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# **An Overview of Discretionary Reprieves from Removal: Deferred Action, DACA, TPS, and Others**

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## Summary

Since at least the 1970s, immigration authorities in the United States have sometimes exercised their discretion to grant temporary reprieves from removal to non-U.S. nationals (aliens) present in the United States in violation of the Immigration and Nationality Act (INA). Well-known types of reprieves include deferred action, Deferred Action for Childhood Arrivals (DACA), and Temporary Protected Status (TPS). The authority to grant some types of discretionary reprieves from removal, including TPS, comes directly from the INA. The authority to grant other types of reprieves generally arises from the Department of Homeland Security's (DHS's) enforcement discretion—that is, its discretion to determine the best manner for enforcing the immigration laws, including by prioritizing some removal cases over others.

The primary benefit that a reprieve offers to an unlawfully present alien is an assurance that he or she does not face imminent removal. Reprieves also generally confer other benefits, including eligibility for employment authorization and nonaccrual of unlawful presence for purposes of the three- and ten-year bars on admission to the United States under the INA. Reprieves do not confer “lawful immigration status,” in the narrow sense that reprieve recipients typically remain removable under the INA's grounds of inadmissibility or deportability (although they may have defenses to removal, including a statutory defense in the case of TPS) and in the more general sense that recipients do not enjoy most of the statutorily fixed protections that come with lawful permanent resident (LPR), refugee, asylee, and nonimmigrant status. The availability and duration of reprieves often turn upon executive policies, and accordingly reprieves do not offer steadfast protection from removal or reliable access to other benefits.

Categories of reprieves premised upon executive enforcement discretion include the following:

- ***Deferred Action***. The generic term that DHS uses for a decision not to remove an inadmissible or deportable alien pursuant to its enforcement discretion.
- ***DACA***. A large-scale, programmatic type of deferred action available since 2012 for a subset of aliens who arrived in the United States as children.
- ***Deferred Enforced Departure (DED)***. A reprieve premised on the President's exercise of foreign policy powers to protect nationals of countries experiencing war or instability.
- ***Extended Voluntary Departure (EVD)***. An earlier version of DED little used since 1990.

Reprieves granted pursuant to statutory authority include the following:

- ***TPS Relief***. A form of temporary protection from removal for aliens from countries that DHS designates as unsafe for return because of armed conflict, natural disaster, or other extraordinary conditions.
- ***Parole***. A statutory power that authorizes DHS to grant entry (but not admission) to inadmissible aliens on a case-by-case basis.

Immigration authorities may grant other reprieves in connection with removal proceedings:

- ***Administrative Closure***. A decision to discontinue temporarily a removal proceeding.
- ***Voluntary Departure***. A brief reprieve that allows an alien to depart the United States at his own expense in lieu of removal proceedings or enforcement of a removal order.
- ***Stay of Removal, Order of Supervision***. Mechanisms often used together that allow DHS or an immigration judge to postpone enforcement of a removal order.

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## Introduction

The Immigration and Nationality Act (INA) establishes a system of rules as to which non-U.S. nationals (aliens) may enter the United States and under what conditions.<sup>1</sup> It sets forth, for instance, three primary categories—family-based, employment-based, and diversity-based—through which an alien may qualify for an immigrant visa and thereby seek admission to the United States as a lawful permanent resident (LPR).<sup>2</sup> The INA also establishes requirements for the admission of refugees,<sup>3</sup> and delineates the categories of aliens who may be admitted temporarily as nonimmigrants for particular purposes such as study, tourism, or temporary work.<sup>4</sup>

Those aliens who enter or remain in the country in violation of the INA’s restrictions generally are subject to removal based on their presence within the United States alone.<sup>5</sup> As a consequence, the Department of Homeland Security (DHS)—the federal agency primarily responsible for enforcing the INA—has a statutory basis to seek the removal of such aliens even if they have not committed crimes or violated other INA provisions.<sup>6</sup> According to recent estimates, there are currently between ten and twelve million aliens in the United States whose presence violates the INA.<sup>7</sup> They arrive in two ways primarily: (1) surreptitiously, by crossing the border without inspection; or (2) on a temporary nonimmigrant visa (e.g., on a B-1/B-2 tourist visa,<sup>8</sup> which typically allows them to remain for six months), which they then overstay.<sup>9</sup> DHS has estimated in

<sup>1</sup> 8 U.S.C. §§ 1101, *et seq.*

<sup>2</sup> See 8 U.S.C. § 1151(a) (setting forth the three categories of immigrant visa eligibility). For an overview of immigrant visa categories and application procedure, see CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*, by (name redacted).

<sup>3</sup> 8 U.S.C. § 1157; see generally CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by (name redacted).

<sup>4</sup> 8 U.S.C. § 1101(a)(15); see generally CRS Report R45040, *Nonimmigrant (Temporary) Admissions to the United States: Policy and Trends*, by (name redacted).

<sup>5</sup> See 8 U.S.C. § 1182(a)(6)(A)(i) (“An alien present in the United States without being admitted or paroled . . . is inadmissible”); *id.* § 1229a(e)(2)(B) (defining inadmissible aliens who have not been admitted to the United States as “removable”); *id.* § 1227(a)(1)(B) (rendering any alien “who is present in the United States in violation of this chapter or any other law of the United States” deportable and thus subject to removal); *id.* § 1227(a)(1)(C) (rendering any alien “who was admitted as a nonimmigrant and who has failed to maintain . . . nonimmigrant status” deportable and thus subject to removal); see generally, DAVID WEISSBRODT & LAURA DANIELSON, *IMMIGRATION LAW AND PROCEDURE* 349 (6<sup>th</sup> ed. 2011) (“Non-citizens who are present in the U.S. in violation of the INA or any other law of the U.S. are removable . . . as are those who fail to maintain the nonimmigrant . . . status in which they were admitted.”).

<sup>6</sup> See, e.g., *Mondragón v. Holder*, 706 F.3d 535, 541 (4<sup>th</sup> Cir. 2013) (“It is uncontroverted that Mondragón entered the United States illegally and is therefore removable.”); *Ghaffar v. Mukasey*, 551 F.3d 651, 653 (7<sup>th</sup> Cir. 2008) (denying petition for review of final order of removal based on overstay of nonimmigrant visa).

<sup>7</sup> Ctr. for Migration Studies, *The US Undocumented Population Fell Sharply During the Obama Era: Estimates for 2016* (Feb. 22, 2018) (estimating 10.8 million in 2016), <http://cmsny.org/publications/warren-undocumented-2016/>; Dep’t of Homeland Sec. Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2014* (July 2017) (estimating 12.1 million in 2014), <http://www.dhs.gov/sites/default/files/publications/>

[Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%20January%202014\\_1.pdf](http://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%20January%202014_1.pdf); Pew Research Center, *Overall Number of U.S. Unauthorized Immigrants Holds Steady Since 2009* (Sept. 20, 2016) (estimating 11.1 million in 2014), <http://www.pewhispanic.org/2016/09/20/overall-number-of-u-s-unauthorized-immigrants-holds-steady-since-2009/>.

<sup>8</sup> See generally 9 Foreign Affairs Manual (FAM) 402.2.

<sup>9</sup> See Office of Immigration Statistics, *supra* note 7, at 1; David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade*, 122 *YALE L.J. ONLINE* 167, 171 (2012) (“[E]ntrants without inspection (EWIs, in immigration-speak) probably constitute the stereotypical ‘illegal alien’ in the public mind, but by commonly accepted estimates they make up only fifty to sixty-seven percent of the unlawfully (continued...)”).

the past that its resources allow it to remove a maximum of 400,000 aliens per year who are present in violation of the INA.<sup>10</sup>

For reasons that may range from administrative convenience to humanitarian concerns, immigration authorities sometimes decide not to seek the removal of unlawfully present aliens<sup>11</sup>—either during a specified timeframe or indefinitely—and communicate that decision to the affected aliens.<sup>12</sup> Well-known examples of such decisions include grants of deferred action,<sup>13</sup> protections granted under the Deferred Action for Childhood Arrivals (DACA) initiative,<sup>14</sup> and Temporary Protected Status (TPS).<sup>15</sup> The former two types of reprieves confer assurances from DHS, premised on its enforcement discretion, that the agency will not seek an alien’s removal, often during a defined time period.<sup>16</sup> The latter, TPS, is a statutory mechanism that allows immigration authorities to grant temporary protection from removal to aliens from countries experiencing upheaval or instability.<sup>17</sup>

This report refers to executive decisions not to seek removal as “discretionary reprieves from removal” because their effective period generally depends on the duration of the Executive’s inclination not to seek removal and because the reprieves (unlike statutory legalization

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(...continued)

present population. The rest entered through normal nonimmigrant channels (primarily on a student, tourist, or business visa), were admitted after inspection at the border, and then overstayed or otherwise violated the conditions of their temporary admission.”)

<sup>10</sup> See Dep’t of Justice Office of Legal Counsel, *The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 Op. O.L.C. (2014) (“DHS has explained that although there are approximately 11.3 million undocumented aliens in the country, it has the resources to remove fewer than 400,000 such aliens each year.”); Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1759 (2016) (describing the “gap between the INA’s putative scope and its enforceable scope”).

<sup>11</sup> The INA defines unlawful presence as follows: “[A]n alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the [Secretary of Homeland Security] or is present in the United States without being admitted or paroled.” 8 U.S.C. § 1182(a)(9)(B)(ii).

<sup>12</sup> See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999) (“At each stage [of the removal process] the Executive has discretion to abandon the endeavor, and at the time [the Illegal Immigration Reform and Immigrant Responsibility Act of 1996] was enacted the INS had been engaging in a regular practice (which had come to be known as ‘deferred action’) of exercising that discretion for humanitarian reasons or simply for its own convenience.”); see also *Arizona v. United States*, 567 U.S. 387, 396 (2012) (“A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.”).

<sup>13</sup> See *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 483–84; *infra* “Generally Available Reprieves Premised upon Enforcement Discretion or Executive Powers” (describing deferred action).

<sup>14</sup> Memorandum from Secretary of Homeland Security Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 1* (June 15, 2012) [hereinafter DHS DACA Memo]; see CRS Report R44764, *Deferred Action for Childhood Arrivals (DACA): Frequently Asked Questions*, by (name redacted) *infra* “Generally Available Reprieves Premised upon Enforcement Discretion or Executive Powers” (describing DACA).

<sup>15</sup> 8 U.S.C. § 1254a. TPS and some other reprieve programs may also provide relief to nonimmigrants and other aliens present pursuant to a statutory immigration status. See, e.g., *id.* § 1254a(c) (requiring aliens to have been physically present since a date specified by DHS in order to qualify for TPS, but not excluding lawfully present aliens from eligibility). This report focuses on the use of discretionary reprieves to regulate the population of aliens present in violation of the INA.

<sup>16</sup> See *infra* “Generally Available Reprieves Premised upon Enforcement Discretion or Executive Powers” (discussing deferred action and DACA).

