Jennifer Chang Newell
Cecilia D. Wang
Michael Tan*
R. Orion Danjuma*†
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
T: (415) 343-0770
jnewell@aclu.org
cwang@aclu.org
mtan@aclu.org
odanjuma.org

**Pro hac vice application forthcoming*
† Admitted in New York

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizona Dream Act Coalition, et al., Plaintiffs, vs. Brewer, et al., Defendants.	No. 2:12-cv-02546-DGC **DECLARATION OF TESS RANAHAN**

I, Tess Ranahan, hereby declare:

I make the statements in this Declaration based on my own personal knowledge, except as to any statements which are identified as being made on information and belief, and if called to testify I could and would do so competently as follows:

1. I am a paralegal with the American Civil Liberties Union Foundation Immigrants' Rights Project. I work with the attorneys representing the Plaintiffs in the class action identified in the caption above.

2. On December 4, 2012, I visited the official website of Arizona State Governor Janice K. Brewer and downloaded a copy of Executive Order 2012-06, Re-Affirming Intent of Arizona Law in Response to the Federal Government's Deferred Action Program, *available at* http://www.azgovernor.gov/Newsroom/Gov_EO.asp. A true and correct copy of this document is attached to this Declaration as Exhibit A.

2. On December 3, 2012, I visited the official website of the U.S. Social Security Administration and downloaded a copy of the document identified as the "Social Security Number – Deferred Action for Childhood Arrivals," *available at* http://www.ssa.gov/pubs/deferred_action.pdf. A true and correct copy of this document is attached to this Declaration as Exhibit B.

3. On December 3, 2012, I visited the official website of the U.S. Department of Homeland Security and downloaded a copy of the memorandum, issued by Janet Napolitano on June 15, 2012, titled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. A true and correct copy of this memorandum is attached to this Declaration as Exhibit C.

5. On December 11, 2012, I visited the official website of U.S. Citizenship and Immigration Services at and printed a PDF copy of the web page titled, "Consideration of

Deferred Action for Childhood Arrivals Process," which was updated on September 14, 2012, *available at* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD. A true and correct copy of a PDF of this web page is attached hereto as Exhibit D.

4. On December 11, 2012, I visited The Daily Beast website and downloaded a copy of an article, written by Terry Green Sterling and titled, "Gov. Jan Brewer Battles Obama's DREAM Directive in Arizona," *available at* http://www.thedailybeast.com/articles/2012/08/17/governor-jan-brewer-battles-obama-s-dream-directive-in-arizona.html. The article was published on the Daily Beast website on August 17, 2012. A true and correct copy of this article is attached to this Declaration as Exhibit E.

5. On December 11, 2012, I visited the Arizona Chanel 12 News website at and watched a video titled, "Why did Brewer issue "dreamer" order?" which aired on August 15, 2012, *available at* http://www.azcentral.com/video/#/Why+did+Brewer+issue+%27dreamer%27+order%3F/1787777903001. On this video, Defendant Brewer explained that Executive Order 2012-06 was intended to clarify that there would be "no drivers licenses for illegal people."

6. On December 11, 2012, I visited the Fox News Latino website and downloaded a copy of the article, "Jan Brewer Bars IDs, Benefits for Undocumented Immigrants in Arizona," which was published on Aug. 16, 2012, *available at*

http://latino.foxnews.com/latino/politics/2012/08/16/brewer-blocks-id-benefits-for-undocumented-immigrants/. A true and correct copy of this article is attached to this Declaration as Exhibit F.

7. On December 11, 2012, I visited the official website of the U.S. Department of Homeland Security and downloaded a copy of the recommendation by Citizenship and Immigration Services Ombudsman, published on July 11, 2011 and titled "Deferred Action: Recommendations to Improve Transparency and Consistency in the USCIS Process," *available at* http://www.dhs.gov/xlibrary/assets/cisomb-combined-dar.pdf. A true and correct copy of this recommendation is attached to this Declaration as Exhibit G.

8. On December 11, 2011, I visited the official website of U.S. Citizenship and Immigration Services and downloaded a copy of the Interoffice Memorandum, dated May 6, 2009, from Donald Neufield, Acting Associate Director of USCIS, regarding Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, *available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF. A true and correct copy of this recommendation is attached to this Declaration as Exhibit H.

9. On December 11, 2012, I visited the official website of U.S. Citizenship and Immigration Services and downloaded a copy of the webpage titled, "Frequently Asked Questions," under the subcategory "Consideration of Deferred Action for Childhood Arrivals Process," which was last updated on September 14, 2012, *available at* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?v

gnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD. A true and correct copy of this recommendation is attached to this Declaration as Exhibit I.

10. On December 11, 2012, I visited the official website of the White House and downloaded a copy of the transcript of the President's speech on June 15, 2012, identified on the website as "Remarks by the President on Immigration," *available at* http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration. A true and correct copy of this recommendation is attached to this Declaration as Exhibit J.

11. On November 1, 2012, I visited the U.S. Census Bureau website at http://factfinder2.census.gov/to research data on statistics related to driving in Arizona. Census Bureau statistics indicate that over 87 percent of Arizonans commute to work by car and only two percent of all Arizonan workers commute to work by public transportation. I reached this conclusion by selecting the "Search" function at the top of the Census Bureau website, selecting the "Geographies" tab on the left hand side of the page, and selecting the state "Arizona." I then selected and downloaded the document titled, "Selected Economic Characteristics, 2011 American Community Survey 1 Year Estimates." A true and correct copy of this document is attached to this Declaration as Exhibit K.

12. On December 11, 2012, I visited the CNN website and watched a video, titled "Brewer: Obama immigration 'outrageous,'" which originally aired on June 15, 2012, *available at* www.cnn.com/video/#/video/bestoftv/2012/06/15/bts-immigration-jan-

brewer-reax.cnn. On the video, Governor Jan Brewer described the Deferred Action for Childhood Arrivals program as "backdoor amnesty" and "desperate political pandering by a president desperate to shore up his political base" and "pandering to a certain population."

13. On December 11, 2012, I visited the Fox News website and watched a video identified as "Brewer Bans Benefits for Undocumented Immigrants," which originally aired on August 15, 2012, *available at* http://video.latino.foxnews.com/v/1788365218001/brewer-bans-benefits-for-undocumented-immigrants. On the video, Governor Brewer stated that Executive Order 2012-06 was necessary to make clear there would be "no drivers [sic] licenses for illegal people."

I hereby declare that the foregoing is true and accurate under penalty of perjury pursuant to the laws of Arizona and the United States.

Dated this 13th day of December, 2012.

By: s/Tess Ranahan
Tess Ranahan

EXHIBIT A

Executive Order 2012-06

Re-Affirming Intent of Arizona Law In Response to the Federal Government's Deferred Action Program

WHEREAS, United States Citizenship and Immigration Services (USCIS) plans to issue employment authorization documents to certain unlawfully present aliens who are granted Deferred Action under federal immigration laws; and

WHEREAS, the USCIS has confirmed that the Deferred Action program does not and cannot confer lawful or authorized status or presence upon the unlawful alien applicants; and

WHEREAS, unless otherwise made available under applicable law, 8 United States Code § 1621 provides that aliens unlawfully present in the United States are not eligible for any state or local public benefit – as defined in both federal and Arizona law; and

WHEREAS, 8 United States Code § 1622 authorizes states to determine eligibility for any state public benefits for most classes of aliens, including unlawfully present aliens with Deferred Action; and

WHEREAS, the Deferred Action program is purportedly an act of prosecutorial discretion and the program does not provide for any additional public benefit to unlawfully present aliens beyond the delayed enforcement of United States immigration laws and the possible provision of employment authorization; and

WHEREAS, Arizona Revised Statutes § 1-501 and § 1-502 limit access to public benefits to persons demonstrating lawful presence in the United States; and

WHEREAS, Arizona Revised Statutes § 28-3153 prohibits the Arizona Department of Transportation (ADOT) from issuing a drivers license or nonoperating identification license unless an applicant submits proof satisfactory to ADOT that the applicant's presence in the United States is authorized under federal law; and

WHEREAS, the federal executive's policy of Deferred Action and the resulting federal paperwork issued could result in some unlawfully present aliens inappropriately gaining access to public benefits contrary to the intent of Arizona voters and lawmakers who enacted laws expressly restricting access to taxpayer funded benefits and state identification; and

WHEREAS, allowing more than an estimated 80,000 Deferred Action recipients improper access to state or local public benefits, including state issued identification, by presenting a USCIS employment authorization document that does not evidence lawful, authorized status or presence will have significant and lasting impacts on the Arizona budget, its health care system and additional public benefits that Arizona taxpayers fund.

NOW THEREFORE, I, Janice K. Brewer, Governor of the State of Arizona, by virtue of the authority vested in me by the Constitution and laws of the State of Arizona, do hereby order and direct as follows:

1. The issuance of Deferred Action or Deferred Action USCIS employment authorization documents to unlawfully present aliens does not confer upon them any lawful or authorized status and does not entitle them to any additional public benefit.

2. State agencies that provide public benefits, as defined in 8 United States Code § 1621 shall conduct a full statutory, rule-making and policy analysis and, to the extent not prohibited by state or federal law, initiate operational, policy, rule and statutory changes necessary to prevent Deferred Action recipients from obtaining eligibility, beyond those available to any person regardless of lawful status, for any taxpayer-funded public benefits and state identification, including a driver's license, so that the intent of Arizona voters and lawmakers who enacted laws expressly restricting access to taxpayer funded benefits and state identification are enforced.

3. All state agencies that confer taxpayer-funded public benefits and state issued identification shall undergo emergency rule making to address this issue if necessary.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Arizona.

Janice K. Brewer

GOVERNOR

DONE at the Capitol in Phoenix on this 15th day of August in the Year Two Thousand Twelve and of the Independence of the United States of America the Two Hundred and Thirty-Seventh.

ATTEST: Ken Bennett

SECRETARY OF STATE

EXHIBIT B

Social Security Number — Deferred Action For Childhood Arrivals

Am I eligible for a Social Security number?

- If the U.S. Citizenship and Immigration Services (USCIS) grants you Deferred Action status and employment authorization, you may be eligible for a Social Security number.
- After you receive your Employment Authorization Card (I-766) from USCIS, you can apply for a Social Security number.

How do I apply for a Social Security number?

- You must visit a Social Security office in person to complete and sign an application for a Social Security number. Find your local office at ***www.socialsecurity.gov/locator***.
- You must bring your USCIS-issued Employment Authorization Card (I-766) and proof of age and identity.

You Must Show Social Security

You must show an original document or a certified copy of one of the following as proof of your age and identity:

- Foreign birth certificate;
- Foreign passport;
- U.S. military record;
- U.S. military identification card;
- Religious record showing age or date of birth;
- U.S. driver's license;
- U.S. state-issued identification card;
- School record showing age or date of birth;
- School identification card; or
- Copy of medical record.

Please note, while you may have provided photocopies of the above documents to USCIS, Social Security requires original documents or copies certified by the agency that issued them. **We cannot accept photocopies or notarized copies**. We must independently verify the documentation you provide.

For more information, visit ***www.socialsecurity.gov*** or call toll-free, **1-800-772-1213** (for the deaf or hard of hearing, call our TTY number, **1-800-325-0778**).

EXHIBIT C

Secretary

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

June 15, 2012

MEMORANDUM FOR: David V. Aguilar
Acting Commissioner, U.S. Customs and Border Protection

Alejandro Mayorkas
Director, U.S. Citizenship and Immigration Services

John Morton
Director, U.S. Immigration and Customs Enforcement

FROM: Janet Napolitano
Secretary of Homeland Security

SUBJECT: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children

By this memorandum, I am setting forth how, in the exercise of our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation's immigration laws against certain young people who were brought to this country as children and know only this country as home. As a general matter, these individuals lacked the intent to violate the law and our ongoing review of pending removal cases is already offering administrative closure to many of them. However, additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities.

The following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to this memorandum:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.

Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.

As part of this exercise of prosecutorial discretion, the above criteria are to be considered whether or not an individual is already in removal proceedings or subject to a final order of removal. No individual should receive deferred action under this memorandum unless they first pass a background check and requests for relief pursuant to this memorandum are to be decided on a case by case basis. DHS cannot provide any assurance that relief will be granted in all cases.

1. With respect to individuals who are encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or U.S. Citizenship and Immigration Services (USCIS):

- With respect to individuals who meet the above criteria, ICE and CBP should immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.
- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear.

2. With respect to individuals who are **in** removal proceedings but not yet subject to a final order of removal, and who meet the above criteria:

- ICE should exercise prosecutorial discretion, on an individual basis, for individuals who meet the above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States.
- ICE is instructed to use its Office of the Public Advocate to permit individuals who believe they meet the above criteria to identify themselves through a clear and efficient process.
- ICE is directed to begin implementing this process within 60 days of the date of this memorandum.
- ICE is also instructed to immediately begin the process of deferring action against individuals who meet the above criteria whose cases have already been identified through the ongoing review of pending cases before the Executive Office for Immigration Review.

3. With respect to the individuals who are **not** currently in removal proceedings and meet the above criteria, and pass a background check:

- USCIS should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, by deferring action against individuals who meet the

above criteria and are at least 15 years old, for a period of two years, subject to renewal, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.

- The USCIS process shall also be available to individuals subject to a final order of removal regardless of their age.
- USCIS is directed to begin implementing this process within 60 days of the date of this memorandum.

For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.

Janet Napolitano

EXHIBIT D

U.S. Citizenship and Immigration Services

Consideration of Deferred Action for Childhood Arrivals Process

FAQs updated September 14, 2012

On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several key guidelines may request consideration of deferred action for a period of two years, subject to renewal, and would then be eligible for work authorization. Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. Deferred action does not provide an individual with lawful status.

If you need further information and cannot find it on this Web page or in our Frequent Asked Questions, you may contact our National Customer Service Center at 1-800-375-5283 or 1-800-767-1833 (TDD for the hearing impaired). Customer service officers are available Monday – Friday from 8 a.m. – 8 p.m. in each U.S. time zone.

View the Consideration of Deferred Action for Childhood Arrivals Process Video

Loading the player ...

Guidelines

You may request consideration of deferred action for childhood arrivals if you:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching your 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
5. Entered without inspection before June 15, 2012, or your lawful immigration status expired as of June 15, 2012;
6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
7. Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

Age Requirements

Anyone requesting consideration for deferred action under this process must have been under 31 years old as of June 15, 2012. You must also be at least 15 years or older to request deferred action, unless you are currently in removal proceedings or have a final removal or voluntary departure order, as summarized in the table below:

Your situation	Required age
I have never been in removal proceedings, or my proceedings have been terminated before making my request.	At least 15 years old at the time of submitting your request and not over 31 years of age as of June 15, 2012.
I am in removal proceedings, have a final removal order, or have a voluntary departure order, and I am not in immigration detention.	Not above the age of 31 as of June 15, 2012, but you may be younger than 15 years old at the time you submit your request.

Timeframe for Meeting the Guidelines

You must prove	
That on June 15, 2012 you	**As of the date you file your request you**
• Were under 31 years old • Had come to the United States before your 16th birthday • Were physically present in the United States • Entered without inspection by this date, or your lawful immigration status expired as of this date	• Have resided continuously in the U.S. since June 15, 2007; • Were physically present in the United States; and • Are in school, have graduated from high school in the United States, or have a GED; or • Are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States

Education and Military Service Guidelines

Your school or military status at the time of requesting deferred action under this process	Meet education or military service guidelines for deferred

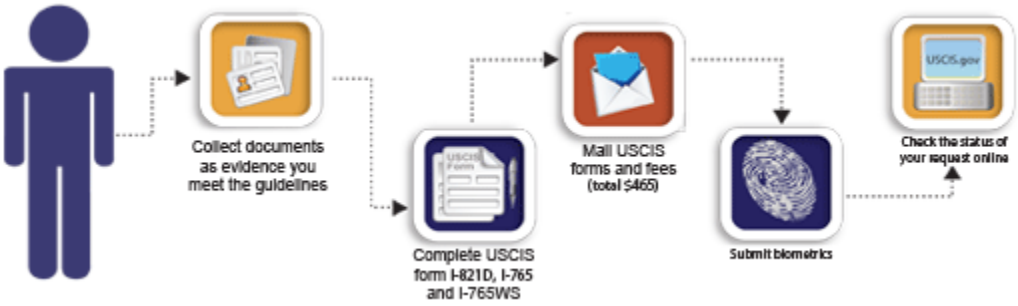
	action under this process (Y/N)
I graduated from: • Public or private high school; or • Secondary school. Or • I have obtained a GED.	Yes
I am currently enrolled in school. See the Education section of the FAQs for a full explanation of who is considered currently in school.	Yes
I was in school but dropped out and did not graduate. I am not currently in school and am not an honorably discharged veteran of the Coast Guard or Armed Forces of the U.S.	No
I am an honorably discharged veteran of the Coast Guard or Armed Forces of the U.S.	Yes

Please see our Frequently Asked Questions for more detail on school-related guidelines.

Return to top

Filing Process for Consideration of Deferred Action for Childhood Arrivals

If you meet the guidelines for deferred action under this process, you will need to complete the following steps to make your request to USCIS.



	**Collect documents as evidence you meet the guidelines.** You will need to submit supporting documents with your request for consideration of deferred action for childhood arrivals. You can submit legible copies of these documents unless the instructions specify you must submit an original document.

Examples of Documents to Submit to Demonstrate you Meet the Guidelines **Please see the instructions to Form I-821D, Consideration of Deferred Action for Childhood Arrivals, for further details on acceptable documentation.**	
Proof of identity	• Passport or national identity document from your country of origin • Birth certificate with photo identification • School or military ID with photo • Any U.S. government immigration or other document bearing your name and photo
Proof you came to U.S. before your 16th birthday	• Passport with admission stamp • Form I-94/I-95/I-94W • School records from the U.S. schools you have attended • Any Immigration and Naturalization Service or DHS document stating your date of entry (Form I-862, Notice to Appear) • Travel records • Hospital or medical records
Proof of immigration status	• Form I-94/I-95/I-94W with authorized stay expiration date • Final order of exclusion, deportation, or removal issued as of June 15, 2012 • A charging document placing you into removal proceedings
Proof of presence in U.S. on June 15, 2012	• Rent receipts or utility bills • Employment records (pay stubs, W-2 Forms, etc) • School records (letters, report cards, etc) • Military records (Form DD-214 or NGB Form 22) • Official records from a religious entity confirming participation in a religious ceremony • Copies of money order receipts for money sent in or out of the country • Passport entries • Birth certificates of children born in the U.S. • Dated bank transactions • Social Security card • Automobile license receipts or registration • Deeds, mortgages, rental agreement contracts • Tax receipts, insurance policies
Proof you continuously resided in U.S. since June 15, 2007	

Proof of your student status at the time of requesting consideration of deferred action for childhood arrivals	• School records (transcripts, report cards, etc) from the school that you are currently attending in the United States showing the name(s) of the school(s) and periods of school attendance and the current educational or grade level • U.S. high school diploma or certificate of completion • U.S. GED certificate
Proof you are an honorably discharged veteran of the Coast Guard or Armed Forces of the U.S.	• Form DD-214, Certificate of Release or Discharge from Active Duty • NGB Form 22, National Guard Report of Separation and Record of Service • Military personnel records • Military health records

See our Frequently Asked Questions for information on submitting affidavits or circumstantial evidence to support your request.

Return to top

Complete the required two forms and worksheet

Form name	Fee
I-821D, Consideration of Deferred Action for Childhood Arrivals	Total fee of $465. $380 fee plus $85 fee for biometric services. **These fees cannot be waived.**
I-765, Application for Employment Authorization	
I-765WS, Worksheet	

Form Filing Tips

- Forms must be mailed to the USCIS Lockbox.
- You cannot e-file your deferred action request for this process.
- If you have questions call the Customer Service Center at 1-800-375-5283; do NOT visit a USCIS field office in person.
- Write your name, date of birth, and mailing address exactly the same way on each form.
- Failure to submit Forms I-821D, I-765, I-765WS and the $465 fee will result in your package being rejected.
- We prefer that you download the forms from our website, fill them out electronically, and

Form name	Fee

then print your forms.

- Use black ink only. Do NOT use highlighters or red ink on your forms as they may make your materials undetectable when scanned.
- Ensure that you are using the correct edition of the form. The correct, most current edition of every USCIS form is always available for FREE download on this website.
- Ensure that you provide all required supporting documentation and evidence.
- Organize and label evidence by the guideline it meets.
- Be sure to sign all of your forms.
- Be sure that you mail all pages of the forms.
- If you must change your form, we recommend that you begin with a new form, rather than trying to white out information, which can lead to scanning errors.

	**Mail your forms to the appropriate USCIS Lockbox.** See the mailing instructions for Form I-821D. Include the required forms, fees and supporting documentation with your filing. Remember to carefully follow instructions and fully complete your forms. USCIS will not accept incomplete forms or forms without proper fee. USCIS will mail you a receipt after accepting your request. You may also choose to receive an email and/or text message notifying you that your form has been accepted by completing a Form G-1145, E-Notification of Application/Petition Acceptance.
	**Visit an Application Support Center (ASC) for biometric services**. After USCIS receives your complete request with fees, we will send you a notice scheduling you to visit an ASC to for biometric services. If you fail to attend your ASC appointment, USCIS may deny your request for deferred action. Children under 14 in removal proceedings, with a final removal order, or with a voluntary departure order, and who are not in immigration detention, will appear at the ASC for photographs only.
	**Check the status of your request on Case Status Online.** The 90-day period for reviewing Form I-765 filed together with Form I-821D begins if and when USCIS decides to defer action in your case.

Fee Exemptions

There are no fee waivers available for the deferred action for childhood arrivals process. Fee exemptions are available in very limited circumstances. Visit the Fee Exemption page for more details.

If USCIS Defers Action in Your Case

If USCIS defers action in your case and grants employment authorization, you will receive a notice of decision in writing and an Employment Authorization Document separately in the mail.

If USCIS Does Not Exercise Deferred Action in Your Case

If USCIS decides not to defer action in your case, you cannot appeal the decision or file a motion to reopen or reconsider. USCIS will not review its discretionary determinations.

USCIS will apply our policy guidance governing the referral of cases to U.S. Immigration and Customs Enforcement (ICE) and the issuance of Notices to Appear (NTA). Your case does not involve a criminal offense, fraud, or a threat to national security or public safety, your case will not be referred to ICE for purposes of removal proceedings except where DHS determines there are exceptional circumstances. For more detailed information on the applicable NTA policy visit www.uscis.gov/NTA.

Administrative Errors

You may request a review using the Service Request Management Tool process if you met all of the process guidelines and you believe that your request was denied because of an administrative error. Examples of administrative errors include USCIS denying your request for deferred action because:

- USCIS believes you abandoned your case by not responding to a Request for Evidence (RFE) and you claim that you did respond to the RFE within the prescribed time; or
- USCIS mailed the RFE to the wrong address, even though you had submitted a Form AR-11, Change of Address, or changed your address online at www.uscis.gov before the issuance of the Request for Evidence.

To make a service request, you must call the National Customer Service Center at 1-800-375-5283. A USCIS customer service representative will then forward your request to the proper USCIS office. Your service request will be reviewed for accuracy and USCIS will send you a letter informing you of its decision.

The USCIS National Customer Service Center is now open Monday – Friday from 8 a.m. – 8 p.m. in each U.S. time zone.

Return to top

Travel Requirements and Restrictions

Certain travel outside the United States may affect the continuous residence guideline. Travelling outside the U.S. before August 15, 2012 will not interrupt your continuous residence if the travel was brief, casual, and innocent. If you travel outside the United States after August 15, 2012 and before your request for deferred action is adjudicated, you will not be considered for deferred action under this process.

Deferred action will terminate automatically if you travel outside the United States without receiving advance parole from USCIS. If USCIS approves your request for deferred action, you may travel outside the United States only if you receive advance parole from USCIS before traveling.

Application procedures for advance parole for individuals with deferred action are being finalized. USCIS expects to incorporate those requirements into USCIS Form I-131, Application for Travel Document, in the near future and will inform the public when the new form is available. Should you have a compelling need to travel outside the United States before the new instructions are issued for reasons related to your current employment, education or humanitarian purposes, you may submit Form I-131 and request advance parole from USCIS by attaching a copy of your DACA approval Form I-797, and a letter that explains your compelling need to travel to your application and send it to:

If mailing using U.S. Postal Service:

USCIS
P.O. Box 5757
Chicago, IL 60680-5757

If mailing using USPS express mail/courier:

USCIS
Attn: Deferred Action for Childhood Arrivals
131 S. Dearborn – 3rd Floor
Chicago, IL 60603-5517

Travel Dates	**Type of Travel**	**Does it Affect Continuous Residence**
Before August 15, 2012	• brief • casual • innocent	No
	• For an extended time • Because of an order of exclusion, deportation, or removal • To participate in criminal activity	Yes
After August 15, 2012, and before you have requested deferred action	• Any	Yes.
After August 15, 2012, and after you have requested deferred action	• Any	Yes. You cannot travel while your request is under review. You cannot apply for advance parole unless and until DHS has determined whether to defer action in your case.

Note: If you have been ordered deported or removed, and you then leave the United States, your departure may result in your being considered deported or removed, with potentially serious future immigration consequences.

For detailed information see the Travel section of the Frequently Asked Questions.

Return to top

National Security and Public Safety Guidelines

If you have been convicted of a felony offense, a significant misdemeanor offense, or three or more other misdemeanor offenses not occurring on the same date and not arising out of the same act,

omission, or scheme of misconduct, or are otherwise deemed to pose a threat to national security or public safety, you will not be considered for deferred action under this process.

What is the difference between "significant misdemeanor", "non-significant misdemeanor", and "felony"?

Felony	Significant Misdemeanor	Non-significant Misdemeanor
A felony is a federal, state or local criminal offense punishable by imprisonment for a term exceeding one year.	A significant misdemeanor is a misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) and: 1. Regardless of the sentence imposed, is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence; or, 2. If not an offense listed above, is one for which the individual was sentenced to time in custody of more than 90 days. The sentence must involve time to be served in custody, and therefore does not include a suspended sentence.	A crime is considered a non-significant misdemeanor (maximum term of imprisonment is one year or less but greater than five days) if it: 1. Is not an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence; and 2. Is one for which the individual was sentenced to time in custody of 90 days or less.

A minor traffic offense will not be considered a misdemeanor for purposes of this process, but it is important to emphasize that driving under the influence is a significant misdemeanor regardless of the sentence imposed. You can find detailed information in the National Security and Public Safety section of the Frequent Asked Questions.

Renewing Deferred Action Under This Process

Individuals whose case is deferred under this process will not be placed into removal proceedings or removed from the United States for a period of two years, unless terminated. You may request consideration for a two-year extension of deferred action through a process to be detailed in the future. As long as you were under the age of 31 on June 15, 2012, you may request a renewal even after turning 31. Your request for an extension will be considered on a case-by-case basis.

Don't Be a Victim of Immigration Scams

Dishonest practitioners may promise to provide you with faster services if you pay them a fee. These people are trying to scam you and take your money. Visit our Avoid Scams page to learn how you can

protect yourself from immigration scams.

Make sure you seek information about consideration of deferred action for childhood arrivals from official government sources such as USCIS or the Department of Homeland Security. If you are seeking legal advice, visit our Find Legal Services page to learn how to choose a licensed attorney or accredited representative.

Remember you can download all USCIS forms for free at www.uscis.gov/forms.

Combatting Fraud

USCIS is committed to safeguarding the integrity of the immigration process. If individuals knowingly make a misrepresentation, or knowingly fail to disclose facts, in an effort to have their case deferred or obtain work authorization through this process, they will be treated as an immigration enforcement priority to the fullest extent permitted by law, and be subject to criminal prosecution and/or removal from the United States.

Return to top

Find this page at www.uscis.gov/childhoodarrivals

Last updated: 11/30/2012

Plug-ins

EXHIBIT E

THE DAILY BEAST

Gov. Jan Brewer Battles Obama's DREAM Directive in Arizona

The GOP governor tries to thwart Obama's decision allowing some undocumented kids to apply for work permits by issuing her own directive denying them drivers' licenses. Critics call her order mean-spirited and ill-advised political posturing.

by Terry Greene Sterling (/contributors/terry-greene-sterling.html) | August 17, 2012 4:45 AM EDT

Zulleth Romero was 12 when she and her mother trekked through the ovenlike Arizona desert (/cheats/2012/06/03/five-bodies-found-in-az-desert.html) . The two ran out of water and Romero's mother collapsed when she reached the highway, where a smuggler picked them up and transported them to Phoenix. Both survived, and the girl, now 18, recently graduated with honors from a Phoenix-area high school.

Protesters in front of the capitol the day after Arizona Gov. Jan Brewer, in an executive order reaffirmed Arizona state law denying young illegal immigrants drivers' licenses and other public benefits, Aug. 16, 2012. (Ross D. Franklin / AP Photos)

On Wednesday, like many of the nation's 1.7 million young, undocumented immigrants known as "Dreamers" who were brought illegally to the United States as kids, a jubilant Romero began applying for a two-year renewable permit to work and stay in the United States temporarily, thanks to an administrative directive issued by President Obama in June. Romero says she celebrated because finally she could drive and work legally.

Then that same day, Arizona Gov. Jan Brewer (/articles/2012/04/12/governor-jan-brewer-signs-arizona-s-extreme-new-abortion-law.html) (https://webmail.iac.com/owa/redir.aspx?C=Aws28-f0-EaIQTSo63zAqn4FqaOiT88IvxxyD6JiU29Rj3zquGyg1bx6am_dyqcCOTMFuNmNvQY.&URL=http%3a%2f%2fwww.thedailybeast.com%2farticles%2f2012%2f04%2f12%2fgovernor-jan-brewer-signs-arizona-s-extreme-new-abortion-law.html) , who had become a conservative superstar (/articles/2012/01/28/will-arizona-s-gop-self-destruct.html) (https://webmail.iac.com/owa/redir.aspx?C=Aws28-f0-EaIQTSo63zAqn4FqaOiT88IvxxyD6JiU29Rj3zquGyg1bx6am_dyqcCOTMFuNmNvQY.&URL=http%3a%2f%2fwww.thedailybeast.com%2farticles%2f2012%2f01%2f28%2fwill-arizona-s-gop-self-destruct.html) after wagging her finger at the president (/cheats/2012/01/25/president-and-arizona-s-brewer-argue.html) (https://webmail.iac.com/owa/redir.aspx?C=Aws28-f0-EaIQTSo63zAqn4FqaOiT88IvxxyD6JiU29Rj3zquGyg1bx6am_dyqcCOTMFuNmNvQY.&URL=http%3a%2f%2fwww.thedailybeast.com%2fcheats%2f2012%2f01%2f25%2fpresident-and-arizona-s-brewer-argue.html) on an airport tarmac and subsequently calling Obama's Dreamer directive "back-door amnesty (http://azcapitoltimes.com/news/2012/06/15/brewer-decries-obama-backdoor-amnesty-policy/) ," fired back at Obama by issuing her own directive (/cheats/2012/08/15/az-gov-defies-new-immigration-policy.html) (https://webmail.iac.com/owa/redir.aspx?C=Aws28-f0-EaIQTSo63zAqn4FqaOiT88IvxxyD6JiU29Rj3zquGyg1bx6am_dyqcCOTMFuNmNvQY.&URL=http%3a%2f%2fwww.thedailybeast.com%2fcheats%2f2012%2f08%2f15%2faz-gov-defies-new-immigration-policy.html) .

