



## **PRACTICE ADVISORY<sup>1</sup>**

August 28, 2013

### **ADVANCE PAROLE FOR DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) RECIPIENTS**

By the Legal Action Center and Catholic Legal Immigration Network, Inc.<sup>2</sup>

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#### **I. Introduction**

On June 15, 2012, the Secretary of the United States Department of Homeland Security (DHS) issued a memorandum allowing individuals who entered the United States before turning sixteen and who meet certain guidelines to pursue Deferred Action for Childhood Arrivals (DACA).<sup>3</sup> One of the benefits of DACA is that the recipient may seek permission to travel abroad temporarily for humanitarian, educational, or employment purposes.<sup>4</sup> A DACA recipient who seeks to temporarily leave and re-enter the United States must apply for advance parole.<sup>5</sup>

Parole is “the authorization to allow an otherwise inadmissible person to physically proceed into the United States under certain safeguards and controls.”<sup>6</sup> Section 212(d)(5) of the Immigration and Nationality Act (INA) provides DHS with the discretionary authority to parole an individual into the United States “for urgent humanitarian reasons” or “significant public benefit.” Note that parole is not an “admission” into the United States; an individual who has been paroled has not been “admitted.”<sup>7</sup> Instead, the parolee is considered an “applicant for

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<sup>3</sup> DHS Secretary Janet Napolitano Memorandum on “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” June 15, 2012, *available at* <http://1.usa.gov/M5MZhH>.

<sup>4</sup> USCIS Frequently Asked Questions regarding DACA, *available at* <http://1.usa.gov/TJysu6> (hereinafter DACA FAQs).

<sup>5</sup> DACA FAQs.

<sup>6</sup> USCIS DACA National Standard Operating Procedures Manual at 125, Sept. 13, 2012, *available at* <http://cliniclegal.org/resources/deferred-action-childhood-arrivals> (hereinafter [DACA SOP](#)).

<sup>7</sup> INA § 212(d)(5).

admission” and, as such, is subject to removal proceedings based upon grounds of inadmissibility, notwithstanding the grant of parole.<sup>8</sup>

*Advance parole*, an administrative practice derived from the general parole authority in INA § 212(d)(5), gives an individual who is in the United States advance authorization to enter the United States after temporary travel abroad.<sup>9</sup> U.S. Citizenship and Immigration Services (USCIS) has the authority to grant advance parole and issue a Form I-512L, an advance parole authorization document.<sup>10</sup> This document allows a Customs and Border Protection (CBP) or other immigration inspector at a U.S. port-of-entry to parole an individual into the United States. Advance parole does not guarantee subsequent parole into the United States, however; the inspecting immigration official may, in his or her discretion, deny parole at the port-of-entry.<sup>11</sup>

This practice advisory provides guidance on advance parole eligibility for DACA recipients; applying for advance parole; legal issues, including any potential risks to the client, to consider prior to traveling; and the post-travel impact on future immigration benefits. It is not designed to be a substitute for legal advice on an individual basis from an attorney or Board of Immigration Appeals (BIA or Board) accredited representative.

## II. Advance Parole Eligibility for DACA Recipients

Prior to applying for advance parole, an individual must apply for and receive a DACA approval.<sup>12</sup> Indeed, an individual is *disqualified* from DACA if he or she departs the United States at any time after August 15, 2012 unless he or she is first granted *both* DACA and advance parole. In order to receive advance parole, a DACA recipient generally must show that s/he is traveling abroad for humanitarian, employment, or educational purposes.<sup>13</sup>

The USCIS Frequently Asked Questions (FAQs) on DACA provide examples of situations that fall under the categories of humanitarian, employment, and educational purposes.<sup>14</sup> Humanitarian purposes relate to “travel for emergent, compelling, or sympathetic circumstances.”<sup>15</sup> This category includes obtaining medical assistance, attending a funeral service for a family member, visiting a sick relative, or other urgent family-related purposes.<sup>16</sup> Educational purposes include study abroad programs and academic research.<sup>17</sup> Employment purposes include overseas assignments or client meetings, interviews, conferences, trainings in

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<sup>8</sup> See, e.g., *Matter of G-A-C*, 22 I&N Dec. 83, 88-89 (BIA 1998).

