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Screening DACA Recipients for Other Relief

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Given the uncertain future of the DACA program, it's critical to screen recipients for all other forms of immigration relief. Is the client potentially eligible for a more permanent immigration benefit, either affirmatively or defensively if in removal proceedings? Even if a client was thoroughly screened prior to applying for DACA initially, changes in personal circumstances or immigration policy may mean that a new form of relief is now available. This advisory reviews some of the most common forms of relief that may apply to DACA recipients. It also provides tips on screening for inadmissibility, which is a prerequisite to many types of relief. In addition to a detailed screening interview, consider filing Freedom of Information Act requests, FBI background checks, and criminal records requests from the very beginning, so that you have the information you need about clients' immigration and criminal history.

U.S. Citizenship

Did your client have a U.S. citizen parent at the time of their birth? Some DACA recipients may be U.S. citizens without realizing it. A child born abroad may automatically acquire citizenship if one or both parents was a U.S. citizen at the time of the child's birth. The laws regarding acquisition of citizenship have varied over time, and the specific requirements depend on the law that was in effect when the child was born. However, several factors are relevant across the years: whether one or both parents were U.S. citizens at the time of the child's birth; whether the child was born in or out of wedlock; and whether the U.S. citizen parent has ever resided in the United States, and if so, when and for how long?

The following requirements apply if a child was born in wedlock:

- Born on/after Dec. 24, 1952, and prior to Nov. 14, 1986, (one U.S. citizen and one alien parent): Before the child's birth, citizen had been physically present in the United States or its outlying possessions for 10 years, at least five of which were after the age of 14.

- Born on/after Nov. 14, 1986, (one U.S. citizen and one alien parent): Before the child's birth, citizen had been physically present in the United States or its outlying possessions for five years, at least two of which were after the age of 14.

For children born out of wedlock, the requirements have differed depending on whether the U.S. citizen parent was the mother or the father¹:

- Child born out of wedlock to a U.S. citizen mother on/after Dec. 24, 1952, and prior to June 13, 2017: The mother must have been physically present in the United States or one of its outlying possessions for one continuous year before the child's birth.
- Child born out of wedlock to U.S. citizen father on/after Nov. 15, 1971, and prior to June 13, 2017: Child must be legitimated by father or acknowledged under oath/paternity established by competent court. U.S. citizen father must have been physically present in the United States or its outlying possessions five years before the child's birth, at least two of which were after age 14.

It's possible for parents who are unaware of their own citizenship to transmit citizenship to a child unknowingly. For this reason, it's important to ask about the citizenship of parents and grandparents. Find out where each was born, whether they lived in the United States, and if so, how they came to reside here.

Lawful Permanent Residence

This section will discuss paths to residency through family-based immigration, employment-based immigration, the diversity visa lottery, the Cuban Adjustment Act, and Liberian Refugee Immigrant Fairness.

Family-Based Immigration

Does your client have a U.S. citizen or lawful permanent resident (LPR) family member who has filed or could file an I-130 petition on their behalf? DACA recipients may be eligible to seek LPR status based on a family-based petition. To immigrate, the client must be the beneficiary of an approved I-130, have an immigrant visa immediately available and not be inadmissible.² For someone who

¹ The Supreme Court has ruled that for children born on or after June 13, 2017, a U.S. citizen mother must meet the same residency requirements as U.S. citizen fathers. *Sessions v. Morales-Santana*, 582 U.S. ____ 2017. The change in law does not impact acquisition of citizenship for DACA recipients, who must be born prior to June 15, 1982 in order to meet the DACA eligibility guidelines.

² See stand-alone discussion on Screening for Inadmissibility on page 11.

meets all of these criteria, determine whether the client will be eligible for adjustment of status or must pursue consular processing instead.

