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Legalization Framework Under the Immigration and Nationality Act (INA)

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The population of unlawfully present aliens in the United States numbers between ten million and twelve million, according to recent estimates. The Immigration and Nationality Act (INA) takes three primary approaches to regulating this population: removal, deterrence, and—to a lesser extent—legalization. Legalization, as used here, means the granting of a lawful immigration status to an unlawfully present alien so that he or she is no longer subject to removal under the INA. Put differently, an unlawfully present alien “legalizes” by obtaining lawful permanent resident status (LPR or “green card” status) or any other status (such as a nonimmigrant status) that extinguishes the statutory basis for his or her removal.

The INA takes a generally restrictive approach to legalization. During much of the 20th century, a statutory provision called “registry” allowed unlawfully present aliens to obtain LPR status based on their long-standing presence in the United States. If unlawfully present aliens had entered the United States before a fixed cutoff date and satisfied other requirements, such as a lack of certain types of criminal convictions, they could apply to the Attorney General for LPR status. The registry statute is now effectively obsolete because its cutoff date, which Congress last updated in 1986, remains fixed at 1972.

The most consequential body of legalization principles in the INA governs when unlawfully present aliens may obtain LPR status through qualifying family relationships or on other qualifying grounds. In general, the INA imposes barriers to the acquisition of LPR status for unlawfully present aliens who come within one of the three major categories that the law uses to select aliens for immigration to the United States: family-based immigrants, employment-based immigrants, and diversity immigrants. Specifically, most unlawfully present aliens who come within these categories must pursue LPR status by departing the United States to apply for an immigrant visa abroad (rather than applying to adjust status within the United States), and their departure typically triggers a ten-year bar on readmission to the United States. There are important exceptions to this general framework, however. In particular, an alien who overstays a nonimmigrant visa and then becomes the immediate relative of a U.S. citizen (through marriage, for example) may generally apply to adjust to LPR status without leaving the country and without facing any time bars on admission.

Other INA provisions allow for legalization on hardship or humanitarian grounds. Cancellation of removal allows for legalization where the removal of an unlawfully present alien would cause hardship to immediate relatives who are U.S. citizens or LPRs, but the hardship must be “exceptional and extremely unusual.” Cancellation of removal also is generally only available as a defense in removal proceedings (aliens cannot apply for it affirmatively), is subject to an annual cap, and, among other requirements, is only available to unlawfully present aliens who have been in the United States for at least ten years. As for humanitarian relief, asylum creates a pathway to LPR status for unlawfully present aliens who have a well-founded fear of persecution or suffered past persecution in their countries of origin. However, aliens generally must apply for asylum within one year of arriving in the United States (unless an exception applies), so asylum is not available to most unlawfully present aliens who have been in the country for long periods of time. Subsidiary protections from persecution and torture—*withholding of removal* and *protection under the Convention Against Torture (CAT)*—do not have the one-year application deadline, but they offer more limited relief that arguably does not qualify as lawful immigration status. Separately, a series of nonimmigrant statuses, including the U visa, offer the prospect of lawful immigration status to unlawfully present aliens who are victims or witnesses of certain crimes.

U.S. immigration law has also taken other approaches to legalization, separate and apart from the narrow legalization provisions in the INA. First, Congress occasionally has enacted ad hoc legalization laws that, rather than reforming the INA’s generally applicable provisions going forward, have offered one-time relief or relief only for discrete populations. Second, executive branch agencies have exercised enforcement discretion to grant unlawfully present aliens discretionary reprieves from removal, such as deferred action or the Deferred Action for Childhood Arrivals (DACA) initiative, which have conferred a weaker form of protection than lawful immigration status. This weaker form of protection is sometimes known as “quasi-legal status” and, although it typically confers work authorization and gives an unlawfully present alien an assurance that immigration authorities will not pursue his or her removal during a certain time, it does not extinguish the statutory basis for the alien’s removal.

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Introduction

When a non-U.S. national (alien) enters the United States illegally or overstays a temporary visa, her presence in the country violates the Immigration and Nationality Act (INA).¹ She is subject to removal from the country on that basis alone, regardless of whether she has a criminal history or other factors, and there are few circumstances in which she can legalize her presence to extinguish the statutory basis for her removal.² The population of aliens in this situation—that is, aliens whose presence in the United States violates the INA, referred to here as “unlawfully present aliens”³—currently numbers between ten million and twelve million, according to some recent estimates.⁴ About 80% of unlawfully present aliens have been in the United States for more than ten years, according to a study by the Department of Homeland Security (DHS).⁵

The issue of whether and to what extent to legalize or provide other relief from removal to unlawfully present aliens is a frequent topic of debate in Congress. The issue is sometimes called the “third leg of the stool” of immigration reform, after the issues of border enforcement and legal

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

² See, e.g., *Mondragón v. Holder*, 706 F.3d 535, 541 (4th Cir. 2013) (“It is uncontroverted that Mondragón entered the United States illegally and is therefore removable.”); *Ghaffar v. Mukasey*, 551 F.3d 651, 653 (7th Cir. 2008) (denying petition for review of final order of removal based on overstay of nonimmigrant visa); *infra* note 28 (overview of legalization options under the INA).

³ Strictly speaking, not all aliens whose presence in the United States violates the INA are “unlawfully present” for all purposes, because some of these aliens may acquire employment authorization documents (EADs) through deferred action or other discretionary reprieve programs and, on that basis, no longer accrue unlawful presence for purposes of some grounds of inadmissibility under the INA. See *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 975 (9th Cir. 2017) (en banc) (“[D]eferred action recipients do not accrue ‘unlawful presence’ for purposes of calculating when they may seek admission to the United States.”). Nonetheless, this report uses “unlawfully present aliens” to refer to aliens whose presence violates the INA because the term, though flawed, is the best available. “Illegal aliens” and “undocumented aliens” are both politically charged terms. See, e.g., Alex Nowrasteh, *You Say “Illegal Alien.” I Say “Undocumented Immigrant.” Who’s Right?*, NEWSWEEK (Dec. 12, 2017), <https://www.newsweek.com/you-say-illegal-alien-i-say-undocumented-immigrant-whos-right-750644> (discussing the significance of “illegal” and “undocumented” terminology in public discourse and issue framing). And “undocumented” is technically incorrect because an EAD is a document. See *id.* “Unauthorized aliens” does not work because the INA defines it to exclude any alien who has received work authorization. *Chamber of Commerce v. Whiting*, 563 U.S. 582, 589 (2011) (“‘Unauthorized alien’ [means] an alien who is not ‘lawfully admitted for permanent residence’ or not otherwise authorized by the Attorney General to be employed in the United States.” (quoting 8 U.S.C. § 1324a(h)(3))); see also *Lozano v. City of Hazelton*, 724 F.3d 297, 300 n.1 (3d Cir. 2013) (opting to “use the term ‘unauthorized alien’ when discussing issues of employment, and . . . either ‘aliens not lawfully present’ or ‘aliens lacking lawful immigration status’ when referring to persons who are not legally in this country”).

⁴ Robert Warren, *The US Undocumented Population Fell Sharply During the Obama Era: Estimates for 2016*, CTR. FOR MIGRATION STUDIES (Feb. 22, 2018), <https://cmsny.org/publications/warren-undocumented-2016/> (estimating 10.8 million in 2016); DHS OFFICE OF IMMIGRATION STATISTICS, POPULATION ESTIMATES 1 (Dec. 2018) [hereinafter DHS Study], https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf (estimating 12.0 million as of January 2015); Jeffrey S. Passel & D’Vera Cohn, *Overall Number of U.S. Unauthorized Immigrants Holds Steady Since 2009*, PEW RESEARCH CTR. (Sept. 20, 2016), <https://www.pewresearch.org/hispanic/2016/09/20/overall-number-of-u-s-unauthorized-immigrants-holds-steady-since-2009/> (estimating 11.1 million in 2014).

⁵ DHS Study, *supra* note 4, at 4.

admissions.⁶ Many (but not all) proposals for comprehensive immigration reform include provisions that would create pathways to lawful permanent residence for unlawfully present aliens in significant numbers.⁷ These bills generally follow a model for one-time legalization programs exemplified by the Immigration Reform and Control Act of 1986,⁸ which offered the prospect of lawful permanent resident (LPR) status to much of the unlawfully present population in the United States at that time.⁹ Other bills would create legalization programs for discrete segments of the unlawfully present population; the various Dream Act proposals, for example, would offer relief to many childhood arrivals.¹⁰ These legislative proposals contemplate ad hoc legalization measures: they would offer relief to extant populations of unlawfully present aliens, but the proposals would not change generally applicable law concerning legalization going forward.¹¹ The version of the DREAM Act recently passed by the House of Representatives, for example, would create a pathway to LPR status for some unlawfully present childhood arrivals who entered the United States at least four years before enactment; the bill would not, however, change the INA's approach to future childhood arrivals.¹²

This report covers the current law that underlies the ad hoc legalization debate. It reviews the limited extent to which, under the INA, an unlawfully present alien can obtain a legal immigration status that extinguishes the statutory basis for removal. In other words, the report explains the narrow circumstances in which unlawfully present aliens can legalize under current law. As used here, "legalization" means the acquisition of a lawful immigration status by an unlawfully present alien so that he or she is no longer subject to removal under the INA. Because the INA takes a restrictive approach to legalization, the term is often used synonymously with ad hoc legalization to refer to proposals for programs of one-time relief.¹³ This report, in contrast, focuses on legalization under current law.

⁶ See *The Three-Legged Stool*, DHS (Nov. 16, 2009), <https://www.dhs.gov/blog/2009/11/16/three-legged-stool> (Secretary Janet Napolitano at the Center for American Progress stating: "Let me be clear: when I talk about 'immigration reform,' I'm referring to what I call the 'three-legged stool' that includes a commitment to serious and effective enforcement, improved legal flows for families and workers, and a firm but fair way to deal with those who are already here.").

⁷ See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2101 (as passed by Senate, June 27, 2013) (creating a pathway to legal permanent residence for aliens without legal status who entered the United States before December 31, 2011 and who met other criteria); see generally CRS Report R43097, *Comprehensive Immigration Reform in the 113th Congress: Major Provisions in Senate-Passed S. 744*, by Ruth Ellen Wasem; CRS Report R42980, *Brief History of Comprehensive Immigration Reform Efforts in the 109th and 110th Congresses to Inform Policy Discussions in the 113th Congress*, by Ruth Ellen Wasem; but see Gabby Orr, *Trump Team Pitches New Immigration Plan Amid Furor Over Border*, POLITICO (July 16, 2019), <https://www.politico.com/story/2019/07/16/trump-immigration-plan-1417024> (describing White House proposal for immigration reform that "is not expected to address illegal immigration beyond the border security component").

⁸ Pub. L. No. 99-603, 100 Stat. 3359 (1986).

⁹ See generally *McNary v. Haitian Refugee Ctr. Inc.*, 498 U.S. 479, 483 (1991) ("[IRCA's] first amnesty program permitted any alien who had resided in the United States continuously and unlawfully since January 1, 1982, to qualify for an adjustment of his or her status to that of a lawful permanent resident. The second program required the Attorney General to adjust the status of any alien farmworker who could establish that he or she had resided in the United States and performed at least 90 days of qualifying agricultural work during the 12-month period prior to May 1, 1986 . . .") (citations omitted); Hiroshi Motomura, *What is "Comprehensive Immigration Reform"? Taking the Long View*, 63 ARK. L. REV. 225, 226 (2010) (describing IRCA and explaining that its two legalization programs "legalized over sixty percent of the pre-IRCA undocumented population").

¹⁰ See CRS Insight IN10777, *Unauthorized Childhood Arrivals: Legislative Options*, by Andorra Bruno.

¹¹ See *id.*

¹² American Dream and Promise Act, H.R. 6, 116th Cong. § 111 (as passed by the House on June 4, 2019).

¹³ See Motomura, *supra* note 9, at 237 (describing "ad hoc legalization" and opining that "it corrects the shortcomings

To the exclusion of other issues, this report focuses on the circumstances in which the INA allows acquisition of legal status notwithstanding unlawful presence. Many of the statutory provisions discussed that allow legalization in limited circumstances—such as adjustment of status, asylum, and cancellation of removal—apply to lawfully present aliens as well, but those aspects of the statutes are not explored here.¹⁴ Further, most of the statutory provisions treated here have requirements that disqualify aliens with certain criminal convictions or immigration violations. Those requirements are referenced but not analyzed here; another CRS report discusses them in more depth.¹⁵

Overview of INA Regulation of Unlawful Presence

The INA takes three primary approaches to regulating the unlawfully present population: removal, deterrence, and—to a lesser extent—legalization.

First, unlawfully present aliens are subject to removal for as long their presence violates the INA; no statute of limitations applies.¹⁶ This regime of perpetual removability has been a feature of U.S. immigration law since 1924.¹⁷ Under it, aliens who enter the country surreptitiously or overstay nonimmigrant visas may be removed even after many years in the United States, whether or not they have committed other crimes or offenses.¹⁸ Enforcement of this legal regime comes with a well-known catch: the federal government does not allocate enough resources to make the removal of all unlawfully present aliens possible. According to DHS estimates and removal statistics, the agency’s resources allow it to pursue removal each year of only a small fraction of the approximately ten million to twelve million unlawfully present aliens in the United States.¹⁹ There is an enforcement gap, in other words. In response, executive branch

of immigration laws in the past. Legalization does nothing to fix immigration laws going forward.”).

¹⁴ See, e.g., CRS Report R45539, *Immigration: U.S. Asylum Policy*, by Andorra Bruno, at 3 (“An alien may file an affirmative asylum application regardless of his or her immigration status, subject to applicable restrictions.”).

¹⁵ See CRS Report R45151, *Immigration Consequences of Criminal Activity*, by Hillel R. Smith.

¹⁶ See *Adams v. Holder*, 692 F.3d 91, 104 (2d Cir. 2012) (“[T]he INA . . . specifically imposes no time limitations on removal proceedings.”); *Asika v. Ashcroft*, 362 F.3d 264, 269 (4th Cir. 2004) (“[T]he provisions of the [INA] that govern deportation [do not] refer . . . to any time limitation on deportation at all.”); 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE §71.01[2][b][iii] (2012) (“[T]here is now no period of limitation restricting the time during which deportation proceedings must be commenced.”). Some grounds of deportation unrelated to unlawful presence apply only to conduct that occurs within a certain time after entry. See 8 U.S.C. § 1227(a)(1)(E)(i) (“Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.”) (emphasis added); *id.* § 1227(a)(5) (“Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.”) (emphasis added).

¹⁷ See EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965 448 (1981) (explaining that the Immigration Act of 1924 “remov[ed] the time limit on deportability of the illegal immigrant”).

¹⁸ See *Adams*, 692 F.3d at 104; GORDON, *supra* note 16, at §71.01[2][b][iii].

¹⁹ See DOJ OFFICE OF LEGAL COUNSEL, THE DEPARTMENT OF HOMELAND SECURITY’S AUTHORITY TO PRIORITIZE REMOVAL OF CERTAIN ALIENS UNLAWFULLY PRESENT IN THE UNITED STATES AND TO DEFER REMOVAL OF OTHERS 1 (2014), <https://www.justice.gov/olc/opinion/department-homeland-security-s-authority-prioritize-removal-certain-aliens-unlawfully> (“DHS has explained that although there are approximately 11.3 million undocumented aliens in the country, it has the resources to remove fewer than 400,000 such aliens each year.”); see also *Regents of the Univ. of Cal. v. DHS*, 908 F.3d 476, 509 (9th Cir. 2018) (“[T]he reality is (and always has been) that the executive agencies charged with immigration enforcement do not have the resources required to deport every single person present in this country without authorization.”); DHS, ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2017 12 (Mar. 2019), https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf (showing that number of aliens removed following apprehensions by Immigration and Customs Enforcement, the DHS component primarily

administrations have, to varying degrees, established enforcement priorities to focus their removal resources on aliens who have committed crimes or who meet other criteria.²⁰ But the point remains that unlawfully present aliens face perpetual risk of removal under the INA, even if only a small percentage are actually placed in removal proceedings each year.²¹

Second, the INA seeks to deter the arrival or continued presence of unlawfully present aliens. It criminalizes some immigration violations, such as illegal entry and reentry,²² and bars most aliens who lack lawful immigration status from working²³ or receiving federal public benefits.²⁴ The INA renders aliens who commit some immigration violations inadmissible (i.e., ineligible for admission), either for a specified time period or for life.²⁵ Aliens who are unlawfully present in the United States for one year or more, for example, are inadmissible for ten years once they depart, subject to some waiver provisions.²⁶ Aliens who reenter the country illegally after being removed are inadmissible for life, also subject to limited waiver.²⁷

Finally, legalization: as this report explains, the INA offers limited opportunities for unlawfully present aliens to acquire legal immigration status that extinguishes the statutory basis for their removal. An alien who overstays a nonimmigrant visa and later marries a U.S. citizen (or otherwise becomes the immediate relative of a U.S. citizen) can legalize through the adjustment of status process, so long as he or she has not committed certain crimes and does not fall within other eligibility bars.²⁸ Beyond that notable exception, the legalization mechanisms in the INA exist mainly to relieve specific types of hardships such as persecution abroad (asylum) or the extreme hardship that U.S. citizens or LPRs would suffer due to the removal of their parents (cancellation of removal).²⁹ Where these forms of relief do not apply, unlawfully present aliens may seek to legalize by leaving the country and applying for an immigrant visa abroad on the

responsible for interior enforcement, did not exceed 200,000 in any year between 2010 and 2017).