<sup>17</sup> See *infra* “Generally Available Reprieves Granted Pursuant to Statutory Authority” (discussing TPS).

mechanisms such as cancellation of removal,<sup>18</sup> registry,<sup>19</sup> or asylum<sup>20</sup>) do not confer LPR status or create a direct avenue to that status.<sup>21</sup> (However, in some jurisdictions, TPS may facilitate adjustment to LPR status for aliens who otherwise qualify for immigrant visas in a family-based, employment-based, or diversity-based category.)<sup>22</sup> Discretionary reprieves from removal do not, in other words, offer steadfast protection from removal,<sup>23</sup> although they typically confer eligibility for work authorization, among other benefits.<sup>24</sup> A burgeoning body of legal scholarship about discretionary reprieves has coined an array of terms for the peculiar sort of relief that they provide, including “quasi-legal status,”<sup>25</sup> “liminal”<sup>26</sup> or “twilight” status,<sup>27</sup> and the “status of nonstatus.”<sup>28</sup> In recent decades, discretionary reprieves have grown in prevalence and become an increasingly significant aspect of the federal government’s regulation of the unlawfully present population.<sup>29</sup> The prevalence of discretionary reprieves may well decline in the near term,

<sup>18</sup> 8 U.S.C. § 1229b(b) (authorizing the cancellation of removal and adjustment of status for certain nonpermanent residents).

<sup>19</sup> *Id.* § 1259 (authorizing the conferral of a record of admission for permanent residence in the case of certain aliens who entered the United States prior to January 1, 1972).

<sup>20</sup> *Id.* § 1158.

<sup>21</sup> See *Arpaio v. Obama*, 797 F.3d 11, 17 (D.C. Cir. 2015) (“[D]eferred action remains discretionary and reversible, and ‘confers no substantive right, immigration status or pathway to citizenship.’”) (quoting DHS DACA Memo, *supra* note 14, at 3); *Texas v. United States*, 809 F.3d 134, 148 (5<sup>th</sup> Cir. 2015) (“‘Lawful presence’ [obtained through deferred action] is not an enforceable right to remain in the United States and can be revoked at any time, but that classification nevertheless has significant legal consequences.”); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 412 (E.D.N.Y. 2018) (“By granting a removable alien deferred action, immigration officials convey that they do not currently intend to remove that individual from the country. As such, deferred action offers the recipient some assurance—however non-binding, unenforceable, and contingent on the recipient’s continued good behavior—that he or she may remain, at least for now, in the United States.”).

<sup>22</sup> See 8 U.S.C. § 1254a(f)(4) (providing that aliens granted TPS “shall be considered as being in, and maintaining, lawful status as a nonimmigrant” for purposes of adjustment of status eligibility); *infra* note 141 (citing cases on adjustment of status eligibility for TPS recipients).

<sup>23</sup> See *Arpaio*, 797 F.3d at 17; *Texas*, 809 F.3d at 148. TPS provides perhaps the most rigid protection against removal of any discretionary reprieve. See *infra* “Generally Available Reprieves Granted Pursuant to Statutory Authority” (discussing TPS).

<sup>24</sup> See 8 C.F.R. § 274a.12(c) (establishing categories of aliens eligible to apply for employment authorization).

<sup>25</sup> See, e.g., Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1217 (2013); Hiroshi Motomura, *What Is “Comprehensive Immigration Reform”? Taking the Long View*, 63 ARK. L. REV. 225, 226 (2010).

<sup>26</sup> Jennifer M. Chacon, *Producing Liminal Legality*, 92 DENV. UNIV. L. REV. 709, 713 (2015).

<sup>27</sup> David A. Martin, *Twilight Statuses: A Closer Examination of the Unauthorized Population*, 2 MIGRATION POLICY INST. 1, 7-8 (June 2005).

<sup>28</sup> See Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115 (2015).

<sup>29</sup> See *id.* at 1120 (“[I]n recent years, the United States has expanded the number of persons placed in nonstatus.”). Two events, in particular, did much to increase the number of aliens receiving discretionary reprieves: the enactment of the TPS statute in 1990 and the implementation of the DACA program in 2012. See CRS Report RS20844, *Temporary Protected Status: Overview and Current Issues*, by (name redacted) at 11 (calculating that 436,866 people held TPS as of October 12, 2017); CRS Report R44764, *Deferred Action for Childhood Arrivals (DACA): Frequently Asked Questions*, by (name redacted) at 6 (“As of March 31, 2017, a total of 787,580 initial DACA requests and 799,077 renewal requests had been approved.”); see also U.S. Citizenship and Immigration Servs., *Number of Approved Employment Authorization Documents, by Classification and Basis for Eligibility, Oct. 1, 2012 – June 29, 2017* (2017) (providing statistics for employment authorization documents approved for recipients of deferred action, DACA, parole, and other types of discretionary reprieves), <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/eads-by-basis-for-eligibility.pdf> [hereinafter USCIS EAD Data]. The Obama Administration’s proposed Deferred Action for Parents of Americans (DAPA) initiative, which federal courts enjoined before implementation, had the potential to make approximately four million unlawfully present aliens eligible for discretionary reprieves. See *Texas v. United States*, 809 F.3d 134, 148 (5<sup>th</sup> Cir. (continued...))

however, as a result of changes in executive policy concerning DACA, TPS, and Deferred Enforced Departure (DED).<sup>30</sup>

This report provides an overview of discretionary repeives from removal. It discusses the primary sources of authority on which discretionary repeives are premised and describes, in general, the nature of the protections that they confer. The report concludes with a glossary of the principal types of discretionary repeives.

## Sources of Executive Authority to Grant Discretionary Repeives from Removal

The Executive’s power to grant most of the existing forms of discretionary repeives—including deferred action, DACA, and DED, among others—is typically attributed to its enforcement discretion: that is, its authority to determine the best method for enforcing federal immigration law.<sup>31</sup> This enforcement discretion includes the authority to prioritize some cases over others to conserve resources or avoid unjust results.<sup>32</sup> Criminal prosecutors in the United States possess a similar type of discretion.<sup>33</sup> They need not prosecute every crime of which they become aware, and their ability to set prosecution priorities that maximize the impact of their limited resources is considered fundamental to the American criminal justice system.<sup>34</sup> Drawing from this criminal law tradition, courts, immigration officials, and commentators often call the Executive’s authority

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2015) (affirming injunction against DAPA and observing that of “the approximately 11.3 million illegal aliens in the United States, 4.3 million would be eligible for [repeives] pursuant to DAPA.”), *aff’d by an equally divided Court*,— U.S.—, 136 S. Ct. 2271, 2272 (2016); *Arpaio v. Obama*, 797 F.3d 11, 18 n.1 (D.C. Cir. 2015) (similar estimate); *cf.* Randy Capps et. al., *Deferred Action For Unauthorized Immigrant Parents*, MIGRATION POLICY INST. 3 (Feb. 2016) (estimating that DAPA could have potentially reached “as many as 3.6 million unauthorized immigrants”), <https://www.migrationpolicy.org/research/deferred-action-unauthorized-immigrant-parents-analysis-dapas-potential-effects-families>.

<sup>30</sup> See CRS Legal Sidebar LSB10052, *UPDATE: The End of the Deferred Action for Childhood Arrivals Program: Some Immediate Takeaways*, by (name redacted) CRS Legal Sidebar LSB10070, *Termination of Temporary Protected Status for Sudan, Nicaragua, Haiti, and El Salvador: Key Takeaways and Analysis*, by (name redacted)

<sup>31</sup> See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999); *Arpaio*, 797 F.3d at 16 (“The Secretary of Homeland Security is charged with the administration and enforcement of the immigration laws. With enforcement responsibility comes the latitude that all executive branch agencies enjoy to exercise enforcement discretion—discretion necessitated by the practical fact that “[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing.”) (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)) (some internal quotation marks and citations omitted).

<sup>32</sup> *Arizona v. United States*, 567 U.S. 387, 396 (2012); *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 483–84.

<sup>33</sup> See *United States v. Batchelder*, 442 U.S. 114, 124 (1979) (“Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion.”); CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by (name redacted) 11 (“The judicial branch has traditionally accorded federal prosecutors ‘broad’ latitude in making a range of investigatory and prosecutorial determinations, including when, against whom, and whether to prosecute particular criminal violations of federal law.”).

<sup>34</sup> See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 682 (2014) (“With limited resources and broad charging options, federal prosecutors must choose how to allocate investigative and prosecutorial resources; they must prioritize some offenses at the expense of others.”); *cf.* LUIGI FERRAJOLI, *LAW AND REASON* 574 (1989) (categorizing prosecutorial discretion as an attribute of the Anglo-American system of accusatorial criminal justice that belongs to its historical tradition but not its theoretical framework, and noting that prosecutorial discretion does not form part of the civil law tradition).

to decline to seek removal of some unlawfully present aliens “prosecutorial discretion,”<sup>35</sup> even though removal proceedings are civil rather than criminal in nature.<sup>36</sup>

Enforcement discretion in the immigration context has unique attributes that distinguish it from prosecutorial discretion in the criminal context. The INA puts no general statute of limitations on removal.<sup>37</sup> Thus, the Executive’s decision not to seek removal of an alien lacks the definitive quality of many decisions not to prosecute crimes, which become irreversible if an applicable statute of limitations expires.<sup>38</sup> Aliens present in violation of the INA remain removable indefinitely (unless they otherwise acquire a legal status), so an assurance that the Executive will not seek their removal at a particular juncture does not redress their long-term situation.<sup>39</sup> Further, perhaps as a consequence of this reality, a discretionary reprieve from removal differs from a decision not to prosecute a crime in that a discretionary reprieve from removal often carries a fixed term, which can typically be renewed.<sup>40</sup> DACA, for instance, carries a two-year renewable term.<sup>41</sup>

Over time, the Executive has employed its enforcement discretion to grant various types of reprieves under inconstant terminology. In 1974, John Lennon famously pursued a type of

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<sup>35</sup> See, e.g., Shoba Shivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010); DHS DACA Memo, *supra* note 14, at 1.

<sup>36</sup> *Arizona*, 567 U.S. at 396 (2012) (“Removal is a civil, not criminal, matter.”); cf. Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 49 (2010) (“[C]ourts have consistently held that removal is not punishment for crime but is instead a remedial civil sanction and a collateral, rather than direct, consequence of a conviction. This theoretical characterization of removal developed many decades ago in the context of the very different immigration law that existed then. It no longer corresponds in any meaningful way to the realities of immigration law and enforcement . . .”).

