DACA LEGAL SERVICES TOOLKIT

Practice Advisory 6 of 7

DEFENSES FOR DACA RECIPIENTS FACING ENFORCEMENT OR REMOVAL (DEPORTATION) PROCEEDINGS

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Center for Human Rights and Constitutional Law
256 S. Occidental Blvd.
Los Angeles, CA 90057
Telephone: (213) 388-8693

A Note from the Executive Director

The Center for Human Rights and Constitutional Law is a non-profit, public interest legal foundation dedicated to furthering and protecting the civil, constitutional, and human rights of immigrants, refugees, children, prisoners, and the poor. Since its incorporation in 1980, under the leadership of a board of directors comprising civil rights attorneys, community advocates and religious leaders, the Center has provided a range of legal services to vulnerable low-income victims of human and civil rights violations and technical support and training to hundreds of legal aid attorneys and paralegals in the areas of immigration law, constitutional law, and complex and class action litigation.

The Center has achieved major victories in numerous major cases in the courts of the United States and before international bodies that have directly benefited hundreds of thousands of disadvantaged persons**.**

The purpose of this Advisory is to advise legal services and pro bono lawyers, paralegals, accredited representatives, advocates and DACA recipients about legal options DACA recipients may possess when facing removal proceedings before the Immigration Courts of DOJ.

Manuals prepared by the Center are routinely reviewed for improvements and updates to reflect current policies and practices. Please feel free to email pschey@centerforhumanrights.org if you would like to suggest updates or edits to portions of this practice advisory.

Peter Schey
President and Executive Director
Center for Human Rights and
Constitutional Law

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I. INTRODUCTION

A. RESCISSION OF DACA

On September 18, 2017, President Trump announced that he was revoking the Deferred Action For Childhood Arrivals program (DACA). See Notice of Memorandum Of Rescission Of Deferred Action For Childhood Arrivals (DACA), 82 Fed. Reg. 43556 (09/18/2017).

Due to this, DACA holders (commonly referred to as 'Dreamers') must face several certainties. One is that eventually their DACA status will expire, meaning they will not be in the United States legally. When this occurs, their work authorizations will also end, prohibiting them from working here legally. Due to this, they should investigate whether they qualify for other categories of legal status.

Even before it was rescinded, even though DACA afforded recipients legal status, it has given them only a temporary reprieve from deportation. What DACA recipients have received, in essence, is a decision by immigration officials that no enforcement action, including deportation, would be taken against them for the two-year duration of their DACA grant, which they were allowed to renew in two-year increments. With the rescission of DACA, its recipients can no longer file applications for renewal.

A DACA grant, however, did not lead to any other legal status, such as lawful permanent resident status (also known as Legal Permanent Residency or LPR; as well as a "green card"); a path to citizenship; or a visa for temporary legal status. In addition, DACA status can be withdrawn, if a recipient, for example, commits a certain type of crime.

The purpose of this Advisory is to advise Dreamers about their legal options when facing court cases involving the possibility of deportation.

B. TERMINATION OF DACA

President Trump, in announcing the revocation of DACA, delayed the revocation for six months to give Congress an opportunity to pass legislation to preserve the program:

> Under the change announced today, current DACA recipients generally will not be impacted until after March 5, 2018, six months from now. That period of time gives Congress the opportunity to consider appropriate legislative solutions.
> White House, Fact Sheets, "President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration" (9/5/2017).

As of the end of 2017, Congress has not passed legislation regarding DACA.

C. DEPARTMENT OF HOMELAND SECURITY'S CURRENT ENFORCEMENT POLICIES

On January 25, 2017, President Trump issued an Executive Order which terminated a Department of Homeland Security (DHS) program called the Priority Enforcement Program (PEP). That program had prioritized enforcement actions against immigrants starting with immigrants who posed the highest level threats to the public safety, the highest priority being "Priority 1 (threats to national security, border security, and public safety). . . " Memorandum, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants", Jeh Charles Johnson, Secretary, U.S. Department of Homeland Security, (11/20/2014).

