



## Back on the Table

### U.S. Legalization and the Unauthorized Immigrant Groups that Could Factor in the Debate

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**Migration Policy Institute**

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# Contents

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- Executive Summary** ..... 1
  
- 1 Introduction** ..... 3
  
- 2 The Unauthorized Immigrant Population: A Profile** ..... 5
  - Unauthorized Immigrant Subgroups ..... 7
  
- 3 Policy Options: Legislative Reform and Executive Action** ..... 18
  - A. Legislative Solutions ..... 18
  - B. Executive Action ..... 26
  
- 4 Conclusion** ..... 29
  
- About the Authors** ..... 30
  
- Acknowledgments** ..... 31

## Executive Summary

Sixty percent of the estimated 11 million unauthorized immigrants in the United States have lived in the country for a decade or more, and are thus deeply embedded in its workforce, economy, and communities. Just one-fifth of the unauthorized immigrant population has been in the United States for less than five years. Even if the U.S. government intended to deport everyone without legal status, it would require major resources and result in

large-scale dislocations. Yet attempts to legalize the unauthorized immigrant population have been largely unsuccessful for at least two decades, thwarting any prospects for broader reform of a U.S. immigration system that urgently requires updating. Amid this stasis, Congress has mounted new obstacles that make it more difficult for those who would otherwise have been eligible to legalize to do so.

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The Biden administration has unveiled a framework for a pathway to citizenship for unauthorized immigrants, urging Congress to take up legalization. This report provides an analysis of the composition and characteristics of the unauthorized immigrant population in the United States today. It draws upon a

### BOX 1 Definition of Legalization

In this report, the term “legalization” refers to the process by which qualifying noncitizens lacking lawful immigration status, including those in quasi-legal statuses such as Deferred Action for Childhood Arrivals (DACA), can access some form of legal status that gives them protection from removal and the ability to work lawfully.

unique Migration Policy Institute (MPI) methodology that allows the assignment of legal status in U.S. Census Bureau data. It also takes stock of the legalization options that exist, particularly amid growing calls to recognize the role immigrants, including the unauthorized, have played in providing essential services during the COVID-19 pandemic and their outsized vulnerability to the disease.

Within the overall unauthorized immigrant population, some subgroups with particularly strong equities stand out:

- ▶ **Recipients of Deferred Action for Childhood Arrivals (DACA), and DREAMers more broadly.** A legalization program for DACA holders could offer more enduring protections to up to 1.7 million individuals potentially eligible for DACA by December 2021. Such a legalization program could also broaden eligibility criteria. Depending on how the requirements are drawn, MPI estimates between 1.9 million and 2.9 million unauthorized immigrants brought to the United States as minors could be eligible.
- ▶ **Recipients of Temporary Protected Status (TPS).** Of the 320,000 people with TPS as of September 2020, 80 percent have held the status for at least ten years.

- ▶ **Essential workers.** Between 1.1 million and 5.6 million unauthorized immigrants could be considered “essential” workers, depending on how the occupations considered essential are defined. This category has emerged in the public conversation as a result of the COVID-19 outbreak.
- ▶ **Farmworkers.** Close to half of the estimated 2.4 million agricultural workers not on temporary visas were unauthorized immigrants, according to data from the 2015-16 National Agricultural Workers Survey, the most recent available from the U.S. Department of Labor. They provide essential food supply services that have become especially vital for the country’s residents during the pandemic.
- ▶ **Family- and employer-sponsored immigrants.** MPI estimates 1.4 million unauthorized immigrants have a U.S.-citizen or permanent resident spouse, and at least 1.7 million others are most likely to have employer sponsors. Both groups would be able to attain permanent resident status (also known as getting a green card) if not for impediments imposed by Congress in 1996.
- ▶ **Parents of U.S. citizens and permanent residents.** As of 2021, MPI estimates there were 3.4 million unauthorized immigrants who live with U.S.- citizen or permanent resident children and have been in the country for at least five years.

The overlap among these subgroups is not measurable and is likely extensive—e.g., unauthorized immigrants with a U.S.-citizen spouse may have DACA and also perform essential work—so it would not be accurate to add them together to estimate the total number of unauthorized immigrants who fall into one or more of these subgroups.

There are several ways to approach legalization for these subgroups or for the broader unauthorized immigrant population. Legislation is clearly the most durable mechanism to establish legalization. Congress could provide a broad path to legal status and eventually citizenship. One example of this is the legalization framework that President Joe Biden sent to Congress upon his inauguration, which would make anyone in the country illegally as of January 1, 2021 eligible to apply.

Given the political difficulties inherent in achieving broad legalizations, policymakers could tackle the challenge piecemeal, creating pathways to legal status for one or more of the above subgroups. Elements of U.S. immigration law that have fallen into disuse, such as the registry provision (which allows unauthorized immigrants who have been in the country for an extended period and meet other requirements to get green cards), could be revived. Elements that have served as barriers to legalization could be revisited, including the narrowed options for cancellation of removal and the three- and ten-year unlawful presence bars, which have effectively prevented otherwise eligible unauthorized immigrants from attaining lawful permanent residence.

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Alternatively, short of a pathway to citizenship, legislation could create a limited, renewable legal status that provides more protections and certainty than measures created through administrative action, such as DACA and TPS, which provide only nondurable relief from deportation and work authorization.

If legislation fails, executive action could provide legal protections—albeit less durable—to unauthorized immigrants who might otherwise be subject to deportation. The executive branch has several tools it can use to offer these protections, including grants of deferred action, parole-in-place, Deferred Enforced Departure (DED), and TPS.

Addressing the status of the unauthorized population in some fashion remains foundational to establishing a workable U.S. immigration system in the coming years. While legalization can be broad or limited, both in terms of the populations it covers and the scope of relief it offers, providing permanent legal protections to them serves not only their interests but national interests as well.

## 1 Introduction

The issue of legalization for unauthorized immigrants in the United States has paralyzed the progress of immigration reform legislation for the last 20 years. Should any unauthorized immigrants be eligible for legal status at all? Who should be legalized? Under what conditions? How quickly? These questions and the political reactions that they trigger have repeatedly brought lawmakers to an impasse. Those on the right, generally averse to legalization, see it as rewarding lawbreakers and inviting more illegal immigration, while those on the left have broadly called for a path to citizenship for millions as an equitable outcome for people who are contributing to the life of the nation.

The term legalization means different things to different people. In this report, it refers to the process by which qualifying unauthorized immigrants, including those in quasi-legal statuses such as Temporary Protected Status (TPS) or Deferred Action for Childhood Arrivals (DACA),<sup>1</sup> can access some form of legal status that gives them protections from removal and the ability to work lawfully.<sup>2</sup>

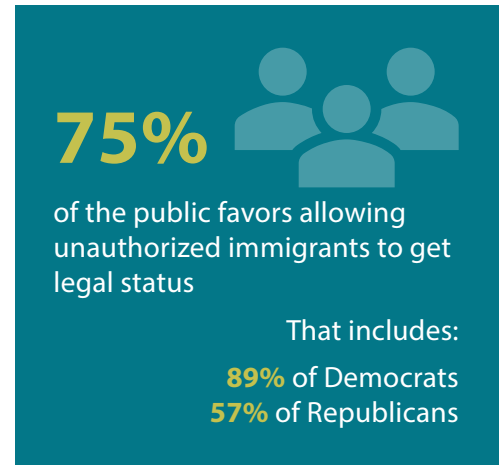
### BOX 2 About the Rethinking U.S. Immigration Policy Project

This report is part of a multiyear Migration Policy Institute (MPI) project, Rethinking U.S. Immigration Policy. At a time when U.S. immigration realities are changing rapidly, this initiative is generating a big-picture, evidence-driven vision of the role immigration can and should play in America's future. It is providing research, analysis, and policy ideas and proposals—both administrative and legislative—that reflect these new realities and needs for immigration to better align with U.S. national interests.

To learn more about the project and read other reports and policy briefs generated by the Rethinking U.S. Immigration Policy initiative, see [bit.ly/RethinkingImmigration](https://bit.ly/RethinkingImmigration).

- 1 The Deferred Action for Childhood Arrivals (DACA) program is open to unauthorized immigrants who were 15 or younger when they entered the United States; were 30 or younger on June 15, 2012; have lived in the United States since June 15, 2007; have clean criminal records; and are in school, have a high school degree or equivalent, or are veterans. See U.S. Citizenship and Immigration Services (USCIS), "Consideration of Deferred Action for Childhood Arrivals (DACA)," updated January 21, 2021.
- 2 For more on quasi-legal statuses, also known as liminal status or liminal legality, see Cecilia Menjivar, "Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States," *American Journal of Sociology* 111, no. 4 (2006): 999-1037.

