to the new enhanced D3 waiver process outlined in the July 15, 2024, Foreign Affairs Manual update, D3 waivers for most DACA beneficiaries are now faster, more likely to be approved, and subject to an internal review process when a waiver is denied. Specifically, 9 FAM 305.4-3 creates three important benefits:

(1) Visa officers are instructed to consider the fact that a person has a U.S. degree and is returning to work for a U.S. employer a significant positive factor in meeting one of the D3 waiver requirements, significantly increasing the chances of waiver approval.

(2) Visa officers are encouraged to recommend expedited D3 waiver processing in the same circumstances when a person has a U.S. degree and is returning to work for a U.S. employer.

(3) If a visa officer declines to recommend a D3 waiver for approval, the applicant can ask DOS headquarters to review the decision.

While D3 waivers are never guaranteed, these new enhancements make an H-1B with D3 route faster, easier, and reviewable. For those DACA beneficiaries who choose to obtain a H-1B visa using this new process, the risks and uncertainty with obtaining approvals have significantly decreased. This is an essential tool that DACA beneficiaries should consider while DACA advance parole still exists.

Maneuvering the Uncertainty: What Happens After an H-1B with D3 is Approved?

Attorneys sometimes ask whether getting a nonimmigrant visa with a D3 waiver is a short-term gain with no long-term plan. Will it leave the individual vulnerable in the future? Since there are many fact patterns in the Dreamer population, we present below an FAQ laying out some of the longer-term options. For those who are undocumented or concerned about the end of DACA, the D3 waiver benefit may be enough for now, even if there is no clear long-term plan. For others, it is possible to map out a longer-term strategy to move to permanent residence.

Note that through individual screenings, an attorney may find employment-based visa strategies aside from the D3 waiver, such as individuals who would not trigger the unlawful presence bar by travel and would not need a waiver and those eligible for an employment-based green card and adjustment of status through INA § 245(i).

This FAQ details the legal options and obstacles a Dreamer recipient must maneuver after returning to the United States with a D3 waiver after a consular officer finds that they have triggered a three-year or ten-year unlawful presence ground of inadmissibility.

Q. How many DACA beneficiaries are subject to potential unlawful presence bar findings?

A. Approximately 40% of DACA beneficiaries do not have more than 180 days of unlawful presence and are therefore eligible to return to the United States in H-1B status without triggering unlawful presence bars, while approximately 60% of DACA beneficiaries will likely return to the United States with H-1B visas after obtaining a D3 waiver to waive an unlawful presence bar finding.

Q. What are the three-year and ten-year unlawful presence bars?

A. There are two unlawful presence bars that usually make a DACA beneficiary (or undocumented graduate) who applies for an H-1B visa at a U.S. consulate potentially inadmissible, or ineligible for a visa, unless a waiver is approved:

- **The 3-year unlawful presence bar:** If you leave the United States after having accrued more than 180 days but less than one year of unlawful presence during a single stay and before removal proceedings begin; or

- **The 10-year unlawful presence bar**: If you leave the United States After having accrued one year or more of unlawful presence during a single stay, regardless of whether you leave before, during, or after removal proceedings.[9]

[9] A third "permanent" unlawful presence bar applies to a smaller group of DACA beneficiaries who reenter or try to reenter the United States without being admitted or paroled after having accrued more than one year of unlawful presence in the aggregate during one or more stays in the United States. For purposes of the permanent bar, time in the United States in unlawful presence at any age counts towards this bar. For purposes of the 3-year and 10-year bars, only time spent in the United States after turning 18, with some exceptions, counts as unlawful presence. Since most DACA beneficiaries do not have this permanent bar, this bar is not addressed in this FAQ. It is important to assure this bar does not apply, however.

Q. If I am found to be inadmissible under the 3-year or 10-year bars, what waivers are available in the employment-based work visa context?

