

# BEYOND DEFERRED ACTION: LONG-TERM IMMIGRATION REMEDIES EVERY DREAMER SHOULD KNOW ABOUT



EDUCATORS FOR FAIR CONSIDERATION

**CURRAN & BERGER LLP**  
IMMIGRATION LAW OFFICES

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# INTRODUCTION

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In January 2012, Educators for Fair Consideration (E4FC) and Curran & Berger LLP embarked on a program to offer in-depth legal consultations to undocumented students. We considered every possible legal remedy - looking for the proverbial “needle in the haystack.” This is an essential strategy in immigration law.<sup>1</sup>

We completed 121 consultations with undocumented students, representing a wide range of nationalities, ages, geographic locations and fields of study.<sup>2</sup> Although that is not enough to make a statistically valid sample, we found six legal remedies that were by far the most common in our work. We also found that many undocumented students were often unaware of their options, or did not understand their own immigration history. Lastly, we found that the advice given to undocumented students, even when well-intentioned, was sometimes skewed – an asylum clinic was more likely to see a potential asylum case, while a business lawyer was more likely to see a business immigration option.

As a result, we decided to provide a self-assessment guide for those six remedies as well as information about how they work. We hope that this guide will help get information to DREAMers considering Deferred Action, and beyond that to other family members and friends, including younger siblings.

President Obama’s Deferred Action for Childhood Arrivals (DACA) program highlights the need for such a guide. Organizations across the United States are preparing to help an estimated one million DREAMers evaluate the DACA option and apply early. DACA is a temporary, discretionary program that could be changed as quickly as it was created. DREAMers should take this opportunity to consider other longer-term options, and pursue them as appropriate. And for some, especially those with minor criminal records, a solid remedy from this list may be safer than trying to get DACA.

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<sup>1</sup> This can be seen from an article many years ago for foreign student advisers called “Employment-Based Visas – there must be a better way” that goes through the strange and complex mix of immigration options from A visas to V visas. See [www.curranberger.com/images/articles/better-way.pdf](http://www.curranberger.com/images/articles/better-way.pdf).

<sup>2</sup> DREAMers are a very mixed group as seen by the recent study at [www.immigrationpolicy.org/just-facts/who-and-where-dreamers-are](http://www.immigrationpolicy.org/just-facts/who-and-where-dreamers-are).

This guide is not intended as legal advice – do not make decisions about which category to apply for based just on this information. Rather, use this guide to spot categories that might work for you, now or in the future. And then explore them through the links provided and through competent, accredited legal service providers.

In particular, do not make decisions about your options without reviewing all possible documents. Many DREAMers have assumptions about their status based on things they have heard from family or misunderstandings about complicated visa history. Self-assessment tools are challenging because sometimes it takes an immigration law professional to look at the documents to figure out what they mean. For example, if a DREAMer assumes that s/he entered the United States without inspection when there was a legal entry, the self-assessment will not work. It is a good idea to dig through parents’ and attorneys’ files to get as much documentation as possible, and supplement as needed Freedom of Information Act (FOIA) Requests.<sup>3</sup>

You can find free or low cost legal services through [www.ImmigrationLawHelp.org](http://www.ImmigrationLawHelp.org) and [www.justice.gov/eoir/probono/states.htm](http://www.justice.gov/eoir/probono/states.htm). Some private attorneys who are members of the American Immigration Lawyers Association (AILA) can be found through [www.AilaLawyer.com](http://www.AilaLawyer.com). More information about non-lawyers who may try to prey on DREAMers is at [www.StopNotarioFraud.org](http://www.StopNotarioFraud.org) as well as information on how to file a complaint.

Educators for Fair Consideration (E4FC)  
Curran & Berger LLP

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<sup>3</sup> For details on these requests, see [www.uscis.gov/FOIA](http://www.uscis.gov/FOIA) [www.cbp.gov/xp/cgov/admin/fl/foia/](http://www.cbp.gov/xp/cgov/admin/fl/foia/) [www.state.gov/m/a/ips/](http://www.state.gov/m/a/ips/), and <http://www.ice.gov/foia/>.

# SIX MOST COMMON REMEDIES WE OBSERVED

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# SIX MOST COMMON REMEDIES WE OBSERVED

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## 1. EMPLOYMENT-BASED GREEN CARD (PERMANENT RESIDENCY) FOR DREAMERS WITH LIFE ACT (245I) PROTECTION

This remedy is much more common than expected, and involves the intersection of two immigration law concepts – 245i protection and employment-based green card sponsorship. (A “green card” is also known as “Permanent Residency” or being a “Lawful Permanent Resident” or “LPR.”)

### **First, the DREAMer must have 245i protection.**

Usually, someone present in the United States who did not originally enter with a visa (or other permission) cannot complete a green card without first returning to his/her country of origin. In many cases, s/he must wait abroad to process a waiver – asking to be excused for being in the United States without status. Returning to a country s/he does not know, for an indefinite period of time, and without assurance that s/he will get back into the United States is scary to say the least.

In 1994, 1998 and 2001, Congress passed a law that had allowed undocumented immigrants to finish their green card process in the United States if they or their parents had STARTED a green card process by a certain date. The last deadline to have had a petition filed was April 30, 2001. So, for example, if a DREAMer’s father’s U.S. citizen sister had started a (very slow) sibling green card process by filing an I-130 relative petition by April 30, 2001, then that DREAMer and his father might be covered by 245i. This may still be true even if the sibling green card petition is still pending today, or was abandoned (perhaps because the sister passed away).