DACA recipients who are eligible may apply for LPR status in the United States through adjustment of status. Others will have no choice but to return to their home country to consular process. Departing the United States to attend an immigrant visa interview could trigger a number of different inadmissibility grounds. If the only ground of inadmissibility the client's departure will trigger is an unlawful presence bar under INA § 212(a)(9)(B),³ determine whether he or she is eligible for an I-601A provisional waiver prior to departure. To qualify, the client will need to have a U.S. citizen or LPR spouse or parent who would suffer extreme hardship if the waiver was not granted. If the client faces any other inadmissibility issues in addition to unlawful presence, he or she is not eligible for a provisional waiver. Instead, the client would need to apply for the relevant inadmissibility waivers, if available, after attending the interview and being found inadmissible.

There are two statutory doorways to adjust status in the United States: INA § 245(a) and INA § 245(i).

245(a) adjustment

To adjust under 245(a), an I-130 beneficiary must have been "inspected and admitted or paroled" upon their last entry; have an immigrant visa immediately available; and be admissible. Immediate relatives (i.e. spouses or children of U.S. citizens or parents of adult U.S. citizens) may file their Form I-485 adjustment of status application together with the petitioner's I-130 (what is called a "one-step" filing). For someone in a preference category to adjust under INA § 245(a), in addition to meeting the requirements described above, he or she may not fall into one of the INA § 245(c) bars to adjustment. Because most preference beneficiaries will either have worked without authorization or failed to have continuously maintained lawful immigration status (or both), 245(a) adjustment will be unlikely.

When screening, ask DACA clients if they have a spouse, son or daughter (21 or older), or parent (if they are over 21) who is a U.S. citizen. If the spouse, parent, or child is an LPR, is that relative eligible to naturalize, such that the beneficiary could become an immediate relative? If the DACA client is unmarried, do they have a partner who is a U.S. citizen or LPR whom they would like to marry? If your client's last entry was without inspection, determine whether he or she subsequently traveled abroad and returned under a grant of advance parole. Since 245(a) eligibility can be based on

³ For DACA recipients who traveled with a valid advance parole travel document, their departure is not considered to have triggered the unlawful presence ground of inadmissibility. See *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012).

entry with admission or *parole*, a DACA beneficiary who returned to the United States after travel on advance parole may now meet the “inspected and admitted or paroled” requirement for 245(a) adjustment eligibility.

245(i) adjustment

Someone whose last entry was without inspection may nonetheless be eligible to adjust under INA 245(i) upon paying a \$1,000 penalty if an immigrant visa is immediately available, the person is admissible, and he or she is the beneficiary (or derivative beneficiary) of an approvable when filed petition filed on or before April 30, 2001. Ask clients whether anyone ever filed a petition on their behalf (or on behalf of one of their parents) before April 30, 2001. Note that if a Form I-130, I-140, I-360, I-526, or labor certification application was filed between Jan. 15, 1998 and April 30, 2001, there is an additional requirement that the principal beneficiary was physically present in the United States on Dec. 21, 2000.

For clients who appear to be adjustment eligible either under 245(a) or 245(i), confirm that the petitioner (or potential petitioner) is working or can otherwise meet the income requirements for the Form I-864 Affidavit of Support.

Employment-Based Immigration

When screening DACA clients, inquire about their current job, employment and education history, and whether an employer has ever sponsored the client for an employment-based immigrant visa. If not, would their employer or a prospective employer be willing to sponsor them for LPR status? Keep in mind that to immigrate in some of the employment-based preference categories, a PERM labor certification is required from the Department of Labor before the sponsoring employer can file the I-140 petition. This means that, even if the employment-based Visa Bulletin indicates an immigrant visa is available, it could take a year or more before the employer can file its I-140 petition and the client could concurrently file their adjustment application or proceed with consular processing.

Employment-based adjustment applicants must meet the requirements of either INA § 245(a) or INA § 245(i). Most DACA recipients will not be able to adjust through 245(a) due to the fact that they have either been out of status or worked without authorization for an aggregate of more than 180 days.⁴ With one exception, section 245(c) prevents an employment-based applicant from adjusting under 245(a) if he or she has ever worked without authorization or failed to maintain lawful immigration status. Since having no lawful status on June 15, 2012, was a prerequisite to getting DACA, DACA recipients are unlikely to qualify for 245(a) adjustment based on employment unless

⁴ See INA §§ 245(c) and 245(k).

they fall into the narrow exception at INA § 245(k). Section 245(k) protects 245(a) adjustment eligibility for employment-based beneficiaries in the first, second, third or fourth preference categories who worked without authorization or have been in the United States without lawful status for an aggregate period of 180 days or less.