A. Two potential waivers can waive an unlawful presence bar finding:

(1) A D3 waiver for a request for a nonimmigrant visa (i.e., for a temporary work visa such as an H-1B); and/or

(2) An I-601A or I-601 "extreme hardship" waiver for an immigrant visa petition (i.e., to request lawful permanent resident status based on a family-based I-130 petition or an employment-based I-140 petition).

Q. What is the difference between the D3 waiver for a temporary visa and the I-601 or I-601A waiver for an immigrant visa?

A. A D3 waiver is used for a temporary visa like an H-1B and is an easier standard to meet. The legal standard requires an officer to weigh three factors: (1) the risk of harm to the United States if the visa is granted; (2) the seriousness of the ground of inadmissibility; and (3) the reasons for applying for the visa. For a DACA beneficiary whose only legal violation is unlawful presence before their DACA application was approved, the waiver standard should be relatively easy to meet. Since it is highly discretionary, though, there is no guarantee it will be granted.

An I-601 or I-601A waiver – which is needed to convert to lawful permanent resident status to waive any unlawful presence bar – is a harder standard to meet. First, the applicant must have a family member who is a U.S. citizen or lawful permanent resident spouse or parent. Second, the applicant must prove that one or more of these qualifying family members will suffer "extreme hardship" if the waiver is not approved. These waivers require extensive documentation and are currently subject to lengthy processing times.

Q. I am a DACA beneficiary, and I want to travel abroad with advance parole, obtain an H-1B visa and return to the United States in H-1B status. How do I know if I will trigger the 3- or 10- year unlawful presence bars requiring a D3 waiver?

A. The chart below details the three potential outcomes for a DACA beneficiary who obtains advance parole and applies for an H-1B visa at a U.S. consulate.

Category	Explanation	Consular outcome
Younger DACA beneficiaries (approximately 40% of all DACA beneficiaries)	Anyone whose DACA application was approved before they turned 18.5 and who do not have more than 180 days of unlawful presence will not trigger unlawful presence bars.	H-1B visa will be issued with no finding of unlawful presence and no D3 waiver is required.
Older DACA beneficiaries who were issued an H-1B without a 212(d)3 waiver	The visa officer sometimes grants an H-1B without a D3 waiver when an applicant presents arguments that travel on DACA advance parole does not trigger	H-1B visa will be issued with no finding of unlawful presence and no D3 waiver is required.

	unlawful presence bars under Matter of Arrabally / Yerrabelly, 25 I&N Dec. 771 (BIA 2012).	
Older DACA beneficiaries who were issued an H-1B with a D3 waiver	The visa officer most often will require a DACA beneficiary who applies for an H-1B to first obtain a D3 waiver after finding that traveling on DACA advance parole still triggers unlawful presence bars.	H-1B visa will be issued, but visa officers will find that a 10-year unlawful presence bar applies and will require an approved D3 waiver before the visa is issued. The H-1B visa foil will have an annotation mentioning the D3 waiver.

Q. If I am found to be inadmissible because of a 3-year or 10-year unlawful presence bar and am issued an H-1B visa with a D3 waiver, when will the unlawful presence bar run?

A. The unlawful presence bar will be served three years or ten years after you left the United States to obtain your H-1B visa abroad. The three-year or ten-year bars can be served from abroad or from within the United States after you enter the United States with the H-1B visa, regardless of whether you maintain lawful immigration status after you enter.[10] Once the 3- or 10 years have passed, the bars no longer apply and, assuming certain conditions are met, you can immediately apply for lawful permanent resident status without an additional unlawful presence waiver.

Q. For younger DACA beneficiaries who obtain H-1B visas without D3 waivers, what happens after they return to the United States in H-1B status?

A. H-1B visa holders who do not trigger unlawful presence bars have the easiest path given that they are usually immediately eligible for employment-based applications for lawful permanent resident status without waivers.