Another example would be that the DREAMer’s mother was working in 2000, and her employer started an employment-based green card for her. The receipt from that green card (probably filed initially with the state labor department) could lead to 245i protection for the mother and the DREAMer.

A few points to note:

\*\*The 2001 law also required that the beneficiary of the green card be physically in the United States on the day Congress passed the law - December 20, 2000. See [www.uscis.gov/files/pressrelease/Section245ProvisionLIFEAct\\_032301.pdf](http://www.uscis.gov/files/pressrelease/Section245ProvisionLIFEAct_032301.pdf) for details.

\*\* Everyone using 245i must pay a \$1000 penalty to get a green card and qualify under the regular visa and permanent residency requirements.

**Second, the DREAMer must have an employer-sponsor for a green card.** DREAMers are a compelling group with which to work because their ‘dreams’ often include higher education. Aided perhaps by a future work permit card from the Deferred Action for Childhood Arrivals (DACA) program, DREAMers may be able to find an employer sponsor for a green card. As discussed, usually the DREAMer could start the process in the United States, but could not get the green card without going back to his/her home country. But, if you combine an employment-based green card with 245i protection, the entire process can be safely completed within the United States. This intersection of humanitarian immigration law and business immigration law can be a powerful tool.

For this guide, it will be useful to provide a **basic overview of the main employment-based green card category - Alien Labor Certification (LC).**

LC is a process by which an employer may sponsor an employee for permanent residence. Almost all full-time, non-temporary jobs might qualify for LC. The goal of the Labor Certification Process is to make sure that foreign workers are not taking jobs from qualified U.S. workers. The actual standard is that Labor Certification will be granted if there are no U.S. workers “able, willing, qualified and available” to accept the job at the prevailing wage for that occupation in the area of intended employment, and that employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

As you can imagine, a higher skilled job, requiring an advanced degree or years of work experience, will be an easier case. And those cases will also go faster because they are higher priority. So, it may make sense to use this as a longer-term plan, to try after getting more education or some job experience.

This process is common in the business immigration world, and works for all kinds of jobs. However, it is a

complicated process and the Department Of Labor (DOL) is looking very carefully at these petitions, given high unemployment, so we recommend getting help from an experienced business immigration attorney. The first and most important step in the process is a conference between the attorney and employer (and occasionally the employee) to establish job duties, minimum requirements and advertising strategy for a “test of the labor market.” For basic PERM Labor Certification, two Sunday print ads in a newspaper of general circulation in the area are required, along with three additional forms of advertising.

In 2005, the Department of Labor (DOL) instituted a web-based system for filing called “PERM,” which is similar to filing taxes online. No documents are provided to the government, just information.

PERM applications may be subject to “Audit” based upon DOL “red flag” criteria or random selection. If the case is audited, the DOL will ask for evidence of recruitment, the recruitment report, all resumes received and reasons for disqualification, and/or further information on the sponsoring-employer. If the DOL finds the documentation satisfactory, the case should be approved.

Since 2007, the employee CANNOT pay for the DOL processing, and the employer cannot later take the costs out of the employee’s salary. There are other costs for U.S. Citizenship & Immigration Services (USCIS) processing that can be paid by the employee.

PERM is the first step in a three-step process to legal permanent residence. The employer is only directly involved in the first two steps of the process – the last step is a personal application for the employee and each dependent family member.

Timing at the USCIS stages is uncertain and wildly variable. For more information on PERM Labor Certification, see [www.foreignlaborcert.doleta.gov](http://www.foreignlaborcert.doleta.gov).

## 2. ADJUSTMENT OF STATUS THROUGH MARRIAGE TO A U.S. CITIZEN

This is also a common potential remedy for DREAMers. You may be eligible to adjust status to a Permanent Resident of the United States if you are in a bona fide (real) marriage to a U.S. citizen, and any previous marriages have been lawfully terminated.

Marriage fraud (a fake marriage to get a green card) carries harsh penalties—including possible deportation,

denial of a Deferred Action request, fines, and a possible felony conviction for the U.S. citizen.

Be prepared to document your relationship and share details about your life with immigration officials. Possible evidence includes photographs, correspondence, evidence of any shared assets and joint financial obligations, and more. You will also have an interview with an immigration officer. There is no magic formula to documenting a real marriage – some marriages are new, some couples do not have assets to share, some are students who have not filed taxes, some are living with family members or friends so there are no leases, and some live apart to pursue school or job goals. The key is to think creatively about how best to document the particular relationship on paper.

When considering this option, there is another question to keep in mind: did you enter the U.S. in a valid immigration status (i.e. with a visa), or did you enter without inspection/without papers?

\*\*If you entered the U.S. in a valid status (even if your status has expired) and you have not left the U.S. since you entered, your U.S. citizen spouse may be able to file a family-based immediate relative petition for you and an adjustment of status application from within the United States. As the spouse of a U.S. Citizen, the penalties for overstaying your visa and unauthorized work are waived. Please be aware that if you have left the United States and re-entered after overstaying a visa, then you may have accumulated unlawful presence and are therefore be subject to a 3 or 10- year bar against re-entry.<sup>4</sup>

\*\*If you entered the U.S. without inspection (unless the law changes or you have 245i protection—see remedy #1 above for more information on 245i protection), you will have to leave the U.S. before you can come back in as a Permanent Resident. However, when you leave the country, you will become subject to a 3 or 10-year bar on return. You will need an I-601 waiver proving that a “qualifying relative” (i.e. your U.S. citizen spouse or U.S. citizen parent) would suffer extreme hardship if you were forced to remain outside of the United States for the duration of your bar.