There has been a growing public consensus in favor of some form of legalization. According to a June 2020 Pew Research Center poll, 75 percent of the U.S. public, including 89 percent of Democrats and 57 percent of Republicans, agreed that unauthorized immigrants who meet certain requirements should be able to stay legally.<sup>3</sup> However, what this support means to different people—including whether these immigrants should receive a temporary renewable status or a permanent status with a path to citizenship, and how liberal or restrictive the eligibility requirements should be—varies greatly. Further, those who oppose increased immigration in general tend to have more intense feelings on the issue than do those who generally favor it.<sup>4</sup>



The rise in the unauthorized population in the United States is a product both of immigration policies that do not align with U.S. labor market realities and of a political stalemate that prevents any significant legislative reform. Throughout the 1980s, 1990s, and 2000s, the availability of jobs in the United States and limited economic opportunities in Mexico led many more Mexicans to make their way across the U.S.-Mexico border than U.S. visa quotas permitted. These push-and-pull factors led to a 249 percent growth in the unauthorized immigrant population between 1990 and 2007, rising from 3.5 million to 12.3 million, despite increasing levels of resources devoted to border enforcement.<sup>5</sup> Since then, the size of the unauthorized population has decreased from its 2007 peak to 11.0 million in 2018, mostly due to reduced economic opportunities in the United States and increased opportunities and declining demographic pressures in Mexico.<sup>6</sup>

Fulfilling his campaign pledge to send Congress a bill during his first 100 days, President Biden on January 20 unveiled a legislative framework that would offer a pathway to citizenship for the unauthorized population.<sup>7</sup> While presidential leadership is key, it is Congress that will make or break such a proposal. In the event of a continuing impasse on Capitol Hill, after failed attempts at immigration reform in 2006, 2007, and 2013, executive actions offer an alternative channel for providing relief, albeit more limited and less durable.

3 Jens Manuel Krogstad, “Americans Broadly Support Legal Status for Immigrants Brought to the U.S. Illegally as Children,” Pew Research Center Fact Tank blog, June 17, 2020.

4 Conservatives in this survey were both more opposed to immigration and described as “more sensitive” to issues relating to immigration than other societal groups. This means they think about immigration more often and have stronger emotions about it. Questions in this survey were not asked about legalization specifically. See Stephen Hawkins, Daniel Yudkin, Miriam Juan-Torres, and Tim Dixon, *Hidden Tribes: A Study of America’s Polarized Landscape* (New York: More in Common, 2018), 62.

5 Pew Research Center, “Unauthorized Immigrant Population Trends for States, Birth Countries and Regions,” Pew Research Center, June 12, 2019.

6 Randy Capps, Julia Gelatt, Ariel G. Ruiz Soto, and Jennifer Van Hook, *Unauthorized Immigrants in the United States: Stable Numbers, Changing Origins* (Washington, DC: Migration Policy Institute, 2020), 1.

7 Biden-Harris Transition, “Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System” (press release, January 20, 2021).

The profile of the unauthorized immigrant population, particularly those crossing over the U.S.-Mexico border, is changing.<sup>8</sup> The flow arriving at the border today is dominated by mixed migration from Central America, i.e. migrants seeking protection, alongside others in search of economic opportunity, as well as those migrating for a combination of these reasons.<sup>9</sup> Thus, to achieve more effective migration management and reduce illegality, policies aimed at legalizing the unauthorized population should be paired with a more comprehensive response to humanitarian arrivals and a better alignment of legal immigration channels with U.S. labor market needs.<sup>10</sup>

When considering legalization policy options, it is also important to note that there is historical precedent for policymakers to cover narrower subgroups, rather than grant the fullest possible protections by covering the entire unauthorized population. Indeed, the United States has carried out smaller-scale legalizations throughout the past century, which have ultimately provided legal status to more people with much less political resistance than that engendered by contentious large-scale programs.<sup>11</sup>

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The purpose of this report is to provide an analysis of the numbers and characteristics of the various subsets of the unauthorized population—including new insights that have emerged during the COVID-19 crisis—and to re-examine the range and scope of options available to policymakers as the country re-engages in the legalization debate.<sup>12</sup>

## 2 The Unauthorized Immigrant Population: A Profile

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The unauthorized population, including those with temporary protections such as DACA and TPS, has been estimated to number between 10.5 million and 12 million.<sup>13</sup> The several reliable estimates of this population have slight variances that are explained by the different methodologies they employ. The Migration Policy Institute (MPI) estimated that as of 2018, the unauthorized population numbered 11.0 million. The Center

8 People who entered the country legally but overstayed their visas made up an estimated 44 percent of the unauthorized immigrant population as of 2015. See Robert Warren, “DHS Overestimates Visa Overstays for 2016; Overstay Population Growth Near Zero During the Year,” *Journal on Migration and Human Security* 5, no. 4 (2017): 768-79.

9 Randy Capps, Doris Meissner, Ariel G. Ruiz Soto, Jessica Bolter, and Sarah Pierce, *From Control to Crisis: Changing Trends and Policies Reshaping U.S.-Mexico Border Enforcement* (Washington, DC: Migration Policy Institute, 2019), 22.

10 For more on creating temporary labor migration pathways for migrants from Central America, see Andrew Selee and Ariel G. Ruiz Soto, *Building a New Regional Migration System: Redefining U.S. Cooperation with Mexico and Central America* (Washington, DC: Migration Policy Institute, 2020).

11 Donald Kerwin, *More than IRCA: US Legalization Programs and the Current Policy Debate* (Washington, DC: Migration Policy Institute, 2010).

12 It is not within the scope of this report to debate the pros and cons of legalization. For more on this topic, see, for example, Cynthia Bansak, “Legalizing Undocumented Immigrants,” IZA World of Labor, March 2016.

13 Capps, Gelatt, Ruiz Soto, and Van Hook, *Unauthorized Immigrants in the United States*, 4.



for Migration Studies of New York estimated it at 10.6 million.<sup>14</sup> The Pew Research Center estimates that as of 2017, there were 10.5 million unauthorized immigrants.<sup>15</sup> And finally, the U.S. Department of Homeland Security (DHS) put the number at 12.0 million in 2015.<sup>16</sup> MPI finds the majority of unauthorized immigrants are from Mexico (51 percent), Central America (17 percent), and Asia (14 percent).<sup>17</sup>

Both MPI and the Pew Research Center estimate that the unauthorized population peaked in 2007, fell during the recession of 2008-09, and has remained relatively steady thereafter.<sup>18</sup> Much of this decrease owes to a change in Mexican migration flows, with net migration to the United States from Mexico decreasing since the Great Recession: fewer Mexicans came to the United States illegally, partly due to reduced U.S. job opportunities, increased border enforcement, and an aging population, while more left the United States, during a time of rising interior enforcement and job loss.<sup>19</sup> Even with the increase in illegal immigration from Central America across the U.S.-Mexico border in 2018,<sup>20</sup> all available data suggest the decline in the Mexican unauthorized immigrant population has offset that growth.<sup>21</sup>

Based on its unique methodology to assign legal status within data from the U.S. Census Bureau's American Community Survey (ACS) and thus study key characteristics of the unauthorized immigrant population,<sup>22</sup> MPI estimates:

- ▶ 60 percent have lived in the United States for ten years or more
- ▶ 57 percent of those who are at least 5 years old speak only English, or speak it well or very well
- ▶ 66 percent of those age 16 or older are employed (5 percent are unemployed and 30 percent are not in the labor force)
- ▶ 29 percent are homeowners
- ▶ 35 percent of those who are at least 15 years old live with at least one minor U.S.-citizen child
- ▶ 22 percent of those age 15 or older are married to a U.S. citizen or lawful permanent resident (LPR).<sup>23</sup>

14 Migration Policy Institute (MPI) Migration Data Hub, "Profile of the Unauthorized Population: United States," accessed January 12, 2021; Center for Migration Studies of New York (CMS), "State-Level Unauthorized Population and Eligible-to-Naturalize Estimates," accessed January 12, 2021.

15 Jeffrey S. Passel and D'Vera Cohn, "Mexicans Decline to Less Than Half the U.S. Unauthorized Immigrant Population for the First Time," Pew Research Center, June 12, 2019.

16 Bryan Baker, *Estimates of the Illegal Alien Population Residing in the United States: January 2015* (Washington, DC: Department of Homeland Security, 2018).

17 Capps, Gelatt, Ruiz Soto, and Van Hook, *Unauthorized Immigrants in the United States*, 6.

18 MPI's estimates show a decline from 2008-11 and then slow growth since then. The Pew Research Center estimates show an ongoing slow decline since 2008. See Capps, Gelatt, Ruiz Soto, and Van Hook, *Unauthorized Immigrants in the United States*, 4.