Governor Jan set off a heated national legal debate and scored points with her conservative fans by issuing an "executive order" denying Arizona's 80,000 Dreamers drivers' licenses and state identification cards, along with a handful of state benefits. That evening, Brewer said her order clarified (http://www.azcentral.com/video/#/Why+did+Brewer+issue+%27dreamer%27+order%3F/1787777903001) that there would be no state-funded benefits and "no driver licenses for illegal people."

Federal law will prevent most Dreamers from accessing Medicaid or food stamps, and Arizona law bans them from enjoying a few state benefits, such as state-subsidized child care, unemployment, and state contracts. Much of Brewer's administrative order was redundant, but seemed to set off yet another skirmish in the state's epic battle between old white people and young brown people.

But Brewer's driver-license prohibition could spell misery for Arizona Dreamers. In Phoenix, a sprawling city surrounded by a web of suburbs with limited public transportation, many have no choice but to drive to work.

While Democrats blasted Brewer for mean-spirited anti-Obama gasbagging with her executive order, the ACLU of Arizona and national immigration lawyers and activists scrambled to read Arizona's motor vehicle laws Thursday.

Their conclusion: Brewer doesn't understand the linkage between federal immigration law and Arizona's drivers' license statute. And that could open the Grand Canyon State to a slew of lawsuits.

Brewer, who once accused Obama of giving Dreamers amnesty, now seems to be signaling that Dreamers do *not* have amnesty. She argues that Dreamers may be getting a temporary reprieve from deportation under the Obama directive, but nevertheless will not be legally present in the United States—and thus can't legally drive in Arizona.

Immigration lawyers counter that the president's directive will indeed make Dreamers legally present in the country—which entitles them to Arizona drivers' licenses.

The legal debate over the drivers' licenses centers on the arcane immigration-law concept of being *lawfully present* vs. having *lawful status.*

Arizona law requires drivers' licenses be issued to those *lawfully present* under federal immigration law. Thanks to the Obama directive, Dreamers soon will be lawfully present. The state's driver-license law doesn't require *lawful status,* which Dreamers will *not* get under the Obama directive.

But Brewer "uses *presence* and *status* interchangeably," says Alessandra Soler, executive director of the ACLU of Arizona.

"Whoever reviewed this governor's executive order didn't understand immigration law," Soler told The Daily Beast. "The governor's order is based on bad advice … This is similar to problems we've seen with SB 1070 [Arizona's immigration law, signed by Brewer]—another example of her getting involved in federal immigration matters she has no business doing."

And Danny Ortega, a prominent Phoenix lawyer and former chair of the National Council of La Raza, said that for now he's reserving an opinion on which side will win, but described Brewer's move as pure political posturing.

Brewer's order could open the Grand Canyon State to a slew of lawsuits.

Brewer's spokesman, Matthew Benson, said the governor is neither posturing politically nor receiving bad legal advice. The governor's take is that even with Obama's directive, Dreamers won't be legally present in Arizona—and thus state law prohibits them from driving, he said in an interview.

Dreamers "have neither legal status nor legal presence ... The governor is merely upholding Arizona law, as is her duty," he added in an email.

Others disagree.

"As a matter of federal immigration law, the governor's office is simply wrong," said Ben Winograd, staff attorney for the American Immigration Council in Washington. Dreamers, he says, "are considered to be lawfully present despite lacking valid immigration status."

The upshot: despite the governor's executive order, Dreamers probably will be able to drive to work legally, although they might have to take Brewer to court.

If nothing else, the governor's executive order dampened the spirits of many Arizona Dreamers. Zulleth Romero and several other undocumented youths spent the night on the lawn of the Arizona Capitol, protesting Brewer's order. Thursday morning, Romero and other Dreamers visited Brewer's office in hopes of meeting with her. But Romero said "we were told she wasn't available."

Tags:

- immigration law, (/topics/immigration-law.html)
- Jan Brewer, (/topics/jan-brewer.html)
- Barack Obama, (/topics/barack-obama.html)
- Arizona,United States, (/topics/arizona-united-states.html)
- U.S. News (/us-news.html)

EXHIBIT F

Print Close

Jan Brewer Bars IDs, Benefits for Undocumented Immigrants in Arizona

Published August 16, 2012 | Fox News Latino

SANTA ANA, Calif. – Arizona Governor Jan Brewer signed an executive order on Wednesday directing state agencies to deny drivers licenses and other public benefits to anyone benefiting from President Barack Obama's 'deferred action' immigration policy.

In an executive order, Brewer said she was reaffirming the intent of current Arizona law denying taxpayer-funded public benefits and state identification to undocumented immigrants.

[pullquote]

"They are here illegally and unlawfully in the state of Arizona and it's already been determined that you're not allowed to have a driver's license if you are here illegally," Brewer said in a press conference. "The Obama amnesty plan doesn't make them legally here."

Young undocumented immigrants around the nation on Wednesday began the process of applying for federal work permits under the federal Deferred Action for Childhood Arrivals program.

The Arizona Governor said they will issue employment authorization cards to those people who apply, but "they will not be entitled to a driver's license nor will they be entitled to any public benefits."

[sidebar]

Obama's federal policy defers deportations for that group if they meet certain criteria, including arrival in the United States before they turned 16 and no convictions for certain crimes.

After that announcement, dozens marched to the capitol Wednesday night, upset with Brewer's executive order, according to FOX affiliate KSAZ in Arizona.

But immigration attorney Jose Penalosa told KSAZ he fully expects the Obama administration to trump Brewer. He believes those approved for deferred action will eventually be allowed to get drivers licenses.

"So I believe the Obama administration's going to come out and say we're changing the notes and our tones of our directive, and say these kids are here under color of law and protected by U.S. immigration laws and due process, and/or they have a specific non-visa immigrant category that allows them to have a driver's license," said Penalosa.

After Obama announced the policy change in June, Brewer labeled it "backdoor amnesty" and political pandering by the Democratic president.

Arizona has been in the vanguard of states enacting laws against illegal immigration.

The U.S. Supreme Court in June overturned parts of the Arizona enforcement law known as SB1070 but ruled that a key provision on requiring police to ask people about their immigration status under certain circumstances can be implemented.

The Obama administration challenged that law in 2010 after Brewer signed it into law.

In the past decade, Arizona voters twice approved laws denying publicly funded services, such as in-state resident university tuition rates, to undocumented immigrants unless mandated by the federal government.

Brewer's order said the policy's federal paperwork doesn't confer lawful status on undocumented immigrants and won't entitle them to Arizona public benefits.

However, it said the policy change "could result in some unlawfully present aliens inappropriately gaining access to public benefits contrary to the intent of Arizona voters and lawmakers who enacted laws expressly restricting access to taxpayer funded benefits and state identification."

Brewer directed state agencies to start any necessary emergency rulemaking processes to implement her order.

Some protesters marched to the state Capitol on Wednesday night from the downtown Phoenix office of the Arizona Dream Act Coalition.

"We are saddened that Gov. Brewer is siding with the past, against progress, against young people and the general support the Dream Act has in the general population," Dulce Matuz, Arizona ADAC chairman, said in a statement.

State Rep. Catherine Miranda, who supports the federal program, called Brewer's action mean-spirited.

"She just continues to put obstacles in front of young people in Arizona," the Phoenix Democrat said.

Rep. Martin Quezada, D-Phoenix, said he questioned whether the order would have much practical effect under Arizona's current laws. But he said it served to demonize good kids who should be allowed to get state-issued identification and enter the workforce.

Arizona Democratic Party executive director Luis Heredia said Brewer's order "fails to move Arizona forward on immigration reform. This amounts to a gubernatorial temper tantrum."

Reporting by the Associated Press.

*Follow us on **twitter.com/foxnewslatino***
*Like us at **facebook.com/foxnewslatino***

EXHIBIT G

Citizenship and Immigration Services Ombudsman

DEFERRED ACTION: RECOMMENDATIONS TO IMPROVE TRANSPARENCY AND CONSISTENCY IN THE USCIS PROCESS

July 11, 2011

Transparency and consistency are the primary objectives of these recommendations. The Federal Government, including the Department of Homeland Security, has, in recent years, steadily made efforts to provide more information to the public, and to enhance the efficient administration of government services. Here, U.S. Citizenship and Immigration Services (USCIS) is encouraged to carry these objectives into the administration of deferred action requests.

These recommendations focus on how USCIS processes deferred action requests and the steps that can be taken to ensure that an individual in compelling circumstances, whether or not represented, knows how to submit a deferred action request, receives a decision in a timely manner, and can be assured that the request will be processed in a consistent manner.

The recommendations do not delve into who should receive deferred action. Every day, USCIS officers and leadership apply their expertise and experience to make decisions that impact both individual lives and the public as a whole. As past administrations have acknowledged, along with this authority comes the responsibility to appropriately exercise discretion when compelling needs arise.

Above all, these recommendations are about good government. Building accessible, uniform, and transparent processes is critical to effective government services. In fact, these recommendations echo recommendations that this office made in 2007. While deferred action requests are a minute fraction of the millions of decisions USCIS makes every year, they warrant the same transparency and consistency that the Federal Government strives for across the board.

Most Sincerely,

January Contreras
Citizenship and Immigration Services
Ombudsman

RECOMMENDATIONS

The Ombudsman recommends that USCIS:

1. Issue public information describing deferred action and the procedures for making a request for this temporary form of relief with USCIS;

2. Establish internal procedures for accepting and processing deferred action requests in order to promote consistency and assist local offices in responding to urgent, periodic increases in the demand for deferred action;

3. Inventory all pending deferred action requests to verify that each request received a confirmation of receipt with estimated processing timeframes and USCIS contact information; and

4. Consistently track data related to deferred action requests and make available statistics identifying the number of requests received and the numbers of requests approved and denied.

REASONS FOR THE RECOMMENDATIONS

- Stakeholders lack clear, consistent information regarding requirements for submitting a deferred action request and what to expect following submission of the request.

- There is no formal national procedure for handling deferred action requests.

- When experiencing a change in the type or number of submissions, local USCIS offices often lack the necessary standardized process to handle such requests in a timely and consistent manner. As a result, many offices permit deferred action requests to remain pending for extended periods.

- Stakeholders lack information regarding the number and nature of deferred action requests submitted each year; and they are not provided with any information on the number of cases approved and denied, or the reasons underlying USCIS' decisions.

Homeland Security

Office of the Citizenship and Immigration Services Ombudsman
U.S. Department of Homeland Security
Mail Stop 1225
Washington, DC 20528
www.dhs.gov/cisombudsman

Citizenship and Immigration Services Ombudsman

DEFERRED ACTION: RECOMMENDATIONS TO IMPROVE TRANSPARENCY AND CONSISTENCY IN THE USCIS PROCESS

July 11, 2011

The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.

Executive Summary

For decades the U.S. Immigration and Naturalization Service (INS), followed by the Department of Homeland Security (DHS), has used deferred action to provide limited relief to foreign nationals who do not qualify for other immigration benefits that are typically available to individuals in exigent circumstances.[1] Upon creation of the DHS in 2003, the power to grant deferred action was formally delegated to U.S. Citizenship and Immigration Services (USCIS), as well as U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP).[2]

When accorded deferred action, an individual is able to remain, temporarily, in the United States: USCIS declines to exercise its authority to issue a Notice to Appear and does not place the individual in removal proceedings. USCIS has granted deferred action to individuals suffering serious medical conditions and to persons temporarily prevented from returning to their home country due to a natural disaster, among others. The employment authorization regulations briefly describe this form of administrative relief, classifying deferred action as, "an act of administrative convenience to the government which gives some cases lower priority."[3]

Over the past year, stakeholders have expressed concerns to the Office of the Citizenship and Immigration Services Ombudsman (Ombudsman's Office) regarding long pending deferred action requests submitted by Haitian nationals following the earthquake in January 2010.[4] These Haiti-related concerns led to broader conversations among stakeholders about the way USCIS processes deferred action requests at local offices.

Based on an analysis of USCIS' handling of deferred action requests, the Ombudsman's Office has made the following findings:

- Stakeholders lack clear, consistent information regarding requirements for submitting a deferred action request and what to expect following submission of the request.

- There is no formal national procedure for handling deferred action requests. Accordingly, it is difficult to track deferred action processing, in order to determine who receives deferred action, and under what circumstances.

---

[1] INS Commissioner Doris Meissner, *Exercising Prosecutorial Discretion*, HQOPP 50/4 (Nov. 17, 2000).
[2] Homeland Security Act of 2002, Pub. L. No. 107-296, § 442(c), 116 Stat. 2135, 2194 (2002); Department of Homeland Security (DHS) Secretary Tom Ridge, *Delegation to the Bureau of Citizenship and Immigration Services* (Mar. 1, 2003) (delegating authority to grant voluntary departure under section 240B of the INA. 8 U.S.C. §1229c, and deferred action); *See* U.S. Department of Justice, *Immigration Naturalization Service Fact Sheet, Prosecutorial Discretion Guidelines* (Nov. 28, 2000).
[3] 8 C.F.R. §274a.12(c)(14) (2011).
[4] Information provided by stakeholders (Mar. 28 and 29, 2011).

- When experiencing a change in the type or number of submissions, local USCIS offices often lack the necessary standardized process to handle such requests in a timely and consistent manner. As a result, many offices permit deferred action requests to remain pending for extended periods.

- Stakeholders lack information regarding the number and nature of deferred action requests submitted each year; and they are not provided with any information on the number of cases approved and denied, or the reasons underlying USCIS' decisions.

In response to its findings, the Ombudsman's Office recommends that USCIS take the following actions to improve the processing of requests for deferred action:

1) **Issue public information describing deferred action and the procedures for making a request for this temporary form of relief with USCIS;**

2) **Establish internal procedures for accepting and processing deferred action requests in order to promote consistency and assist local offices in responding to urgent, periodic increases in the demand for deferred action;**

3) **Inventory all pending deferred action requests to verify that each request received a confirmation of receipt with estimated processing timeframes and USCIS contact information; and**

4) **Consistently track data related to deferred action requests and make available statistics identifying the number of requests received and the numbers of requests approved and denied.**

BACKGROUND

A grant of deferred action indicates that the government has, temporarily, declined to exercise its authority to remove a particular individual from the United States. As such, the named individual may remain, provisionally, in the United States. Deferred action is a form of relief that is typically granted to individuals whose cases raise compelling humanitarian concerns and to individuals whose removal is not in the best interests of the U.S. government. It does not provide a pathway to permanent residency.

Factors considered for this form of relief include: humanitarian issues, the likelihood of eligibility to gain legal status, family ties to the United States, criminal history, and immigration concerns.[5] USCIS has granted deferred action to individuals suffering from serious medical conditions and to those temporarily prevented from returning to their home country due to a natural disaster, among others.

While ICE and CBP also are provided with authority to grant deferred action, this review focuses solely on USCIS' communication about and processing of deferred action.

Legal Framework. For decades INS, followed by DHS, has used deferred action to provide limited relief to foreign nationals who do not qualify for other immigration benefits that are typically available to individuals in

[5] Meissner Memo, HQOPP 50/4 (Nov. 17, 2000) (the memorandum provides a more comprehensive list). USCIS reported that the Meissner memo is used as informal guidance for local offices reviewing a deferred action request. (Apr. 15, 2011). *See also Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal (Standard Operating Procedures)*, Part X.; Deferred action is "an act of administrative choice to give some cases lower priority and in no way an entitlement..." former O.I. §242.1(a)(22) (withdrawn June 24, 1997).

exigent circumstances.[6] However, prior to 2000, neither the legacy INS, nor its predecessor agency had published any significant guidance regarding the use of this power.[7]

On November 17, 2000, INS Commissioner Doris Meissner issued a memorandum entitled, "Exercising Prosecutorial Discretion.[8]" That memo set forth guidance on the exercise of prosecutorial discretion by immigration officials and described the process to be followed in making and monitoring discretionary decisions. The memo states:

> The favorable exercise of prosecutorial discretion means a discretionary decision not to assert the full scope of the INS enforcement authority as permitted under the law. Such decisions will take different forms, depending on the status of a particular matter, but include decisions such as not issuing an [Notice to Appear]…detaining an alien placed in proceedings and approving deferred action.[9]

In 2003, Secretary of DHS Tom Ridge formally delegated to USCIS the authority to grant deferred action.[10] USCIS continues to rely on the Meissner memo as guidance on exercising this and other forms of discretionary authority.[11]

Methodology. In preparing this review, the Ombudsman's Office met with stakeholders. To determine the USCIS deferred action process, the Ombudsman's Office also conducted meetings and conference calls with local and regional USCIS offices[12] and requested statistical data from USCIS Headquarters regarding deferred action requests.[13]

Individual Deferred Action Requests and USCIS Processing. USCIS processes two types of deferred action requests: 1) those submitted by individuals who qualify based on a USCIS decision to use deferred action as a pre-adjudication form of temporary relief for those who have filed certain petitions or applications (*e.g.*, widows of U.S. citizens, qualified victims of a crime or abuse); and 2) those submitted by individuals in exigent circumstances (*e.g.*, extreme medical cases, victims of the September 11th terrorist attacks), who may, or may not, have an application for immigration benefits pending.[14] This study examines only USCIS processing of the latter type of request.

Currently, there are no official, national standard operating procedures for how to process a deferred action request. Nevertheless, most USCIS offices follow some sort of informal, standard process, rather than proceeding in an *ad hoc* fashion.[15] Typically, an individual can submit a deferred action request in-person, or

---

[6] *Supra n. 2.*
[7] Meissner Memo, HQOPP 50/4 (Nov. 17, 2000).
[8] *Id.*
[9] *Id.*
[10] Secretary DHS Tom Ridge, *Delegation to the Bureau of Citizenship and Immigration Services* (Mar. 1, 2003).
[11] Information provided by USCIS (Mar. 30, 2011; Apr. 15, 2011).
[12] Information provided by USCIS (Mar. 29, 30, Apr. 19 and 20, 2011).
[13] The Ombudsman's Office received basic submission statistics, but the information was incomplete, providing information on grants of requests but not the actual submission and denial numbers. Information provided by USCIS (Apr. 15, 2011).
[14] USCIS memorandum from William Yates, *Assessment of Deferred Action in Requests for Interim Relief from U Nonimmigrant Status Eligible Aliens in Removal Proceedings*, HQOPRD 70/6.2 (May 6, 2004); USCIS memorandum from Stuart Anderson, *Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status*, HQADN 70/6.2 (May 8, 2002).
[15] Information provided by site visits and teleconference calls with USCIS district offices. (Mar. 29, 2011; Apr. 19 and 20, 2011). The North Eastern Regional Office has an SOP that went into effect on February 17, 2011. Other local offices have guidelines on how to review a deferred action request.

by mail, to a local USCIS office.[16] USCIS does not have a nationwide process for acknowledging the receipt of deferred action requests, but many USCIS offices have implemented a local method for logging submissions and acknowledging their receipt. Other offices do not issue a written acknowledgement of receipt for deferred action requests.

Normally, a deferred action request is reviewed at the local office. A summary sheet explaining the positive and negative equities associated with the deferred action request is completed.[17] The district director reviews the summary and makes a recommendation. That recommendation is forwarded to the regional director. The regional director issues a decision on the recommendation and returns the final decision to the district director so that he/she may deliver it to the requestor.[18] Deferred action requests are not filed on a standardized application form and no fee is collected to defray the costs associated with processing deferred action requests.

Once granted deferred action, the requestor is eligible to apply for employment authorization.[19] When USCIS does grant deferred action, it is usually valid for one to two years.[20]

Local Offices Responding to Increases in Deferred Action Submissions. The number of deferred action requests received by local offices can vary greatly.[21] Certain local offices have evolved new processes when experiencing a rise in submissions.[22] Nevertheless, there is no mechanism to hold local offices accountable for issuing decisions within a certain timeframe, and USCIS did not report any coordinated efforts across districts to share locally developed solutions for managing a significant deferred action workload.

Recently, USCIS Headquarters began tracking deferred action requests. USCIS Headquarters has instructed district directors to send data on deferred action decisions to the National Benefits Center for tracking.[23] In addition, USCIS devised a template acknowledgement letter for local offices to issue in response to requests for deferred action. However, not all local offices use the template letter.[24] Stakeholders have reported that some local offices do not issue any type of written acknowledgement that a deferred action request has been received.

Furthermore, the template letter includes a statement that the applicant will receive a response to the request within 60 days. Stakeholders and USCIS officials report that many cases remain pending without a decision well beyond 60 days.[25]

Prior Ombudsman's Office Recommendations. On April 9, 2007, the Ombudsman's Office published recommendations on deferred action.[26] The recommendations were: 1) post general information on the USCIS website; 2) maintain deferred action statistics; and 3) designate a USCIS Headquarters official to review decisions to help ensure consistency in decision making.

---

[16] Information provided by USCIS site visit (Mar. 29, 2011).
[17] Form G-312, *Deferred Action Case Summary*, outlines the individual's biographical information, familial history, grounds of inadmissibility and deportability and physical and mental conditions requiring treatment in the United States.
[18] Information provided by USCIS (Mar. 29, 2011 and Apr. 15, 2011).
[19] 8 C.F.R. §274a.12(c)(14) (2011).
[20] Information provided by USCIS (Mar. 30, 2011).
[21] Information provided by USCIS (Mar. 29, 2011; Apr. 15, 19 and 20, 2011).
[22] *Id.*
[23] Information provided by USCIS site visit (Mar. 29 and 30, 2011).
[24] Field offices report issuing decisions from a time range of two weeks to indefinitely pending. Information provided by USCIS (Mar. 29, 2011) and stakeholders (Mar. 28, 2011).
[25] Information provided by USCIS teleconference calls and site visits (Mar. 29-30 and Apr. 19-20, 2011).
[26] CIS Ombudsman Recommendation #32, Deferred Action (Apr. 9, 2007).

USCIS responded that deferred action requests are reviewed on a case-by-case basis and that published guidance would not be a meaningful addition to USCIS' website.[27] USCIS committed to collecting deferred action statistics on a quarterly basis. USCIS did not find it necessary to review deferred action decisions at USCIS Headquarters.

Stakeholder Concerns. Over the past year, stakeholders expressed concerns to the Ombudsman's Office regarding the delayed processing of numerous deferred action requests submitted by Haitian nationals following the earthquake in January 2010. In public meetings, stakeholders from across the country repeatedly requested USCIS guidance and information regarding the handling of these deferred action requests.[28] Stakeholders reported to the Ombudsman's Office that some individuals have waited for more than seven months for decisions on their requests.[29] Recently, an extension and re-designation of Haiti Temporary Protected Status (TPS) provided certain individuals affected by the earthquake with relief; many of whom had requested deferred action. In the process of waiting for USCIS to act on their deferred action requests, many individuals accrued unlawful presence, which may impact their eligibility for future immigration benefits. These Haiti-related concerns led to broader conversations among stakeholders about the way that USCIS is processing deferred action requests.

Stakeholder meetings and inquiries have highlighted that USCIS is not communicating essential information on how to make or renew a deferred action request.[30] While stakeholders acknowledge that a grant of deferred action by USCIS is a discretionary decision, they have expressed that general guidance from USCIS would be helpful to determine whether clients should be advised to step forward and seek this relief. Stakeholders explain that preparing a deferred action request requires a significant investment of time and effort. Due to the level of staff resources needed to submit requests, representatives and attorneys who assist people in seeking deferred action note that directions and guidance are especially critical.

CASE PROBLEM: The United States Army medically evacuated an individual to the United States for a life-saving operation that was not available in her home country. The individual had been in the care and custody of U.S. military personnel for many years due to her situation and had received deferred action from USCIS. The U.S. Army identified that she needed continued medical treatment. Military personnel could not find information on how the patient could renew her request for deferred action. After contacting various resources, the Ombudsman's Office was contacted. The Ombudsman's Office, in turn, worked with USCIS and the individual to submit a new request for deferred action and to file an employment authorization application. USCIS granted the request, and the individual was permitted to remain temporarily in the United States to continue to receive life-saving treatment.

Stakeholders report difficulties in obtaining status updates on pending requests. After filing the initial request, many individuals are not provided a USCIS point of contact or a written acknowledgement that the request has

[27] USCIS Response to Recommendation #32, Deferred Action (Aug. 7, 2007).
[28] Information provided by stakeholders (Mar. 28, 2011).
[29] Information provided by stakeholders (Mar. 29, 2011).
[30] Recent publications have highlighted the need for public guidance on how to submit a deferred action request to USCIS and to expect subsequent to the submission. *See* Penn State Law School, Duane Morris & Maggio+Kattar, *Private Bills & Deferred Action, Toolkit* (May 17, 2011), http://law.psu.edu/_file/PBDA_Toolkit.pdf (accessed on July 5, 2011); Mary Kenney, *Prosecutorial Discretion: How to Advocate for Your Client* (June 24, 2011), http://www.legalactioncenter.org/practice-advisories/prosecutorial-discretion-how-advocate-your-client (accessed on July 5, 2011); Donald M. Kerwin, Doris Meissner & Margie McHugh, *Executive Action on Immigration: Six Ways to Make the System Work Better* (Mar. 2011), http://www.migrationpolicy.org/pubs/administrativefixes.pdf (accessed on July 5, 2011).

been filed. This makes it difficult to submit additional supporting documentation or to obtain information regarding the processing of the request.

ANALYSIS & RECOMMENDATIONS

The Ombudsman's Office makes the following recommendations to USCIS:

(1) Issue public information describing deferred action and the procedures for making a request for this temporary form of relief with USCIS.

Although most local offices appear to follow a basic process, there is little public information explaining how to request deferred action and what type of supporting documentation should be submitted with a request. USCIS posts humanitarian notices for victims of natural disasters, but does not always include information on deferred action.[31] Some USCIS offices have provided local guidance, but this is often only visible to community-based organizations or legal representatives, and not to individuals who lack access to such aid networks, leaving the most vulnerable individuals – those who are not represented – without knowledge of how to be considered for this temporary form of relief.

LOCAL PRACTICE: The Miami Field Office published a checklist outlining the basic documentation that should be included in a deferred action request, which reduces the number of requests for additional evidence.

Public guidance would ensure that individuals in need of relief are aware of deferred action and know how to make a request. Informative guidance would include: 1) information explaining what deferred action is and what it is not; 2) instructions for submitting a request for deferred action to a local office; 3) an explanation of what information and documentation should be included in the request; and 4) an indication of what to expect following the submission of a request for deferred action, including a point of contact able to provide processing updates and other relevant information.

Issuing public guidance would not impact USCIS' discretionary authority to decide a deferred action request.

(2) Establish internal procedures for accepting and processing deferred action requests in order to promote consistency and assist local offices in responding to urgent, periodic increases in the demand for deferred action.

LOCAL PRACTICE: When an individual submits a deferred action request, officers in the Boston Field Office immediately determine the individual's previously assigned A-number, or generate a new A-number, as necessary. This ensures that the individual leaves the office with a unique identifier that can be used to track the request and can be referenced when inquiring as to case status, required follow-up, etc.

[31] USCIS New Release, *Haiti Relief Measures: Questions and Answers;* http://www.uscis.gov/portal/site/uscis/template.PRINT/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=855260f64f336210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD (accessed on May 6, 2011); USCIS Reminds Japanese Nationals Impacted by Recent Disaster, *Questions and Answers*, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9c6ac337ab5ce210VgnVCM100000082ca60aRCRD&vgnextchannel=6abe6d26d17df110VgnVCM1000004718190aRCRD (accessed on May 6, 2011).

Establishing nationwide USCIS procedures to guide local offices in responding to submission increases would optimize resources and ensure that individuals requesting deferred action are not subjected to unnecessary delays due to manpower shortages and other administrative impediments.

(3) Inventory all pending deferred action requests to verify that each request received a confirmation of receipt with estimated processing timeframes and USCIS contact information.

Many USCIS offices have a backlog of deferred action requests which have been pending for extensive periods of time.[32] Establishing a comprehensive national inventory of deferred action requests would identify cases that have been long pending and assist in the implementation of a national process for timely, consistent processing of deferred action requests.

Additionally, USCIS Headquarters should verify that pending deferred action requests were issued receipt confirmation with an estimated processing time from the responsible local office. In recent months, USCIS Headquarters has started to track deferred action requests received at local field offices. However, USCIS must be more proactive in providing the public with information obtained through its tracking activities.

(4) Consistently track data related to deferred action requests and make available statistics identifying: the number of requests received and the numbers of requests approved and denied.

Tracking and releasing to the public data on the number of deferred action request submissions (*i.e.*, approvals, denials, pending requests, etc.) would help provide transparency demonstrating how often and in what types of circumstances deferred action is granted.

LOCAL PRACTICE: When regional directors started receiving an increase in deferred action requests from district offices due to the earthquake in Haiti, they met to discuss recent trends and attempted to facilitate consistent deferred action decisions coming from the four USCIS regions. While the coordination so far does not appear to have resulted in the development of a centralized national process, the discussion was a positive step towards coordinating deferred action processing at the regional level.

CONCLUSION

Issuing public guidance on the procedures for making a request for deferred action would ensure that those who may merit humanitarian relief know how to seek it, whether they are represented or not. Establishing a standardized and responsive national procedure, as well as conducting an inventory of pending deferred action requests to verify that each individual who has made a request has received confirmation of receipt, would improve customer service, agency accountability, and help ensure consistency in deferred action decisions. Finally, tracking submissions and releasing the data to the public would improve management of the deferred action process and provide transparency to the public.

[32] Stakeholders report that most deferred action requests remain pending without explanation. Information provided at stakeholder meeting (Mar. 28, 2011). Information provided at USCIS site visit (Mar. 29, 2011).

EXHIBIT H

U.S. Department of Homeland Security
20 Massachusetts Ave., NW
Washington, DC 20529

U.S. Citizenship and Immigration Services

Interoffice Memorandum

To: Field Leadership

From: Donald Neufeld /s/
Acting Associate Director
Domestic Operations Directorate

From: Lori Scialabba /s/
Associate Director
Refugee, Asylum and International Operations Directorate

From: Pearl Chang /s/
Acting Chief
Office of Policy and Strategy

Date: May 6, 2009

Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act

Revision to and Re-designation of *Adjudicator's Field Manual* (*AFM*) Chapter 30.1(d) as Chapter 40.9 (*AFM* Update AD 08-03)

1. Purpose

Chapter 30.1(d) of the *Adjudicator's Field Manual* consolidates USCIS guidance to adjudicators for determining when an alien accrues unlawful presence, for purposes of inadmissibility under section 212(a)(9)(B) or (C) of the Immigration and Nationality Act. This memorandum re-designates Chapter 30.1(d) of the *AFM* as chapter 40.9 of the *AFM*. This memorandum also revises newly re-designated Chapter 40.9 to clarify the available guidance, and to incorporate into Chapter 40.9 prior guidance that was issued after adoption of former Chapter 30.1(d) but not incorporated into former Chapter 30.1(d).