For now, you may only apply for the waiver once outside the U.S., though more information on a stateside waiver

<sup>4</sup> Foreign nationals who have 6-12 months of unlawful presence are subject to a 3-year bar against entering the United States; those who have more than one year of unlawful presence are subject to a 10-year bar. If you have overstayed your visa, you should not travel outside of the U.S., even after you receive travel documents, because you will trigger the bar. If you need to travel, you should consult a qualified immigration attorney.



should become available in fall of 2012. (The stateside waiver would allow people to get a decision on their I-601 waiver before leaving the U.S. for their interview at the U.S. consulate abroad, making it more likely that that individual will be successful in the entire process and not get stuck abroad).

NOTE: What does it mean to have "entered without inspection" (EWI)?

It is very important to understand the way you came into the United States. Some situations are simple - if you came across the border and never interacted with a U.S. border agent, then you are EWI. If you entered through an immigration checkpoint or airport on a temporary visa, such a tourist visa or student visa) and then overstayed, you are not EWI.

The more complicated situation is one that is common for DREAMers. What if you came across the border with fake papers, but were actually "inspected" by a U.S. immigration official? This could include using someone else's passport. Or what if you were a young child and asked to pretend you were sleeping in the back of a car - you may not know what was said about your status.

For those situations - you need to think about three separate things. Because there are so many fact patterns, we strongly recommend getting as much information as you can from family, those who were there with you, previous attorneys, and/or Freedom of Information Act requests. We have met with many DREAMers who self-reported EWI who were not, and vice versa. Here are the three issues to think about:

1. How does this affect a DACA application? Any of those entries may qualify for DACA - the form gives a choice of "no lawful status" for manner of entry, which may apply. Consult a legal service organization to review the details of your situation. DACA does not ask for many details on the manner of entry.
2. For future immigration applications, such as a green card through marriage to a U.S. citizen, those entries may count as entering with inspection. In case you hear different stories about this, there was a federal court case a few years ago where the judges said that an inspection that was based on false papers does not count. But that decision was vacated, and for now, entering with false papers can count as an admission. For more details on this, see <http://www.legalactioncenter.org/litigation/adjustment-status-when-admission-involved-fraud-or-misrepresentation>.
3. Could whatever happened at the border be considered fraud or misrepresentation? If so, it could be an issue if discovered in DACA eligibility. It could also be considered a crime under federal law (such as a false claim to U.S. citizenship if you used a U.S. passport or birth certificate to entry. Or it could be considered a crime under state law (identity theft if you used someone else's documents). There may be ways to file for DACA, and waivers available

during the green card process. If you were quite young, it is unlikely that the Immigration Service would hold you responsible for presenting a false document. But if you were older, it is possible. Also, there may be questions about who gave you the false documents, and potential liability for them - if your parents gave you a false document to show, that could lead to charges or immigration action against your parents.

This is all a very complicated area of law, and requires a good, authorized legal service provider to help you work through this. Be careful not to assume that an entry was EWI or not EWI without investigating - no matter what you were told before. These are situations that immigration attorneys face regularly, so do not hesitate to ask for help figuring out what happened and what it means for you.

If you have been married for less than two years at the time your green card is approved, you will get a two-year "Conditional" Card. You will then need to file a petition on Form I-751 to make the green card permanent by showing that the marriage has lasted two years. If the marriage does not last two years, you will have to show clear evidence that it was in good faith originally. For those DREAMers who have been married a full two years before receiving their initial green card, there is no conditional status, and no need for the I-751 process.

All filings are forwarded from a central lockbox in Chicago to the National Benefits Center (NBC) in Missouri. If the case passes initial review, the NBC will mail receipts, instructions for getting fingerprinted, and then (usually in a few months) a combination work card/travel. A green card through marriage to a U.S. citizen, if all goes well, can be relatively fast – often less than a year from start to finish.

### 3. U-VISAS FOR VICTIMS OF CRIME WHO ASSIST LAW ENFORCEMENT

The U-Visa was created by the Victims of Trafficking and Violence Prevention Act in 2000 to protect noncitizens who have suffered substantial physical or mental abuse resulting from a "qualifying criminal activity," and have been helpful to law enforcement. The goal is to encourage victims to cooperate with police and prosecutors without worrying about being deported.

The U-visa can provide a legal status in the United States and employment authorization, with the possibility of getting a green card later on. Quite a few of the DREAMers we talked to had been victims of



crime, or their parents had been, making the U-visa a possibility.

#### Qualifying Criminal Activities for U-Visa Eligibility

- » Abduction
- » Abusive Sexual Contact
- » Blackmail
- » Domestic Violence
- » Extortion
- » False Imprisonment
- » Female Genital Mutilation
- » Felonious Assault
- » Hostage
- » Incest
- » Involuntary Servitude
- » Kidnapping
- » Manslaughter
- » Murder
- » Obstruction of Justice
- » Peonage
- » Perjury
- » Prostitution
- » Rape
- » Sexual Assault
- » Sexual Exploitation
- » Slave Trade
- » Torture
- » Trafficking
- » Witness Tampering
- » Unlawful Criminal Restraint
- » Other related crimes

The U-visa application also requires a certifying statement (USCIS Form I-918 Supplement B) from the department or official investigating the case (such as the police or district attorney). This means that the crime must not have gone unreported. Since some police are less cooperative than others, this can be a significant hurdle in the application. In some counties, a judge or even a child protection office can certify a U-visa; a case doesn't necessarily need to be prosecuted in order to support a U-visa application. The

key is cooperation with law enforcement.