President Trump replaced PEP with a set of "Enforcement Priorities":

> Sec. 5. Enforcement Priorities. In executing faithfully the immigration laws of the United States, the Secretary of Homeland Security (Secretary) shall prioritize for removal those aliens described by the Congress in sections 212(a)(2), (a)(3), and (a)(6)(C), 235, and 237(a)(2) and (4) of the INA (8 U.S.C. 1182(a)(2), (a)(3), and (a)(6)(C), 1225, and 1227(a)(2) and (4)), as well as removable aliens who:
> (a) Have been convicted of any criminal offense;
> (b) Have been charged with any criminal offense, where such charge has not been resolved;
> (c) Have committed acts that constitute a chargeable criminal offense;
> (d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
> (e) Have abused any program related to receipt of public benefits;
> (f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or

> (g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.
> President Trump, Executive Order: "Enhancing Public Safety in the Interior of the United States" (1/25/2017) (Emphasis Added).

In another memorandum dated January 25, 2017, from the Department of Homeland Security:

> . . . Department personnel . . . have full authority to initiate removal proceedings against any alien who is subject to removal under any provision of the INA, and to refer appropriate cases for criminal prosecution. The Department shall prioritize aliens described in the Department's Enforcement Priorities (Section A) for arrest and removal. This is not intended to remove the individual, case-by-case decisions of immigration officers. The exercise of prosecutorial discretion with regard to any alien who is subject to arrest, criminal prosecution, or removal in accordance with law shall be made on a case-by-case basis . . . the Department no longer will exempt classes or categories of removable aliens from potential enforcement. . .
> John Kelly, Secretary, Department of Homeland Security, "Enforcement of the Immigration Laws to Serve the National Interest" (2/20/2017). (Emphasis Added).

'Section A' cited above is identical to 'Section 5' of President Trump's Executive Order, dated January 25, 2017. Therefore, DHS will prioritize enforcement against those immigrants who have committed acts listed under "Section A". However, DHS will still enforce actions against all immigrants who do not have legal status.

Dreamers must realize that they will not be excluded from enforcement actions based only on the fact they held DACA status in the past. Instead, they will be subject to prosecutorial discretion, made on a case-by-case basis, unless they meet the requirements for legal status in another program.
The purpose of this Advisory is to educate Dreamers about legal options they have in order to stay in the U.S. if they face enforcement and/or deportation procedures by DHS. In addition, if they do qualify for these options, they must gather all the required documents to prove their cases immediately. As stated, DACA will terminate March 5, 2018, and Dreamers must be prepared.

II. TYPES OF LEGAL STATUS; REQUIREMENTS FOR LEGAL PERMANENT RESIDENCY & ADJUSTMENT OF STATUS

Individuals in the United States, including children, either have legal status or do not (they are called "undocumented immigrants"). These are the different categories of legal status:

- U.S. Citizen
- Legal Permanent Residency (LPR)
- Visas that grant temporary legal status

A Dreamer who is granted LPR status would be able to indefinitely reside and work in the United States (INA §101(a)(20); 8 C.F.R. § 274a.12(a)(1)). To apply for LPR status, if an immigrant applies in the U.S., the process is called Adjustment of Status. If the nonimmigrant is outside of the U.S., she uses Consular Processing. There may be situations where although the nonimmigrant is in the U.S., she will still have to go outside the U.S. to complete processing of her application.