If 245(a) adjustment is not an option, determine whether the client meets the requirements to adjust under 245(i). For those who are not eligible to adjust status under either provision, there is the possibility of consular processing. But, as with family-based immigration, consular processing will only be an option for intending immigrants who can depart the United States without triggering an unlawful presence bar or who can qualify for an inadmissibility waiver.

If necessary, refer clients out to an employment-based immigration specialist for further screening.

Some DACA recipients may also inquire about the possibility of nonimmigrant employment-based status. In order to be granted a change of status into a nonimmigrant status like H-1B, TN, or R-1, INA § 248 requires the beneficiary to be in lawful nonimmigrant status to begin with; DACA is not considered a lawful nonimmigrant status. Thus, any petition for a nonimmigrant worker would need to be applied for as a consular processing petition and, if approved, the beneficiary would have to leave the United States to apply for a nonimmigrant visa abroad. As discussed earlier, for many DACA beneficiaries, departing the United States will trigger an unlawful bar or other inadmissibility grounds or execute an outstanding removal order.

Diversity Visa Lottery

For DACA clients who do not have a qualifying relative or employer sponsor, consider whether they qualify to enter the 2022 Diversity Immigrant Visa Program once the online registration period opens in the fall of 2021. Was the client or client's spouse born in a country whose natives qualify to enter the lottery? Alternatively, was one of the client's parents born in an eligible country? An applicant may be charged to a parent's country of birth if neither parent was a resident of their son or daughter's country of birth at the time the child was born. To qualify, the applicant will also need a high school diploma or its equivalent or at least two years of work experience in an occupation requiring at least two years of training or experience. DACA recipients who qualified for DACA based on having graduated from high school or obtained a GED will be able to meet the education requirement of the DV program.

If the client already entered the 2021 diversity lottery and is selected, he or she must be issued an immigrant visa or have an adjustment application approved by Sept. 30, 2021. Remember that diversity lottery selectees who want to adjust status here in the United States, must meet the criteria to adjust status under the requirements of 245(a) or 245(i).

Cuban Adjustment

In order to be granted adjustment under the Cuban Adjustment Act, an applicant must:

- 1) Be a native or citizen of Cuba;
- 2) Have been inspected and admitted or paroled into the United States after January 1, 1959;
- 3) Have at least one year of aggregate physical presence in the United States
- 4) Not be inadmissible to the United States (though not all inadmissibility grounds apply to Cuban adjustment)

When screening, start by asking whether the client is a native or citizen of Cuba, or is the child or spouse of a Cuban citizen. Cuban adjustment is unlikely to be an option for most clients since there are very few Cuban DACA grantees.⁵

Liberian Refugee Immigrant Fairness

In order to adjust under Liberian Refugee Immigrant Fairness (LRIF), a principal applicant must:

- 1) Be a national of Liberia;
- 2) Show continuous presence in the United States from November 20, 2014, through the date the adjustment application is filed;
- 3) Not be inadmissible to the United States (although the INA §§ 212(a)(4), 212(a)(5), 212(a)(6)(A), and 212(a)(7)(A) inadmissibility grounds do not apply to LRIF adjustment); and
- 4) Not have an aggravated felony conviction; two or more convictions for a crime involving moral turpitude (other than a purely political offense); or have participated in the persecution of others.

In addition, the spouse and unmarried children, sons and daughters of an eligible Liberian principal applicant may also apply to adjust status regardless of nationality and without showing continuous physical presence. They are subject to the same inadmissibility requirements as principal applicants and the same ineligibility criteria pertaining to certain convictions and persecution of others.

All LRIF adjustment applicants must file an I-485 on or by Dec. 20, 2020.

