

Waivers for DACA Recipients Open Narrow Path for Work Relief (1)

By Andrew Kreighbaum

Deep Dive

- Administration promotes pathway to employment-based visas
- Used sparingly because of unpredictable approval process

An initiative by the Biden administration to steer undocumented young people with college degrees to long-term employment-based visas may offer relief to only a narrow group of Dreamers.

The policy, rolled out alongside an ambitious new parole plan for undocumented spouses of US citizens, puts new emphasis on waivers for immigrants whose presence would serve the national interest.

It could also offer applicants and their employers more certainty of their ability to live and work in the US, an outcome that large tech firms like Microsoft and Alphabet Inc. have urged for all recipients of Deferred Action for Childhood Arrival protections, the program for undocumented people who arrived in the US as children.

The administration's option is known as a "D-3" waiver—so-called because of the relevant provision of the Immigration and Nationality Act—which exempts immigrants from penalties that require them to leave the country for extended periods because of unlawful presence in the US. It's been used sparingly by applicants, however, because of long wait times and unpredictable consular decisions.

The June 18 announcement was welcomed by immigration advocates who said it puts a bigger spotlight on the waivers both for immigrants and consular officers. That's significant, as the DACA program faces an uncertain future and thousands of young undocumented people graduate college without access to those protections.

"This administration is expressly saying that bringing in highly-skilled professionals, workers with a college degree obtained in the United States, that is a significant US government interest," said Arturo Castellanos-Canales, policy and advocacy manager at the National Immigration Forum.

But attorneys say the waivers may not be significantly more attractive to potential recipients without additional changes to the application process, such as the ability to apply within the US.

"If somebody is forced to leave the country without a waiver in their pocket, I don't think anyone is using this option," said Leon Fresco, a partner at Holland & Knight LLP.

Limited Work Visas

The waiver process requires that both US Customs and Border Protection and the State Department sign-off on a request for an exemption to inadmissibility bars. But an applicant must travel outside the country to seek visa approval at a US consulate.

That requirement to travel outside the country without assurances of a waiver approval or the chance of a long wait time for processing is a serious barrier, said Daniel Pierce, a partner at Fragomen, Del Rey, Bernsen & Loewy LLP.

"If you're an employee who can already work in the United States, you don't really want to go abroad for six months with an uncertain outcome," he said. "If you're an employer, you don't necessarily want to lose access to your worker."

The most likely visa option for those employed in the private sector is an H-1B specialty occupation visa, Pierce said, but less than one in five workers registered by employers were selected in the annual lottery for the visas this spring.

Although the H-1B offers a pathway to eventual permanent residency, it would also tie workers to a single employer, unlike the unrestricted employment authorization provided under programs like DACA or Temporary Protected Status.

"There are some kernels of good ideas here. What really matters is how this gets implemented," Pierce said.

A State Department spokesperson said that the Department of Homeland Security may waive certain ineligibilities for visa applicants based on a recommendation from a consular officer following an interview. Applicants therefore can't seek waiver recommendations while in the US.

"Ultimately, DHS remains responsible for approving waiver requests," the spokesperson said.

US Customs and Border Protection didn't respond to a request for comment.

More Certainty

But for immigrants whose company is willing to sponsor them for an employment-based green card, the waiver option could insulate them against DACA going away because of a court decision or change in administration, said Dan Berger, a partner at Curran, Berger & Kludt Immigration Law.

"We work with a lot of professionals who have spent their lives and careers planning around the uncertainty of an election," he said. "Once they're on a temporary visa status, they don't have to worry about that."

Tech giants like Microsoft have pushed for lawmakers to pass permanent relief for DACA recipients. The company didn't comment on whether it would support employees using the waiver process.

Jack Chen, Microsoft's associate general counsel, said in a post on LinkedIn that the Biden administration's actions on behalf of undocumented spouses of US citizens and Dreamers are "much needed options for people who have only known the U.S. as home."

The administration plans to issue an update to the foreign affairs manual, which consular officials rely on in reviewing visa decisions, but it's not clear if new regulations will be issued as well. Miriam Feldblum, executive director of the Presidents' Alliance on Higher Education and Immigration, said the waiver process could be further bolstered by making clear that there would be a presumption of approval for applicants who met criteria, identifying what documentation is required of applicants, and expediting decisions at consular offices.

There are roughly 400,000 undocumented students enrolled in US higher education institutions, according to the alliance, but the share of those eligible for DACA protections continues to decline.

Despite serious questions over details of the waivers, it's the first significant relief extended to Dreamers since the memorandum creating Deferred Action for Childhood Arrivals more than a decade ago, said Andrea Rathbone Ramos, a DACA recipient and digital communications specialist at the American Immigration Council.

"If this is their only way to be able to work legally in the country, they'll do it," she said.

(Updated with comment from Department of State.)

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