Q. Once I enter in H-1B status, what do I have to do to maintain my H-1B status?

A. Unlike the unrestricted work authorization given to DACA beneficiaries, an H-1B visa is tied to the employment offer listed on the H-1B visa petition. An H-1B visa requires the visa holder to work for a specific employer making a specific minimum salary and working at the job location(s) listed on the H-1B petition. If these conditions are not met, there could be a violation of H-1B status.

Q. What happens if I lose or quit my job after I enter the United States with an H-1B visa?

A. There is typically a 60-day grace period in which you can potentially change status or find another job and change H-1B employers or if the new employer files an H-1B change of employer petition within the grace period. The 60-day grace period is subject to certain conditions so you should assure that the grace period applies to you by consulting with an experienced immigration attorney.

[10] See *Matter of Duarte-Gonzalez*, 28 I&N Dec. 688 (BIA 2023) and USCIS, Policy Memorandum: INA 212(a)(9)(B) Policy Manual Guidance (June 24, 2022), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220624-INA212a9B.pdf. This guidance was incorporated in the USCIS Policy Manual.

Q. Can I change jobs after I secure an H-1B visa with a D3 waiver?

A. Yes, you can change employers once you enter the United States in H-1B status with a D3 waiver as long as the new employer files a petition for H-1B status as a change of employer petition while you are still employed with your H-1B employer or within 60 days of termination, assuming you satisfy the 60-day grace period mentioned above. Normally, an employee can start work for the new H-1B employer upon filing of the H-1B petition, but this should be discussed with an immigration lawyer to assure that the risks are fully understood given your situation.

Q. Why do some older DACA beneficiaries who apply for H-1B visas obtain their visas without a D3 waiver, while others must obtain a D3 waiver first?

A. Arguably, when someone applies for DACA advance parole and leaves the United States to obtain an H-1B visa, they do not trigger any unlawful presence bars and their visas should be issued without a waiver. In 2012, the Board of Immigration Appeals (BIA) issued a precedential decision in a case called *Matter of Arrabally / Yerrabelly*.[11] The BIA found that someone who "leaves the United States temporarily pursuant to a grant of advance parole does not ... make a 'departure . . . from the United States' for purposes of the three- or ten-year unlawful presence bars."

The Department of State has issued visas without D3 waivers for some applicants who use this argument at their visa interviews. More often, however, the Department of State requires a D3 waiver even if a person secured DACA advance parole before they left the United States, finding that to avoid unlawful presence bars, an applicant must depart *and return* to the United States with their advance parole document. Since DACA beneficiaries who apply for H-1B visas abroad will depart with advance parole, but return with an H-1B status, visa officers often find that they need a D3 waiver and are subject to a ten-year unlawful presence bar.

Q. What happens after an H-1B with D3 is approved for those who are found to be inadmissible based on the ten-year unlawful presence bar?

A. Since older DACA beneficiaries will likely be granted an H-1B visa with D3 waiver annotation to overcome a ten-year or three-year unlawful presence bar, once they enter the United States they will need to maneuver the unlawful presence finding from within the United States with United States Citizenship and Immigration Services (USCIS).

Q. If I am subject to a three-year unlawful presence bar only, can I serve that inside the United States while in H-1B status?

A. Yes. USCIS currently allows a person to serve the 3- or 10-year unlawful presence bars from within the United States regardless of whether they maintain lawful immigration status.[12] This means that for those that have the three-year bar, they can start the employment-based green card process right away and then file for adjustment of status based on an approved I-140 after the three-year bar has run.

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[11] 25 I&N Dec. 771 (BIA 2012).

[12] https://www.uscis.gov/policy-manual/volume-8-part-o-chapter-6, Subsection B. See also https://www.aila.org/library/new-uscis-policy-on-3-10-year-unlawful-presence-ba.

Q. How long can I stay in H-1B status?

A. An H-1B employee can change employers and extend their H-1B status for up to six years and possibly longer if certain requirements are met. (see explanations below).