USCIS intends *AFM* Chapter 40.9 to provide comprehensive guidance to adjudicators concerning the accrual of unlawful presence and the resulting inadmissibility. Since Chapter 40.9 provides comprehensive guidance, the following prior memoranda are rescinded in their entirety:

Date	Subject
September 19, 1997	Section 212(a)(9)(B) Relating to Unlawful Presence
March 3, 2000	Period of stay authorized by the Attorney General after 120-day tolling period for purposes of section 212(a)(9)(B) of the Immigration and Nationality Act (the Act) (AD 00-07)
June 12, 2002	Unlawful Presence
April 2, 2003	Guidance on Interpretation of "Period of Stay Authorized by the Attorney General" in Determining "Unlawful Presence" under Section 212(a)(9)(B)(ii) of the Immigration and Nationality Act (Act)

Also, the following memoranda are rescinded, insofar as they dealt with inadmissibility under section 212(a)(9)(B) or (C) of the Act.

Date	Subject
March 31, 1997	Implementation of section 212(a)(6)(A) and 212(9) grounds of Inadmissibility
June 17, 1997	Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)

Also rescinded is any other USCIS memorandum (or legacy INS memorandum) that addresses inadmissibility under section 212(a)(9)(B) or (C) of the Act, to the extent that any other such memorandum is inconsistent with *AFM* Chapter 40.9.

2. Background

The three- and ten-year bars to admissibility of section 212(a)(9)(B)(i) of the Act and the permanent bar to admissibility of section 212(a)(9)(C)(i)(I) of the Act were added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of PL 104-208 (September 30, 1996)) (IIRIRA). The amendments enacting sections 212(a)(9)(B) and (C) became effective on April 1, 1997.

Section 212(a)(9)(B)(i)(I) of the Act renders inadmissible those aliens who were unlawfully present for more than 180 days but less than one (1) year, who voluntarily departed the United States prior to the initiation of removal proceedings and who seek admission within three (3) years of the date of such departure or removal from the United States. Section 212(a)(9)(B)(i)(II) of the Act renders inadmissible those aliens unlawfully present for one (1) year or more, and who seek admission within ten (10) years of the date of the alien's departure or removal from the United States. Finally, section 212(a)(9)(C)(i)(I) of the Act renders inadmissible any alien who

has been unlawfully present in the United States for an aggregate period of more than one (1) year, and who enters or attempts to reenter the United States without being admitted.

Section 212(a)(9)(B)(ii) of the Act specifies that "unlawful presence" can accrue during any period in which an alien, other than a Legal Permanent Resident, is present in the United States without having been admitted or paroled, or after the expiration of the period of stay authorized by the Secretary of Homeland Security. As discussed in *AFM* Chapter 40.9.2, there are other situations in which an alien who is actually in an unlawful immigration status is, nevertheless, protected from the accrual of unlawful presence.

Over the last ten (10) years, the determination of what constitutes "unlawful presence" has been the subject of various interpretations, in part because of legislation amending the rights of aliens seeking immigration benefits. Legacy Immigration and Naturalization Service (INS) and the United States Citizenship and Immigration Services (USCIS) have issued several memoranda on this issue; however, sometimes, the *AFM* was not updated. Therefore, this revised and re-designated section 40.9.2 in the *AFM* consolidates the information contained in these memoranda and updates the *AFM*.

In general, the consequences of accruing unlawful presence depend on the immigration status of an individual, the particular type of benefit or relief sought, and whether the denial of the benefit is subject to administrative and judicial review. The details are set forth in the field guidance below.

3. Field Guidance and *AFM* Update

The adjudicator is directed to comply with the guidance provided in the *AFM* as amended by this memorandum. Additionally, overseas adjudication officers can also find guidance on this issue, tailored to the overseas context, in the International Operations "Procedures for Adjudication of Form I-601 for Overseas Adjudication Officers" dated July 30, 2008 or subsequent revisions.

The *AFM* is updated as follows:

1. Chapter 30.1(d) of the *AFM* entitled "Unlawful Presence Under Section 212(a)(9) of the Act" is re-designated as Chapter 40.9 and
2. Chapter 40.9 and is amended as follows:

40.9 Aliens Previously Removed and Unlawfully Present (Section 212(a)(9) of the Act)

Section 212(a)(9) of the Act renders certain aliens inadmissible based on prior violations of U.S. immigration law. Section 212(a)(9) of the Act has three major subsections.

Under Section 212(a)(9)(A) of the Act, an alien, who was deported, excluded or removed under any provision of law, is inadmissible if the alien seeks admission to the

United States during the period specified in section 212(a)(9)(A) of the Act, unless the alien obtains consent to reapply for admission during this period.

Under section 212(a)(9)(B) of the Act, an alien is inadmissible if the alien has accrued a specified period of unlawful presence, leaves the United States after accruing the unlawful presence, and then seeks admission during the period specified in section 212(a)(9)(B)(i) (either 3 years or 10 years after the departure, depending on the duration of the accrued unlawful presence).

Under Section 212(a)(9)(C)(i) of the Act, an alien is inadmissible if the alien enters or attempts to enter the United States without admission after having been removed or after having accrued more than one year (in the aggregate) of unlawful presence.

AFM Chapter 40.9.2 provides an overview of USCIS' policy concerning the accrual of unlawful presence and the resulting inadmissibility under section 212(a)(9)(B) or section 212(a)(9)(C)(i)(I) of the Act.

40.9.1 Inadmissibility Based on Prior Removal (Section 212(a)(9)(A) of the Act) or Based on Unlawful Return after Prior Removal (Section 212(a)(9)(C)(i)(II) of the Act)) [Reserved]

40.9.2 Inadmissibility Based on Prior Unlawful Presence (Sections 212(a)(9)(B) and (C)(i)(I) of the Act)

Table of Contents

(D) Specific Requirements for Inadmissibility under Section 212(a)(9)(B)(i)(II) of the Act (The 10-Year Bar)

(E) Specific Requirements for Inadmissibility under Section 212(a)(9)(C)(i)(I) of the Act (The Permanent Bar)

(i) General Requirements

(ii) Special Note on the Effects of an Alien's Entry on Parole After Having Accrued More Than One (1) Year of Unlawful Presence

(5) Triggering the Bar by Departing the United States

(6) Triggering the 3-Year and the 10-Year Bar but not the Permanent Bar When Departing with Advance Parole or with a Refugee Travel Document

(A) Travel on Advance Parole Issued to Applicants for Adjustment of Status on Form I-512, Authorization for Parole of An Alien Into The United States, pursuant to 8 CFR 212.5(f) and 8 CFR 245.2(a)(4)

(B) Special Note on the Effect of an Alien's Entry on Parole after Having Accrued More Than One (1) Year of Unlawful Presence

(C) Travel on a Valid Refugee Travel Document Issued pursuant to Section 208(c)(1)(C) of the Act and 8 CFR 223.2

(7) Multiple Grounds of Inadmissibility and the Relationship Between Sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act

(8) Benefits That May Be Available Despite Inadmissibility under Section 212(a)(9)(B)(i)(I), (B)(i)(II), or (C)(i)(I) of the Act

(9) Effective Date of Sections 212(a)(9)(B) and (C)(i)(I) of the Act

(A) Effective Date

(B) The Child Status Protection Act and Its Influence on Unlawful Presence

(b) <u>Determining When an Alien Accrues Unlawful Presence</u>

(1) Aliens Present in Lawful Status or as Parolees

(A) Lawful Permanent Residents (LPRs)

(B) Lawful Temporary Residents (Section 245A(b) of the Act and 8 CFR 245a)

(C) Conditional Permanent Residents under Sections 216 and 216A of the Act

(D) Aliens Granted Cancellation of Removal or Suspension of Deportation

(E) Lawful Nonimmigrants

(i) Nonimmigrants Admitted until a Specific Date (Date Certain)

(ii) Nonimmigrants Admitted for Duration of Status (D/S)

(iii) Non-controlled Nonimmigrants (e.g. Canadian B-1/B-2)

(F) Other Types of Lawful Status

(i) Aliens in Refugee Status

(ii) Aliens Granted Asylum

(iii) Aliens Granted Temporary Protected Status (TPS) pursuant to Section 244 of the Act

(G) Aliens Present as Parolees

(2) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence by Statute for Purposes of Section 212(a)(9)(B) of the Act (Statutory Exceptions)

(A) Minors Who Are under 18 Years of Age

(B) Aliens with Pending Asylum Applications (Including Children Aging Out and Dependents of Asylum Applicants)

(C) Aliens Physically Present in the United States with pending Forms I-730

(D) Beneficiary of Family Unity Protection (FUP) Granted pursuant to Section 301 of the Immigration Act of 1990; 8 CFR 236.15

(E) Certain Battered Spouses, Parents, and Children

(F) Victims of Severe Form of Trafficking in Persons

(G) Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS] ("Tolling")

(3) Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence By Virtue of USCIS Policy for Purposes of Sections 212(a)(9)(B) and (C)(i)(I) of the Act

(A) Aliens with Properly Filed Pending Applications for Adjustment of Status or Registry (Sections 209, 245, 245(i), and 249 of the Act, Sections 202 of Public Law 99-603 Cuban Haitian Adjustment, Section 202(b) of the Nicaraguan Adjustment and Central American Relief Act (NACARA), section 902 of the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA))

(B) Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS)("Tolling")

(C) Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS) Who Depart the United States During the Pendency

(D) Nonimmigrants – Effect of a Decision on the Request for Extension of Status (EOS) or Change of Status (COS) on Unlawful Presence

(i) Approved Requests

(ii) Denials Based on Frivolous Filings or Unauthorized Employment

(iii) Denials of Untimely Applications

(iv) Denials for Cause of Timely Filed, Non-Frivolous Applications for EOS or COS

(v) Motion to Reopen/Reconsider

(vi) Appeal to the Administrative Appeals Office (AAO) of the Underlying Petition Upon Which an EOS or COS Is Based

(vii) Nonimmigrants – Multiple Requests for EOS or COS ("Bridge Filings") and Its Effect on Unlawful Presence

(E) Aliens with Pending Legalization Applications, Special Agricultural Worker Applications, and LIFE Legalization Applications

(F) Aliens granted Family Unity Program Benefits under Section 1504 of the LIFE Act Amendments of 2000

(G) Aliens with Pending Applications for Temporary Protected Status (TPS) pursuant to Section 244 of the Act

(H) Aliens Granted Voluntary Departure pursuant to Section 240B of the Act

(I) Aliens Granted Stay of Removal

(J) Aliens Granted Deferred Action

(K) Aliens Granted Withholding of Removal under Section 241(b)(3) of the Act or Withholding of Deportation under Former Section 243 of the Act

(L) Aliens Granted Withholding of Removal or Deferral of Removal under the United Nations Convention Against Torture Pursuant to 8 CFR 208.16 and 8 CFR 208.17

(M) Aliens Granted Deferred Enforced Departure (DED)

(N) Aliens Granted Satisfactory Departure under 8 CFR 217.3

(4) Effect of the Protection from the Accrual of Unlawful Presence on Previously Accrued Unlawful Presence: Protection from the Accrual of Unlawful Presence Does Not Cure Previously Accrued Unlawful Presence

(5) Effect of Removal Proceedings on Unlawful Presence

(A) Initiation of Removal Proceedings

(B) Effect of Filing an Appeal or Petition for Review on Unlawful Presence

(6) Effect of an Order of Supervision pursuant to 8 CFR 241.5 on Unlawful Presence

(c) <u>Relief from Inadmissibility under Section 212(a)(9)(B)(i)(I) and (II), and Section 212(a)(9)(C)(i)(I) of the Act</u>

(1) Waiver of the 3-Year Bar or the 10-Year Bar under Section 212(a)(9)(B)(i) of the Act

(A) Nonimmigrants

(B) Immigrants and Adjustment of Status Applicants Who Are the Spouses, Sons, or Daughters of U.S. Citizens or LPRs, and Fiancé(e) of U.S. Citizens

(C) Asylees and Refugees Applying for Adjustment of Status

(D) TPS Applicants

(E) Legalization under the CSS LULAC and NWRIP Class Settlement Agreements, and Legalization Applicants pursuant to 8 CFR 245a.2(k) and 8 CFR 245a.18

(2) Wavier of the Permanent Bar under Section 212(a)(9)(C)(i)(I) of the Act

(A) HRIFA and NACARA Applicants

(B) Legalization, SAW, LIFE Act Legalization, and Legalization Class Settlement Agreement Applicants

(C) TPS Applicants

(D) Certain Battered Spouses, Parents, and Children

(E) Asylee and Refugee Adjustment Applicants under Section 209(c) of the Act

(a) General Overview

If an alien, other than an alien lawfully admitted for permanent residence, accrues unlawful presence in the United States, he or she may be inadmissible pursuant to section 212(a)(9)(B)(i)(Three-year and Ten-year bars) or 212(a)(9)(C)(i)(I) of the Act (Permanent bar).

(1) **Outline of Section 212(a)(9)(B)(i) and Section 212(a)(9)(C)(i)(I) of the Act**

(A) **Section 212(a)(9)(B)(i) of the Act - The 3-Year and the 10-Year Bars**. Section 212(a)(9)(B)(i) is broken into two (2) sub-groups:

- Section 212(a)(9)(B)(i)(I) of the Act (3-year bar). This provision renders inadmissible for three (3) years those aliens, who were unlawfully present for more than 180 days but less than one (1) year, and who departed from the United States voluntarily prior to the initiation of removal proceedings.
- Section 212(a)(9)(B)(i)(II) of the Act (10-year bar). This provision renders inadmissible an alien, who was unlawfully present for one (1) year or more, and who seeks again admission within ten (10) years of the date of the alien's departure or removal from the United States.

Both bars can be waived pursuant to section 212(a)(9)(B)(v) of the Act.

(B) **Section 212(a)(9)(C)(i)(I) of the Act - The Permanent Bar**. This provision renders an individual inadmissible, if he or she has been unlawfully present in the United States for an aggregate period of more than one (1) year, and who enters or attempts to reenter the United States without being admitted. An alien, who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act is permanently inadmissible; however, after having been outside the United States for at least ten (10) years, he or she may seek consent to reapply for admission pursuant to section 212(a)(9)(C)(ii) of the Act and 8 CFR 212.2. A waiver is also available for certain Violence Against Women Act (VAWA) self-petitioners under section 212(a)(9)(C)(iii) of the Act. The 10-year absence requirement does not apply to a VAWA self-petitioner who is seeking a waiver under section 212(a)(9)(C)(iii) of the Act, rather than seeking consent to reapply under section 212(a)(9)(C)(ii) of the Act.

A DHS regulation at 8 CFR 212.2 addresses the filing and adjudication of an application for consent to reapply (filed on Form I-212). As stated by the Board of Immigration Appeals (BIA) in *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006), however, the consent to reapply regulation at 8 CFR 212.2 predates the enactment of section 212(a)(9)(C) of the Act and the related consent to reapply provision in section 212(a)(9)(A)(iii) of the Act. Thus, although the *filing procedures* in 8 CFR 212.2 are still in effect, the substantive requirements of section 212(a)(9) of the Act govern during the adjudication of Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation and Removal. A USCIS adjudicator must consider the specific requirements of section 212(a)(9)(C)(ii) of the Act when adjudicating Form I-212

that is filed by an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act. That is, because of the 10-year absence requirement for consent to reapply, section 212(a)(9)(C)(i)(I) of the Act is a permanent bar for which neither the retroactive nor the prospective grant of consent to reapply is possible. The regulatory language at 8 CFR 212.2(i) and (j) is not applicable, *see Torres-Garcia*, at 875, and the alien has to be physically outside the United States for a period of at least ten years since his or her last departure before being eligible to be granted consent to reapply. *See id.*, at 876. Finally, the regulatory language referring to the 5-year and the 20-year limitation on consent to reapply does not apply to section 212(a)(9)(C) of the Act; these limitations refer to former sections 212(a)(6)(A) and (B), the predecessors of current section 212(a)(9)(A) of the Act. *See id.* at 874 (for a historical analysis).

Also, an adjudicator should pay special attention to the possibility that an alien who is inadmissible under section 212(a)(9)(C)(i)(II) of the Act (because the alien entered or attempted to enter without admission after having been removed) may be subject to the reinstatement provision of section 241(a)(5) of the Act (reinstatement of removal orders).

(2) **Distinction Between "Unlawful Status" and "Unlawful Presence"**

To understand the operation of sections 212(a)(9)(B) and 212(a)(9)(C)(i)(I) of the Act, it is important to comprehend the difference between being in an unlawful immigration status and the accrual of unlawful presence ("period of stay not authorized"). Although these concepts are related (one must be present in an unlawful status in order to accrue unlawful presence), they are not the same.

As discussed in chapters 40.9.2(b)(2) and (3), there are situations in which an alien who is present in an unlawful status nevertheless does not accrue unlawful presence. As a matter of prosecutorial discretion, DHS may permit an alien who is present in the United States unlawfully, but who has pending an application that stops the accrual of unlawful presence, to remain in the United States while that application is pending. In this sense, the alien's remaining can be said to be "authorized." However, the fact that the alien does not accrue unlawful presence does *not* mean that the alien's presence in the United States is actually lawful.

> **Example 1:** An alien is admitted as a nonimmigrant, with a Form I-94 that expires on January 1, 2009. The alien remains in the United States after the Form I-94 expires. The alien's status becomes unlawful, and she begins to accrue unlawful presence, on January 2, 2009. On May 10, 2009, the alien properly files an application for adjustment of status. The filing of the adjustment application stops the accrual of unlawful presence. But it does not "restore" the alien to a substantively lawful immigration status. She is still amenable to removal as a deportable alien under section 237(a)(1)(C) of the Act because she has remained after the expiration of her nonimmigrant admission.

> **Example 2:** An alien is admitted as a nonimmigrant, with a Form I-94 that expires on January 1, 2009. On October 5, 2008, he properly files an application for adjustment of status. He does not, however, file any application to extend his nonimmigrant stay, which expires on January 1, 2009. The adjustment of status application is still pending on January 2, 2009. On January 2, 2009, he becomes subject to removal as a deportable alien under section 237(a)(1)(C) of the Act because he has remained after the expiration of his nonimmigrant admission. For purposes of future inadmissibility, however, the pending adjustment application protects him from the accrual of unlawful presence.

The application of section 245(k) of the Act is a good example of the importance of clearly distinguishing unlawful *status* from the accrual of unlawful presence. Guidance concerning section 245(k) may be found in chapter 23.5(d) of the *AFM*. If the requirements of section 245(k) are met, this provision relieves certain employment-based immigrants of ineligibility under section 245(c)(2), (c)(7) or (c)(8) of the Act for adjustment of status. For example, an alien who failed to maintain a lawful status after any entry is, ordinarily, ineligible for adjustment of status under section 245(c)(2) of the Act. Departure from the United States and return does, ordinarily, not relieve the alien of this provision. 8 CFR 245.1(d)(3). For an alien who is eligible for the benefit of section 245(k) of the Act, however, only a failure to maintain status since the *last lawful admission* is considered in determining whether the alien is subject to section 245(c)(2), (c)(7) or (c)(8) of the Act. AFM Chapter 23.5(d)(4). Unless the alien, since the last lawful admission failed to maintain lawful status for at least 181 days, section 245(k) of the Act relieves the alien of ineligibility under section 245(c)(2), (c)(7) or (c)(8) of the Act.

As stated in chapters 40.9.2(b)(2) and (3), some aliens who are actually present in an unlawful *status*, are, nevertheless, protected from accruing unlawful presence. But if their unlawful status continues for more than 180 days, in the aggregate, they would be ineligible for the benefit of section 245(k) of the Act, *even if they have accrued no unlawful presence for purposes of section 212(a)(9)(B)* of the Act.

> **Example 3:** An alien is admitted for "duration of status" as an F-1 nonimmigrant student. One year later, the alien drops out of school, and remains in the United States for one year after dropping out. The alien's status became unlawful when she dropped out of school. Neither USCIS nor an IJ ever makes a finding that the alien was out of status; therefore, she never accrues any unlawful presence for purposes of section 212(a)(9)(B) of the Act. Chapter 40.9.2(b)(1)(E)(ii). The alien eventually leaves the United States and returns lawfully as a nonimmigrant. While in nonimmigrant status, a Form I-140 is approved and the alien applies for adjustment of status. Because the alien failed to maintain a lawful status for more than 180 days during her prior sojourn, she is ineligible for adjustment under section 245(c)(2) of the Act, and section 245(k) of the Act does not relieve her of this ineligibility. Under section 245(k) of the Act, the alien is still eligible for adjustment, since the prior failure to maintain status does not apply to make the alien ineligible under section 245(c) of the Act. Also, the alien did not accrue

unlawful *presence* despite the prior unlawful *status,* and so the alien is not inadmissible under section 212(a)(9)(B) of the Act.

Example 4: The alien is admitted as a lawful nonimmigrant, and, while still in status, applies for adjustment of status on the basis of an approved I-140. While the Form I-485 is pending, the alien's EAD expires, and the alien fails to apply for a new EAD. Nevertheless, the alien continues to work after the EAD expires. The period of unauthorized employment exceeds 180 days. The alien would not be inadmissible under section 212(a)(9)(B) of the Act, since the pendency of the I-485 stopped the accrual of unlawful presence. Also, there has been no "departure" to trigger section 212(a)(9)(B) of the Act. Section 245(k) of the Act does not relieve the alien of ineligibility under section 245(c)(2) of the Act since the alien engaged in unauthorized employment for more than 180 days..

An alien who is present in a lawful status will not accrue unlawful presence as long as that lawful status is maintained.

(3) **Definition of Unlawful Presence and Explanation of Related Terms**

(A) **Unlawful Presence**. Section 212(a)(9)(B)(ii) of the Act defines "unlawful presence" for purposes of sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act to mean that an alien is deemed to be unlawfully present in the United States, if the alien is:

- present after the expiration of the period of stay authorized by the Secretary of Homeland Security; or
- present without being admitted or paroled.

(B) **Period of Stay Authorized (Authorized Stay)**. When nonimmigrants are admitted into the United States, the period of stay authorized is generally noted on Form I-94, Admission/Departure Record. Additionally, by policy, USCIS has designated other statuses - including some that are not actually lawful - as "periods of stay authorized." Please see the more detailed analysis in sections (b) and (c), below.

(C) **Admission**. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Div. C of Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, PL 104-208 (September 30, 1996)) amended section 101(a)(13) of the Act by removing the definition of the term "entry," and by replacing it with a definition of the terms "admission" and "admitted." Section 101(a)(13)(A) of the Act now defines "admission" and "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *See* section 101(a)(13)(A) of the Act. Section 101(a)(13)(B) of the Act furthermore clarifies that parole is not admission, and that an alien crewman, who is permitted to land temporarily in the United States, shall not be considered to have been admitted. *See* section 101(a)(13)(B) of the Act.

(D) **Parole**. Parole is the discretionary decision, under section 212(d)(5)(A) of the Act, to permit an inadmissible alien to leave the inspection facility free of official custody, so that, although the alien is not admitted, the alien is permitted to be physically present in the United States. By statutory definition, parole is not admission. *See* section 101(a)(13)(B) of the Act. An alien, who has been paroled under section 212(d)(5)(A) of the Act "[is] still in theory of law at the boundary line and [has] gained no foothold in the United States." *Leng May Ma v. Barber*, 357 U.S. 185, 188-189 (1958), *quoting Kaplan v. Tod*, 267 U.S. 228 (1925).

Parole may be granted on a case-by-case basis for urgent humanitarian reasons (humanitarian parole) or for significant public benefit. *See* section 212(d)(5)(A) of the Act and 8 CFR 212.5. Deferred inspection and advance parole are parole, as are individual port of entry paroles and paroles authorized while a person is overseas. Section 212(a)(9)(B)(ii) of the Act makes clear that an alien, who has been paroled, does not accrue unlawful presence as long as the parole lasts. For purposes of unlawful presence, the reason for the grant of parole is irrelevant. For more information on parole pursuant to section 212(d)(5) of the Act, *see* chapter 54 of the *AFM.*

Only parole under section 212(d)(5)(A) of the Act qualifies as parole for purposes of section 212(a)(9) of the Act. In an April 1999 memorandum and an August 1998 legal opinion (Legal Opinion No. 98-10, August 21, 1998), former INS suggested that a release under section 236 of the Act (conditional parole) could also be considered "parole" for purposes of adjustment of status under the Cuban Adjustment Act. The Board of Immigration Appeals (BIA) has rejected this interpretation in at least one unpublished decision. *See Matter of Ortega-Cervantes,* 2005 WL 649116 (BIA, January 6, 2005). The Ninth Circuit confirmed the BIA's decision and held that release under section 236 of the Act was not "parole" for purposes of adjustment of status. *See Ortega-Cervantes v. Gonzales*, 501 F.3d 1111 (9th Cir. 2007). DHS/Office of the General Counsel reconsidered that aspect of the 1999 memorandum, and the related 1998 legal opinion. On September 28, 2007, it issued a memorandum stating that release under section 236 of the Act is not deemed to be a form of parole under section 212(d)(5) of the Act. *See* September 28, 2007 Memorandum, Office of the General Counsel of the Department of Homeland Security, *Clarification of the Relation Between Release Under Section 236 and Parole Under Section 212(d)(5) of the Immigration and Nationality Act*. As of the release of this *AFM* chapter, the Ninth Circuit is the only circuit that has decided this issue, although several circuits have cases outstanding. If the adjudicator encounters the issue, he or she is advised to inquire with the USCIS Office of the Chief Counsel (Adjudications Law Division) about the status of any pending litigation or further developments.

(4) General Considerations when Counting Unlawful Presence Time Under Sections 212(a)(9)(B) and 212(a)(9)(C)(i)(I) of the Act

(A) **Unlawful Presence for Purposes of the 3-Year and 10-Year Bars Is Not Counted in the Aggregate**. Section 212(a)(9)(B)(i) of the Act only applies to an alien, who has accrued the required amount of unlawful presence during any single stay in the United States; the length of the alien's accrued unlawful presence is not calculated by combining periods of unlawful presence accrued during multiple unlawful stays in the United States. If, during any single stay, an alien has more than one (1) period during which the alien accrues unlawful presence, the length of each period of unlawful presence is added together to determine the total period of unlawful presence time accrued during that single stay.

Reminder: The statutory provisions of the 3-year and the 10-year bars became effective on or after April 1, 1997. An alien, who was unlawfully present in the United States prior to April 1, 1997, started to accrue unlawful presence on April 1, 1997, if he or she remained present in the United States at that time. An alien, who was unlawfully present in the United States prior to April 1, 1997, but departed prior to April 1, 1997, did not accrue any unlawful presence for purposes of section 212(a)(9)(B) of the Act.

Example 1: An alien's status becomes unlawful, and the alien begins to accrue unlawful presence on April 1, 2004. On September 1, 2004 (150 days after April 1, 2004), the alien files an adjustment of status application. The alien does not accrue unlawful presence while the adjustment application is pending. *See* section (b)(3)(A) of this *AFM* chapter. The adjustment application is denied on October 15, 2006 (administratively final decision). After the denial, the alien continues to remain in the United States unlawfully; the accrual of unlawful presence resumes on October 16, 2006, a day after the application is denied. The alien leaves the United States on January 1, 2007. At that time, the individual had accrued unlawful presence from April 1, 2004 to September 1, 2004, and again from October 16, 2006 to January 1, 2007. The total period of unlawful presence time accrued during this single unlawful stay exceeds 180 days. By departing the United States on January 1, 2007, the alien triggered the three-year bar and is inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

Example 2: An alien's status becomes unlawful, and the alien begins to accrue unlawful presence on April 1, 2004. On September 1, 2004, the alien leaves the United States. The alien returns unlawfully on October 15, 2006. He departs the United States again on January 1, 2007. Although the alien has been unlawfully present in the United States for more than 180 days in the aggregate, the unlawful presence was accrued during two (2) separate stays in the United States; during each of these stays, the alien accrued less than 180 days of unlawful presence. Thus, the alien is not inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

(B) **Unlawful Presence for Purposes of the Permanent Bar Is Counted in the Aggregate**. Under section 212(a)(9)(C)(i)(I) of the Act, the alien's unlawful presence is counted in the aggregate, i.e. the total amount of unlawful presence time is determined by adding together all periods of time during which an alien was unlawfully present in the United States on or after April 1, 1997. Therefore, if an alien accrues a total of more than one (1) year of unlawful presence time, whether accrued during a single stay or during multiple stays, departs the United States, and subsequently reenters or attempts to reenter without admission, he or she is subject to the permanent bar of section 212(a)(9)(C)(i)(I) of the Act.

> **Example**: An alien enters the United States unlawfully on April 1, 2004, and leaves on September 1, 2004. The alien has accrued about 150 days of unlawful presence at this time. She reenters the United States unlawfully on January 1, 2005 and stays until November 1, 2005. This time, the alien has accrued 300 days of unlawful presence. Although neither period of unlawful presence exceeds one (1) year, the aggregate period of unlawful presence does exceed one (1) year by totaling 450 days of unlawful presence, which the alien accrued during both stays. If the alien ever returns or attempts to return to the United States without being admitted, he or she will be inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

(C) **Specific Requirements for Inadmissibility under Section 212(a)(9)(B)(i)(I) of the Act (The 3-Year Bar)**. For the three-year bar to apply, the individual must have accrued at least 180 days but less than one (1) year of unlawful presence, and thereafter, must have departed voluntarily prior to the commencement of removal proceedings. Any period of unlawful presence accrued prior to April 1, 1997, does not count for purposes of section 212(a)(9)(B)(i)(I) of the Act.

The alien does not need a formal grant of voluntary departure by DHS for his or her departure to be considered voluntary. However, if DHS grants voluntary departure, the departure is still voluntary because removal proceedings have not yet commenced.

The statutory language of section 212(a)(9)(B)(i)(I) of the Act specifically requires that the alien must have departed the United States prior to the commencement of removal proceedings. Removal proceedings commence with the filing of the Notice to Appear (NTA) with the immigration court following service of the NTA on the alien. *See* 8 CFR 1003.14. An alien, who departs the United States after the NTA has been filed with the immigration court, therefore, is not subject to the three-year bar according to the statutory language. To avoid future inadmissibility, however, the alien must leave before he or she has accrued more than one year of unlawful presence, and becomes inadmissible under section 212(a)(9)(B)(i)(II) of the Act, rather than section 212(a)(9)(A)(i)(I) of the Act. This provision provides the alien with an incentive to end his or her unlawful presence by leaving the United States, rather that contesting removal.

The burden is on the applicant to establish that the NTA had already been filed by the time the applicant had departed. The record of proceedings before the immigration court will generally indicate when the NTA was actually filed, and the filing date shown in the court's record will be controlling.