In order to be granted LPR, an immigrant must have "been inspected and admitted, or paroled into the United States . . . or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted ... " 8 U.S.C. §1255(a). According to 8 U.S. Code § 1225(a)(3) Inspection requires that "All aliens . . . be inspected by immigration officers." (emphasis added); "Admitted" means that immigrants can come into the U.S. because they do not fall into certain categories, such as posing a 'health risk' or having committed certain criminal acts. See 8 U.S. Code § 1182(a); Parole is a temporary legal status granted for urgent humanitarian reasons or significant public benefit. See INA Section 212(5)(A).
Many of those who were not "inspected and admitted or paroled" have to go to another country and undergo consular processing. Depending on the length of time an immigrant had lived in the U.S. without legal status, this departure may bar her from returning back to the U.S. for a period of 3 or 10 years. INA § 212(a)(9). Especially affecting Dreamers, ". . . No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence". Id.

However, case law has recognized two other entry narratives, which also meet the "inspected and admitted" requirement:

1. Commonly called a "Wave through", one court held ". . . an alien has not entered without inspection when he presented himself for inspection and made no knowing false claim to citizenship applies in determining whether an' alien has satisfied the inspection and admission requirement of section 245 of the Act." *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980) (emphasis added); and See *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010).

2. The majority of circuit courts and the Board of Immigration Appeals treat a noncitizen who has been inspected and allowed to enter as someone who has been "inspected and admitted" even if the admission was gained through fraud, misrepresentation or the use of false documents, provided the noncitizen did not falsely claim U.S. citizenship. See, e.g., *Emokah v. Mukasey*, 523 F.3d 110, 118 (2d Cir. 2008); *Yin Hing Sum v. Holder*, 602 F.3d 1092, 1097-99 (9th Cir. 2010); but see *Ramsey v. INS*, 14 F.3d 206, 211 n.6 (4th Cir. 1994).

If a Dreamer is facing an enforcement action, it is important to carefully question him as to how he entered the U.S. If he was a child at the time, then his parents, (or the adults) with whom he crossed into this country must be interviewed. In this way, he may properly make his defense that he was 'inspected and admitted' into the U.S., and file an application for LPR status.

III. DREAMERS WHO ARE APPROACHED BY ICE

It should be explained to Dreamers that if they are approached by ICE (The Immigration and Customs Enforcement of the U.S. Department of Homeland Security), that they should not speak to them, or answer their questions. If you are a lawyer who is representing a Dreamer who is in the custody of ICE, below is a letter you can send them re: your client:

A. ATTORNEY LETTER

[ATTORNEY ORGANIZATION]
[ATTORNEY NAME]
[ATTORNEY ADDRESS]
[ATTORNEY PHONE]

[DATE]

Dear ICE officer,

I, [ATTORNEY NAME], an attorney licensed in California ([ATTORNEY BAR #]), represent [NAME OF IMMIGRANT] for purposes of ICE questioning or any search of my client, my client's vehicle, or home.

[Optional]: A complete G-28 Notice of Appearance form is attached.

I have instructed my client not to answer your questions unless my client voluntarily waives the right to remain silent and I am present. I have also advised my client not to consent to any searches unless you are in possession of a search warrant issued by a U.S. District Court Judge or U.S. Magistrate Judge.

I am instructing you to not question my client unless I am present to advise my client and my client consents to answer your questions. Please do not try to convince my client to waive the right to remain silent or to consent to any warrantless search. It would be a violation of the Fourth and Fifth Amendments of the U.S. Constitution for you to continue questioning my client or to seek consent to search without a valid search warrant. Should you in any way coerce or induce my client to answer your questions or to consent to a warrantless search, my client may later seek judicial remedies against you and ICE for false arrest and to suppress any statements made to you in egregious violation of the Fourth or Fifth Amendments.

In the event my client wishes to telephone me, please immediately permit my client to do so. If you would like to discuss this matter with me, you may reach me at the telephone number above. However, I will not consent to questioning or a search without first having the opportunity to discuss the matter with my client in person.