Q. Can I remain in H-1B status until the ten-year bar is served?

A. Possibly, but it's not guaranteed, so it's best to plan to change or adjust status before the ten-year period ends. Generally, an H-1B visa holder can be in H-1B status for a maximum of 6 years, with some exceptions for extensions of an H-1B beyond the sixth year. An H-1B visa holder who is subject to the ten-year bar should strategize to stay in H-1B or other nonimmigrant visa status until the ten-year bar runs or until they can apply for adjustment of status.

Q. Will time I spend abroad after my first entry in H-1B status help?

A. Yes. Subject to limited exceptions (see below), an H-1B beneficiary can be in the United States for a maximum of 6 years in H-1B status in the aggregate. Any time spent physically outside the United States can be recaptured, so H-1B beneficiaries who can spend a significant amount of time abroad can count days physically outside the United States toward this 6-year maximum.

One potential strategy for those who are willing and able, is to plan to spend a significant amount of time abroad. Any days spent outside the United States can be "recaptured" and used to extend the H-1B beyond the normal 6 year maximum. Working remotely from abroad is legally permitted assuming an H-1B employer allows this.

Q. How can I qualify for a 1-year extension beyond the 6-year maximum in H-1B status?

A. A one-year extension beyond the 6th year maximum is available if an H-1B beneficiary's employer files a PERM labor certification right before the 5th year in H-1B status begins. This benefit is subject to Visa Bulletin wait times and careful planning about when the PERM labor certification is filed.

Under AC21 § 106(a), an H-1B beneficiary is eligible for a one-year H-1B extension after the 6th year if at least 365 days have passed since the filing of a PERM labor certification with the DOL or an immigrant visa petition with USCIS. *See* 8 CFR § 214.2(h)(13)(iii)(D). However, this extension is only available if the applicant also files for adjustment of status within one year of visa availability. 8 CFR § 214.2(h)(13)(iii)(D)(10).

While this one-year extension is likely to be available, this requires careful planning with an immigration attorney to assure this strategy will indeed work.

Q. How can I qualify for a 3-year extension beyond the 6-year maximum in H-1B status?

A. A three-year extension beyond the 6th year maximum in H-1B status might also be available.

Under INA §104(c), an H-1B beneficiary can obtain a three-year extension beyond the sixth year max-out, if at time of filing the extension request, they have an approved I-140 petition in the EB-1, EB-2 or EB-3 categories and are eligible to adjust status but for Visa Bulletin backlogs. The H-1B status can be extended every three years until the backlogs caused by the

per country limitation clears. Although this might not be available if the Visa Bulletin is current, this could be a viable option for some to remain work authorized while they spend the ten-year bar inside the United States.

Given that most DACA beneficiaries are born in Mexico and other Latin American countries, the Visa Bulletin is likely to be current much sooner than if they were born in China or India, which have historic backlogs. A three-year extension is subject to careful analysis and depends on the Visa Bulletin and other factors which require careful planning with immigration counsel.

Q. Can I change to another nonimmigrant visa instead of extending my H-1B status?

A. Possibly. For those who are subject to the ten-year bar, it's important to strategize early. One strategy might be to secure another nonimmigrant visa from within the United States for a few years and then move back to H-1B status for the remaining years. Another option is to extend the H-1B as long as possible and then file a change of status to another nonimmigrant visa status.

Q. What nonimmigrant visa options other than H-1B visa are available?

A. The L-1 visa is for certain people who work outside the United States for a year and then come to the United States to work for an affiliated employer. The L-1 visa does not require temporary intent, and can be an option for those who do not qualify for an H-1B or are not selected for the H-1B in the lottery.

Another option is an O visa, which requires that a person work in an extraordinary ability capacity. For information about the O visa option, see here.