<sup>37</sup> See *Adams v. Holder*, 692 F.3d 91, 104 (2d Cir. 2012) (“[T]he INA . . . specifically imposes no time limitations on removal proceedings.”); *Asika v. Ashcroft*, 362 F.3d 264, 269 (4th Cir. 2004) (“[T]he provisions of the [INA] that govern deportation [do not] refer . . . to any time limitation on deportation at all.”). Some grounds of deportation, however, apply only to conduct that occurs within a certain time after entry. See 8 U.S.C. § 1227(a)(1)(E)(i) (“Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.”) (emphasis added); *id.* § 1227(a)(5) (“Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.”) (emphasis added); WEISSBRODT & DANIELSON, *supra* note 5, at 279-80 (“[N]on-citizens who become dependent on government benefits are removable only if they become a public charge within five years of entry . . . . Because there is no general statute of limitations, however, ICE can remove [such non-citizens] . . . at any time—even if [they] cease[] to be a public charge.”) (emphasis in original). Also, one INA provision imposes a limitations period on actions to *rescind* a person’s LPR status if he obtained it through adjustment despite being ineligible, 8 U.S.C. § 1256(a), but every federal appellate court to consider the issue, except one, has held that that limitations period does not apply to removal proceedings. See *Adams*, 692 F.3d at 101-02, 102 n.6 (collecting cases and explaining that only the Third Circuit “has applied § 1256(a)’s five-year limitations period to removal proceedings based on alleged fraudulent procurement of adjustment of status”).

<sup>38</sup> See *United States v. Marion*, 404 U.S. 307, 322 (1971) (“[Criminal] statutes [of limitation] . . . ‘are made for the repose of society and the protection of those who may (during the limitation) . . . have lost their means of defence.’ These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant’s right to a fair trial would be prejudiced.”) (quoting *Public Schools v. Walker*, 9 Wall. 282, 288 (1870)).

<sup>39</sup> See 8 U.S.C. § 1182(a)(6)(A)(i); *id.* § 1227(a)(1)(B); Andrew Tae-Hyun Kim, *Deportation Deadline*, 95 WASH. U.L. REV. 531, 550 (2017) (noting the lack of any limitations period in the INA and explaining that because “deferred action is not an affirmative grant of relief from removal . . . a change in administrative policy or priorities could change what was once a low-priority case to a high-priority one. All this heightens the level of uncertainty for undocumented immigrants.”).

<sup>40</sup> See, e.g., DHS DACA Memo, *supra* note 14, at 2 (authorizing “deferring action for a period of two years” for qualified aliens).

<sup>41</sup> *Id.*



reprieve called “nonpriority status,” which his lawyer accused the Immigration and Naturalization Service (INS)<sup>42</sup> of keeping secret.<sup>43</sup> Soon thereafter, the INS adopted the term “deferred action,”<sup>44</sup> which DHS continues to use today for a reprieve from removal granted under its general enforcement discretion.<sup>45</sup> Immigration authorities have also, however, granted reprieves under the labels “Extended Voluntary Departure” (EVD), DED, and DACA.<sup>46</sup> In some instances, such as DACA, these labels denote a particular reprieve type’s focus on a discrete group.<sup>47</sup> In other instances, such as with EVD and DED, the bureaucratic terminology seems to supply multiple labels for the same type of reprieve.<sup>48</sup> The criteria for granting the reprieves (other than the statutorily authorized reprieves discussed below) are generally set forth in agency manuals and policy memoranda,<sup>49</sup> although for some reprieve types it can be difficult to locate a controlling document.<sup>50</sup> Federal statute does not set the criteria for reprieves grounded in enforcement discretion; nor does a particular law supply explicit authorization for the Executive to grant such reprieves,<sup>51</sup> although scattered provisions of the INA reference deferred action and describe narrow categories of aliens as eligible to receive it.<sup>52</sup> In recent years, questions have arisen as to

<sup>42</sup> The INS was the agency with primary responsibility for enforcing the INA until March 1, 2003, when it ceased to exist and most of its functions were transferred to DHS under the Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135. *See* *Nijar v. Holder*, 689 F.3d 1077, 1078–79 (9<sup>th</sup> Cir. 2012).

<sup>43</sup> Heeren, *supra* note 28, at 1134; Wadhia, *supra* note 35, at 246–47.

<sup>44</sup> *See* *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999); *see also* Heeren, *supra* note 28, at 1133–34; Wadhia, *supra* note 35, at 246–47.

<sup>45</sup> *See* 8 C.F.R. § 274a.12(c)(14) (describing deferred action as “an act of administrative convenience to the government which gives some cases lower priority”).

<sup>46</sup> *See infra* “Generally Available Reprieves Premised upon Enforcement Discretion.”

<sup>47</sup> *See* DHS DACA Memo, *supra* note 14, at 2 (describing the DACA initiative as premised on “the exercise of [] prosecutorial discretion . . . [for] certain young people who were brought to this country as children and know only this country as home”).

<sup>48</sup> *See* U.S. IMMIGRATION AND NATURALIZATION SERVS, ADJUDICATOR’S FIELD MANUAL, ch. 38.2(a) (“DED, in use since 1990, was formerly known as Extended Voluntary Departure (EVD). EVD [was] in use from 1960 until 1990 . . . .”) [hereinafter USCIS AFM].

<sup>49</sup> *See, e.g., id.*; IMMIGRATION AND CUSTOMS ENFORCEMENT, DETENTION AND REMOVAL OPERATIONS POLICY AND PROCEDURE MANUAL, ch. 20.8 (concerning deferred action), [https://www.ice.gov/doclib/foia/dro\\_policy\\_memos/09684drofieldpolicymanual.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf) [hereinafter DROPPM].

<sup>50</sup> *See infra* “Generally Available Reprieves Premised upon Enforcement Discretion or Executive Powers” (discussing deferred action); Heeren, *supra* note 28, at 1134 (contending that the controlling legal authority for discretionary reprieves “is tenuous and sometimes even secret . . . DHS will fill in requirements, if at all, using regulations or more commonly with non-binding policy guidance or memoranda”).

<sup>51</sup> *See* *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (quoting treatise for the proposition that deferred action is a “commendable exercise in administrative discretion [] developed without express statutory authorization”); *Texas v. United States*, 809 F.3d 134, 167 (5<sup>th</sup> Cir. 2015) (same); *see also* *Arpaio v. Obama*, 797 F.3d 11, 16 (D.C. Cir. 2015) (“With [DHS’s] enforcement responsibility comes the latitude that all executive branch agencies enjoy to exercise enforcement discretion—discretion necessitated by the practical fact that ‘[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing.’”) (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

<sup>52</sup> *See* 8 USC § 1227(d)(2) (providing that the denial of an administrative stay of removal to applicants for T or U nonimmigrant status “shall not preclude the alien from applying for . . . deferred action”); REAL ID Act of 2005, P.L. 109–13, § 202(c)(2)(B)(viii) (emphasis added) (listing deferred action as a “lawful status” for purposes of the minimum issuance standards for driver’s licenses). At least two statutory provisions go so far as to state that specific groups of aliens are “eligible” for deferred action. *See* 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (providing that certain self-petitioners for LPR status under the Violence Against Women Act are “eligible for deferred action and work authorization”); National Defense Authorization Act of 2004, P.L. 108–136, Div. A, Title VII, § 1703(c), 117 Stat. 1693 (codified at 8 U.S.C. § 1151 NOTE) (providing that the spouses and children of certain deceased U.S. combat veterans are “eligible for deferred action, advance parole, and work authorization”); *see also* *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 413 (E.D.N.Y. 2018) (reasoning that “Congress has repeatedly ratified immigration officials’ practice of according (continued...)”).

whether the Executive may lawfully use its enforcement discretion to provide reprieves in a programmatic fashion for large populations of aliens that meet specific criteria, instead of granting reprieves on a purely case-by-case basis.<sup>53</sup> The Supreme Court has yet to decide this issue.<sup>54</sup>

Although most types of discretionary reprieves from removal are grounded entirely in enforcement discretion, a few types have a statutory footing. First, the INA expressly gives DHS authority to grant immigration parole on a case-by-case basis to certain aliens,<sup>55</sup> providing legal permission for their physical presence in the United States without granting them admission (thereby leaving them “at the boundary line” of the United States for most immigration purposes).<sup>56</sup> DHS interprets its parole authority to encompass two types of discretionary grants of parole with implications for aliens whose presence violates the INA: parole-in-place and advance parole.<sup>57</sup> Second, the INA gives DHS authority to grant TPS relief to nationals from designated countries,<sup>58</sup> which resembles a discretionary reprieve in many respects but confers more rigid protection from removal than most reprieves because the bases for terminating TPS are statutorily limited.<sup>59</sup> Although TPS eligibility is not limited to unlawfully present aliens,<sup>60</sup> TPS may be particularly consequential for aliens who otherwise lack a legal foothold to remain in the United States.<sup>61</sup> Finally, the INA gives DHS and immigration courts authority to grant some types of discretionary reprieves in conjunction with the removal process, including voluntary departure,<sup>62</sup> stays of removal,<sup>63</sup> and orders of supervision.<sup>64</sup> (Other types of reprieves granted during removal proceedings, such as administrative closure, have a basis only in principles of executive discretion and docket management.)<sup>65</sup>

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(...continued)

deferred action to certain aliens without lawful immigration status”).

<sup>53</sup> See *Texas v. United States*, 809 F.3d 134, 179-82 (5<sup>th</sup> Cir. 2015) (reasoning that the Deferred Action for Parents of Americans (DAPA) reprieve program was “manifestly contrary to the INA” because “the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present . . . [and] [e]ntirely absent from those specific classes is the group of 4.3 million illegal aliens who would be eligible for lawful presence under DAPA”).), *aff’d by an equally divided Court*, 136 S. Ct. 2271, 2272 (2016); *contra Batalla Vidal*, 279 F. Supp. 3d at 422 (“The court is aware of no principled reason why the Executive Branch may grant deferred action to particular immigrants but may not create a program by which individual immigrants who meet certain prescribed criteria are eligible to request deferred action.”).

<sup>54</sup> See *United States v. Texas*, 136 S. Ct. 2271 (2016) (Mem.).

<sup>55</sup> 8 U.S.C. § 1182(d)(5).

<sup>56</sup> *Leng May Ma v. Barber*, 357 U.S. 185, 189 (1958).

<sup>57</sup> See *infra* “Generally Available Reprieves Granted Pursuant to Statutory Authority” (discussing parole-in-place and advance parole).

<sup>58</sup> 8 U.S.C. § 1254a.

<sup>59</sup> *Id.* § 1254(c)(3); see *infra* “Generally Available Reprieves Granted Pursuant to Statutory Authority” (discussing TPS).

<sup>60</sup> See 8 U.S.C. § 1254(c)(1) (setting forth TPS eligibility standards).

<sup>61</sup> See, e.g., *Ramirez v. Brown*, 852 F.3d 954, 958 (9<sup>th</sup> Cir. 2017) (concerning adjustment of status ramifications of a grant of TPS to an alien who entered without inspection).

<sup>62</sup> 8 U.S.C. § 1229c.

<sup>63</sup> *Id.* § 1229a(b)(5)(C); *id.* § 1231(c)(2).

<sup>64</sup> 8 U.S.C. § 1231(a)(3); see *infra* “Reprieves Granted Exclusively in Connection with the Removal Process” (discussing voluntary departure, stays of removal, and orders of supervision).

<sup>65</sup> *Matter of Avetisyan*, 25 I. & N. Dec. 688, 692 (BIA 2012); see *infra* “Reprieves Granted Exclusively in Connection with the Removal Process” (discussing administrative closure).