<sup>9</sup> 8 C.F.R. § 212.5(f); see also USCIS definition of Parolee, including definition of Advance Parole, <http://1.usa.gov/91KMKG>; USCIS Adjudicator’s Field Manual, § 54.1(c); *Matter of Arrabally & Yerrabelly*, 25 I&N Dec. 771, 777 (BIA 2012) (providing general information about advance parole).

<sup>10</sup> INA § 212(d)(5); 8 C.F.R. §§ 212.5(a), (f); USCIS Adjudicator’s Field Manual, § 54.1(a).

<sup>11</sup> Instructions for Application for Travel Document at 1, available at <http://1.usa.gov/xOVcM> (hereinafter Form I-131 instructions).

<sup>12</sup> DACA FAQs.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> DACA SOP at 126; DACA FAQs.

<sup>16</sup> *Id.*

<sup>17</sup> DACA SOP at 125; DACA FAQs.

other countries, and travel needed to pursue a job with a foreign employer in the United States.<sup>18</sup> The FAQs expressly provide that travel abroad for vacation is not a valid purpose for advance parole.<sup>19</sup>

USCIS guidance states that “USCIS will determine whether [the requester’s] purpose for international travel is justifiable based on the circumstances describe[d] in [the] request.”<sup>20</sup> This language appears to allow USCIS to decide DACA requests on a case-by-case basis and not to limit reasons for travel to the examples provided in the DACA FAQs. The USCIS DACA National Standard Operating Procedures Manual also provides that the humanitarian, educational, and employment categories “are to be construed broadly.”<sup>21</sup> In addition, the instructions for the USCIS Application for Travel Document (Form I-131), used to apply for advance parole, state that the humanitarian, employment, and educational purposes “include, but are not limited to” the examples listed in the instructions.<sup>22</sup> As such, advocates may make the case for advance parole when DACA recipients seek to travel for humanitarian, educational, or employment purposes that USCIS has not specifically listed.<sup>23</sup>

### **III. Applying for Advance Parole**

To apply for advance parole, a DACA recipient must submit Form I-131 to USCIS. The advance parole applicant must submit proof of DACA status – either a copy of the USCIS Notice of Action (Form I-797) showing a DACA approval or a copy of an approval order, notice or letter from U.S. Immigration and Customs Enforcement (ICE). The filing fee is \$360. In Part 4 of Form I-131, the DACA recipient must explain the purpose of the trip and the countries the applicant plans to visit. In addition, the requester must submit evidence of the purpose of the trip, the intended date(s) of travel, and the duration of the trip(s).<sup>24</sup>

DACA recipients must provide as much evidence as possible to explain the purpose of intended travel abroad. For a trip involving a humanitarian purpose, proper evidence includes but is not limited to the following:

- A letter from a medical professional explaining the reason for the need to travel abroad to obtain medical treatment;
- A letter from a hospital or treating medical professional explaining the relative’s ill condition; and/or
- A death certificate for a deceased relative

For a trip involving an educational purpose, evidence includes but is not limited to the following:

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<sup>18</sup> DACA SOP at 126; *see also*, DACA FAQs.

<sup>19</sup> DACA FAQs; DACA SOP at 125-26.

<sup>20</sup> DACA FAQs.

<sup>21</sup> DACA SOP at 125.

<sup>22</sup> Form I-131 instructions, at 4-5.

<sup>23</sup> One practitioner has reported obtaining a grant of advance parole for a DACA recipient who sought to travel abroad because of a death in the family and to undergo consular processing.

<sup>24</sup> USCIS Form I-131 at 2-4, Form I-131 instructions at 8.

- A letter from an educational institution explaining the purpose of travel abroad; or
- A document showing enrollment in a program or class and documents showing the applicant is required to travel for a program or class or will benefit from such travel.

For a trip involving an employment purpose, appropriate evidence includes but is not limited to the following:

- A letter from an employer explaining the need to travel abroad; and/or
- A document showing an employment need, such as a conference or training program, and showing the applicant's participation.<sup>25</sup>

A single Form I-131 may be used to request that the DACA recipient be allowed to leave and re-enter the United States multiple times. However, the recipient must show that each trip is intended to serve a humanitarian, employment, or educational purpose and explain why the DACA recipient needs to travel multiple times.

