



## **Streamlining Dreamers' Access to Employment-Based Visas Using D-3 Waivers: What You Need To Know**

### **Introduction**

With Deferred Action for Childhood Arrival (DACA)'s future under threat in the courts and continuing stalemate in Congress, many Dreamers with and without DACA face high barriers and great uncertainty about their ability to participate and contribute to our nation's workforce. Hundreds of thousands of DACA recipients are already employed across the U.S., and there are over [400,000 undocumented students](#) enrolled in higher education at the undergraduate and graduate levels, many of whom are multilingual, enriching the educational experiences of all students and helping to produce better members of an increasingly globalized workforce.

The purpose of this explainer is to provide information on why Dreamers are eligible for employment-based visa options, the obstacles that DACA recipients and other Dreamers face in accessing such visas, what are D-3 waivers, why they are needed, and why the Biden administration's action to provide clarifying guidance for D-3 waivers is significant. This document also provides a more indepth look at DACA recipients who have been sponsored for H-1B visas and additional resources.

### **Why are many Dreamers eligible for employment-based visa options?**

DACA recipients and other Dreamers are pursuing academic degrees and careers in STEM, healthcare, teaching, and other fields that require specialized training. There also are many DACA recipients that have demonstrated outstanding achievements in their areas of study and work.

Based on their education and achievements, many Dreamers are eligible to pursue employment-based temporary visas, which would allow them to adjust their status and fill critical workforce needs while ensuring that U.S. employers and communities benefit from their contributions and talent. For example, this includes H-1B visas, which is an employment-based visa that allows employers in the U.S. to hire non-citizens to fill positions in a "speciality occupation," and which generally require applicants to have a Bachelor's degree or higher in the academic field that aligns with the position. However, while some DACA recipients have received approval for employment-based visas - such as an H-1B visa - based on their academic credentials, employment or employment offers, it has been very difficult in practice for many DACA recipients or other Dreamers, and their employers to pursue these existing visa options.

Securing employment-based visas usually requires people to leave the United States and apply to re-enter. DACA recipients and Dreamers who have accrued more than 180 days of “unlawful presence” in the U.S. and/or do not have “initial lawful entry” to the U.S. could face 3 or 10 year bars to re-entry into the U.S., unless they obtain what is known as a “**D-3 Waiver.**”

### **What is the D-3 waiver?**

The Immigration and Nationality Act §212(d)(3) waiver, known commonly as the D-3 waiver, can excuse a wide range of grounds of inadmissibility to the United States, including unlawful presence, the only immigration law violation of most undocumented graduates. An approved D-3 waiver removes that bar for temporary visa purposes, allowing the Dreamer to obtain the employment-based temporary visa, such as an H-1B visa, at a U.S. consulate abroad, and then enter the United States in valid status with work authorization.

### **Why is a change in the D-3 waiver process needed?**

Currently, it can be a long and uncertain process for DACA recipients to obtain the D-3 waiver. D3s are rarely used by Dreamers because there is very little written guidance - meaning Dreamers have to risk leaving the United States to wait abroad for an unknown number of months for their waivers to be adjudicated. The adjudication process is also subjective. Moreover, the process requires communication between different federal agencies, including consular services in the Department of State (consulates or embassies abroad), Customs and Border Protection (CBP), and US Citizenship and Immigration Service (USCIS).

While most D-3 waivers for DACA recipients have been ultimately approved under this Administration, the significant uncertainty, anxiety, and long waiting periods are practical deterrents. This results in few eligible Dreamers and employers pursuing this route.

### **Why is the new Administrative action significant?**

On June 18th, the Biden Administration announced new administrative actions to clarify the guidance for D-3 waivers, including new language in the Foreign Affairs Manual, which would allow for more predictable and streamlined access to employment-based visas for eligible DACA recipients and other Dreamers. While the D-3 waiver process exists, providing clear guidance enables college-educated and workforce-ready Dreamers to eventually adjust their immigration status.

This is a smart, strategic approach that enables these individuals to adjust their status and fill critical workforce needs while ensuring that U.S. employers and communities benefit from their contributions and talent.

### **A Case Study: Dreamers and H-1B Visas**

Many Dreamers, who have graduated from U.S. colleges and universities, may be eligible for an array of employment-based visas. H-1B visas are a good example.. A streamlined process for Dreamers to access these employment-based visas benefits Dreamers, employers, and the U.S. workforce.