²⁰ The Obama Administration created enforcement priorities for criminal aliens, repeat violators of immigration laws, and recent arrivals. *See* Memorandum from John Morton, Director, ICE, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>. The Trump Administration rescinded these enforcement priorities and now directs DHS personnel to “execute the immigration laws of the United States against all removable aliens,” but it has nonetheless instructed personnel to prioritize the removal of aliens who have committed certain crimes or immigration-related offenses. *See* Memorandum from John Kelly, Secretary, DHS, on Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

²¹ *See Adams*, 692 F.3d at 104; GORDON, *supra* note 16, at §71.01[2][b][iii].

²² 8 U.S.C. §§ 1325, 1326.

²³ *Id.* § 1324a(a)(1)(A).

²⁴ *Id.* § 1611 (Aliens who are not qualified aliens ineligible for Federal public benefits); *see also id.* § 1601(2) (“It continues to be the immigration policy of the United States that . . . the availability of public benefits not constitute an incentive for immigration to the United States.”); Gregory T.W. Rosenberg, *Alienating Aliens: Equal Protection Violations in the Structures of State Public-Benefit Schemes*, 16 U. PA. J. CONST. L. 1417, 1424 (2014) (providing an overview of alien eligibility for public benefits under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996).

²⁵ *See* 8 U.S.C. § 1182(a).

²⁶ *Id.* § 1182(a)(9)(B)(i)(II).

²⁷ *Id.* § 1182(a)(9)(C)(i)(II).

²⁸ *See id.* § 1255(c)(2); *infra* note 84 and accompanying text.

²⁹ *See* 8 U.S.C. §§ 1158 (asylum), 1229(b) (cancellation of removal for nonpermanent residents); *see also infra* “Nonimmigrant Visas for Victims and Witnesses of Certain Crimes.”

basis of a qualifying family relationship or in an employment or diversity category.³⁰ In most cases, however, their prior unlawful presence in the United States will make them ineligible to return for ten years.³¹ As such, under current law, it is generally more difficult for unlawfully present aliens in the United States to obtain legal immigration status on generally applicable grounds, such as qualifying family relationships, than it is for aliens abroad applying to immigrate on the same grounds.³²

Early Legalization Law: Registry for Long-Standing Presence

U.S. immigration law developed its current stance toward the unlawfully present population in the middle period of the twentieth century, when Congress strengthened removal statutes and allowed the primary legalization statute—known as the registry statute, which provided for legalization based on long-standing presence—to become obsolete.

Illegal immigration emerged as a significant issue in the United States with the advent of quantitative immigration restrictions in the 1920s.³³ Until 1875, the only restrictions on immigration into the United States came from state laws providing for the exclusion or expulsion of convicts, paupers, and people with contagious diseases.³⁴ The Page Act of 1875 imposed the first federal restrictions when it barred convicts and prostitutes.³⁵ Additional qualitative restrictions, including bars against Chinese laborers and aliens “likely to become public charges,” followed in the ensuing decades, culminating in the imposition of a literacy test in 1917.³⁶

The first numerical restrictions on immigration were not imposed until 1921, when the temporary measures of the Emergency Quota Act capped new admissions by nationality (at 3% of the foreign-born population of each nationality, as reflected in the census of 1910).³⁷ Congress established a permanent and generally more restrictive system of national origins quotas in the Immigration Act of 1924, also known as the Johnson-Reed Act.³⁸ Numerical limitations of some

³⁰ See *Ramirez v. Brown*, 852 F.3d 954, 964 (9th Cir. 2017).

³¹ See § 1182(a)(9)(B)(i)(II).

³² See *id.*

³³ See MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 57 (2014) (“[T]he Immigration Acts of 1921 and 1924 . . . for the first time imposed numerical restrictions on immigration. . . . Although unlawful entry had always resulted from exclusion, in the 1920s illegal immigration achieved mass proportions and deportation assumed a central place in immigration policy.”); WEISSBRODT & DANIELSON, *supra* note 1, at 12.

³⁴ See generally Gerald L. Neuman, *The Lost Century of American Immigration Law*, 93 COLUM. L. REV. 1833, 1841–65 (1993); HUTCHINSON, *supra* note 17, at 397–401 (“[T]he dominant concern of the [state] legislators was that immigrants would add to the burden of poor relief, and there was strong suspicion at the time that Europe was deliberately exporting its human liabilities.”).

³⁵ Page Act of 1875, 43 Cong. ch. 141, § 5, 18 Stat. 477; see HUTCHINSON, *supra* note 17, at 405, 407.

³⁶ See ROGER DANIELS, *GUARDING THE GOLDEN DOOR* 39 (2005); NGAI, *supra* note 33, at 58–59; see generally HUTCHINSON, *supra* note 17, at 405–42.

³⁷ Emergency Quota Act of 1921, ch. 8 § 2(a) (providing that “the number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910.”); See DANIELS, *supra* note 36, at 49 (“The 1921 act was a benchmark in immigration restriction: it marked the first time that a numerical cap had been legislated.”); NGAI, *supra* note 33, at 20.

³⁸ Immigration Act of 1924, 43 Stat. 153; see HUTCHINSON, *supra* note 17, at 470; NGAI, *supra* note 33, at 17.

form have remained a fixture of U.S. immigration law ever since.³⁹ Some illegal immigration had existed during the regime of qualitative restrictions that began in 1875, but it increased with the introduction of numerical caps.⁴⁰

The 1924 Act, beyond establishing a permanent quota system, was also notable for its removal provisions. The act rendered aliens who entered or remained in the country in violation of its restrictions subject to deportation “at any time after entering,” which meant that no limitations period applied and even long-standing unlawfully present aliens could be deported.⁴¹ This marked a significant change from earlier deportation statutes, which had imposed limitations periods of between one and five years for the removal of illegal entrants.⁴² Aliens physically present for longer than the limitations period could not be deported under those laws on the ground that their presence violated the immigration statutes.⁴³ The 1924 Act eliminated this limitations period going forward.⁴⁴

Yet soon after U.S. immigration law settled upon this regime of perpetual deportability of unlawfully present aliens, the law also developed a mechanism called “registry” for such aliens to legalize on the basis of long-standing presence. Congress enacted the first registry statute in 1929 and revised it periodically thereafter.⁴⁵ Generally speaking, the registry statute authorized immigration officials to grant lawful permanent residence to aliens who entered the United States before a date specified in the statute and who resided in the country continuously after entry.⁴⁶ To qualify, aliens also had to demonstrate “good moral character” and not be ineligible on certain grounds that changed over time (e.g., not have certain criminal convictions).⁴⁷ Unlawful presence—whether as a result of surreptitious entry or the overstay of a visa—was not a bar to registry.⁴⁸

³⁹ See 8 U.S.C. § 1151 (Worldwide level of immigration); HUTCHINSON, *supra* note 17, at 476–77. For an overview of the system of numerical restrictions under current law, see CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*, by William A. Kandel.

⁴⁰ See NGAI, *supra* note 33, at 57.

⁴¹ Immigration Act of 1924, 43 Stat. 153, 162 (“Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted . . . shall be taken into custody and deported . . .”); see HUTCHINSON, *supra* note 17, at 447–48.

⁴² See 6 GORDON, *supra* note 16, at §71.01[2][b][iii] (2012) (“In the earliest deportation statutes a one year period of limitation for deportability was fixed. This was increased in later legislation to 3 years and in 1917 the period of limitation generally became 5 years.”).

⁴³ See *Lehmann v. U.S. ex rel. Carson*, 353 U.S. 685, 686–87 (1957) (discussing effect of five-year statute of limitations provision in the Immigration Act of 1917).

⁴⁴ See HUTCHINSON, *supra* note 17, at 447–48. After the 1924 Act, the five-year limitations period from the 1917 Act benefitted only those aliens who had entered before July 1, 1924. See *Lehmann*, 353 U.S. at 686–87; NGAI, *supra* note 33, at 60 n.11.

⁴⁵ See generally archived CRS Report RL30578, *Immigration: Registry as Means of Obtaining Lawful Permanent Residence*, by Andorra Bruno; Richard A. Boswell, *Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 HARV. J. ON LEGIS. 175, 180–89 (2010) (summarizing the “historical origins of registry”).

⁴⁶ See 8 U.S.C. § 1259 (registry statute).

⁴⁷ *Id.* § 1259(c), (d); Boswell, *supra* note 45, at 183 (“There were relatively few requirements to qualify for the earlier registry: proof of physical entry before the cutoff date, good moral character, and not being subject to deportation or ineligible for U.S. citizenship. Later amendments to the registry requirements replaced the deportability provision with one that proscribed registry for persons who were inadmissible based on more serious exclusion grounds.”).

⁴⁸ See 8 U.S.C. § 1259 (specifying requirements that do not include maintenance of lawful immigration status). Until 1958, one of the requirements for registry was that an alien not be “subject to deportation.” Boswell, *supra* note 45, at 183. That requirement may not have impacted the eligibility of unlawfully present aliens, however, because the cutoff

In plain terms, then, the registry statute provided for the legalization of unlawfully present aliens who had been in the United States since a given cutoff date. The first cutoff date, under the 1929 statute, was June 3, 1921.⁴⁹ Congress apparently sought to provide relief to aliens who entered the United States before the first numerical restrictions went into effect in 1921 and before immigration officials began systematically recording alien admissions at ports of entry.⁵⁰ In 1939, Congress advanced the cutoff date to 1924.⁵¹ About 200,000 aliens appear to have legalized through registry between 1929 and 1945.⁵² A few more changes to the cutoff date followed in later decades. A 1958 law advanced the date from 1924 to 1940;⁵³ a 1965 law moved it up to 1948;⁵⁴ and in 1986, the Immigration Reform and Control Act (IRCA) set the current date of 1972.⁵⁵

Under current law, the registry statute remains in effect, but the 1972 cutoff date renders it mostly obsolete.⁵⁶ Registry applications surged on the heels of the 1986 update that set the date at 1972, but applications dwindled to a trickle as the date grew more distant.⁵⁷ In 2004, the last year for which DHS published separate statistics on registry in its statistical yearbook, 205 aliens became LPRs through registry.⁵⁸ Thus, while the concept of registry persists in U.S. law as a legalization mechanism based on long-standing presence, few (if any) unlawfully present aliens qualify to legalize through registry because few have been present since the 1972 cut-off date.⁵⁹

Legalization for Aliens Eligible to Immigrate

Perhaps the most significant body of legalization principles in the INA governs the extent to which unlawful presence disqualifies an alien from obtaining LPR status through family

date for registry before the 1958 amendments was July 1, 1924, *see id.* at 182, and aliens who entered before that date were not subject to deportation after a maximum five-year limitations period. *See Lehmann*, 353 U.S. at 686–87.

⁴⁹ Act of March 2, 1929, ch. 536, § 1, 45 Stat. 1512, 1513.

⁵⁰ *See Boswell*, *supra* note 45, at 182–83 (“The clear intent of the first registry was to create a record of lawful admission for anyone who had entered the country prior to the [first quota provisions] of June 3, 1921 . . . [o]ne impetus for creating registry was that, with the 1906 enactment of stricter rules requiring the registration of all persons coming to the United States, there were many people with sympathetic cases who did not have documents evidencing their records of admission”).

⁵¹ Act of Aug. 7, 1939, ch. 517, 53 Stat. 1243. One bill introduced in 1939 would have replaced the cutoff date with a ten-year continuous residency requirement. *See Boswell*, *supra* note 45, at 189. More recent bills have advanced similar proposals. *See* archived CRS Report RL30578, *Immigration: Registry as Means of Obtaining Lawful Permanent Residence*, by Andorra Bruno, at 7–8 (describing three bills introduced in 107th Congress that would have created a “rolling registry date,” and one that would have implemented an ongoing fifteen-year continuous residency requirement).

⁵² *See Boswell*, *supra* note 45, at 184.

⁵³ Pub. L. No. 85-616, 72 Stat. 546 (1958).

⁵⁴ Pub. L. No. 89-236, § 19, 79 Stat. 911, 920 (1965).

⁵⁵ Pub. L. No. 99-603, § 203, 100 Stat. 3359 (1986).

⁵⁶ *See* 8 U.S.C. § 1259(a).

⁵⁷ *See* archived CRS Report RL30578, *Immigration: Registry as Means of Obtaining Lawful Permanent Residence*, by Andorra Bruno, at 6 (collecting statistics showing that adjustments through registry peaked at 40,029 in 1988, two years after IRCA, falling sharply thereafter, to fewer than 200 in 1998); DHS OFFICE OF IMMIGRATION STATISTICS, 2004 YEARBOOK OF IMMIGRATION STATISTICS 14 tbl. 4 (2004) [hereinafter DHS Yearbook 2004], https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2004.pdf.

⁵⁸ DHS Yearbook 2004, *supra* note 57, at 14 tbl. 4 (Immigrants Admitted by Type and Selected Class of Admission: Fiscal Years 1995 to 2004).

⁵⁹ *See id.*

relationships or on other generally applicable grounds.⁶⁰ With the registry statute effectively obsolete, federal law no longer provides for the legalization of unlawfully present aliens based on the duration of their presence in the country alone.⁶¹ But unlawfully present aliens often come within the generally applicable criteria that the law uses to select aliens for immigration to the United States.⁶² The INA allocates immigrant visas to three major categories of aliens: family-based immigrants, employment-based immigrants, and diversity-based immigrants.⁶³ Family-based immigrants account for about two-thirds of permanent immigration to the United States each year; employment-based immigrants account for about 12%; and diversity-based immigrants account for about 4% (refugees, asylees, and some other categories account for the remainder).⁶⁴ An unlawfully present alien would come within one of these categories, to give some examples, by marrying a U.S. citizen,⁶⁵ having a U.S. citizen son or daughter who turns twenty-one,⁶⁶ obtaining an offer of employment that qualifies for an employment-based immigrant visa,⁶⁷ or entering and winning a visa slot in the diversity lottery program.⁶⁸

The law's approach to aliens in this situation—that is, aliens who become eligible for an immigrant visa while living in the United States in violation of the INA—is to impose two interlinking obstacles to their acquisition of LPR status. *First*, current law prohibits most (but not all) such aliens from obtaining LPR status unless they depart the United States to apply for the immigrant visa at a U.S. consulate abroad.⁶⁹ As discussed below, exceptions to this prohibition allow some groups of unlawfully present aliens who are eligible for immigrant visas to become LPRs by adjusting their status from within the United States. The most notable exception benefits those aliens who enter on a nonimmigrant visa, overstay, and then marry a U.S. citizen or otherwise become the immediate relative of a U.S. citizen.⁷⁰ *Second*, most unlawfully present aliens who depart the United States to apply for immigrant visas abroad will face a bar on readmission of three years from the date of their departure (for aliens unlawfully present for more than 180 days)⁷¹ or ten years from the date of their departure (for aliens unlawfully present for

⁶⁰ See Motomura, *supra* note 9, at 230 (drawing attention to INA principles that generally prevent unlawfully present aliens from “acquir[ing] legal status if they qualify in the current categories for lawful immigration”).

⁶¹ See *supra* note 58 and accompanying text.

⁶² See generally Marisa S. Cianciarulo, *Seventeen Years Since the Sunset: The Expiration of 245(i) and Its Effect on U.S. Citizens Married to Undocumented Immigrants*, 18 CHAP. L. REV. 451, 452 (2015).

⁶³ 8 U.S.C. § 1151(a); See generally CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*, by William A. Kandel.

⁶⁴ See CRS Report R42866, *supra* note 63, at 10.

