

CHAPTER SEVEN

TEMPORARY PROTECTED STATUS, ASYLUM, WITHHOLDING OF REMOVAL, DEFERRED ACTION FOR CHILDHOOD ARRIVALS

I. TEMPORARY PROTECTED STATUS

INA § 244 authorizes the Attorney General to designate foreign states or parts thereof if he or she finds that there is an emergency situation there, such as ongoing armed conflict which would endanger nationals if they returned, or an environmental disaster, such as an earthquake, flood, drought or epidemic, resulting in substantial, but temporary, disruption of living conditions there. For environmental disaster designations, the foreign state must have requested the designation.

Nationals of a designated foreign state or area who are in the United States may be granted temporary protected status and employment authorization for the effective period of the designation if they register for TPS by a specified date. Persons in valid nonimmigrant status may apply within 30 days of the expiration of the nonimmigrant status. The effective period will continue for a minimum of six and maximum of 18 months, and TPS may be terminated at the end of the effective period. Upon termination of TPS for some nationalities, the Attorney General has granted a further temporary relief known as Deferred Enforced Departure (DED) for a specified period of time for persons who were covered by TPS.

In order to be eligible for TPS, nationals of the designated state or area must satisfy the following individual requirements:

- Have been continuously physically present in the United States since the effective date of the most recent designation;
- Have continuously resided in the United States since such date as the Attorney General may designate (typically, TPS is available to nationals of the designated state or area who have been physically present in the United States since a specified date in the past);
- Be admissible as an immigrant under INA § 212. INA §§ 212(a)(5) (lack of labor certification) and 212(a)(7)(A) (lack of valid immigrant visa and passport) are waived for TPS applicants. All other inadmissibility grounds, with the exception of INA §§ 212(a)(2)(A) and (B) (relating to criminal inadmissibility grounds), 212(a)(2)(C) (relating to drug offenses, except as to single offense of simple possession of thirty grams or less of marijuana), and 212(a)(3)(A),(B),(C) and (E) (relating to national security and participation in genocide or Nazi persecutions), may be waived for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.
- Not have been convicted of any felony or two or more misdemeanors, and not have participated in the persecution of any person on account of race, religion, nationality, political opinion, or membership in a particular social group.

Countries currently designated for TPS are Haiti, El Salvador, Honduras, Nicaragua, Somalia, Sudan, South Sudan and Syria.

II. ASYLUM

To qualify for asylum, the alien must meet the definition of a refugee at INA § 101(a)(42)(A) – person who is outside the country of his or her nationality, and who is unable or unwilling to return to his native country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

A. SUBSTANTIVE REQUIREMENTS FOR ASYLUM CLAIM

The applicant for asylum must establish the following:

- He or she has a well-founded fear of persecution or has suffered past persecution;
- Such persecution is on account of race, religion, nationality, membership in a particular social group or political opinion; and,
- Asylum should be granted in the exercise of discretion.

B. WELL-FOUNDED FEAR

This is defined as a reasonable fear of persecution, rather than the higher standard of a clear probability of persecution, which is the proper standard for withholding *INS v. Cardoza Fonseca*, 480 U.S. 421 (1987). An alien possesses a well founded fear if a “reasonable person in her circumstances would fear persecution if she were returned to her country.” Matter of Mogharrabi, 19 I & N Dec. at 445.

C. GROUPS INELIGIBLE FOR ASYLUM

Aliens who are ineligible for asylum include the following:

- Persecutors of others, INA § 101(a)(42)(B);
- Aliens who pose a danger to the security of the U.S., INA § 208(b)(2)(iv);
- Aliens who are inadmissible or removable for terrorist activity, INA § 208(b)(2)(A);
- Aliens convicted of a particularly serious crime who constitute a danger to the community (aggravated felonies are deemed to be particularly serious crimes), INA § 208(b)(2)(A).