Generally, USCIS does not grant expedited requests for advance parole for DACA recipients. However, in a dire emergency, USCIS is willing to consider an expedited request at a local USCIS office.<sup>26</sup>

#### **IV. Travel Logistics**

A DACA recipient who is granted advance parole receives an Authorization for Parole of an Alien into the United States (I-512L). The I-512L authorizes an immigration inspector at a port-of-entry to parole the individual into the United States. The document contains a date by which the individual must present the document to an inspector at a port-of-entry to seek parole. USCIS issues an I-512L that is valid for the duration of the intended trip.<sup>27</sup>

If the expected dates of travel are relatively soon after the date the advance parole application is submitted and approved, the individual needs to be ready to travel promptly after receiving the authorization document. The travel itinerary needs to be clear and well-organized to ensure that the individual returns to the United States within the time allotted in the document.

The advance parole authorization document makes clear that advance parole does not guarantee entry into the United States. DHS reserves the right to revoke or terminate the advance parole document. The individual is also subject to inspection by an immigration inspector at the time of seeking parole into the United States. DACA recipients should be aware of these facts – and of any risks presented in their cases – prior to traveling abroad.

#### **V. Legal Issues to Consider Prior to Traveling Abroad**

##### **A. Prior Removal Orders**

Prior to traveling abroad, it is important to determine whether the DACA recipient has an unexecuted deportation or removal order. If such an order exists, and if the DACA recipient

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<sup>25</sup> DACA SOP at 125-126. *See also*, DACA FAQs; Form I-131 instructions at 8.

<sup>26</sup> DACA SOP at 126.

<sup>27</sup> Form I-131 instructions at 8.

were to depart the United States on advance parole, he or she likely would be found to have executed the deportation/removal order and would face harsh future immigration consequences, such as the inability to re-enter the United States for a given period of time.

To avoid this, a DACA recipient with an unexecuted removal order can submit a motion to reopen removal proceedings with the Immigration Court or the BIA. Once removal proceedings are reopened, the removal order no longer exists. The DACA recipient then can move to administratively close or terminate the reopened proceedings. If either termination of proceedings or administrative closure is granted, the DACA recipient can travel on advance parole without risking the consequences of an executed removal order.

A motion to reopen asks the court to reopen proceedings for consideration of new evidence<sup>28</sup>, which in this case would be the grant of DACA and the recipient's need to travel on advance parole. A motion to reopen a final removal order of an Immigration Judge must be filed with the Immigration Court having administrative control over the Record of Proceedings.<sup>29</sup> Where an appeal has been decided by the BIA and no case is currently pending, a motion to reopen is to be filed with the Board.<sup>30</sup> Generally, a party may file only one motion to reopen in a case and must do so within 90 days of the date of the final removal order.<sup>31</sup> However, these number and time limitations do not apply to jointly filed motions.<sup>32</sup> Thus, regardless of whether the DACA recipient's case was decided by the Immigration Court or the Board, counsel may wish to contact the relevant ICE Office of the Chief Council (OCC) to request that the parties jointly move to reopen and then administratively close or terminate the DACA recipient's removal proceedings.<sup>33</sup> Should OCC not agree, and assuming a motion to reopen is barred by the time or number limitations, both immigration judges and the BIA have the *sua sponte* authority to reopen cases on their own motions.<sup>34</sup> Consequently, as a last resort, a DACA recipient can request that the immigration judge or BIA reopen proceedings *sua sponte*.<sup>35</sup>

## B. Unlawful Presence Bars

Any decisions regarding travel outside of the United States should include an analysis of a DACA recipient's unlawful presence in the United States to determine whether the recipient is subject to inadmissibility bars of INA § 212(a)(9)(B) (sometimes referred to as the three- and

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<sup>28</sup> INA § 240(c)(7).

<sup>29</sup> 8 C.F.R. § 1003.23(b)(1)(ii).