⁶⁵ See, e.g., *Ramirez v. Lopez*, 852 F.3d 954, 957 (9th Cir. 2017) (considering case of alien who entered U.S. surreptitiously and subsequently sought immigrant status on basis of marriage to U.S. citizen).

⁶⁶ See, e.g., *Matter of Flores-Mendoza*, No. A093 127 729 - IMP, 2015 WL 4510744, at *1 (BIA June 19, 2015) (unpublished) (considering case of alien who entered surreptitiously and subsequently sought LPR status on the basis of a petition filed by his U.S. citizen son).

⁶⁷ See, e.g., *Chaudhry v. Holder*, 705 F.3d 289, 290–91 (7th Cir. 2013) (considering case of alien who overstayed nonimmigrant visas before seeking LPR status on the basis of an offer to work as a “multi-national executive or manager”).

⁶⁸ See, e.g., *Carrillo-Gonzalez v. INS*, 353 F.3d 1077, 1078 (9th Cir. 2003) (considering case of alien who won the diversity lottery while present without status in the United States after entering surreptitiously).

⁶⁹ See 8 U.S.C. §§ 1255(a), (c) (generally rendering aliens ineligible for adjustment of status if they enter unlawfully or fail to maintain lawful status after entry); *infra* note 84 and accompanying text (discussing applicability of § 1255 requirements to unlawfully present aliens).

⁷⁰ See 8 U.S.C. § 1255(c)(2) (exempting immediate relatives of U.S. citizens from the requirement that they maintain lawful status in order to adjust to LPR status).

⁷¹ See 8 U.S.C. § 1182(a)(9)(B)(i)(I); *Cervantes-Ascencio v. INS*, 326 F.3d 83, 85 (2d Cir. 2003) (“Subpart I [of

one year or more).⁷² Unless they receive a discretionary waiver of the ineligibility—a remedy with narrow eligibility criteria—they generally must wait out the bars abroad.⁷³ In general, then, the INA imposes a double barrier to the legalization of unlawfully present aliens who come within an immigrant visa category: the law prohibits such aliens from seeking LPR status unless they apply from abroad (the first barrier) and then bars their readmission for three or ten years once they depart the United States (the second barrier).

Crucially, the three- and ten-year bars on readmission apply only if the alien departs the United States following the period of unlawful presence.⁷⁴ The law that governs an alien’s eligibility to adjust status from within the United States—that is, to obtain LPR status without departing—is therefore hugely important, because in most cases it determines whether an unlawfully present alien in an immigrant visa category must face the three- and ten-year bars before obtaining legal status.⁷⁵ In many cases, a grant of advance parole—essentially, an assurance from DHS that it will allow an alien to reenter the country on immigration parole after a trip abroad—can help an unlawfully present alien become eligible to adjust status, as discussed further below.⁷⁶

Adjustment of Status: Legalization without Departing the United States

Adjustment of status under INA § 245 is the legal mechanism that makes it possible for an alien who is present in the United States and qualifies for an immediately available immigrant visa to acquire LPR status without leaving the country.⁷⁷ Like most immigration benefits, adjustment of

§ 1182(a)(9)(B)(i)] imposes a three-year bar on re-admission on all ‘short term’ aliens—those whose unlawful presence in the United States amounts to less than one year—who voluntarily depart the United States prior to commencement of removal proceedings.”).

⁷² See 8 U.S.C. § 1182(a)(9)(B)(i)(II); *Cervantes-Ascencio*, 326 F.3d at 85–86 (“Subpart II [of § 1182(a)(9)(B)(i)] . . . applies to ‘long term’ aliens—those . . . whose unlawful presence in the United States amounts to one year or more. Subpart II imposes a ten-year bar on re-admission on all ‘long term’ aliens, irrespective of *how* or *when* the ‘long term’ alien departs.”). Unlike the three-year bar, which does not cover aliens who depart voluntarily after the commencement of removal proceedings or who are removed, the ten-year bar applies to aliens who depart voluntarily at any time and also to aliens who are removed. *Cervantes-Ascencio*, 26 F.3d at 86.

⁷³ See 8 U.S.C. § 1182(a)(9)(B)(i).

⁷⁴ *Id.* The three-year bar is triggered only by a voluntary departure before the commencement of removal proceedings. *Id.* § 1182(a)(9)(B)(i)(I); *Cervantes-Ascencio*, 326 F.3d at 85; 9 FAM 302.11-3(B)(2)(b) (“The three-year bar of [§ 1182(a)(9)(B)(i)(I)] applies only to aliens who left the United States voluntarily before the DHS commenced proceedings against them.”). The ten-year bar, in contrast, is triggered by any voluntary departure (regardless of whether removal proceedings began beforehand) and also by removal. 8 U.S.C. § 1182(a)(9)(B)(i)(II); *Cervantes-Ascencio*, 326 F.3d at 85–86; 9 FAM 302.11-3(B)(2)(c) (“[A]n alien who departs the United States after having been unlawfully present for a period of one year or more subsequent to April 1, 1997, is barred [under § 1182(a)(9)(B)(i)(II)] from returning to the United States for ten years, whether the departure was before, during, or after removal proceedings and regardless of whether the alien departed on his or her own initiative or under removal order.”) As discussed below, a trip abroad pursuant to a grant of advance parole does not count as a “departure” for either the three- or ten-year bars. See *infra* “Lawful Entry Requirement: Exceptions and Significance of Parole Programs.”

⁷⁵ See 8 U.S.C. § 1182(a)(9)(B)(i); *Wood v. Mukasey*, 516 F.3d 564, 567 n.1 (9th Cir. 2008) (explaining the significance of adjustment of status, in light of the three- and ten-year unlawful presence bars, to an alien who overstayed a nonimmigrant visa and then sought LPR status on the basis of marriage to a U.S. citizen); Richard A. Boswell, *Crafting True Immigration Reform*, 35 WM. MITCHELL L. REV. 7, 37 n.105 (2008) (explaining that the three- and ten-year bars “do not apply to persons who are eligible for ‘adjustment of status’” but that adjustment “is a narrowly defined benefit”).

⁷⁶ See *infra* “Lawful Entry Requirement: Exceptions and Significance of Parole Programs.”

⁷⁷ 8 U.S.C. § 1255(a). Other statutes that apply only to particular groups of aliens—such as refugees, asylees, and aliens of specific nationalities—create mechanisms for adjustment of status that are independent of INA § 245(a) and

status is a discretionary remedy: the INA authorizes but does not require immigration authorities to grant it to eligible aliens.⁷⁸ This mechanism did not exist in federal immigration statute until 1952.⁷⁹ Its inexistence before that date sometimes forced creative administrative maneuverings. In the early 1940s, people fleeing German-occupied Europe who entered the United States on temporary visas or on immigration parole, and who qualified for and had the government's support to acquire LPR status, could gain such status only by departing the country to apply for U.S. immigrant visas.⁸⁰ A special arrangement between the U.S. and Canadian governments facilitated such persons' entry into Canada to apply for the visas at the U.S. embassy there, with the understanding that they would return to the United States as LPRs.⁸¹ In 1945, President Truman issued a presidential declaration to exempt from this exit-to-enter procedure—which he considered “wasteful”—a group of about 1,000 displaced persons who had been brought from camps in Italy to a War Relocation Camp near Oswego, New York.⁸² The first version of the adjustment of status statute was enacted seven years later.⁸³

Under current law, an alien seeking to adjust to LPR status within the United States must meet several requirements, two of which have outsize implications for the unlawfully present population: (1) the alien must have been “inspected and admitted or paroled into the United

generally impose less burdensome requirements. *See, e.g.*, 8 U.S.C. § 1159 (Adjustment of Status for Refugees); Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966); *Zheng v. Gonzales*, 422 F.3d 98, 109–10 (3d Cir. 2005) (“The Cuban Refugee Adjustment Act specifically created a new mechanism for adjustment of status, in language that to some extent parallels [INA] section 245 but does not rely on it.”).

⁷⁸ *Mutie-Timothy v. Lynch*, 811 F.3d 1044, 1048 (8th Cir. 2016) (“Adjustment of status is a discretionary decision committed to the Attorney General.”).

⁷⁹ *See* Immigration and Nationality Act, H.R. 5678, 82d Cong. § 245(a) (1952); Joe A. Tucker, *Assimilation to the United States: A Study of the Adjustment of Status and the Immigration Marriage Fraud Statutes*, 7 YALE L. & POL'Y REV. 20, 42 (1989) (“The Immigration Act of 1924 did not permit an alien present in the United States, and otherwise eligible for permanent residence, to acquire permanent status without leaving the country to receive a visa from a consular officer. In effect, the alien was required to leave the country in order to return.”).

⁸⁰ *See* DANIELS, *supra* note 36, at 85–87. U.S. immigration law did not provide for the entry of refugees as a distinct category until the enactment of the Displaced Persons Act of 1948 (DPA), 62 Stat. 1009. *See id.* at 81; *see generally* *Negusie v. Holder*, 555 U.S. 511, 519–19 (2009) (“The DPA was enacted ‘to enable European refugees driven from their homelands by the [second world] war to emigrate to the United States without regard to traditional immigration quotas.’” (quoting *Fedorenko v. United States*, 449 U.S. 490, 495 (1981))). Previously, refugees had to enter the United States under the generally applicable provisions for immigrants and nonimmigrants, or pursuant to grants of immigration parole. *See* DANIELS, *supra* note 36, at 85–87. The Refugee Act of 1980 established the current framework of U.S. refugee law; as the Supreme Court has explained, “[u]nlike the DPA, which was enacted to address not just the postwar refugee problem but also the Holocaust and its horror, the Refugee Act was designed to provide a general rule for the ongoing treatment of all refugees and displaced persons.” *Negusie*, 555 U.S. at 520.

⁸¹ DANIELS, *supra* note 36, at 85–87.

⁸² *Id.* at 86; *Statement and Directive by the President on Immigration to the United States of Certain Displaced Persons and Refugees in Europe*, UNIV. OF CAL. SANTA BARBARA (Dec. 22, 1945),

<http://www.presidency.ucsb.edu/ws/index.php?pid=12253> (“[I]t would be inhumane and wasteful to require these [displaced] people to go all the way back to Europe merely for the purpose of applying there for immigration visas and returning to the United States. Many of them have close relatives, including sons and daughters, who are citizens of the United States and who have served and are serving honorably in the armed forces of our country. I am therefore directing the Secretary of State and the Attorney General to adjust the immigration status of the members of this group who may wish to remain here, in strict accordance with existing laws and regulations.”); *see also* *Ramirez v. Brown*, 852 F.3d 954, 957 (9th Cir. 2017) (calling the process of leaving the country in order to reenter with status “a Rube Goldberg-like procedure”).

⁸³ Immigration and Nationality Act, H.R. 5678, 82d Cong. § 245(a) (1952); *see also* Tucker, *supra* note 79, at 43 (describing the first version of the adjustment of status statute, which applied only to nonimmigrants, and its amendment in 1960 to allow parolees to adjust).

States,”⁸⁴ and (2) the alien must have maintained “lawful status,” including by not accepting unlawful employment after entry.⁸⁵ Accordingly, aliens who entered the United States surreptitiously generally cannot adjust status, because they were neither “inspected and admitted” nor “paroled” into the United States, and also because they have not maintained lawful status after entry.⁸⁶ Similarly, aliens present in the United States after overstaying their nonimmigrant status generally cannot adjust: although they were “inspected and admitted,” they failed to maintain lawful status by overstaying.⁸⁷ Exceptions exist to both requirements, however, as do administrative procedures that provide relief from them, as explained below.⁸⁸ Perhaps most notably, the second requirement—maintenance of lawful status—does not apply to the immediate relatives of U.S. citizens.⁸⁹

One significant statutory provision—INA § 245(i)—changed the adjustment of status framework by lifting the lawful entry and maintenance of status requirements for aliens eligible for family-based or employment-based immigrant visas, provided they paid a \$1,000 fine and met certain other requirements.⁹⁰ INA § 245(i) thus cleared the way for many unlawfully present aliens, including unlawful entrants, to adjust status.⁹¹ However, the provision has a cutoff date—it applies only to aliens for whom a visa petition or application for labor certification was submitted before April 30, 2001—that makes it inapplicable to most cases today.⁹² Accordingly, under

⁸⁴ 8 U.S.C. § 1255(a).

⁸⁵ *Id.* § 1255 (c)(2). For a discussion of the requirements to adjust under INA § 245 in general, see, e.g., *Chacky v. Attorney General*, 555 F.3d 1281, 1286 (11th Cir. 2008) (INA § 245(a) . . . provides that, in the case of an alien lawfully admitted into the United States, such alien may adjust his status ‘if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.’”) (emphasis removed).

⁸⁶ See, e.g., *Akwasi Agyei v. Holder*, 729 F.3d 6, 9 (1st Cir. 2013) (explaining that aliens who entered without inspection cannot adjust status unless they fall within a special exception); *Butt v. Gonzales*, 500 F.3d 130, 132 (2d Cir. 2007) (similar).

⁸⁷ See, e.g., *Gazeli v. Sessions*, 856 F.3d 1101, 1105 (6th Cir. 2017) (explaining that aliens “who are ‘in unlawful immigration status’ on the date they file their applications or who ‘failed (other than through no fault of [their] own or for technical reasons) to maintain continuously a lawful status since entry into the United States’” generally do not qualify for adjustment of status (quoting 8 U.S.C. § 1255(c)(2))).

⁸⁸ See, e.g., *id.* (explaining that 8 U.S.C. § 1255(k) “acts as a 180-day grace period to . . . [the] requirement that an applicant be in lawful status at the time of filing,” but only for beneficiaries of employment-based immigrant visa petitions).

⁸⁹ 8 U.S.C. § 1255(c)(2); *Ramirez v. Brown*, 852 F.3d 954, 957 (9th Cir. 2017) (explaining that § 1255(c)(2)’s bar for failure to maintain lawful status “applies to an alien, *other than an immediate relative* or special immigrant defined under the statute, ‘who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed . . . to maintain continuously a lawful status since entry into the United States.’”) (emphasis added) (quoting 8 U.S.C. § 1255(c)(2))).

⁹⁰ 8 U.S.C. § 1255(i); see generally *Butt*, 500 F.3d at 132; archived CRS Report RL31373, *Immigration: Adjustment to Permanent Resident Status Under Section 245(i)*, by Andorra Bruno.

⁹¹ See, e.g., *Delgado v. Mukasey*, 516 F.3d 65, 69 (2d Cir. 2008) (describing § 245(i) as “a provision permitting aliens who entered without inspection to apply for adjustment of status under certain circumstances without leaving the United States”).

⁹² 8 U.S.C. § 1255(i)(1)(B); see, e.g., *Matters of Arrabally & Yerrabally*, 25 I&N Dec. 771, 772 (BIA 2012) (discussing availability of adjustment under § 245(i) to unlawfully present aliens whose visa petition was filed before the April 30, 2001, cutoff date and explaining that such adjustment “is available for a fee to certain aliens who are ‘physically present in the United States’ but covered by [the maintenance of lawful status requirement of] section 245(c)”).

current law, aliens generally may adjust status only if they meet the lawful entry and maintenance of status requirements or fall within an exception to those requirements.⁹³

Lawful Entry Requirement: Exceptions and Significance of Parole Programs

Exceptions to the lawful entry requirement (i.e., the requirement that an alien must have been “inspected and admitted or paroled” in order to adjust status) exist for victims of domestic violence,⁹⁴ certain statutorily defined “special immigrants” who are juveniles⁹⁵ or have affiliations with the U.S. Armed Forces,⁹⁶ and aliens who meet the INA § 245(i) cutoff date.⁹⁷ To illustrate with a domestic violence example, if an alien enters surreptitiously and suffers domestic violence in the United States at the hands of an immediate relative who is a U.S. citizen or LPR, the alien may apply to adjust status notwithstanding the surreptitious entry.⁹⁸ Some (but not all) federal courts have held that aliens who acquire Temporary Protected Status (TPS)⁹⁹ meet the lawful entry requirement, even if they are present in the United States following a surreptitious entry.¹⁰⁰

⁹³ See *Ramirez*, 852 F.3d at 956–57.

⁹⁴ 8 U.S.C. § 1255(a) (authorizing the adjustment of status of “an alien who was inspected and admitted or paroled into the United States or . . . any other alien having an approved petition for classification as a [Violence Against Women Act] self-petitioner”) (emphasis added); see generally Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1152–53 (2015) (“[A] petition filed by a U.S.-citizen [or LPR] family member, such as a spouse, provides one means to obtain LPR status . . . Congress found that many abusive spouses were using this power to control their unauthorized partner. Thus, VAWA created a process for abused spouses and children [of U.S. citizens and LPRs] to file ‘self-petitions.’ If the petition met certain requirements, including a showing that the petitioner had suffered ‘battery or extreme cruelty,’ it would be approved, thus allowing the petitioner to then seek LPR status.” (quoting 8 U.S.C. § 1154(a)(1)(A)(iii)(I)(bb))).