Humanitarian Relief

The humanitarian forms of relief discussed in this section may offer a path to permanent residency for DACA recipients who are not eligible to immigrate through the family-based system.

⁵Cuba is not among the top countries of origin for DACA recipients. See USCIS "Approximate Active DACA Recipients - Sep. 30, 2019 (Jan. 14, 2020) available at www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-821d-deferred-action-childhood-arrivals.

Violence Against Women Act (VAWA)

VAWA provides a path to permanent residency for noncitizens who have been abused by a U.S. citizen or lawful permanent resident spouse or parent.⁶ Parents who have been abused by a U.S. citizen adult son or daughter may also self-petition under this provision. Those who meet the requirements may file a Form I-360 VAWA self-petition rather than rely on an abusive family member to file a relative petition on their behalf.

To qualify based on abuse by a spouse the applicant must show that he or she was battered or subjected to extreme cruelty; that the marriage was entered into in good faith; that the applicant resided with the abusive U.S. citizen or LPR at some point; and that the applicant is of good moral character. "Battery or extreme cruelty" includes physical, emotional or psychological abuse. Children who are unmarried and under the age of 21 may be included in a VAWA self-petition as derivative beneficiaries. Thus, a child who has not been directly abused could still immigrate based on a parent who qualifies for VAWA.

The child of an abusive U.S. citizen or lawful permanent resident may self-petition under VAWA if he or she: resides or has resided with the abusive U.S. citizen or lawful permanent resident parent; has been battered by or has been the subject of extreme cruelty perpetrated by the U.S. citizen or lawful permanent resident parent; and is a person of good moral character, if age 14 or older. A person who is over age 21 may still file a VAWA self-petition as a child until age 25, if the abuse was one central reason for the delay in filing.⁷

Those whose VAWA self-petitions are approved may apply for permanent residency based on their preference category or as an immediate relative. VAWA self-petitioners who are in the United States are eligible to adjust status despite having entered without inspection or parole. While they wait to apply for adjustment of status they may qualify for deferred action and employment authorization.

DACA recipients may be eligible for VAWA in several ways. Those who have directly been abused by a U.S. citizen or LPR spouse or parent may file their own self-petition. A DACA recipient whose child is abused by a U.S. citizen or LPR spouse may also file for VAWA. Finally, DACA recipients who are unmarried and under the age of 21 may be derivative beneficiaries on a VAWA self-petition filed by a parent who was subject to abuse.

When screening for VAWA eligibility, examine possible abuse the DACA recipient has suffered directly by a parent or spouse, or whether the DACA recipient's child may have been abused by a U.S. citizen or LPR spouse.

⁶ INA § 204.

⁷ INA § 204(a)(1)(D)(v).

While VAWA self-petitioners do not need to prove that they are admissible to the United States, the grounds of inadmissibility will apply when they later seek LPR status. For that reason, clients should be screened for potential inadmissibility as well as eligibility for any VAWA-specific exceptions and waivers.

U Status

Victims of serious crimes and their close family members may be eligible for U nonimmigrant status, also referred to as the U visa. To qualify, the victim must have suffered substantial physical or mental abuse as the result of having been the victim of a certain criminal activity that violated the laws of the United States or occurred in the United States.⁸ The victim must have been helpful, is being helpful, or is likely to be helpful to law enforcement in the investigation or prosecution of the crime. Finally, the applicant must be admissible or have the applicable ground waived.⁹

Qualifying crimes include: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting; attempt, conspiracy or solicitation to commit any of the above-mentioned crimes; or any similar activity in violation of federal, state or local law.

Applicants must obtain a law enforcement certification indicating their helpfulness in the investigation or prosecution of the crime. “Helpfulness” does not require a specific act and could include activities such as reporting the crime to police, sharing information to aid in the investigation of a crime, etc., even if the case is not prosecuted or the perpetrator of the crime is not convicted.

Certain relatives of the direct victim may qualify as “indirect victims,” which allows them to apply for U status though they were not the immediate victim of the crime. “Indirect victims” may include family members where the direct victim is deceased, incompetent, or incapacitated and therefore unable to provide information about the crime or cooperate with law enforcement in the investigation or prosecution of the crime.¹⁰ Indirect victims may include the victim’s spouse or children. If the direct victim is under 21, indirect victims may also include parents and siblings under age 18.