19 Ana Gonzalez-Barrera, "More Mexicans Leaving Than Coming to the U.S.," Pew Research Center, November 19, 2015.

20 Capps, Meissner, Ruiz Soto, Bolter, and Pierce, *From Control to Crisis*.

21 From 2007 to 2017, the Mexican unauthorized immigrant population declined by 2 million. See Passel and Cohn, "Mexicans Decline to Less than Half the U.S. Unauthorized Immigrant Population." From 2010 to 2018, the Mexican unauthorized population declined by 2.6 million. See Robert Warren, "Reverse Migration to Mexico Led to US Undocumented Population Decline: 2010 to 2018," *Journal on Migration and Human Security* 8, no. 1 (2020): 32-41.

22 MPI, "MPI Methodology for Assigning Legal Status to Noncitizen Respondents in U.S. Census Bureau Survey Data," accessed January 18, 2021.

23 All data from MPI Data Hub, "Profile of the Unauthorized Population: United States."

This profile suggests that large segments of the overall unauthorized population are deeply embedded in communities and labor markets, and are living in family structures often composed of people with different legal statuses. Most recently, the response to COVID-19 has demonstrated the critical role immigrants, including those without legal status, are playing as essential workers in keeping the country running in the face of the pandemic.<sup>24</sup> Thus, removal of otherwise law-abiding unauthorized immigrants would cause dislocation and have strong collateral consequences—separating spouses and parents from children, removing wage earners from families, and depriving communities of leaders and business owners.

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Within the broad unauthorized population, there are a variety of subgroups, many of which have been created by varying targeted immigration policy actions over the course of many years.

### *Unauthorized Immigrant Subgroups*

The smaller groupings among the unauthorized population are not mutually exclusive—there may be considerable overlap—but each is identifiable and possesses distinct characteristics and equities. Indeed, Biden’s legalization proposal would address most of these subgroups, including DACA recipients, TPS holders, farmworkers, and those with willing family or employer sponsors and who have been blocked from receiving green cards despite being eligible. Essential workers, even if not specifically included in the initial Biden proposal, are also the subject of proposed legislation.<sup>25</sup> Table 1 presents estimates of the size of each of these populations, explored in further detail below.

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24 See, for example, Julia Gelatt, *Immigrant Workers: Vital to the U.S. COVID-19 Response, Disproportionately Vulnerable* (Washington, DC: MPI, 2020 revised).

25 Laura Barrón-López and Sabrina Rodriguez, “Democrats Ready Immigration Push for Biden’s Early Days,” Politico, January 15, 2021.

**TABLE 1**  
**Subgroups of the Unauthorized Immigrant Population**

<b>Unauthorized Population Subgroup</b>	<b>Estimated Size (year of estimate)</b>
DACA-eligibles and DREAMers (those who arrived as minors)	1.7 million to 2.9 million (2021) (the range depends on definitions of years of U.S. residence, age at entry, and maximum age)
Temporary Protected Status (TPS) holders	320,000 (2020)
Essential workers	1.1 million to 5.6 million (2018) (the range depends on the definition of occupations considered essential)
Essential workers with DACA	72,000 to 361,000 (2020)
Farmworkers	1.2 million (2016)
Spouses of U.S. citizens and permanent residents	1.4 million (2018)
Parents living with U.S.-citizen and permanent resident children	3.4 million (2021)
Recipients of repeated discretionary relief	69,000 to 109,000 (2020) (the range depends on how many people have received discretionary status grants for multiple years)
Unauthorized immigrants with possible employer sponsors	At least 1.7 million (2018)

Note: Estimate of spouses of U.S. citizens and permanent residents includes all spouses of legal permanent residents (LPRs) plus those spouses of U.S. citizens who are estimated to have entered without inspection (versus overstaying a visa). Spouses of U.S. citizens who entered with a visa and overstayed could adjust under current law without triggering a ten-year bar on re-entry to the United States. Sources: Estimates for the Deferred Action for Childhood Arrivals (DACA) and DREAMer cohort and parents living with U.S.-citizen or permanent resident children cohort: Migration Policy Institute (MPI) analysis of U.S. Census Bureau data from the 2014-18 American Community Survey (ACS) pooled and the 2008 Survey of Income and Program Participation (SIPP), drawing on an MPI methodology developed in consultation with James Bachmeier of Temple University and Jennifer Van Hook of The Pennsylvania State University, Population Research Institute. Estimates for the Temporary Protected Status (TPS) cohort: MPI calculation of TPS population based on Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues* (Washington, DC: Congressional Research Service, 2018), 5; U.S. Citizenship and Immigration Services (USCIS), "Extension of the Designation of Somalia for Temporary Protected Status," *Federal Register* 85, no. 48 (March 11, 2020): 14229-35; USCIS, "Extension of the Designation of South Sudan for Temporary Protected Status," *Federal Register* 85, no. 212 (November 2, 2020): 69344-51; USCIS, "Extension of the Designation of Syria for Temporary Protected Status," *Federal Register* 84, no. 184 (September 23, 2019): 49751-57; USCIS, "Extension of the Designation of Yemen for Temporary Protected Status," *Federal Register* 85, no. 41 (March 2, 2020): 12313-19. Estimates for the essential worker cohorts: MPI analysis of U.S. Census Bureau data from the pooled 2014-18 ACS and the 2008 SIPP, weighted to 2018 unauthorized immigrant population estimates provided by Jennifer Van Hook of The Pennsylvania State University; Philip Martin and J. Edward Taylor, *Ripe with Change: Evolving Farm Labor Markets in the United States, Mexico, and Central America* (Washington, DC: MPI, 2013), 4. Estimates for the farmworker cohort: Trish Hernandez and Susan Gabbard, *Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers* (N.p.: JBS International, 2018), 52; U.S. Department of Labor, Employment and Training Administration, "Data Limitations," accessed January 12, 2021. Estimates of unauthorized immigrants who entered without inspection were done by MPI using visa overstay rates by country from Robert Warren and Donald Kerwin, 2017, "The 2,000 Mile Wall in Search of a Purpose: Since 2007 Visa Overstays Have Outnumbered Undocumented Border Crossers by a Half Million," *Journal on Migration and Human Security* 5 (1): 124-36. Estimates for recipients of repeated discretionary relief, MPI estimates based on Transactional Records Access Clearinghouse (TRAC), "The Life and Death of Administrative Closure," updated September 10, 2020; USCIS, "Form I-765 Application for Employment Authorization: All Receipts, Approvals, Denials Grouped by Eligibility Category and Filing Type," accessed January 26, 2021.

## DACA and DREAMer Populations

A path to permanent residence for those covered by DACA and for other DREAMers who entered the United States as children may be the most widely discussed potential legalization program in recent years. MPI estimates up to 1.7 million young people in the United States could be eligible for DACA under its original criteria, in effect as of January 2021;<sup>26</sup> this includes the 641,000 active DACA holders as of September 2020.<sup>27</sup> By mid-2021, all those eligible for DACA will have lived in the United States for at least 13 years. There is broad bipartisan support for providing them permanent residence, though there are different ways of defining this population. Several bills have been introduced in recent years that would provide a pathway to permanent residence for different segments of the DACA-eligible population.<sup>28</sup>

*MPI estimates up to 1.7 million young people in the United States could be eligible for DACA under its original criteria.*

Several versions of the DREAM Act and similar legislative proposals introduced since 2001 have broader eligibility criteria beyond those covered by DACA.<sup>29</sup> Some policymakers have considered eliminating or adjusting age limits to expand the eligible pool. If the requirement under DACA that migrants be under age 16 when they entered the country in 2007 were adjusted in a legalization bill to include those under age 18, an additional 382,000 individuals could become eligible, for a total of 2.1 million. Adjusting the maximum age could also expand the eligible population, as could revisions to cutoff dates and other changes. If the requirement that they be under age 31 as of June 15, 2012 were removed, an additional 208,000 individuals could become eligible, for a total of 1.9 million (see Table 2).

Legislation for DREAMers could also extend eligibility for legal status to those who entered the United States as children after June 15, 2007 (the current cutoff date for DACA eligibility). If a legalization program were to cover those who met the original DACA criteria but moved the cutoff date for entering the country up to 2016, an additional 399,000 individuals could become eligible, for a total of 2.1 million. Changing the cutoff date for entry would expand coverage to young people who entered the country more recently but face the same challenges as the DREAMers who came before them. Other updates to the DACA criteria could make more than 1.1 million additional people eligible for such a legalization program (see Table 2).