⁹⁵ 8 U.S.C. § 1255(h) (providing that “special immigrants,” as defined at 8 U.S.C. § 1101(a)(27)(J), “shall be deemed . . . to have been paroled into the United States” for adjustment of status purposes); 8 U.S.C. § 1101(a)(27)(J) (defining as “special immigrants” certain alien juveniles “whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis” and “for whom . . . it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality”); see DEP’T OF JUSTICE IMMIGRATION & NATURALIZATION SERV., *Legal Opinion: Special Immigrant Juveniles*, 1997 WL 33169236 (May 30, 1997) (“The juveniles whom Congress primarily intended to benefit from Section 101(a)(27)(J) were deportable aliens (under the law in effect at the time), most of whom had entered the United States without inspection and, therefore, had been neither inspected and admitted nor paroled. . . . [8 U.S.C. § 1255(h)] ‘deems’ them to have been paroled for purposes of [8 U.S.C. § 1255(a)], thereby removing this basis of potential ineligibility. Therefore, any alien who meets the definition of special immigrant juvenile contained in Section 101(a)(27)(J) is eligible to adjust his or her status, no matter the manner of entry into the United States.”).

⁹⁶ 8 U.S.C. § 1255(g) (providing that “special immigrants,” as defined at 8 U.S.C. § 1101(a)(27)(K), “shall be deemed . . . to have been paroled into the United States” for adjustment of status purposes); 8 U.S.C. § 1101(a)(27)(K) (defining as “special immigrants” certain immigrants who “served honorably on active duty in the Armed Forces of the United States after October 15, 1978,” along with their spouses and children).

⁹⁷ See *Butt v. Gonzales*, 500 F.3d 130, 132 (2d Cir. 2007).

⁹⁸ See USCIS, Memorandum Regarding Adjustment of Status for VAWA Self-Petitioner Who Is Present without Inspection, 2008 WL 1825998, at *2 (April 11, 2008) (“Under section 245(a) of the [INA], the alien beneficiary of a VAWA self-petition may apply for adjustment of status even if the alien is present without inspection and admission or parole.”); see, e.g., *Alhuay v. U.S. Att’y Gen.*, 661 F.3d 534, 538–39 (11th Cir. 2011).

⁹⁹ TPS provides temporary protection from removal for aliens from countries that DHS designates as unsafe for return because of armed conflict, natural disaster, or other extraordinary conditions. See CRS Report R45158, *An Overview of Discretionary Reprieves from Removal: Deferred Action, DACA, TPS, and Others*, by Ben Harrington, at 15-16.

¹⁰⁰ See *Ramirez v. Brown*, 852 F.3d 954, 964 (9th Cir. 2017) (holding that “a TPS recipient is considered ‘inspected and admitted’ under [8 U.S.C.] § 1255(a)” and that an alien who entered surreptitiously before obtaining TPS was therefore eligible to adjust status on the basis of his marriage to a U.S. citizen); *Flores v. USCIS*, 718 F.3d 548, 554 (6th Cir. 2013) (same); *contra Serrano v. U.S. Att’y Gen.*, 655 F.3d 1260, 1265 (11th Cir. 2011) (holding that a grant of TPS does not satisfy the lawful entry requirement of § 1255(a)).

Where none of these narrowly drawn exceptions applies, however, a grant of immigration parole¹⁰¹ from DHS can enable an alien who entered the country surreptitiously to adjust status.¹⁰² In other words, a grant of parole can function as a work-around for the bar that unlawful entry typically poses to adjustment of status.¹⁰³ This is because, even if the alien was not “inspected and admitted,” the alien can qualify to adjust status by being “paroled.”¹⁰⁴ DHS most commonly exercises the parole power to permit entry to aliens not yet on U.S. territory who are (or may be) inadmissible.¹⁰⁵ In some circumstances, however, DHS also grants parole to unlawfully present aliens.¹⁰⁶ Grants of parole to aliens physically present in the U.S. come in two forms: (1) “parole in place,” which confers parole status on physically present aliens without requiring them to leave and come back,¹⁰⁷ and (2) “advance parole,” which allows unlawfully present aliens to depart the United States with an assurance that they will be permitted to reenter on parole.¹⁰⁸ Both varieties of parole satisfy the lawful entry requirement for adjustment of status, even when granted to an

¹⁰¹ The INA authorizes DHS to “parole” inadmissible aliens into the United States, on a case-by-case basis, “for urgent humanitarian reasons or significant public benefit.” 8 U.S.C. § 1182(d)(5). An alien who enters pursuant to a grant of parole is not considered “admitted” into the country for immigration purposes, *see id.* (“[S]uch parole of such alien shall not be regarded as an admission of the alien . . .”), although, as discussed in this section, parolees are considered to have entered lawfully for adjustment of status purposes. *See Succar v. Ashcroft*, 394 F.3d 8, 26 (9th Cir. 2005) (“Congress specifically says parolees are not considered admitted. Despite their status as inadmissible, Congress has also made the policy determination that these paroled aliens should be eligible to apply for adjustment of status, which essentially can act as an admission.”).

¹⁰² *See* 8 U.S.C. § 1255(a); *Succar*, 394 F.3d at 26.

¹⁰³ *See* 8 U.S.C. § 1255(a); Jan C. Ting, *U.S. Immigration Policy and President Obama’s Executive Order for Deferred Action*, 66 SYRACUSE L. REV. 65, 79–80 (2016) (explaining that “advance parole is the magic bullet which clears the pathway to citizenship for most deferred action beneficiaries when they qualify as immediate relatives” because “upon returning to the United States with an advance parole, the alien having been ‘paroled’ now magically satisfies the threshold requirement of [INA] section 245 and qualifies for adjustment of status, and can claim the immediate relative visa or any other immediately available visa without leaving the United States.”).

¹⁰⁴ 8 U.S.C. § 1255(a); *see Zheng v. Gonzales*, 422 F.3d 98, 118 (3d Cir. 2005) (“Congress intended that parolees, as a general class, be eligible for adjustment of status: [8 U.S.C. § 1255(a)] provides explicitly that the Attorney General may grant adjustment to ‘an alien who was inspected and admitted or paroled into the United States.’”).

¹⁰⁵ *See, e.g., Succar*, 394 F.3d at 15 (“The purpose of parole is to permit a non-citizen to enter the United States temporarily while investigation of eligibility for admission takes place.”).

¹⁰⁶ *See* USCIS, POLICY MEMORANDUM RE: PAROLE OF SPOUSES, CHILDREN, AND PARENTS OF ACTIVE DUTY MEMBERS OF THE U.S. ARMED FORCES (Nov. 13, 2013) [hereinafter USCIS MEMORANDUM], https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf (“Although it is most frequently used to permit an alien who is outside the United States to come into U.S. territory, parole may also be granted to aliens who are already physically present in the U.S. without inspection or admission.”).

¹⁰⁷ *See* USCIS POLICY MANUAL, Vol. 7, Part B, ch. 2, n. 47 (last updated Oct. 29, 2019), <https://www.uscis.gov/policy-manual> (including section entitled “*Parole in Place: Parole of Certain Foreign Nationals Present Without Admission or Parole*” (emphasis in original)); *see generally*, Margaret D. Stock, *Parole in Place and Other Immigration Benefits for Military Family Members: An Update*, 16-02 IMMIGR. BRIEFINGS 1 (2016).

¹⁰⁸ *See* 8 C.F.R. § 212.5(f) (“Advance authorization. When parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued an appropriate document authorizing travel.”); *Gazeli v. Sessions*, 856 F.3d 1101, 1104 (6th Cir. 2017) (“[A]dvance parole . . . permits an alien who is otherwise inadmissible to leave the United States and reenter at a later date.”); *Ibragimov v. Gonzales*, 476 F.3d 125, 132 (2d Cir. 2007) (“‘Advance parole’ is a practice whereby the government decides in advance of an alien’s arrival that the alien will be paroled into the United States when he arrives at a port-of-entry. . . . Advance parole is not explicitly contemplated by the statute governing parole, but is permitted by 8 C.F.R. § 212.5(f)”); *Matters of Arrabally & Yerrabally*, 25 I&N Dec. 771, 777 (BIA 2012) (“As its name implies, ‘advance parole’ is simply parole that has been requested and authorized in advance based on an expectation that the alien will be presenting himself for inspection without a valid visa in the future . . . typically it is sought by an alien who is already inside the United States and who wants to leave temporarily but fears that he will either be excluded as an inadmissible alien upon return or be deemed to have abandoned a pending application for an immigration benefit.”).

alien present following a surreptitious entry, although for advance parole the alien must actually leave and be paroled back into the country.¹⁰⁹

The eligibility criteria for both of these parole programs are set by DHS and recorded in internal memoranda and agency manuals; no statute or regulation spells out which aliens may qualify for parole in place or advance parole.¹¹⁰ Accordingly, it can sometimes be difficult to track DHS's practice in granting these forms of relief.¹¹¹ The agency appears, however, to place narrow parameters on both programs. Agency materials state that parole in place is granted "only sparingly" and affirmatively endorses granting it only to the immediate relatives of members of the U.S. armed forces.¹¹² When DHS does grant parole in place to an unlawfully present alien, however, the primary purpose is apparently to help the recipient to adjust status.¹¹³

¹⁰⁹ See USCIS POLICY MANUAL, *supra* note 107, at Vol. 7, Part B, ch. 2 ("If DHS grants parole before the foreign national files an adjustment application, the foreign national meets the 'inspected and paroled' requirement for adjustment."); see also, e.g., *Matter of Mejia-Erazo*, No. A200 114 497 - Houston, TX, 2017 WL 1330076, at *1 n.1 (BIA Mar. 9, 2017) (unpublished) ("[R]espondent is the spouse of a citizen who is veteran of the United States Army, she was recently granted 'parole in place,' and she has a pending visa petition (Form I-130) and appears eligible to adjust her status."). One exception to parole's effect on adjustment of status eligibility exists for alien crewmen, whom INA § 245(c) specifically bars from adjusting status. 8 U.S.C. § 1255(c) (providing that adjustment of status "shall not be applicable to [] an alien crewman"). The U.S. Court of Appeals for the Eleventh Circuit has held that an alien who enters the country as an alien crewman cannot overcome the statutory bar to adjustment of status through a grant of parole following that entry. *Reganit v. Sec'y, DHS*, 814 F.3d 1253, 1258 (11th Cir. 2016). Also, a grant of "conditional parole" under INA § 236, which enables DHS to release an alien from detention pending the outcome of removal proceedings, does not amount to a grant a parole for adjustment of status purposes. *Cruz-Miguel v. Holder*, 650 F.3d 189, 191 (2d Cir. 2011) ("[W]e conclude that aliens released on 'conditional parole' pursuant to [INA § 236(a)(2)(B)] have not been 'paroled into the United States' within the meaning of [INA § 245(a)]"); *Delgado-Sobalvarro v. U.S. Att'y Gen.*, 625 F.3d 782, 787 (3d Cir. 2010) ("[W]e conclude that the petitioners are not eligible to adjust status under [INA] § 245 on the basis of their [INA] § 236 conditional parole.").

¹¹⁰ See USCIS POLICY MANUAL, *supra* note 107, at Vol. 7, Part B, ch. 2 (parole in place section); USCIS Adjudicator's Field Manual, Ch. 54.4 (instructing USCIS adjudicators to "remain informed of the special circumstances set forth in cables, memoranda, and regulations which authorize the issuance of advance parole"), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html>; see also *Samirah v. Holder*, 627 F.3d 652, 659 (7th Cir. 2010) ("[T]he only statutory authority for granting advance parole is found in the statutory provision that authorizes the grant of parole."); cf. 8 C.F.R. § 212.5(f) (recognizing advance parole without providing criteria).

¹¹¹ See *Stock*, *supra* note 107, at nn.40–42 (noting that "[p]racticitioners regularly ask what family members are eligible for parole in place" and that the answer depends on USCIS practice, which is to some extent reflected in its policy memoranda); *Heeren*, *supra* note 94, at 1131–32 (observing that grants of discretionary privileges and protections in immigration law, including parole, rarely fall under a "detailed [statutory] framework" and that "DHS will fill in requirements, if at all, using regulations or more commonly with non-binding policy guidance or memoranda").

¹¹² See USCIS POLICY MANUAL, *supra* note 107, at Vol. 7, Part B, ch. 2 ("USCIS grants parole in place only sparingly. The fact that a foreign national is a spouse, child, or parent of an active duty member of the U.S. armed forces, a member in the Selected Reserve of the Ready Reserve, or someone who previously served in the U.S. armed forces or the Selected Reserve of the Ready Reserve ordinarily weighs heavily in favor of parole in place. Absent a criminal conviction or other serious adverse factors, parole in place would generally be an appropriate exercise of discretion for such a foreign national."); *Stock*, *supra* note 107, at n.21 ("Parole in place is a procedure by which [DHS] assists the immediate family members of U.S. military personnel and military veterans to become eligible to adjust status in the United States"). It appears that DHS also systematically granted parole in place to certain aliens seeking to adjust status who were present in the Commonwealth of the Northern Mariana Islands (CNMI) before the CNMI became subject to U.S. immigration law. See *Matter of Valdez*, 25 I&N Dec. 824, 826 n.1 (BIA 2012) ("[C]ertain individuals lawfully present under the CNMI immigration laws prior to November 28, 2009 . . . are considered applicants for admission to the United States . . . Under current USCIS policy, such individuals are granted parole-in-place immediately prior to the approval of their application for adjustment, provided they are otherwise eligible for parole and adjustment of status.").

¹¹³ See *id.*; USCIS MEMORANDUM, *supra* note 106 ("[A]djustment of status requires that the alien have been 'inspected and admitted or paroled.' INA § 245(a). The grant of parole under INA § 212(d)(5)(A) overcomes that obstacle").

Advance parole, according to agency materials, is available to unlawfully present aliens who receive many types of discretionary reprieves from removal (such as TPS and Deferred Enforced Departure),¹¹⁴ although DHS sometimes makes clear that it grants advance parole only for a narrow set of travel purposes, including to visit ill family members or attend their funeral.¹¹⁵ DHS does not appear to grant advance parole for the purpose of facilitating adjustment of status applications by unlawful entrants, but advance parole has that effect.¹¹⁶ An unlawfully present alien who receives a grant of advance parole and then leaves and reenters the United States pursuant to that grant is not subject to the three- or ten-year bar for unlawful presence. Those bars apply only to aliens who “depart” the United States after the period of unlawful presence, and under current case law, a trip abroad pursuant to a grant of advance parole does not count as a “departure” for purposes of those bars.¹¹⁷

¹¹⁴ See USCIS FAQs for TPS (last updated Nov. 1, 2019), <https://www.uscis.gov/humanitarian/temporary-protected-status> (“Travel authorization for TPS is issued as an advance parole document if USCIS determines it is appropriate to approve your request.”); USCIS FAQs for Deferred Enforced Departure (last updated Apr. 4, 2019), <https://www.uscis.gov/humanitarian/temporary-protected-status/deferred-enforced-departure> (similar). For more information about TPS and Deferred Enforced Departure, see CRS Report R45158, *An Overview of Discretionary Reprieves from Removal: Deferred Action, DACA, TPS, and Others*, by Ben Harrington, at 14–16.

¹¹⁵ See USCIS FAQs for DACA Recipients (last updated Mar. 8, 2018), <http://www.uscis.gov/archive/frequently-asked-questions> (explaining that USCIS would only grant advance parole to DACA recipients who needed to travel abroad for certain humanitarian, educational, or employment purposes). DHS stopped granting advance parole under the DACA initiative when it announced the rescission of DACA in September 2017. See *NAACP v. Trump*, 298 F. Supp. 3d 209, 219 (D.D.C. 2018), *cert. granted before judgment*, 139 S. Ct. 2779 (2019).