⁸ INA § 101(a)(15)(U).

⁹ INA § 212(d)(14) provides an inadmissibility waiver specific to U nonimmigrant status. Any ground may be waived in the public or national interest, except for the grounds applicable to perpetrators and participants of Nazi persecutions, genocide, acts of torture or extrajudicial killings.

¹⁰ Indirect victim may be the spouse or child of the direct victim. If the direct victim is unmarried and under age 21, indirect victims may include the parents and unmarried siblings under age 18.

Principal applicants may include derivative beneficiaries in their U application. If the principal is under age 21, derivatives include the spouse, parents, children, and siblings who are unmarried and under 18. If the principal applicant is age 21 or older, the spouse and children are included as derivative beneficiaries.

Those with prima facie eligibility will be granted deferred action and work authorization and placed on a wait list. The number of U visas that may be issued each year to U principal applicants is capped at 10,000. The high demand for U status has resulted in an extremely long wait for before applicants are granted U status. At the time of writing, it is taking approximately four and a half years to get onto the U visa wait list.¹¹ After placement on the waiting list, applicants face an additional wait until a U visa becomes available.¹² Once someone has been in U status for three years, they may apply for lawful permanent residency.

T Status

T nonimmigrant status (also referred as the T visa) provides immigration relief to victims of human trafficking, including both labor trafficking and sex trafficking.¹³ T nonimmigrants are granted four years of lawful status and a path to permanent residency. To qualify, an applicant must show that he or she: is a survivor of a severe form of trafficking or attempted trafficking¹⁴; is physically present in the United States or at a port-of-entry on account of such trafficking; has complied with any reasonable request for assistance in investigating or prosecuting the trafficking; and would suffer extreme hardship involving unusual and severe harm upon removal from the United States. Note that cooperation with law enforcement is not required if the applicant is under age 18 or unable to cooperate because of physical or psychological trauma, or if the request for cooperation is not reasonable. Most inadmissibility grounds apply to T status applicants but may be waived if in the national interest and the activities resulting in inadmissibility were connected to the victimization.¹⁵

Derivative beneficiaries for applicants over age 21 include a spouse and children. Applicants over 21 may also include parents and unmarried siblings under age 18 if law enforcement certifies they face a present danger of retaliation. For applicants under 21, derivatives include spouse, children,

¹¹ See I-918 processing times, available at: egov.uscis.gov/processing-times/.

¹² See USCIS Statistics on Form I-918, Petition for U Nonimmigrant Status, 2009 – 2019, available at: www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victim%20Statistics/fy2019_qtr4.pdf.

¹³ INA § 101(a)(15)(T).

¹⁴ See definition of trafficking under 22 USC § 7102.

¹⁵ See INA § 212(d)(13).

parents and unmarried siblings under the age of 18. Finally, the adult or minor children of a derivative beneficiary may also be included if they face a present danger of retaliation.¹⁶

T nonimmigrants may apply for permanent resident status after three years in T status or sooner if the investigation or prosecution is complete.¹⁷

Labor and sex trafficking crimes may also be U status qualifying crimes. If a noncitizen may qualify for either form of relief, consider whether T status is more advantageous. A law enforcement certification is an absolute requirement for U status, while it is not required for T status. Although T visas are subject to an annual cap of 5,000, there are fewer applicants for T status than for U status and the cap has never been reached, thus it is a much faster path to permanent residency.

Asylum

If your client fled persecution in his or her home country or is afraid of returning to their home country, they may be eligible for asylum. To qualify for asylum one must show that they are unable or unwilling to return to their country of nationality because of persecution or a well-founded fear of future persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.¹⁸

Those who apply for asylum may also apply for employment authorization. Asylees may apply for permanent resident status after one year.

