

FAMILY-BASED OPTIONS

THIS DOCUMENT IS INTENDED TO ASSIST DACA RECIPIENTS WHO MAY HAVE FAMILY-BASED RELIEF OPTIONS IF THE DACA RECIPIENT IS MARRIED TO A UNITED STATES CITIZEN.

(1) consular processing at a U.S. consulate abroad; or

(2) through adjustment of status at a U.S. Citizenship and Immigration Services ("USCIS") office or Immigration Court in the U.S.

(a) have been “inspected and admitted or paroled,”

(b) are admissible,

(c) have an immigrant visa immediately available to them; and

(d) warrant a favorable exercise of discretion.

**THIS DOCUMENT IS ONLY
FOR GENERAL
INFORMATIONAL
PURPOSES AND DOES
NOT CONSTITUTE LEGAL
ADVICE. PLEASE CONSULT
WITH AN IMMIGRATION
ATTORNEY REGARDING
YOUR CASE.**



CONSULAR PROCESSING AND UNLAWFUL PRESENCE

Many DACA recipients were not “inspected and admitted or paroled” and cannot adjust their status (apply for a green card) within the U.S. These DACA recipients must consular process, meaning they cannot obtain a family-based green card through their U.S. citizen spouse without leaving the U.S. to interview at a U.S. consulate abroad. If the DACA recipient accrued unlawful presence while in the U.S., as they exit and seek permission to re-enter, they will trigger an unlawful presence bar.[1] Thus, it is important to talk to an immigration attorney regarding eligibility for a waiver of the unlawful presence bar.

The unlawful presence waiver requires a showing that the applicant warrants a favorable exercise of a discretion and hardship to a qualifying relative. If the applicant lacks a qualifying family member, is unable to establish hardship that rises to the required level, or is denied based on discretion, then they will be unable to overcome this ground of inadmissibility and a waiver will be denied.

A qualifying family member is a U.S. citizen or lawful permanent resident spouse or parent. No other relatives, including U.S. citizen or LPR children, can be qualifying family members for this type of waiver.

Assuming the applicant has a qualifying family member, the next hurdle in obtaining an unlawful presence waiver is demonstrating that the qualifying family member would suffer extreme hardship if the waiver applicant is denied admission. Common consequences, such as family separation and financial hardship, are not enough. Rather, the applicant must show the qualifying relative would experience hardship beyond the common consequences of family separation or relocating to another country.

If an applicant is eligible for an unlawful presence waiver, there are two different unlawful presence waiver processes: (1) Form I-601; and (2) Form I-601A (the provisional waiver process). The I-601 can be used to waive multiple grounds of inadmissibility, including unlawful presence. In contrast, the I-601A has a much narrower use: it allows immigrant visa applicants presently within the U.S. who will be leaving to consular process—thereby triggering the unlawful presence bar—to apply for a waiver before leaving the U.S., significantly reducing the time they must be away from family to complete the process.

The chart on the next page explains the differences.

[1] This educational piece only addresses the unlawful presence three- and ten-year bars. A three-year bar is triggered when an individual has accrued 180 days-1year unlawful presence. The ten-year bar is triggered when an individual accrues unlawful presence of one year or more. This does not address the permanent bar and other inadmissibility issues. For this reason, it is critically important to obtain an immigration legal consult. For screening, please contact the Nebraska Immigration Legal Assistance Hotline at (855) 307-6730.



I-601 – Application for Waiver of Grounds of Inadmissibility

- Can be used with consular processing, adjustment of status, and immigration court
 - With consular processing, it will be filed AFTER consular interview, and finding of inadmissibility
 - With consular processing wait for decision on waiver OUTSIDE of the US
 - Can also waive other grounds of inadmissibility, including unlawful presence
 - Requires proof of extreme hardship on qualifying relative. Qualifying relatives include: LPR/USC spouse or parent.
 - Appeal or motion to reopen available; can also re-file
 - \$930 filing fee
 - May take over a year to process
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I-601A – Application for Provisional Unlawful Presence Waiver

- Use ONLY for consular processing
 - File BEFORE leaving U.S. to attend consular interview
 - Wait for decision on waiver INSIDE the US
 - ONLY waives unlawful presence
 - Requires proof of extreme hardship on qualifying relative. Qualifying relatives include: LPR/USC spouse or parent.
 - No appeal or motion to reopen available, but can re-file
 - \$630 filing fee, plus \$85 biometrics fee
 - 6.5-8.5 months to process
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For up-to-date information on DACA and the appeal pending before the Supreme Court of the United States and for screening for eligibility for a referral for an immigration legal consultation, please contact the Nebraska Immigration Legal Assistance Hotline (“NILAH”) at (855) 307-6730.