¹¹⁶ See USCIS POLICY MANUAL, *supra* note 107, at Vol. 7, Part B, Ch. 2 (noting that evidence of parole for purposes if INA § 245(a) includes a “parole stamp on the foreign national’s advance parole document”); see also *Qi-Zhuo v. Meissner*, 70 F.3d 136, 141 (D.C. Cir. 1995) (explaining the view of the legacy INS that “advance parole grants had created a ‘loophole’ with respect to the adjustment of all [aliens who entered without inspection] . . . who left the country on advance parole and who could then claim eligibility for adjustment under INA § 245(a) upon return.”); *Matter of Patel*, A073 546 027, 2017 WL 4418375 (BIA July 11, 2017) (unpublished) (holding that a DACA recipient who “obtained advance parole, left the United States pursuant to the grant of advance parole, and then was paroled back into the United States” did not appear to be barred from adjusting status).

¹¹⁷ *Matters of Arrabally & Yerrabelly*, 25 I&N Dec. 771, 775–76 (BIA 2012) (“When [INA] section 212(a)(9)(B)(i)(II) is understood in context, it becomes clear to us that Congress did not intend it to cover aliens . . . who have left and returned to the United States pursuant to a grant of advance parole.”). Before *Arrabally*, the BIA had held the opposite: that a trip abroad pursuant to advance parole counted as a “departure” for the unlawful presence bars. See *Cheruku v. U.S. Att’y Gen.*, 662 F.3d 198, 201–02 (3d Cir. 2011) (affirming BIA decision holding that applicant for adjustment of status was inadmissible under the ten-year bar because she left and reentered the United States on advance parole after accruing more than one year of unlawful presence). The Department of State Foreign Affairs Manual (FAM) seems to suggest that the *Arrabally* holding applies only when advance parole is granted to an alien with an already-pending adjustment of status application. See 9 FAM 302.11-3(B)(2)(c) (“[A]n alien cannot become inadmissible under INA 212(a)(9)(B)(i)(II) solely by virtue of a departure and return to the United States undertaken pursuant to a valid grant of advance parole based on the alien’s pending application for adjustment of status.”) (emphasis added). The FAM provision implies that an alien who travels abroad on advance parole granted in other circumstances—such as a deferred action recipient without a pending adjustment application—would incur a “departure” for purposes of the unlawful presence bars. See *id.* Some of the reasoning in *Arrabally* did underscore that the petitioners in that case had pending adjustment applications when they traveled on advance parole. 25 I&N Dec. at 778 (“[A]n undocumented alien’s departure under a grant of advance parole is qualitatively different from other departures, because it presupposes both that he will be permitted to return to the United States thereafter and that he will, upon return, continue to pursue the adjustment of status application he filed before departing.”) (emphasis added). Nevertheless, other authorities have not interpreted *Arrabally* as applying only where advance parole was granted to aliens with pending adjustment of status applications. See *Ortiz-Bouchet v. U.S. Att’y Gen.*, 714 F.3d 1353, 1357 (11th Cir. 2013) (holding that under *Arrabally* “an exit pursuant to a grant of advance parole does not qualify as a ‘departure’ within the meaning of § 1182(a)(9)(B)(i)(II),” without considering whether the alien had a pending adjustment application when she received advance parole); *Matter of Patel*, A073 546 027, 2017 WL 4418375 (BIA July 11, 2017) (unpublished) (holding that a DACA recipient who “obtained advance parole, left the United States pursuant to the grant of advance parole, and then

The applicability of these forms of parole to unlawfully present aliens has generated controversy on both sides of the immigration debate. Some Members of Congress have criticized advance parole and its facilitation of adjustment of status applications as a loophole that subverts enforcement of the statutory bars for unlawful presence.¹¹⁸ The former INS, pursuing a similar theory, issued a regulation in 1997 that made many parolees ineligible for adjustment of status under INA § 245(a), but multiple federal appellate courts struck down the regulation as incompatible with the statute¹¹⁹ and DHS repealed the regulation in 2006.¹²⁰ On the other side of the debate, some immigration advocates have called for the expansion of parole in place and advance parole as a way to clear a path to legalization for a large segment of the unlawfully present population (namely, those eligible for immigrant visas on the basis of family relationships or other grounds).¹²¹

Maintenance of Lawful Status Requirement: INA § 245(c)(2)

Even if the lawful entry requirement is met, INA § 245(c)(2) generally bars aliens from adjusting status if they fail to maintain lawful status in any of three ways: (1) if they are “in unlawful immigration status on the date of filing the application for adjustment”; (2) if they have failed “to maintain continuously a lawful status since entry into the United States”; or (3) if they have engaged in “unauthorized employment.”¹²² As such, § 245(c)(2) generally bars unlawfully present aliens from adjusting status, even if they satisfy the lawful entry requirement, due to their lack of lawful immigration status.¹²³

was paroled back into the United States” did not appear to be barred from adjusting status).

¹¹⁸ See, e.g., Letter from Rep. Bob Goodlatte, Chairman of the House Judiciary Committee, to Jeh Johnson, Secretary of DHS (Feb. 13, 2015), https://judiciary.house.gov/wp-content/uploads/2016/02/021315_DACALetter.pdf (describing DHS’s decision to consider advance parole applications from recipients of relief under the DACA initiative as a “a sneaky attempt to place potentially hundreds of thousands of unlawful immigrants on a path to citizenship”).

¹¹⁹ *Zheng v. Gonzales*, 422 F.3d 98, 119 (3d Cir. 2005) (“We are . . . faced with a statute providing that, in general, aliens paroled into the United States may apply to adjust their status, and a regulation [8 C.F.R. § 1245.1(c)(8)], providing that, in general, they may not. The conflict between regulation and statute is clear and unmistakable.”); *Succar v. Ashcroft*, 394 F.3d 8, 19–20 (1st Cir. 2005); *contra Momin v. Gonzales*, 447 F.3d 447, 460 (5th Cir. 2006) (upholding regulation as valid exercise of Attorney General’s authority); *Mouelle v. Gonzales*, 416 F.3d 923 (8th Cir. 2005) (same). Specifically, the regulation made parolees and other “arriving aliens” in removal proceedings ineligible to adjust status. See *Zheng*, 422 F.3d at 118 (“[T]he regulation limits its scope to arriving aliens who are ‘in removal proceedings,’ but . . . this is no real limitation. At least the majority of aliens paroled into the United States are in removal proceedings . . .”).

¹²⁰ See Chelsy L. Knight, *Beyond Agency Authority: Administrative Elimination of Statutory Eligibility for Lawful Permanent Residence*, 78 U. COLO. L. REV. 307, 309 (2007) (citing 71 Fed. Reg. 27,585 (May 12, 2006)).

¹²¹ See, e.g., Christina Carr, Gutierrez Suggests Obama Expand ‘Parole in Place,’ CQ ROLL CALL, 2014 WL 1814596 (May 8, 2014) (describing advocacy efforts by various groups and legislators to expand parole in place “to allow some undocumented family members of U.S. citizens and permanent residents to adjust their status and obtain a green card while inside the United States, thereby avoiding lengthy family separations”); CTR. FOR HUMAN RIGHTS & CONSTITUTIONAL LAW, LOOKING BEYOND DACA/DAPA, PART 1: ADVANCE PAROLE 5 (June 28, 2016) (“[A]dvocating for more robust availability of advance parole would grant thousand[s] of long-term resident immigrants the ability to obtain lawful permanent resident status.”), <https://www.centerforhumanrights.org/PDFs/06-28-16AdvanceParoleWebinarOutline-2.pdf>.

¹²² 8 U.S.C. § 1255(c)(2). The statute does not define “lawful status,” but a regulation defines it to include only six categories of immigration status. *Gazeli v. Sessions*, 856 F.3d 1101, 1105 (6th Cir. 2017) (“The operative definition [of lawful status under § 1255(c)(2)], provided in regulations promulgated by the Attorney General, consists of six categories of lawful status: lawful permanent residency, non-expired or extended non-immigrant status, refugee status, asylee status, valid parole status, or eligibility under the Immigration Nursing Relief Act of 1989.” (citing 8 C.F.R. § 1245.1(d)(1))).

¹²³ *Id.* A statutory caveat exists for aliens with TPS. Although TPS does not carry all of the attributes of lawful status,

The § 245(c)(2) bar does have exceptions, however. It does not apply to the immediate relatives of U.S. citizens.¹²⁴ Thus, as already mentioned, if an alien overstays a nonimmigrant visa and then marries a U.S. citizen, the alien’s failure to maintain lawful status does not bar an application for adjustment.¹²⁵ Under other exceptions, the bar for failure to maintain lawful status also does not apply to certain domestic violence victims,¹²⁶ certain “special immigrants,”¹²⁷ applicants for employment-based immigrant visas with a lapse or lapses in status not exceeding 180 days in the aggregate,¹²⁸ and aliens who meet the April 30, 2001, cutoff date of INA § 245(i).¹²⁹

Application for Immigrant Visa Abroad: Three- and Ten-Year Bars for Unlawful Presence

As the prior section explains, many unlawfully present aliens who are eligible to immigrate based on family relationships or other grounds do not qualify for adjustment of status because of the statutory requirements concerning lawful entry and maintenance of lawful status. These aliens, therefore, cannot obtain LPR status from within the United States.¹³⁰ Such aliens may still pursue LPR status by departing the country and applying for an immigrant visa at a U.S. consulate abroad.¹³¹ Most unlawfully present aliens who take this route, however, encounter a significant obstacle: their departure from the United States triggers the three-year unlawful presence bar (for those who were unlawfully present for between 180 and 365 days) or the ten-year unlawful presence bar (for those who were unlawfully present for more than year).¹³² Aliens qualify for a discretionary waiver of these bars only if (1) they are the “spouse or son or daughter” of a U.S.

such as blanket authorization to reenter the United States following a trip abroad or the ability to sponsor relatives for lawful status, the enabling statute makes clear that time in TPS counts as time in lawful nonimmigrant status for purposes of adjustment of status. 8 U.S.C. § 1254a(f)(3) (“[F]or purposes of adjustment of status . . . the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.”); *see Ramirez v. Brown*, 852 F.3d 954, 957 (9th Cir. 2017) (“[T]he grant of TPS allows an alien . . . to avoid the bar under § 1255(c)(2) [for failure to maintain lawful status].”) As noted above, some but not all federal courts have held that TPS also satisfies the lawful entry requirement to adjustment of status. *See supra* note 99.

¹²⁴ 8 U.S.C. § 1255(c)(2) (excepting “immediate relatives” from the maintenance of lawful status requirement).

¹²⁵ *See Pouhova v. Holder*, 726 F.3d 1007, 1010 n.4 (7th Cir. 2013) (“Although Pouhova conceded inadmissibility for not maintaining her student visa, adjustment of status would still be available to her because of her marriage to a U.S. citizen, so long as the [immigration] judge found that she merited a favorable exercise of discretion.”).

¹²⁶ 8 U.S.C. § 1255(c) (excepting “an alien having an approved petition for classification as a [Violence Against Women Act of 1994] self-petitioner” from the maintenance of lawful status requirements).

¹²⁷ *Id.* § 1255(c)(2) (excepting from maintenance of lawful status requirements “a special immigrant described in [8 U.S.C. §] 1101(a)(27)(H), (I), (J), or (K)”); *see supra* notes 95–96 (collecting authorities on statutorily-defined “special immigrants”).

¹²⁸ 8 U.S.C. § 1255(k).

¹²⁹ *Id.* § 1255(i)(1)(A)(ii); *see supra* notes 90–93 (discussing INA § 245(i)).

¹³⁰ *See supra* notes 86–87.

¹³¹ *See* 8 U.S.C. § 1201(a)(1)(A) (authorizing consular officers to issue an immigrant visa “to an immigrant who has made proper application therefor”); *Ramirez*, 852 F.3d at 957 (explaining that an alien in the U.S. who seeks LPR status but does not qualify for adjustment of status must “exit the United States to seek an immigrant visa through processing at a U.S. embassy or consulate in another country . . . [the alien] could then return to the United States to request admission as a lawful permanent resident”).

¹³² 8 U.S.C. § 1182(a)(9)(B)(i). Time spent in the United States without lawful status but pursuant to a discretionary reprieve from removal, such as deferred action, does not constitute “unlawful presence” for purposes of the three- and ten-year bars. *See Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 975 (9th Cir. 2017) (“[D]eferred action recipients do not accrue ‘unlawful presence’ for purposes of calculating when they may seek admission to the United States.”) The statute also exempts minors and certain other aliens from the accrual of unlawful presence. 8 U.S.C. § 1182(a)(9)(B)(iii).

citizen or LPR—the parents of U.S. citizens or LPRs do not qualify; *and* (2) their inability to return to the United States during the applicable time bar (three or ten years from the date they departed the United States) would “result in extreme hardship” to their U.S. citizen (or LPR) parent or spouse.¹³³ DHS interprets extreme hardship to mean “more than the usual level of hardship that commonly results from family separation or relocation.”¹³⁴ Aliens who do not receive discretionary waivers must remain outside the United States for the duration of the bar, unless DHS grants them parole or they receive a discretionary waiver on a future visa application.¹³⁵

Although the eligibility criteria for the unlawful presence waivers are narrow, DHS allows unlawfully present aliens to apply for the waivers from within the United States, before they depart for their visa interviews abroad, so long as the aliens are not inadmissible on other grounds and meet other requirements.¹³⁶ This “provisional waiver” program mitigates the uncertainty that unlawfully present aliens face as to how long they will have to remain abroad if they leave the United States to apply for an immigrant visa.¹³⁷ DHS introduced the provisional waiver program in 2013,¹³⁸ but immigration authorities provided relief of a similar nature as early as 1935, when the Immigration and Naturalization Service (INS) began the practice of “pre-examining” unlawfully present aliens domestically before channeling them into immigrant visa application procedures in Canada.¹³⁹

Illustrations

The following hypotheticals are intended to demonstrate how the INA provisions described in this section work in practice. Each hypothetical assumes that the alien (1) has not departed the United States after entry and (2) is not inadmissible to the United States for reasons other than unlawful entry or unlawful presence (such as a conviction for a crime of moral turpitude).

¹³³ 8 U.S.C. § 1182(a)(9)(B)(v); *see Ramirez*, 852 F.3d at 964; *see also* Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1203 (2015) (“While there is a waiver available for the unlawful presence bars . . . [t]he waiver is only available to an immigrant who is the ‘spouse or son or daughter’ of a U.S. citizen or LPR. Parents of U.S. citizens and LPRs are *not* eligible.”) (emphasis in original).

¹³⁴ USCIS POLICY MANUAL, *supra* note 107, at Vol. 9, Part B, Ch. 2.A; *cf.* Elinor R. Jordan, *Point, Click, Green Card: Can Technology Close the Gap in Immigrant Access to Justice?*, 31 GEO. IMMIGR. L.J. 287, 293 (2017) (arguing that “the definition and interpretation of ‘extreme hardship’ is ambiguous” for purposes of unlawful presence waivers and that “[t]he phrase ‘extreme hardship’ is not defined in the INA or in any decisions of the Board of Immigration Appeals”).

¹³⁵ *See* 8 U.S.C. § 1182(a)(9)(B)(i); *Cheruku v. U.S. Att’y Gen.*, 662 F.3d 198, 207 (3d Cir. 2011) (“Under the ten-year bar, an alien with a one-year period of unlawful presence in the U.S. would not be eligible for consular admission and inspection at all during the applicable bar period without a waiver of inadmissibility.”).

¹³⁶ 8 C.F.R. § 212.7(e) (Provisional unlawful presence waivers of inadmissibility); *see* Memorandum from Jeh Charles Johnson, Secretary, DHS, on Expansion of Provisional Waiver Program (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_i601a_waiver.pdf [hereinafter “Johnson Memorandum”].

¹³⁷ Johnson Memorandum, *supra* note 135, at 2 (explaining that the initiation of the provisional waiver program “provided eligible individuals with some level of certainty that they would be able to return after a successful consular interview and would not be subject to lengthy overseas waits while the waiver application was adjudicated”).

¹³⁸ Johnson Memorandum, *supra* note 135, at 1.

¹³⁹ *See* NGAI, *supra* note 33, at 85 (“[A]n immigrant in the United States without a visa could be ‘pre-examined’ for legal admission, leave the country as a ‘voluntary departure,’ proceed to the nearest American consul in Canada, obtain a visa for permanent residence, and reenter the United States formally as a legal admission.”).