D. PROVING ELIGIBILITY FOR ASYLUM

Keep the following tips in mind when assisting an asylum applicant:

- Complete the asylum application as thoroughly as possible.
- Give as comprehensive an accounting of the applicant’s claim as possible.
- Submit corroborating evidence when it is available. If not available, explain why.
- The applicant should provide the asylum officer or the immigration judge with extensive detail on all relevant aspects of the case.
- If, due to cultural, age, psychological, or other factors the applicant has difficulty recalling and providing great detail, this should be explained. The appropriate professional, a psychologist, social worker, psychiatrist, MFCC, political scientist, anthropologist, or

other expert should submit an affidavit as to the communication or memory problem. If the applicant is in immigration court, then the expert will have to testify.

E. ASYLUM PROCEDURES

1. One-Year Filing Deadline

Applicants must file an application for asylum within one year of arrival in the U.S. INA § 208(a)(2)(B)

An exception to the deadline is allowed for persons who can show that changed country conditions materially affect their eligibility for asylum, or who can show that changes in the U.S. (including changes in U.S. law) have changed the person's possibility of qualifying for asylum. There is also an exception for persons who can show "extraordinary circumstances" that prevented the timely filing. 8 CFR § 208.4(a)(4).

2. Frivolous Applications

Applicants who file a frivolous asylum claim after receiving notice of the consequences are permanently ineligible for immigration benefits. INA § 208(d)(6).

3. Previous Applications

An alien cannot reapply if he or she was previously denied asylum unless the alien can show changed or extraordinary circumstances. An application is only "denied" if it has been denied by an Immigration Judge or BIA, 8 CFR § 208.4(a)(3).

4. Limited Judicial Review

The discretionary decision to deny asylum may be reviewed by a court, but the decision is conclusive unless manifestly contrary to law or an abuse of discretion, INA § 242(a)(2)(B).

5. Derivative Spouse/Children of Asylee

Derivative refugee/asylee status is available if the principal files for his or her spouse or children within a two-year period after being admitted as a refugee or being granted asylum. A separate Form I-730 (January 2013 Edition) must be filed for each derivative.

6. Asylum for Aliens in Expedited Removal

If an arriving alien who arrives at a port of entry with false documents or no documents and who indicates a desire to apply for asylum expresses a fear of persecution to a DHS officer, he or she will be referred for a credible fear screening. Credible fear is a significant possibility, taking into account the credibility of the statements made by the alien and other facts known to the officer, that the alien could establish eligibility for asylum. If there is a negative determination of credible fear, and the alien requests review, there will be an Immigration Judge review within 7 days, either in person, telephonically or by video. If the IJ reverses, that alien will be placed in removal proceedings and normal procedures for presenting an asylum

application will apply. 8 CFR § 208.30(d). Right to counsel is very limited during the expedited removal process. The alien is allowed to consult with counsel before an interview, so long as it does not cause unreasonable delay.

III. WITHHOLDING OF REMOVAL

This is also a form of relief for aliens fearing persecution, and it is available in immigration proceedings. Unlike asylum, withholding is a mandatory form of relief if the alien can meet the high standard of proof it requires. The standard of proof for withholding is that the alien must show a “clear probability” of persecution, rather than the more generous “well founded fear” standard for asylum.

Unlike asylum, the grant of withholding does not eventually lead to a permanent status. An asylee can apply for permanent residence in the U.S. after one year. In contrast, an alien granted withholding may remain in the U.S. and obtain employment authorization, but he has no right to apply for permanent status.

IV. DEFERRAL OF REMOVAL

This remedy stems from the U.S.’s participation in the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture). The remedy is available to individuals who cannot obtain asylum or withholding of removal.

Torture consists of the following elements:

- Extreme form of cruel and inhuman treatment
- Intentionally causing pain and suffering (lawful sanctions like death penalty are not torture)
- Victim must be in custody or physical control of perpetrator
- Inflicted by official instigation or with consent or acquiescence of same or others acting in an official capacity.

Aliens barred from asylum and withholding of removal due to INA § 241(b)(3)(B), i.e., conviction of a particularly serious crime, security threat, or persecutor of others, may receive deferral of removal if they demonstrate that it is more likely than not that they will be tortured if they are returned to the proposed country of removal. This remedy is available only in Immigration Court and a grant or denial of such relief may be appealed by the DHS or the applicant.

The DHS may detain aliens granted deferral of removal and may request that the Immigration Court reopen the proceedings based on subsequent evidence or evidence which was available at the time of the initial hearing which demonstrates that the alien no longer merits protection under the Convention Against Torture.