<sup>30</sup> 8 C.F.R. § 1003.2(a); BIA Practice Manual § 5.2(a)(iii)(A).

<sup>31</sup> INA §§ 240(c)(7)(A), (7)(C)(i).

<sup>32</sup> 8 C.F.R. §§ 1003.2(c)(3)(iii); 1003.23(b)(4)(iv).

<sup>33</sup> Long-standing ICE policy has recognized that the agency should consider joining motions to reopen in appropriate cases. *See, e.g.*, John Morton, ICE Director, [Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens](#) (June 17, 2011) (recognizing that “prosecutorial discretion” involves responding to or joining in a motion to reopen); William J. Howard, Principal Legal Advisor, [Prosecutorial Discretion](#) (October 24, 2005) (same).

<sup>34</sup> 8 C.F.R. §§ 103.2(a); 1003.23(b)(1).

<sup>35</sup> Even if OCC does not cooperate, the BIA has held that the Board and Immigration Judges may administratively close a case over the objection of either party. *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012).

ten-year bars). Individuals under the age of 18 do not accrue unlawful presence for purposes of these bars and DACA recipients are considered to be lawfully present in the U.S. during the DACA grant period.<sup>36</sup> However, DACA recipients who applied for DACA after turning 18 as well as DACA recipients who departed the United States and reentered or attempted to reenter the United States without being admitted – including those who are under the age of 18 – will have likely accrued unlawful presence prior to obtaining DACA.<sup>37</sup>

If the individual accrued unlawful presence under INA § 212(a)(9)(B) prior to obtaining DACA and subsequently travels with advance parole, does the individual become subject to the unlawful presence ground of inadmissibility upon departure from the United States? According to a recent BIA precedent decision, the answer should be no. In *Matter of Arrabally and Yerrabelly*, the Board held that travel on advance parole does not constitute a “departure” for purposes of the 10-year-bar for unlawful presence under INA § 212(a)(9)(B)(i)(II).<sup>38</sup> While *Matter of Arrabally and Yerrabelly* addressed advance parole in the context of adjustment applications, the USCIS Administrative Appeals Office (AAO) has since applied this analysis in at least several cases involving individuals holding Temporary Protected Status (TPS), each of whom left temporarily following the accumulation of more than one year of unlawful presence and then returned to the United States under advance parole.<sup>39</sup> Based on *Matter of Arrabally and Yerrabelly*, the AAO found that these applicants were not inadmissible and that waivers of inadmissibility were not necessary.<sup>40</sup>

Although there has been no formal written guidance on this issue yet, it appears likely that USCIS views *Matter of Arrabally and Yerrabelly* as applicable to DACA recipients traveling on advance parole.<sup>41</sup> Indeed, some DACA recipients have received advance parole authorizations (Form I-512L) explicitly stating that traveling abroad under advance parole is not a departure within the context of INA § 212(a)(9)(B), pursuant to *Matter of Arrabally and Yerrabelly*.<sup>42</sup> While this is a promising development, an I-512L issued more recently by the USCIS Nebraska Service Center does not include a reference to *Matter of Arrabally and*

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<sup>36</sup> DACA FAQs.

<sup>37</sup> INA §§ 212(a)(9)(B)(iii); 212(a)(9)(C) (minors not excepted statutorily from the accrual of unlawful presence under this subsection).

<sup>38</sup> *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012). This holding was applied in a recent Court of Appeals decision: *Ortiz-Bouchet v. United States A.G.*, 714 F.3d 1353, 1357 (11th Cir. 2013) (citing *Matter of Arrabally and Yerrabelly* and holding that a noncitizen’s exit pursuant to a grant of advance parole was not a “departure” within the meaning of § 212(a)(9)(B)(i)(II) and that the noncitizen was not inadmissible under this section).

<sup>39</sup> See, e.g., [August 7, 2012 AAO Decision](#); [July 20, 2012 AAO Decision](#); [July 16, 2012 AAO Decision](#).

<sup>40</sup> *Id.*

<sup>41</sup> In November 2012, USCIS proposed changes to the instructions accompanying the Form I-131 that would apply the holding in *Matter of Arrabally and Yerrabelly* to DACA requesters. The revised Form I-131 issued in March 2013 did not include this advisal.