1. An alien is admitted to the United States on a B-2 tourist visa for six months.¹⁴⁰ He overstays. Ten years later, he marries a U.S. citizen, who obtains an approved immigrant visa petition on his behalf.¹⁴¹ Even though the alien has been out of legal status for ten years, he is eligible to adjust to LPR status.¹⁴² He will not face the ten-year unlawful presence bar unless he departs the United States before obtaining LPR status.¹⁴³
2. Same facts as the previous example, except that the alien enters the United States surreptitiously rather than on a visitor visa. Even with an approved immigrant visa petition as the spouse of a U.S. citizen, he is not eligible to adjust status because of his unlawful entry.¹⁴⁴ To obtain LPR status, he must apply for an immigrant visa at a U.S. consulate abroad.¹⁴⁵ His departure from the country will trigger the ten-year unlawful presence bar.¹⁴⁶ He may apply for a provisional waiver of the bar before departing, but he must show “extreme hardship” to his spouse to succeed on the application.¹⁴⁷
3. An alien enters the United States surreptitiously and subsequently has a daughter. After the daughter (a U.S. citizen) turns twenty-one, she obtains an approved immigrant visa petition for her mother.¹⁴⁸ The mother is not eligible to adjust status due to her unlawful entry.¹⁴⁹ To obtain LPR status, she must apply for an immigrant visa at a U.S. consulate abroad.¹⁵⁰ Her departure from the country will trigger the ten-year unlawful presence bar,¹⁵¹ and she is not eligible for a waiver.¹⁵²
4. Same facts as the previous example, except that the U.S. citizen daughter is in the military. Her mother may qualify for parole in place,¹⁵³ which would make her eligible to adjust status.¹⁵⁴ In that scenario, the mother would not face the ten-year unlawful presence bar unless she departs the United States before obtaining LPR status.¹⁵⁵

¹⁴⁰ See 8 U.S.C. § 1101(a)(15)(B) (defining as a nonimmigrant “ an alien . . . having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily . . . for pleasure”); 9 FAM 402.2-2(A) (describing B-2 visas as “visitor visas . . . for persons who want to enter the United States temporarily for . . . tourism, pleasure or visiting”).

¹⁴¹ 8 U.S.C. § 1154(a)(1)(A)(i) (allowing U.S. citizens to file a petition for the classification of an alien as their immediate relative).

¹⁴² *Id.* §§ 1255(a), (c)(2).

¹⁴³ *Id.* § 1182(a)(9)(B)(i)(II) (requiring departure or removal to trigger ten-year bar).

¹⁴⁴ *Id.* § 1255(a).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* § 1182(a)(9)(B)(i)(II).

¹⁴⁷ *Id.* § 1182(a)(9)(B)(v); 8 C.F.R. § 212.7(e).

¹⁴⁸ 8 U.S.C. § 1151(b)(2)(A)(i) (requiring U.S. citizens to be at least 21 years of age to sponsor a parent for an immigrant visa).

¹⁴⁹ *Id.* § 1255(a).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* § 1182(a)(9)(B)(i)(II).

¹⁵² *Id.* § 1182(a)(9)(B)(v).

¹⁵³ See USCIS POLICY MANUAL, *supra* note 107, at Vol. 7, Part B, ch. 2.

¹⁵⁴ *Id.*

¹⁵⁵ 8 U.S.C. § 1182(a)(9)(B)(i)(II) (requiring departure or removal to trigger ten-year bar).

5. An alien enters the United States surreptitiously at age eight. At age twenty-two, he receives a grant of Deferred Action for Childhood Arrivals (DACA).¹⁵⁶ At age twenty-three, he marries a U.S. citizen, who obtains an approved immigrant visa petition on his behalf.¹⁵⁷ The alien is not eligible to adjust status due to his unlawful entry.¹⁵⁸ To obtain LPR status, he must apply for an immigrant visa at a U.S. consulate abroad.¹⁵⁹ His departure from the country will trigger the ten-year unlawful presence bar.¹⁶⁰ He may apply for a provisional waiver of the bar before departing, but he must show “extreme hardship” to his spouse to succeed on the application.¹⁶¹
6. Same facts as the previous example, except that the alien, after receiving DACA and after the immigrant visa petition is approved, was granted advance parole to visit a sick family member abroad.¹⁶² Upon being paroled back into the United States following his trip abroad, he became eligible to adjust status.¹⁶³ He will not face the ten-year unlawful presence bar unless he departs the United States before obtaining LPR status.¹⁶⁴

Legalization in Cases of Hardship to U.S. Relatives: Cancellation of Removal

The INA’s cancellation of removal provision authorizes immigration judges¹⁶⁵ to grant LPR status to some unlawfully present aliens who are in removal proceedings and who have lived in the United States for at least ten years.¹⁶⁶ Aliens qualify, however, only if, aside from meeting other requirements, they show that their removal would cause “exceptional and extremely unusual hardship” to immediate relatives who are U.S. citizens or LPRs.¹⁶⁷

The lineage of this form of relief extends back at least to 1935, when two members of President Franklin Roosevelt’s cabinet, frustrated by the lack of a statutory mechanism to grant relief from deportation in hardship cases, used bureaucratic ingenuity to implement “a two-step procedure

¹⁵⁶ See Memorandum from Janet Napolitano, Secretary, DHS, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [hereinafter “DACA Memorandum”].

¹⁵⁷ 8 U.S.C. § 1154(a)(1)(A)(i).

¹⁵⁸ *Id.* § 1255(a).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* § 1182(a)(9)(B)(i)(II).

¹⁶¹ *Id.* § 1182(a)(9)(B)(v); 8 C.F.R. § 212.7(e).

¹⁶² USCIS POLICY MANUAL, *supra* note 107, at Vol. 7, Part B, Ch. 2; see USCIS FAQs for DACA Recipients, *supra* note 115, at Q57 (identifying travel abroad “to visit an ailing relative” as a purpose for which USCIS may grant advance parole to a DACA recipient). As already mentioned, USCIS stopped granting advance parole under the DACA initiative in September 2017. See *supra* note 115.

¹⁶³ See 8 U.S.C. § 1255(a); USCIS POLICY MANUAL, *supra* note 107, at Vol. 7, Part B, Ch. 2.

¹⁶⁴ 8 U.S.C. § 1182(a)(9)(B)(i)(II).

¹⁶⁵ An immigration judge is “an attorney appointed by the Attorney General as an administrative judge within the Executive Office for Immigration Review. She is qualified to conduct specified classes of proceedings, including those involving removal under 8 U.S.C. § 1229a, and is subject to such supervision as the Attorney General directs.” *United States v. McLean*, 891 F.3d 1308, 1310 (11th Cir. 2018).

¹⁶⁶ 8 U.S.C. § 1229b(b)(1).

¹⁶⁷ *Id.* § 1229b(b)(1)(D).

whereby the secretary [of labor] granted [an] illegal alien a waiver from deportation and allowed him or her to depart to Canada and to reenter the United States as a legal permanent resident.”¹⁶⁸ In 1940, Congress rendered this arrangement unnecessary by enacting the first clearly delineated statutory form of relief from deportation in hardship cases,¹⁶⁹ which was called “suspension of deportation” until 1996.¹⁷⁰ The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 replaced “suspension of deportation” with “cancellation of removal,” a more restrictive form of relief due in part to its higher threshold for qualifying hardship and its omission of hardship to the alien (as opposed to the alien’s U.S. family) as a basis for relief.¹⁷¹ Under the current version of the INA, one form of cancellation of removal exists for LPRs in removal proceedings,¹⁷² and one exists for non-LPRs, including unlawfully present aliens.¹⁷³

To qualify for non-LPR cancellation of removal, aliens must have been physically present in the United States for the ten years preceding their application,¹⁷⁴ and, critically, they must make the requisite showing of “exceptional and extremely unusual hardship” to their U.S. citizen or LPR immediate relatives.¹⁷⁵ “Exceptional and unusual hardship” means a level of hardship to an immediate relative that is “‘substantially’ beyond the ordinary hardship that would be expected when a close family member leaves this country.”¹⁷⁶ The paradigmatic case involves “a U.S.

¹⁶⁸ NGAI, *supra* note 33, at 84 (“Without statutory reform, [Secretary of Labor] Perkins and [INS Director] MacCormack creatively used provisions of existing law to suspend deportations and to legalize the status of certain illegal immigrants in hardship cases.”). The legacy INS, which DHS replaced in 2002 as the agency with primary responsibility for enforcing the INA, fell under the Department of Labor until it was transferred to the Department of Justice (DOJ) in 1940. *See Nijar v. Holder*, 689 F.3d 1077, 1078 n.1 (9th Cir. 2012) (citing Reorganization Plan No. V of 1940, 5 Fed. Reg. 2223, ch. 231, § 1 (June 14, 1940)).

¹⁶⁹ *See* Alien Registration Act of 1940, Tit. II § 20, 54 Stat. 670.

¹⁷⁰ *See* Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393, 396 (2017) (explaining that the Alien Registration Act of 1940 created suspension of deportation “as a form of relief from removal” available where removal would result in “serious economic detriment”).

¹⁷¹ *See* *Pareja v. U.S. Att’y Gen.*, 615 F.3d 180, 185 (3d Cir. 2010) (“In IIRIRA, Congress, among other things, did away with ‘suspension of deportation,’ substituted it with a form of relief called ‘cancellation of removal,’ and changed the ‘extreme hardship’ standard back to ‘exceptional and extremely unusual hardship.’ Congress also limited the hardship inquiry to whether the alien could show hardship to a qualifying relative alone; hardship to the alien herself is no longer a relevant factor.”).

¹⁷² 8 U.S.C. § 1229b(a) (cancellation of removal for certain permanent residents).

¹⁷³ *Id.* § 1229b(b) (cancellation of removal and adjustment of status for certain nonpermanent residents). Another form of cancellation, called “special rule cancellation,” exists for some nationals of specified countries who, under the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2160 (1997), remain eligible for relief under the less restrictive pre-IIRIRA suspension of deportation criteria. *See generally*, *Monroy v. Lynch*, 821 F.3d 1175, 1175–76 (9th Cir. 2016) (“NACARA amended [IIRIRA] by adding a ‘special rule for cancellation of removal’ for certain classes of aliens. This amendment to IIRIRA allowed qualified individuals to apply for special rule cancellation of removal under the more lenient standards that existed before the passage of IIRIRA.”); Margaret H. Taylor, *What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, 30 J.L. & POL. 527, 538 (2015) (“NACARA restored the more generous, pre-1996 suspension of deportation provisions . . . for some nationals of El Salvador, Guatemala, the former Soviet Union, and certain Eastern European countries . . . Cases adjudicated under these procedures are known as ‘NACARA 203’ or ‘special rule’ cancellation cases.”).

¹⁷⁴ 8 U.S.C. § 1229b(b)(1)(A); *cf.* *Pereira v. Sessions*, 138 S. Ct. 2105, 2109 (2018) (“Under the so-called ‘stop-time rule’ set forth in § 1229b(d)(1)(A), . . . th[e] period of continuous physical presence [that counts toward satisfaction of the ten-year requirement] is ‘deemed to end . . . when the alien is served a notice to appear under section 1229(a).’ . . . [But] [a] notice that does not inform a noncitizen when and where to appear for removal proceedings . . . does not trigger the stop-time rule.”).

¹⁷⁵ 8 U.S.C. § 1229b(b)(1)(D). Less stringent physical presence and hardship requirements apply to domestic violence victims. *Id.* § 1229b(b)(2) (“Special rule for battered spouse or child”).

¹⁷⁶ *See Pareja*, 615 F.3d at 193 (quoting *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 59 (BIA 2001) (en banc)).

citizen child with a serious medical condition who, if [cancellation of removal] is denied, would be either involuntarily separated from her parent or relocated to a country where adequate medical treatment is not available.”¹⁷⁷ Aliens also must show good moral character and not have certain types of criminal convictions.¹⁷⁸

Like adjustment of status, cancellation of removal is a discretionary form of relief, meaning that immigration judges retain discretion to deny it even to aliens who meet the statutory criteria.¹⁷⁹ The INA caps cancellations of removal for non-LPRs at 4,000 per year,¹⁸⁰ although the cap does not apply to some groups.¹⁸¹ If the cap has been reached in a particular fiscal year but the immigration judge determines that a cancellation of removal application should be granted, the judge must reserve decision until a subsequent fiscal year when cap spaces are available.¹⁸² Finally, cancellation of removal is available only as a *defense* to removal, meaning that aliens can apply for cancellation only if they are in removal proceedings.¹⁸³ They cannot apply for relief affirmatively (i.e., outside of removal proceedings).¹⁸⁴

¹⁷⁷ Taylor, *supra* note 173, at 531 (explaining that, under the “exceptional and extremely unusual hardship” standard, successful claims often involve “a U.S. citizen child with a serious medical condition who, if [cancellation of removal] is denied, would be either involuntarily separated from her parent or relocated to a country where adequate medical treatment is not available”).

¹⁷⁸ 8 U.S.C. §§ 1229b(b)(1)(B)–(C).

¹⁷⁹ 8 U.S.C. § 1229b(b)(1) (“The Attorney General *may* cancel removal of . . . an alien who is inadmissible or deportable from the United States . . .”) (emphasis added); *Rodriguez v. Gonzales*, 451 F.3d 60, 62 (2d Cir. 2006) (“Obtaining either adjustment of status or cancellation of removal is a two-step process. First, an alien must prove eligibility by showing that he meets the statutory eligibility requirements. Second, assuming an alien satisfies the statutory requirements, the Attorney General in his discretion decides whether to grant or deny relief.”) (citations omitted).

¹⁸⁰ 8 U.S.C. § 1229b(e)(1).

¹⁸¹ *Id.* § 1229b(e)(3) (exempting from the cap certain aliens covered by the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 (1997), and aliens who applied for relief from deportation before April 1, 1997).

¹⁸² 8 C.F.R. § 1240.21(c)(1) (“When grants are no longer available in a fiscal year, further decisions to grant such relief must be reserved until such time as a grant becomes available under the annual limitation in a subsequent fiscal year.”). Before January 4, 2018, the regulation required immigration judges to reserve decisions “to grant *or deny*” cancellation of removal for statutorily eligible aliens when the cap had been reached. *See Procedures Further Implementing the Annual Limitation on Suspension of Deportation and Cancellation of Removal*, 82 Fed. Reg. 57,336 (Dec. 5, 2017) (amending 8 C.F.R. § 1240.21(c)(1) to delete “or deny”); Taylor, *supra* note 173, at 542–43 (explaining that under prior version of the regulation that prohibited immigration judges from denying cancellation applications if the statutory cap had been reached, “the availability of work authorization [for aliens who had submitted applications] create[d] a powerful incentive for non-LPRs in removal proceedings to file unsubstantiated cancellation claims”).

¹⁸³ 8 C.F.R. § 1240.20(a) (placing jurisdiction over cancellation of removal applications under INA § 240A with the immigration court only and only following commencement of removal proceedings); *see Lagandaon v. Ashcroft*, 383 F.3d 983, 989 (9th Cir. 2004) (“Department of Justice regulations . . . require applications for cancellation to be filed *after* jurisdiction vests in the immigration court. Jurisdiction vests when the [charging document that initiates removal proceedings] is filed with the [immigration] court . . .”). DHS accepts affirmative applications only for special rule cancellation and not for standard non-LPR cancellation. *See* 8 C.F.R. § 1240.62(a) (vesting jurisdiction to consider some special rule cancellation applications in asylum officers, before the initiation of removal proceedings); Taylor, *supra* note 173, at 538 (explaining that DOJ allowed affirmative applications in such cases because “many special rule cancellation applicants had asylum applications pending before INS [and] the most efficient way to implement the statute was to delegate authority to INS asylum officers to decide suspension and cancellation applications in these cases, dispensing with the usual rule that only immigration judges could grant this type of relief in the context of removal proceedings”).

¹⁸⁴ 8 C.F.R. § 1240.20(a).

When an immigration judge grants cancellation of removal to an unlawfully present alien, the alien becomes an LPR.¹⁸⁵ Some commentators have thus called cancellation of removal a mechanism for “case-by-case legalization.”¹⁸⁶ But the major parameters for this mechanism—the annual cap, the fact that aliens cannot apply for it affirmatively but instead only in removal proceedings, and the required hardship showing—sharply limit its availability.¹⁸⁷ The lack of an affirmative channel for requesting cancellation of removal, in particular, has prompted some aliens who believe they clearly qualify for cancellation to proactively prompt DHS to initiate removal proceedings against them.¹⁸⁸ The aliens do this, through their counsel, by making a special request to DHS or by filing an affirmative application for asylum, which upon denial triggers an automatic referral to removal proceedings.¹⁸⁹ This strategy has pitfalls, however: it affirmatively triggers proceedings that could end in removal, and, in any event, immigration judges have discretion to dismiss the proceedings without granting cancellation upon determining that the alien filed “a meritless asylum application with the USCIS for the sole purpose of seeking cancellation of removal in the Immigration Court.”¹⁹⁰

¹⁸⁵ 8 U.S.C. § 1229b(b)(1) (authorizing the Attorney General to “cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence” an alien who satisfies the statutory requirements for cancellation).