## Nature of Protections for Recipients: In General

The principal benefit of a discretionary reprieve is the temporary assurance it provides to an unlawfully present alien that he or she does not face imminent removal, even though his or her presence in the United States violates the INA.<sup>66</sup> The nature of the Executive’s ability to retract this assurance—and the resulting reliability of the assurance to the alien—varies by reprieve type. A grant of TPS to an individual alien, due to the applicable statutory parameters, is relatively difficult for DHS to withdraw during the grant’s validity period.<sup>67</sup> In contrast, DHS asserts that it may terminate a grant of deferred action or DACA at its discretion,<sup>68</sup> although the Administrative Procedure Act and constitutional principles may require DHS to have an adequate justification for doing so.<sup>69</sup> No type of reprieve offers a bulwark against removal as rigid as the statutorily authorized presence that comes with LPR, refugee, and asylee status, whose holders can be removed only if they acquired their status unlawfully (e.g., through fraud) or if they engage in specified forms of misconduct.<sup>70</sup> Aliens present in violation of the INA who receive discretionary reprieves remain technically removable under the inadmissibility or deportability grounds of the INA, and, except in the case of TPS recipients, do not have a statutory defense against removal based on the reprieve itself.<sup>71</sup>

Discretionary reprieves also typically carry advantages beyond protection from removal, including eligibility to seek an employment authorization document (EAD) from DHS that allows aliens to work legally in the United States.<sup>72</sup> Perhaps most significantly, under DHS regulations, recipients of most types of reprieves are not considered “unlawfully present” within the United

<sup>66</sup> See *Reno*, 525 U.S. at 484.

<sup>67</sup> See 8 U.S.C. § 1254a(c)(3) (enumerating three bases for withdrawal of TPS); *infra* “Generally Available Repeives Granted Pursuant to Statutory Authority” (discussing TPS).

<sup>68</sup> DROPPM, *supra* note 49, ch. 20.8(f) (concerning deferred action termination); U.S. Citizenship & Immigration Servs., *DHS DACA FAQs*, at Q27 (Apr. 25, 2017) (“DACA is an exercise of prosecutorial discretion and deferred action may be terminated at any time, with or without a Notice of Intent to Terminate, at DHS’s discretion.”), <https://www.uscis.gov/archive/frequently-asked-questions> [hereinafter *DHS DACA FAQs*].

<sup>69</sup> See *infra* note 119 (collecting precedents concerning potential limitations on termination of individual DACA grants and rescission of the DACA program).

<sup>70</sup> See 8 U.S.C. § 1227 (enumerating specific grounds of deportability for admitted aliens, including certain criminal convictions); *id.* § 1158(c)(2) (governing termination of asylum); *cf.* Amanda Frost, *Independence and Immigration*, 89 S. CAL. L. REV. 485, 503 (2016) (“Congress has expanded the grounds on which even longtime lawful permanent residents can be deported. Today, even longtime lawful permanent residents can be deported for fairly minor criminal offenses . . .”). Nonimmigrant aliens do not enjoy a level of protection from removal commensurate with LPRs, asylees, and refugees, because the Department of State has discretion to revoke a nonimmigrant visa “at any time,” 8 U.S.C. § 1201(i), and revocation renders the visa holder removable. 8 U.S.C. § 1227(a)(1)(B) (providing for the removal of any alien “whose nonimmigrant visa . . . has been revoked under section 1201(i)”; see *Texas v. United States*, 809 F.3d 134, 167 n.102 (5<sup>th</sup> Cir. 2015); *Mier-Fiorito v. Mukasey*, 282 Fed. Appx. 536, 538 (9<sup>th</sup> Cir. 2008) (unpublished) (holding that revocation of alien’s nonimmigrant visa rendered him deportable).

<sup>71</sup> See 8 U.S.C. § 1182(a)(6)(A)(i) (“An alien present in the United States without being admitted or paroled . . . is inadmissible”); *Id.* § 1227(a)(1)(C) (rendering any alien “who was admitted as a nonimmigrant and who has failed to maintain . . . nonimmigrant status” deportable and thus subject to removal); see generally, Amanda Frost, *Cooperative Enforcement in Immigration Law*, 103 IOWA L. REV. 1, 51 n.78 (2017) (“[D]eferred action does not provide any defense to removal and the executive has absolute discretion to revoke deferred action unilaterally . . .”) (internal quotation marks and citation omitted); *cf.* *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048, 2018 WL 1061408, at \*17 (C.D. Cal. Feb. 26, 2018) (reasoning that DACA was “specifically designed for persons without lawful immigration status” but that DHS must supply a non-arbitrary or capricious reason for terminating a DACA grant).

<sup>72</sup> See 8 C.F.R. § 274a.12(c); see also REAL ID Act of 2005, P.L. 109-13, § 202(c)(2)(B)(viii) (listing deferred action as a “lawful status” for purposes of the minimum issuance standards for federal recognition of state-issued driver’s licenses and other identification documents).

States.<sup>73</sup> This is because DHS has “authorized” the aliens’ presence by granting them reprieves.<sup>74</sup> As a consequence, time spent in the United States on deferred action, TPS, and most other types of reprieves does not count toward the accumulation of unlawful presence for purposes of the three- and ten-year bars on admission set forth in INA § 212(a)(9)(B)(i) (although a reprieve does not cure, for purposes of the bars, any unlawful presence already accumulated).<sup>75</sup> A discretionary reprieve may also trigger eligibility for certain benefits or programs for which “lawful presence” is a qualifying criterion, such as in-state university tuition under certain state laws.<sup>76</sup> More generally, even though state governments typically have broad discretion to deny state benefits to unlawfully present aliens, that discretion might be more limited in the event that such aliens are granted a discretionary reprieve from removal by the federal government.<sup>77</sup>

It is often said that discretionary reprieves do not confer lawful immigration status.<sup>78</sup> But “lawful immigration status” is an imprecise term. The INA uses variations of it in some places<sup>79</sup> but does not define it.<sup>80</sup> Although a determination that an alien lacks “lawful immigration status” triggers consequences under some INA provisions—most notably, a potential bar to adjustment of status<sup>81</sup>—it does little to describe the alien’s legal condition in a formal sense. According to DHS

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<sup>73</sup> *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 974 (9<sup>th</sup> Cir. 2017) (en banc); *Texas v. United States*, 809 F.3d 134, 147-48 (5<sup>th</sup> Cir. 2015) (explaining that deferred action recipients are “lawfully present” based on agency memoranda); *see also* 8 C.F.R. § 1.3(a)(4) (defining recipients of several types of reprieves as “lawfully present in the United States” for purposes of applying for social security benefits).

<sup>74</sup> *Arizona Dream Act Coal.*, 855 F.3d at 974.

<sup>75</sup> USCIS AFM, *supra* note 48, ch. 40.9(b)(3)(J) (“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.”). Aliens who are unlawfully present for more than 180 days but less than one year are, following departure from the country, barred from admission for three years. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(I). Aliens unlawfully present for more than a year are subject to a ten-year bar on admission to the United States following departure or removal from the country. *Id.* § 1182(a)(9)(B)(i)(II).

<sup>76</sup> *See, e.g.*, 8 U.S.C. § 1623 (prohibiting states from providing any “postsecondary education benefit” on the basis of state residency to aliens who are “not lawfully present,” unless the same benefit is made available to U.S. citizens without regard to residency). Some have argued that a discretionary reprieve recipient’s lack of unlawful presence does not mean that he or she possesses lawful presence for purposes of other statutes. *Arizona Dream Act Coal.*, 855 F.3d at 960 n.3 (Kozinski, J., dissent from denial of rehearing en banc) (“Even if it were true that an immigrant was ‘unlawfully present’ if he stayed beyond a period approved by the Attorney General, this doesn’t mean he would be ‘lawfully present’ if he didn’t stay beyond such a period. In formal logic, the inverse of a conditional cannot be inferred from the conditional.”).

<sup>77</sup> *See Arizona Dream Act Coal.*, 855 F.3d at 963 (rejecting as preempted by federal law a state policy that deemed individuals with employment authorization through DED and deferred action to be unlawfully present and denied them state-issued driver’s licenses on that basis).

<sup>78</sup> *See* USCIS, *Consideration of Deferred Action for Childhood Arrivals (DACA)*, <http://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> (“Deferred action does not provide lawful status.”); *United States v. Arrieta*, 862 F.3d 512, 516 (5<sup>th</sup> Cir. 2017) (holding that DACA recipients lack “lawful status”).

<sup>79</sup> *E.g.*, 8 U.S.C. § 1254a(f)(4) (providing that a TPS recipient “shall be considered as being in, and maintaining, lawful status as a nonimmigrant” for adjustment of status purposes); *id.* § 1644 (“[N]o State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”).

<sup>80</sup> *Gazeli v. Sessions*, 856 F.3d 1101, 1105 (6<sup>th</sup> Cir. 2017) (“[T]he INA does not define ‘lawful immigration status’ . . . .”); *see also* *Tula Rubio v. Lynch*, 787 F.3d 288, 293 (5<sup>th</sup> Cir. 2015) (“Although the word ‘status’ is not defined in the INA, its general meaning is ‘[a] person’s legal condition.’”) (quoting BLACK’S LAW DICTIONARY 1542 (10<sup>th</sup> ed. 2014)).

<sup>81</sup> *See* 8 U.S.C. § 1255(c)(2) (rendering some aliens who “fail to maintain continuously a lawful status” ineligible for adjustment of status).

regulations, TPS holders do not have “lawful status,”<sup>82</sup> even though they have a statutory protection against removal.<sup>83</sup> Nonimmigrants, however, indisputably possess lawful status,<sup>84</sup> but it can be revoked more easily than TPS.<sup>85</sup> Similarly, under the DHS definition, parole is a lawful status,<sup>86</sup> even though it, too, can be terminated at DHS’s discretion.<sup>87</sup> Perhaps the only concrete legal meaning that can be attributed to the term “lawful immigration status” is that aliens who lack it—including those unlawfully present aliens who are granted discretionary reprieves—are removable under the inadmissibility or deportability grounds of the INA.<sup>88</sup>

When understood as a general concept rather than a formal legal term, however, “lawful immigration status” usefully describes the bundle of statutorily defined privileges and protections that come with the major statuses set forth in the INA (LPR, asylee, refugee, and nonimmigrant status).<sup>89</sup> To say that unlawfully present aliens who receive discretionary reprieves do not have lawful immigration status means, generally speaking, that they lack most such privileges and protections or possess them only as a matter of executive grace.<sup>90</sup> For example, aliens who receive discretionary reprieves generally cannot work legally unless DHS, in its discretion, authorizes them to do so (unlike LPRs, refugees, asylees, and some nonimmigrants);<sup>91</sup> they have no statutorily established prospects of remaining permanently in the United States (unlike LPRs, asylees, and refugees);<sup>92</sup> they are generally subject to removal by virtue of their presence within the United States alone (unlike all aliens with LPR, refugee, asylee, and unexpired nonimmigrant status);<sup>93</sup> they have no legal basis to facilitate the admission of immediate relatives into the United States (unlike LPRs, refugees and asylees in some circumstances, and some

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<sup>82</sup> See 8 C.F.R. § 1245.1(d)(1) (omitting TPS from definition of “lawful immigration status”); Dep’t of Homeland Security Office of Immigration Statistics, *supra* note 7, at 1 (classifying TPS holders as “unauthorized immigrants”); see also Heeren, *supra* note 28, at 1141 (“TPS meets most of the characteristics for nonstatus, although it is a close call.”); *but cf.* United States v. Orellana, 405 F.3d 360, 370-71 (5<sup>th</sup> Cir. 2005) (disagreeing with agency interpretations and holding that a TPS recipient is not an alien “illegally or unlawfully in the United States” for purposes of a statute criminalizing firearm possession by such aliens).