If the government of the country to which the alien would be returned furnishes the Secretary of State with assurances that the Attorney General finds are sufficiently reliable, the alien may be removed to that country. An immigration judge may not controvert the Attorney

General's finding that these assurances are reliable and may not consider an application under the Convention Against Torture in such cases.

Aliens claiming fear of torture during the expedited removal process shall have that claim reviewed by an asylum officer during the process. Such a claim may be reviewed by an Immigration Judge if the Asylum Officer makes a negative credible fear determination.

I. Deferred Action for Childhood Arrivals (DACA)

A. Deferred Action for Childhood Arrivals (DACA) Overview

On June 15, 2012, Janet Napolitano, the former Secretary of DHS issued a memorandum addressed to CBP, USCIS, and ICE titled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children." In this memorandum, the DHS announced that certain individuals who entered the U.S. as children and who meet certain guidelines may request deferred action for two years (subject to renewal) and are eligible to apply for work authorization. Deferred action is a discretionary decision to defer removal action against an individual. Deferred action is an act of prosecutorial discretion.

B. Eligibility Requirements

To be eligible for DACA, an individual must submit evidence to show the following:

1. On June 15, 2012, s/he was under 31 years old;
2. Came to the U.S. before turning 16;
3. Continuously resided in the U.S. since June 15, 2007 until the present;
4. On June 15, 2012, s/he was physically present in the U.S.;
5. At the time of the DACA request, s/he is physically present in the U.S.;
6. Entered without inspection prior to June 15, 2012 or have expired lawful immigration status as of June 15, 2012;
7. Currently in school, graduated or obtained certificate of completion from high school, possess general education development (GED) certificate, or honorably discharged veteran of Coast Guard or Armed Forces of the U.S.; and
8. Not convicted of a felony, significant misdemeanor, three or more other misdemeanors, and are not a threat to national security or public safety.

1. Age & Continuous Residence

Individuals must be at least 15 years old to apply for DACA, unless they are in removal proceedings, has a final removal order or voluntary departure order. Applicants who have brief, casual, and innocent absences from the U.S. may still be able to show that they "continuously resided" in the U.S. An absence will be considered brief, casual, and innocent if it occurred on or after June 15, 2007 and before August 15, 2012, and was short, reasonably calculated to satisfy a lawful purpose, and not a response to a removal order or voluntary departure order.

2. "Currently in School"

Applicants may be considered “currently in school” if they are enrolled in elementary, junior high, middle, high school or secondary school (public or private), in education, literacy, career training, or vocational training program leading to placement in post secondary education, job training, or employment. Furthermore, enrollment in a program in which students are seeking a high school diploma or some other recognized equivalent as defined by state law, certificate of completion, or certificate of attendance or alternate award, or enrollment in GED program, is also satisfactory.

3. Criminal History & Juvenile Delinquency

Individuals who have been convicted of a felony, significant misdemeanor, or three or more other misdemeanors that did not occur on the same day and did not arise out of the same act, omission, or scheme are not eligible for DACA. DHS considers the totality of circumstances, including an individual’s full offense history, when evaluating requests for deferred action.

- A “felony” is defined as a federal, state, or local criminal offense that may lead to a term of imprisonment of more than one year.
- A “significant misdemeanor” is a crime that may lead to a term of imprisonment of one year or less, but greater than five days and is a domestic violence, sexual abuse or exploitation, burglary, unlawful possession/use of a firearm, drug distribution or trafficking, or driving under the influence offense (regardless of the actual sentence given). A “significant misdemeanor” also includes other offenses where an individual was sentenced to time in custody of more than 90 days (a suspended sentence is not included).
- A “non-significant misdemeanor” is a crime that may lead to a term of imprisonment of one year or less, but greater than five days. It cannot be a domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, or driving under the influence offense and the individual must have been sentenced to time in custody of 90 days or less. Non-significant misdemeanors may include trespass, petty theft, or disorderly conduct.

In addition, individuals with juvenile adjudications are not automatically barred from DACA and such cases are subject to a case-by-case review.