Even if the applicant is not subject to the three-year or the ten-year bar, there may be other grounds of inadmissibility that apply based on the fact that the removal proceedings were initiated and the alien departed the United States during the proceedings. For example, a conviction that made the alien subject to removal as a deportable alien may also make the alien inadmissible.

(D) **Specific Requirements for Inadmissibility under Section 212(a)(9)(B)(i)(II) of the Act (The 10-Year Bar)**. An alien, who voluntarily departs the United States or who was removed from the United States after having been unlawfully present for more than one (1) year, triggers the 10-year bar to admission under section 212(a)(9)(B)(i)(II) of the Act. Any period of unlawful presence accrued prior to April 1, 1997 does not count for purposes of section 212(a)(9)(B)(i)(II) of the Act.

Unlike the 3-year bar, the 10-year bar applies even if the alien leaves after removal proceedings have commenced; the individual will be inadmissible, even if he or she leaves after the NTA has been filed with the immigration court. Moreover, filing the NTA does not stop the accrual of unlawful presence. 8 CFR 239.3.

(E) **Specific Requirements for Inadmissibility under Section 212(a)(9)(C)(i)(I) of the Act (The Permanent Bar)**

(i) General Requirements. To be permanently inadmissible under section 212(a)(9)(C)(i)(I) of the Act, an alien must have accrued more than one (1) year of unlawful presence in the aggregate, must have left the United States thereafter, and must then have entered or attempted to reenter the United States without being admitted. Any unlawful presence accrued prior to April 1, 1997, or any unlawful entry or attempted reentry into the United States prior to April 1, 1997, does not count for purposes of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act.

(ii) Special Note On the Effect of An Alien's Entry on Parole After Having Accrued More Than One (1) Year Of Unlawful Presence

Is an alien, who had accrued more than one (1) year of unlawful presence, and who is paroled into the United States but not admitted, subject to section 212(a)(9)(C)(i)(I) of the Act?

An alien's inadmissibility under section 212(a)(9)(C)(i)(I) of the Act is fixed at the time of the alien's unlawful entry or attempted reentry.

An alien who had accrued more than one (1) year of unlawful presence, and who has *never* returned or attempted to return without admission after that unlawful presence, and who is paroled into the United States pursuant to section 212(d)(5) of the Act, but not admitted, is not subject to inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. It is the Department of Homeland Security's (DHS) policy that for purposes of section 212(a)(9)(C)(i)(I) inadmissibility, an alien's parole is not deemed to be an "entry or attempted reentry without being admitted," even though parole is not considered admission. *See* section 101(a)(13)(B) and section 212(d)(5)(A) of the Act. This conclusion reflects the legal principle that, although a parolee is actually allowed to physically enter the United States, a parolee is deemed to be at a port of entry, pending a final decision on whether to admit the alien or not. *See Leng May Ma v. Barber*, 357 U.S. 185, 188-189 (1958), *quoting Kaplan v.Tod*, 267 U.S. 228 (1925).

As noted, however, an alien's inadmissibility for returning unlawfully after accruing sufficient unlawful presence is fixed at the time of the alien's unlawful return or attempt to return. Paroling an alien who is already inadmissible does not relieve the alien of inadmissibility. For example, if an alien who is already present in the United States without being admitted because he or she entered without inspection, and who, in the past, had accumulated unlawful presence in excess of one (1) year, is taken into custody, and then later paroled pursuant to section 212(d)(5) of the Act, the alien's parole would not relieve the alien of inadmissibility under section 212(a)(9)(C)(i) of the Act.

For a more detailed explanation and examples, please see (a)(6)(B) of this subsection, below.

(5) **Triggering the Bar by Departing the United States**

An alien must leave the United States after accruing more than 180 days or one (1) year of unlawful presence in order to trigger the 3-year or 10-year bar to admission under section 212(a)(9)(B) of the Act. This includes departures made while traveling after having approved advance parole or with a valid refugee travel document. *See* section (a)(6) of this chapter.

Note: By granting advance parole or a refugee travel document, USCIS does not authorize the alien's departure from the United States; it merely provides a means for the alien to return to the United States, regardless of admissibility. Therefore, even if the alien has an advance parole document, the alien's actual departure from the United States will still trigger the bar to inadmissibility under section 212(a)(9)(B) of the Act.

Section 212(a)(9)(C)(i)(I) of the Act does not explicitly mention "departure" as a prerequisite for the bar to apply. However, according to the wording of the statute, an alien with the requisite period of unlawful presence must "enter or attempt to enter without admission" in order to incur inadmissibility. Thus, the alien cannot violate the provision unless the alien leaves the United States and then returns or attempts to

return. *See Matter of Rodarte-Roman*, 23 I&N Dec. 905 (BIA 2006)(Departure triggers the bars; the IJ erred when denying adjustment of status because of the individual's accrual of unlawful presence in excess of one (1) year without departure.).

(6) **Triggering the 3-Year and the 10-Year Bars But Not the Permanent Bar When Departing with Advance Parole or with a Refugee Travel Document**

(A) **Travel on Advance Parole Issued to Applicants for Adjustment of Status on Form I-512, Authorization For Parole Of An Alien Into The United States, pursuant to 8 CFR 212.5(f) and 8 CFR 245.2(a)(4)**. An alien with a pending adjustment of status application, who has accrued more than 180 days of unlawful presence time, will trigger the bars to admission, if he or she travels outside the United States subsequent to the issuance of an advance parole document. When the alien presents the advance parole document at a port of entry, he or she may be permitted to return to the United States as a parolee because aliens who request parole into the United States are not required to establish admissibility under section 212(a) of the Act. However, the fact that the alien is permitted to return to the United States as a parolee does not confer a waiver of inadmissibility under section 212(a)(9)(B)(i)(I) and (II) of the Act. Consequently, a waiver under section 212(a)(9)(B)(v) of the Act would be required when determining the alien's eligibility to adjust status to lawful permanent residence.

(B) **A Special Note on the Effect on Section 212(a)(9)(C) of the Act of an Alien's Entry on Parole After Having Accrued More Than One (1) Year Of Unlawful Presence**. Parole is not admission. *See* section 101(a)(13)(B) of the Act. An individual is subject to section 212(a)(9)(C)(i)(I) of the Act, if he or she has accrued more than one (1) year of unlawful presence in the United States during a single stay or during multiple stays, who departs, and subsequently enters or attempts to reenter "without being admitted." The statutory language omits the word "parole" and makes it unclear whether an alien, who enters on parole, triggers the bar to inadmissibility under section 212(a)(9)(C) of the Act. Therefore, if an alien is paroled into the United States pursuant to section 212(d)(5)(A) of the Act after having accrued more than one (1) year of unlawful presence, is he or she inadmissible under section 212(a)(9)(C)(i)(I) of the Act because the alien was not "admitted"? The answer is "no" for the following reason:

An alien's inadmissibility pursuant to section 212(a)(9)(C)(i)(I) of the Act is fixed as of the date of the alien's entry or attempted reentry without being admitted. If an alien, who has accrued unlawful presence in excess of one (1) year, came to a port of entry and applied for admission to the United States or asked to be paroled into the United States, the alien will not be deemed to have attempted to enter the United States without "being admitted," if DHS actually paroles the alien. The significant point is that the alien will have arrived at a port of entry and presented himself or herself for inspection. If the alien is paroled, the alien will continue to be considered an applicant for admission, and so cannot be said to have entered or attempted to enter without admission. Thus, if DHS paroles the alien under section 212(d)(5) of the Act, the alien's departure and subsequent return as a parolee does not trigger the section 212(a)(9)(C)(i)(I)-bar for

purposes of a subsequent admissibility determination by DHS (such as at the time of the adjustment of status adjudication). This conclusion reflects the legal principle that, although a parolee is actually allowed to physically enter the United States, a parolee is deemed to be at a port of entry, pending a final decision on whether to admit the alien or not. *See Leng May Ma v. Barber*, 357 U.S. 185, 188-189 (1958), *quoting Kaplan v. Tod*, 267 U.S. 228 (1925).

> **Example**: An alien enters the United States on a B visa. The status expires on January 1, 2000. On January 2, 2000, the individual commences to accrue unlawful presence as having overstayed his or her period of admission The alien applies for adjustment of status on January 1, 2005. The individual is in authorized stay during the pendency of the adjustment of status application and does not accrue unlawful presence. *See* section (b)(3)(A) of this *AFM* chapter. Based on the pending adjustment application, the alien applies for advance parole (Form I-131), which is approved. The alien then leaves the United States on April 1, 2005; at this time, the alien has triggered the 10-year bar to admission to the United States because the alien had accrued unlawful presence in excess of one (1) year (from January 2, 2000, to January 1, 2005). On April 15, 2005, the alien returns to the United States through a port of entry, presents his advance parole document, and is paroled into the United States. The alien will not be considered to have triggered inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. Because the alien is currently a parolee, the alien is deemed to still be at the port of entry. At the time of the adjudication of the adjustment of status application, the alien's request for admission (through the adjustment of status application) will be decided. Thus, the individual is a parolee, he or she is not deemed to have "entered or attempted to reenter without being admitted." (Note: The alien still may be inadmissible under section 212(a)(9)(B) of the Act at the time of the adjustment of status application.)

By contrast, the parole of an alien after the alien had already become inadmissible under section 212(a)(9)(C)(i) would not relieve the alien of inadmissibility under section 212(a)(9)(C)(i) of the Act.

> **Example**: An alien enters the United States on a B visa. The status expires on January 1, 2000. On January 1, 2000, the alien commences to accrue unlawful presence for having overstayed his or her period of admission. The alien applies for adjustment of status on January 1, 2005. The alien departs the United States and returns illegally by crossing the border 30 miles west of the nearest port of entry on April 15, 2005. The alien is now inadmissible under section 212(a)(9)(C)(i)(I) of the Act. (An additional consequence, unrelated to the illegal entry, is that the alien also abandoned his or her adjustment application). Even if the alien were later taken into custody and paroled under section 212(d)(5) of the Act, or were to *later* travel and return on a grant of advance parole, the alien would remain inadmissible under section 212(a)(9)(C)(i)(I) of the Act since the

alien did, in fact, enter without admission after having accrued the requisite period of unlawful presence.

The instructions to Form I-131, Application for Travel Document, and Form I-485, Application to Register Permanent Residence or Adjust Status, as well as the standard Form I-512, Authorization for Parole of an Alien into the United States, include language warning the alien that traveling abroad and returning to the United States by using Form I-512 may make the alien inadmissible under section 212(a)(9)(B) of the Act.

(C) **Travel on a Valid Refugee Travel Document Issued pursuant to Section 208(c)(1)(C) of the Act and 8 CFR 223**. An asylee who had accrued more than 180 days of unlawful presence time prior to having filed the bona fide asylum application, will trigger the bar to admission, if he or she departs the United States while traveling on a valid refugee travel document. When the asylee presents the travel document at a port of entry, he or she can be permitted to reenter the United States to resume status as an asylee; however, the asylee will be inadmissible when he or she applies to adjust status to lawful permanent resident, and a waiver would be required at that time.

(7) **Multiple Grounds of Inadmissibility and the Relationship Between Sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act**

Sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act establish different grounds of inadmissibility based on prior unlawful presence. Whether a specific ground applies to an alien depends on an analysis of the facts of the person's case in light of that specific ground.

It is possible that the alien's immigration history makes the alien inadmissible under *both* section 212(a)(9)(B) of the Act and section 212(a)(9)(C)(i)(I) of the Act.

> **Example**: An alien with more than one (1) year of unlawful presence leaves the United States, thus triggering the 10-year bar to admissibility under section 212(a)(9)(B)(i)(II) of the Act. Three (3) years after the alien's last departure, the alien returns to the United States and enters illegally, thus without having been admitted. The alien is now inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(9)(C)(i)(I) of the Act.

Also, an alien with sufficient unlawful presence who is removed from the United States, may be inadmissible under section 212(a)(9)(A), as well as section 212(a)(9)(B)(i)(II) and/or section 212(a)(9)(C)(i) of the Act depending on the circumstances of the individual case.

(8) **Benefits That May Be Available Despite Inadmissibility under Section 212(a)(9)(B)(i)(I), (B)(i)(II), or (C)(i)(I) of the Act**

Section (c) of this chapter specifies forms of relief from inadmissibility under sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act ("Waivers"). Even without a grant of a waiver, aliens who are subject to these grounds of inadmissibility, may still obtain certain benefits as outlined below in (b)(2) and (b)(3), if otherwise eligible.

(A) **Under Section 212(a)(9)(B)(i)(I) or (II) of the Act**. An alien, who is inadmissible under section 212(a)(9)(B)(i) of the Act may apply for and receive, if eligible, a grant of:

- Registry under section 249 of the Act;
- Adjustment of status under section 202 of NACARA;
- Adjustment of status under section 902 of HRIFA;
- Adjustment of status under section 245(h)(2)(A) of the Act;
- Change to V nonimmigrant status under 8 CFR 214.15 (but the alien may need a waiver to obtain adjustment of status to LPR after having acquired V nonimmigrant status);
- LPR status pursuant to the LIFE Legalization Provision: A Legalization applicant under section 1104 of the LIFE Act may travel with authorization during the pendency of the application without triggering inadmissibility under section 212(a)(9)(B) of the Act. *See* 8 CFR 245a.13(e)(5).

(B) **Under Section 212(a)(9)(C)(i)(I) of the Act**. An alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act may apply for and receive, if eligible, a grant of:

- Registry under section 249 of the Act.

(C) **Special Concerns Regarding Section 245(i) - Applications**. The USCIS position is that inadmissibility under section 212(a)(9)(B) or (C) of the Act makes an alien ineligible for adjustment of status under section 245 of the Act, regardless of whether the alien applies under section 245(a) or section 245(i) of the Act. The BIA has endorsed this view. In *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007), the Board held that an alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act is not eligible for adjustment under section 245(i) of the Act. An alien who is inadmissible under section 212(a)(9)(B) of the Act is also ineligible for section 245(i) adjustment. *Matter of Lemus*, 24 I&N Dec. 373 (BIA 2007).

USCIS adjudicators will follow *Matter of Briones* and *Matter of Lemus* in all cases, regardless of the decisions of the 9th Circuit in *Acosta v. Gonzales,* 439 F.3d 550 (9th Cir. 2006) or of the 10th Circuit in *Padilla-Caldera v. Gonzales,* 453 F.3d 1237 (10th Cir. 2005). Following these Board cases, rather than *Acosta* and *Padilla-Caldera*, will allow the Board to reexamine the continued validity of these court decisions.

USCIS adjudicators should also be aware that the 9th Circuit has held that the Board's decision in *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006) is entitled to judicial

deference, and that the decision in *Perez-Gonzales v. Ashcroft,* 379 F.3d 783 (9th Cir. 2004), is no longer good law. *Gonzales v. Department of Homeland Security,* 508 F.3d 1227 (9th Cir. 2007).

(9) **Effective Date of Sections 212(a)(9)(B) and (C)(i)(I) of the Act**

(A) **Effective Date**. Only periods of unlawful presence spent in the United States after the April 1, 1997, effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act of 1997, PL 104-208 (September 30, 1996))(IIRIRA), count towards unlawful presence for purposes of section 212(a)(9)(B) and (C)(i)(I) of the Act.

For purposes of section 212(a)(9)(C)(i)(I) of the Act, one (1) full year of unlawful presence must have accrued. Therefore, the earliest an individual could have been subjected to this ground of inadmissibility was April 2, 1998.

(B) **The Child Status Protection Act and Its Influence on Unlawful Presence**. On August 6, 2002, the Child Status Protection Act (CSPA) (PL 107-208, August 6, 2002) was enacted to provide relief to certain children, who "aged-out" during the processing of certain applications. The CSPA applies to derivative children of asylum and refugee applicants, children of United States citizens, children of Lawful Permanent Residents (LPRs), and derivative beneficiaries of family-based, employment-based, and diversity visas. The CSPA changes how a child's age should be calculated for purposes of eligibility for certain immigration benefits; it does not change the definition of "child" pursuant to section 101(b)(1) of the Act.

The CSPA was effective on August 6, 2002. In general, its provisions are not retroactive: Any qualified petition or application that was pending on the effective date is subject to the provisions of the CSPA. For detailed information, please consult the policy memorandum, Domestic Operations, April 30, 2008, Revised Guidance for the Child Status Protection Act (AD07-04), or AFM Chapter 21.2(e).

Calculation of Unlawful Presence, if the CSPA Is Applicable: Any derivative beneficiary child who is in a "period of stay authorized" because of a pending application or petition, does not accrue unlawful presence merely because of his or her "aging-out," if the requirements and conditions of the CSPA are met. For more information about the applicability of the CSPA, *see AFM* sections describing individual types of immigration benefits and Chapter 21.2(e).

The CSPA applies only to those benefits expressly specified by the statute. Nothing in the CSPA provides protection for nonimmigrant visa holders (such as K or V nonimmigrants), or to NACARA, HRIFA, Family Unity, Cuban Adjustment Act, and Special Immigrant Juvenile Applicants, and/or derivatives. However, there may be

limited coverage for K-2 and K-4 individuals. *See* Chapter 21.2(e). This list is not exhaustive.

(b) Determining When an Alien Accrues Unlawful Presence

(1) Aliens Present in Lawful Status or as Parolees

An alien does not accrue unlawful presence, if he or she is present in the United States under a period of stay authorized by the Secretary of Homeland Security, or if he or she has been inspected and paroled into the United States and the parole is still in effect.

An alien who is present in the United States without inspection accrues unlawful presence from the date of the unlawful arrival, unless the alien is protected from the accrual of unlawful presence as described in this *AFM* chapter. Note that an alien, who arrived at a port of entry and obtained permission to come into the United States by making a knowingly false claim to be a citizen, is present in the United States without having been inspected and admitted. *See Matter of S--,* 9 I&N Dec. 599 (BIA 1962).

(A) **Lawful Permanent Residents (LPRs).** An alien lawfully admitted for permanent residence will not accrue unlawful presence unless the alien becomes subject to an administratively final order of removal by the IJ or the BIA (which means that during the course of proceedings, the alien was found to have lost his or her LPR status), or if he or she is otherwise protected from the accrual of unlawful presence. Unlawful presence will start to accrue the day after the order becomes administratively final, and not on the date of the event that made the alien subject to removal.

(B) **Lawful Temporary Residents (Section 245A(b) of the Act and 8 CFR 245a)**. A lawful temporary resident must file an application to adjust from temporary to permanent resident status before the beginning of the 43rd month from the date he or she was granted lawful temporary resident status. *See* 8 CFR 245a.3(a)(2). However, unlike conditional permanent residents, the status of a lawful temporary resident does not automatically terminate, if the alien fails to file a timely application, and the DHS needs to advise the alien of its intent to terminate his or her Temporary Residence Status. *See* section 245A(b)(2) of the Act, and 8 CFR 245a.2(u)(2). The same procedures apply, if the alien's status is terminated for the reasons specified in section 245A(b)(2) of the Act. Lawful Temporary Resident status also terminates upon the entry of a final order of deportation, exclusion, or removal. *See* 8 CFR 245.2(u)(2).

If the DHS advises the alien of its intent to terminate lawful temporary resident status, the alien continues to be a lawful temporary resident and does not accrue unlawful presence until a notice of termination is issued. If the termination is appealed, the period of authorized stay continues through the administrative appeals process. The termination of an alien's lawful temporary resident status cannot be reviewed in removal proceedings before an immigration judge. The alien would accrue unlawful presence

time during removal proceedings or while a petition for review is pending in Federal court.

(C) **Conditional Permanent Residents under Sections 216 and 216A of the Act**

(i) Termination upon the Entry of an Administratively Final Order of Removal. As is the case with other LPRs, an alien lawfully admitted for permanent residence on a conditional basis under section 216 or 216A of the Act begins to accrue unlawful presence upon the entry of an administratively final order of removal. A conditional LPR will also accrue unlawful presence before the entry of an administratively final removal order, if USCIS terminates the alien's conditional LPR status, as described below.

(ii) Automatic Termination. Pursuant to section 216 or section 216A of the Act, an alien, who was granted conditional permanent resident status must properly file a petition to remove the conditions placed on his or her status within the 90-day period immediately preceding the second anniversary of the date on which lawful permanent resident status on a conditional basis was granted. *See* Sections 216(c)(1) and 216A(c)(1) of the Act. The petition is filed on Form I-751, Petition to Remove Conditions of Residence, or on Form I-829, Petition by Entrepreneur to Remove Conditions. *See* 8 CFR 216.4 and 8 CFR 216.6. Failure to do so results in the automatic termination of conditional resident status and the initiation of removal proceedings at the expiration of the 90-day period, unless the parties can establish good cause for failure to file the petition. *See* section 216(c)(2) and 8 CFR 216.4(a)(6); section 216A(c)(2) and 8 CFR 216.6(a)(5); section 216(c)(4) and 8 CFR 216.5. The alien begins to accrue unlawful presence as of the date of the second anniversary of the alien's lawful admission for permanent residence. *See id.* Also, failure to appear for the personal interview that may be required by USCIS in relation to the I-751 or I-829 petition results in the automatic termination of the conditional legal permanent resident status, unless the parties establish good cause for the failure to appear. *See* section 216(c)(2)(A) of the Act and 8 CFR 216.4(b)(3); section 216A(c)(2)(A) of the Act and 8 CFR 216.6(b)(3).

(iii) Late Filings of the Petition to Remove the Conditional Basis Of LPR Status by the Alien. Current regulations at 8 CFR 216.4(a)(6) and 8 CFR 216.6(a)(5) allow a conditional resident to submit a late filing to USCIS, if jurisdiction has not yet vested with the immigration judge, and if certain requirements are met. If the late filed petition is accepted and approved, no unlawful presence time will be deemed to have accrued. If jurisdiction has already vested with the immigration judge, the judge may terminate removal proceedings upon joint motion by the alien and DHS. Consequently, if a late filing is accepted and approved while the alien is in proceedings, the alien will not accrue unlawful presence time. If, however, the late filing is rejected, the alien begins to accrue unlawful presence time on the date his or her status as a conditional resident automatically terminated.

(iv) Termination on Notice. If the DHS advises the alien of its intent to terminate conditional permanent resident status, the alien continues to be a conditional permanent resident and does not accrue unlawful presence until a notice of termination is issued. The alien begins to accrue unlawful presence on the day after the notice of termination is issued, unless the alien seeks review of the termination in removal proceedings. *See* 8 CFR 216.3.

(v) Review in Removal Proceedings. If the alien seeks review of the termination in removal proceedings, DHS bears the burden of proving that the termination was proper. Thus, the alien will be deemed not to accrue unlawful presence unless the immigration judge affirms the termination. *See* 8 CFR 216.3. If the immigration judge affirms the termination, the alien will begin to accrue unlawful presence on the day after the immigration judge's removal order becomes administratively final.

(D) **Aliens Granted Cancellation of Removal or Suspension of Deportation**. Section 240A of the Act provides for two (2) different types of cancellation of removal: cancellation of removal for an alien who has been admitted for permanent residence (section 240A(a) of the Act), and cancellation of removal and adjustment of status for certain aliens who have been present in the United States for a period of not less than ten (10) years (section 240A(b) of the Act). Therefore, the effect of a grant of cancellation of removal on the accrual of unlawful presence (or of suspension of deportation under former section 244 of the Act) depends on the alien's status immediately before relief was granted, and as outlined below:

- If an alien who has already acquired LPR status becomes subject to removal but applies for and receives a grant of cancellation of removal under section 240A(a) of the Act, or a grant of suspension of deportation under former section 244 of the Act, the alien retains his or her LPR status. No period of unlawful presence will have accrued because the grant of cancellation or suspension prevents the loss of LPR status.

- If an alien who is not already an LPR obtains a grant of cancellation of removal under section 240A(b) of the Act, or a grant of suspension of deportation under former section 244 of the Act, the alien becomes an alien lawfully admitted for permanent residence as of the date of the final decision granting relief. As such, the alien will no longer accrue unlawful presence after cancellation of removal or suspension of deportation is granted. Moreover, given the special nature of these forms of relief, any unlawful presence that may have accrued before the grant of cancellation of removal or suspension of deportation will be eliminated for purposes of any future application for admission.

  Example: An alien had accrued ten (10) years of unlawful presence in the United States, and is subsequently granted cancellation of removal. The

alien is now an LPR. If, after becoming an LPR, the alien travels abroad and returns to the United States through a port of entry, none of the pre-grant unlawful presence will be considered in determining the alien's admissibility. Section 212(a)(9)(B)(i) of the Act does not apply to LPRs.

(E) **Lawful Nonimmigrants**. The period of authorized stay for a nonimmigrant may end on a specific date or may continue for "duration of status (D/S)." Under current USCIS policy, nonimmigrants begin to accrue unlawful presence as follows:

(i) Nonimmigrants Admitted until a Specific Date (Date Certain). Nonimmigrants admitted until a specific date will generally begin to accrue unlawful presence the day following the date the authorized period of admission expires, as noted on Form I-94, Arrival/Departure Record. If USCIS finds, during the adjudication of a request for immigration benefit, that the alien has violated his or her nonimmigrant status, unlawful presence will begin to accrue either the day after Form I-94 expires or the day after USCIS denies the request, whichever is earlier. If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order or the day after the Form I-94 expired, whichever is earlier. It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated. Removal proceedings have no impact on whether an individual is accruing unlawful presence. *See* 8 CFR 239.3.

> **Example**: An individual is admitted in H-1B status until September 20, 2007, as evidenced on Form I-94, Arrival/Departure Record. On January 1, 2007, an NTA is issued and the individual is placed in removal proceedings. The individual will not start to accrue unlawful presence unless the immigration judge holds that the alien had violated his or her nonimmigrant status, or until his or her Form I-94 expires, whichever is earlier.

(ii) Nonimmigrants Admitted for Duration of Status (D/S). If USCIS finds a nonimmigrant status violation while adjudicating a request for an immigration benefit, unlawful presence will begin to accrue on the day after the request is denied. If an immigration judge makes a determination of nonimmigrant status violation in exclusion, deportation, or removal proceedings, unlawful presence begins to accrue the day after the immigration judge's order. It must be emphasized that the accrual of unlawful presence neither begins on the date that a status violation occurs, nor on the day on which removal proceedings are initiated. *See* 8 CFR 239.3.

(iii) Non-controlled Nonimmigrants (e.g. Canadian B-1/B-2). Nonimmigrants, who are not issued a Form I-94, Arrival/Departure Record, are treated as nonimmigrants admitted for D/S for purposes of determining unlawful presence.

(F) **Other Types of Lawful Status**

(i) Aliens in Refugee Status. In general, the period of authorized stay begins on the date the alien is admitted to the United States in refugee status. If refugee status is terminated, unlawful presence will start to accrue the day after the refugee status is terminated.

If the individual is a derivative refugee, either by accompanying or by following to join the principal, the alien will commence to accrue unlawful presence as follows:

- If the derivative refugee is outside the United States: The period of stay authorized begins on the date the alien either enters as an accompanying or following-to-join refugee pursuant to section 207(c)(2) of the Act and 8 CFR 207.7.

- If the derivative refugee is inside the United States: The accrual of unlawful presence ceases when USCIS accepts the filing of a bona fide Asylee/Refugee Relative Petition (Form I-730) on the individual's behalf. USCIS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to refugees and asylees alike. Therefore, once the bona fide Form I-730 petition is filed on behalf of the individual, the individual will be protected from the accrual of unlawful presence. No period of time during which the bona fide petition is pending shall be taken into account in determining the period of unlawful presence. If the petition is subsequently denied, the individual will again begin to accrue unlawful presence, if the individual has previously accrued unlawful presence.

- Because filing a Form I-730 stops the accrual of unlawful presence, but does not cure any unlawful presence that has already accrued, an individual who departs the United States during the pendency of the petition, with or without advance parole, will trigger the 3-year or the 10-year bar. In this case and because an individual seeking refugee status has to be admissible as an immigrant pursuant to section 207 of the Act, the individual will be required to file Form I-602, Application by Refugee For Waiver of Grounds of Excludability, to overcome the bars to admissibility before the Asylee/Refugee Relative Petition can be approved. If the alien is not permitted to reenter the United States, the individual will have to seek the waiver through the U.S. consulate where the approved I-730 is processed.

(ii) Aliens Granted Asylum. The period of authorized stay begins on the date the alien files a bona fide application for asylum. *See* section 212(a)(9)(B)(iii)(II) of the Act; *see also* section (b)(2)(B) of this chapter. This includes aliens, who entered the United States illegally but who were subsequently granted asylum. If asylum status is terminated, unlawful presence starts to accrue the day after the date of termination. A grant of asylum does not eliminate any prior periods of unlawful presence.

An individual who is included in the principal's asylum application (Form I-589) as a derivative beneficiary is in a period of stay authorized as of the date the principal

applicant is in a period of stay authorized (unless he or she works without authorization or it is deemed that the application for the derivative individual is not bona fide). However, if it is determined that the asylum application is not bona fide for reasons other than the ones to be attributed to the derivative beneficiary, the individual is in a period of stay authorized until the determination is made that the application by the principal was not bona fide. Also, if the principal works without authorization, the derivative beneficiary only commences to accrue unlawful presence at the time the determination is made that the principal had worked without authorization.

Finally, a derivative beneficiary, who is physically present in the United States, but who was not included on the asylum application, is protected from the accrual of unlawful presence once the qualifying asylee files an Asylee/Refugee Relative Petition on behalf of the individual. DHS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to all applicants for asylum, including derivative beneficiaries, who obtain their status through an Asylee/Refugee Relative Petition.

(iii) Aliens Granted Temporary Protected Status (TPS) pursuant to Section 244 of the Act. If an alien's TPS application has been granted, the alien is deemed to be in lawful nonimmigrant status for the duration of the grant. *See* section 244(f) of the Act. Please *see* (b)(3)(G) of this section of this *AFM* chapter for the effect of a violation of TPS status on the accrual of unlawful presence, and for the effect of a pending TPS application on the accrual of unlawful presence.

If an alien is granted TPS, he or she is, while the grant is in effect, deemed to be in lawful nonimmigrant status for purposes of adjustment of status and change of status according to section 244(f) of the Act.

A grant of TPS does not, however, cure any unlawful presence that may have accrued before the grant of TPS. If the alien was present without inspection and admission or parole, the alien remains an alien who has not been inspected and admitted or paroled, despite the grant of TPS. *See* INS General Counsel Opinion, 91-27, March 4, 1991. Therefore, if before TPS is granted, the applicant had previously accrued unlawful presence sufficient to trigger the bars, and the applicant travels outside the United States after having obtained advance parole, his or her departure triggers the bars for purposes of an adjustment of change of status application; that is, the individual may be ineligible to adjust despite the wording of section 244(f) of the Act, and depending on the basis upon which the alien seeks adjustment. Also, if a waiver was granted for inadmissibility under section 212(a)(9)(B) or (C) of the Act for purposes of the TPS application, the alien is still inadmissible for purposes of adjustment of status because the standard of the waiver granted for TPS status is different than the one granted in relation to an immigrant benefits application (although both are filed on Form I-601, Application for Waiver of Grounds of Inadmissibility).