To qualify for asylum one must apply within one year of arriving in the United States, unless there are changed circumstances or extraordinary circumstances that prevented the applicant from requesting asylum earlier. Since DACA recipients must have resided in the United States since June 15, 2007, they will need to meet one of these two exceptions to the one-year bar.

A noncitizen who was previously ordered removed but never departed is still considered to be in removal proceedings. Therefore, the immigration court would retain jurisdiction over the case. Where asylum is a viable option, there may be a basis for reopening the removal order to allow the individual to file an affirmative asylum application with USCIS. For more information, see CLINIC's practice advisory "[Motions to Reopen for DACA Recipients with Removal Orders.](#)"

It is important for potential asylum applicants to understand that there is a risk of being placed in removal proceedings if their application is denied. For this reason, DACA recipients should seek immigration advice from a licensed attorney or DOJ accredited representative. For additional

¹⁶ See T status regulations at 8 CFR § 214.11.

¹⁷ See T adjustment regulations at 8 § CFR 245.23.

¹⁸ INA §§ 208(b)(1)(A); 101(a)(42).

guidance on asylum for DACA recipients, see CLINIC's practice advisories "[Overcoming the Asylum One-Year Filing Deadline for DACA Recipients](#)" and "[LGBTI DACA Recipients and Options for Relief under Asylum Law](#)."

Special Immigrant Juvenile Status (SIJS)

Children under age 21 who have been abused, abandoned or neglected by at least one parent may be eligible for Special Immigrant Juvenile Status (SIJS). To qualify, the child must be dependent on a juvenile court or have been legally committed to, or placed under the custody of, an agency, entity or individual appointed by a juvenile court; the child's reunification with one or both parents is not viable due to abuse, neglect, abandonment or similar basis under state law; and it is not in the child's best interest to be returned to the child's or the parent's country of origin.¹⁹

A state court must make the determination that the child has been abandoned, abused or neglected by at least one parent and that he or she cannot be reunited with that parent. The court must also decide that it is not in the child's best interests to return to their home country.

DACA recipients who are under the age of 21 and unmarried may be eligible for this relief. With a predicate order from a state court, the individual can affirmatively apply to USCIS for Special Immigrant Juvenile Status.²⁰ Certain inadmissibility grounds do not apply to special immigrant juveniles and others are waivable for humanitarian purposes, family unity, or when in the public interest.²¹

Once the applicant has a current priority date, they may also apply for adjustment of status. Note that there is a backlog in the Employment Based 4th preference category, at present, for SIJs from Guatemala, El Salvador, Honduras and Mexico.²²

For more information, see CLINIC's practice advisory "[Screening DACA Recipients for Special Immigrant Juvenile Status Eligibility](#)."

¹⁹ INA § 101(a)(27)(J).

²⁰ 8 CFR § 204.11(d)(2).

²¹ INA § 245(h)(2)(B).

²² See April 2020 Chart A Final Action Dates for Employment-Based Preference Cases. According to the USCIS website, employment based visa applicants must use the Final Action Dates, Chart A for April 2020.

Other Temporary Relief

Parole In Place

Does your client have a spouse, parent, son or daughter who is or was in the U.S. military? Spouses, children, and parents of active duty members of the U.S. Armed Forces or those in the Selected Reserve of the Ready Reserve (as well as those who previously served in the Armed Forces or Selected Reserve) may qualify for a discretionary grant of parole in place (PIP). If approved, parole will be authorized in one-year increments and parolees may apply for employment authorization.

Similar to a DACA recipient who returned to the United States with advance parole, a grant of PIP overcomes the “inspected and admitted or paroled” obstacle of 245(a) adjustment for someone who originally entered without inspection. Thus, PIP could help create adjustment eligibility for DACA clients who entered without inspection and were not able to travel on advance parole when this was still an option. Even a DACA client with a military member child who is younger than 21 can apply for PIP now in order to create adjustment eligibility later, once the child turns 21 and can file an I-130.