Once the Law Enforcement Agency (LEA) certification is obtained, a comprehensive application must be sent to USCIS using Form I-918. Documentation of the crime, the significance of the physical and/ or mental abuse on the victim, and the victim's helpfulness in the investigation must all be well documented. A survivor of a qualifying crime has an ongoing obligation to be reasonably cooperative if the law enforcement agency has a future need for victim testimony or other help. USCIS may check with the law enforcement agency to make sure that you kept helping until the end of the very end of the criminal case.

If you get a U-visa, you may be able to apply for your spouse, children, and parent (in the case of a child under 16).

Many nonprofits are funded to help survivors of crimes file for a U-visa and you may be able to find one near you at no or low cost by going to [www.ImmigrationLawHelp.org](http://www.ImmigrationLawHelp.org). For more details on the U-visa, see [www.ilrc.org/info-on-immigration-law/u-visas](http://www.ilrc.org/info-on-immigration-law/u-visas).

## 4. ASYLUM

Asylum is available to anyone in the United States, regardless of status, who has been persecuted in his/her home country or has a well-founded fear of persecution there, based on one of these five groupings: your race, religion, nationality, membership in a particular social group, or political opinion. The persecution must be done by the government, or by a group that the government is unwilling or unable to control.

It is not enough to say that you are afraid to go back to your country of origin because of general violence, or poor living conditions. An asylum application can be difficult to document if you left your home country quickly to escape a bad situation and do not have many documents to help show that you (or an immediate family member) were persecuted or otherwise in danger due to being a member of one of the five group classifications mentioned above.

Most DREAMers do not come from countries where they are afraid for political or religious reasons. Rather, many fear domestic violence, mistreatment based on their sexual orientation, or gang or mafia violence. These cases (that fall in the "social group" category)

are cutting edge in asylum law, and can be hard to document. Take a look at the U.S. State Department Human Rights reports and other reputable sources for supporting materials - [www.state.gov/j/drl/rls/hrrpt](http://www.state.gov/j/drl/rls/hrrpt), [www.asylumlaw.org](http://www.asylumlaw.org), [www.hrw.org](http://www.hrw.org) and [www.amnestyusa.org](http://www.amnestyusa.org)

The first step is to file an asylum application (on USCIS form I-589). There is usually a screening interview for USCIS to weed out bad cases, and approve the strongest cases, before a work card is issued. If the case is not approved at this interview but the DREAMer has Deferred Action, then the asylum case will probably end after the screening interview. However, if the DREAMer does not qualify for DACA, or if USCIS suspects that there was fraud in either the DACA or asylum applications, then the case will likely be referred to the Immigration Court (EOIR) for a more formal hearing before an immigration judge. That is the beginning of a removal (i.e. deportation) hearing.

There are important deadlines in asylum cases, but these deadlines are more relaxed for minors. If you have just turned 18 or will soon turn 18, it is very important to find out about what deadlines may be coming up soon in your own case.

Before filing an asylum application with USCIS, meet with a nonprofit legal services provider or qualified immigration attorney to better understand the level of risk involved for you since a denied asylum application may result in having to defend yourself in a removal / deportation case.

## 5. FOLLOW-UP ON PARENTS' APPLICATION

Many DREAMers have parents who started Labor Certifications, I-130s, asylum petitions, Nicaraguan Adjustment and Central American Relief Act (NACARA) petitions, or who have other pending petitions, and do not know where those applications stand. The Child Status Protection Act (CSPA) can be used to get the old applications back on track and is the focus of this section of the guide.

As discussed at the beginning of this guide, try to obtain a copy of all previous immigration documents, for yourself and your parents. If you suspect that your family did file an application (such as an I-130, asylum, NACARA, Labor Cert, etc.) you can try a Freedom of Information Act (FOIA) request. See [www.foia.gov/](http://www.foia.gov/)

[index.html](#). The FOIA request will need to be signed by the person who filed the application/petition, or by the beneficiary. However, if possible, it is best to have the person who signed the form also sign the FOIA request. DHS has been inconsistent about allowing beneficiaries to gain access to petitioners' records. Any application filed by an employer might require the employer's signature on the FOIA.

If possible, consult with an immigration attorney. The possibility of immigration benefits depends on the type of application that was filed, whether the DREAMer was listed as a dependent or beneficiary, and the DREAMer's age when it was filed. You also must be careful when you make a FOIA request to get your/ your parents' records. If, for example, USCIS (or the former INS) mistakenly mailed an important, time-sensitive document many years ago to the wrong address, (and you or your parents want to claim that petition should still be valid since you never got it), once you get those documents in a newly-filed FOIA response, USCIS will arguably have given you new notice, which would restart sensitive deadlines. Also, some people may not feel comfortable making a FOIA request using their current home address. Therefore, use caution when ordering a FOIA request and make sure you have a plan to review the results with an attorney or legal services agency soon after those results come to you. These are complex issues that require careful and appropriate guidance.

The Child Status Protection Act is VERY important – usually children can only follow in their parents' applications if the children are still under 21 when the parents get their green cards. For older Dream Act students, do the calculations carefully under the Child Status Protection Act to see if you can still qualify – [www.manila.usembassy.gov/www3228.html](http://www.manila.usembassy.gov/www3228.html).