<sup>83</sup> See 8 U.S.C. § 1254a(c)(3).

<sup>84</sup> See 8 C.F.R. § 1245.1(d)(1)(ii).

<sup>85</sup> See *supra* note 70.

<sup>86</sup> 8 C.F.R. § 1245.1(d)(1)(v).

<sup>87</sup> See *infra* “Generally Available Reprieves Granted Pursuant to Statutory Authority” (discussing parole).

<sup>88</sup> See 8 U.S.C. § 1182(a)(6)(A)(i) (inadmissibility); *id.* § 1227(a)(1)(C) (deportability); see Judulang v. Holder, 565 U.S. 42, 46 (2011) (“[T]he immigration laws provide two separate lists of substantive grounds, principally involving criminal offenses, for [removal]. One list specifies what kinds of crime render an alien excludable (or in the term the statute now uses, ‘inadmissible’), while another—sometimes overlapping and sometimes divergent—list specifies what kinds of crime render an alien deportable from the country.”) (citations omitted); see also, e.g., Matter of Ventura, 25 I. & N. Dec. 391, 392 (BIA 2010) (“[A] grant of TPS does not affect an alien’s admissibility or inadmissibility for purposes of the Immigration and Nationality Act generally.”).

<sup>89</sup> See Heeren, *supra* note 28, at 1122-24 (citing dictionaries for the proposition that “status” denotes “high standing” and explaining the statutory benefits of LPR, refugee, asylee, and nonimmigrant status).

<sup>90</sup> *Id.* at 1129-30; see Matter of Blancas-Lara, 23 I. & N. Dec. 458, 460 (B.I.A.2002) (“‘Status’ is a term of art . . . [that] denotes someone who possesses a certain legal standing, e.g., classification as an immigrant or nonimmigrant.”).

<sup>91</sup> 8 C.F.R. § 274a.12.

<sup>92</sup> Compare DHS DACA FAQs, *supra* note 68, at Q68 (“Deferred action is a form of prosecutorial discretion that does not confer lawful permanent resident status or a path to citizenship.”), with 8 U.S.C. § 1101(a)(20) (providing that LPRs are “accorded the privilege of residing permanently in the United States”), and *id.* § 1159 (providing for the adjustment of refugees and asylees to LPR status).

<sup>93</sup> See 8 U.S.C. § 1182(a)(6)(A)(i) (inadmissibility of aliens who enter without inspection); *id.* § 1227(a)(1)(C) (deportability of visa overstays).

nonimmigrants);<sup>94</sup> they face considerable restrictions on eligibility for federal public benefits (particularly as compared with LPRs, refugees, and asylees);<sup>95</sup> and, unless DHS decides to grant them advance parole, they generally cannot travel abroad with any legal basis to request re-entry to the United States (unlike all aliens with one of the four major statuses, except some nonimmigrants).<sup>96</sup> Strictly speaking, it is not correct to say that discretionary reprieves bestow no statutorily defined protections: TPS recipients have a statutory defense against removal, and recipients of most discretionary reprieves garner some advantages grounded in statute by virtue of DHS's authorization of their presence.<sup>97</sup> Generally speaking, however, the legal situation of aliens granted discretionary reprieves from removal ranks so low along the spectrum of immigration categories as to not be considered "lawful immigration status" in common parlance (even though most reprieves vitiate unlawful presence).<sup>98</sup>

In summary, recipients of discretionary reprieves obtain a temporary assurance against removal that varies in reliability by reprieve type. Such aliens, in most cases, are not unlawfully present in the United States during the term of the reprieve. Such aliens do not, however, possess "lawful immigration status," in the narrow sense that they remain technically removable under the INA's inadmissibility or deportability provisions and in the more general sense that they do not enjoy most of the statutorily fixed protections that come with LPR, refugee, asylee, and nonimmigrant status.

## Glossary of Discretionary Reprieves

This glossary describes the principal types of discretionary reprieves from removal granted by DHS or the Attorney General.<sup>99</sup> The glossary is divided into three categories: (1) reprieves

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<sup>94</sup> Compare DHS DACA Memo, *supra* note 14, at 2 (not mentioning relief for family members of DACA recipients); with, e.g., 8 U.S.C. § 1153(a)(2) (allocating immigrant visas to the "[s]pouses and unmarried sons and unmarried daughters" of LPRs), *id.* § 1159(a) (providing for the adjustment to LPR status of the spouses and children of refugees), and *id.* § 1101(a)(H) (providing for the issuance of nonimmigrant visas to the spouses and minor children of H-1B specialty occupation workers).

<sup>95</sup> The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), P.L. 104-193, 110 Stat. 2105, limited eligibility for many federal public benefits to "qualified aliens." See 8 U.S.C. §§ 1611-1613; see generally CRS Report RL33809, *Noncitizen Eligibility for Federal Public Assistance: Policy Overview*, coordinated by Audrey Singer. "Qualified alien" is defined to cover specific categories of aliens, such as LPRs, refugees, and asylees, but does not cover most aliens who obtain discretionary reprieves, other than aliens granted parole for at least one year. See 8 U.S.C. § 1641(b).

<sup>96</sup> Compare, e.g., 8 U.S.C. § 1254a(f)(3) (providing that TPS holders "may travel abroad with the prior consent of the Attorney General"), with 8 U.S.C. § 1187(a)(7) (requiring possession of valid visa in order to apply for admission to the United States). Some nonimmigrants who have expired visas but still possess unexpired nonimmigrant status may not be able to leave and return to the United States without obtaining a new visa. See 9 FAM 403.9-4(A) ("For example, an alien whose B-1 visa may expire a month after entry into the United States, could be admitted by a Department of Homeland Security (DHS) officer at a port of entry (POE) for a stay of up to one year.").

<sup>97</sup> See *supra* text at notes 72-76.

<sup>98</sup> See *supra* note 78; Heeren, *supra* note 28, at 1132-33 (arguing that "immigration law affords a continuum of rights and privileges" and that holders of discretionary reprieves "fall in the nebulous middle of this spectrum," beneath holders of lawful status).

<sup>99</sup> The Attorney General, through the immigration judges of the Executive Office for Immigration Review (EOIR), administers removal proceedings and has authority to grant some discretionary reprieves from removal in those proceedings. See 8 U.S.C. § 1101(b)(4) (defining "immigration judge" as "an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under [8 U.S.C.] § 1229a [concerning removal proceedings]"); see, e.g., *infra* note 134 (discussing Attorney General authority to adjudicate TPS applications in removal proceedings); *infra* "Reprieves Granted Exclusively in Connection with the Removal Process" (discussing Attorney General authority to (continued...))

premiered upon enforcement discretion or presidential foreign policy powers (i.e., reprieves granted without express statutory authorization); (2) reprieves premised upon statutory authorization; and (3) reprieves granted exclusively in contemplation of or in connection with the removal process. The categories overlap—most of the reprieves in category (3) have statutory foundations,<sup>100</sup> and the reprieves in categories (1) and (2) can be granted to aliens before or after the initiation of removal proceedings<sup>101</sup>—but are nonetheless useful in conceptualizing the array of discretionary reprieves from removal available under current law and executive policy.

For additional information, or for information about any type of discretionary reprieve not listed below, please contact the author.

## Generally Available Reprieves Premised upon Enforcement Discretion or Executive Powers

**Deferred Action.** DHS regulations describe deferred action as “an act of administrative convenience to the government which gives some cases lower priority.”<sup>102</sup> Thus, the term serves as a generic label for a decision by DHS not to remove an inadmissible or deportable alien pursuant to its enforcement discretion.<sup>103</sup> Some other types of discretionary reprieves, such as DACA, are forms of deferred action tailored to particular groups or circumstances.<sup>104</sup> By regulation, deferred action recipients qualify for work authorization if they show “an economic necessity for employment.”<sup>105</sup> They are not considered unlawfully present for purposes of the three- and ten-year bars on admission to the United States that the INA imposes on aliens who depart the country after being unlawfully present for more than 180 days.<sup>106</sup> According to DHS employment authorization data, only a small number of people receive generic deferred action each year as opposed to DACA.<sup>107</sup> There does not appear to be one central, publicly available agency memorandum or policy document that governs the criteria and procedures for deferred

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(...continued)

grant voluntary departure and stays of removal).

<sup>100</sup> See, e.g., 8 U.S.C. § 1229c (voluntary departure); *id.* § 1231(a)(3) (orders of supervision).

<sup>101</sup> See, e.g., DHS DACA Memo, *supra* note 14, at 2 (providing guidance on granting DACA to aliens in removal proceedings); 8 U.S.C. § 1229c(b)(5)(B) (requiring that TPS relief be available to aliens in removal proceedings).

<sup>102</sup> 8 C.F.R. § 274a.12(c)(14); see also USCIS AFM, *supra* note 48, ch. 40.9.2(b)(3)(J) (“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 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.”).

<sup>103</sup> See *id.*; *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999).

<sup>104</sup> See DHS DACA Memo, *supra* note 14, at 2 (describing DACA relief as “deferred action”).

<sup>105</sup> 8 C.F.R. § 274a.12(c)(14).

<sup>106</sup> See 8 U.S.C. § 1182(a)(9)(B)(i)(I) (establishing a three-year bar for unlawful presence for “a period of more than 180 days but less than 1 year” following departure); *id.* § 1182(a)(9)(B)(i)(II) (establishing a ten-year bar for unlawful presence “for one year or more” following departure or removal); *id.* § 1182(a)(9)(B)(ii) (exempting any “period of stay authorized” by the Secretary of Homeland Security (formerly the Attorney General) from the construction of “unlawful presence” for purposes of the three- and ten-year bars); *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 975 (9<sup>th</sup> Cir. 2017) (“[D]eferred action recipients do not accrue ‘unlawful presence’ for purposes of calculating when they may seek admission to the United States.”); USCIS AFM, *supra* note 48, ch. 40.9.2(b)(3)(J) (“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.”).