An H-1B is a non-immigrant visa that allows U.S. companies to employ foreign workers in specialty occupations that require theoretical or technical expertise in specialized fields such as IT, engineering, medicine, architecture, and more. The applicant must have at least a bachelor's degree or its equivalent in a related field. The H-1B visa is initially granted for up to three years but can be extended for a maximum of six years, and an H-1B visa holder can retain their status during their application for a green card. While the H-1B visa is a temporary visa, it uses "status," a very important term in immigration law. DACA is not a status. With status, the H-1B holder has a much greater possibility of being able to adjust to lawful permanent residence (LPR), or in other words, apply for a green card.

There is an annual cap on the number of new H-1B visas issued. Currently, the cap is set at 65,000 visas per fiscal year, with an additional 20,000 visas available for applicants who have earned a master's degree or higher from a U.S. institution. There are several exemptions to the H-1B cap. For example, all colleges and universities, related or affiliated nonprofits, and governmental or nonprofit research organizations are exempt from the cap.

### **Consider the following examples:**

1. **Dr. L** grew up in Arizona, went to Arizona State University as an undergraduate and Harvard University for medical school. She was a radiation oncology resident at a major teaching hospital and a DACA recipient. Her hospital petitioned for an H-1B visa for her, which was approved. She then traveled this spring to a consulate outside the U.S., was considered for a D-3 waiver and came back to the US in H-1B status. She will now return to her home state to work at a major cancer center. She does not have to worry about the fate of DACA. .
2. **A** nurse, who grew up in Florida who was able to move into H-1B status and avoid a [deportation order](#).
3. **A** financial analyst at a large public university, received her bachelor's and master's as a DACA recipient. Her employer sponsored her for an H-1B visa, which was

approved. She traveled outside the country to apply for the H-1B visa stamp, and was able to move from DACA to H-1B status. She can now pursue a green card through employer-sponsorship.

**But, for every successful case, there are many more individuals who would greatly benefit from clarified guidance and a more streamlined process:**

4. In a case where the individual is still waiting for the D-3 waiver, an emergency medicine doctor on DACA was sponsored for H-1B by his employer. He traveled to El Salvador in November 2023 to apply for the H-1B visa stamp at the US Embassy there. Unfortunately, the D-3 waiver is still pending seven months later. The doctor had to return to the U.S. using advance parole because neither he nor his employer could have him wait in El Salvador.
5. A robotics engineer, who is fully undocumented, and who earned a master's in engineering, has a job offer at a major robotics manufacturer. With clearer D-3 waiver guidance, the manufacturer could sponsor her for an O-1 or TN that would allow her move into lawful status, and more fully contribute her talents.
6. An engineer in bridge construction, who is fully undocumented and earned his master's in civil engineering, received a job offer from a firm who sponsored him for an H-1B. While the H-1B was approved, without clearer D-3 guidance, the engineer does not feel he is in a secure enough position to travel to apply for D-3 and move into H1-B status. The firm cannot hire bridge engineers fast enough, and very much seeks to bring this bridge engineer on board.

## **Resources**

[Messaging Guidance on D3 Waiver & Dreamers](#) (Presidents' Alliance, TheDream.US, Cornell Law School Path2Papers)

### **Supporting Data on Undocumented Students and Graduates**

- **Data on undocumented students in higher education:** There are over [400,000 undocumented students](#) in higher education (Higher Ed Immigration Portal).
- [2024 Factsheet on Undocumented students in Higher Education](#) (Presidents' Alliance)
- **TheDream.US & Golden Door Scholars** [2024 Alumni Survey Report](#) (June 2024)

### **Additional Explainers on Employment-Based Pathways for Dreamers**

- [Employment-Based Immigration Visas For DACA Recipients](#) (ILRC)
- [The D-3 Waiver and H-1B Visa: FAQ for Students](#) (CBK Immigration)

- [Adjustment of Status Through Work Visas for DACA Recipients: Explainer](#) (National Immigration Forum)
- [Resources on Employment-Based Pathways for DACA Recipients and Other Non-Citizens](#) (Higher Ed Immigration Portal/Presidents' Alliance)
- [SUCCESS 2024 Session on Employment-Based Pathways for Dreamers](#) (Higher Ed Immigration Portal)
- [Admin Relief for Longtime Residents: Homegrown Talent](#) (Immigration Hub)

*The goal of this document is to provide general information and is not meant to act as a substitute for legal advice from an attorney.*