26 MPI Migration Data Hub, “Estimates of DACA-Eligible Population at U.S. and State Levels,” accessed January 20, 2021. This 1.7 million estimate includes 1.3 million people who meet all criteria to apply for the DACA program, whether they have or not; a further 384,000 who meet all criteria but for education; and 14,000 children under age 15 who could age into eligibility provided they remain in school.

27 USCIS, “Approximate Active DACA Recipients: As of September 30, 2020,” accessed February 2, 2021.

28 Sarah Pierce, “A Path to Citizenship for 1.8 Million DREAMERS? Despite Talk, No Proposal Would Do So,” MPI commentary, February 2018.

29 See, for example, Jeanne Batalova, Ariel G. Ruiz Soto, Sarah Pierce, and Randy Capps, *Differing DREAMs: Estimating the Unauthorized Populations That Could Benefit under Different Legalization Bills* (Washington, DC: MPI, 2017).

TABLE 2

**Unauthorized Immigrants Eligible under Updated or Expanded DACA Criteria by December 2021**

<b>Changes to DACA Criteria</b>	<b>Immediately Eligible</b>	<b>Eligible but for Education</b>	<b>Eligible in the Future</b>	<b>Total Eligible</b>
No changes	1,339,000	384,000	6,000	1,729,000
Remove age cap (set at under age 31 as of June 15, 2012)	1,443,000	489,000	6,000	1,937,000
Raise age at entry to 17 or younger	1,513,000	593,000	6,000	2,111,000
Move date of entry from current date of June 15, 2007 to 2016	1,456,000	460,000	213,000	2,128,000
Move date of entry to 2016 and remove age cap	1,495,000	507,000	213,000	2,216,000
Remove the age cap, and raise the age at entry to 17 or younger	1,689,000	815,000	6,000	2,509,000
Move date of entry to 2016 and raise age at entry to 17 or younger	1,728,000	759,000	213,000	2,700,000
Move date of entry to 2016, remove age cap, and raise age at entry to 17 or younger	1,804,000	868,000	213,000	2,885,000

Notes: MPI estimates of the population eligible for the Deferred Action for Childhood Arrivals (DACA) program under its original criteria include unauthorized immigrant youth who had been in the United States since 2007, were under the age of 16 at the time of arrival, and were under the age of 31 as of 2012. Three populations are estimated: (1) Immediately eligible youth and adults who meet both age and educational criteria (i.e., they will be ages 15 to 39 as of 2021 and are projected to either be enrolled in school or have at least a high school diploma or equivalent); (2) youth and adults who are eligible but for education (i.e., those ages 15 to 39 in 2021 who meet the other requirements but are not projected to have a high school diploma or equivalent and will not be enrolled in school); and (3) children eligible in the future who meet the age-at-arrival requirements but will be age 14 or younger in 2021, and would become eligible when they reach age 15 provided they stay in school. Eligibility due to adult-education program enrollment and ineligibility due to criminal history or lack of continuous U.S. presence were not modeled due limitations of Census data. For the immediately eligible population, the MPI estimates capture those meeting the criteria to apply for DACA, whether or not they ever did. As a result, past and current DACA recipients would be included within the MPI estimates.

Source: MPI analysis of U.S. Census Bureau data from the 2014-18 American Community Survey (ACS) pooled and the 2008 Survey of Income and Program Participation (SIPP), drawing on a methodology developed in consultation with James Bachmeier of Temple University and Jennifer Van Hook of The Pennsylvania State University, Population Research Institute.

The COVID-19 pandemic has brought attention to many DACA recipients and DREAMers working in “essential” industries. Under the broadest definition of essential industries, MPI estimates that 361,000 of the 641,000 current DACA holders are employed in essential jobs, 268,000 are under a slightly narrower definition, and 72,000 under the most limited definition (see Essential Workers section below for a more detailed explanation of these definitions).<sup>30</sup> Legalizing DACA holders or a broader population of DREAMers

30 MPI analysis of U.S. Census Bureau data from the 2014-18 American Community Survey (ACS) pooled and the 2008 Survey of Income and Program Participation (SIPP), drawing on a methodology developed in consultation with James Bachmeier of Temple University and Jennifer Van Hook of The Pennsylvania State University, Population Research Institute; USCIS, “Approximate Active DACA Recipients: As of September 30, 2020,” Francine D. Blau, Josefine Koebe, and Pamela A. Meyerhofer, “Who Are the Essential and Frontline Workers?” (NBER Working Paper 27791, National Bureau of Economic Research, Cambridge, MA, September 2020).

would thus offer permanence to people who both came to the United States as children and are now doing critical jobs.

## Temporary Protected Status Holders

TPS offers temporary legal protection and work authorization to nationals of countries facing natural disasters, armed conflict, or other temporary and extraordinary circumstances, as designated by DHS. Its purpose is to provide temporary protection to those subject to removal until the country of origin is again safe for repatriation. The statute does not define a time period that could be considered “temporary.”

*As of September 2020, an estimated 320,000 people from ten countries had TPS.*

As of September 2020, an estimated 320,000 people from ten countries had TPS.<sup>31</sup> All had been in the United States for at least three years, though 80 percent (256,000) had TPS for at least ten years.<sup>32</sup>

The Trump administration terminated TPS for nationals of six of these countries (97 percent of beneficiaries), arguing that years-long stays were no longer temporary and that the dangerous conditions that led to the original TPS designations had been resolved, though none of these terminations had gone into effect as of January 2021.<sup>33</sup> Several bills introduced since the termination of TPS for these countries’ nationals would have legalized those with TPS or eligible for it as of a certain date, prior to termination.<sup>34</sup> A legalization bill for TPS holders would require a three-fifths vote in the Senate to overcome or repeal the prohibition in the statute against granting permanent residence to those holding TPS.

Extending legalization to certain TPS holders would recognize that a significant population—such as those having been permitted to remain in the United States for more than a decade—can no longer be realistically considered temporary migrants. Instead, it would acknowledge that the government has allowed TPS holders to stay for prolonged periods during which they have put down roots.

## Essential Workers

Throughout the COVID-19 pandemic, foreign-born workers, including unauthorized immigrants, have been key to the continued functioning of what have been considered essential industries. Unlike DACA and TPS holders, essential workers have not been granted any form of protection. Of the 6.8 million employed

31 These ten countries are El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen. Not all nationals from these countries are eligible; they must have lived in the United States since certain dates and meet other criteria. MPI calculation of Temporary Protected Status (TPS) population based on Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues* (Washington, DC: Congressional Research Service, 2018), 5; USCIS, “Extension of the Designation of Somalia for Temporary Protected Status,” *Federal Register* 85, no. 48 (March 11, 2020): 14229-35; USCIS, “Extension of the Designation of South Sudan for Temporary Protected Status,” *Federal Register* 85, no. 212 (November 2, 2020): 69344-51; USCIS, “Extension of the Designation of Syria for Temporary Protected Status,” *Federal Register* 84, no. 184 (September 23, 2019): 49751-57; USCIS, “Extension of the Designation of Yemen for Temporary Protected Status,” *Federal Register* 85, no. 41 (March 2, 2020): 12313-19.

32 MPI calculation based on continuous residence requirements in USCIS, “Temporary Protected Status—Countries Currently Designated for TPS,” updated December 7, 2020; MPI calculation based on *Federal Register* notices, available at U.S. Department of Justice, “Temporary Protected Status,” updated December 9, 2020.

33 The Trump administration terminated TPS for El Salvador (which has the largest TPS population), Haiti, Honduras, Nepal, Nicaragua, and Sudan.

34 See, for example, *American Dream and Promise Act of 2019*, HR 6, 116th Cong., 1st sess., *Congressional Record* 165, no. 93, daily ed. (March 12, 2019): H 4292; *Keeping Salvadoran Families Together Act*, HR 4956, 115th Cong., 2nd sess. (February 6, 2018).

unauthorized immigrants, MPI estimates that between 1.1 million and 5.6 million (between 16 percent and 82 percent of the overall unauthorized population in the labor force) were working in such industries as of 2018, depending on the criteria used to select the occupations deemed essential.

A narrow definition, developed by MPI, encompasses industries directly related to combating the public-health crisis and to providing the U.S. population with basic necessities. By that definition, MPI estimates 1.1 million unauthorized immigrants work in essential industries, with the biggest shares in health care, food production and retail, and manufacturing (see Table 3). Of this 1.1 million, 72,000 are current DACA recipients, as mentioned above. These workers ensure that the country maintains its food supply, cares for coronavirus patients, and produces supplies needed to combat the outbreak.