<sup>107</sup> See USCIS EAD Data, *supra* note 29 (showing 8,769 employment authorization documents approved under generic deferred action in fiscal year 2017, as opposed to 360,389 approved under DACA).

action.<sup>108</sup> According to one agency manual, when DHS grants deferred action, it informs recipients so that they may seek employment authorization.<sup>109</sup> DHS apparently does not specify a particular time period for which a grant of generic deferred action is valid (unlike DACA), but DHS does periodically review each grant.<sup>110</sup> DHS claims authority to terminate a grant of deferred action at any time in its discretion.<sup>111</sup>

***Deferred Action for Childhood Arrivals (DACA).*** DACA is a type of deferred action for aliens present in violation of the INA who meet the following criteria:

- came to the United States under the age of sixteen;
- have continuously resided in the United States since June 15, 2007, and were present in the United States on June 15, 2012;
- are in school, have graduated from high school, have obtained a general education development certificate, or are honorably discharged veterans;
- have not been convicted of certain criminal offenses and do not pose a threat to national security or public safety; and
- were under the age of thirty-one on June 15, 2012.<sup>112</sup>

The Secretary of Homeland Security created DACA by memorandum in 2012.<sup>113</sup> As a result, DACA has clearer eligibility criteria and application procedures than generic deferred action.<sup>114</sup> A grant of DACA lasts two years, subject to renewal.<sup>115</sup> DACA generally confers the same collateral advantages as generic deferred action (eligibility for work authorization, no unlawful presence).<sup>116</sup> Also like generic deferred action, DHS claims authority to terminate a grant of

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<sup>108</sup> See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 n.8 (1999) (“Prior to 1997, deferred-action decisions were governed by internal INS guidelines . . . . These were apparently rescinded on June 27, 1997, but there is no indication that the INS has ceased making this sort of determination on a case-by-case basis.”); Compare DROPPM, *supra* note 49, ch. 20.8 (concerning deferred action), with DHS Office of Inspector General, *ICE Deportation Operations*, at 8 (Apr. 17, 2017) (“Officials we interviewed said ICE considers the 2003 Detention and Removal Operations Policy and Procedure Manual (manual) ‘the official guide’ to operations, but ICE has not periodically reviewed the manual or revised it since 2008. For a time, ICE would affix a memo to the front of the appropriate chapter to indicate changes, rather than incorporate changes and issue a revised manual.”), <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-51-Apr17.pdf>; cf. Memorandum from Secretary of Homeland Security John Kelly, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017) (“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 in consultation with the head of the field office component, where appropriate, of CBP, ICE, or USCIS that initiated or will initiate the enforcement action . . . .”).

<sup>109</sup> DROPPM, *supra* note 49, ch. 20.8(c)(1).

<sup>110</sup> *Id.* ch. 20.8(e), (f).

<sup>111</sup> *Id.* ch. 20.8(f). As noted below, there is some authority for the proposition that principles of due process and administrative procedure restrict DHS’s ability to terminate an individual DACA grant without good justification, and that proposition could arguably extend to generic deferred action as well. See *infra* note 119 (collecting cases concerning limits on termination of individual DACA grants); DHS DACA Memo, *supra* note 14, at 2-3 (describing DACA as conferring “deferred action” relief).

<sup>112</sup> DHS DACA Memo, *supra* note 14, at 1; see generally CRS Report R44764, *Deferred Action for Childhood Arrivals (DACA): Frequently Asked Questions*, by (name redacted)

<sup>113</sup> *Id.*

<sup>114</sup> See *id.*; *Consideration of Deferred Action for Childhood Arrivals*, *supra* note 78 **Error! Hyperlink reference not valid.** (describing eligibility criteria and filing process).

<sup>115</sup> *Id.*

<sup>116</sup> See 8 C.F.R. § 274a.12(c)(14); *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 975 (9<sup>th</sup> Cir. 2017).



DACA at its discretion,<sup>117</sup> although its internal Standard Operating Procedures (SOP) apparently set forth specific bases (such as fraud or criminal issues) for DACA termination.<sup>118</sup> There is ongoing litigation over whether the Administrative Procedure Act (APA) or the Constitution restricts DHS's ability to terminate an individual DACA grant without proper justification or in a manner that does not follow the SOP.<sup>119</sup> There is also ongoing litigation over the extent of DHS's authority to rescind the DACA program in its entirety. DHS announced plans to rescind the DACA program effective March 5, 2018,<sup>120</sup> but federal courts have enjoined the rescission in most respects on the ground that it is likely "arbitrary and capricious" under the APA.<sup>121</sup>

**Deferred Enforced Departure (DED).** DHS describes DED as follows:

[A] temporary, discretionary, administrative stay of removal granted to aliens from designated countries. Unlike TPS [which is authorized by statute], DED emanates from the President's constitutional powers to conduct foreign relations and has no statutory basis . . . . The President designates DED for nationals of a particular country through either an Executive Order or a Presidential Memorandum.<sup>122</sup>

DED resembles TPS in that it protects nationals of certain designated countries from removal, except that DED is rooted in inherent executive power rather than in statutory authority.<sup>123</sup> Eligibility criteria depend on the relevant presidential directive.<sup>124</sup> DED recipients are generally

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<sup>117</sup> DHS DACA FAQs, *supra* note 68, at Q27 ("DACA is an exercise of prosecutorial discretion and deferred action may be terminated at any time, with or without a Notice of Intent to Terminate, at DHS's discretion.").

<sup>118</sup> DEP'T OF HOMELAND SEC., DACA NATIONAL STANDARD OPERATING PROCEDURES, 132-34 (April 4, 2013); *see* *Medina v. U.S. Dep't of Homeland Sec.*, No. C17-0218RSM, 2017 WL 5176720, at \*3 (W.D. Wash. Nov. 8, 2017) ("The National Standard Operating Procedures . . . issued by DHS describe the procedures to be followed in adjudicating DACA requests and terminating DACA status.").

<sup>119</sup> *See* *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048, 2018 WL 1061408, at \*17 (C.D. Cal. Feb. 26, 2018) (holding that a DHS practice of "terminating DACA based solely on the issuance of a[] [document] charging the DACA recipient with presence without admission or overstaying a visa" likely violates the APA); *Medina*, 2017 WL 5176720 at \*9 ("[T]he Court finds that Plaintiff has alleged a plausible claim that the government violated the APA because its conduct [in terminating his DACA grant without notice] was arbitrary, capricious and an abuse of discretion, and contrary to its own operating procedures, and that claim may proceed."); *Coyotl v. Kelly*, 261 F. Supp. 3d 1328, 1343 (N.D. Ga. 2017) (granting preliminary injunction against the termination of an individual DACA grant on the ground DHS's "fail[ure] to present any evidence that they complied with their own administrative processes and procedures with regard to the termination" sufficed to show a likelihood of success on the claim that the termination violated the APA).

<sup>120</sup> Memorandum from U.S. Dep't of Homeland Sec., *Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children"* (Sept. 5, 2017).

<sup>121</sup> *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 409 (E.D.N.Y. 2018) (holding that DHS's planned rescission of DACA program likely violates the APA because DHS based the rescission on an erroneous legal conclusion that DACA was unlawful); *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F.Supp.3d 1011, 1037 (N.D. Cal. 2018) (same); *contra Casa De Maryland v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 772 (D. Md. 2018) ("[T]he decision to rescind DACA was neither arbitrary nor capricious, but rather was a carefully crafted decision supported by the Administrative Record."); *see* CRS Legal Sidebar LSB10057, *District Court Enjoins DACA Phase-Out: Explanation and Takeaways*, coordinated by (name redacted) and (name redacted)

<sup>122</sup> USCIS AFM, *supra* note 48, ch. 38.2 (Deferred Enforced Departure).

<sup>123</sup> *See id.*; Heeren, *supra* note 28, at 1131, 1140 ("Some countries, like El Salvador and Liberia, have shifted between TPS and DED designations. TPS is similar to the [Extended Voluntary Departure] and DED programs after which it was modeled, but . . . there is a specific standard for TPS set out in the statute.").

<sup>124</sup> *See* Presidential Memorandum, *Deferred Enforced Departure for Liberians* (Sept. 28, 2016) (setting forth DED eligibility criteria for Liberian nationals); USCIS AFM, *supra* note 48, ch. 38.2(d) ("In general, eligibility requirements and ineligibility bars are set forth in the Presidential designation of DED for each specific group of aliens.").

eligible for work authorization.<sup>125</sup> They do not accrue unlawful presence during the period of DED.<sup>126</sup> According to USCIS, an individual cannot be removed while he or she possesses DED.<sup>127</sup> Agency materials do not make provision for the termination of an individual's DED grant.<sup>128</sup> Currently, Liberia is the only country designated for DED, but the Trump Administration has decided to terminate that designation effective March 31, 2019.<sup>129</sup>

**Extended Voluntary Departure (EVD).** EVD was an earlier version of DED that fell mostly into disuse with the advent of DED in 1990,<sup>130</sup> although DHS apparently continues to grant EVD to a small number of aliens.<sup>131</sup> Under EVD, the Attorney General—rather than the President—designated countries for protection due to unstable conditions.<sup>132</sup>

**Nonpriority Status.** Prior to 1975, immigration authorities used the term “nonpriority status” to describe the type of reprieve now labeled deferred action.<sup>133</sup>

## Generally Available Reprieves Granted Pursuant to Statutory Authority

**Temporary Protected Status (TPS).** Section 244 of the INA authorizes DHS to grant TPS to aliens who are nationals of countries that the Secretary of Homeland Security has designated as

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<sup>125</sup> USCIS AFM, *supra* note 48, ch. 38.2(b); 8 C.F.R. § 274a.12(a)(11).

<sup>126</sup> See 8 U.S.C. § 1182(a)(9)(B)(ii); *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 974 (9<sup>th</sup> Cir. 2017) (rejecting state policy that deemed individuals with employment authorization through DED and deferred action as not “authorized to be present”).

<sup>127</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS, AFFIRMATIVE ASYLUM PROCEDURES MANUAL 37 (May 2016) (“DED does not prevent DHS from obtaining a removal order. Rather, it prevents DHS from executing that order during the pendency of DED.”).

<sup>128</sup> See *id.*; DROPPM, *supra* note 49, ch. 20.10(c) (“Aliens who have been granted DED may not be removed from the United States until the designated period of DED has expired.”). These agency materials do not clarify whether DHS claims authority to terminate an individual grant of DED by initiating removal proceedings—an authority that DHS claims with respect to other reprieve types. See *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048, 2018 WL 1061408, at \*17 (C.D. Cal. Feb. 26, 2018) (describing DHS practice of “terminating DACA based solely on the issuance of a[] [document] charging the DACA recipient with presence without admission or overstaying a visa”).

<sup>129</sup> Presidential Memorandum for the Secretary of State and the Secretary of Homeland Security (Mar. 27, 2018).

<sup>130</sup> USCIS AFM, *supra* note 48, ch. 38.2(a) (“DED, in use since 1990, was formerly known as Extended Voluntary Departure (EVD). EVD [was] in use from 1960 until 1990 . . .”).

<sup>131</sup> Heeren, *supra* note 28, at 1138 (citing statistics obtained from DHS under the Freedom of Information Act for the proposition that the agency continued to grant “something it calls EVD to a small number of individuals” at least until 2014).