Other options include nonimmigrant visa options such as a TN, E-2, or R visas, with possible challenges to consider due to nonimmigrant intent.[13] While these visa options are more likely to be denied if filed with DOS at consulates abroad, they may have a higher chance of success if filed as requests for change status with USCIS.

As explained above, another option is to spend time abroad and serve the ten-year bar while working from abroad for a time, potentially using time spent working abroad to qualify for L-1A or L-1B status.

H-1B visa holders who must wait ten years for their unlawful presence bars to be served should explore all their options and strategize as early as possible.

Q. Could I qualify for a "compelling circumstances EAD" after I have maxed out my time in H-1B status?

A. Possibly. A "compelling circumstances" Employment Authorization Document (EAD) is a work permit that can be given to those who are in H-1B status (including the 60 day grace period following the termination of H-1B employment) at time of filing the I-765 application for work authorization. To be eligible, the applicant must also be the beneficiary of an approved I-140 petition. In addition, the applicant must show that on the date the I-765 application is filed, the priority date for the I-140 is not current as listed on the final action date of the Visa Bulletin.

[13] Note that current DOS guidance refers to "dual intent" for R-1s and O-1s.

Importantly, this procedure gives work authorization, but does not confer immigration status per se so subsequent requests to convert to other nonimmigrant or lawful permanent resident status would likely need to be done through consular processing.

Q. Can I file for adjustment of status before the ten-year unlawful presence bar is served with an I-601 waiver?

A. Yes, if before you serve the ten-year unlawful presence bar you have a spouse or parent who is a lawful permanent resident or USC, you can potentially file for adjustment of status with an I-601 waiver. In addition to proving that you have a lawful permanent resident or US citizen spouse or parent, you must prove they will suffer extreme hardship if your waiver is not approved. If you have such a "qualifying relative" you can file for adjustment of status with an I-601 waiver before the ten years of unlawful presence have run.

Q. Can I file an adjustment of status application before the ten-year unlawful presence bar is served without an I-601 waiver?

A. Possibly. One possible option for DACA beneficiaries is to obtain an I-140 approval and file for adjustment of status before the ten-year bar is served. Since the BIA and USCIS both have stated that ten-year bars are ***not*** triggered when an applicant travels on advance parole, there is valid legal argument that the DOS is wrong in requiring a D3 waiver when someone left the United States on DACA advance parole. Arguably, a DACA beneficiary can file for adjustment of status and ask USCIS to revisit the inadmissibility finding. If USCIS disagrees, an applicant can pursue a federal district court action. While this option is not guaranteed, it is a possible strategy that can be explored to pursue lawful permanent resident status before the ten year bar is served.

It is likely that this legal theory will be tested within the next few years. If it is successful and/or USCIS makes an explicit policy change, this would eliminate the need to serve the ten-year bar from within the United States.

Q. What is the legal theory that would be used if I file for adjustment of status before the ten-year bar is served even though I have been issued a D3 waiver at the consulate after I was found to be inadmissible due to the ten-year bar?

A. In 2012, the Board of Immigration Appeals issued a precedential decision in a case called *Matter of Arrabally / Yerrabelly*.[14] The BIA found that someone who "leaves the United States temporarily pursuant to a grant of advance parole does not ... make a 'departure . . . from the United States' for purposes of the three- or ten-year unlawful presence bars. In other words, when someone applies for advance parole – which is a permission USCIS grants advance permission to leave the United States – they do not trigger the unlawful presence bars. Importantly, the BIA mentions no requirement that a person must travel ***and return*** on advance parole to be protected from triggering the unlawful presence bars.