A broader definition includes all “frontline” workers—those who work in occupations that do not allow most employees to work from home.<sup>35</sup> MPI estimates 4.7 million of these workers are unauthorized immigrants, out of whom 268,000 are DACA holders. These workers are among those ensuring that the economy continues to function and are, at the same time, more likely to be exposed to COVID-19.

The broadest definition of “essential” workers comes from the U.S. Cybersecurity and Infrastructure Security Agency (CISA) in DHS.<sup>36</sup> CISA issued guidance in 2020 that was originally meant to inform state and local decisions about who would be exempted from stay-at-home orders. Its purpose evolved to inform decisions about risk management in workplaces and to help jurisdictions prioritize distribution of resources to protect essential workers from the virus. Its definition of essential encompasses critical infrastructure industries, including those that directly provide and maintain critical infrastructure, as well as those involved in associated supply chains.

MPI estimates a majority of unauthorized immigrant workers—5.6 million out of the 6.8 million in the workforce—fall into one of the categories described in CISA’s guidance. Of these 5.6 million, 361,000 are DACA holders. While this guidance is helpful in showing how many workers are employed in industries connected to critical infrastructure, it may be less useful in deciding how to prioritize eligibility for legal status for the most in-demand and most affected workers during the pandemic because of how broad the guidance is, in that it does not distinguish between workers who can and cannot work from home.

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35 This definition comes from Blau, Koebe, and Meyerhofer, “Who Are the Essential and Frontline Workers?” The authors define frontline workers as those “in occupation groups where a third or less of workers can feasibly work from home.”

36 Memorandum from Christopher C. Krebs, Director, Cybersecurity and Infrastructure Security Agency (CISA), “[Advisory Memorandum on Ensuring Essential Critical Infrastructure Workers Ability to Work During the COVID-19 Response](#),” August 18, 2020.

TABLE 3

**Number of Civilian, Unauthorized Immigrant Essential Workers by Major Industry Group, 2018**

	<b>Definition 1: Food Industries, Health Care, Deliveries, Scientific Research, and First Responders</b>	<b>Definition 2: Frontline Workers</b>	<b>Definition 3: CISA-Defined Essential Workers</b>
Accommodation and food services	N/A	974,000	1,057,000
Agriculture, forestry, fishing, and hunting	255,000	269,000	283,000
Construction	N/A	1,295,000	1,352,000
Educational services	N/A	44,000	222,000
Finance and insurance, and real estate and rental and leasing	N/A	68,000	185,000
Health care	302,000	263,000	327,000
Information	N/A	17,000	57,000
Manufacturing	172,000	383,000	497,000
Mining, quarrying, and oil and gas extraction	N/A	17,000	23,000
Other services	N/A	104,000	110,000
Professional, scientific, and management, and administrative, and waste management services	20,000	605,000	686,000
Public administration	12,000	19,000	46,000
Retail trade	173,000	255,000	319,000
Social assistance	40,000	76,000	104,000
Transportation and warehousing	23,000	167,000	215,000
Utilities	N/A	9,000	15,000
Wholesale trade	65,000	88,000	117,000
<b>Total</b>	<b>1,063,000</b>	<b>4,654,000</b>	<b>5,615,000</b>

Notes: N/A means that no industries within the industry group were included in that definition of “essential” jobs. The arts, entertainment, and recreation industry has been excluded because none of the three definitions included any unauthorized immigrant essential workers in that industry.

Sources: These 2018 data result from MPI analysis of U.S. Census Bureau data from the pooled 2014–18 ACS and the 2008 SIPP, weighted to 2018 unauthorized immigrant population estimates provided by Van Hook. The definitions of essential and frontline workers employ the coding used in Francine D. Blau, Josefine Koebe, and Pamela A. Meyerhofer, “[Who Are the Essential and Frontline Workers?](#)” NBER Working Paper 27791, National Bureau of Economic Research, Cambridge, MA, September 2020. However, MPI added educational workers in the definition of essential workers.

Regardless of how essential occupations are defined, a sizeable number in industries designated as critical during this crisis period are unauthorized immigrants. They are also disproportionately susceptible to contracting the infection, either because of crowded working conditions, such as those reported in meatpacking plants;<sup>37</sup> dense living conditions, such as those provided to temporary farmworkers; or

37 Kimberly Kindy, “[More Than 200 Meat Plant Workers in the U.S. Have Died of COVID-19. Federal Regulators Just Issued Two Modest Fines.](#)” *Washington Post*, September 13, 2020.



because of direct work with COVID-19 patients. Yet most lack legal status and thus are vulnerable to deportation.

During the pandemic, other countries have provided legal protections to certain unauthorized immigrants given their role as essential workers. Italy granted six-month residence permits to migrants working in industries including agriculture, food processing, and caregiving.<sup>38</sup> Canada has offered permanent residence to a population of essential workers estimated to be 1,000, targeting the small number of asylum seekers who worked in hospitals or nursing homes in spring 2020.<sup>39</sup>

Essential workers demonstrate the dual argument for legalization: that legal status would provide legal protections and better access to health care for people who are risking their lives to serve the country, as well as benefit the United States at large by securing an essential workforce and reducing public-health risks overall.

## Farmworkers

While essential workers have emerged as a subgroup more recently, there has been longstanding support for specialized legalization programs for farmworkers. A separate process to legalize farmworkers in the *Immigration Reform and Control Act of 1986* (IRCA) allowed 1.1 million to become permanent residents. Excluding those on temporary agricultural work visas, as of 2016, about 49 percent of the estimated 2.4 million farmworkers in the United States were unauthorized immigrants.<sup>40</sup>

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Unauthorized immigrant farmworkers have been recognized by both Democrats and Republicans as essential to the U.S. agriculture industry<sup>41</sup>—a sentiment likely increased since the COVID-19 pandemic has shone a light on the workers who are part of the essential domestic food supply. Since IRCA, other attempts at comprehensive immigration reform have included special pathways for legalizing farmworkers. For example, the 2013 comprehensive immigration reform bill that passed the Senate included an expedited legalization pathway for farmworkers who had worked in agriculture for a total of at least 100 days in 2011 and 2012.<sup>42</sup> The Congressional Budget Office estimated that 1.5 million farmworkers and their spouses and children could have attained LPR status through this pathway.<sup>43</sup>

38 Virginia Pietromarchi, “Thousands of Undocumented Migrants to Get Italian Work Permits,” Al Jazeera, May 13, 2020.

39 Colin Harris, “Some Asylum Seekers Who Cared for Patients in Pandemic to Get Permanent Residency,” CBC News, August 14, 2020.

40 Philip Martin and J. Edward Taylor, *Ripe with Change: Evolving Farm Labor Markets in the United States, Mexico, and Central America* (Washington, DC: MPI, 2013), 4; Trish Hernandez and Susan Gabbard, *Findings from the National Agricultural Workers Survey (NAWS) 2015–2016: A Demographic and Employment Profile of United States Farmworkers* (N.p.: JBS International, 2018), 52; U.S. Department of Labor, Employment and Training Administration, “Data Limitations,” accessed January 12, 2021.

41 See, for example, statements from members of Congress on why farmworkers should be legalized: Mario Diaz-Balart, “Bipartisan Farm Workforce Modernization Act Passes the House of Representatives” (press release, December 11, 2019).

42 *Border Security, Economic Opportunity, and Immigration Modernization Act*, S. 744, 113th Cong., 1st sess., *Congressional Record* 159, no. 51, daily ed. (April 16, 2013): S2684.

43 Congressional Budget Office (CBO), “S. 744 Border Security, Economic Opportunity, and Immigration Modernization Act” (cost estimate, CBO, Washington, DC, June 18, 2013), 21.

More recently, Congress has tried to address farmworkers outside the comprehensive immigration reform framework. For example, in 2019, the House passed, on a bipartisan basis, the *Farm Workforce Modernization Act*, which similarly offered a pathway to legal residence for farmworkers who had worked at least 180 days in agriculture in the prior two years. The Senate did not consider this bill.<sup>44</sup>

### Family- and Employer-Sponsored Immigrants

Other groups of unauthorized immigrants would be eligible to legalize if not for provisions of the law that put up roadblocks for those who have stayed illegally in the country. Immigrants who have resided illegally in the United States for at least six months and then leave are barred from re-entry for three years, and those illegally present for at least 12 months are barred from return for ten years, due to provisions enacted under the *Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)*.<sup>45</sup>

Known as the three- and ten-year or unlawful presence bars, these provisions largely prevent immigrants who entered the country illegally but subsequently became eligible for lawful visas from getting legal permanent residence because (with some exceptions) they must leave the country to apply for a green card at a U.S. consulate abroad.<sup>46</sup> Knowing that leaving the country could trigger years-long separations from families or jobs leads immigrants to remain in the country without legal status, even though they are otherwise eligible for it through sponsorship by a family member or employer.<sup>47</sup>

*An estimated 1.4 million unauthorized immigrants who are the spouses of U.S. citizens or LPRs could be eligible for permanent residence through family sponsorship.*

An estimated 1.4 million unauthorized immigrants who are the spouses of U.S. citizens or LPRs could be eligible for permanent residence through family sponsorship. An estimated 1.7 million unauthorized immigrants over age 25 have a bachelor's degree or higher. If the current pattern of employer sponsorship for green cards is any guide, a sizeable section of this population may have or could find employers to

sponsor them for a green card (see Table 4). An additional group of unauthorized immigrants who do not have a bachelor's degree but work in skilled occupations could also be candidates for employer sponsorship for a green card.