Overview of Possible Actions & Benefits from Parents' Applications

How Your Parents' Application Can Help You / Type of Petition Your Parents Had	Action You Can Take / Benefits To You (if any)
Labor certification	Watch the backlogs for old slow employment-based labor certification cases to see if/when your parents can move forward.
Your parent had a family member who filed a family-based petition where you were listed as a dependent	Watch the backlogs to see when to move forward with the final personal Adjustment of Status applications. Monitor the Visa Bulletin at <a href="http://travel.state.gov/visa/bulletin/bulletin_1360.html">http://travel.state.gov/visa/bulletin/bulletin_1360.html</a> .
Asylum	Some old asylum cases are still pending – consider trying to move it forward if the basic claim was strong.
Nicaraguan and Central American Relief Act (NACARA)	<p>If your parent was granted NACARA when you were less than 21 years of age or if you entered the U.S. on or before October 1, 1990 and are unmarried, you could be eligible to file an I-881 (Application for suspension of deportation or special rule cancellation of removal under NACARA 203). In order to file this form you must have had seven years of continuous physical presence in the United States, good moral character during those seven years; that your deportation or removal would result in extreme hardship to you or to your spouse, child, or parent who is a U.S. citizen or lawful permanent resident; AND lastly that the application for the child merits a favorable exercise of discretion.</p> <p>For more information, see <a href="http://www.ilrc.org/resources/nacara-manual">www.ilrc.org/resources/nacara-manual</a> or contact a legal services agency that specializes in NACARA cases.</p>
U-visa	If your parent was granted a U-visa when you were a minor, they may be able to file form I-918 Supplement A on your behalf if you are under 21 and unmarried. If you turn 21 while your Supplement A is still pending, your case may be in limbo with USCIS for several years until the government issues clearer guidance what will happen to those individuals who appear to 'age-out' while their U-visa derivative case is still pending.

## 6. TEMPORARY WORKING VISAS (SUCH AS THE H-1B) AND PROCESSING IN YOUR HOME COUNTRY

Earlier in this guide, we have discussed how difficult it is to leave the United States to finish a green card. It is not a simple matter to leave to get a temporary visa, but it is generally easier and faster, and open to a much wider range of DREAMers. It is still discretionary, and the timeframe is uncertain, but it is worth considering. The most common version of this is an H-1B professional working visa, with a d3 waiver, granting permission from a U.S. consular officer to re-enter the country despite previous immigration violations. We will discuss each of these in turn.

**An H-1B nonimmigrant visa is a temporary visa** for professional workers that normally requires a bachelor's degree or equivalent at the minimum requirement. Typical examples of H-1B eligible professionals are computer programmers, engineers, teachers, scientists, and lawyers. The H-1B visa is valid for three years and can be renewed for an additional three years, for a maximum of six years.

For H-1Bs, the job and the degree must match nicely. For example, an English major who is talented with computers, but only has limited academic or work experience, may not be eligible for an H-1B, even if he/she is a better programmer than a computer science major. Generally, United States Citizenship & Immigration Services (USCIS) will look to the degrees held by others with similar jobs at the same company, and across the industry, to decide whether an H-1B is appropriate.

For an H-1B, the employer is the petitioner, and is required to make successive filings with the Department of Labor (DOL) and then with USCIS. The employer must "attest" (promise) that it will pay the prevailing wage for that job in that geographic area, as well as disclose the actual wage paid at the company for others in the same job, among other attestations.

There is an H-1B "cap," or a numerical limitation on H-1B visas available each fiscal year. Currently, the numerical limit is 65,000, with an additional 20,000 H-1Bs for graduates with at least a master's degree from a U.S. institution of higher education. In a good economy, it is common for USCIS to receive far more

H-1B petitions than available visa numbers within only a few days of filing acceptance. In these cases, there is a random selection process to determine which petitions will be accepted. In a downturn economy however, H-1Bs tend to be much less competitive. In Fiscal Years 2010 and 2011, for example, the quota was not met until months after the fiscal year began.

There are also a number of exceptions to the H-1B cap. All colleges and universities, related or affiliated non-profits, and governmental research organizations are exempt. This means that an H-1B petition can be filed by these employers at any time of the year.

For general information about H-1Bs, see <http://curranberger.com/content/view/35/67/>.

**The Immigration and Nationality Act §212(d)(3), known commonly as the d3 option, excuses unlawful presence, the key immigration law violation of most undocumented graduates.** For any DREAMer who has been present in the United States for one year or more in violation of immigration laws, leaving the United States triggers a 10-year bar to readmission. D-3 allows a temporary visa to be issued despite the bar.

In considering this option, please keep in mind these key points:

\*\* The so-called H-1B/D-3 option is a short-term solution. Long-term status will require a separate plan or action by Congress. However, getting a temporary visa is significantly more secure than the discretionary Deferred Action program provides the option to transition to other visas or to obtain permanent residence. A temporary visa may be particularly appropriate for a DREAMer who does not qualify for DACA, such as one who is age 31 or over.

\*\* H-1B visas are sponsored by employers. To set up this option, try to develop relationships with potential employers through internships, volunteering, networking, etc., so that the employer may be more likely to support the H-1B process. The H-1B/d-3 option is not common, so if an employer is interested, you may need to help explain this option, or find an attorney to help you do so.

\*\* The first step is for the employer to petition for the visa here in the United States. After it is approved, the file is sent to the U.S. consulates in the DREAMer's country of citizenship, and he/she can then choose to leave and apply there for d3 permission to return in

valid H-1B status.

As explained above, most DREAMers who have been unlawfully present in the United States for one year or more face a 10-year bar to admission from the date of their departure or removal from the United States. Thus, departure from the United States – which is necessary for a d-3 application – is what triggers the 10-year bar, which starts clocking from the date of departure. A successful d-3 application removes the 10-year bar for temporary visa purposes only. In other words, the 10-year bar remains for green card purposes.

The law about the 3- and 10-year bars, INA § 212(a)(9)(B), does not say whether you can serve your time *inside* the United States. Some unpublished court cases and a couple of guidance letters indicate that you can spend the 3 or 10 years in the United States, as long as you are in legal status. The H-1B counts as legal status – Deferred Action does not.