The USCIS Policy Manual instructs officers to apply the BIA's finding in *Arrabally / Yerrabelly* when adjudicating benefits. Specifically, the Policy Manual states that "USCIS applies the holding of *Matter of Arrabally and Yerrabelly (PDF)*, 25 I&N Dec. 771 (BIA 2012)—that a

[14] 25 I&N Dec. 771 (BIA 2012).

noncitizen who leaves the United States temporarily with advance parole does not make a departure from the United States within the meaning of INA 212(a)(9)(B)(i)(II)."[15]

However, the DOS' Foreign Affairs Manual, which tells visa officers how to apply the law to visa applications abroad, adds a legal obstacle that is not mentioned in BIA case law. Specifically, the Foreign Affairs Manual states that "[a]n individual who has left ***and returned to*** the United States under a grant of advance parole has not made a 'departure . . . from the United States' within the meaning of INA 212(a)(9)(B)(i)."[16] In other words, the BIA and USCIS say that someone who departs the United States with advance parole does not trigger unlawful presence bars, while the DOS's manual states that someone must depart *and return* to the United States with advance parole to avoid triggering unlawful presence bars.

Despite this additional requirement, H-1B applicants should first request visa officers to issue H-1B or other nonimmigrant visas without D3 waivers if they travel on advance parole assuming their only potential ground of inadmissibility is due to unlawful presence. Several visa applicants have been successful at consulates abroad making this argument and have secured visas without a finding of unlawful presence bars.

Unlike DOS, USCIS has never required a departure and return on advance parole to trigger protection from the unlawful presence bars. Arguably, only the Foreign Affairs Manual adds that requirement.

After entering the United States with an H-1B and D3 waiver, applicants can potentially file for adjustment of status without an I-601 waiver by arguing that USCIS policy and BIA case law protected them from triggering the unlawful presence bar that DOS found that applies. USCIS might agree with this argument and may find that the applicant is not inadmissible due to unlawful presence because they left on advance parole, despite DOS requiring them to obtain an approved D3 waiver first. If this does not work, it is possible to sue USCIS in federal district court.

While this legal theory has yet to be tested, it is a possible route that should be explored with an experienced immigration attorney.

Undocumented Dreamers

This group is potentially larger than the DACA population now, and could benefit tremendously from the D3 waiver pathway. Over 200,000 people are DACA eligible but are not able to apply since initial applications are on hold by court order (or have initial DACA pending). In addition, there are over 400,000 undocumented students in American higher education now. For these people, getting a screening for D3 may help them try to leverage a job offer into the ability to use the degree they earn. Colleges and universities now are considering how to support these students through experiential education[17] and networking through faculty mentors, and career

[15] USCIS, 7 Policy Manual B.2(A)(5) n.65, *reprinted in* Volume 15 of Immigration Law and Procedure, *supra* note 2, also available at https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-2#footnote-65 (last visited Sept. 4, 2024), and through the Lexis® online research services.

[16] 9 FAM 302.11-3(B)(2)(d) (emphasis added) (citing Matter of Arrabally and Yerrabelly, 25 I&N Dec. 771 (BIA 2012)).

[17] https://www.higheredimmigrationportal.org/effective_practice/faq-on-experiential-and-funding-opportunities-for-undocumented-students/.

services and alumni offices. See in particular the Presidents' Alliance on Higher Education and Immigration's Legal Pathways That Work Initiative.

There will be longer term options for some that are faster than serving out the ten-year bar in nonimmigrant status. But even if there is not, these students now have an incentive to stay in school and finish their education.

Conclusion

As with the original DACA program, we encourage immigration attorneys to carefully consider the new D3 pathway for their clients. D3 is one of many tools that are available to immigration practitioners to consider. Given the uncertainty surrounding DACA, for many Dreamers it could mean choosing between remaining undocumented or having a more stable lawful status.

For more information around employment-based options for Dreamers, we have collaborated with the Immigrant Legal Resource Center to develop a practice advisory (which is being updated as we learn more) and a recorded webinar.[18] We also keep updated resources and guides on our Path2Papers and Legal Pathways that Work websites.

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[18] *See also* https://www.aila.org/library/free-preview-of-aila-waivers-online-course-nonimmigrant-inadmissibility-and-relief-under-ina-212-d-3-a.