44 *Farm Workforce Modernization Act of 2019*, HR 5038, 116th Cong., 1st sess., *Congressional Record* 165, no. 180, daily ed. (November 12, 2019): H8783.

45 *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, H. Rept. 104-828, 104th Cong., 2nd sess. September 24, 1996.

46 People who are being sponsored as immediate relatives (spouses, children, and parents of U.S. citizens) are exempted from this requirement if they entered the country legally and overstayed their visa. For a full list of exceptions, see USCIS, "[Chapter 3 - Unlawful Immigration Status at Time of Filing \(INA 245\(c\)\(2\)\)](#)," USCIS Policy Manual, accessed January 12, 2021.

47 Kristi Lundstrom, "The Unintended Effects of the Three- and Ten-Year Unlawful Presence Bars," *Law and Contemporary Problems* 76, nos. 3 & 4 (2013): 389-412.

TABLE 4

**Unauthorized Immigrants Subject to Ten-Year Bar Who Have Potential Sponsors, 2018**

<b>Unauthorized Immigrants in the United States for One Year or Longer</b>	
Spouse of U.S. citizen or legal permanent resident (LPR)*	1,380,000
Spouse of U.S. citizen	712,000
Spouse of LPR	668,000
Potentially eligible for employer sponsorship**	At least 1,671,000

\*Estimate includes all spouses of legal permanent residents (LPRs) plus those spouses of U.S. citizens who are estimated to have entered without inspection (versus overstaying a visa). Spouses of U.S. citizens who entered with a visa and overstayed could adjust under current law without triggering a ten-year bar. Other categories of family sponsorship not listed here are very difficult to estimate with any precision.

\*\*The estimate of immigrants eligible for employer sponsorship is the number of unauthorized immigrants age 25 or older with a bachelor's degree or higher. The assumption is that this is the population that would be most likely to have an employer willing to sponsor them, based on current employment-based visa requirements and usage patterns. There may be overlap between people who could be sponsored by employers and those who could be sponsored by family members.

Sources: MPI analysis of U.S. Census Bureau data from pooled 2014-18 ACS, and 2008 SIPP, with legal-status assignments using a unique MPI methodology developed in consultation with Bachmeier and Van Hook. Estimates of unauthorized immigrants who entered without inspection were estimated using visa overstay rates by country from Robert Warren and Donald Kerwin, 2017, "The 2,000 Mile Wall in Search of a Purpose: Since 2007 Visa Overstays Have Outnumbered Undocumented Border Crossers by a Half Million," *Journal on Migration and Human Security* 5 (1): 124-36.

An unknowable, likely larger, number of unauthorized immigrants have U.S.-citizen children or U.S.-citizen or LPR parents who could sponsor them for family-based visas. Because they do not live in the same households, these potential beneficiaries are not included in the data required to make these estimates.

### Parents of U.S. Citizens and Lawful Permanent Residents

Parents of U.S. citizens or LPRs who have been in the United States for a specified period also have been considered for legalization, as the Obama administration attempted to do in late 2014 within the narrower scope of its executive action authority through a program similar to DACA, known as the Deferred Action for Parents of Americans (DAPA) program. However, the Obama action was quickly struck down in federal court, a decision later affirmed by the Supreme Court.<sup>48</sup> DAPA would have protected parents who had been in the United States for about five years—since 2010—and who were not otherwise immigration enforcement priorities. At the time, MPI estimated that 3.3 million unauthorized immigrants with U.S.-citizen or permanent resident children living in their households would have been eligible.<sup>49</sup> If DAPA were to be reinstated in 2021 with adjusted criteria to include those in the United States since 2016, thereby maintaining the five-year continuous residence requirement, MPI estimates that 3.4 million would be eligible.<sup>50</sup>

48 *State of Texas et al. v. United States of America et al.*, Civil No. B-14-254 (U.S. District Court for the Southern District of Texas, order of temporary injunction, February 16, 2015); *United States et al. v. Texas et al.*, No. 15-674 (U.S. Supreme Court, June 23, 2016).

49 Randy Capps, Heather Koball, James D. Bachmeier, Ariel G. Ruiz Soto, Jie Zong, and Julia Gelatt, *Deferred Action for Unauthorized Immigrant Parents: Analysis of DAPA's Potential Effects on Families and Children* (Washington, DC: MPI, 2016).

50 MPI analysis of U.S. Census Bureau data from pooled 2014-18 ACS, and 2008 SIPP, with legal-status assignments using a unique MPI methodology developed in consultation with Bachmeier and Van Hook. This estimate does not include parents with U.S.-citizen and legal permanent resident (LPR) children ages 18 or older who reside outside of the household. In 2016, MPI estimated there were 340,000 parents with U.S.-citizen adult children outside the household. This estimate likely would be larger as of 2021 due to children aging and moving outside their parents' households since 2016. For the 2016 estimate, see Capps, Koball, Bachmeier, Ruiz Soto, Zong, and Gelatt, *Deferred Action for Unauthorized Immigrant Parents*.

## Other Long-Term Residents with Discretionary Relief

Sixty percent (6.6 million) of the 11 million unauthorized immigrants in the country, including some with DACA and TPS, have resided in the country for ten years or longer, as stated above.<sup>51</sup> Segments of this long-term population have been granted various forms of discretionary relief by DHS or by immigration judges, in the form of stays of removal or deferred action, for example. Discretionary relief protects unauthorized immigrants from deportation, and some forms allow eligibility for work authorization. The protections are temporary and sometimes can be terminated with little or no prior notice. They do not offer a pathway to permanent residence.

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*Sixty percent of the 11 million unauthorized immigrants in the country have resided in the country for ten years or longer.*

Deferred action is granted on a humanitarian basis, for example to someone who has a U.S.-citizen dependent or is responsible for caring for a sick relative.<sup>52</sup> It can be granted, before a final order of removal is issued, by U.S. Immigration and Customs Enforcement (ICE), USCIS, or an immigration judge. ICE may grant stays of removal for humanitarian reasons, even after a noncitizen has been ordered removed. ICE, for example, granted stays of removal to noncitizens with removal orders who did not meet the administration's enforcement priorities during the final years of the Obama presidency.<sup>53</sup> In fiscal year 2020, 17,000 foreign nationals other than DACA recipients were granted deferred action and fewer than 24,000 were granted stays of removal.<sup>54</sup> Of this total, the duration for which they have been beneficiaries of the relief is not known. However, it is not uncommon that immigrants might consistently have these forms of short-term relief renewed for years on end, causing some with significant community ties to live in precarity for decades and face deportation at any time.<sup>55</sup>

Additionally, there are 69,000 noncitizens whose immigration court cases have been administratively closed as a form of discretion.<sup>56</sup> Between 2012 and 2017, immigration judges closed 88,000 cases as an exercise of prosecutorial discretion for people who did not meet the Obama administration's enforcement priorities. As of July 2020, proceedings had not been reopened in 69,000 such cases.<sup>57</sup> Noncitizens whose cases are administratively closed cannot be removed without reopening their removal proceedings, but they are not authorized to work in the United States.

51 MPI Migration Data Hub, "Profile of the Unauthorized Population: United States."

52 Shoba Sivaprasad Wadhia, "My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE," *Georgetown Immigration Law Journal* 27 (2013): 345-85.

53 Randy Capps, Muzaffar Chishti, Julia Gelatt, Jessica Bolter, and Ariel G. Ruiz Soto, *Reving Up the Deportation Machinery: Enforcement under Trump and the Pushback* (Washington, DC: MPI, 2018).

54 The number of stays of removal issued in fiscal year (FY) 2020 is based on the number of orders of supervision issued. There were 23,433 orders of supervision issued in FY 2020. People granted stays of removal typically receive orders of supervision also. However, orders of supervision may be issued to other noncitizens who cannot be deported but have already been ordered removed, so it is likely that 23,433 is an overestimate of the number with stays of removal. See USCIS, "Form I-765 Application for Employment Authorization: All Receipts, Approvals, Denials Grouped by Eligibility Category and Filing Type," accessed January 26, 2021.