Pursuant to 8 U.S.C. § 1326(a)(1), you are only authorized without a warrant to question a person who does not exercise his or her right to remain silent if you have reason to believe the person to be an immigrant, and you may not rely upon racial profiling or other improper factors in making that determination. Pursuant to 8 U.S.C. § 1326(a)(2), you may not, without warrant, arrest any person unless that person is entering or attempting to enter the United States in violation of any law or regulation unless you have reason to believe that the person so arrested is likely to escape before an arrest warrant can be obtained for his or her arrest. My client is not likely to flee before a warrant can be obtained. Pursuant to 8 U.S.C. § 1326(a)(4) and (5), you may arrest without

warrant if you have a reasonable suspicion the person has committed certain felonies and is likely to escape before a warrant can be obtained, or for certain criminal offenses committed in your presence.

Thank you for your consideration and compliance with federal law and the U.S. Constitution. Signed,

[ATTORNEY SIGNATURE]

[ATTORNEY NAME]
[ATTORNEY ORG]

IV. IMMIGRATION COURT PROCEEDINGS

A. Notice to Appear

Immigration Court Proceedings begin by a "Notice to Appear" served on the Dreamer:

Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service. The charging document must include a certificate showing service on the opposing party . . .
8 CFR 1003.14(a)

Charging document means the written instrument which initiates a proceeding before an Immigration Judge. . . these documents include a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing by Alien.
8 CFR1003.13

As with all court proceedings, Dreamers should make sure that they were properly served; otherwise this could serve as a defense to the proceedings.

B. Burden of Proof

The U.S. has the burden of proving that the Dreamer is an immigrant, with no legal status. If that is proven, then the Dreamer must prove that she is either here lawfully, or "entitled to be admitted":

> Immigrants present in the United States without being admitted or paroled. In the case of a respondent charged as being in the United States without being admitted or paroled, the Service must first establish the alienage of the respondent. Once alienage has been
>
> established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.
> 8 CFR 1240.8(c)

As to presenting defenses, an immigrant who does not have legal status can apply for adjustment of status in a removal proceeding. (Removal proceedings were formerly called Deportation proceedings).

C. BOND HEARING

A Dreamer who is in a Removal proceeding may be able to be released on bond:

> . . . a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—
> (1) may continue to detain the arrested alien; and
> (2) may release the alien on—
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
> (B) conditional parole; but
> (3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.
> 8 CFR § 1226(a) (emphasis added)

V. CANCELLATION OF REMOVAL

Dreamers whose legal status has expired may apply to remain in the U.S. if they fulfill the requirements of Cancellation of Removal. In cases of Dreamers who were not admitted to the U.S. legally, one requirement is that they prove that not remaining here would impose a crucial hardship on an immediate family who is a citizen or LPR:

> (b) Cancellation of removal and adjustment of status for certain nonpermanent residents
> (1) In general The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
> (B) has been a person of good moral character during such period;
> (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.
> 8 U.S. Code § 1229b (emphasis added)

If a Dreamer was admitted as an LPR, the requirements are easier:

> (a) Cancellation of removal for certain permanent residents. The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
> (3) has not been convicted of any aggravated felony.
> 8 U.S. Code § 1229b (emphasis added)

A. CANCELLATION OF REMOVAL - VAWA RELIEF

Battered spouses and children may also apply for Cancellation of Removal:

(a)(2) Special rule for battered spouse or child

(A) Authority The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that—

(i) (I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);

(II) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a lawful permanent resident . . . or . . .

(ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application . . .

(iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);

(iv) the alien is not inadmissible . . . is not deportable . . . and has not been convicted of an aggravated felony; and

(v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

Id.

As stated previously, because the DACA program is scheduled to terminate March 5, 2018, if a Dreamer fulfills the requirements for Cancellation of Removal it is crucial that he obtain the required documents immediately so he can provide them to DHS and/or an Immigration Court.

VI. ADJUSTMENT OF STATUS FOR FAMILY-SPONSORED IMMIGRANTS

Petitions for Family-Sponsored Immigrants are divided into two different categories. The first is comprised of:

> . . . aliens who are considered "immediate relatives" of citizens: children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.
> 8 U.S. Code § 1151(b)(2)(A)(i)

There are an unlimited number of visas granted in this category.