(G) **Aliens Present as Parolees**. Section 212(a)(9)(B)(ii) of the Act makes clear that an alien, who has been paroled, does not accrue unlawful presence as long as the parole lasts. For purposes of the accrual of unlawful presence, the specific type of parole and the reasons for the grant of parole do not matter; however, conditional parole pursuant to section 236 of the Act cannot be considered parole for purposes of section 212(a)(9)(B)(ii) of the Act. *See* section 40.9.1(a)(3)(D) of this *AFM* chapter.

An alien, who has been paroled into the United States does, however, begin to accrue unlawful presence as follows:

When a parolee remains in the United States beyond the period of parole authorization, unlawful presence begins to accrue the day following the expiration of the parole authorization.

> **Example**: The alien's parole expires January 1, 2007, and the alien does not depart. January 2, 2007 will be the alien's first day of unlawful presence.

If the parole authorization is revoked or terminated prior to its expiration date, unlawful presence begins to accrue the day after the revocation or termination.

An alien paroled for the purpose of removal proceedings will begin to accrue unlawful presence the day after the date the removal order becomes administratively final, or unless the alien is otherwise protected from the accrual of unlawful presence.

(2) **Aliens Present in Unlawful Status Who Do not Accrue Unlawful Presence by Statute for Purposes of Section 212(a)(9)(B) of the Act (Statutory Exceptions)**

As noted in section (a)(2) of this *AFM* chapter, an alien must be in the United States in an unlawful status in order to accrue unlawful presence; however, there are some situations in which unlawful presence does not accrue despite unlawful status. The alien may be protected from accruing unlawful presence by section 212(a)(9)(B) of the Act itself, or by USCIS policy. This section (b)(2) deals with individuals, who are actually in unlawful status but who, by statute, do not accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act.

The exceptions listed in this section (b)(2) apply *only* to grounds of inadmissibility listed in section 212(a)(9)(B) of the Act, and *do not* apply for purposes of inadmissibility under section 212(a)(9)(C) of the Act. There are two reasons for this conclusion: 1) The terms of sections 212(a)(9)(B)(iii) and (iv) of the Act refer *only* to specific subsections of section 212(a)(9)(B)(i) of the Act; and 2) Inadmissibility under section 212(a)(9)(C)(i)(I) of the Act rests on a more serious immigration violation than simple unlawful presence: To be inadmissible under section 212(a)(9)(C)(i)(I) of the Act, the alien must not only have accrued sufficient unlawful presence but also returned or attempted to return to

the United States without admission. Since the precise language of sections 212(a)(9)(B)(iii) and (iv) of the Act clearly make them apply only to inadmissibility under section 212(a)(9)(B) of the Act and not to inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, and because violations of section 212(a)(9)(C)(i)(I) of the Act are more culpable than mere unlawful presence, USCIS has concluded that these statutory exceptions do not apply to section 212(a)(9)(C)(i)(I) cases. *See* June 17, 1997, Office of Programs memorandum – *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Immigration and Nationality Act (Act)*; *see also* Section (b)(3) below for the same remark.

(A) **Minors Who Are under 18 Years of Age**. An alien whose unlawful status begins before his or her 18th birthday does not begin to accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act until the day after his or her 18th birthday pursuant to section 212(a)(9)(B)(iii)(I) of the Act.

(B) **Aliens with Pending Asylum Applications (Including Children Aging Out and Dependents of Asylum Applicants)**

(i) Principal Applicant. An alien, whose bona fide application for asylum is pending, is in an authorized period of stay and does not accrue unlawful presence for purposes of section 212(a)(9)(B) of the Act unless the alien is employed without authorization while the application is pending. *See* section 212(a)(9)(B)(iii)(II) of the Act. It does not matter whether the application is or was filed affirmatively or defensively.

DHS has interpreted the phrase "bona fide asylum application" to mean a properly filed asylum application that has a reasonably arguable basis in fact or law, and is not frivolous. If this is the case, unlawful presence does not accrue while the application is pending unless the alien engages in unauthorized employment. DHS considers the application for asylum to be pending during any administrative or judicial review (including review in Federal court).

A denial of an asylum claim is not determinative of whether the claim was bona fide for purposes of section 212(a)(9)(B)(iii)(II) of the Act. Similarly, the abandonment of an application for asylum does not mean that the application was not bona fide. The Asylum Division within the Refugee, Asylum, and International Operations Directorate at USCIS' HQ can provide guidance regarding whether a filing of an asylum application can be deemed "bona fide" based on the specific facts of the case and should be contacted, if there are any questions as to the determination.

(ii) Dependents in General.
An individual who is included in the principal's asylum application (Form I-589) as a derivative beneficiary is in a period of stay authorized as of the date the principal applicant is in a period of stay authorized (unless he or she works without authorization or it is deemed that the application for the derivative individual is not bona fide).

However, if it is determined that the asylum application is not bona fide for reasons other than the ones to be attributed to the dependent, the individual is in a period of stay authorized, for example until the determination is made that the application was not bona fide. Also, if the principal works without authorization, the derivative beneficiary only commences to accrue unlawful presence at the time the determination is made that the principal had worked without authorization.

A dependent's asylum case is no longer considered pending if the principal asylum applicant notifies USCIS that the dependent is no longer part of the principal's application, or if USCIS determines that the dependent relationship no longer exists (for example because of divorce, or if the individual is no longer considered a "child"). In such cases, USCIS will remove the individual from the pending asylum application; the individual must file his or her own asylum application as a principal applicant within a reasonable amount of time. The individual will commence to accrue unlawful presence from the time USCIS has removed the dependent from the principal's application. Individuals, who do file a bona fide application within a reasonable period of time, will be deemed to have a pending application and they do not accrue unlawful presence from the time the new bona fide application is pending.

Finally, a derivative beneficiary, who is physically present in the United States but who was not included on the asylum application, is in a period of stay authorized at the time the qualifying asylee files an Asylee/Refugee Relative Petition on behalf of the individual. DHS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to all applicants for asylum, including derivative beneficiaries who obtain their status through an Asylee/Refugee Relative petition.

Adjudicators should keep in mind that if the principal asylum applicant's dependent is not yet 18 years old, then the dependent will be protected from accrual of unlawful presence under section 212(a)(9)(B)(iii)(I) of the Act.

(iii) Children Who Age Out and The Child Status Protection Act (CSPA). The CSPA amended section 208(b)(3)(B) of the Act to allow continued classification as a child for an unmarried son or daughter, who was under 21 years of age on the date the parent filed for asylum, provided that the son or daughter turned 21 years of age while the application remained pending. Therefore, if the requirements of the CSPA are met (the alien is present in the United States, named in the asylum application of his or her parent, and the application was pending on or after August 6, 2002) the individual may continue to be classified as a "child" and can be considered to have a pending application. Thus, unlawful presence does not accrue in such cases.

Example: Form I-589, Application for Asylum and for Withholding of Removal, was filed on February 7, 2000, listing a 20-year old derivative son in the United States. The son turned 21 on October 1, 2000. The application remained pending through August 6, 2002, and continues to be pending. For purposes of the asylum application, the son

continues to be a "child" because the application was filed prior to his 21st birthday. The son will not start to accrue unlawful presence until and unless the application is denied.

(C) **Aliens Physically Present in the United States with pending Forms I-730**
Accrual of unlawful presence stops upon the filing of a bona fide Asylee/Refugee Relative Petition (Form I-730). USCIS interprets the language of section 212(a)(9)(B)(iii)(II) of the Act to apply to refugees and asylees alike. Therefore, once the bona fide petition is properly filed on behalf of the individual, the individual will no longer accrue unlawful presence.

If the alien was already accruing unlawful presence when the Form I-730 was filed, and the Form I-730 is subsequently denied, the individual will again begin to accrue unlawful presence on the day after the denial of the petition. If, at the time of the filing of the Form I-730, the alien was protected from the accrual of unlawful presence (for example, was in lawful status or had another application pending), but the other basis for protection expired while the Form I-730 was pending, then the alien will begin to accrue unlawful presence on the day after the denial of the Form I-730.

No period during which the bona fide Form I-730 was pending will be counted in determining the accrual of unlawful presence. Since the filing of a Form I-730 does not cure any unlawful presence that has already accrued, if the individual departs during the pendency of the petition, the individual will trigger the 3-year and the 10-year bar, if, prior to the filing of the petition, the individual has already accrued sufficient unlawful presence. Because a refugee has to be admissible as an immigrant pursuant to section 207 of the Act, the individual, upon his return to the United States, will be required to file Form I-602, Application By Refugee For Wavier of Grounds of Excludability, to overcome the bars to admissibility before Form I-730 can be granted to confer derivative refugee status. If the alien departs without advance parole, the individual will have to seek the waiver through the U.S. consulate where the approved Asylee/Refugee Relative Petition will be processed.

(D) **Beneficiary of Family Unity Protection (FUP) Granted pursuant to Section 301 of the Immigration Act of 1990; 8 CFR 236.15**. No period of time in which an alien is a beneficiary of FUP shall be taken into account in determining the period of unlawful presence in the United States, for purposes of section 212(a)(9)(B) of the Act. If the FUP application (Form I-817) is approved, the accrual of unlawful presence will be deemed to have stopped as of the date of the filing of Form I-817, Application for Family Unity Benefits, and will continue through the period the alien retains FUP protection. The grant of FUP protection does not, however, erase prior unlawful presence.

The filing of Form I-817, by itself, does not stop the accrual of unlawful presence. If the Form I-817 is denied, the individual will continue to accrue unlawful presence as if no Form I-817 had been filed.

Section 212(a)(9)(B)(iii)(III) of the Act, by its terms, applies only to Family Unity Program benefits under section 301 of the Immigration Act of 1990. Congress provided similar benefits under section 1504 of the LIFE Act Amendments of 2000. As a matter of policy, USCIS treats section 1504 FUP cases the same as section 301 FUP cases, for purposes of the accrual of unlawful presence. See *AFM* chapter 40.9.2(b)(3)(F), below.

(E) **Certain Battered Spouses, Parents, and Children**. An approved VAWA self-petitioner and his or her child(ren) can claim an exception from inadmissibility under section 212(a)(9)(B)(i) of the Act, if he or she can establish a substantial connection between the abuse suffered, the unlawful presence, and his or her departure from the United States. He or she claims this exception by submitting evidence of such substantial connection with his or her adjustment application. If the exception is granted, the individual is deemed to not be inadmissible under section 212(a)(9)(B)(i) of the Act for purposes of future immigration benefits. This exception does not apply to inadmissibility under section 212(a)(9)(C)(i) of the Act, which has its own VAWA waiver in section 212(a)(9)(C)(iii) of the Act.

(F) **Victims of Severe Form of Trafficking in Persons**. Section 212(a)(9)(B)(i) of the Act does not apply to certain victims of severe forms of trafficking. *See* section 212(a)(9)(B)(iii)(V) of the Act. Similar to the battered spouses, a victim of a severe form of trafficking in persons may claim an exception to inadmissibility under section 212(a)(9)(B)(i) of the Act, if he or she can demonstrate that the severe form of trafficking (as that term is defined in section 7102 of Title 22 U.S.C.) was at least one central reason for the alien's unlawful presence in the United States. An individual can claim the exception by submitting evidence of the central reason with Form I-914, Application for T Nonimmigrant Status, or, at the time of the adjustment, when filing Form I-485, Application to Register Permanent Residence or Adjust Status. 8 CFR 214.11; 8 CFR 245.23 If the exception is granted by USCIS, the individual will be deemed to have never accrued any unlawful presence for purposes of the current nonimmigrant benefits application or any future benefits application.

If the exception is not granted, the individual may apply for a discretionary waiver of the ground of inadmissibility. If seeking T nonimmigrant status, the alien would apply under section 212(d)(3)(A) or 212(d)(13) of the Act by filing Form I-192, Advance Permission to Enter as Nonimmigrant. See 8 CFR 212.16. If the alien is already a T nonimmigrant, and is seeking adjustment of status, the alien would file Form I-601, Application for Waiver Grounds of Inadmissibility. See 8 CFR 212.18.

(G) **Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS)("Tolling")**. Pursuant to section 212(a)(9)(B)(iv) of the Act, a nonimmigrant, who has filed a timely request for extension of nonimmigrant status (EOS) or change of nonimmigrant status (COS), is protected from accruing unlawful presence during the pendency of the application for up to 120 days (the accrual of unlawful presence is "tolled"). Section 212(a)(9)(B)(iv) of the Act is only applicable to the three-year bar of section 212(a)(9)(B)(i)(I) of the Act, and is also referred to as the

"tolling-provision." However, unlawful presence for purposes of the 3-year bar will only be tolled, if

1) the alien has been lawfully admitted or paroled into the United States, and

2) the application for EOS or COS is timely filed, and not frivolous, and

3) the alien does not engage and/or has not been engaging in unauthorized employment. *See* section 212(a)(9)(B)(iv) of the Act.

By policy, USCIS has extended the 120-day statutory tolling period to cover the entire period during which an application for EOS or COS is pending; this extension is valid for the 3-year and the 10-year bars. For a more detailed description of this extension and guidance concerning whether unlawful presence accrues after the 120-day period specified by the statute, please *see* section 3(C) below.

(3) **Aliens Present in Unlawful Status Who Do not Accrue Unlawful Presence by Virtue of USCIS Policy for Purposes of Sections 212(a)(9)(B) and (C)(i)(I) of the Act**

As noted in section (a)(2) of this *AFM* chapter, there are some circumstances in which an alien whose status is actually unlawful is, nevertheless, protected from the accrual of unlawful presence. As a matter of policy, USCIS has determined that an alien whose status is actually unlawful does not accrue unlawful presence in the situations described in this subsection. These exceptions are based on policy, unlike the statutory exceptions listed in sections 212(a)(9)(B)(iii) and (iv) of the Act that were discussed in section (b)(2) of this *AFM* chapter. It is USCIS' policy that these exceptions apply to unlawful presence accrued for purposes of sections 212(a)(9)(B) and (C)(i)(I) of the Act unless otherwise noted in this section.

(A) **Aliens with Properly Filed Pending Applications for Adjustment of Status or Registry (Sections 209, 245, and 245(i) of the Act, sections 202 of Public Law 99-603 (Cuban-Haitian Adjustment), section 202(b) of NACARA, section 902 of HRIFA, and aliens with properly filed, pending Registry applications under section 249 of the Act)**. Accrual of unlawful presence stops on the date the application is properly filed pursuant to 8 CFR 103 and the regulatory filing requirements governing the particular type of benefit sought. Note that, if the application is properly filed according to the regulatory requirements, the applicant will not accrue unlawful presence, even if it is ultimately determined that the applicant was not eligible for the benefit in the first place. The accrual of unlawful presence is tolled until the application is denied.

Example: An alien, who has been unlawfully in the United States for 90 days, and who had worked without authorization during the 90 days, applies for adjustment of status based on an approved I-130, Petition for Alien Relative. The

application for adjustment of status is properly filed, that is, the application is fully executed, signed, and the applicant pays the proper fee. *See* 8 CFR 103.2(a)(7). Also, with the application package, the alien provides a copy of Form I-797, Notice of Approval for the Alien Relative Petition, and a copy of the newest Visa Bulletin, demonstrating that a visa number is immediately available in his or her preference category. *See* 8 CFR 245.2. Therefore, USCIS accepts the application and stamps it as received and properly filed as of January 1, 2007. What is not readily apparent from the initial review of the application is that the alien had previously worked without authorization, and therefore, he or she is not eligible to apply for adjustment of status pursuant to section 245(c) of the Act. However, because the application was accepted by USCIS as (technically) properly filed, the applicant is now in authorized stay and does not accrue any unlawful presence during the pendency of the properly filed application for adjustment of status.

At the time of the interview, on April 1, 2007, the applicant's adjustment of status application is denied based on section 245(c) of the Act, for having been employed without authorization. On April 2, 2007, the alien's accrual of unlawful presence resumes because he or she no longer has a pending application for adjustment of status. The alien departs the United States on May 1, 2007, after having secured an immigrant visa interview at the US Embassy/consular section in his or her home country. In assessing the alien's inadmissibility under section 212(a)(9) of the Act, the consular officer will count the alien's 90 days of unlawful presence that accrued prior to the filing of the adjustment of status application, and the 30 days of unlawful presence that accrued after the adjustment of status application was denied. However, the consular officer will not count the time period during which the adjustment of status application was pending because the individual was in a period of stay authorized and did not accrue unlawful presence during the pendency of the adjustment application. In total, the alien had accrued 120 days of unlawful presence in the United States; the alien is not inadmissible under section 212(a)(9)(B) of the Act.

Except in the case of a NACARA or HRIFA application, the application must have been filed affirmatively (with USCIS) rather than defensively (before the immigration judge as a form of relief from removal) for it to toll the accrual of unlawful presence; that is, an alien, who files an application for adjustment of status after being served with a Notice to Appear (NTA) in removal proceedings, is not protected from the accrual of unlawful presence. Accrual of unlawful presence resumes the day after the application is denied. However, if the application that was filed with USCIS is denied, and the alien has a legal basis upon which to renew the application in proceedings before an immigration judge, the protection against the accrual of unlawful presence will continue through the administrative appeal. *See* for example for adjustment of status applications under section 245 of the Act: 8 CFR 245.2(a)(5)(ii) and 8 CFR 1245.2(a)(5)(ii).

(B) **Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS)("Tolling")**. As noted in 40.9.2(b)(2)(G) of this AFM chapter, by statute, an alien does not accrue unlawful presence for up to 120 days while a non-frivolous EOS or COS application is pending, provided that the alien does not work and/or has not worked unlawfully. This is referred to as "tolling:" while the application is pending after having been properly filed, the alien will not accrue unlawful presence. The above described statutory exception applies to section 212(a)(9)(B)(i)(I) of the Act; it does not apply to section 212(a)(9)(B)(i)(II) or (C)(i)(I) of the Act.

However, according to USCIS policy, an alien does not accrue unlawful presence (the accrual of unlawful presence is tolled), and is considered in a period of stay authorized for purposes of sections 212(a)(9)(B)(i)(I), (B)(i)(II), and (C)(i)(I) of the Act during the entire period a properly filed EOS or COS application is pending, if the EOS or COS application meets the following requirements:

- the non-frivolous request for EOS or COS was filed timely. To be considered timely, the application must have been filed with USCIS, i.e. be physically received (unless specified otherwise, such as mailing or posting date) before the previously authorized stay expired. *See* 8 CFR 103.2(a)(7); 8 CFR 214.1(c)(4); 8 CFR 248.1(b). An untimely request may be excused in USCIS' discretion pursuant to 8 CFR 214.1(c)(4) and 8 CFR 248.1(b); and
- the alien did not work without authorization before the application for EOS or COS was filed or while the application is pending; and
- the alien has not failed to maintain his or her status prior to the filing of the request for EOS or COS.

If these requirements are met, the period of authorized stay covers the 120-day tolling period described in section 212(a)(9)(B)(iv) of the Act and extends to the date a decision is issued on the request for EOS or COS.

A request for EOS or COS may be filed on Form I-539, Application to Extend/Change Nonimmigrant Status, or may be included in the filing of Form I-129, Petition for a Nonimmigrant Worker.

Please *see* Section 40.9.2(b)(2)(G) of this *AFM* chapter for a detailed description of the statutory tolling provision under section 212(a)(9)(B)(iv) of the Act, covering *only* inadmissibility under section 212(a)(9)(B)(i)(I) of the Act.

(C) **Nonimmigrants with Pending Requests for Extension of Status (EOS) or Change of Status (COS) Who Depart the United States During the Pendency**. Departure from the United States while a request for EOS or COS is pending, does not subject an alien to the 3-year, 10-year, or permanent bar, if he or she departs after the expiration of Form I-94, Arrival/Departure Record unless the application was frivolous,

untimely, or the individual had worked without authorization. D/S nonimmigrants, who depart the United States while an application for COS or EOS is pending, generally do not trigger the 3-year, 10-year, or permanent bar under sections 212(a)(9)(B)(i) or 212(a)(9)(C)(i)(I) of the Act.

- Evidentiary Considerations: If the applicant subsequently applies for a nonimmigrant visa abroad, the individual has to establish to the satisfaction of the consular officer that the application was timely filed and not frivolous. The requirement that the application was timely may be established through the submission of evidence of the date the previously authorized stay expired, together with a copy of a dated filing receipt, a canceled check payable to USCIS for the EOS or COS application, or other credible evidence of a timely filing.

- Determination by a Consular Officer that the Application Was Non-Frivolous: To be considered non-frivolous, the application must have an arguable basis in law and fact, and must not have been filed for an improper purpose (such as to prolong one's stay to pursue activities inconsistent with one's status). In determining whether an EOS or COS application was non-frivolous, DOS has instructed consular posts that it is not necessary to make a determination that USCIS would have ultimately ruled in favor of the alien. *See* 9 Foreign Affairs Manual (*FAM*) 40.92 Notes, Note 5c.

(D) **Nonimmigrants - Effect of a Decision on the Request for Extension of Status (EOS) or Change of Status (COS) on Unlawful Presence**. The following information pertains to applications requesting EOS or COS, or petitions that include requests for EOS or COS.

(i) Approved Requests. If a request for EOS or COS is approved, the alien will be granted a new period of authorized stay, retroactive to the date the previous period of authorized stay expired. This applies to aliens admitted until a specific date and aliens admitted for D/S.

(ii) Denials Based on Frivolous Filings or Unauthorized Employment. If a request for EOS or COS is denied because it was frivolous or because the alien engaged in unauthorized employment, any and all time after the expiration date marked on Form I-94, Arrival/Departure Record, will be considered unlawful presence time, if the alien was admitted until a specific date. However, if the alien was admitted for D/S, unlawful presence begins to accrue on the date the request is denied.

(iii) Denials of Untimely Applications. If a request for EOS or COS is denied because it was not timely filed, unlawful presence begins to accrue on the date Form I-94 expired. If, however, the alien was admitted for D/S, unlawful presence begins to accrue the day after the request is denied.

(iv) Denials for Cause of Timely Filed, Non-Frivolous Applications for EOS or COS. If a timely filed, non-frivolous request for EOS or COS is denied for cause, unlawful presence begins to accrue the day after the request is denied.

(v) Motion to Reopen/Reconsider. The filing of a motion to reopen or reconsider does not stop the accrual of unlawful presence. *See* 8 CFR 103.5(a)(iv) (Effect of motion or subsequent application or petition). However, if the motion is successful and the benefit granted, the grant is effective retroactively. The alien will be deemed to not have accrued unlawful presence. If DHS reopens proceedings, but ultimately denies the petition or application again, the petition or application will be considered to have been pending since the initial filing date. Thus, unlawful presence will accrue as specified in paragraphs (ii), (iii) or (iv). In the case of a timely, non-frivolous application, unlawful presence will accrue from the date of the last denial of the petition or application, not from the earlier, reopened decision.

(vi) Appeal to the Administrative Appeals Office (AAO) of the Underlying Petition Upon Which an EOS or COS Is Based. If an individual applies for an EOS or COS as part of an I-129, Petition for Nonimmigrant Worker, the adjudicator has to adjudicate two requests: The petition seeking a particular classification, and the request for an EOS or COS.

The denial of an EOS or COS cannot be appealed. *See* 8 CFR 214.1(c)(5) and 248.3(g). However, the denial of the underlying petition for the status classification can, in general, be appealed. The filing of an appeal to the AAO for the denial of the underlying petition, however, has no influence on the accrual of unlawful presence. Unlawful presence starts to accrue on the day of the denial of the request for EOS or COS regardless of whether the applicant or the petitioner appeals the denial of the petition to the AAO. However, if the denial of the underlying petition is reversed on appeal, and the EOS or COS subsequently granted, the individual is not deemed to have accrued any unlawful presence between the denial of the petition and request for EOS or COS, and the subsequent grant of the EOS or COS.

(vii) Nonimmigrants - Multiple Requests for EOS Or COS ("Bridge Filings") and Its Effect on Unlawful Presence. The terms "authorized status" (authorized period of admission or lawful status) and "period of stay authorized by the Secretary of Homeland Security" are not interchangeable. They do not carry the same legal implications. *See* Section (a)(2) of this *AFM* chapter. An alien may be in a period of stay authorized by the Secretary of Homeland Security but not in an authorized status.

An alien whose authorized status expires while a timely filed request for EOS or COS is pending, is in a period of stay authorized by the Secretary of Homeland Security. The alien does not accrue unlawful presence as long as the timely filed request is pending. However, the filing of a request for EOS or COS does not put an individual into valid

and authorized nonimmigrant status, i.e. he or she is not in authorized status. Therefore, if an individual has filed an initial application for EOS or COS and subsequently files additional (untimely) requests for EOS or COS, the subsequently filed request will not stop the individual from accruing unlawful presence, if the initial request is denied.

(E) **Aliens with Pending Legalization Applications, Special Agricultural Worker (SAW) Applications, and LIFE Legalization Applications**. An alien who properly filed an application under section 245A of the Act (including an applicant for Legalization under any Legalization-related Class Settlement Agreements), section 210 of the Act, or section 1104 of the LIFE Act, is in a period of authorized stay as long as the application remains pending. Accrual of unlawful presence stops on the date the application is filed and resumes the day after the application is denied. However, if the denial is appealed, the period of authorized stay continues through the administrative appeals process. Denied applications cannot be renewed before an immigration judge. Therefore, the period of authorized stay does not continue through removal proceedings or while a petition for review is pending in Federal court.

(F) **Aliens granted Family Unity Program Benefits under section 1504 of the LIFE Act Amendments of 2000**

Section 212(a)(9)(B)(III)(iii) of the Act, by its terms, applies only to Family Unity Program (FUP) benefits under section 301 of the Immigration Act of 1990. Congress provided similar benefits under section 1504 of the LIFE Act Amendments of 2000. As a matter of policy, USCIS treats section 1504 FUP cases the same as section 301 FUP cases, for purposes of the accrual of unlawful presence.

As with section 301 FUP cases, if the Form I-817 is approved, then the alien will be deemed not to accrue unlawful presence from the Form I-817 filing date throughout the period of the FUP grant.

A grant of FUP benefits under section 1504 does not, however, erase any unlawful presence accrued before the grant of FUP benefits under section 1504 of the LIFE Act Amendments of 2000.

Also, as with section 301 FUP cases, the filing of Form I-817, by itself, does not stop the accrual of unlawful presence. If the Form I-817 is denied, the individual will continue to accrue unlawful presence as if no Form I-817 had been filed.

(G) **Aliens with Pending Applications for Temporary Protected Status (TPS) pursuant to Section 244 of the Act**. The period of authorized stay begins on the date a prima facie application for TPS is filed, provided the application is ultimately approved. If the application is approved, the period of authorized stay continues until TPS status is terminated. If the application is denied, or if prima facie eligibility is not established, unlawful presence accrues as of the date the alien's previous period of authorized stay

expired. The application for TPS can be renewed in removal proceedings pursuant to 8 CFR 244.11 and 8 CFR 1244.11, and the period of authorized stay continues through removal proceedings.

(H) **Aliens Granted Voluntary Departure pursuant to Section 240B of the Act**
Voluntary departure is a discretionary relief that allows certain favored aliens to leave the country willingly. Voluntary departure can either be granted by DHS, by the immigration judge, or the Board of Immigration Appeals (BIA). The length of the voluntary departure period that can be granted depends on the stages of proceedings the alien is in. If the alien is not in removal proceedings, DHS can grant voluntary departure for up to 120 days. *See* section 240B(a) and 8 CFR 240.25. The denial of voluntary departure at this stage, cannot be appealed; however, the denial is without prejudice to the alien for a later application of voluntary departure in removal proceedings. See 8 CFR 240.25(e).

If the alien is in removal proceedings but these proceedings are not yet completed, or if the alien's proceedings are at the conclusion, the immigration judge or the judge at the BIA, may grant voluntary departure. *See* section 240B(a) or (b) of the Act; 8 CFR 1240.26. If the IJ denies voluntary departure, the denial can be appealed to the BIA. 8 CFR 1240.26(g). The time period granted can be up to 120 days if granted prior to completion, or up to 60 days if granted at the conclusion of proceedings. See 8 CFR 1240.26(e). Under certain circumstances, the voluntary departure period can be extended, or voluntary departure reinstated. Voluntary departure is always granted in lieu of removal proceedings or a final order of removal. Therefore, if an alien timely departs according to the voluntary departure period, the alien is not subject to a final order of removal. However, if the alien fails to depart, and there was an alternate order of removal, the alternate order will be become effective upon the alien's failure to depart. *See* 8 CFR 1240.26(d).

On December 18, 2008, the Department of Justice amended the voluntary departure rule; the changes became effective on January 20, 2009 and apply prospectively only. 73 FR 76927 (December 18, 2008). The new rules clarified the relationship between voluntary departure and the filing of a motion to reopen/reconsider or petition for review. It also clarified the impact of the failure to post bond on voluntary departure and the alternate order of removal.

General Rule for the Accrual of Unlawful Presence in Connection With A Grant of Voluntary Departure: Accrual of unlawful presence stops on the date an alien is granted voluntary departure and resumes on the day after voluntary departure expires, if the alien has not departed the United States according to the terms of the grant of voluntary departure.

(i) Voluntary Departure Granted by DHS pursuant to 8 CFR 240.25 (Including Extension of Voluntary Departure). If DHS grants voluntary departure before initiation of removal

proceedings, time spent in voluntary departure does not add to an alien's unlawful presence. A grant of voluntary departure prior to the initiation of removal proceedings may not exceed 120 days. *See* section 240B(a)(2) of the Act. Pursuant to 8 CFR 240.25, voluntary departure may be extended at the discretion of the Field Office Director, except that the total period allowed, including any extensions, may not exceed the 120-day limit. Courts may not extend voluntary departure but they may reinstate voluntary departure.

(ii) Voluntary Departure Granted Pursuant to Section 240B of the Act after the Initiation of Removal Proceedings. If a person is granted voluntary departure after commencement of removal proceedings, unlawful presence ceases to accrue with the grant, and resumes after the expiration of the voluntary departure period. Voluntary departure after the initiation of removal proceedings is governed by section 240B(b) of the Act and 8 CFR 1240.26.

If the immigration judge grants voluntary departure, the alien is not subject to the 3-year bar because of the wording of section 212(a)(9)(B)(i)(I) of the Act. However, the fact that proceedings commenced does not stop the accrual of unlawful presence time for purposes of the 10-year and the permanent bar. *See* 8 CFR 239.3.

(iii) Reversal of a Denial of Voluntary Departure. If the denial of voluntary departure by the Immigration Judge is reversed on appeal by the BIA, the time from the denial to the reversal will be considered authorized stay in the United States (Remember: A denial of voluntary departure by USCIS cannot be appealed.)

(iv) Reinstatement of Voluntary Departure by the Board Of Immigration Appeals (BIA) or the Immigration Judge. An immigration judge or the BIA may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntary departure, and if reopening was granted prior to the expiration of the original period of voluntary departure. *See* 8 CFR 1240.26(h). In no event can the reinstatement of voluntary departure result in a total period of time, including any reinstatement, exceeding the 60 or the 120 days of voluntary departure stated in section 240B of the Act. If voluntary departure is reinstated by the BIA or by the immigration judge, the time from the expiration of the grant of voluntary departure to the grant of reinstatement is not considered authorized stay. However, the time of the reinstated voluntary departure to the ending period of this voluntary departure, is considered authorized stay. Reinstatement of voluntary departure is regulated at 8 CFR 1240.26(h).