55 See, for example, Rebecca Plevin, "Do We Have to Say Goodbye?: Essential Worker, Mother of 4, Set to Be Deported in June," *Desert Sun*, May 26, 2020; Jomana Karadsheh and Kareem Khadder, "Pillar of the Community' Deported From Us After 39 Years to a Land He Barely Knows," CNN, February 9, 2018.

56 Transactional Records Access Clearinghouse (TRAC), "The Life and Death of Administrative Closure," updated September 10, 2020.

57 TRAC, "The Life and Death of Administrative Closure."

While such discretionary forms of relief are temporary, many individuals have them for extended periods of time. As with TPS, legalization proponents argue that those whom the government has continually allowed to stay in the country, often for humanitarian reasons, should at some point—for example, after ten or more years—be given the opportunity to be considered for permanent residency.

Taken together, although the categories described above include overlapping numbers and characteristics, disaggregating the unauthorized population of approximately 11 million illustrates the range and complexity of circumstances and equities that have accumulated over more than 30 years and are now faced through the legalization question and public debates. As a policy matter, the continued presence of such a sizeable proportion of the foreign-born population having lived and worked in the country for long periods but lacking certainty in their legal status represents a failure of policymaking that brings harm not only to millions of individuals and their families but increasingly to the economic, political, and social well-being of the country at large.

### 3 Policy Options: Legislative Reform and Executive Action

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There are two roads to take with regards to legalization. One is for Congress to enact legislation, either creating a new pathway to legal status for a share of the unauthorized population or removing obstacles to existing paths. The other is for the administration to employ executive actions that provide temporary protections for specific segments of the unauthorized population.

#### A. Legislative Solutions

Legalization established by statute provides the most enduring form of relief. There is a spectrum of options, many with precedents, for legislation that could confer eligibility for legal status on the unauthorized. Past actions have ranged from covering broad populations to targeted segments. Protections also may encompass anything from a quick pathway to citizenship to more modest and narrower legal protections.<sup>58</sup>

#### Pathways to Citizenship for a Broad Population

The broadest legalization program would cover most of the unauthorized population, as Biden proposed on his first day in office with a plan that would cover unauthorized immigrants in the United States as of January 1, 2021,<sup>59</sup> and set out a path to citizenship for applicants meeting certain requirements. The Biden plan outline supports allowing unauthorized immigrants to apply for an initial temporary status, then permanent residence after five years if they pass background checks and pay taxes, and finally the ability to apply for citizenship after having LPR status for three years if they pass additional background checks and demonstrate a knowledge of English and U.S. civics. The proposal would also provide an expedited path for

58 Marc R. Rosenblum, *Immigrant Legalization in the United States and European Union: Policy Goals and Program Design* (Washington, DC: MPI, 2010), 6. Rosenblum explained that “political conditions may permit a broader legalization ... if benefits are limited to temporary visas, while a legalization leading to permanent visas may need to be more limited in scope in order to gain public support and political approval.”

59 Biden-Harris Transition, “Fact Sheet: President Biden Sends Immigration Bill to Congress.”

DREAMers, TPS holders, and certain farmworkers, allowing them to immediately apply for LPR status and then for citizenship after three years.

There has been one similar program passed into law in U.S. history—IRCA, enacted in 1986, though Biden’s proposal would cover a much broader population of unauthorized immigrants. IRCA legalized most unauthorized immigrants in the country at the time through its general legalization and through separate targeted measures for farmworkers and certain Cubans and Haitians.<sup>60</sup> Of the approximately 3.2 million unauthorized immigrants living in the United States at the time of the bill’s passage, 1.6 million legalized through IRCA’s general legalization, and another 1.1 million farmworkers and 38,000 Cubans and Haitians also received green cards.<sup>61</sup>

Applicants had to demonstrate continuous residence since 1982, pay a \$185 filing fee, and have a clean criminal history and proof of financial resources to ensure self-sufficiency to qualify for the initial temporary status. To adjust to permanent residence, holders of this temporary status had to additionally demonstrate either a basic knowledge of English and U.S. history and government or show that they were enrolled in courses to achieve this knowledge. Subsequent research showed that those who had legalized were able to increase their educational attainment and boost their incomes.<sup>62</sup>

The 1986 legislation has been criticized for a number of reasons. The farmworker eligibility provisions were considered too lenient and as inviting fraud.<sup>63</sup> The accompanying employer sanctions for hiring unauthorized immigrants proved easy for employers to evade and difficult for the government to enforce. The resources for border enforcement included in the legislation were inadequate. A share of the population that had arrived more recently than the five-year cutoff remained uncovered. And the legislation did not include increased numbers of visas for working legally in the country at a time of robust economic growth. As a result, the unauthorized population began to grow again in the 1990s.<sup>64</sup>

In part due to IRCA’s shortcomings, subsequent attempts to enact similar programs have failed.<sup>65</sup> The most recent legalization came in a comprehensive reform bill in 2013 that passed the Senate but was not taken up in the House. Its path to citizenship included two \$1,000 fines, the participation of employers, complex procedures to renew an initial temporary status, and a requirement for processing years-long existing green-card backlogs prior to applications by newly legalizing immigrants.<sup>66</sup>

60 Kerwin, *More than IRCA*.

61 Ruth Ellen Wasem, *Unauthorized Aliens Residing in the United States: Estimates Since 1986* (Washington, DC: Congressional Research Service, 2012); Kerwin, *More than IRCA*.

62 Kalena E. Cortes, “Achieving the DREAM: The Effect of IRCA on Immigrant Youth Postsecondary Educational Access,” *American Economic Review* 103, no. 3 (May 2013): 428-32. On income, initial research identified a general increase in wages for legalized immigrants, but more recent research has contended that such benefits accrued only to high-skilled immigrants who legalized. See Magnus Lofstrom, Laura Hill, and Joseph Hayes, “Wage and Mobility Effects of Legalization: Evidence from the New Immigrant Survey,” *Journal of Regional Science* 53 (2013): 171-97.

63 Betsy Cooper and Kevin O’Neil, *Lessons from the Immigration Reform and Control Act of 1986* (Washington, DC: MPI, 2005).

64 Peter Brownell, “The Declining Enforcement of Employer Sanctions,” *Migration Information Source*, September 1, 2005.

65 For example, *Comprehensive Immigration Reform Act of 2006*, S. 2611, 109th Cong., 2nd sess., *Congressional Record* 152, no. 44, daily ed. (April 7, 2006): S3378; *Comprehensive Immigration Reform Act of 2007*, S. 1348, 110th Cong., 1st sess., *Congressional Record* 153, no. 76, daily ed. (May 9, 2007): S5869; *Border Security, Economic Opportunity, and Immigration Modernization Act*, S. 744.

66 National Immigration Law Center (NILC), “Summary and Analysis: Border Security, Economic Opportunity, and Immigration Modernization Act of 2013,” NILC, updated August 15, 2013; María E. Enchautegui, “Legalization Programs and the Integration of Unauthorized Immigrants: A Comparison of S. 744 and IRCA,” *Journal on Migration and Human Security* 2, no. 1 (2014): 1-13.

Thus, even a broad legalization program aimed at sizeable populations can, in practice, reach varying shares of unauthorized populations, depending on the eligibility requirements it establishes.<sup>67</sup> The Biden plan outlines a broad approach by calling for a cutoff date for eligibility of January 1, 2021. Congress could establish a less recent date for continuous residence in the United States, as it did in IRCA, as well as mandate certain employment history, lack of criminal history, English ability, and/or payment of fines, among other possibilities. The precise length of a continuous residence requirement would affect how many immigrants would be eligible. MPI estimates that a little over 9.5 million unauthorized immigrants had been in the United States at least three years as of 2018, and slightly more than 8.5 million had been in the United States at least five years. Requirements beyond residence ones would shrink the eligible population to different degrees.<sup>68</sup>

## Reviving an Historical Approach

Another much simpler approach to legalization that would still cover a significant population—though smaller than a broad legalization—would be to update the date for registry in immigration law. The registry provision was last amended as part of IRCA and offers a straightforward process for legalization that has deep roots in immigration history.