<sup>132</sup> See *Hotel & Rest. Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1501 (D.C. Cir. 1988) (“While the Attorney General has exercised his discretion to suspend deportation proceedings against nationals of other countries for a variety of reasons, he has declined to grant EVD status either to all Salvadorans or to a more narrowly defined subgroup. In making this determination, the Attorney General cited both political and economic factors.”); *Matter of Sosa Ventura*, 25 I. & N. Dec. 391, 394 (BIA 2010) (noting that EVD “had existed for decades to address humanitarian concerns”); *Matter of Medina*, 19 I. & N. Dec. 734, 748 n.7 (BIA 1988) (defining EVD by explaining that “[t]hrough the years, the Attorney General, ordinarily with the advice of the Secretary of State, has exercised prosecutorial discretion to temporarily suspend deportation proceedings against nationals of various, usually war-torn countries (e.g., Uganda, Ethiopia, Poland, Afghanistan).”).

<sup>133</sup> See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (“To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation . . . . This commendable exercise in administrative discretion . . . originally was known as nonpriority and is now designated as deferred action.”) (quoting 6 C. GORDON, S. MAILMAN, & S. YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 72.03 [2][h] (1998)); see also Heeren, *supra* note 28, at 1133-34; Wadhia, *supra* note 35, at 246-47.

unsafe for return because of armed conflict, natural disaster, or other extraordinary conditions.<sup>134</sup> A country's initial TPS designation is valid for up to 18 months and may be extended for up to 18 months, in the Secretary of Homeland Security's discretion, with no limit on the number of extensions.<sup>135</sup> Some countries, such as Sudan and Nicaragua, have been designated for TPS since the late 1990s, although the Trump Administration recently announced its intention not to extend those designations or the designations of Haiti and El Salvador when they expire in late 2018 and 2019.<sup>136</sup>

To qualify for TPS, nationals of designated countries must have resided in the United States since a specified date (usually, a date around the onset of the destabilizing conditions) and must meet certain other requirements set forth in the INA.<sup>137</sup> An alien granted TPS qualifies for work authorization<sup>138</sup> and does not accrue unlawful presence for purposes of the three- and ten-year bars to admission.<sup>139</sup> TPS provides statutorily based protection from removal: an alien cannot be removed while enrolled, and DHS may only withdraw the protection from an individual alien for specified statutory reasons (such as failure to maintain continuous residence in the United States or failure to comply with a yearly registration requirement).<sup>140</sup> Significantly, some (but not all) courts have held that a grant of TPS satisfies the lawful entry requirement for adjustment of status under INA § 245(a), such that aliens who enter the country surreptitiously and then receive TPS may adjust to LPR status if they become eligible for an immigrant visa on an independent basis (such as a qualifying family relationship with a U.S. citizen).<sup>141</sup>

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<sup>134</sup> 8 U.S.C. § 1254a. DHS's authority to grant TPS is not exclusive. An immigration judge has jurisdiction to consider a TPS application from an alien in removal proceedings if DHS denied the application in the first instance. *Matter of Lopez Aldana*, 25 I. & N. Dec. 49, 51 (BIA 2009). Immigration judges may also have authority to consider TPS applications in the first instance in "certain limited circumstances," *id.* at 51 n.1, but in practice it appears that DHS typically considers applications in the first instance even for aliens already in removal proceedings. *See Matter of Sosa Ventura*, 25 I. & N. Dec. at 392-93 (considering docket management powers of immigration judge where DHS grants TPS during removal proceedings).

<sup>135</sup> *Id.* § 1254a(b)(2),(3).

<sup>136</sup> See CRS Legal Sidebar LSB10070, *Termination of Temporary Protected Status for Sudan, Nicaragua, Haiti, and El Salvador: Key Takeaways and Analysis*, by (name redacted)

<sup>137</sup> 8 U.S.C. § 1254a(a)(5); *see, e.g.*, Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3476 (Jan. 21, 2010) (designating Haiti for TPS because of an earthquake that occurred on January 12, 2010, and restricting eligibility to Haitian nationals "who have continuously resided in the United States since January 12, 2010"); Designation of El Salvador Under Temporary Protected Status Program, 66 Fed. Reg. 14214 (Mar. 9, 2001) (designating El Salvador for TPS because of earthquakes that occurred on January 13, February 13, and February 17, 2001, and restricting eligibility to nationals of El Salvador "who have 'continuously resided' in the United States since February 13, 2001").

<sup>138</sup> 8 U.S.C. § 1254a(a)(1)(B).

<sup>139</sup> USCIS AFM, *supra* note 48, ch. 40.9.2(b)(1)(F)(iii).

<sup>140</sup> 8 U.S.C. § 1254(c)(3); *cf.* *Matter of Sosa Ventura*, 25 I. & N. Dec. 391, 396 (BIA 2010) (holding that it was improper for immigration judge to terminate removal proceedings against alien who was granted TPS relief because "TPS only provides a temporary protection from removal," but that any removal order issued against the alien could not be executed during the period in which the alien had TPS relief).

<sup>141</sup> *Ramirez v. Brown*, 852 F.3d 954, 964 (9<sup>th</sup> Cir. 2017) (holding that "a TPS recipient is considered 'inspected and admitted' under [8 U.S.C.] § 1255(a)" and that an alien who entered surreptitiously before obtaining TPS was therefore eligible to adjust status on the basis of his marriage to a U.S. citizen); *Flores v. U.S. Citizenship & Immigration Servs.*, 718 F.3d 548, 554 (6<sup>th</sup> Cir. 2013) (same); *contra Serrano v. Attorney General*, 655 F.3d 1260, 1265 (11<sup>th</sup> Cir. 2011) (holding that a grant of TPS does not satisfy the lawful entry requirement of § 1255(a)). Time spent in TPS counts as time in lawful nonimmigrant status for adjustment of status purposes; the question that has divided the courts is whether TPS also satisfies the lawful entry requirement for adjustment of status purposes. *See* 8 U.S.C. § 1254a(f)(4) ("[F]or purposes of adjustment of status under section 1255 of this title . . . the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant"); *see Ramirez*, 852 F.3d at 957 ("Reading the TPS and adjustment statutes together, the question we confront is whether the grant of TPS allows an alien not only to avoid the [failure to (continued...)]

**Parole.** The INA authorizes DHS to “parole” inadmissible aliens into the United States, on a case-by-case basis, “for urgent humanitarian reasons or significant public benefit.”<sup>142</sup> Paroled aliens are considered unadmitted for purposes of the INA despite their physical presence within the United States.<sup>143</sup> Parole offers little formal protection against removal: DHS typically grants parole for a fixed period<sup>144</sup> but has discretion to terminate the parole whenever it determines that “neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States.”<sup>145</sup> Paroled aliens may obtain work authorization<sup>146</sup> and do not accrue unlawful presence while the parole remains valid.<sup>147</sup> DHS interprets its parole authority to include two types of discretionary grants of parole potentially relevant to aliens present in the United States in violation of the INA:

**Parole in place.** Although the parole power generally applies to aliens seeking to enter the country, DHS claims the authority to grant parole to aliens who are physically present in the United States following surreptitious entry.<sup>148</sup> DHS calls this exercise of the parole power “parole in place” and, as a matter of policy, appears to reserve it primarily for the immediate relatives of certain members of the U.S. Armed Forces.<sup>149</sup> Parole in place removes significant legal obstacles to an unlawfully present alien’s ability to obtain LPR status without leaving the United States, if the alien qualifies for an immigrant visa on an independent basis (such as a qualifying family relationship with a U.S. citizen).<sup>150</sup>

**Advance Parole.** Advance parole, another exercise of the executive parole authority directed toward physically present aliens, allows aliens to depart the United States with parole already

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(...continued)

maintain lawful status] bar under § 1255(c)(2) but also to meet the ‘inspected and admitted or paroled’ requirement in § 1255(a).”)

<sup>142</sup> 8 U.S.C. § 1182(d)(5); see 8 C.F.R. § 212.5 (DHS regulation implementing statutory parole authority and identifying circumstances in which granting parole “would generally be justified”).

<sup>143</sup> 8 U.S.C. § 1182(d)(5) (“[P]arole . . . shall not be regarded as an admission of the alien . . .”).

<sup>144</sup> See, e.g., *Reganit v. Sec’y, Dep’t of Homeland Sec.*, 814 F.3d 1253, 1255 (11<sup>th</sup> Cir. 2016) (addressing case in which alien was granted parole for one month); *Chaudhry v. Holder*, 705 F.3d 289, 293 (7<sup>th</sup> Cir. 2013) (addressing case in which alien was granted parole for one year).

<sup>145</sup> 8 U.S.C. § 1182(d)(5)(A) (“[W]hen the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled . . . .”); 8 C.F.R. § 212.5(e)(2)(i) (“[W]hen in the opinion of [specified] officials . . . neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States, parole shall be terminated . . . .”); *Hassan v. Chertoff*, 593 F.3d 785, 789 (9<sup>th</sup> Cir. 2010) (“The statutory and regulatory provisions governing the grant of parole provide for the revocation of parole when it no longer serves its purpose.”).

<sup>146</sup> 8 C.F.R. § 274a.12(c)(11) (with narrow exceptions, enabling parolees to apply for employment authorization).

<sup>147</sup> 8 U.S.C. § 1182(a)(9)(B)(ii); USCIS AFM, *supra* note 48, ch. 40.9.2(b)(1) (“An alien does not accrue unlawful presence . . . if he or she has been inspected and paroled into the United States and the parole is still in effect.”).

<sup>148</sup> See U.S. Citizenship & Immigration Servs., Policy Memorandum, *Parole of Spouses, Children, and Parents of Active Duty Members of the U.S. Armed Forces*, at 2 (Nov. 13, 2013) (“Although it is most frequently used to permit an alien who is outside the United States to come into U.S. territory, parole may also be granted to aliens who are already physically present in the U.S. without inspection or admission.”).

<sup>149</sup> *Id.* at 3 (“[P]arole in place is to be granted only sparingly. The fact that the individual is a spouse, child or parent of an Active Duty member of the U.S. Armed Forces, an individual in the Selected Reserve of the Ready Reserve or an individual who previously served in the U.S. Armed Forces or the Selected Reserve of the Ready Reserve, however, ordinarily weighs heavily in favor of parole in place.”).