The other category consists of immigrants who are considered "qualified immigrants": close relatives of Permanent Residents, or relatives more distantly related to Citizens than are 'immediate relatives'. See 8 U.S. Code § 1153. There are limited visas in this category.

Only Dreamers who fulfill the requirements in the first category, whose relatives are "immediate relatives" may successfully apply for adjustment of status. This is because of the following statutory requirements to adjust status:

> (1) the alien makes an application for such adjustment,
> (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
> (3) an immigrant visa is immediately available to him at the time his application is filed.
> 8 USCS § 1255(a) (emphasis added).

Therefore, a Dreamer in an Immigration Court proceeding may file a Petition to adjust status if he meets the requirements of having "immediate relatives". He should immediately collect all the documents needed to prove his case in Immigration court.

In the case of any immigrant who has been placed in deportation proceedings or in removal proceedings (other than as an arriving immigrant), the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the immigrant may file.
8 CFR § 1245.2(a)(1)

VII. ASYLUM AND WITHHOLDING OF REMOVAL

A. ASYLUM

To claim asylum, a Dreamer must prove that he would be persecuted if removed to another country, and also:

> . . . must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.
> 8 U.S.C. § 1158 (b)(1)(B)(i) (emphasis added)

A Dreamer in an Immigration Court proceeding may assert a claim of asylum and/or withholding of removal, if he meets the requirements:

> (1) If the alien expresses fear of persecution or harm upon return to any of the countries to which the alien might be removed . . . and the alien has not previously filed an application for asylum or withholding of removal . . . the immigration judge shall:
>
> (i) Advise the alien that he or she may apply for asylum in the United States or withholding of removal to those countries . . .
>
> (3) Applications for asylum and withholding of removal so filed will be decided by the immigration judge . . . after an evidentiary hearing to resolve factual issues in dispute.
>
> 8 CFR§ 1240.11(c) (Emphasis Added)

The Dreamer must meet additional requirements:

> (2) (i) . . . an applicant has the burden of proving:
>
> (A) By clear and convincing evidence that the application has been filed within 1 year of the date of the alien's arrival in the United States, or
>
> (B) To the satisfaction of the asylum officer, the immigration judge, or the Board that he or she qualifies for an exception to the 1-year deadline.
>
> 8 CFR Sec. 208.4

B. WITHHOLDING OF REMOVAL

> (A) In general.-Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.
>
> INA Section 241(b)(2) (emphasis added)

VIII. U-VISA

U visas are available to noncitizens who have been the victims of certain crimes, suffered substantial physical or mental abuse as a result of having been

victims of such crimes, and cooperated with law enforcement in the investigation or prosecution of those crimes. INA § 101(a)(15)(U).

A Dreamer in a removal proceeding in an Immigration court may file an application for a U-Visa:

> (i) An alien who is in removal proceedings under section 240 of the Act, 8 U.S.C. 1229a . . . and who would like to apply for U nonimmigrant status must file a Form I-918 directly with USCIS
> 8 CFR § 214.14(c)(i) (emphasis added)

IX. T-VISA or TRAFFICKING VISA

Dreamers eligible for this visa must meet the following requirements:

(I) is or has been a victim of a severe form of trafficking in persons. . .
(II) is physically present in the United States . . . on account of such trafficking,
(III) (aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking . . .
(bb) . . . is unable to cooperate with a request described in item (aa) due to physical or psychological trauma; or
(cc) has not attained 18 years of age; and
(IV) the alien [3] would suffer extreme hardship involving unusual and severe harm upon removal . . .
8 U.S. Code § 1101(a)(15)(T) (Emphasis added)

Victims of trafficking who are eligible for this visa and are in immigration proceedings may file an application:

> Individuals who believe they are victims of severe forms of trafficking in persons and who are in pending immigration proceedings must inform the Service if they intend to apply for T nonimmigrant status . . . immigration judge . . . may request that the proceedings be administratively closed . . . in order to allow the alien to pursue an application for T nonimmigrant status
> 8 CFR§ 1214.2(a) (Emphasis added)

X. SPECIAL IMMIGRANT JUVENILE STATUS (SIJS)

"Special Immigrant" means:

> (J) an immigrant who is present in the United States—
> (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;… and
> (iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that— no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; …
> INA § 101(a)(27)(J)

A Dreamer in Removal Proceedings who is eligible for this kind of visa, but who has not yet applied, should inform the Service they intend to do so. In this way, it can be a defense to Removal.

XI. ADMISSIBILITY ISSUES AND WAIVERS

To apply for LPR status an individual must be admissible to the United States under section 212(a) of the Immigration and Nationality Act (INA).

A. CLASSES OF IMMIGRANTS INELIGIBLE TO RECEIVE VISAS AND INELIGIBLE FOR ADMISSION: CRIMES AND OTHER ACTIVITIES

It is crucial that Dreamers in Immigration court proceedings who have committed crimes review whether they are ineligible for admission. As an Immigration court has jurisdiction to determine an adjustment of status application, it also has the jurisdiction to determine whether an immigrant's crime or acts would make him ineligible for the underlying petition for adjustment of status:

(A) Conviction of certain crimes.-

(i) In general.-Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.
(ii) Exception.- Clause (i)(I) shall not apply to an alien who committed only one crime if-
(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or
(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months . . .
(B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), . . . for which the aggregate sentences to confinement were 5 years or more is inadmissible.
(C) Controlled Substance Traffickers- Any alien who the consular officer or the Attorney General knows or has reason to believe--
(i) . . . an illicit trafficker in any controlled substance or in any listed chemical (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or
(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity . . . is inadmissible.
(D) Prostitution and commercialized vice.-Any alien who-
(i) is coming to the United States . . . to engage in prostitution, or has engaged in prostitution within 10 years or . . .
(ii) to engage in any other unlawful commercialized vice, . . .is inadmissible. . .
(I) . . . offense which . . . (relating to laundering of monetary instruments). . . inadmissible.
(3) (A) Any alien . . . seeks to enter the United States to engage . . . in-

(i) any activity (I) . . . espionage or sabotage or . . .
(ii) any other unlawful activity, or
(iii) any activity a purpose of which is the opposition to, of the Government of the United States by force, . . . is inadmissible.
(B) (i) Any alien who- (I) has engaged in a terrorist activity. . . is inadmissible.
8 U.S.C. 1182 (emphasis added)

B. WAIVERS: INADMISSIBILITY DUE TO CRIMES

The Attorney General may, in his discretion, waive the application . . .it relates to a single offense of simple possession of 30 grams or less of marijuana if-

> (1) (A) .(i) occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status.
> (ii) would not be contrary to the national welfare, safety, or security of the United States, and
> (iii) the alien has been rehabilitated; or
> (B) . . . alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or
> (C) . . .the alien is a VAWA self-petitioner; and
> (2) the Attorney General, . . . has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.
> No waiver shall be provided under this subsection in the case of an alien . ..convicted of (or . . .admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit . . .No waiver shall be granted under this subsection in the case of an alien who has previously been admitted . . .as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date . . .to remove the alien from the United States. . .
> (i) (1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if

> it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of a VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.
> INA Section 212(h)

In evaluating extreme hardship to a qualifying relative:

> . . . factors to be considered include, but are not limited to: whether the qualifying relative has family ties to this country; the extent of the qualifying relative's family ties outside the United States; conditions in the country of removal; financial impact of departure from this country; and significant health conditions, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Matter of Cervantes*, 22 I&N Dec. 560, 566 (BIA 1999); see also *INS v. Jong Ha Wang*, 450 U.S. 139 (1981).
> United States Dept. of Justice, Executive Office for Immigration Review, Immigration Judge Benchbook, (8/8/2017).

