



## **Adjustment of Status Through Work Visas for DACA Recipients: Explainer**

The status of Dreamers covered under Deferred Action for Childhood Arrivals (DACA) has remained in flux since the program's inception in 2012. In the absence of congressional action to provide DACA recipients with permanent status, this paper examines possible alternate pathways for DACA recipients to obtain legal status through work visas. Employment-based visas could serve as a means of adjustment for DACA recipients who meet certain qualifications, functioning as a bridge to a more stable and secure life in the U.S.

### **What is DACA?**

Deferred Action for Childhood Arrivals ([DACA](#)) is [a program](#) created and implemented by the Obama administration, via executive action, in 2012. It is aimed at protecting undocumented immigrants who came to the U.S. as children, who are commonly referred to as "Dreamers." DACA temporarily shields them from deportation and provides them with work authorization, with possible renewal every two years.

Other benefits that derive from having DACA and a work permit include the ability to lawfully obtain a Social Security number and state identification cards or driver's licenses. Additionally, DACA recipients may be able to apply for "Advance Parole," which is a temporary permission to leave the U.S. for work, educational, or emergency reasons and then re-enter, even though they normally would not be able to re-enter lawfully. However, DACA does not provide lawful status and it does not provide a pathway to permanent status, such as a green card or citizenship. Because DACA was created via executive action and not legislation, the DACA policy generally can be revoked by further executive action.

There are as many as [3.6 million Dreamers](#) residing in the United States, but only [about 580,000 Dreamers](#) are currently protected under DACA. The [average DACA recipient](#) arrived in the United States at age seven and has lived in the U.S. for more than 20 years.

### **Can DACA Recipients be Eligible for an H-1B Work Visa?**

Yes, in some specific cases. DACA recipients may be eligible for an H-1B visa if they meet certain requirements. Because DACA is not a legal nor permanent status, an H-1B visa could provide some DACA recipients with legal status in the U.S.

#### *H-1B Visas*

An [H-1B visa](#) allows companies and employers in the United States to hire foreign-born workers to fill positions that [require](#) "the theoretical and practical application of a body of highly specialized knowledge and a bachelor's degree or higher in the specific specialty." According to U.S. Citizenship and Immigration Services (USCIS), these occupations include fields such as architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, account, law, theology, and the arts. Congress established a cap of 65,000 H-1B visas per year and an advanced degree exemption. The exemption provides an additional 20,000 H-1B visas for individuals who have earned a U.S. master's degree or higher. In addition, not all H-1B visa applications are subject to the cap. Jobs in an institution of higher

education, a non-profit that collaborates with such an institution, or a government research program are exempt from the cap and do not require applicants to go through the lottery.

### *DACA and H-1B Visas*

DACA recipients may be [eligible](#) to obtain an H-1B visa if they meet certain qualifications, including the following:

- **Bachelor’s degree.** DACA recipients must have earned a bachelor’s degree or higher from an accredited university.
- **An employment offer from an employer willing to sponsor them.** DACA recipients must have a job offer or already have a job from an employer that can sponsor them to obtain an H-1B visa. The job must be in a *specialty occupation*, which in general means it requires the skill level of a bachelor’s degree or higher.
- **Initial lawful entry to the U.S.** DACA recipients must have entered the U.S. lawfully. In many cases, this means that they must have entered the U.S. through a port of entry with a tourist visa or a temporary status. DACA recipients who entered unlawfully between ports of entry may not meet this requirement, though they may be able to use [Advance Parole](#) to leave and re-enter the U.S. lawfully.
- **Less than six months of unlawful presence.** DACA recipients must have less than 180 days of unlawful presence in the U.S. Unlawful presence starts accruing for undocumented individuals once they turn 18 years of age. Once an individual obtains DACA, they are not considered “unlawfully present” in the U.S.

The key element for DACA recipients is having less than six months of unlawful presence in the U.S. If a DACA recipient was less than 18.5 years old when they obtained DACA, they would in effect have less than six months of unlawful presence. If they also meet the other requirements, they are likely eligible to obtain an H-1B visa.

Most DACA recipients are likely to meet the first two qualifications. A report found that in 2021 [40 percent](#) of DACA recipients were currently in school, with 83 percent of those in school working towards a bachelor’s degree or higher. An [estimated](#) 408,000 undocumented students are enrolled in postsecondary education including 141,000 DACA-eligible students. Many DACA recipients have already graduated with a bachelor’s degree or higher. Of students pursuing advanced degrees, 33.6 percent of undocumented students and 37.1 percent of DACA-eligible students have an undergraduate degree in a STEM field..