<sup>150</sup> See 8 U.S.C. § 1255(a) (rendering aliens who were not “inspected and admitted or paroled” ineligible for adjustment of status); see generally, Margaret D. Stock, *Parole in Place and Other Immigration Benefits for Military Family Members: An Update*, 16-02 IMMIGR. BRIEFINGS 1 (2016).

approved, so as to facilitate their re-entry.<sup>151</sup> Upon being paroled back into the country, such aliens receive the same advantages as recipients of parole in place and other parolees (e.g., eligibility for work authorization and a clearer path to adjustment of status).<sup>152</sup>

## Reprieves Granted Exclusively in Connection with the Removal Process

**Administrative Closure.** When Immigration and Customs Enforcement (ICE, a component of DHS responsible for interior enforcement) decides to discontinue temporarily a removal proceeding against a particular alien before the Department of Justice’s Executive Office of Immigration Review (EOIR)—because ICE deems the case low-priority, because the alien has obtained or is seeking a form of discretionary relief such as DACA, or for some other reason—ICE may ask the presiding immigration judge to place the proceeding in a status called “administrative closure.”<sup>153</sup> An immigration judge may also place removal proceedings in administrative closure upon the alien’s motion and over the government’s objection, although this course of events may be less common.<sup>154</sup> The effect of administrative closure is to suspend but not terminate the removal proceeding.<sup>155</sup> As such, administrative closure offers little formal protection from removal: the alien cannot be removed while the proceedings are suspended, but ICE can move to re-activate the proceedings at any time and will likely succeed in doing so if the alien is not in the midst of pursuing independent protections from removal outside of immigration court.<sup>156</sup> Furthermore, administrative closure does not itself confer any additional rights or

<sup>151</sup> See 8 C.F.R. § 212.5(f) (“Advance authorization. When parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued an appropriate document authorizing travel.”); Ibragimov v. Gonzales, 476 F.3d 125, 132 (2d Cir. 2007) (“‘Advance parole’ is a practice whereby the government decides in advance of an alien’s arrival that the alien will be paroled into the United States when he arrives at a port-of-entry . . . . Advance parole is not explicitly contemplated by the statute governing parole, but is permitted by 8 C.F.R. § 212.5(f) . . .”).

<sup>152</sup> See 8 U.S.C. § 1255(a); 8 C.F.R. § 274a.12(c)(11).

<sup>153</sup> Matter of Avetisyan, 25 I. & N. Dec. 688, 692 (BIA 2012) (“Administrative closure, which is available to an Immigration Judge and the Board [of Immigration Appeals], is used to temporarily remove a case from an Immigration Judge’s active calendar or from the Board’s docket. In general, administrative closure may be appropriate to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time.”).

<sup>154</sup> *Id.* at 694-96 (holding that government consent to administrative closure is not required, but listing “the basis for any opposition” as a factor to consider when evaluating a closure motion and noting that the government may immediately appeal an administrative closure granted over its objection); see also Kristin Bohman, *Avetisyan’s Limited Improvements Within the Overburdened Immigration Court System*, 85 U. COLO. L. REV. 189, 201 (2014) (“*Avetisyan* provides that immigration judges can override an objection if they find that administrative closure is in the best interests of the immigrant and if there will be some palpable final resolution to the case in the near future.”).

<sup>155</sup> Matter of Avetisyan, 25 I. & N. Dec. at 695 (“[A]dministrative closure does not result in a final order . . . . In this way, administrative closure differs from termination of proceedings, where the Immigration Judge or the Board issues a final order, which constitutes a conclusion of the proceedings and which, in the absence of a successful appeal of that decision or a motion, would require the DHS to file another charging document to initiate new proceedings.”).

<sup>156</sup> See *id.* (“[A]t any time after a case has been administratively closed, the DHS may move to recalendar it before the Immigration Judge or reinstate the appeal before the Board . . . .”); Matter of W-Y-U-, 27 I. & N. Dec. 17, 20 (BIA 2017) (“[T]he primary consideration for an Immigration Judge in determining whether to administratively close or recalendar proceedings is whether the party opposing administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits.”); Matter of Pascual, No. A086-963-266, 2012 WL 1705592, at \*2 (BIA Apr. 30, 2012) (unpublished) (“Immigration Judges and the Board lack the authority to decide matters of prosecutorial discretion or to decide for humanitarian reasons whether an order of removal should be entered or is in the national interest . . . . If DHS is denied its request to recalendar proceedings after action on the case has been deferred for a period of time, particularly when DHS is not contributing to any delay in resolving any petition, collateral matter or (continued...)”).

protections, such as work authorization or lawful presence.<sup>157</sup> However, administrative closure is often granted in conjunction with other discretionary reprieves that do provide additional protections.<sup>158</sup> For example, an alien whose removal case is placed in administrative closure may also have enrolled in DACA, which confers eligibility for work authorization and vitiates unlawful presence.<sup>159</sup>

**Voluntary Departure.** The INA authorizes grants of a brief discretionary reprieve called “voluntary departure” for aliens who agree to leave the United States at their own expense either before or prior to the conclusion of removal proceedings.<sup>160</sup> For aliens not yet in removal proceedings, DHS may grant a voluntary departure period of 120 days or less.<sup>161</sup> For aliens in removal proceedings, either DHS or the immigration judge may grant voluntary departure<sup>162</sup> for a maximum period of 120 days.<sup>163</sup> At the conclusion of removal proceedings, the immigration judge alone may grant voluntary departure for a maximum of 60 days.<sup>164</sup> Voluntary departure does not confer eligibility for work authorization<sup>165</sup> but does suspend the accumulation of unlawful presence for purposes of the three- and ten-year bars on admission following the alien’s departure or removal from the United States.<sup>166</sup> Aliens who fail to leave the country within the voluntary departure period are subject to a fine and become ineligible to receive, for a period of ten years, adjustment of status, cancellation of removal, and certain other forms of relief from removal.<sup>167</sup>

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(...continued)

other action that formed the basis for the administrative closure, the denial of the motion could undermine DHS’s ability to enforce the immigration laws.”).

<sup>157</sup> See 8 C.F.R. § 274a.12 (not listing administrative closure among bases for eligibility for work authorization); Amelia Wilson et. al., *Addressing All Heads of the Hydra: Reframing Safeguards for Mentally Impaired Detainees in Immigration Removal Proceedings*, 39 N.Y.U. REV. L. & SOC. CHANGE 313, 365 (2015) (explaining, based on agency practice and guidance, that administrative closure “does not confer any legal status or give rise to an independent basis to seek work authorization”).

<sup>158</sup> See *Matter of Sosa Ventura*, 25 I. & N. Dec. 391, 396 (BIA 2010) (concluding that immigration judges may properly grant administrative closure in cases where aliens have received temporary forms of protections such as TPS).

<sup>159</sup> See Memorandum from Brian M. O’Leary, Chief Immigration Judge, Executive Office of Immigration Review, Dep’t of Justice, on Continuances and Administrative Closure (March 7, 2013) (encouraging immigration courts to grant administrative closure where the respondent in removal proceedings has received DACA).

<sup>160</sup> 8 U.S.C. § 1229c.

<sup>161</sup> *Id.* § 1229c(a)(2)(A).

<sup>162</sup> 8 C.F.R. § 240.25(d); *id.* § 1240.26(b)(1).

<sup>163</sup> 8 U.S.C. § 1229c(a)(1), (2)(A).

<sup>164</sup> *Id.* § 1229c(b)(2); 8 C.F.R. § 1240.26(c).

<sup>165</sup> See 8 C.F.R. § 274a.14(a)(iii) (providing that a grant of voluntary departure automatically terminates any employment authorization). Regulations also use the term “voluntary departure” for the relief from removal granted under the statutorily created (and now largely obsolete) Family Unity Program to spouses and children of aliens who legalized under the Immigration Reform and Control Act. 8 C.F.R. § 236.15 (implementing § 301 of the Immigration Act of 1990, 104 Stat. 4978, and authorizing “voluntary departure” for up to two years). Such aliens do qualify for work authorization. *Id.* § 236.15(d), § 274a.12(a)(13). Despite the overlapping terminology, the Family Unity Program, on the one hand, and voluntary departure under § 1229b, on the other hand, are separate and distinct forms of relief. Compare *id.* § 236.15 (governing voluntary departure under the Family Unity Program), with *id.* § 240.25 (governing voluntary departure under 8 U.S.C. § 1229b).

<sup>166</sup> USCIS AFM, *supra* note 48, ch. 40.9.2(b)(3)(H) (“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.”); 9 FAM 302.11-3(B)(1)(b)(3).

<sup>167</sup> 8 U.S.C. § 1229c(d)(1).

**Stay of Removal.** DHS, an immigration judge, or the Board of Immigration Appeals<sup>168</sup> may stay a final order of removal against an alien to allow him or her to pursue relief or in light of practical or humanitarian considerations.<sup>169</sup> A stay of removal does not confer eligibility for work authorization under DHS regulations,<sup>170</sup> but an order of supervision—which often accompanies a stay—does confer such eligibility in some circumstances.<sup>171</sup> Unlawful presence does not accrue during a stay of removal for purposes of the three- and ten-year bars on admission.<sup>172</sup>

**Order of Supervision (OSUP).** If DHS does not remove an alien within ninety days of the date that a removal order becomes final—either because DHS cannot identify an appropriate destination country or because of practical or public interest-related considerations—in most cases DHS places the alien under an “order of supervision.”<sup>173</sup> An OSUP requires the alien to check in periodically with DHS and may impose other restrictions.<sup>174</sup> DHS regulations provide for the grant of work authorization to aliens present pursuant to OSUPs—subject, however, to criteria stricter than those that govern work authorization for other types of discretionary reprieves.<sup>175</sup> An OSUP does not, by itself, suspend the accumulation of unlawful presence for purposes of the three- and ten year bars on admission.<sup>176</sup> At least one federal court has held that due process principles restrict the reasons and the manner in which DHS may revoke an OSUP.<sup>177</sup>

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<sup>168</sup> The Board of Immigration Appeals (BIA) within EOIR, has administrative appellate jurisdiction over various matters decided by immigration judges in removal and other proceedings. 8 C.F.R. § 1003.1(b).

<sup>169</sup> *Id.* § 241.6 (DHS authority); *id.* § 1003.6 (BIA authority); *id.* § 1003.23(b)(1)(v) (immigration judge authority). A few provisions of the INA that concern discrete motions for relief or specific categories of aliens directly authorize or mandate stays of removal. *See* 8 U.S.C. § 1227(d)(2) (authorizing stays of removal for applicants for T or U nonimmigrant status); *id.* § 1229a(b)(5)(C) (providing for an automatic stay upon the filing of certain motions challenging *in absentia* removal orders); *id.* § 1231(c)(2) (authorizing stays of removal of aliens arriving at ports of entry).

<sup>170</sup> *See* 8 C.F.R. § 274a.12 (not listing stays of removal as a basis for granting work authorization).

<sup>171</sup> *Id.* § 274a.12(c)(18); *see* 8 U.S.C. § 1231(c)(3) (providing an alien who has been granted a stay of removal may be released from detention pursuant to “conditions [that the Secretary of Homeland Security] may prescribe”); Heeren, *supra* note 28, at 1147 (explaining that individuals who receive stays of removal “typically” receive orders of supervision).

<sup>172</sup> USCIS AFM, *supra* note 48, ch. 40.9.2(b)(3)(I).

<sup>173</sup> *See* 8 U.S.C. § 1231(a)(3) (authorizing supervision after 90-day period); 8 C.F.R. § 241.5(a) (order of supervision).

<sup>174</sup> 8 C.F.R. § 241.5(a).

<sup>175</sup> *See* 8 C.F.R. § 274a.12(c)(18).

<sup>176</sup> USCIS AFM, *supra* note 48, ch. 40.9.2(b)(6) (“Unless protected by some other provision . . . 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 . . .”).

<sup>177</sup> *Ragbir v. Sessions*, No. 18-CV-236 (KBF), 2018 WL 623557, at \*2 (S.D.N.Y. Jan. 29, 2018).

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