

## Administrative Relief for Longtime Residents

# Streamlining Access to Work Visas for Homegrown Talent

Because not all Dreamers and other long-term residents who have earned college and advanced degrees in the U.S. will have family-based paths to legal status, the administration should ensure that, where options may exist to provide lawful status via our employment-based immigration system, they are clear and streamlined. For example, under our laws, individuals who have accrued unlawful presence in the United States may nonetheless be eligible for nonimmigrant work visas (NIVs) given their skill, experience, and backgrounds, if they apply to waive those grounds. Guidance around these “NIV Waivers” could be issued with the purposes of clarifying existing rules, which in turn could encourage more employers to hire eligible Dreamers with specialized skills and advanced degrees to help meet their workforce needs. It would also give the prospective workers greater confidence in that process, should the worker have an employment-based path available to them.

## 1 What are NIV Waivers, and Why Does the Current Process Need to be Fixed?

As a preliminary matter, employers must identify a need for a foreign worker and the potential applicants must meet the specific requirements that apply for the NIV being sought. Many, but not all, NIV programs begin with the filing of a visa petition by a prospective employer. Once approved, a prospective NIV recipient who is in the U.S. but is ineligible to change status from within the U.S.—as is the case for DACA recipients—will generally have to leave the country and apply for the NIV at an embassy or consulate abroad. A consular officer will determine whether the applicant is eligible and deserving of the NIV and, in the case of an applicant who would be eligible but for being inadmissible on one or more grounds, whether to recommend to DHS that such grounds of inadmissibility be waived.

At issue is the time the current process for deciding on the NIV Waivers. The current process typically requires the prospective worker to wait abroad for many months for their waivers to be adjudicated. This creates at least two challenges. First, the additional processing time needed to pursue an NIV Waiver acts as a barrier to entry for many employers – including many who want to do the right thing by converting invaluable and talented staff with DACA into another status – but who understandably also need certainty to meet their workforce needs in a timely manner. Second, potentially eligible workers like DACA holders are dissuaded by the uncertainty in a process that requires them to leave the U.S. and potentially wait months outside the country while their cases are decided. Both employers and prospective employees would benefit greatly from a streamlined process that ensures the former gets the workers they request and the latter gains greater clarity about the amount of time they may have to spend abroad.

## 2 What Tools Can the Administration Make the NIV Waiver Process Work Better?

To enhance protections for Dreamers and other long-term residents who have earned college and advanced degrees in the U.S., the Biden administration should consider refining aspects of the work visa system to incentivize greater hiring of this domestic talent pool. For example, the Department of State (State) should update its Foreign Affairs Manual to expedite the current multi-month consular processing period for non-immigrant visa applicants who require unlawful presence waivers. This can be achieved by issuing guidance on expedited requests and establishing presumptions of eligibility in certain cases. State and the Department of Homeland Security (DHS) should collaborate to initiate rulemaking aimed at creating a mechanism for stateside processing of nonimmigrant visa waivers, similar to the provisional waiver process in the family-based context.

### 3 How Could Nonimmigrant Visa Waivers Help Dreamers and others Educated in the U.S.?

The impact of this change could be significant. New American Economy estimates that 13% of DACA-eligible students are pursuing graduate & professional degrees, and of those 43% have undergraduate STEM degrees, including in the healthcare field. In addition, the Center for American Progress estimates that more than three-quarters of DACA recipients in the workforce (343,000 people) were employed in jobs determined essential by the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency. This figure includes 34,000 health care workers, 11,000 individuals working in other health care settings, 20,000 educators, and 100,000 working along the food supply chain.

### 4 Are There Other Ways the Administration Can Streamline Employment-Based Visa Processes?

It's important to understand that the NIV Waiver is just one part of a larger process. For example, prospective petitioners must also meet the specific requirements of the underlying NIV program. Our laws also presume that, with few exceptions, every noncitizen intends to immigrate until they prove to the government's satisfaction that they are entitled to nonimmigrant (temporary) status. Some nonimmigrant visa categories also require the noncitizen to maintain a foreign residence that they do not intend to abandon. The administration should explore how to address and clarify these issues through agency guidance. This could enhance access to a broader range of NIVs, including the TN visa, which is specifically tailored for Canadian and Mexican nationals. This NIV category in particular could prove to be an important option for many DACA holders.

The NIV Waiver described above is often associated with the H-1B nonimmigrant visa, which, among other things, is exempt from the immigrant intent requirement. Although the H-1B visa is subject to an annual cap of 65,000 visas, with an additional 20,000 visas for those with advanced degrees from the U.S., certain institutions are exempt from this numerical cap, including universities, related non-profit entities, non-profit research organizations, and government research institutions. Importantly, the administration has an opportunity to provide more flexibility for cap-exempt nonprofit and governmental organizations as part of its proposed H-1B regulation.