### **Would DACA Recipients Have to Leave the U.S. During the H-1B Visa Process?**

Yes, but temporarily. DACA provides lawful presence in the U.S., but it does not confer a “status.” An employer [may file](#) an H-1B petition while a DACA recipient is living in the U.S., but once the petition is approved, the DACA recipient may have to leave the U.S. for a short period of time to start the consular part of the process. If everything goes according to plan, the individual may re-enter the U.S. on their H-1B visa.

DACA recipients can request “[Advance Parole](#)” (USCIS Form I-131, Application for Travel Document) to leave the U.S. temporarily and return, even if the H-1B petition is rejected. A DACA recipient may travel outside the U.S. under one of the following three categories:

- **Humanitarian:** This includes trips to attend a funeral, visiting a sick family member, and retrieving medical supplies.
- **Educational:** This includes study abroad trips and traveling for research.
- **Employment:** This includes job interviews, client meetings, conferences, and various work-related travel. If a DACA recipient has already formed a relationship with an employer that is willing to sponsor them, they can apply for advance parole for the purposes of employment.

### **Can DACA Recipients with an H-1B Visa Adjust to Lawful Permanent Resident (LPR or Green Card) Status?**

Yes. DACA recipients who obtain an H-1B visa could eventually adjust to lawful permanent resident (LPR or green card) status. The H-1B visa is [a dual intent visa](#), allowing immigrants to be eligible for lawful permanent resident status after they reach their maximum six-year period of stay under the visa. While on a valid H-1B visa, the employer may choose to sponsor the H-1B visa holder for an employment-based green card. Most H-1B visa holders generally apply under the [EB-1](#), [EB-2](#), or [EB-3](#) employment-based immigrant visa categories.

### **Are there Exceptions to the Unlawful Presence Requirement, like the D-3 Waiver?**

The Immigration and Nationality Act (INA) [§212\(d\)\(3\) waiver](#), more commonly known as the D-3 Waiver, excuses certain grounds of inadmissibility for individuals seeking to enter the U.S., including unlawful presence. An approved D-3 Waiver generally should permit individuals to return to the U.S. even if facing the 3 and 10-year re-entry bar, which kicks in once the individual has accrued more than 180 days of unlawful presence in the U.S.

An approved D-3 waiver [could potentially](#) allow DACA recipients eligible for an H-1B visa to leave the United States to apply for an H-1B visa at a consulate or port of entry in their home country. They would then enter the United States once that visa is granted under valid nonimmigrant status with work authorization. The D-3 waiver could help DACA recipients who have accumulated unlawful presence for more than 180 days, since departure from the U.S. triggers the 3 and 10-year inadmissibility bar once they apply to re-enter the U.S. More research might be needed on this matter, but it is a promising area of study.

### **Can DACA Recipients Adjust Status Through Other Work Visas? What about Religious Workers?**

There may be other avenues for DACA recipients to adjust status through work visas. One option is the Special Immigrant Religious Worker program.

DACA recipients who are ministers and non-ministers in religious vocations and occupations may be able to adjust status through the [EB-4 category](#) for special immigrant religious workers. To be eligible, the applicant must work at least 35 hours a week as a minister or have a religious occupation employed by a religious non-profit in the U.S., a religious organization authorized by a group tax exemption holder, or a non-profit organization affiliated with a religious faith in the U.S. According to U.S. Citizenship and Immigration Services (USCIS), the applicant must have been a member of the religious organization for at least two years immediately before the filing petition and have been working for the organization after the age of 14 continuously for at least

two years. The prior religious work does not need to correspond precisely to the type of work the individual will perform moving forward. The U.S. employer will file the petition on the applicant's behalf.

DACA recipients would likely have to meet some of the same requirements needed for an H-1B visa, namely having an initial lawful entry to the U.S. and maintaining less than six months of unlawful presence in the country.

## **Conclusion**

Utilizing work visas as an avenue to legal status for DACA recipients involves navigating a complex and challenging process. Applicants must satisfy stringent criteria, demonstrating their qualifications and eligibility. The H-1B visa offers an important avenue for legal status, providing security and stability for certain DACA recipients who meet the required qualifications. DACA recipients considering this route should carefully assess their eligibility and seek professional guidance to navigate the complexities involved with this process.

Work visas present an opportunity for some DACA recipients, but not everyone. Congress must still provide a legislative avenue to protect DACA recipients and the Dreamer community, as not every DACA recipient will be eligible and there is no assurance every eligible individual will have an opportunity to obtain a work visa. Employment-based visas might provide some relief to DACA recipients, but they are not a solution to Congress' inaction.

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