The latest, House-approved language of the DREAM Act requires, in part, for a student to have been “physically present in the United States for a continuous period of not less than 5 years immediately preceding the date of the enactment.” The House bill allows for brief breaks in presence, but not “for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days,” with only limited and compelling exceptions – illness or death of a close relative, for instance. Under this statutory language, it would appear that a DREAMer would still be eligible for relief after a short trip abroad to secure a d3 waiver and H-1B visa. However, we don’t know precisely how the DREAM Act will be worded if it is passed, or how it will be interpreted.

Consular officers use three criteria to make their discretionary d3 decisions:

\*\*The risk of harm to society if the applicant is admitted to the United States. For most DREAMers, their risk of harm to society is low if they intend to enter the United States as a working professional. Rather, there may be a potential benefit to U.S. society.

\*\*The seriousness of the applicant’s immigration law violation. This is compared to the range of grounds of inadmissibility covered by the d3 waiver. The immigration violation of unlawful presence, for example, is less serious than criminal convictions, drug offenses, or smuggling.

\*\*The reasons for wishing to enter the United States.

This is not limited to exceptional or humanitarian circumstances, but covers any legitimate purpose.

Some undocumented students with a bachelor’s degree may have other longer-term paths to permanent residence that do not involve leaving the United States. As an example, a student who qualifies for 245i may face a choice of leaving the United States to pursue an H-1B visa with d3 waiver, but may also have the option of staying in the United States, pursuing a Masters degree, and then seeking a green card through an employer sponsor. The speed of becoming legal, the effort involved in the process, and the risk/reward of each option should be considered.

# IMPORTANT CONSIDERATION FOR THOSE IN REMOVAL PROCEEDINGS

15 MOTION TO SUPPRESS



# IMPORTANT CONSIDERATION FOR THOSE IN REMOVAL PROCEEDINGS

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This section has been added to highlight a little-known mechanism for DREAMers who are in removal proceedings. E4FC and other groups have collaborated on a separate guide for removal cases - [http://curranberger.com/dreamact/images/e4fc\\_deportationguide.pdf](http://curranberger.com/dreamact/images/e4fc_deportationguide.pdf). The Motion to Suppress is added here as one more arrow in the quiver of a DREAMer facing immigration court proceedings.

## MOTION TO SUPPRESS

If an immigrant was placed in removal proceedings by Immigration & Customs Enforcement (ICE) or police misconduct, in violation of the 4th Amendment right to privacy or 5th Amendment right to silence, that person may be able to file a Motion to Suppress (MTS) to have their removal (i.e. deportation) case dismissed.

Sometimes, ICE does not have a search warrant or proper evidence to search or detain someone it suspects is in the U.S. without status. Immigrants (just like U.S. Citizens) have the protections of the right of privacy (often in their car or home) and right to silence (not to admit facts that will be used against them in a later prosecution), but since immigration laws are usually enforced civilly and not criminally, ICE agents may not fully advise individuals of their *Miranda* warnings that police officers must provide if there is a criminal arrest.

MTS is a sophisticated legal tool that an immigration attorney can help you screen for in a removal defense case. MTS is a good option for a minors placed into removal proceedings to try because a children's right to silence (to be warned not to voluntarily share with ICE information about their country of origin, or the fact they are not a U.S. citizen) should be protected, particularly if they were not given a chance to meet with an immigration attorney before being questioned by ICE. MTS needs to be argued very early in a removal case or else it is lost as a defense. Therefore, if you (or a DREAMer you know) are arrested, make sure they

get information about MTS quickly as it may help to get them out of removal, particularly since whatever gets them into trouble with the law may also make them ineligible for DACA. MTS can be a good last resort to avoid removal (deportation).

Hopefully, now that the current Obama administration has said that it intends to slow or stop removal of DREAMers, fewer law-abiding people will find themselves in removal (deportation) proceedings. However, if you are ever arrested, remember that you have the right to remain silent and that ICE may use information you give to the police about where you were born (or just the fact that you are not yet an American) against you in a removal case.

For more information about MTS, visit: <http://www.ilrc.org/publications/motions-to-suppress> and an outline of the Table of Contents is available at [www.ilrc.org/files/mts-2009-toc.pdf](http://www.ilrc.org/files/mts-2009-toc.pdf).



# ADDITIONAL REMEDIES TO CONSIDER FOR FAMILY MEMBERS UNDER AGE 18

17 ADOPTIONS

17 SPECIAL IMMIGRANT JUVENILE (SIJ)

# ADDITIONAL REMEDIES TO CONSIDER FOR FAMILY MEMBERS UNDER AGE 18

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We hope that this information will not only be shared with DREAMers applying for Deferred Action, but also will be passed on to younger brothers and sisters. Any DREAMer or undocumented youth who is under 18 may have other options to consider.

## ADOPTIONS

First, if a child is under age 16, there is a possibility of being adopted by a U.S. citizen in the United States. Siblings may be adopted together if one is under 16 and the other is under 18. Adoptions are complicated, potentially requiring the severing of parental rights of biological parents. This is a process that definitely requires legal advice. For more details, including country-by-country guides, see [adoption.state.gov](http://adoption.state.gov).

The most common situation is a DREAMer living with a U.S. citizen aunt, uncle, grandparent or family friend. If the DREAMer entered the United States in legal status, then it may be possible to process an adoption in state court here in the United States. Then, to be sure the adoption is not just for immigration purposes, USCIS requires that the DREAMer and the U.S. citizen actually live together for at least two years. Once the two years is up, then the U.S. citizen can sponsor the DREAMer for permanent residence as an adopted child.