As to situations in which immigrants may request waivers:

The Board now interprets section 212(h) . . . the Attorney General may grant a waiver in two situations: first, . . . may provide a waiver to an immigrant at the border who seeks admission, including an immigrant who has departed the United States after committing a deportable offense, so long as the immigrant remains outside our borders while applying for relief; and second, . . .may provide a waiver to an immigrant within our borders after his conviction for a deportable offense so long as he applies for an adjustment of status. Cf. *Matter of Abosi*, 24 I. & N. Dec. 204, 205 (BIA 2007). . . . federal regulations provide that, for immigrants who apply for a hardship waiver while within the United States, an application for an adjustment of status "shall be the sole method of requesting the exercise of discretion under section 212 . . . (h) . . . ."
8 C.F.R. § 1245.1(f). See *Poveda v. United States AG*, 692 F.3d 1168 (11th Cir.) (8/27/2012)
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C. SUSPENSION OF DEPORTATION

This is a defense under pre-1997 deportation proceedings that can be applied for in removal proceedings arising in the Ninth Circuit Court of Appeals; other circuit courts of appeals may not have considered the issue. The Ninth Circuit indicated that a noncitizen still may apply for suspension of deportation today in removal proceedings, if he was convicted of a deportable offense before April 1, 1997. The court used the same reliance analysis on eligibility for suspension that the U.S. Supreme Court used in considering the former §212(c) relief, in *INS v. St. Cyr*, 533 U.S. 289, 316 (2001). See *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 853 (9th Cir. 2006); *Hernandez De Anderson v. Gonzales*, 497 F.3d 927, 935 (9th Cir. 2007).

XII. LIFE CASES

Also check if the Dreamer may undergo Adjustment of Status under the Legal Immigration Family Equity Act ("LIFE Act"). This permits adjustment of status for certain immigrants who would otherwise be ineligible to adjust their status under INA Section 245(a). LIFE Act, Pub. L. No. 106-553 (Dec. 21, 2000), and the LIFE Act Amendments, Pub. L. No. 106-554 (Dec. 21, 2000). Under section 245(i) of the Act, adjustment of status was available to immigrant crewmen, immigrants continuing or accepting unauthorized employment, immigrants admitted in transit without visa, and immigrants who entered without inspection. INA Section 245(i)(1)(A)(i)-(ii). This law sunset on January 14, 1998, but was revived under the LIFE Act, which extended INA Section 245(i) to April 30, 2001. INA Section 245(i) is now expired except for those immigrants who already grandfathered.

To seek adjustment under INA Section 245(i), the immigrant must pay a penalty (currently $1,000) See 8 C.F.R. Section 1245.2(a)(3)(iii). To be grandfathered under INA Section 245(i), the immigrant must be the beneficiary of either a labor certification under INA Section 212(a)(5)(A) or a petition under INA Section 204 (including I-140, I-130, I-360, I-526) that was filed on or before April 30, 2001. A beneficiary can adjust status based on an immigrant visa petition or labor certification that was approved after April 30, 2001, so long as his petition or application for certification was "properly filed" (postmarked or received by the Department) on or before April 30, 2001, and "approvable when filed." 8 C.F.R. Section 1245.10(a)(2). If the labor certification or petition was filed after January 14, 1998, the applicant must have been physically present in the U.S. on December 21, 2000. INA Section

245(i); 8 C.F.R. Section 1245.10; LIFE Act Section 1502(a)(1)(B), Pub. L. No. 106-553.
To be eligible to adjust to lawful permanent resident status under INA Section 245(i), the immigrant must show that he is not inadmissible from the United States or that all grounds of inadmissibility have been waived. INA Section 245(i)(2)(A); 8 C.F.R. Section 1245.10(b)(3).