¹⁸⁶ See Taylor, *supra* note 173, at 533 (quoting HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 192 (2014)).

¹⁸⁷ See 8 U.S.C. § 1229b(b)(1).

¹⁸⁸ See Taylor, *supra* note 173, at 544–46.

¹⁸⁹ *Id.* at 544–45 (“In rare instances, an attorney might advise an individual with the requisite ten years of continuous physical presence and a uniquely strong case of hardship to request to be placed in removal proceedings so that she might pursue non-LPR cancellation.”); *id.* at 546 (explaining that a “work-around” exists for the lack of an affirmative application process for cancellation of removal: “file an unfounded affirmative asylum application and go through (or fail to show up for) the asylum office interview . . . this approach will result in a referral from the asylum officer to immigration court for removal proceedings”).

¹⁹⁰ Matters of Jaso & Ayala, 27 I&N Dec. 557, 558 (BIA 2019). The argument has been made that the cancellation of removal statute authorizes DHS to accept affirmative applications for cancellation of removal, such that DHS could grant cancellation affirmatively if it were so inclined. See Taylor, *supra* note 173, at 532 n.20 (arguing that “statutory delegation of this authority [over cancellation of removal] to the Attorney General does not preclude affirmative adjudications of applications by United States Citizenship and Immigration Services” and that the creation of an affirmative application process “does not require congressional action”). The best authority for this argument seems to be DOJ’s decision to accept affirmative applications for special rule cancellation starting in 1998, a practice that has continued under DHS. See 8 C.F.R. § 1240.62(a); Taylor, *supra* note 173, at 538. Provisions of the INA, however, suggest that the Attorney General (acting through the immigration courts of the Executive Office of Immigration Review (EOIR)) possesses exclusive authority to grant non-LPR cancellation of removal under 8 U.S.C. § 1229b(b)(1), because EOIR rather than the legacy INS exercised that function before the creation of DHS in 2002. See 8 U.S.C. § 1103(a) (charging the Secretary of Homeland Security with “the administration and enforcement” of the INA and all laws relating to immigration, “except insofar as . . . such laws relate to the powers, functions, and duties conferred upon the . . . Attorney General”); *id.* § 1103(g) (“The Attorney General shall have such authorities and functions . . . relating to the immigration and naturalization of aliens as were exercised by [EOIR] . . . on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.”); DOJ, *EOIR Begins Special Procedures to Comply with Annual Cap on Suspension of Deportation and Cancellation of Removal* (May 3, 1999), <https://www.justice.gov/eoir/eoir-procedures-cap-on-suspension-1999> (indicating that EOIR has administered cancellation of removal since before 2002). For a general discussion of the division of immigration-related responsibilities between DHS, DOJ, the Department of State, and other federal agencies, see WEISSBRODT & DANIELSON, *supra* note 1, at 110–26 (explaining that in 1983 DOJ “removed immigration judges from the INS and placed them under the direct supervision of the Associate Attorney General in the newly created [EOIR]. The Homeland Security Act of 2002 placed the EOIR under the control of the Attorney General.”).

Legalization as Relief from Persecution or Other Harms: Asylum and Other Protections

Other mechanisms in the INA provide for the legalization of unlawfully present aliens who suffer particular types of harms. Asylum offers the prospect of LPR status to unlawfully present aliens who would face a risk of persecution if returned to their countries of origin, while the related protections of withholding of removal and relief under the Convention against Torture (CAT) offer more limited relief from persecution or torture. A series of nonimmigrant visas, including the U visa, offer the prospect of relief to unlawfully present aliens who are the victims or witnesses of certain crimes.

Asylum

Unlawfully present aliens may qualify for asylum, a lawful immigration status with a pathway to LPR status and citizenship, if they have suffered persecution in their country of origin or have a well-founded fear of suffering such persecution upon returning to that country.¹⁹¹ The general eligibility criteria for asylum include a requirement that the persecution be on account of an enumerated statutory ground (race, religion, nationality, membership in a particular social group, or political opinion).¹⁹² Aliens who have persecuted others or committed “serious crimes” are not eligible.¹⁹³

The law of asylum is a broad subject that in most respects is conceptually distinct from the issue of legalization. Asylum is a general remedy for aliens in or at the threshold of the United States who suffer persecution, not a form of relief designed specifically for the unlawfully present population.¹⁹⁴ However, asylum can work as a legalization mechanism in some cases.¹⁹⁵ Lawful entry and maintenance of lawful status are not prerequisites to asylum.¹⁹⁶ Periods of unlawful presence do not affect an alien’s eligibility.¹⁹⁷ Put differently, aliens present within the United States may qualify for asylum regardless of surreptitious entry or unlawful presence.¹⁹⁸ Thus, for those unlawfully present aliens who have suffered persecution and meet the other statutory requirements, asylum, much like cancellation of removal, offers a path to LPR status.¹⁹⁹ Unlike

¹⁹¹ 8 U.S.C. § 1158(b)(1); 8 U.S.C. § 1101(a)(42)(A); *see generally*, CRS Report R45539, *Immigration: U.S. Asylum Policy*, by Andorra Bruno.

¹⁹² 8 U.S.C. § 1158(b)(1)(B)(i) (“[T]he applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”); *see* CRS Legal Sidebar LSB10046, *The Application of the “One Central Reason” Standard in Asylum and Withholding of Removal Cases*, by Hillel R. Smith.

¹⁹³ 8 U.S.C. § 1158(b)(2); CRS Report R45151, *Immigration Consequences of Criminal Activity*, by Hillel R. Smith, at 20.

¹⁹⁴ *See* 8 U.S.C. § 1158(a)(1) (making any alien “who is physically present in the United States or who arrives in the United States” generally eligible to apply for asylum).

¹⁹⁵ *See, e.g.*, *Amrollah v. Napolitano*, 710 F.3d 568, 570 (5th Cir. 2013) (case of alien who obtained asylum after entering illegally).

¹⁹⁶ 8 U.S.C. § 1158(a)(1).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *See id.* § 1159(b).

cancellation of removal, however, unlawfully present aliens may apply for asylum affirmatively.²⁰⁰

As relevant here, a few aspects of asylum law bear directly on the nature and availability of this form of relief to unlawfully present aliens. First, eligibility to apply for asylum is time-restricted.²⁰¹ Although aliens may apply for asylum either affirmatively (i.e., on their own accord, even if the government is not seeking to remove them) or defensively (i.e., as a defense in removal proceedings), generally they must apply within one year of arriving in the United States.²⁰² Thus, asylum is not available to most unlawfully present aliens who have been in the United States for long periods of time.²⁰³

Second, asylum offers a secure form of relief to unlawfully present aliens. Asylees are not subject to removal unless their status is terminated for a specified statutory reason;²⁰⁴ their spouses and minor children may apply to join them in the United States in asylee status;²⁰⁵ asylees are authorized to work;²⁰⁶ and, as already mentioned, they have a direct pathway to LPR status and therefore to citizenship.²⁰⁷

Related Protections: Withholding of Removal and Convention Against Torture Relief

Unlawfully present aliens who do not obtain asylum may qualify for a more limited form of relief under the INA's provision for "restriction on removal" (commonly called "withholding of removal"), which prohibits the removal of aliens to a country where their "life or freedom would be threatened" on account of "race, religion, nationality, membership in a particular social group, or political opinion."²⁰⁸ Somewhat similarly, statutory and regulatory provisions implementing the Convention Against Torture prohibit the removal of aliens to any country in which there is substantial reason to believe they could be tortured.²⁰⁹ Unlike asylum, these two forms of relief do

²⁰⁰ See 8 C.F.R. § 208.2(a); USCIS, *The Affirmative Asylum Process* (Apr. 19, 2019), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process>.

²⁰¹ See 8 U.S.C. § 1158(a)(2).

²⁰² *Id.* (requiring asylum applicants to demonstrate "by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States," unless they demonstrate "to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application"); 8 C.F.R. § 208.4(a)(4), (5) (enumerating exceptions to the one-year filing deadline); see also, e.g., *Linares-Urrutia v. Sessions*, 850 F.3d 477, 481 (2d Cir. 2017) (explaining that "[s]ection 208(a)(2)(B) of the Immigration and Nationality Act requires asylum applications to be filed, 'within 1 year after the date of the alien's arrival in the United States'" and that "the implementing regulation states that '[t]he 1-year period shall be calculated from the date of the alien's last arrival in the United States.'" (emphasis in original) (quoting 8 U.S.C. § 1158(a)(2)(B), 8 C.F.R. § 208.4(a)(2)(ii))).

²⁰³ See *Linares-Urrutia*, 850 F.3d at 481.

²⁰⁴ 8 U.S.C. § 1158(c).

²⁰⁵ *Id.* § 1158(b)(3).

²⁰⁶ *Id.* § 1158(c)(1)(B).

²⁰⁷ *Id.* § 1159(b) (creating independent pathway to adjustment of status for aliens granted asylum).

²⁰⁸ 8 U.S.C. § 1231(b)(3); see CRS Legal Sidebar LSB10046, *The Application of the "One Central Reason" Standard in Asylum and Withholding of Removal Cases*, by Hillel R. Smith (explaining the differences between asylum and withholding of removal).

²⁰⁹ Pub. L. No. 195-277, § 2242(b), 112 Stat. 2681 (Oct. 21, 1998) (requiring agencies to "prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment"); 8 C.F.R. § 208.16(c) (Eligibility for withholding of removal under the Convention Against Torture).

not create an avenue to LPR status and do not confer many of the other advantages typically associated with lawful immigration status, such as the ability to seek admission to the United States following a trip abroad or the ability to sponsor family members for admission.²¹⁰ As such, withholding of removal and CAT protection arguably do not constitute legalization mechanisms, although they do confer a defense to removal and work authorization on recipients.²¹¹ Withholding and CAT protection also have a stricter burden of proof than asylum.²¹² In a different vein, unlike asylum, which is a discretionary form of relief, these two forms of relief are mandatory—immigration judges must grant them to eligible aliens.²¹³ Nor do withholding of removal or CAT relief have one-year application deadlines.²¹⁴

Nonimmigrant Visas for Victims and Witnesses of Certain Crimes

The INA authorizes DHS to grant three special nonimmigrant statuses to unlawfully present aliens who are victims or witnesses of certain crimes and who provide assistance to law enforcement. First and most broadly, aliens who suffer “substantial physical or mental abuse” from certain crimes committed against them in the United States (including rape, domestic violence, and kidnapping, among other qualifying offenses) and who assist in the investigation or prosecution of those crimes may qualify for nonimmigrant U visa status.²¹⁵ Second, victims of sex trafficking or slavery trafficking who comply with “reasonable requests for assistance” from law enforcement may qualify for nonimmigrant T visa status if removal would cause them “extreme hardship.”²¹⁶ Third, aliens willing to provide “critical reliable information” about criminal or terrorist organizations may qualify for nonimmigrant S visa status.²¹⁷ The INA caps U visas at 10,000 per year,²¹⁸ T visas at 5,000 per year,²¹⁹ and S visas at 250 per year across two subcategories (these caps do not apply to immediate family members who qualify derivatively).²²⁰ Recipients of each of the three statuses may adjust to LPR status if they satisfy specific statutory requirements.²²¹

²¹⁰ See 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(c); CRS Legal Sidebar LSB10046, *The Application of the “One Central Reason” Standard in Asylum and Withholding of Removal Cases*, by Hillel R. Smith (discussing withholding of removal); Heeren, *supra* note 94, at 1142–46 (discussing withholding of removal and CAT).

²¹¹ See 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 274a.12(a)(10).

²¹² See *Scatambuli v. Holder*, 558 F.3d 53, 58 (1st Cir. 2009) (“To qualify for asylum, an alien bears the burden of proving that he has suffered past persecution or has a well-founded fear of future persecution based on one of the statutorily protected factors. . . . Withholding of removal requires a showing ‘that an alien is more likely than not to face persecution’ on account of a protected ground.” (quoting *Datau v. Mukasey*, 540 F.3d 37, 42 (1st Cir.2008))); *Torres v. Mukasey*, 551 F.3d 616, 625 (7th Cir. 2008) (“The ‘clear probability of persecution’ standard is a higher threshold than that for asylum.”).

²¹³ *E.g.* *Salgado-Sosa v. Sessions*, 882 F.3d 451, 456 (4th Cir. 2018) (“Asylum is discretionary, whereas withholding of removal is mandatory”); *Dankam v. Gonzales*, 495 F.3d 113, 115–16 (4th Cir. 2007) (“Withholding and deferral of removal under the CAT are mandatory forms of relief that hinge on risk within the country to which the Government is seeking expulsion.” (quoting *Yang v. Gonzales*, 478 F.3d 133, 141 (2nd Cir.2007))).

²¹⁴ See, *e.g.*, *Mouawad v. Gonzales*, 485 F.3d 405, 411 (8th Cir. 2007).

²¹⁵ See 8 U.S.C. § 1101(a)(15)(U).

²¹⁶ *Id.* § 1101(a)(15)(T).

²¹⁷ *Id.* § 1101(a)(15)(S).

²¹⁸ *Id.* § 1184(p)(2).

²¹⁹ *Id.* § 1184(o)(2).

²²⁰ *Id.* § 1184(k)(1).

²²¹ *Id.* § 1255(j), (l), (m).

Of these three nonimmigrant statuses, U visa status has the broadest eligibility criteria and, as such, is the most frequently sought by unlawfully present aliens and also the most frequent subject of litigation and commentary.²²² DHS has reached the statutory cap of 10,000 U visas in every fiscal year since 2010 and, as of the first quarter of FY2019, had a backlog of 234,114 pending U visa applications.²²³ Unlawfully present aliens on the waiting list for a U visa typically receive a discretionary reprieve from removal—deferred action or parole.²²⁴ However, it takes an average of four years for DHS to vet applicants for eligibility before placing them on the waiting list and granting them deferred action or parole.²²⁵

Other Approaches to Legalization

Although the legalization mechanisms in the INA are narrow, U.S. immigration law has used two other methods to confer legal immigration status or other protections from removal on segments of the unlawfully present population: (1) ad hoc legalization laws that, rather than reforming the INA’s generally applicable legalization provisions going forward, offer one-time relief or offer relief only for discrete populations, and (2) discretionary reprieves from removal, such as deferred action, that confer weaker protection sometimes described as “quasi-legal status.”

Ad Hoc Legalization Laws

In the second half of the twentieth century, Congress enacted a major one-time legalization program and also enacted other ad hoc legalization measures for narrowly defined populations.²²⁶

The Immigration Reform and Control Act (IRCA) of 1986²²⁷ contained two primary legalization measures that offered the prospect of LPR status to much of the population of aliens without legal status in the United States at that time.²²⁸ These were one-time legalization measures: they

²²² See *Catholic Charities CYO v. Chertoff*, 622 F. Supp. 2d 865, 880 (N.D. Cal. 2008) (granting motion to dismiss statutory challenges to DHS’s implementation of the U visa program); Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 MICH. J. L. REFORM 915, 916–17 (2015) (“Although Congress established the [U visa] program in 2000, implementing regulations were not issued until late 2007. The 10,000 visa quota quickly proved inadequate to assist the number of eligible applicants. Unfortunately, efforts to expand the quota sit stagnate along with the larger debate in Congress over comprehensive immigration reform.”); Zolan Kanno-Youngs, *Trump’s Immigration Crackdown Blunts His Effort to Be Tough on Crime*, N.Y. TIMES (May 14, 2019), <https://www.nytimes.com/2019/05/14/us/politics/trumps-immigration-visa-crime.html> (describing delays in U-visa processing and growth in case backlog).

²²³ USCIS, NUMBER OF FORM I-918, PETITION FOR U NONIMMIGRANT STATUS, BY FISCAL YEAR, QUARTER, AND CASE STATUS 2009–2019, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2019_qtr1.pdf.

²²⁴ 8 C.F.R. § 214.14(d)(2).

²²⁵ See Kanno-Youngs, *supra* note 222 (“It is the period to even appear on the waiting list that has ballooned.”); see also Imogene Mankin, *Abuse-in(g) the System: How Accusations of U Visa Fraud and Brady Disclosures Perpetrate Further Violence Against Undocumented Victims of Domestic Abuse*, 27 BERKELEY LA RAZA L.J. 40, 47 (2017) (explaining that in 2017, the processing time was two and a half years for placement on the waiting list and receipt of provisional protection). Updated USCIS information on case processing times is available at <https://egov.uscis.gov/processing-times/>.