C. Supporting Documentation for DACA Application

Applicants must provide supporting documentation to demonstrate that they are eligible for DACA. For example, adequate proof that an individual came to the U.S. before turning 16 includes, but is not limited to, passport with admission stamp, U.S. school records, and/or hospital/medical records. Proof that may be used to show that a person is “currently in school” includes, but is not limited to, acceptance letters, transcripts, and/or report cards. The USCIS website includes a DACA Frequently Asked Questions (FAQs) section that contains a list of examples of documents that may be used.

In general, affidavits alone are not sufficient to prove eligibility for DACA. However, with regard to certain eligibility requirements, affidavits may be used (only if the applicant lacks sufficient documentation):

- For the five years of continuous residence requirement, affidavits may be used to fill gaps in documentation; and
- For brief, casual, and innocent absences from the U.S., affidavits may be used to fill gaps in documentation.

The FAQs issued by USCIS regarding DACA contain further information regarding documentation.

D. DACA Application Process

DACA applicants must submit Form I-821-D, Consideration of Deferred Action for Childhood Arrivals (June 2013 Edition), to USCIS, unless the applicant is detained by immigration authorities. If applicants are in immigration detention, they must contact ICE. Form I-765 (Application for Employment Authorization) and Form I-765 WS (Worksheet), which explains the applicant's economic necessity, must accompany Form I-821-D. All supporting documents, the filing fee, and two passport-style photos must accompany these forms.

DACA applicants must pay a filing fee is \$465. Fee waivers are limited and must be supported by a letter and supporting documentation showing to USCIS that applicant is as follows: (1) under 18, income is less than 150% of U.S. poverty level, and is in foster care or lacking parental/familial support; (2) under 18 and homeless; (3) cannot take care of his/herself because of a serious, chronic disability and income is less than 150% of U.S. poverty level; or (4) accumulated \$25,000 or more in debt in past year because of medical expenses for his/herself or immediate family member and income is less than 150% of U.S. poverty level.

If USCIS deems the application complete, USCIS will issue a receipt notice. USCIS then sends an appointment notice instructing the applicant to visit an Application Support Center (ASC) to provide fingerprints. If the applicant complies with the necessary steps and is deemed eligible for DACA and work authorization, the applicant will receive an approval letter and a work authorization card.

E. Appealing DACA Decisions

Generally, applicants cannot appeal a DACA denial or file a motion to reopen or reconsider a DACA denial.

However, USCIS guidelines provide that applicants may request review of denials if they believe that the reason was one of the following:

- USCIS denied request on abandonment grounds and applicant responded to a Request for Evidence in a timely fashion; or
- USCIS mailed Request for Evidence to the wrong address despite the fact that

applicant provided proper notice of change of address (Form AR-11) prior to the time the RFE was issued.

Applicants and advocates are encouraged to seek review of denials based on other types of USCIS errors. To request review of a denial, applicants may use the Service Request Management Tool by calling the USCIS National Customer Service Center to make a service request. Applicants may also contact the service center that handled their case to seek review of a denial. In addition, applicants may file a case assistance request with the USCIS Ombudsman's office.

F. Benefits of DACA

A person who is granted DACA is considered lawfully present in the U.S. during the deferred action period. An individual benefiting from DACA does not accrue unlawful presence during the deferred action period; however, any prior unlawful presence is not erased. DACA does not afford an individual lawful status in the U.S. DACA also does not offer a path to lawful permanent residency or path to citizenship. DACA also does not offer any benefits to derivative family members and may be terminated. In certain situations, denial of a DACA application can lead to enforcement action.

DACA allows individuals to apply for work authorization for the two-year deferred action period, which is subject to renewal. A person who is granted DACA also becomes eligible for a social security number and in most states, a driver's license.

DACA recipients who seek to travel outside the U.S. must apply for advance parole (permission to leave and re-enter the U.S.) using Form I-131 (Application for Travel Document). Individuals must show that the proposed travel is for humanitarian purposes, such as medical treatment, funeral of a family member, or visiting a sick relative, educational purposes, such as study abroad programs or academic research, or employment purposes, such as overseas assignments, interviews, conferences, trainings, or client meetings. Travel for the sole purpose of taking a vacation is not allowed.