XIII. MOTION TO SUPPRESS

If a Dreamer is facing Removal procedures, as explained, ICE has the burden to prove that the Dreamer fails to have the requisite legal status. It commonly occurs that an immigrant is questioned by ICE officers, and at first the immigrant remains silent, refusing to answer their questions. However, over time, often the immigrant feels pressured to talk, and eventually reveals to the officers that she does not have the proper legal status.

It is important to carefully examine all the evidence ICE has to present as its 'proof' that the immigrant is not legally in the U.S. If it consists only of statements by the Dreamer when she was being interrogated by ICE, it may be possible to have this evidence dismissed. One example occurs when ICE questions the Dreamer without a warrant, which the officer can only do under the following circumstances:

> If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning.
> 8 CFR(b)(2) (Emphasis Added)

> Violating this regulation occurs when an ICE officer questions an alien, but lacks the mandated "specific articulable facts". In one case, a court ruled that ". . .officers . . . committed an egregious Fourth Amendment violation because they seized (an alien) . . . based on his Latino ethnicity alone." Therefore, the lower court should have granted the alien's Motion to Suppress, and the Removal proceedings should have been terminated. Sanchez v. Sessions, (U.S.C.A. 9th Cir.) (2017)

In other circumstances, the Officer arrests an immigrant, but fails to obtain a necessary warrant:

> A warrant of arrest shall be obtained except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained.
> 8 CFR(c)(2)(ii)

Courts have also concluded that there are circumstances where:

> the exclusionary rule may apply in removal proceedings where an alien shows 'egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.' *Oliva Ramos v. Attorney General Of United States*, 694 f.3d 259, 284-85 (3d cir. 2012), quoting *Lopez–Mendoza*, 468 U .S. 1032, 1051 (1984).

Therefore, it can be quite common that the evidence ICE submits as proof in a removal case can be overcome by a Motion to Suppress, which will terminate the proceedings.

XIV. ARGUMENTS CITED IN CURRENT CASES OPPOSING TERMINATION OF DACA

Several lawsuits have been filed in response to President Trump's ending of DACA, claiming that its termination was not legal. The arguments posed in those cases can also be brought up by a lawyer representing a Dreamer in a Removal proceeding.

1. Plaintiffs allege that the decision to rescind the DACA program:
violated the equal-protection principles incorporated in the Due Process Clause of the Fifth Amendment . . . "target[s] individuals for discriminatory treatment, without lawful justification" and that it was "motivated, at least in part, by a discriminatory motive and/or a desire to harm a particular group." (Mexicans and Latinos).
Vidal v. Duke, at 21, 2017 U.S. Dist. LEXIS 186349, (E.D.N.Y.) November 9, 2017

2. Plaintiffs also contend that Defendants violated the Fifth Amendment's Due Process Clause by failing to provide DACA recipients with adequate notice of the decision to rescind the DACA program.
Id., at 21-22

3. DHS impermissibly backtracked on its representations that it would use information gleaned from DACA applications for immigration-enforcement purposes only in limited circumstances. . . a violation of the APA (Administrative Procedure Act), and . . . as "fundamentally unfair," in violation of the Due Process Clause of the Fifth Amendment.
Id., at 23

4. Plaintiffs challenge the decision to end the DACA program under the APA as substantively "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).
Id., at 24

5. Plaintiffs also contend that DHS's implementation of the DACA Rescission Memo constitutes a substantive or legislative "rule" for purposes of the APA, and thus needed to be made through notice-and-comment rulemaking procedures. See 5 U.S.C. § 553
Id., at 25

6. Plaintiffs claim . . . violated the RFA by issuing the DACA Rescission Memo without conducting an analysis of the rescission's impact on "small entities" . . . assert that they and their "small governmental jurisdictions, nonprofits, and businesses, and their residents" are harmed by Defendants' failure to conduct such a regulatory impact analysis.
Id., at 25-26