²²⁶ See DONALD M. KERWIN, MORE THAN IRCA: US LEGALIZATION PROGRAMS AND THE CURRENT POLICY DEBATE, MIGRATION POLICY INST., at 4–6 (Dec. 2010), <https://www.migrationpolicy.org/research/us-legalization-programs-by-the-numbers> (reviewing history of “population specific legalization programs”).

²²⁷ Pub. L. No. 99-603, 100 Stat. 3359 (1986).

²²⁸ See generally *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 483 (1991) (“[IRCA’s] first amnesty program permitted any alien who had resided in the United States continuously and unlawfully since January 1, 1982, to qualify

benefited only those aliens without legal status who had been in the United States since 1982 or who had performed agricultural work in the United States for at least ninety days between May 1985 and May 1986.²²⁹ The law specified a limited application period for both programs.²³⁰ The major rationale appears to have been that one-time legalization relief would not undermine—and might even advance—the deterrence of future illegal immigration, which was another major goal of IRCA.²³¹ In other words, Congress appears to have reasoned that a one-time legalization program for aliens already in the United States, unlike a legalization mechanism baked into the regular framework of the INA, would not encourage aliens to enter or remain in the country in violation of the INA in the future.²³²

Aside from IRCA, Congress also enacted other legalization laws in the second half of the twentieth century that targeted particular nationalities rather than aliens present at a particular juncture. For example, the Cuban Adjustment Act of 1966,²³³ the Nicaraguan Adjustment and Central American Relief Act,²³⁴ and the Chinese Student Protection Act of 1992²³⁵ all created special mechanisms for some aliens without legal status of particular nationalities to acquire LPR status or to seek LPR status under less exacting criteria than those generally applicable under the INA. A more recent law created a special permanent resident status for long-time residents of the Commonwealth of the Northern Mariana Islands facing revocation of immigration parole.²³⁶ Somewhat like IRCA, these laws created targeted relief for aliens who fell within specific

for an adjustment of his or her status to that of a lawful permanent resident. The second program required the Attorney General to adjust the status of any alien farmworker who could establish that he or she had resided in the United States and performed at least 90 days of qualifying agricultural work during the 12-month period prior to May 1, 1986” (citations omitted). Other provisions of IRCA updated the registry date to 1972 and facilitated the adjustment of status of some Cuban and Haitian aliens. Pub. L. No. 99-603, §§ 202–03, 100 Stat. 3359, 3404–05 (1986).

²²⁹ See *McNary*, 498 U.S. at 483.

²³⁰ 8 U.S.C. §§ 1160 (providing for eighteen-month application period for initial legalization relief for special agricultural workers), 1255a(a)(1)(A) (providing for twelve-month application period for initial legalization relief for aliens present since 1982); see *Perales v. Reno*, 48 F.3d 1305, 1307 (2d Cir. 1995) (“The amnesty program established by IRCA was developed as a one-time opportunity to legalize”). For some discrete groups of aliens, litigation and legislation extended the application period for the general amnesty program under § 1255a. See generally *Catholic Social Servs., Inc. v. Ashcroft*, 268 F. Supp. 2d 1172, 1178 (E.D. Cal. 2002); IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 1771 (2014).

²³¹ See H.R. REP. NO. 99-682(I), at 49 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, 5653 (“[L]egalizing the status of aliens who have been present in the United States for several years . . . would enable INS to target its enforcement efforts on new flows of undocumented aliens The Committee strongly believes that a one-time legalization program is a necessary part of an effective enforcement program”); Elizabeth A. Cavoli, *Statutory Preclusion of Judicial Review Under the Immigration Reform and Control Act of 1986*, 58 GEO. WASH. L. REV. 1044, 1045 (1990) (“Congress enacted IRCA to achieve two major goals: to discourage illegal immigration into the United States and to eliminate, through the legalization process, a subclass of illegal aliens already living within United States borders.”). The deterrent measures in IRCA included provisions that “imposed criminal sanctions on employers who hired undocumented workers and made a number of federally funded welfare benefits unavailable to [unlawfully present] aliens.” *McNary*, 498 U.S. at 481–82.

²³² See H.R. REP. NO. 99-682(I), at 49 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, 5653.

²³³ Pub. L. No. 89-732, 80 Stat. 1161 (1966).

²³⁴ Pub. L. No. 105-100, 111 Stat. 2160 (1997).

²³⁵ Pub. L. No. 102-404, 106 Stat. 1969 (1992).

²³⁶ Northern Mariana Islands Long-Term Legal Residents Relief Act, Pub. L. No. 116-24, § 2, 133 Stat. 977, 977–78 (2019). Earlier laws extended ad hoc legalization relief to larger groups of parolees. See generally Kerwin, *supra* note 226, at 4–5 (“By one count, since 1952 alone, Congress has acted 16 times to extend LPR status to persons in temporary legal status. Between 1946 and 2000, it passed several bills to legalize refugees and similar populations that it had ‘paroled’ into the country, including more than 175,168 Indochinese following the fall of Saigon and 30,752 Hungarians following the 1956 revolution.”).

parameters but did not alter the INA’s generally restrictive approach to legalization for all other aliens.²³⁷

Proposed legalization legislation in the 21st century has generally followed the ad hoc mold of offering relief only to aliens who were unlawfully present in the United States during a specified time period or who fit within narrowly defined groups, or both. The various Dream Act proposals to create a pathway to LPR status for aliens without legal status who were brought to the United States as children, for example, would cover aliens who entered the United States before a particular date (usually several years before enactment) and who have resided in the United States since entry.²³⁸ Legalization provisions in comprehensive immigration reform bills that the Senate passed in 2006 and 2013, beyond providing for relief to childhood arrivals, also would have provided for relief to many or most unlawfully present aliens who lived in the United States during a specified time period and to certain agricultural workers.²³⁹ Other bills would create special adjustment of status mechanisms for recipients of TPS and Deferred Enforced Departure.²⁴⁰ All of these ad hoc proposals stand in contrast to less common proposals to amend the generally applicable legalization mechanisms in the INA going forward, such as proposals to advance the cutoff date for registry under INA § 249²⁴¹ or for the adjustment of status mechanism for unlawfully present aliens in INA § 245(i).²⁴²

Discretionary Reprives from Removal (“Quasi-Legal” Statuses)

In recent decades immigration authorities have increasingly exercised their enforcement discretion to grant unlawfully present aliens temporary reprives from removal, such as deferred action,²⁴³ DACA,²⁴⁴ or TPS.²⁴⁵ These and other types of discretionary reprives from removal, which are covered at more length in another CRS report,²⁴⁶ have thus become a significant aspect

²³⁷ See 133 Stat. at 977–78 (creating a “special provision” to grant resident status only to certain long-term residents of the Northern Mariana Islands).

²³⁸ See, e.g., Dream Act of 2019, H.R. 2820, 116th Cong. § 101(b)(1)(A) (2019); Recognizing America’s Children Act, H.R. 1468, 115th Cong. § 4(a)(1)(A) (2017); see generally CRS Report R45139, *Unauthorized Childhood Arrivals: Legislative Activity in the 115th Congress*, by Andorra Bruno (2018) (reviewing history of DREAM Act legislation).

²³⁹ See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2101(a) (as passed by Senate, June 27, 2013); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 601(b) (2006); see generally CRS Report R43097, *Comprehensive Immigration Reform in the 113th Congress: Major Provisions in Senate-Passed S. 744*, by William A. Kandel (2013); CRS Report R42980, *Brief History of Comprehensive Immigration Reform Efforts in the 109th and 110th Congresses to Inform Policy Discussions in the 113th Congress*, by Ruth Ellen Wasem, by Ruth Ellen Wasem (2013).

²⁴⁰ See American Dream and Promise Act, H.R. 6, 116th Cong. § 211 (2019) (as passed House on June 4, 2019).

²⁴¹ See, e.g., Save America Comprehensive Immigration Act, H.R. 3647, 115th Cong. § 503 (2017) (proposing to advance registry date to 1986); archived CRS Report RL30578, *Immigration: Registry as Means of Obtaining Lawful Permanent Residence*, by Andorra Bruno, at 7–8 (describing three bills introduced in 107th Congress that would have created a “rolling registry date,” and one that would have implemented an ongoing fifteen-year continuous residency requirement).

²⁴² See, e.g., Family Reunification Act, H.R. 3312, 116th Cong. § 503 (2019) (proposing to advance the § 245(i) cutoff date to a date five years after the bill’s enactment).

²⁴³ See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999) (describing deferred action as an exercise of immigration authorities’ discretion to forego removal proceedings “for humanitarian reasons or simply for [their] own convenience”).

²⁴⁴ DACA Memorandum, *supra* note 156, at 1.

²⁴⁵ See 8 U.S.C. § 1254a.

²⁴⁶ CRS Report R45158, *An Overview of Discretionary Reprives from Removal: Deferred Action, DACA, TPS, and Others*, by Ben Harrington (2018).

of the federal government’s regulation of the unlawfully present population.²⁴⁷ Two events, in particular, did much to increase the number of aliens receiving discretionary reprieves: (1) the enactment of the TPS statute in 1990, which created a discretionary reprieve program for nationals of countries that the Secretary of DHS designates as unsafe for return because of armed conflict, natural disaster, or other extraordinary conditions,²⁴⁸ and (2) the executive branch’s implementation of the DACA program in 2012 for certain unlawfully present aliens brought to the United States as children.²⁴⁹ Together, TPS and DACA appear to cover more than one million aliens whose presence in the United States violates the INA,²⁵⁰ although that figure may well decline in the near term as a result of recent executive branch efforts to terminate or curtail these reprieve programs.²⁵¹

The grant of a discretionary reprieve constitutes an assurance from DHS that the recipient does not face imminent removal.²⁵² Discretionary reprieves are not legalization mechanisms because they do not extinguish the basis of the alien’s removability under the INA.²⁵³ They therefore do not offer steadfast protection from removal.²⁵⁴ For example, if an alien overstays a nonimmigrant visa and then receives a grant of deferred action from DHS, the risk remains that DHS will decide to pursue the alien’s removal in the future.²⁵⁵ Yet discretionary reprieves typically confer other advantages, including eligibility for work authorization and the nonaccrual of unlawful presence

²⁴⁷ See generally Heeren, *supra* note 94, at 1120 (“[I]n recent years, the United States has expanded the number of persons placed in nonstatus.”).

²⁴⁸ Immigration Act of 1990, Pub. L. No. 101-649, § 302, 104 Stat. 4978.

²⁴⁹ DACA Memorandum, *supra* note 156, at 1. DHS announced the termination of DACA in September 2017, but pursuant to the orders of various federal courts the program remains partially in place. See CRS Legal Sidebar LSB10216, *DACA: Litigation Status Update*, by Ben Harrington (2018).

²⁵⁰ CRS Report RS20844, *Temporary Protected Status: Overview and Current Issues*, by Jill H. Wilson, at 11 (calculating that 417,341 people held TPS as of November 29, 2018); USCIS, APPROXIMATE ACTIVE DACA RECIPIENTS AS OF APRIL 30, 2019 (2019), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/Approximate_Active_DACA_Recipients_-_Apr_30_2019.pdf (estimating 669,080 active recipients and 36,160 pending renewals).

²⁵¹ See CRS Legal Sidebar LSB10215, *Federal District Court Enjoins the Department of Homeland Security from Terminating Temporary Protected Status*, by Hillel R. Smith (2019); CRS Legal Sidebar LSB10216, *DACA: Litigation Status Update*, by Ben Harrington (2018).

²⁵² See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999).

²⁵³ See *Matter of Sosa Ventura*, 25 I&N Dec. 391, 393 (BIA 2010) (holding that an unlawful entrant who receives TPS “is protected from execution of a removal order during the time her TPS status is valid, but she remains removable based on the charge of inadmissibility” for unlawful entry); see also *Dhakal v. Sessions*, 895 F.3d 532, 537 (7th Cir. 2018) (citing *Matter of Sosa Ventura* for the proposition that “TPS protects its recipients from removal only while the designation is valid; . . . [DHS] views aliens in TPS as remaining subject, as a general matter, to removal proceedings.”); see generally, Heeren, *supra* note 94, at 1130 (explaining the recipients of discretionary reprieves such as deferred enforced departure remain subject to removal under the INA, although “DHS will generally not enforce a removal order” against a reprieve recipient).

²⁵⁴ See *Texas v. United States*, 809 F.3d 134, 148 (5th Cir. 2015) (explaining that deferred action “is not an enforceable right to remain in the United States and can be revoked at any time . . .”), *aff’d by an equally divided court*, *United States v. Texas*, 136 S. Ct. 2271 (2016).

²⁵⁵ See *Arpaio v. Obama*, 797 F.3d 11, 17 (D.C. Cir. 2015) (“[D]eferred action remains discretionary and reversible, and ‘confers no substantive right, immigration status or pathway to citizenship.’” (quoting DACA Memorandum, *supra* note 156, at 1)); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 412 (E.D.N.Y. 2018) (“By granting a removable alien deferred action, immigration officials convey that they do not currently intend to remove that individual from the country. As such, deferred action offers the recipient some assurance—however non-binding, unenforceable, and contingent on the recipient’s continued good behavior—that he or she may remain, at least for now, in the United States.”).

during the duration of the reprieve.²⁵⁶ Legal scholars use an array of terms for the peculiar sort of relief that discretionary reprieves provide: “quasi-legal status,”²⁵⁷ “liminal”²⁵⁸ or “twilight” status,²⁵⁹ and the “status of nonstatus.”²⁶⁰

Conclusion

The INA subjects the more than ten million unlawfully present aliens in the United States to removal without a limitations period and gives them few opportunities to legalize. Political views of this generally restrictive approach to legalization differ: some favor creating expanded, mostly ad hoc pathways to legalization;²⁶¹ others find the extant pathways to legalization too permissive and seek to curtail them.²⁶²

The debate is informed by the INA’s current approach to legalization. The INA does not provide an avenue for an appreciable number of unlawfully present aliens to obtain lawful status based on long-standing presence, as the registry statute once did. The INA’s penalties for unlawful entry and unlawful presence make it difficult for unlawfully present aliens to obtain lawful status based on qualifying family relationships (except, most notably, for nonimmigrant overstays who become immediate relatives of U.S. citizens). And it allows legalization on hardship grounds only in cases of truly extreme hardship to immediate relatives who are U.S. citizens or LPRs.

Forms of humanitarian relief from persecution and other harms, such as asylum and the U visa program, do not exclude unlawfully present aliens from their reach but nonetheless have specific objectives and tailored eligibility criteria. Meanwhile, discretionary reprieves from removal and the quasi-legal status they confer upon unlawfully present aliens have become major components of the U.S. immigration system.

²⁵⁶ See 8 C.F.R. § 274a.12(c) (establishing categories of aliens eligible to apply for employment authorization); *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 975 (9th Cir. 2017) (“[D]eferred action recipients do not accrue ‘unlawful presence’ for purposes of calculating when they may seek admission to the United States.”).

²⁵⁷ See, e.g., *Ingrid v. Eagly*, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1217 (2013); Motomura, *supra* note 9, at 226.

²⁵⁸ Jennifer M. Chacon, *Producing Liminal Legality*, 92 DENV. L. REV. 709 (2015).

²⁵⁹ David A. Martin, *Twilight Statuses: A Closer Examination of the Unauthorized Population*, in 2 MIGRATION POLICY INST. 1, 7–8 (June 2005).

²⁶⁰ See Heeren, *supra* 94, at 1115.

²⁶¹ See, e.g., American Dream and Promise Act, H.R. 6, 116th Cong. §§ 111, 211 (2019) (passed House on June 4, 2019) (providing for legalization programs for certain childhood arrivals and holders of TPS and Deferred Enforced Departure); CTR. FOR HUMAN RIGHTS & CONSTITUTIONAL LAW, LOOKING BEYOND DACA/DAPA, PART 1: ADVANCE PAROLE 5 (June 28, 2016), <https://www.centerforhumanrights.org/PDFs/06-28-16AdvanceParoleWebinarOutline-2.pdf> (“[A]dvocating for more robust availability of advance parole would grant thousand[s] of long-term resident immigrants the ability to obtain lawful permanent resident status.”).

²⁶² See, e.g., SECURE Act, S. 2192, 115th Cong. § 1307 (2017) (“A grant of parole into the United States based on an approved application for advance parole shall not be considered a parole for purposes of qualifying for adjustment of status to lawful permanent resident status in the United States”); Repeal of Executive Amnesty Act, S. 129, 114th Cong. § 102 (2015) (proposing to render all parolees ineligible for adjustment of status).

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