(v) Effect of a Petition for Review. In a case involving a grant of voluntary departure before January 20, 2009, if a Federal court with jurisdiction to review the removal order stays the running of the voluntary departure period while the case is pending, the alien will continue to be considered to be under a grant of voluntary departure and will not accrue unlawful presence.

For any EOIR grant of voluntary departure on or after January 20, 2009, however, the filing of a petition for review terminates a grant of voluntary departure and makes the alternate removal order immediately effective. 8 CFR 1240.26(i). If the alien files a petition for review, therefore, the alien will no longer be protected from the accrual of unlawful presence based on the voluntary departure grant. If the alien remains in the United States while the petition is pending, the accrual of unlawful presence will begin the day after the petition for review is filed. This regulation, however, gives the alien 30 days after filing the petition for review in order to leave the United States voluntarily. If the alien leaves within this 30-day period, the alien will continue to be protected from the accrual of unlawful presence up to the date of the alien's actual departure.

(vi) Voluntary Departure and the Filing of A Motion to Reopen To the Board of Immigration Appeals (BIA)

A motion to reopen is a form of procedural relief that asks the BIA to change its decision in light of newly discovered evidence or a change in circumstances since the hearing. *See Dada v. Mukasey*, 128 S.Ct. 2307, 2315 (2008). In general, a motion to reopen has to be filed within 90 days. *See* 240(c)(7) of the Act. Therefore, an alien granted voluntary departure for a period of up to 60 days is either faced with the choice of departing according to the voluntary departure order, or to make use of his or her statutory right to file the motion to reopen and to await the result of the adjudication of the motion.

In 2008, the Supreme Court addressed the issue and held that to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally and without regards to the underlying merits of the motion to reopen, a voluntary departure request before expiration of the departure period. *See Dada v. Mukasey*, 128 S.Ct. 2307, 2320 (2008). As a result, the alien has the option either to abide by the terms and receive the agreed upon benefits of voluntary departure; or, alternatively, to forego those benefits and remain in the United States to pursue an administrative motion.

Therefore, if an alien was initially granted voluntary departure by the immigration judge or the Board of Immigration Appeals before January 20, 2009, but the alien later requests withdrawal of the voluntary departure order, the alien will commence to accrue unlawful presence at the time of the administratively final order of removal unless the alien is otherwise protected from the accrual of unlawful presence (such as the grant of a stay of removal by the BIA). The motion to reopen does not toll voluntary departure. If the alien requests a withdrawal of the voluntary departure order, the alien will accrue unlawful presence as if voluntary departure had never been granted even if the request for withdrawal is made, for example, on the last day of the voluntary departure period.

The *Dada* decision does not apply, however, to any EOIR grant of voluntary departure that is made on or after January 20, 2009. Under 8 CFR 1240.26(b)(3)(iii), filing a

motion to reopen or reconsider during the voluntary departure period automatically terminates the grant of voluntary departure, and makes the alternative removal order effective immediately. Thus, for a grant of voluntary departure on or after January 20, 2009, the alien will no longer be protected from the accrual of unlawful presence beginning the day after the date the alien files a motion to reopen or to reconsider.

(I) **Aliens Granted Stay of Removal**. A stay of removal is an administrative or judicial remedy of temporary relief from removal. The grant of a stay of removal can be automatic or discretionary. *See* sections 240(b)(5) and 241(c)(2) of the Act; 8 CFR 241.6, 8 CFR 1241.6, 8 CFR 1003.6, and 8 CFR 1003.23(b)(1)(v). During a grant of stay of removal, DHS is prevented from executing any outstanding order of removal, deportation, or exclusion. Therefore, an alien granted stay of removal does not accrue unlawful presence during the period of the grant of stay of removal. A stay of removal does not erase any previously accrued unlawful presence.

If an individual is ordered removed in absentia pursuant to section 240(b)(5)(A) of the Act, and he or she challenges the order in a motion to rescind the in absentia order pursuant to section 240(b)(5)(C) of the Act, the alien's removal order will be stayed automatically until the motion is decided. *See* section 240(b)(5)(C) of the Act. The order will be stayed through a possible appeal to the Board of Immigration Appeals (BIA) or Federal court. *See Matter of Rivera-Claros*, 21 I&N Dec. 232 (BIA 1996). For purposes of section 212(a)(9)(B) and (C)(i)(I) of the Act, an individual, who filed a motion to rescind an in absentia order of removal pursuant to section 240(b)(5)(C) of the Act, will not accrue unlawful presence during the pendency of the motion, including any stages of appeal before the BIA or Federal court.

(J) **Aliens Granted Deferred Action**. A DHS field office director may, in his or her discretion, recommend deferral of (removal) action, an act of administrative choice in determining, as a matter of prosecutorial discretion, to give some cases lower enforcement priority. Deferred action is, in no way, an entitlement, and does not make the alien's status lawful. Deferred action simply recognizes that DHS has limited enforcement resources and that every attempt should be made administratively to utilize these resources in a manner which will achieve the greatest impact under the immigration laws. There is no specific authority for deferred action codified in law or regulation although certain types of benefits refer to a grant of deferred action. For more information on Deferred Action, please *see* Detention and Removal Operations Policy and Procedure Manual (DROPPM), Chapter 20.8.

Accrual of unlawful presence stops on the date an alien is granted deferred action and resumes the day after deferred action is terminated. The granting of deferred action does not eliminate any prior periods of unlawful presence.

(K) **Aliens Granted Withholding of Removal under Section 241(b)(3) of the Act or Deportation under Former Section 243 of the Act**. Accrual of unlawful presence

stops on the date that withholding is granted and continuous through the period of the grant.

(L) **Aliens Granted Withholding of Removal or Deferral of Removal under the United Nations Convention Against Torture Pursuant to 8 CFR 208.16 and 8 CFR 208.17**. Accrual of unlawful presence stops on the date that withholding or deferral is granted and continuous through the period of the grant.

(M) **Aliens Granted Deferred Enforced Departure (DED)**. The period of authorized stay begins on the date specified in the Executive Order or other Presidential directive and ends when DED is no longer in effect.

(N) **Aliens Granted Satisfactory Departure under 8 CFR 217.3**. Under 8 CFR 217.3(a), a Visa Waiver Program (VWP) alien, who obtains a grant of satisfactory departure from U.S. Immigration and Customs Enforcement, and who leaves during the satisfactory departure period, is deemed to not have violated his or her VWP admission. Thus, unlawful presence will not accrue during the satisfactory departure period, if the alien departs as required. If the alien remains in the United States after the expiration of the grant of satisfactory departure, unlawful presence will begin to accrue the day after the satisfactory departure period expires unless some other provision or policy determination protects the person from accrual of unlawful presence. *See* section (b) of this *AFM* chapter.

(4) **Effect of the Protection from the Accrual of Unlawful Presence on Previously Accrued Unlawful Presence: Protection from the Accrual of Unlawful Presence Does Not Cure Previously Accrued Unlawful Presence**

Unless stated otherwise, protection from the accrual of unlawful presence under any section of this *AFM* chapter does *not* cure any unlawful presence that the alien may have already accrued before the alien came to be protected.

> **Example**: An alien accrues 181 days of unlawful presence. He or she then applies for adjustment of status. Although the alien had accrued 181 days of unlawful presence before he or she applied for adjustment of status, the alien stops to accrue unlawful presence once the adjustment of status application is properly filed. However, the already accrued unlawful presence of 181 days continues to apply to the alien. If the alien departs after having obtained a grant of advance parole, the individual will be subject to the 3-year bar under section 212(a)(9)(B)(i)(I) of the Act.

(5) **Effect of Removal Proceedings on Unlawful Presence**

(A) **Initiation of Removal Proceedings**. The initiation of removal proceeding has no effect, neither to the alien's benefit nor to the alien's detriment, on the accrual of unlawful presence. *See* 8 CFR 239.3. If the alien is already accruing unlawful presence

when removal proceedings are initiated, the alien will continue to accrue unlawful presence unless the alien is protected from the accrual of unlawful presence (as described in these *AFM* chapters). If the alien is not accruing unlawful presence when removal proceedings begin, the alien will continue to be protected from the accrual of unlawful presence until the immigration judge determines that the individual has violated his or her status, or until Form I-94, Arrival/Departure Record expires, whichever is earlier (and regardless of whether the decision is subsequently appealed).

Example 1: An alien, who is present without inspection, is placed in proceedings. The alien was already accruing unlawful presence when placed in proceedings, and will continue to do so while in proceedings unless a provision described in this A*FM* chapter stops the accrual of unlawful presence.

Example 2: An alien, admitted as an LPR, is placed in removal proceedings because of a criminal conviction. As an LPR, the alien does not accrue unlawful presence. The alien will not begin to do so unless the alien becomes subject to a final order of removal, that is, when LPR status is terminated.

Example 3: An alien, admitted as a nonimmigrant for duration of status, is placed in removal proceedings. The alien does not accrue unlawful presence while the proceedings are pending. If the immigration judge rules in the alien's favor on the removal charge, no unlawful presence applies to the alien. If the immigration judge sustains the removal charge, unlawful presence begins to accrue the day after the immigration judge's decision becomes administratively final.

Example 4: An alien is admitted as a nonimmigrant until January 10, 2011. On March 15, 2009, DHS places the alien in removal proceedings, claiming that the alien had violated a condition of admission. On May 1, 2010, the immigration judge sustains the removal charge, and the alien appeals. The Board of Immigration Appeals affirms the decision. Once the removal order becomes administratively final, the alien will accrue unlawful presence from May 2, 2010, the day after the immigration judge's order.

Example 5: An alien is admitted as a nonimmigrant until January 10, 2011. On March 15, 2009, DHS places the alien in removal proceedings, claiming that the alien had violated a condition of admission. On May 1, 2010, the immigration judge rules in the alien's favor and dismisses the removal charge. The alien will not be deemed to have accrued any unlawful presence.

Example 6: An alien in unlawful status properly files with USCIS an adjustment of status application. USCIS denies the application and places the alien in proceedings. The alien renews the application before the Immigration Judge. Because the alien is renewing an affirmative application that had stopped the

accrual of unlawful presence, the alien does not accrue unlawful presence while the adjustment application is pending before the IJ.

Example 7: An alien whose nonimmigrant admission ended on November 6, 2008, is placed in removal proceedings. On February 6, 2009, the alien files an adjustment application with the immigration judge. The alien had never filed with USCIS. Because the application is not the "renewal" of an affirmative application, filing the application with the immigration judge does not stop the accrual of unlawful presence.

Example 8: Same facts as in Example 7, except that the alien's application is under NACARA or HRIFA. In this situation, filing the application *does* stop the accrual of unlawful presence.

Example 9: An alien is admitted as a nonimmigrant until January 10, 2011. On March 15, 2009, DHS places the alien in removal proceedings, claiming that the alien had violated a condition of admission. Removal proceedings are still pending on January 11, 2011. Regardless of the outcome of the proceedings, the alien will accrue unlawful presence the day after the I-94 expires, that is, on January 11, 2011.

The result in Example 9 is consistent with *Matter of Halabi,* 15 I&N Dec.105 (BIA 1974), where the Board of Immigration Appeals (BIA) held that the expiration of the alien's authorized period of stay rendered the alien subject to removal without the need to resolve the original charge listed in the Notice to Appear (in *Halabi*, the individual was originally charged with having violated his status). The BIA indicated that being able to charge the alien as a visa overstay from the date the alien's period of authorized stay expired, although while in removal proceedings, did not "punish" the alien for contesting the original removal charge. *See Halabi*, at 106; *see also Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471, 491 (1999) (Removal of an alien, who has remained longer than authorized, is not punishment but simply a matter of the alien's "being held to the terms under which he was admitted."); *cf. Westover v. Reno,* 202 F.3d 475 (1st Cir. 2000) (dicta), and *Halabi* at 107-08 (Roberts, Board Chair, dissenting). The alien may avoid any accrual of unlawful presence, for example, by offering to settle the removal proceeding by agreeing to leave the United States no later than the date his or her status expires in return for dismissal of the charge of having violated his or her status before that date. *See* 8 CFR 239.2(a)(4) (notice to appear may be cancelled, if alien has left the United States). Leaving at the expiration of the period of authorized stay and the resulting dismissal of removal proceedings would also avoid the risk of a ruling against the alien on the original charge of having violated his or her status before it expired.

(B) **Effect of Filing an Appeal or Petition for Review on Unlawful Presence**. As noted, the initiation of removal proceedings does not affect the accrual of unlawful presence. *See* 8 CFR 239.3. Thus, the fact that an alien or DHS files an appeal to the Board of Immigration Appeals (BIA) or seeks judicial review of a removal order or the relief granted, does *not* affect the alien's position in relation to the accrual of unlawful presence. If the Board or a Federal court vacates the removal order, however, the alien will not be deemed to have accrued unlawful presence solely on the basis of the vacated removal order. If the Board or the Federal court affirms the removal order, the alien will be deemed to have accrued unlawful presence from the date of the immigration judge's order, unless the alien was already accruing unlawful presence on that date.

(6) **Effect of an Order of Supervision pursuant to 8 CFR 241.5 on Unlawful Presence**

Unless protected by some other provision included in this *AFM* chapter, an alien present in an unlawful status continues to accrue unlawful presence despite the fact that the alien is subject to an order of supervision under 8 CFR 241.5.

(c) Relief from Inadmissibility under Section 212(a)(9)(B)(i)(I) and (II), and Section 212(a)(9)(C)(i)(I) of the Act

(1) **Waiver of the 3-Year Bar or the 10-Year Bar under Section 212(a)(9)(B)(i) of the Act**

(A) **Nonimmigrants**. If a nonimmigrant is inadmissible, the nonimmigrant may apply for advance permission to enter as a nonimmigrant despite his or her inadmissibility pursuant to section 212(d)(3) of the Act, which is granted in the discretion of the Secretary of Homeland Security. If the alien is an applicant for a nonimmigrant visa at the American consulate, the alien will have to apply for this type of temporary permission through the consulate. The application is adjudicated by the United States Customs and Border Protection (CBP), Admissibility Review Office (ARO) pursuant to section 212(d)(3)(A)(i) of the Act. If the alien is an applicant at the U.S. border for admission because he or she is not required to apply for a visa (other than visa waiver applicants), the application is filed with a CBP designated port of entry or designated Preclearance office. See section 212(d)(3)(A)(ii) and 8 CFR 212.4.

If the nonimmigrant status applicant is an applicant for T or U visa status, the applicant has to file Form I-192 with USCIS at the Vermont Service Center (VSC).

(B) **Immigrants and Adjustment of Status Applicants Who Are the Spouses, Sons, or Daughters of U.S. Citizens or LPRs, and Fiancé(e)s of U.S. Citizens**. DHS has discretion to waive an alien's inadmissibility under section 212(a)(9)(B) of the Act if the alien is applying for an immigrant visa or adjustment of status and the alien is the spouse, son, or daughter of a U.S. citizen or LPR, or the fiancé(e) of a U.S. citizen (in

relation to a K-1/K-2 visa). The alien must establish that denying the alien's admission to the United States, or removing the alien from the United States would result in extreme hardship to the alien's U.S. citizen or LPR spouse, parent, or the K visa petitioner. *See* section 212(a)(9)(B)(v) of the Act; *see* 8 CFR 212.7(a). The application is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility, with the respective fee as stated in 8 CFR 103.7(b). There is no judicial review available, if the waiver is denied but the denial can be appealed to the Administrative Appeals Office of USCIS pursuant to 8 CFR 103.

If the alien seeks a waiver in relation to an application for a K-1 or K-2 visa, approval of the waiver is conditioned on the K-1's marrying the citizen who filed the K nonimmigrant visa petition within the statutory time of three (3) months from the day of the K-1 nonimmigrant's admission. The reason for this condition is that, at the time of the issuance of the K-1 or K-2 nonimmigrant visa, the K-1 and K-2 nonimmigrants are not yet legally related to the petitioner in the manner required by section 212(a)(9)(B)(v) of the Act. If the K-1 nonimmigrant does not marry the petitioner, and the K-1 and K-2 nonimmigrants do not acquire LPR status on that basis, USCIS may ultimately deny the Form I-601.

There is no waiver available to an alien parent if only his or her U.S. citizen or LPR child experiences extreme hardship on account of the mother's or father's removal.

(C) **Asylees and Refugees Seeking Adjustment of Status**. Section 212(a)(9)(B) grounds of inadmissibility can be waived for Asylees and Refugees seeking adjustment of status pursuant to section 209(c) of the Act. Such aliens must file Form I-602, Application by Refugee For Waiver of Grounds of Excludability. Under current USCIS policy, it is within the adjudicator's discretion to determine whether the waiver can be granted without requiring the filing of Form I-602. *See AFM* chapter 41.6; October 31, 2005, Domestic Operations memorandum – *Re: Waiver under Section 209(c) of the Immigration and Nationality Act (AFM* Update 05-33*).*

Normally, waiver applications for refugees are handled overseas before a person is approved for refugee classification. *See* 8 CFR 207.3(b). However, if a ground of inadmissibility arose after the alien's approval for refugee classification, or if the ground was not known to the officer who made such approval, the waiver may be sought and adjudicated as part of the refugee adjustment process. *See AFM* Chapter 23.6 (Asylee and Refugee Adjustment).

(D) **TPS Applicants**. Section 212(a)(9)(B) of the Act may be waived for humanitarian purposes, to assure family unity, or when it would be in the public interest to grant the waiver. The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility. *See* section 244 of the Act; 8 CFR 244.3.

Granting a waiver to a TPS applicant for purposes of the TPS application does not waive any grounds of inadmissibility in connection with a subsequent application for adjustment of status, although both are filed on Form I-601. This is because the standard for adjustment of status applicants to have a ground of inadmissibility waived is generally an "extreme hardship"- standard for section 212(a)(9)(B) of the Act (3-year and 10-year bars), and not the lesser standard for TPS, i.e. the standard that the waiver may be granted for "humanitarian purposes, to assure family unity, or public interest."

Therefore, if an adjustment of status applicant, who was previously granted TPS status, presents an approved Form I-601 to the adjudicator, the adjudicator should not accept this approved Form I-601 as evidence that the alien is not inadmissible under section 212(a)(9)(B) of the Act for purposes of the adjustment of status application. Rather, the adjudicator should direct the applicant to file a new Form I-601 to overcome the specific grounds of inadmissibility for adjustment of status purposes.

(E) **Legalization under Section 245A of the Act and Any Legalization-related Class Settlement Agreements, and Legalization Applicants pursuant to 8 CFR 245a.2(k) and 8 CFR 245a.18**. The waiver can be granted for humanitarian purposes, to ensure family unity, or when the granting of such a waiver is otherwise in the public interest. The waiver is filed on Form I-690, Application for Waiver of Grounds of Inadmissibility pursuant to Section 245A or 210 of the Immigration and Naturalization Act.

(2) **Waiver of the Permanent Bar under Section 212(a)(9)(C)(i)(I) of the Act**

Generally, there is no "waiver" of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act. Rather, an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act must, generally, obtain consent to reapply for admission under section 212(a)(9)(C)(ii) of the Act. *See AFM* chapter 43 concerning Consent to Reapply, which is sought by filing Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal.

As stated by the Board of Immigration Appeals (BIA) in *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006), the consent to reapply regulation at 8 CFR 212.2 predates the enactment of section 212(a)(9)(C) of the Act and the related consent to reapply provision in section 212(a)(9)(A)(iii) of the Act. Thus, although the *filing procedures* in 8 CFR 212.2 are still in effect, the substantive requirements of the provisions in section 212(a)(9) of the Act govern during the adjudication of Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation and Removal; a USCIS adjudicator must consider the specific requirements of section 212(a)(9)(C)(ii) of the Act when adjudicating Form I-212. A Form I-212 cannot be approved for an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act unless the alien has been abroad for at least 10 years. *Matter of Torres-Garcia, supra*. This rule applies in the 9th Circuit as well as in other circuits. *Gonzales v. Department of Homeland Security,* 508 F.3d 1227 (9th Cir. 2007).

There are, however, some waivers that are also available to certain categories of aliens, who are inadmissible under section 212(a)(9)(C)(i)(I) of the Act. If an alien is eligible for one of these waivers, and the waiver is granted, it is not necessary for the alien to obtain approval of a Form I-212.

(A) **HRIFA and NACARA Applicants**. A waiver can be granted at the discretion of USCIS. The waiver is sought by filing Form I-601, Application for Waiver of Grounds of Inadmissibility. *See* 8 CFR 245.13(c)(2) and 8 CFR 245.15(e)(3). However, the standard that applies to the adjudication is the same standard as if the alien had filed Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal. *See* February 14, 2001 Office of Field Operations Memorandum, *Changes to Section 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), and the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), based Upon the Provisions of and Amendments to the Legal Immigration Family Equity Act (LIFE).*

(B) **Legalization, SAW, LIFE Act Legalization, and Legalization Class Settlement Agreement Applicants**. A waiver can be granted to such an applicant, if the applicant establishes that a waiver should be granted based on humanitarian reasons, to ensure family unity, or because granting the waiver would be in the public interest. The waiver is filed on Form I-690, Application for Waiver of Grounds of Excludability under Section 245A or 210 of the Act. *See* 8 CFR 210.3(e), 8 CFR 245a.2(k), and 8 CFR 245a.18(c).

(C) **TPS Applicants**. TPS applicants may obtain waivers for certain grounds of inadmissibility, including inadmissibility under section 212(a)(9)(C) of the Act. *See* section 244(c)(2) of the Act. The permanent bar may be waived for humanitarian purposes, to assure family unity, or when the granting of the waiver is in the public interest. *See* 8 CFR 244.3. The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility. *See id.*

Granting a waiver to an applicant for purposes of the TPS application does not waive any grounds of inadmissibility in connection with a subsequent application for adjustment of status, although both are filed on Form I-601. This is because the standard for adjustment of status applicants to have waived inadmissibility is different from the one used for TPS applicants. In order to overcome the permanent bar to admissibility under section 212(a)(9)(C)(i)(I) of the Act, an applicant for an immigrant visa has to file Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, rather than Form I-601, and no earlier than ten (10) years after the alien's last departure. *See* section 212(a)(9)(C)(ii) of the Act.

Therefore, if an adjustment of status applicant, who was previously granted TPS status, presents an approved Form I-601 to the adjudicator, the adjudicator should not accept this approved Form I-601 as evidence that the person is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act for purposes of the adjustment of status application. Any

Form I-212 that is filed by a TPS applicant would be adjudicated according to same principles that apply generally to aliens who are inadmissible under section 212(a)(9)(C)(i)(I) of the Act, including the requirement that the alien may not obtain consent to reapply under section 212(a)(9)(C)(ii) unless the alien satisfies the 10-year absence requirement in the statute.

(D) **Certain Battered Spouses, Parents, and Children**. An approved VAWA self-petitioner and his or her child(ren) can apply for a waiver from inadmissibility under section 212(a)(9)(C)(i) of the Act, if he or she can establish a "connection" between the abuse suffered, the unlawful presence and departure, or his or her removal, and the alien's subsequent unlawful entry/entries or attempted reentry/reentries. *See* section 212(a)(9)(C)(iii) of the Act. The waiver is filed on Form I-601, Application for Waiver of Grounds of Inadmissibility, with fee. If the waiver is granted, the ground of inadmissibility and any relating unlawful presence is deemed to be erased for purposes of any future immigration benefits applications.

(E) **Asylee and Refugee Adjustment Applicants under Section 209(c) of the Act.** Asylee and Refugee applicants for adjustment of status may obtain a waiver of inadmissibility in lieu of consent to reapply. The waiver is filed on Form I-602, Application by Refugee for Waiver of Grounds of Excludability. *See* 8 CFR 209.1 and 8 CFR 209.2(b); see also AFM chapter 41.6. Under current USCIS policy, it is within the adjudicator's discretion to determine whether the waiver can be granted without requiring the filing of Form I-602. See *AFM* chapter 41.6; October 31, 2005, Domestic Operations memorandum – *Re: Waiver under Section 209(c) of the Immigration and Nationality Act (AFM* Update 05-33*).*

Normally, waiver applications for refugees are handled overseas before a person is approved for refugee classification. *See* 8 CFR 207.3. However, if a ground of inadmissibility arose after the alien's approval for refugee classification, or if the ground was not known to the officer who made such approval, the waiver may be sought and adjudicated as part of the refugee adjustment process. *See AFM* chapter 23.6 (Asylee and Refugee Adjustment).

Note that the 10-year waiting period normally imposed on applicants for consent to reapply under this ground of inadmissibility (*see* section 212(a)(9)(C)(ii) of the Act) does not apply to refugee and asylee adjustment applicants.

(F) **Nonimmigrants.** An alien who is inadmissible under section 212(a)(9)(C)(i)(I) may, as a matter of discretion, be admitted as a nonimmigrant under section 212(d)(3) of the Act. The alien may make the application when applying for the nonimmigrant visa with the Department of State or, if eligible, file Form I-192 to seek this benefit. Obtaining relief under section 212(d)(3) does not relieve the alien of the need to obtain consent to reapply under section 212(a)(9)(C)(ii) of the Act if the alien seeks to acquire permanent residence.

AD 08-03 [Date signed]	Chapter 40.9.2	This memorandum eliminates chapter 30.1(d) of the *Adjudicator's Field Manual* (*AFM*), and redesignates the section as chapter 40.9.2

4. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

5. Contact Information

Operational questions regarding this memorandum may be directed to Roselyn Brown-Frei, Office of Policy and Strategy. Inquiries should be vetted through appropriate supervisory channels.

Distribution List: Regional Office Directors
District Office Directors (Including Overseas District Office Directors)
Service Center Directors
Asylum Office Directors
Field Office Directors

EXHIBIT I

Refugees & Asylum
Victims of Human Trafficking & Other Crimes
Consideration of Deferred Action for Childhood Arrivals Process
Temporary Protected Status & Deferred Enforced Departure
Battered Spouse, Children & Parents
Humanitarian Parole
Special Situations

Home > Humanitarian > Consideration of Deferred Action for Childhood Arrivals Process > Frequently Asked Questions

Printer Friendly

Frequently Asked Questions

FAQs updated September 14, 2012

Over the past three years, this Administration has undertaken an unprecedented effort to transform the immigration enforcement system into one that focuses on public safety, border security and the integrity of the immigration system. As the Department of Homeland Security (DHS) continues to focus its enforcement resources on the removal of individuals who pose a danger to national security or a risk to public safety, including individuals convicted of crimes with particular emphasis on violent criminals, felons, and repeat offenders, DHS will exercise prosecutorial discretion as appropriate to ensure that enforcement resources are not expended on low priority cases, such as individuals who came to the United States as children and meet other key guidelines. Individuals who demonstrate that they meet the guidelines below may request consideration of deferred action for childhood arrivals for a period of two years, subject to renewal, and may be eligible for employment authorization.

You may request consideration of deferred action for childhood arrivals if you:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching your 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
5. Entered without inspection before June 15, 2012, or your lawful immigration status expired as of June 15, 2012;
6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
7. Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety. Individuals can call USCIS at 1-800-375-5283 with questions or to request more information on the deferred action for childhood arrivals process or visit www.uscis.gov.

View the Consideration of Deferred Action for Childhood Arrivals Process Video

About Deferred Action for Childhood Arrivals

Q1: What is deferred action?
A1:Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. Deferred action does not confer lawful status upon an individual. In addition, although an individual whose case is deferred will not be considered to be accruing unlawful presence in the United States during the period deferred action is in effect, deferred action does not excuse individuals of any previous or subsequent periods of unlawful presence.
Under existing regulations, an individual whose case has been deferred is eligible to receive employment authorization for the period of deferred action, provided he or she can demonstrate "an economic necessity for employment." DHS can terminate or renew deferred action at any time at

Related Links

- Deferred Action for Childhood Arrivals Data
- How Do I Request Consideration of Deferred Action for Childhood Arrivals (also available in Spanish, Chinese and Vietnamese)
- Deferred Action for Childhood Arrivals - Flyer (3884KB PDF)
- Deferred Action for Childhood Arrivals: Guidance for Employers (573KB PDF)

Frequently Asked Questions

- Frequently Asked Questions
- Frequently Asked Questions Korean (PDF)
- Frequently Asked Questions Portuguese (PDF)
- Frequently Asked Questions Spanish
- Frequently Asked Questions Tagalog (PDF)

Filing Tips

- What You Need to Know: Filing Tips for Deferred Action for Childhood Arrivals

Forms

- I-821D, Consideration of Deferred Action for Childhood Arrivals
- I-765, Application for Employment Authorization
- G-1145, E-Notification of Application/Petition Acceptance
- Consideration of Deferred Action for Childhood Arrivals Fee Exemption Guidance

Other USCIS Links

- Avoid Scams
- Find Legal Services
- Press Releases

Non-USCIS Links

- Social Security Number - Deferred Action For Childhood Arrivals

DHS Links

- DHS Memo: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the US

Add Our RSS Feed
Share This Page

the agency's discretion.

Q2: What is deferred action for childhood arrivals?
A2: On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several key guidelines may request consideration of deferred action for a period of two years, subject to renewal, and would then be eligible for work authorization.
Individuals who can demonstrate through verifiable documentation that they meet these guidelines will be considered for deferred action. Determinations will be made on a case-by-case basis under the guidelines set forth in the Secretary of Homeland Security's memorandum.

Q3: If my removal is deferred pursuant to the consideration of deferred action for childhood arrivals process, am I eligible for employment authorization?
A3: Yes. Pursuant to existing regulations, if your case is deferred, you may obtain employment authorization from USCIS provided you can demonstrate an economic necessity for employment.

Q4: Does this process apply to me if I am currently in removal proceedings, have a final removal order, or have a voluntary departure order?
A4: This process is open to any individual who can demonstrate he or she meets the guidelines for consideration, including those who have never been in removal proceedings as well as those in removal proceedings, with a final order, or with a voluntary departure order (as long as they are not in immigration detention). If you are not in immigration detention and want to affirmatively request consideration of deferred action for childhood arrivals, you must submit your request to USCIS – not ICE – pursuant to the procedures outlined below. If you are currently in immigration detention and believe you meet the guidelines you should not request consideration of deferred action from USCIS but should identify yourself to your detention officer or contact the ICE Office of the Public Advocate through the Office's hotline at 1-888-351-4024 (staffed 9 a.m. – 5 p.m., Monday – Friday) or by email at EROPublicAdvocate@ice.dhs.gov.

Q5: Do I accrue unlawful presence if I have a pending request for consideration of deferred action for childhood arrivals?
A5: You will continue to accrue unlawful presence while the request for consideration of deferred action for childhood arrivals is pending, unless you are under 18 years old at the time of the request. If you are under 18 years old at the time you submit your request but turn 18 while your request is pending with USCIS, you will not accrue unlawful presence while the request is pending. If your case is deferred, you will not accrue unlawful presence during the period of deferred action. Having action deferred on your case will not excuse previously accrued unlawful presence.