Second, if the DREAMer entered the United States without inspection, or has other serious immigration violations, or if the United States and the DREAMer's country of birth are part of the Hague Convention treaty, then it may be difficult to use an adoption to get a green card.

## SPECIAL IMMIGRANT JUVENILE (SIJ)

The Special Immigrant Juvenile (SIJ) status category is for children who are in the United States, are under 18, and are dependent on a state court or the Department of Social Services for support, and have been abandoned, neglected or abused by a birth parent.

The most common SIJ scenarios for DREAMers are a

child living with a family member rather than the birth parents or a child living with only one parent after having been abandoned, neglected or abused by the other parent. The family member still caring for the child can petition in state court for a permanent guardianship order that has special language to satisfy the SIJ law. If this works, then the DREAMer may be able to self-petition for a SIJ green card (although neither parent may ever benefit from a future family-based petition if that child becomes a permanent resident). For more information on SIJ, see [www.ilrc.org/resources/special-immigrant-juvenile-status-sijs](http://www.ilrc.org/resources/special-immigrant-juvenile-status-sijs).

Note that some minors who might appear to qualify for a U-visa (i.e. are the survivor of a crime) but who for some reason are ineligible for a U-visa, may qualify for SIJ if they have ever been under the jurisdiction of the juvenile court (or family court, or probate court) and the court agrees to continue its jurisdiction over the child and file a 'predicate order.'

In California, for example, the Judicial Council has tried to make SIJ status easier to get by introducing form **JV-224** to guide family law, dependency and delinquency attorneys and judges who may not be very familiar with immigration law. (See: [www.courts.ca.gov/documents/jv224.pdf](http://www.courts.ca.gov/documents/jv224.pdf)) If you have had contact with a judge in a family law, dependency, probate, or delinquency case, consider contacting a nonprofit, such as **Legal Services for Children** ([www.lsc-sf.org](http://www.lsc-sf.org)), or other agency through [www.ImmigrationLawHelp.org](http://www.ImmigrationLawHelp.org) that helps with SIJ status cases. Not all states use a special form, but the resources noted in this paragraph may help direct you to the resources closest to where you live.

The International Adoption Sourcebook (<http://agora.aila.org/Product/Detail/75>) has articles and information about these categories for immigration practitioners, including a discussion of how to use SIJ, or the Violence Against Women Act (VAWA), or asylum, to help young children for whom adoption will not be a viable path to a green card.

Third, and last, if a child under 18 files for Deferred Action, he or she will not accumulate unlawful presence (which only starts at age 18). *This can be a tremendous help later on for opening up options for temporary visas or green cards.* Every DREAMer who is under 18 should consult with a legal service provider – even if the DREAMer does not need a work card now. Once the DREAMer turns 18, unlawful presence begins, and that can very seriously limit immigration options in the future.

# RESOURCES

- 19 E4FC'S FREE DREAMer INTAKE SERVICE
- 19 FINDING LEGAL REPRESENTATION: HOW TO GET STARTED
- 20 FIVE TIPS TO OBTAINING A GOOD PRIVATE IMMIGRATION ATTORNEY

# RESOURCES

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## E4FC'S FREE DREAMer INTAKE SERVICE

Educators for Fair Consideration (E4FC)'s online DREAMer Intake Service provides information about possible immigration remedies and benefits to undocumented students who are under 35 years old and live in the California Bay Area (Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz, Solano, Sonoma, and Yolo counties).

Through this free and anonymous service, you can submit a comprehensive online intake form where you answer a series of questions about your immigration case. E4FC's Student Legal Advocates and attorneys work together to prepare information about your eligibility for certain immigration remedies (including deferred action). If it appears that you have a potential remedy to pursue, you can use this information to help you decide whether you want to find a low-cost nonprofit or pay a private attorney for application legal advice and form-filling assistance to pursue that remedy.

Many people who access our site are afraid to seek out legal counsel and/or worry that they will not be able to pay for it. We hope to alleviate this problem by providing our service for free and online. It is important to note that E4FC does not represent clients or help clients to fill out forms; instead, we want to help you be better prepared before you pay for what could be an expensive immigration attorney. We hope to give you an idea about what kinds of questions you should ask that attorney at your initial consultation and information about documents you may want to gather before your first appointment.

To find out more about E4FC's DREAMer Intake Service, please visit: [www.e4fc.org/legalservices.html](http://www.e4fc.org/legalservices.html).

## FINDING LEGAL REPRESENTATION: HOW TO GET STARTED

It is important to find an immigration attorney (either in private practice or at a nonprofit) or BIA accredited representative (at a nonprofit organization) who can

adequately consult and represent you, especially if you have a complex case. Many communities will set up DACA group processing events, which will hopefully help a lot of *pro se* DREAMers (those not officially represented by an attorney) who have simple cases. But if your DACA case is complex, or you think you qualify for something other than just DACA, find expert help before trying that process on your own.

There are two common ways to find an immigration attorney or accredited representative to meet your needs:

### 1) Non-Profit Legal Service Agencies

Immigration non-profit agencies offer low-cost help to community members. Many non-profit agencies do some full-service help, but cannot meet all of the demand, so they may also offer limited-scope or advice and brief service support. The areas of immigration law in which they practice and the time available to update individual clients may mean waitlists for potential clients or periods of time when not everyone can get help from their local nonprofit. Local immigration non-profit agencies may only serve clients from specific counties and may not represent clients who are in removal (deportation) proceedings. Still, they are often a lot cheaper than a private immigration attorneys and their services are probably not motivated by a need to get paid by you to support their practice. Many nonprofits have staff members who are experts in their fields or sub-focus, so they are definitely a great resource to try to access.