Relief in Removal Proceedings

A DACA recipient who does not qualify for an affirmative remedy might be eligible for relief while in removal proceedings. Consider whether the client is eligible for non-LPR cancellation of removal. He or she must have been physically present in the United States for at least 10 years; must be able to demonstrate good moral character; cannot have been convicted of offenses that would make them inadmissible under INA §§ 212(a)(2), 237(a)(2), or 237(a)(3); and must show that a U.S. citizen or LPR spouse, parent, or child would suffer exceptional and extremely unusual hardship. For more information see CLINIC’s practice advisory “[Non-Lawful Permanent Resident Cancellation of Removal Under INA § 240A\(b\) for DACA Recipients.](#)”

Other common forms of relief from removal include VAWA cancellation, asylum, withholding of removal, and protection under the Convention Against Torture.

Screening for Inadmissibility

It is critical to screen all potential LPR applicants for inadmissibility under INA § 212(a), whether the DACA client plans to adjust status in the United States or consular process overseas. Because DACA was an act of prosecutorial discretion – and not an immigration benefit – applicants were not required to demonstrate admissibility in order to receive DACA but they will have to (or qualify for an inadmissibility waiver) for permanent residence. Likewise, some inadmissibility grounds also apply to various forms of humanitarian relief discussed above.

DACA recipients who are over 18 years old will begin to accrue (or resume accruing) unlawful presence for purposes of the three- and 10-year bars under INA § 212(a)(9)(B) as soon as their deferred action expires.²³ Section 212(a)(9)(B) is only triggered by a departure from the United States (with the exception of a departure under advance parole²⁴). So this ground should not affect those who apply to adjust status in the United States but will impact clients who plan to consular process. Departing the country after accruing at least 180 days of unlawful presence will trigger this ground and the individual will remain ineligible for LPR status for three or 10 years unless he or she qualifies for a waiver after being found inadmissible by the consular officer or had a provisional waiver approved before departing and is not found inadmissible under any other ground.

For clients who appear to be 245(a) adjustment eligible based on advance parole travel, ask about all previous exits and entries to make sure the individual has not already triggered an unlawful presence bar through a prior departure without advance parole. Keep in mind that, even though someone who departed with advance parole is not inadmissible under INA § 212(a)(9)(B), their departure could have triggered another inadmissibility ground. For example, a DACA recipient with a prior removal order who departed with advance parole has likely executed that removal order and could be inadmissible under § 212(a)(9)(A).

DACA clients with outstanding removal orders or who are in removal proceedings will need special attention. An applicant for an affirmative benefit who is found to be ineligible based on the prior order or active proceedings could be at risk of immigration enforcement upon denial of the application by USCIS. For more information, see CLINIC's practice advisories "[Motions to Reopen for DACA Recipients with Removal Orders](#)" and "[Stays of Removal for DACA Recipients with Removal Orders](#)."

Remember that the criminal bars to DACA and the criminal grounds of inadmissibility do not overlap. Thus, it is possible that a client's criminal history was not disqualifying for DACA but makes him or her inadmissible under INA § 212(a)(2) (or deportable under INA § 237(a)(2)). When screening, pay particular attention to criminal history and drug use, including marijuana. For example, someone with a misdemeanor drug possession conviction would not have been automatically disqualified from DACA but could be inadmissible for a controlled substance offense.

Other common inadmissibility grounds to screen for include public charge, smuggling (which could include acts like sending money to or helping a family member cross the border illegally), making a

²³ Likewise, those who lose DACA will begin or resume accruing unlawful presence for purposes of the permanent bar under INA § 212(a)(9)(C).

²⁴ Per the 2012 Board of Immigration Appeals case, *Matter of Arrabally and Yerrabelly*, travel on advance parole is not considered a "departure" for purposes of triggering inadmissibility under 212(a)(9)(B)(i).

material misrepresentation to an immigration official (including using fake or borrowed documents to enter the United States), falsely claiming to be a U.S. citizen, and health based inadmissibility (that could be triggered by marijuana use or DUI arrests or convictions). Pay particular attention to prior contact with immigration officials, and multiple entries to the United States. DACA clients who are inadmissible will not be able to obtain permanent residence unless they are exempt from the particular inadmissibility ground or able to get a waiver for that ground.