Q6: If my case is deferred, am I in lawful status for the period of deferral?
A6: No. Although action on your case has been deferred and you do not accrue unlawful presence during the period of deferred action, deferred action does not confer any lawful status.

There is a significant difference between "unlawful presence" and "unlawful status." Unlawful presence refers to a period an individual is present in the United States (1) without being admitted or paroled or (2) after the expiration of a period of stay authorized by the Department of Homeland Security (such as after the period of stay authorized by a visa has expired). Unlawful presence is relevant only with respect to determining whether the inadmissibility bars for unlawful presence, set forth in the Immigration and Nationality Act at Section 212(a)(9), apply to an individual if he or she departs the United States and subsequently seeks to re-enter. (These unlawful presence bars are commonly known as the 3- and 10-Year Bars.)

The fact that you are not accruing unlawful presence does not change whether you are in lawful status while you remain in the United States. Because you lack lawful status at the time DHS defers action in your case, you remain subject to all legal restrictions and prohibitions on individuals in unlawful status.

Q7: Does deferred action provide me with a path to permanent residence status or citizenship?
A7: No. Deferred action is a form of prosecutorial discretion that does not confer lawful permanent resident status or a path to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.

Q8: If my case is deferred, will I be eligible for premium tax credits and reduced cost sharing through Affordable Insurance Exchanges starting in 2014?
A8: No. The Departments of Health and Human Services and the Treasury intend to conform the relevant regulations to the extent necessary to exempt individuals with deferred action for childhood arrivals from eligibility for premium tax credits and reduced cost sharing. This is consistent with the policy under S. 3992, the Development, Relief, and Education for Alien Minors (DREAM) Act of 2010.

Q9: Can I be considered for deferred action even if I do not meet the guidelines to be considered for deferred action for childhood arrivals?
A9:This process is only for individuals who meet the specific guidelines announced by the Secretary of Homeland Security. Other individuals may, on a case-by-case basis, request deferred action from USCIS or ICE in certain circumstances, consistent with longstanding practice.

Q10: Will the information I share in my request for consideration of deferred action for childhood arrivals be used for immigration enforcement purposes?
A10: Information provided in this request is protected from disclosure to U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) for the purpose of immigration enforcement proceedings unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to U.S. Immigration and Customs Enforcement under the criteria set forth in USCIS's Notice to Appear guidance (www.uscis.gov/NTA). Individuals whose cases are deferred pursuant to the consideration of deferred action for childhood arrivals process will not be referred to ICE. The information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including for assistance in the consideration of deferred action for childhood arrivals request, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense. The above information sharing policy covers family members and guardians, in addition to the requestor.

This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law by any party in any administrative, civil, or criminal matter.

Q11: If my case is referred to ICE for immigration enforcement purposes or if I receive an

NTA, will information related to my family members and guardians also be referred to ICE for immigration enforcement purposes?
A11: If your case is referred to ICE for purposes of immigration enforcement or you receive an NTA, information related to your family members or guardians that is contained in your request will not be referred to ICE for purposes of immigration enforcement against family members or guardians. However, that information may be shared with national security and law enforcement agencies, including ICE and CBP, for purposes other than removal, including for assistance in the consideration of the deferred action for childhood arrivals request, to identify or prevent fraudulent claims, for national security purposes, or for the investigation or prosecution of a criminal offense.

This policy, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Q12: Does this Administration remain committed to comprehensive immigration reform?
A12: Yes. The Administration has consistently pressed for passage of comprehensive immigration reform, including the DREAM Act, because the President believes these steps are critical to building a 21st century immigration system that meets our nation's economic and security needs.

Q13: Is passage of the DREAM Act still necessary in light of the new process?
A13: Yes.The Secretary of Homeland Security's June 15th memorandum allowing certain people to request consideration for deferred action is the most recent in a series of steps that DHS has taken to focus its enforcement resources on the removal of individuals who pose a danger to national security or a risk to public safety. Deferred action does not provide lawful status or a pathway to citizenship. As the President has stated, individuals who would qualify for the DREAM Act deserve certainty about their status. Only the Congress, acting through its legislative authority, can confer the certainty that comes with a pathway to permanent lawful status.

Q14: Can I request consideration of deferred action for childhood arrivals under this process if I am currently in a nonimmigrant status (e.g. F-1, E-2, H-4) or have Temporary Protected Status (TPS)?
A14: No. You can only request consideration of deferred action for childhood arrivals under this process if you currently have no immigration status and were not in any lawful status on June 15, 2012.

Return to top

Guidelines for Requesting Consideration of Deferred Action For Childhood Arrivals

Q1: What guidelines must I meet to be considered for deferred action for childhood arrivals?
A1: Pursuant to the Secretary of Homeland Security's June 15, 2012 memorandum, in order to be considered for deferred action for childhood arrivals, you must submit evidence, including support documents, showing that you:

1. Were under the age of 31 as of June 15, 2012;
2. Came to the United States before reaching your 16th birthday;
3. Have continuously resided in the United States since June 15, 2007, up to the present time;
4. Were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
5. Entered without inspection before June 15, 2012, or your lawful immigration status expired as of June 15, 2012;
6. Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a General Education Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and;
7. Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

These guidelines must be met for consideration of deferred action for childhood arrivals. USCIS retains the ultimate discretion on whether deferred action is appropriate in any given case.

Q2: How old must I be in order to be considered for deferred action under this process?
A2:

- If you have never been in removal proceedings, or your proceedings have been terminated before your request for consideration of deferred action for childhood arrivals, you must be at least 15 years of age or older at the time of filing and meet the other guidelines.
- If you are in removal proceedings, have a final removal order, or have a voluntary departure order, and are not in immigration detention, you can request consideration of deferred action for childhood arrivals even if you are under the age of 15 at the time of filing and meet the other guidelines.
- In all instances, you cannot be the age of 31 or older as of June 15, 2012, to be considered for deferred action for childhood arrivals.

Return to top

Education

Q1: Does "currently in school" refer to the date on which the request for consideration of deferred action is filed?
A1: To be considered "currently in school" under the guidelines, you must be enrolled in school on the date you submit a request for consideration of deferred action under this process.

Q2: Who is considered to be "currently in school" under the guidelines?
A2: To be considered "currently in school" under the guidelines, you must be enrolled in:

- a public or private elementary school, junior high or middle school, high school, or secondary school;
- an education, literacy, or career training program (including vocational training) that is designed to lead to placement in postsecondary education, job training, or employment and where you are working toward such placement; or
- an education program assisting students either in obtaining a regular high school diploma or its

recognized equivalent under state law (including a certificate of completion, certificate of attendance, or alternate award), or in passing a General Educational Development (GED) exam or other equivalent state-authorized exam.

Such education, literacy, or career training programs include, but are not limited to, programs funded, in whole or in part, by federal or state grants. Programs funded by other sources may qualify if they are administered by providers of demonstrated effectiveness, such as institutions of higher education, including community colleges, and certain community-based organizations.

In assessing whether such an education, literacy or career training program not funded in whole or in part by federal or state grants is of demonstrated effectiveness, USCIS will consider the duration of the program's existence; the program's track record in assisting students in obtaining a regular high school diploma or its recognized equivalent, in passing a GED or other state-authorized exam, or in placing students in postsecondary education, job training, or employment; and other indicators of the program's overall quality. For individuals seeking to demonstrate that they are "currently in school" through enrollment in such a program, the burden is on the requestor to show the program's demonstrated effectiveness.

Q3: How do I establish that I am currently in school?
A3: Documentation sufficient for you to demonstrate that you are currently in school may include, but is not limited to:

- evidence that you are enrolled in a public or private elementary school, junior high or middle school, high school or secondary school; or
- evidence that you are enrolled in an education, literacy, or career training program (including vocational training) that is designed to lead to placement in postsecondary education, job training, or employment and where you are working toward such placement, and that the program is funded in whole or in part by federal or state grants or is of demonstrated effectiveness; or
- evidence that you are enrolled in an education program assisting students either in obtaining a regular high school diploma or its recognized equivalent under State law (including a certificate of completion, certificate of attendance, or alternate award), or in passing a General Educational Development (GED) exam or other such state-authorized exam, and that the program is funded in whole or in part by federal or state grants or is of demonstrated effectiveness.

Such evidence of enrollment may include: acceptance letters, school registration cards, letters from school or program, transcripts, report cards, or progress reports showing the name of the school or program, date of enrollment, and current educational or grade level, if relevant.

Q4: What documentation may be sufficient to demonstrate that I have graduated from high school?
A4: Documentation sufficient for you to demonstrate that you have graduated from high school may include, but is not limited to, a high school diploma from a public or private high school or secondary school, or a recognized equivalent of a high school diploma under state law, including a General Education Development (GED) certificate, certificate of completion, a certificate of attendance, or an alternate award from a public or private high school or secondary school.

Q5: What documentation may be sufficient to demonstrate that I have obtained a General Education Development (GED)?
A5: Documentation sufficient for you to demonstrate that you have obtained a GED may include, but is not limited to, evidence that you have passed a GED exam, or other comparable state-authorized exam, and, as a result, you have received the recognized equivalent of a regular high school diploma under state law.

Q6: If I am enrolled in a literacy or career training program, can I meet the guidelines?
A6: Yes, in certain circumstances. You may meet the guidelines if you are enrolled in an education, literacy, or career training program that is designed to lead to placement in postsecondary education, job training, or employment and where you are working toward such placement. Such programs include, but are not limited to, programs funded by federal or state grants, or administered by providers of demonstrated effectiveness.

Q7: If I am enrolled in an English as a Second Language (ESL) program, can I meet the guidelines?
A7: Yes, in certain circumstances. You may meet the guidelines only if you are enrolled in an ESL program as a prerequisite for your placement in postsecondary education, job training, or employment and where you are working toward such placement. You must submit direct documentary evidence that your participation in the ESL program is connected to your placement in postsecondary education, job training or employment and that the program is one of demonstrated effectiveness.

Q8: Will USCIS consider circumstantial evidence that I have met the education guidelines?
A8: No. Circumstantial evidence will not be accepted to establish that you are currently in school, have graduated or obtained a certificate of completion from high school, or have obtained a general education development certificate. You must submit direct documentary evidence to satisfy that you meet the education guidelines.

Q9: If I am currently in school and USCIS defers action in my case, what will I have to demonstrate if I request that USCIS renew the deferral after two years?
A9: If you are in school at the time of your request and your case is deferred by USCIS, in order to have your request for an extension considered, you must show at the time of the request for renewal either (1) that you have graduated from the school in which you were enrolled and, if that school was elementary school or junior high or middle school, you have made substantial, measurable progress toward graduating from high school, or, (2) you have made substantial, measurable progress toward graduating from the school in which you are enrolled.

If you are currently in an education program that assists students either in obtaining a high school diploma or its recognized equivalent under state law, or in passing a GED exam or other equivalent state-authorized exam, and your case is deferred by USCIS, in order to have your request for an extension considered, you must show at the time of the request for renewal that you have obtained a high school diploma or its recognized equivalent or that you have passed a GED or other equivalent state-authorized exam.

If you are currently enrolled in an education, literacy, or career training program (including vocational training) that is designed to lead to placement in postsecondary education, job training,

or employment, and your case is deferred by USCIS, in order to have your request for an extension considered, you must show at the time of the request for renewal that you are enrolled in postsecondary education, that you have obtained the employment for which you were trained, or that you have made substantial, measurable progress toward completing the program.

Specific details on the renewal process will be made available at a later date.

Return to top

Travel

Q1: Do brief departures from the United States interrupt the continuous residence requirement?
A1: A brief, casual, and innocent absence from the United States will not interrupt your continuous residence. If you were absent from the United States for any period of time, your absence will be considered brief, casual, and innocent, if it was before August 15, 2012, and:

1. The absence was short and reasonably calculated to accomplish the purpose for the absence;
2. The absence was not because of an order of exclusion, deportation, or removal;
3. The absence was not because of an order of voluntary departure, or an administrative grant of voluntary departure before you were placed in exclusion, deportation, or removal proceedings; and
4. The purpose of the absence and/or your actions while outside the United States were not contrary to law.

New - **Q2: May I travel outside of the United States before USCIS has determined whether to defer action in my case?**
A2: No. After August 15, 2012, if you travel outside of the United States, you will not be considered for deferred action under this process. If USCIS defers action in your case, you will be permitted to travel outside of the United States only if you apply for and receive advance parole from USCIS.

Any travel outside of the United States that occurred before August 15, 2012, will be assessed by USCIS to determine whether the travel qualifies as brief, casual and innocent (see below).

Note: If you have been ordered deported or removed, and you then leave the United States, your departure may result in your being considered deported or removed, with potentially serious future immigration consequences.

Travel Guidelines

Travel Dates	Type of Travel	Does it Affect Continuous Residence
Before August 15, 2012	• brief • casual • innocent	No
	• For an extended time • Because of an order of exclusion, deportation, or removal • To participate in criminal activity	Yes
After August 15, 2012, and before you have requested deferred action	• Any	Yes.
After August 15, 2012, and after you have requested deferred action	• Any	Yes. You cannot travel while your request is under review. You cannot apply for advance parole unless and until DHS has determined whether to defer action in your case.

New - **Q3: If my case is deferred pursuant to the consideration of deferred action for childhood arrivals process, will I be able to travel outside of the United States?**
A3: Not automatically. If USCIS has decided to defer action in your case and you want to travel outside the United States, you must apply for advance parole by filing a Form I-131, Application for Travel Document and paying the applicable fee ($360). USCIS will determine whether your purpose for international travel is justifiable based on the circumstances you describe in your request. Generally, USCIS will only grant advance parole if you are traveling for humanitarian purposes, educational purposes, or employment purposes. You may not apply for advance parole unless and until USCIS defers action in your case pursuant to the consideration of deferred action for childhood arrivals process. You cannot apply for advance parole at the same time as you submit your request for consideration of deferred action for childhood arrivals. All advance parole requests will be considered on a case-by-case basis.

If USCIS has deferred action in your case under the deferred action for childhood arrivals process after you have been ordered deported or removed, you may still request advance parole if you meet the guidelines for advance parole described above. However, once you have received advance parole, and before you actually leave the United States, you should seek to reopen your case before the Executive Office for Immigration Review (EOIR) and obtain administrative closure or termination of your removal proceeding. Even after you have asked EOIR to reopen your case, you should not leave the United States until after EOIR has granted your request. If you depart after being ordered deported or removed, and your removal proceeding has not been reopened and administratively closed or terminated, your departure may result in your being considered deported or removed, with potentially serious future immigration consequences. If you have any questions about this process, you may call the ICE Office of the Public Advocate through the Office's hotline at 1-888-351-4024 (staffed 9 a.m. – 5 p.m., Monday – Friday) or by email at EROPublicAdvocate@ice.dhs.gov.

National Security and Public Safety

Q1: If I have a conviction for a felony offense, a significant misdemeanor offense, or multiple misdemeanors, can I receive an exercise of prosecutorial discretion under this new process?
A1: No. If you have been convicted of a felony offense, a significant misdemeanor offense, or three or more other misdemeanor offenses not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, you will not be considered for deferred action under the new process except where DHS determines there are exceptional circumstances.

Q2: What offenses qualify as a felony?
A2:A felony is a federal, state, or local criminal offense punishable by imprisonment for a term exceeding one year.

Q3: What offenses constitute a significant misdemeanor?
A3: For the purposes of this process, a significant misdemeanor is a misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) and that meets the following criteria:

1. Regardless of the sentence imposed, is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence; or,
2. If not an offense listed above, is one for which the individual was sentenced to time in custody of more than 90 days. The sentence must involve time to be served in custody, and therefore does not include a suspended sentence.

The time in custody does not include any time served beyond the sentence for the criminal offense based on a state or local law enforcement agency honoring a detainer issued by U.S. Immigration and Customs Enforcement (ICE). Notwithstanding the above, the decision whether to defer action in a particular case is an individualized, discretionary one that is made taking into account the totality of the circumstances. Therefore, the absence of the criminal history outlined above, or its presence, is not necessarily determinative, but is a factor to be considered in the unreviewable exercise of discretion. DHS retains the discretion to determine that an individual does not warrant deferred action on the basis of a single criminal offense for which the individual was sentenced to time in custody of 90 days or less.

Q4: What offenses constitute a non-significant misdemeanor?
A4: For purposes of this process, a non-significant misdemeanor is any misdemeanor as defined by federal law (specifically, one for which the maximum term of imprisonment authorized is one year or less but greater than five days) and that meets the following criteria:

1. Is not an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence; and
2. Is one for which the individual was sentenced to time in custody of 90 days or less. The time in custody does not include any time served beyond the sentence for the criminal offense based on a state or local law enforcement agency honoring a detainer issued by ICE.

Notwithstanding the above, the decision whether to defer action in a particular case is an individualized, discretionary one that is made taking into account the totality of the circumstances. Therefore, the absence of the criminal history outlined above, or its presence, is not necessarily determinative, but is a factor to be considered in the unreviewable exercise of discretion.

Q5: If I have a minor traffic offense, such as driving without a license, will it be considered a non-significant misdemeanor that counts towards the "three or more non-significant misdemeanors" making me unable to receive consideration for an exercise of prosecutorial discretion under this new process?
A5: A minor traffic offense will not be considered a misdemeanor for purposes of this process. However, your entire offense history can be considered along with other facts to determine whether, under the totality of the circumstances, you warrant an exercise of prosecutorial discretion.

It is important to emphasize that driving under the influence is a significant misdemeanor regardless of the sentence imposed.

Q6: Will offenses criminalized as felonies or misdemeanors by state immigration laws be considered felonies or misdemeanors for purpose of this process?
A6: No. Immigration-related offenses characterized as felonies or misdemeanors by state immigration laws will not be treated as disqualifying felonies or misdemeanors for the purpose of considering a request for consideration of deferred action pursuant to this process.

Q7: Will DHS consider my expunged or juvenile conviction as an offense making me unable to receive an exercise of prosecutorial discretion?
A7: Expunged convictions and juvenile convictions will not automatically disqualify you. Your request will be assessed on a case-by-case basis to determine whether, under the particular circumstances, a favorable exercise of prosecutorial discretion is warranted. If you were a juvenile, but tried and convicted as an adult, you will be treated as an adult for purposes of the deferred action for childhood arrivals process.

Q8: What qualifies as a national security or public safety threat?
A8: If the background check or other information uncovered during the review of your request for deferred action indicates that your presence in the United States threatens public safety or national security, you will not be able to receive consideration for an exercise of prosecutorial discretion except where DHS determines there are exceptional circumstances. Indicators that you pose such a threat include, but are not limited to, gang membership, participation in criminal activities, or participation in activities that threaten the United States.

Q9: If I am not in removal proceedings but believe I meet the guidelines for an exercise of deferred action under this process, should I seek to place myself into removal proceedings through encounters with CBP or ICE?
A9: No. If you are not in removal proceedings but believe that you meet the guidelines you should submit your request for consideration of deferred action for childhood arrivals to USCIS under the process outlined below.

Return to top

Filing Process

Q1: How do I request consideration of deferred action for childhood arrivals?
A1:To request consideration of deferred action for childhood arrivals from USCIS, you must submit Form I-821D, Consideration of Deferred Action for Childhood Arrivals to USCIS. This form must be completed, properly signed and accompanied by a Form I-765, Application for Employment Authorization, and a Form I-765WS, Worksheet, establishing your economic need for employment. If you fail to submit a completed Form I-765 (along with the accompanying filing fees for that form, totaling $465), USCIS will not consider your request for deferred action. Please read the form instructions to ensure that you submit all the required documentation to support your request.

You must file your request for consideration of deferred action for childhood arrivals at the USCIS Lockbox. You can find the mailing address and instructions on www.uscis.gov/i-821d. After your Form I-821D, Form I-765, and Form I-765 Worksheet have been received, USCIS will review them for completeness, including submission of the required fee, initial evidence and supporting documents. If it is determined that the request is complete, USCIS will send you a receipt notice. USCIS will then send you an appointment notice to visit an Application Support Center (ASC) for biometric services. Please make sure you read and follow the directions in the notice. Failure to attend your biometrics appointment may delay processing of your request for consideration of deferred action, or may result in a denial of your request. You may also choose to receive an email and/or text message notifying you that your form has been accepted by completing a Form G-1145, E-Notification of Application/Petition Acceptance.

Each request for consideration of deferred action for childhood arrivals will be reviewed on an individual, case-by-case basis. USCIS may request more information or evidence from you, or request that you appear at a USCIS office. USCIS will notify you of its determination in writing.

Note: All individuals who believe they meet the guidelines, including those in removal proceedings, with a final removal order, or with a voluntary departure order (and not in immigration detention), may affirmatively request consideration of deferred action for childhood arrivals from USCIS through this process. Individuals who are currently in immigration detention and believe they meet the guidelines may not request consideration of deferred action from USCIS but may identify themselves to their detention officer or to the ICE Office of the Public Advocate through the Office's hotline at 1-888-351-4024 (staffed 9 a.m. – 5 p.m., Monday – Friday) or by email at EROPublicAdvocate@ice.dhs.gov.

Q2: Will USCIS conduct a background check when reviewing my request for consideration of deferred action for childhood arrivals?
A2: Yes. You must undergo biographic and biometric background checks before USCIS will consider whether to exercise prosecutorial discretion under the consideration of deferred action for childhood arrivals process. If you have been convicted of any felony, a significant misdemeanor offense, three or more misdemeanor offenses not occurring on the same date and not arising out of the same act, omission, or scheme of misconduct, or otherwise pose a threat to national security or public safety, you will not be considered for deferred action for childhood arrivals except where DHS determines there are exceptional circumstances.

Q3: What do background checks involve?
A3: Background checks involve checking biographic and biometric information provided by the individuals against a variety of databases maintained by DHS and other federal government agencies.

Q4: Can I obtain a fee waiver or fee exemption for this process?
A4: There are no fee waivers available for employment authorization applications connected to the deferred action for childhood arrivals process. There are very limited fee exemptions available. Requests for fee exemptions must be filed and favorably adjudicated before an individual files his/her request for consideration of deferred action for childhood arrivals without a fee. In order to be considered for a fee exemption, you must submit a letter and supporting documentation to USCIS demonstrating that you meet one of the following conditions:

- You are under 18 years of age, homeless, in foster care or under 18 years of age and otherwise lacking any parental or other familial support, and your income is less than 150% of the U.S. poverty level.
- You cannot care for yourself because you suffer from a serious, chronic disability and your income is less than 150% of the U.S. poverty level.
- You have, at the time of the request, accumulated $25,000 or more in debt in the past 12 months as a result of unreimbursed medical expenses for yourself or an immediate family member, and your income is less than 150% of the U.S. poverty level.

Additional information on how to make your request for a fee exemption is available on www.uscis.gov/childhoodarrivals. Your request must be submitted and decided before you submit a request for consideration of deferred action for childhood arrivals without a fee. In order to be considered for a fee exemption, you must provide documentary evidence to demonstrate that you meet any of the above conditions at the time that you make the request. For evidence, USCIS will:

- Accept affidavits from community-based or religious organizations to establish a requestor's homelessness or lack of parental or other familial financial support.
- Accept copies of tax returns, banks statement, pay stubs, or other reliable evidence of income level. Evidence can also include an affidavit from the applicant or a responsible third party attesting that the applicant does not file tax returns, has no bank accounts, and/or has no income to prove income level.
- Accept copies of medical records, insurance records, bank statements, or other reliable evidence of unreimbursed medical expenses of at least $25,000.
- Address factual questions through requests for evidence (RFEs).

Q5: Will there be supervisory review of decisions by USCIS under this process?
A5: Yes. USCIS will implement a supervisory review process in all four Service Centers to ensure a consistent process for considering requests for deferred action for childhood arrivals. USCIS will require officers to elevate for supervisory review those cases that involve certain factors.

Q6: Will USCIS personnel responsible for reviewing requests for an exercise of prosecutorial discretion under this process receive special training?
A6: Yes. USCIS personnel responsible for considering requests for consideration of deferred action for childhood arrivals will receive special training.

New - **Q7. Must attorneys and accredited representatives who provide pro bono services to deferred action requestors at group assistance events file a Form G-28 with USCIS?**

A7. An attorney or accredited representative who provides pro bono assistance to an individual in a workshop setting and who intends to represent the individual after the workshop must file a Form G-28. An attorney or accredited representative who provides pro bono assistance to an individual in a workshop setting, but who does not intend to represent the individual after the workshop, should assess the extent of the relationship with the individual and the nature and type of the assistance provided. On that basis, the attorney or accredited representative should determine whether to file a Form G-28. If a Form G-28 is not filed, the attorney or accredited representative should determine whether it would be appropriate under the circumstances to provide the individual and USCIS with a letter noting the limited extent of the representation.

New - **Q8. When must an individual sign a Form I-821D as a preparer?**
A8. If someone other than the requestor prepares or helps fill out the Form I-821D, that individual must complete Part 5 of the Form.

New - **Q9. How should I fill out question nine (9) on the Form I-765, Application for Employment Authorization?**
A9. When you are filing a Form I-765 as part of a Deferred Action Childhood Arrivals request, question nine (9) is asking you to list those Social Security numbers that were officially issued to you by the Social Security Administration.

Return to top

Decisions and Renewals

Q1: Can I appeal USCIS's determination?
A1: No. You cannot file a motion to reopen or reconsider, and cannot appeal the decision if USCIS denies your request for consideration of deferred action for childhood arrivals. USCIS will not review its discretionary determinations. You may request a review using the Service Request Management Tool (SRMT) process if you met all of the process guidelines and you believe that your request was denied due to one of the following errors:

- USCIS denied the request for consideration of deferred action for childhood arrivals based on abandonment and you claim that you did respond to a Request for Evidence within the prescribed time; or
- USCIS mailed the Request for Evidence to the wrong address, even though you had submitted a Form AR-11, Change of Address, or changed your address online at www.uscis.gov before the issuance of the Request for Evidence.

Q2: If USCIS does not exercise deferred action in my case, will I be placed in removal proceedings?
A2: If you have submitted a request for consideration of deferred action for childhood arrivals and USCIS decides not to defer action in your case, USCIS will apply its policy guidance governing the referral of cases to U.S. Immigration and Customs Enforcement (ICE) and the issuance of Notices to Appear (NTA). If your case does not involve a criminal offense, fraud, or a threat to national security or public safety, your case will not be referred to ICE for purposes of removal proceedings except where DHS determines there are exceptional circumstances. For more detailed information on the applicable NTA policy visit www.uscis.gov/NTA. If after a review of the totality of circumstances USCIS determines to defer action in your case, USCIS will likewise exercise its discretion and will not issue you a Notice to Appear.

Q3: Can I extend the period of deferred action in my case?
A3: Yes. Unless terminated, individuals whose case is deferred pursuant to the consideration of deferred action for childhood arrivals process will not be placed into removal proceedings or removed from the United States for a period of two years. You may request consideration for an extension of that period of deferred action. As long as you were not above the age of 30 on June 15, 2012, you may request a renewal after turning 31. Your request for an extension will be considered on a case-by-case basis.

Q4: If my period of deferred action is extended, will I need to re-apply for an extension of my employment authorization?
A4: Yes. If USCIS decides to defer action for additional periods beyond the initial two years, you must also have requested an extension of your employment authorization.

Return to top

Evidence

The following chart provides examples of documentation you may submit to demonstrate you meet the guidelines for consideration of deferred action under this process. Please see the instructions of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, for additional details of acceptable documentation.

Examples of Documents to Submit to Demonstrate you Meet the Guidelines	
Proof of identity	• Passport or national identity document from your country of origin • Birth certificate with photo identification • School or military ID with photo • Any U.S. government immigration or other document bearing your name and photo
Proof you came to U.S. before your 16th birthday	• Passport with admission stamp • Form I-94/I-95/I-94W • School records from the U.S. schools you have attended • Any Immigration and Naturalization Service or DHS document stating your date of entry (Form I-862, Notice to Appear) • Travel records • Hospital or medical records
Proof of immigration status	• Form I-94/I-95/I-94W with authorized stay expiration date

	• Final order of exclusion, deportation, or removal issued as of June 15, 2012 • A charging document placing you into removal proceedings
Proof of Presence in U.S. on June 15, 2012 Proof you continuously resided in U.S. since June 15, 2007	• Rent receipts or utility bills • Employment records (pay stubs, W-2 Forms, etc) • School records (letters, report cards, etc) • Military records (Form DD-214 or NGB Form 22) • Official records from a religious entity confirming participation in a religious ceremony • Copies of money order receipts for money sent in or out of the country • Passport entries • Birth certificates of children born in the U.S. • Dated bank transactions • Social Security card • Automobile license receipts or registration • Deeds, mortgages, rental agreement contracts • Tax receipts, insurance policies
Proof of your student status at the time of requesting consideration of deferred action for childhood arrivals	• School records (transcripts, report cards, etc) from the school that you are currently attending in the United States showing the name(s) of the school(s) and periods of school attendance and the current educational or grade level • U.S. high school diploma or certificate of completion • U.S. GED certificate
Proof you are an honorably discharged veteran of the U.S. Armed Forces or the U.S. Coast Guard	• Form DD-214, Certificate of Release or Discharge from Active Duty • NGB Form 22, National Guard Report of Separation and Record of Service • Military personnel records • Military health records

Q1: May I file affidavits as proof that I meet the guidelines for consideration of deferred action for childhood arrivals?
A1: Affidavits generally will not be sufficient on their own to demonstrate that you meet the guidelines for USCIS to consider you for deferred action for childhood arrivals.
However, affidavits may be used to support meeting the following guidelines only if the documentary evidence available to you is insufficient or lacking:

- A gap in the documentation demonstrating that you meet the five year continuous residence requirement; and
- A shortcoming in documentation with respect to the brief, casual and innocent departures during the five years of required continuous presence.

If you submit affidavits related to the above criteria, you must submit two or more affidavits, sworn to or affirmed by people other than yourself, who have direct personal knowledge of the events and circumstances. Should USCIS determine that the affidavits are insufficient to overcome the unavailability or the lack of documentary evidence with respect to either of these guidelines, it will issue a Request for Evidence, indicating that further evidence must be submitted to demonstrate that you meet these guidelines.

USCIS will not accept affidavits as proof of satisfying the following guidelines:

- You are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development certificate, or are an honorably discharged veteran from the Coast Guard or Armed Forces of the United States;
- You were physically present in the United States on June 15, 2012;
- You came to the United States before reaching your 16th birthday;
- You were under the age of 31 on June 15, 2012; and
- Your criminal history, if applicable.

If the only evidence you submit to demonstrate you meet any of the above guidelines is an affidavit, USCIS will issue a Request for Evidence, indicating that you have not demonstrated that you meet these guidelines and that you must do so in order to demonstrate that you meet that guideline.