<sup>42</sup> The [I-512L](#) (Authorization for Parole of an Alien Into the United States), issued in May 2013, states as follows: “Traveling abroad and returning to the United States under a grant of advance parole is not, itself, a ‘departure’ for purposes of section 212(a)(9)(B).” The document is on file with the author.

*Yerrabelly* or an explanation of the case's impact on DACA recipients.<sup>43</sup> Regardless of the presence or absence of a warning on the I-512L, counsel should be prepared to argue that *Matter of Arrabally and Yerrabelly's* holding precludes an inspecting immigration officer's application of INA § 212(a)(9)(B) to a DACA recipient returning to the United States pursuant to grant of advance parole. Though *Matter of Arrabally and Yerrabelly* is a precedent decision, attorneys may want to continue to monitor developments in this area before advising clients on the impact of travel.

It is also important to note that a DACA recipient who has already triggered the unlawful presence bars under INA § 212(a)(9)(B) or the permanent bar under INA § 212(a)(9)(C) (by previously leaving and re-entering without advance parole) will still be subject to these bars. Future travel under advance parole will not cure previously incurred bars.

### **C. Other Inadmissibility Considerations**

A DACA recipient granted advance parole who returns to the United States shall be considered an applicant for admission.<sup>44</sup> As such, the inspecting immigration officer may deny entry into the United States if the officer finds that any of the inadmissibility grounds apply.<sup>45</sup> Thus, prior to departing the United States, DACA recipients with advance parole must consider not only whether they run afoul of the unlawful presence bars discussed above, but also all other inadmissibility grounds except for INA § 212(a)(7) (documentation requirements). Counsel should pay particular attention to the criminal inadmissibility grounds identified at INA § 212(a)(2), which are much broader than the crime disqualifications for DACA.<sup>46</sup> Counsel should also be mindful that immigration-related fraud or misrepresentation and false claims to U.S. citizenship can bar admission.<sup>47</sup>

## **VI. Post-Travel Impact on Future Immigration Benefits**

Advance parole may make some DACA recipients pursuing lawful permanent residency through immigrant visa petitions eligible for adjustment of status. If a DACA recipient travels abroad and returns under a grant of advance parole, then s/he is "paroled" into the United States within the meaning of INA §245(a), and may qualify for adjustment of status.

It's important to note, however, that eligibility for adjustment of status will most likely only apply to those DACA recipients who qualify to apply as "immediate relatives", i.e. the spouse or child of a U.S. citizen or the parent of an adult U.S. citizen. DACA recipients waiting to immigrate in a preference category who have previously worked without authorization or been

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<sup>43</sup> This [I-512L](#) was issued in July 2013. The document is on file with the author.

<sup>44</sup> Form I-131 instructions at 5.

<sup>45</sup> See generally INA §§ 212(a) (inadmissibility grounds); 235(a) and (b) (inspection of applicants for admission); 8 C.F.R. § 235.1(f)(1) (applicants for admission must establish entitlement to enter).

<sup>46</sup> For example, an individual convicted of misdemeanor simple possession of a controlled substance and sentenced to fewer than 90 days in prison would not be ineligible for DACA on that basis alone, but would be inadmissible. Compare DACA FAQ with INA § 212(a)(2)(A)(i)(II).

<sup>47</sup> INA § 212(a)(6)(C).

in the U.S. without lawful status are ineligible to adjust status under INA §245(a).<sup>48</sup> But for those DACA recipients who are married to a U.S citizen, or qualify as children of U.S. citizens, travel on advance parole may have the dual benefits of eliminating exposure to the unlawful presence ground of inadmissibility and creating eligibility to adjust status in the United States.

At least one practitioner has shared that a DACA recipient successfully adjusted after traveling abroad on advance parole. Similarly, TPS recipients who originally entered without inspection, and thus – like DACA recipients – were unable to adjust, reportedly have been able to adjust after returning on advance parole. In these cases, their status as parolees upon their return rendered them eligible for adjustment.

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<sup>48</sup> INA § 245(c)(2); 8 CFR § 245.1(d)(3); AFM at 40.9.