To find immigration non-profit legal service agencies relevant to you, visit: [www.ImmigrationLawHelp.org](http://www.ImmigrationLawHelp.org).

### 2) Private Immigration Attorneys

Private immigration attorneys commonly often offer a broader range of general immigration assistance than nonprofit and have more time to discuss and update their clients on their specific cases. For example, a private immigration attorney might be more knowledgeable about employment-based options for undocumented individuals than a nonprofit that works exclusively with survivors of violence, and the private attorney may be available to answer additional questions via e-mail and/or phone. Non-profit agencies often have an inherent trust within the community, including former clients on their board of directors, but you may have to research a private immigration attorney's background before hiring him or her (see below for Five Tips to Obtaining a Good Private

Immigration Attorney). Moreover, private immigration attorneys commonly offer their services at a higher price than non-profit agencies.

To find a list of private immigration attorneys, you can visit [www.ailalawyer.org](http://www.ailalawyer.org).

## FIVE TIPS TO OBTAINING A GOOD PRIVATE IMMIGRATION ATTORNEY

If you're going to hire a private immigration attorney, do some research. Below are five tips to finding a good private immigration attorney, brought to you by **About.com**.

**1) Get references.** Ask family, friends or colleagues if they know any immigration lawyers. Even if they haven't been through immigration themselves, they may be able to connect you with someone they know who has retained the services of an immigration lawyer. People are quick to recommend a good lawyer and even quicker to name a poor one, which can be a great help when you're beginning your search.

**2) Search AILA.** Search for a lawyer on the **American Immigration Lawyers Association (AILA)** website. AILA is a national association of lawyers and attorneys who teach and practice immigration law, so you can be reasonably certain you're dealing with someone who understands immigration law and policies. If you're starting your research from scratch, you can search for a lawyer in your area. If you've been given the names of a few lawyers, you can look them up to see if they are members. While membership in AILA is not a requirement to practice immigration law, membership can be a good indication of a lawyer's level of commitment to the practice.

**3) Interview your short list.** Interview potential lawyers to find one who matches your needs. Ask them if they have any experience with your type of case. Immigration law is a huge specialty, so you'll want a lawyer who is familiar with your type of case. If the lawyers provide client references, use the contacts to get a better understanding of the lawyers' work styles.

**4) Compare fee schedules.** Some lawyers bill by the hour while others charge a flat fee. Ask if there might be additional costs such as postage, courier fees or long distance charges.

**5) Check credentials.** When you're sure you've found a lawyer you feel comfortable with, there's only one

thing left to do before you sign a contract for services. Contact your local state bar to find out if your lawyer is licensed and in good standing, and if he or she has ever been subject to disciplinary action.

# CONCLUSION

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Immigration law is a classic example of the old adage that laws are made like sausage – they are bits and pieces bound together often with no consistency or logic. Our work with DREAMers has shown that some have remedies under existing laws and do not realize this. We hope this guide will prompt them to explore certain options, either now, or by setting themselves up to fit into a category in the future. We also hope that these options will be shared with family members and friends so that they too can look for the “needle in the haystack” that will lead to lawful immigration status.

# ABOUT THE AUTHOR

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Dan Berger is a frequent speaker at colleges, universities, and nonprofits on immigration issues. As a law student, he won the 1995 American Immigration Lawyers Association (AILA) annual writing competition for an article on INS policies toward international adoptions. Mr. Berger continued researching and writing, including being a Senior Editor of the AILA Immigration and Nationality Law Handbook for over ten years, Editor-in-Chief of Immigration Options for Academics and Researchers (2005 and now the new edition 2011), and Editor of the International Adoption Sourcebook and the Diplomatic Visas Handbook. He currently is Vice Chair of the AILA Healthcare Committee and a member of the AILA Texas Service Center Liaison Committee and the Rome District Chapter Consular Liaison Group, having previously served in many liaison positions working with different branches of the U.S. Citizenship and Immigration Service. Mr. Berger developed his interest in immigration in college, where he studied immigration history and taught English as a Second Language for adult refugees. He is a graduate of Cornell Law School, and a partner with Curran & Berger LLP in Northampton, Massachusetts.

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# ABOUT US

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## EDUCATORS FOR FAIR CONSIDERATION (E4FC)

Founded in 2006, Educators for Fair Consideration's supports undocumented students in realizing their academic and career goals and actively contributing to society. We offer holistic programming that addresses the financial, legal, career, and emotional health needs of undocumented students. Specifically, we provide scholarships, legal services, professional and personal development workshops, and a strong peer network for undocumented students. We also lead presentations and create educational materials to raise awareness and support for undocumented students nationwide. Our programming is designed by and for undocumented young people with support from committed allies. For more information, visit [www.e4fc.org](http://www.e4fc.org).



## CURRAN & BERGER LLP

Curran & Berger is a law firm in Northampton, MA specializing in immigration, with a wide range of clients from large corporations to top research universities to individuals. For many years our firm has represented colleges and universities. In the past, there would be individual undocumented students approaching us for advice, but the numbers were relatively small. Trying to help these students involved surveying the gamut of visa categories, from family to business, to look for a possible remedy. As we saw the numbers grow, we became increasingly involved in this issue, teaming with E4FC in 2010 to provide targeted legal services. We currently advise many universities about their policies regarding undocumented students. For more information, visit [www.curranberger.com](http://www.curranberger.com). You can also contact us by email at [info@curranberger.com](mailto:info@curranberger.com) or (413) 584-3232.