Q2: Will USCIS consider circumstantial evidence that I have met certain guidelines?
A2: Circumstantial evidence may be used to establish the following guidelines and factual showings if available documentary evidence is insufficient or lacking and shows that:

- You were physically present in the United States on June 15, 2012;
- You came to the United States before reaching your 16th birthday;
- You satisfy the five year continuous residence requirement, as long as you present direct evidence of your continued residence in the United States for a portion of the required five-year period and the circumstantial evidence is used only to fill in gaps in the length of continuous residence demonstrated by the direct evidence; and
- Any travel outside the United States during the five years of required continuous presence was brief, casual, and innocent.

However, USCIS will not accept circumstantial evidence as proof of any of the following guidelines to demonstrate that you:

- Were under the age of 31 on June 15, 2012; and
- Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a General Education Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States.

For example, if you do not have documentary proof of your presence in the United States on June 15, 2012, you may nevertheless be able to satisfy the guideline circumstantially by submitting credible documentary evidence that you were present in the United States shortly before and shortly after June 15, 2012, which under the facts presented may give rise to an inference of your presence on June 15, 2012 as well. However, circumstantial evidence will not be accepted to establish that you have graduated high school. You must submit direct documentary evidence to satisfy that you meet this guideline.

New - **Q3. To prove my continuous residence in the United States since June 15, 2007, must I provide evidence documenting my presence for every day, or every month, of that period?**
A3. To meet the continuous residence guideline, you must submit documentation that shows you have been living in the United States from June 15, 2007 up until the time of your request. You should provide documentation to account for as much of the period as reasonably possible, but there is no requirement that every day or month of that period be specifically accounted for through direct evidence. It is helpful to USCIS if you can submit evidence of your residence during at least each year of the period. USCIS will review the documentation in its totality to determine whether it is more likely than not that you were continuously residing in the United States for the period since June 15, 2007. Gaps in the documentation as to certain periods may raise doubts as to your continued residence if, for example, the gaps are lengthy or the record otherwise indicates that you may have been outside the United States for a period of time that was not brief, casual or innocent. If gaps in your documentation raise questions , USCIS may issue a request for evidence to allow you to submit additional documentation that supports your claimed continuous residence.

Affidavits may be submitted to explain a gap in the documentation demonstrating that you meet the five year continuous residence requirement. If you submit affidavits related to the continuous residence requirement, you must submit two or more affidavits, sworn to or affirmed by people other than yourself, who have direct personal knowledge of the events and circumstances during the period as to which there is a gap in the documentation. Affidavits may only be used to explain gaps in your continuous residence; they cannot be used as evidence that you meet the entire five year continuous residence requirement.

New - **Q4. If I provide my employee with information regarding his or her employment to support a request for consideration of deferred action for childhood arrivals, will that information be used for immigration enforcement purposes against me and/or my company?**
A4. You may, as you determine appropriate, provide individuals requesting deferred action for childhood arrivals with documentation which verifies their employment. This information will not be shared with ICE for civil immigration enforcement purposes pursuant to INA section 274A unless there is evidence of egregious violations of criminal statutes or widespread abuses.

Return to top

Cases in Other Immigration Processes

Q1: Will I be considered to be in unlawful status if I had an application for asylum or cancellation of removal pending before either USCIS or the Executive Office for Immigration Review (EOIR) on June 15, 2012?
A1: Yes. If you had an application for asylum or cancellation of removal, or similar relief, pending before either USCIS or EOIR as of June 15, 2012, but had no lawful status, you may request consideration of deferred action for childhood arrivals.

Q2: Can I request consideration of deferred action for childhood arrivals from USCIS if I am in immigration detention under the custody of ICE?
A2: No. If you are currently in immigration detention, you may not request consideration of deferred action for childhood arrivals from USCIS. If you think you may meet the guidelines of this process, you should identify yourself to your detention officer or contact the ICE Office of the Public Advocate so that ICE may review your case. The ICE Office of the Public Advocate can be reached through the Office's hotline at 1-888-351-4024 (staffed 9 a.m. – 5 p.m., Monday – Friday) or by email at EROPublicAdvocate@ice.dhs.gov

Q3: If I am about to be removed by ICE and believe that I meet the guidelines for consideration of deferred action for childhood arrivals, what steps should I take to seek review of your case before removal?
A3: If you believe you can demonstrate that you meet the guidelines and are about to be removed, you should immediately contact either the Law Enforcement Support Center's hotline at 1-855-448-6903 (staffed 24 hours a day, 7 days a week) or the ICE Office of the Public Advocate through the Office's hotline at 1-888-351-4024 (staffed 9 a.m. – 5 p.m., Monday – Friday) or by email at EROPublicAdvocate@ice.dhs.gov.

Q4: If individuals meet the guidelines for consideration of deferred action for childhood arrivals and are encountered by Customs and Border Protection (CBP) or ICE, will they be placed into removal proceedings?
A4: This policy is intended to allow CBP and ICE to focus on priority cases. Pursuant to the direction of the Secretary of Homeland Security, if an individual meets the guidelines of this process, CBP or ICE should exercise their discretion on a case-by-case basis to prevent qualifying individuals from being apprehended, placed into removal proceedings, or removed. If individuals believe that, in light of this policy, they should not have been placed into removal proceedings, contact either the Law Enforcement Support Center's hotline at 1-855-448-6903 (staffed 24 hours a day, 7 days a week) or the ICE Office of the Public Advocate through the Office's hotline at 1-888-351-4024 (staffed 9 a.m. – 5 p.m., Monday – Friday) or by email at EROPublicAdvocate@ice.dhs.gov.

Q5: If I accepted an offer of administrative closure under the case-by-case review process or my case was terminated as part of the case-by-case review process, can I be considered for deferred action under this process?
A5: Yes. If you can demonstrate that you meet the guidelines, you will be able to request consideration of deferred action for childhood arrivals even if you have accepted an offer of administrative closure or termination under the case-by-case review process. If you are in removal proceedings and have already been identified as meeting the guidelines and warranting discretion as part of ICE's case-by-case review, ICE already has offered you deferred action for a period of two years, subject to renewal.

Q6: If I declined an offer of administrative closure under the case-by-case review process, can I be considered for deferred action under this process?
A6: Yes. If you can demonstrate that you meet the guidelines, you will be able to request consideration of deferred action for childhood arrivals from USCIS even if you declined an offer of administrative closure under the case-by-case review process.

Q7: If my case was reviewed as part of the case-by-case review process but I was not offered administrative closure, can I be considered for deferred action under this process?
A7: Yes. If you can demonstrate that you meet the guidelines, you will be able to request consideration of deferred action for childhood arrivals from USCIS even if you were not offered administrative closure following review of you case as part of the case-by-case review process.

Q8: How will ICE and USCIS handle cases involving individuals who do not satisfy the guidelines of this process but believe they may warrant an exercise of prosecutorial discretion under the June 2011 Prosecutorial Discretion Memoranda?
A8: If USCIS determines that you do not satisfy the guidelines or otherwise determines you do not warrant an exercise of prosecutorial discretion, then it will decline to defer action in your case. If you are currently in removal proceedings, have a final order, or have a voluntary departure order, you may then request ICE consider whether to exercise prosecutorial discretion under the ICE June 2011 Prosecutorial Discretion Memoranda through any of the established channels at ICE, including through a request to the ICE Office of the Public Advocate or to the local Field Office Director. USCIS will not consider requests for review under the ICE June 2011 Prosecutorial Discretion Memoranda.

Q9: What should I do if I meet the guidelines of this process and have been issued an ICE detainer following an arrest by a state or local law enforcement officer?
A9: If you meet the guidelines and have been served a detainer, you should immediately contact either the Law Enforcement Support Center's hotline at 1-855-448-6903 (staffed 24 hours a day, 7 days a week) or the ICE Office of the Public Advocate either through the Office's hotline at 1-888-351-4024 (staffed 9 a.m. – 5 p.m., Monday – Friday) or by email at EROPublicAdvocate@ice.dhs.gov.

Return to top

Avoiding Scams and Preventing Fraud

Q1: Someone told me if I pay them a fee, they can expedite my deferred action for childhood arrivals request, is this true?
A1: No. There is no expedited processing for deferred action. Dishonest practitioners may promise to provide you with faster services if you pay them a fee. These people are trying to scam you and take your money. Visit our Avoid Scams page to learn how you can protect yourself from immigration scams.

Make sure you seek information about requests for consideration of deferred action for childhood arrivals from official government sources such as USCIS or the Department of Homeland Security. If you are seeking legal advice, visit our Find Legal Services page to learn how to choose a licensed attorney or accredited representative.

Q2: What steps will USCIS and ICE take if I engage in fraud through the new process?
A2: If you knowingly make a misrepresentation, or knowingly fail to disclose facts, in an effort to have your case deferred or obtain work authorization through this new process, you will be treated as an immigration enforcement priority to the fullest extent permitted by law, and be subject to criminal prosecution and/or removal from the United States.

Return to top

Last updated: 09/05/2012

EXHIBIT J

The White House

Office of the Press Secretary

For Immediate Release June 15, 2012

Remarks by the President on Immigration

Rose Garden

2:09 P.M. EDT

THE PRESIDENT: Good afternoon, everybody. This morning, Secretary Napolitano announced new actions my administration will take to mend our nation's immigration policy, to make it more fair, more efficient, and more just -- specifically for certain young people sometimes called "Dreamers."

These are young people who study in our schools, they play in our neighborhoods, they're friends with our kids, they pledge allegiance to our flag. They are Americans in their heart, in their minds, in every single way but one: on paper. They were brought to this country by their parents -- sometimes even as infants -- and often have no idea that they're undocumented until they apply for a job or a driver's license, or a college scholarship.

Put yourself in their shoes. Imagine you've done everything right your entire life -- studied hard, worked hard, maybe even graduated at the top of your class -- only to suddenly face the threat of deportation to a country that you know nothing about, with a language that you may not even speak.

That's what gave rise to the DREAM Act. It says that if your parents brought you here as a child, if you've been here for five years, and you're willing to go to college or serve in our military, you can one day earn your citizenship. And I have said time and time and time again to Congress that, send me the DREAM Act, put it on my desk, and I will sign it right away.

Now, both parties wrote this legislation. And a year and a half ago, Democrats passed the DREAM Act in the House, but Republicans walked away from it. It got 55 votes in the Senate, but Republicans blocked it. The bill hasn't really changed. The need hasn't changed. It's still the right thing to do. The only thing that has changed, apparently, was the politics.

As I said in my speech on the economy yesterday, it makes no sense to expel talented young people, who, for all intents and purposes, are Americans -- they've been raised as Americans; understand themselves to be part of this country -- to expel these young people who want to staff our labs, or start new businesses, or defend our country simply because of the actions of their parents -- or because of the inaction of politicians.

In the absence of any immigration action from Congress to fix our broken immigration system, what we've tried to do is focus our immigration enforcement resources in the right places. So we prioritized border security, putting more boots on the southern border than at any time in our history -- today, there are fewer illegal crossings than at any time in the past 40 years. We focused and used discretion about whom to prosecute, focusing on criminals who endanger our communities rather than students who are earning their education. And today, deportation of criminals is up 80 percent. We've improved on that discretion carefully and thoughtfully. Well, today, we're improving it again.

Effective immediately, the Department of Homeland Security is taking steps to lift the shadow of deportation from these young people. Over the next few months, eligible individuals who do not present a risk to national security or public safety will be able to request temporary relief from deportation proceedings and apply for work authorization.

Now, let's be clear -- this is not amnesty, this is not immunity. This is not a path to citizenship. It's not a permanent fix. This is a temporary stopgap measure that lets us focus our resources wisely while giving a degree of relief and hope to talented, driven, patriotic young people. It is --

Q (Inaudible.)

WATCH THE VIDEO

June 15, 2012 1:40 PM

President Obama Speaks on Department of Homeland Security Immigration Announcement

BLOG POSTS ON THIS ISSUE

December 11, 2012 11:32 AM EST

David Plouffe: "Your story bouncing around the White House"

Tell Us What $2,000 Means To You David Plouffe sends a message to the White House email list.

December 11, 2012 11:00 AM EST

Holidays at the White House 2012: The Gold Star Family Tree

The very first tree visitors to the White House see pays tribute to our Armed Forces and their families.

December 11, 2012 7:00 AM EST

Entrepreneurship Is Critical Pillar of U.S. Global Engagement

Over the past four years, the Obama Administration has worked to leverage America's entrepreneurial strength and help our foreign partners build the skills, networks, regulatory environments, and access to capital necessary to realize the potential

THE PRESIDENT: -- the right thing to do.

Q -- foreigners over American workers.

THE PRESIDENT: Excuse me, sir. It's not time for questions, sir.

Q No, you have to take questions.

THE PRESIDENT: Not while I'm speaking.

Precisely because this is temporary, Congress needs to act. There is still time for Congress to pass the DREAM Act this year, because these kids deserve to plan their lives in more than two-year increments. And we still need to pass comprehensive immigration reform that addresses our 21st century economic and security needs -- reform that gives our farmers and ranchers certainty about the workers that they'll have. Reform that gives our science and technology sectors certainty that the young people who come here to earn their PhDs won't be forced to leave and start new businesses in other countries. Reform that continues to improve our border security, and lives up to our heritage as a nation of laws and a nation of immigrants.

Just six years ago, the unlikely trio of John McCain, Ted Kennedy and President Bush came together to champion this kind of reform. And I was proud to join 23 Republicans in voting for it. So there's no reason that we can't come together and get this done.

And as long as I'm President, I will not give up on this issue, not only because it's the right thing to do for our economy -- and CEOs agree with me -- not just because it's the right thing to do for our security, but because it's the right thing to do, period. And I believe that, eventually, enough Republicans in Congress will come around to that view as well.

And I believe that it's the right thing to do because I've been with groups of young people who work so hard and speak with so much heart about what's best in America, even though I knew some of them must have lived under the fear of deportation. I know some have come forward, at great risks to themselves and their futures, in hopes it would spur the rest of us to live up to our own most cherished values. And I've seen the stories of Americans in schools and churches and communities across the country who stood up for them and rallied behind them, and pushed us to give them a better path and freedom from fear --because we are a better nation than one that expels innocent young kids.

And the answer to your question, sir -- and the next time I'd prefer you let me finish my statements before you ask that question -- is this is the right thing to do for the American people --

Q (Inaudible.)

THE PRESIDENT: I didn't ask for an argument. I'm answering your question.

Q I'd like to --

THE PRESIDENT: It is the right thing to do --

Q (Inaudible.)

THE PRESIDENT: -- for the American people. And here's why --

Q -- unemployment --

THE PRESIDENT: Here's the reason: because these young people are going to make extraordinary contributions, and are already making contributions to our society.

I've got a young person who is serving in our military, protecting us and our freedom. The notion that in some ways we would treat them as expendable makes no sense. If there is a young person here who has grown up here and wants to contribute to this society, wants to maybe start a business that will create jobs for other folks who are looking for work, that's the right thing to do. Giving certainty to our farmers and our ranchers; making sure that in addition to border security, we're creating a comprehensive framework for legal immigration -- these are all the right things to do.

We have always drawn strength from being a nation of immigrants, as well as a nation of laws, and that's going to continue. And my hope is that Congress recognizes that and gets behind this effort.

All right. Thank you very much.

and aspirations of up-and-coming entrepreneurs.

VIEW ALL RELATED BLOG POSTS

Q What about American workers who are unemployed while you import foreigners?

END
2:17 P.M. EDT

EXHIBIT K

DP03

SELECTED ECONOMIC CHARACTERISTICS

2011 American Community Survey 1-Year Estimates

Supporting documentation on code lists, subject definitions, data accuracy, and statistical testing can be found on the American Community Survey website in the Data and Documentation section.

Sample size and data quality measures (including coverage rates, allocation rates, and response rates) can be found on the American Community Survey website in the Methodology section.

Although the American Community Survey (ACS) produces population, demographic and housing unit estimates, it is the Census Bureau's Population Estimates Program that produces and disseminates the official estimates of the population for the nation, states, counties, cities and towns and estimates of housing units for states and counties.

Subject	Arizona			
	Estimate	Margin of Error	Percent	Percent Margin of Error
EMPLOYMENT STATUS				
Population 16 years and over	5,044,259	+/-4,894	5,044,259	(X)
In labor force	3,040,762	+/-18,783	60.3%	+/-0.4
Civilian labor force	3,025,208	+/-18,721	60.0%	+/-0.4
Employed	2,687,991	+/-19,218	53.3%	+/-0.4
Unemployed	337,217	+/-13,404	6.7%	+/-0.3
Armed Forces	15,554	+/-1,803	0.3%	+/-0.1
Not in labor force	2,003,497	+/-18,826	39.7%	+/-0.4
Civilian labor force	3,025,208	+/-18,721	3,025,208	(X)
Percent Unemployed	(X)	(X)	11.1%	+/-0.4
Females 16 years and over	2,551,975	+/-4,015	2,551,975	(X)
In labor force	1,404,069	+/-13,459	55.0%	+/-0.5
Civilian labor force	1,402,190	+/-13,483	54.9%	+/-0.5
Employed	1,256,593	+/-13,530	49.2%	+/-0.5
Own children under 6 years	520,440	+/-7,523	520,440	(X)
All parents in family in labor force	314,756	+/-9,848	60.5%	+/-1.6
Own children 6 to 17 years	1,022,108	+/-9,782	1,022,108	(X)
All parents in family in labor force	683,498	+/-16,439	66.9%	+/-1.4
COMMUTING TO WORK				
Workers 16 years and over	2,650,164	+/-18,238	2,650,164	(X)
Car, truck, or van -- drove alone	2,009,959	+/-20,339	75.8%	+/-0.6
Car, truck, or van -- carpooled	308,658	+/-11,901	11.6%	+/-0.4
Public transportation (excluding taxicab)	52,557	+/-4,841	2.0%	+/-0.2
Walked	58,221	+/-6,439	2.2%	+/-0.2
Other means	74,987	+/-5,819	2.8%	+/-0.2
Worked at home	145,782	+/-8,522	5.5%	+/-0.3
Mean travel time to work (minutes)	24.8	+/-0.2	(X)	(X)
OCCUPATION				
Civilian employed population 16 years and over	2,687,991	+/-19,218	2,687,991	(X)
Management, business, science, and arts occupations	920,654	+/-19,207	34.3%	+/-0.6
Service occupations	546,422	+/-14,672	20.3%	+/-0.5
Sales and office occupations	717,086	+/-15,148	26.7%	+/-0.5
Natural resources, construction, and maintenance occupations	245,713	+/-10,459	9.1%	+/-0.4

Subject	Arizona			
	Estimate	Margin of Error	Percent	Percent Margin of Error
Production, transportation, and material moving occupations	258,116	+/-11,040	9.6%	+/-0.4
INDUSTRY				
Civilian employed population 16 years and over	2,687,991	+/-19,218	2,687,991	(X)
Agriculture, forestry, fishing and hunting, and mining	45,569	+/-4,665	1.7%	+/-0.2
Construction	175,081	+/-10,225	6.5%	+/-0.4
Manufacturing	200,479	+/-10,356	7.5%	+/-0.4
Wholesale trade	69,141	+/-5,528	2.6%	+/-0.2
Retail trade	321,736	+/-10,961	12.0%	+/-0.4
Transportation and warehousing, and utilities	134,061	+/-7,716	5.0%	+/-0.3
Information	48,722	+/-4,989	1.8%	+/-0.2
Finance and insurance, and real estate and rental and leasing	223,329	+/-10,524	8.3%	+/-0.4
Professional, scientific, and management, and administrative and waste management services	313,520	+/-12,449	11.7%	+/-0.5
Educational services, and health care and social assistance	577,605	+/-15,445	21.5%	+/-0.6
Arts, entertainment, and recreation, and accommodation and food services	283,691	+/-11,917	10.6%	+/-0.4
Other services, except public administration	134,171	+/-6,454	5.0%	+/-0.2
Public administration	160,886	+/-7,604	6.0%	+/-0.3
CLASS OF WORKER				
Civilian employed population 16 years and over	2,687,991	+/-19,218	2,687,991	(X)
Private wage and salary workers	2,105,834	+/-22,165	78.3%	+/-0.6
Government workers	412,540	+/-14,060	15.3%	+/-0.5
Self-employed in own not incorporated business workers	165,549	+/-7,746	6.2%	+/-0.3
Unpaid family workers	4,068	+/-1,129	0.2%	+/-0.1
INCOME AND BENEFITS (IN 2011 INFLATION-ADJUSTED DOLLARS)				
Total households	2,356,055	+/-12,130	2,356,055	(X)
Less than $10,000	199,310	+/-9,713	8.5%	+/-0.4
$10,000 to $14,999	133,717	+/-6,658	5.7%	+/-0.3
$15,000 to $24,999	288,674	+/-9,555	12.3%	+/-0.4
$25,000 to $34,999	269,103	+/-9,531	11.4%	+/-0.4
$35,000 to $49,999	354,311	+/-11,001	15.0%	+/-0.5
$50,000 to $74,999	434,076	+/-11,458	18.4%	+/-0.5
$75,000 to $99,999	263,676	+/-9,096	11.2%	+/-0.4
$100,000 to $149,999	256,841	+/-8,755	10.9%	+/-0.4
$150,000 to $199,999	84,334	+/-5,618	3.6%	+/-0.2
$200,000 or more	72,013	+/-5,062	3.1%	+/-0.2
Median household income (dollars)	46,709	+/-554	(X)	(X)
Mean household income (dollars)	62,927	+/-690	(X)	(X)
With earnings	1,765,506	+/-15,277	74.9%	+/-0.5
Mean earnings (dollars)	63,379	+/-796	(X)	(X)
With Social Security	719,749	+/-9,156	30.5%	+/-0.4
Mean Social Security income (dollars)	17,826	+/-222	(X)	(X)
With retirement income	461,414	+/-10,099	19.6%	+/-0.4
Mean retirement income (dollars)	23,777	+/-711	(X)	(X)
With Supplemental Security Income	98,459	+/-5,488	4.2%	+/-0.2
Mean Supplemental Security Income (dollars)	9,087	+/-293	(X)	(X)
With cash public assistance income	64,349	+/-4,366	2.7%	+/-0.2
Mean cash public assistance income (dollars)	3,608	+/-339	(X)	(X)
With Food Stamp/SNAP benefits in the past 12 months	325,811	+/-10,308	13.8%	+/-0.4
Families	1,543,923	+/-17,041	1,543,923	(X)
Less than $10,000	92,699	+/-6,770	6.0%	+/-0.4
$10,000 to $14,999	59,688	+/-5,383	3.9%	+/-0.3
$15,000 to $24,999	148,012	+/-7,301	9.6%	+/-0.5
$25,000 to $34,999	158,916	+/-6,392	10.3%	+/-0.4
$35,000 to $49,999	229,461	+/-8,656	14.9%	+/-0.5
$50,000 to $74,999	305,242	+/-9,166	19.8%	+/-0.6

Subject	Arizona			
	Estimate	Margin of Error	Percent	Percent Margin of Error
$75,000 to $99,999	205,399	+/-9,041	13.3%	+/-0.6
$100,000 to $149,999	210,601	+/-7,596	13.6%	+/-0.5
$150,000 to $199,999	71,130	+/-5,116	4.6%	+/-0.3
$200,000 or more	62,775	+/-4,663	4.1%	+/-0.3
Median family income (dollars)	55,328	+/-706	(X)	(X)
Mean family income (dollars)	72,602	+/-940	(X)	(X)
Per capita income (dollars)	23,793	+/-273	(X)	(X)
Nonfamily households	812,132	+/-14,770	812,132	(X)
Median nonfamily income (dollars)	30,542	+/-578	(X)	(X)
Mean nonfamily income (dollars)	41,864	+/-1,089	(X)	(X)
Median earnings for workers (dollars)	27,800	+/-546	(X)	(X)
Median earnings for male full-time, year-round workers (dollars)	42,544	+/-972	(X)	(X)
Median earnings for female full-time, year-round workers (dollars)	36,048	+/-466	(X)	(X)
HEALTH INSURANCE COVERAGE				
Civilian noninstitutionalized population	6,378,280	+/-1,787	6,378,280	(X)
With health insurance coverage	5,283,270	+/-27,358	82.8%	+/-0.4
With private health insurance	3,770,652	+/-40,200	59.1%	+/-0.6
With public coverage	2,221,496	+/-34,788	34.8%	+/-0.5
No health insurance coverage	1,095,010	+/-27,071	17.2%	+/-0.4
Civilian noninstitutionalized population under 18 years	1,621,830	+/-1,382	1,621,830	(X)
No health insurance coverage	208,419	+/-11,020	12.9%	+/-0.7
Civilian noninstitutionalized population 18 to 64 years	3,845,434	+/-2,591	3,845,434	(X)
In labor force:	2,861,520	+/-17,224	2,861,520	(X)
Employed:	2,549,095	+/-18,132	2,549,095	(X)
With health insurance coverage	2,026,994	+/-23,062	79.5%	+/-0.7
With private health insurance	1,831,204	+/-24,170	71.8%	+/-0.7
With public coverage	255,984	+/-11,045	10.0%	+/-0.4
No health insurance coverage	522,101	+/-17,955	20.5%	+/-0.7
Unemployed:	312,425	+/-12,735	312,425	(X)
With health insurance coverage	188,812	+/-8,286	60.4%	+/-1.8
With private health insurance	85,606	+/-5,940	27.4%	+/-1.7
With public coverage	111,810	+/-5,978	35.8%	+/-1.8
No health insurance coverage	123,613	+/-8,589	39.6%	+/-1.8
Not in labor force:	983,914	+/-17,054	983,914	(X)
With health insurance coverage	752,726	+/-16,626	76.5%	+/-0.9
With private health insurance	446,108	+/-14,108	45.3%	+/-1.2
With public coverage	362,876	+/-12,352	36.9%	+/-1.1
No health insurance coverage	231,188	+/-9,774	23.5%	+/-0.9
PERCENTAGE OF FAMILIES AND PEOPLE WHOSE INCOME IN THE PAST 12 MONTHS IS BELOW THE POVERTY LEVEL				
All families	(X)	(X)	14.1%	+/-0.6
With related children under 18 years	(X)	(X)	22.9%	+/-1.0
With related children under 5 years only	(X)	(X)	22.0%	+/-2.3
Married couple families	(X)	(X)	7.8%	+/-0.5
With related children under 18 years	(X)	(X)	13.0%	+/-1.0
With related children under 5 years only	(X)	(X)	10.7%	+/-2.2
Families with female householder, no husband present	(X)	(X)	33.3%	+/-1.8
With related children under 18 years	(X)	(X)	42.1%	+/-2.1
With related children under 5 years only	(X)	(X)	49.7%	+/-6.2
All people	(X)	(X)	19.0%	+/-0.6
Under 18 years	(X)	(X)	27.2%	+/-1.3
Related children under 18 years	(X)	(X)	26.9%	+/-1.3
Related children under 5 years	(X)	(X)	29.6%	+/-1.8
Related children 5 to 17 years	(X)	(X)	25.9%	+/-1.3
18 years and over	(X)	(X)	16.2%	+/-0.5
18 to 64 years	(X)	(X)	18.0%	+/-0.6

Subject	Arizona			
	Estimate	Margin of Error	Percent	Percent Margin of Error
65 years and over	(X)	(X)	8.5%	+/-0.5
People in families	(X)	(X)	17.1%	+/-0.7
Unrelated individuals 15 years and over	(X)	(X)	27.0%	+/-0.8

Data are based on a sample and are subject to sampling variability. The degree of uncertainty for an estimate arising from sampling variability is represented through the use of a margin of error. The value shown here is the 90 percent margin of error. The margin of error can be interpreted roughly as providing a 90 percent probability that the interval defined by the estimate minus the margin of error and the estimate plus the margin of error (the lower and upper confidence bounds) contains the true value. In addition to sampling variability, the ACS estimates are subject to nonsampling error (for a discussion of nonsampling variability, see Accuracy of the Data). The effect of nonsampling error is not represented in these tables.

Selected earnings and income data are not available for certain geographic areas due to problems with group quarters data collection and imputation. See the ACS User Notes for details.

Employment and unemployment estimates may vary from the official labor force data released by the Bureau of Labor Statistics because of differences in survey design and data collection. For guidance on differences in employment and unemployment estimates from different sources go to Labor Force Guidance.

The Census Bureau introduced an improved sequence of labor force questions in the 2008 ACS questionnaire. Accordingly, we recommend using caution when making labor force data comparisons from 2008 or later with data from prior years. For more information on these questions and their evaluation in the 2006 ACS Content Test, see the "Evaluation Report Covering Employment Status" at http://www.census.gov/acs/www/Downloads/methodology/content_test/P6a_Employment_Status.pdf, and the "Evaluation Report Covering Weeks Worked" at http://www.census.gov/acs/www/Downloads/methodology/content_test/P6b_Weeks_Worked_Final_Report.pdf. Additional information can also be found at http://www.census.gov/hhes/www/laborfor/laborforce.html.

Workers include members of the Armed Forces and civilians who were at work last week.

Industry codes are 4-digit codes and are based on the North American Industry Classification System 2007. The Industry categories adhere to the guidelines issued in Clarification Memorandum No. 2, "NAICS Alternate Aggregation Structure for Use By U.S. Statistical Agencies," issued by the Office of Management and Budget.

Occupation codes are 4-digit codes and are based on Standard Occupational Classification 2010.

The health insurance coverage category names were modified in 2010. See ACS Health Insurance Definitions for a list of the insurance type definitions.

This table contains new estimates for health insurance coverage status by employment status in 2010.

While the 2011 American Community Survey (ACS) data generally reflect the December 2009 Office of Management and Budget (OMB) definitions of metropolitan and micropolitan statistical areas; in certain instances the names, codes, and boundaries of the principal cities shown in ACS tables may differ from the OMB definitions due to differences in the effective dates of the geographic entities.

Estimates of urban and rural population, housing units, and characteristics reflect boundaries of urban areas defined based on Census 2000 data. Boundaries for urban areas have not been updated since Census 2000. As a result, data for urban and rural areas from the ACS do not necessarily reflect the results of ongoing urbanization.

Source: U.S. Census Bureau, 2011 American Community Survey

Explanation of Symbols:

1. An '**' entry in the margin of error column indicates that either no sample observations or too few sample observations were available to compute a standard error and thus the margin of error. A statistical test is not appropriate.
2. An '-' entry in the estimate column indicates that either no sample observations or too few sample observations were available to compute an estimate, or a ratio of medians cannot be calculated because one or both of the median estimates falls in the lowest interval or upper interval of an open-ended distribution.
3. An '-' following a median estimate means the median falls in the lowest interval of an open-ended distribution.
4. An '+' following a median estimate means the median falls in the upper interval of an open-ended distribution.
5. An '***' entry in the margin of error column indicates that the median falls in the lowest interval or upper interval of an open-ended distribution. A statistical test is not appropriate.
6. An '******' entry in the margin of error column indicates that the estimate is controlled. A statistical test for sampling variability is not appropriate.
7. An 'N' entry in the estimate and margin of error columns indicates that data for this geographic area cannot be displayed because

the number of sample cases is too small.

8. An '(X)' means that the estimate is not applicable or not available.