Registry has been part of U.S. immigration law since 1929 when the *Registry Act* was enacted. It allowed noncitizens without immigration status to adjust to permanent residence if they entered the country prior

*Registry has been part of U.S. immigration law since 1929 when the Registry Act was enacted ... The rationale is akin to that of statutes of limitation.*

to June 3, 1921, had resided in the United States since then, and had demonstrated good moral character. Congress has advanced the entry date four times, most recently in 1986, when it established eligibility for those who entered the country prior to January 1, 1972.<sup>69</sup>

Between 1930 and 2018, 410,000 immigrants received green cards through the registry provisions.<sup>70</sup> Registry aims to resolve the issue of legal status for those who have been in the country for an extended period. The rationale is akin to that of statutes of limitation, which do not exist in immigration law. That is,

67 See, for example, the suggestion that designers of any legalization program can adjust four variables to broaden or narrow it: qualifications (cutoff date, grounds for exclusion, and continuous presence duration); requirements (fines/fees that must be paid, and passing a language/civics test); benefits (temporary status with no option of permanence, temporary status with the possibility of adjustment to permanence, or immediate permanence); program design/implementation (one-stage vs. phased program). See Rosenblum, *Immigrant Legalization in the United States and European Union*.

68 For example, research found that different types of requirements in five major legalization bills introduced between 2006 and 2010 impacted the eligible population differently. Language requirements made ineligible the most unauthorized immigrants, followed by employment requirements, and then continuous residence requirements. See Marc R. Rosenblum, Randy Capps, and Serena Yi-Ying Lin, *Earned Legalization: Effects of Proposed Requirements on Unauthorized Men, Women, and Children* (Washington, DC: MPI, 2011).

69 Congressional Research Service (CRS), *Immigration: Registry as Means of Obtaining Lawful Permanent Residence* (Washington, DC: CRS, 2001).

70 MPI calculation based on House Judiciary Committee, *Recording the Lawful Admission for Permanent Residence of Certain Aliens Who Entered the United States Prior to June 28, 1940*, House Report No. 1727 (Washington, DC: U.S. Congress, 1958); Department of Justice, *Annual Report of the Immigration and Naturalization Service* (Washington, DC: Department of Justice, various years); Department of Justice, *Statistical Yearbook of the Immigration and Naturalization Service* (Washington, DC: Department of Justice, various years); Department of Homeland Security (DHS), Office of Immigration Statistics, *Yearbook of Immigration Statistics* (Washington, DC: DHS, various years).

that at a certain point no further public interest is served by pursuing long-ago violations. Rather, it is in the public interest to—in the case of immigration—facilitate full legal status.

Different approaches could be used to revive the registry statute. One is to follow past practice by carrying out a one-time update of the registry date. Historically, the registry date has been between eight and 18 years prior to the date of updating the provision. On average, the prior interval has been 15 years. If a new registry date were to be set in accordance with this historical pattern, MPI estimates that, as of 2018, between 2.8 million and 8.0 million people would be eligible to apply for LPR status (see Table 5).

TABLE 5

**Unauthorized Immigrants Potentially Eligible to Adjust Status under Updated Registry Dates of January 1, 2000-2010, as of 2018**

Registry Date	Eligible Population	Share of Unauthorized Population
2000	2,811,000	26%
2001	3,641,000	33%
2002	4,213,000	38%
2003	4,691,000	43%
2004	5,148,000	47%
2005	5,650,000	51%
2006	6,233,000	57%
2007	6,735,000	61%
2008	7,195,000	66%
2009	7,613,000	69%
2010	7,957,000	72%

Note: To calculate how many unauthorized immigrants would be eligible for each potential registry date, MPI looked at the year of immigration of each unauthorized immigrant in its five-year data file, and added up how many entered the United States before each registry date.

Source: MPI analysis of U.S. Census Bureau data from pooled 2014-18 ACS, and 2008 SIPP, with legal-status assignments using a unique MPI methodology developed in consultation with Bachmeier and Van Hook.

In addition to a one-time advancing of the registry date, Congress could require consideration of advancing the registry date at periodic intervals, for example every five years. Such a measure would trigger a process of systematic congressional review of the trends and characteristics attendant to the existence of an unauthorized population, with the goal of acting to prevent the growth of such a sizeable unauthorized population again. This would not be a unique approach. Countries in Europe have commonly conducted multiple broad legalization efforts, with the understanding that a one-time program will inevitably become outdated.<sup>71</sup>

### Pathway to Citizenship for Designated Groups

Despite the prominence of IRCA in the national memory, smaller, targeted programs combined have provided legal status to more people in the United States over time than IRCA's general legalization

<sup>71</sup> Kate Brick, *Regularizations in the European Union: The Contentious Policy Tool* (Washington, DC: MPI, 2011).



program did.<sup>72</sup> Such programs include the *Cuban Adjustment Act* of 1966, which provided a fast track to permanent residence for Cubans admitted or paroled into the United States; the *Nicaraguan Adjustment and Central American Relief Act* (NACARA) of 1997, which allowed certain Central American and Cuban asylum seekers to adjust to LPR status; and the *Haitian Refugee Immigration Fairness Act* of 1998, making some Haitian asylum seekers eligible for permanent residence. They also include the components of IRCA that made certain farmworkers and Cubans and Haitians eligible to legalize. Through these five programs, more than 3 million immigrants have been granted green cards.<sup>73</sup>

However, since 2000, there has been similar legislation for just two small populations. The *Help Haiti Act*, passed in 2010, provided a path to permanent residence for Haitian orphans undergoing U.S. adoptions who had been paroled into the United States during a four-month period after a devastating earthquake in 2010. The *Liberian Refugee Immigration Fairness Act*, passed as part of the *National Defense Authorization Act* for FY 2020, provided a path to permanent residence for several thousand Liberians in the country since November 2014. As of October 2020, at least 261 of the 2,532 applications received had been approved, and most of the rest were pending.<sup>74</sup>

Although rare since 2000, legalization programs for subgroups of the population have garnered political and public support than for a broader population.<sup>75</sup>

### Statutory Protections Granting Legal Status Short of Permanent Residence

Congress could provide less than the full protections that come with permanent resident status and a pathway to citizenship, but still allow broad or designated groups within the unauthorized immigrant population to reside and remain in the country with a more secure legal status. This approach would require creating a new legal status that would provide protection from removal and eligibility for work authorization. It would be renewable at regular intervals, for example every five years, subject to a clean criminal history, other background checks, and payment of requisite fees or fines.

In being formalized by Congress as part of immigration law, such a status would be akin to DACA but would be more stable, durable, and available to broader segments of the unauthorized population because it would be statutorily provided. As a program created administratively, DACA has been vulnerable to court challenges and to reversal by a successor administration, demonstrated in the September 2017 Trump administration directive seeking to wind down the program and the July 2020 attempt to reduce the validity period to one year after federal courts kept the program alive.<sup>76</sup> DACA also does not constitute a statutorily recognized legal status. A statutory status, on the other hand, would allow those eligible to adjust to LPR status through another provision of immigration law, such as through family or employer sponsorship.

<sup>72</sup> Kerwin, *More than IRCA*.

<sup>73</sup> MPI calculation based on DHS, Office of Immigration Statistics, *Yearbook of Immigration Statistics* (various years); Department of Justice, *Statistical Yearbook of the Immigration and Naturalization Service* (various years); Department of Justice, *Annual Report of the Immigration and Naturalization Service* (various years); Kerwin, *More than IRCA*.

<sup>74</sup> Jill H. Wilson, *Applications for Liberian Refugee Immigration Fairness (LRIF): Fact Sheet* (Washington, DC: CRS, 2020).

<sup>75</sup> Kerwin, *More than IRCA*.

<sup>76</sup> Memorandum from Chad Wolf, Acting Secretary of Homeland Security, to Mark Morgan, Senior Official Performing the Duties of Commissioner, U.S. Customs and Border Protection (CBP); Matthew Albence, Senior Official Performing the Duties of Director, U.S. Immigration and Customs Enforcement (ICE); and Joseph Edlow, Deputy Director of Policy, USCIS, "Reconsideration of the June 15, 2012 Memorandum Entitled 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,'" July 28, 2020.

*Given the opposition to legalization with a path to citizenship that has stymied immigration reform in past years, a more limited protection status may be more feasible politically.*

Given the opposition to legalization with a path to citizenship that has stymied immigration reform in past years, a more limited protection status may be more feasible politically. Many members of Congress who typically take restrictive approaches to immigration signed on to a bill in 2018 that included a version of this proposal for DACA

recipients.<sup>77</sup> A statutory provision for protections from deportation and eligibility for work authorization could be designed to reach a broad population or cover any of the subgroups within the unauthorized population profiled above.

The limitations are that unlike permanent residents, individuals holding such a status would not be able to petition for visas for their family members, vote in elections, access most social safety-net programs, or hold jobs requiring U.S. permanent residence or citizenship. Work authorization documents other than green cards may be confusing for employers, particularly when the government is slow to issue renewals.<sup>78</sup> The uncertainty of limited protections can also make it difficult for beneficiaries to establish roots and make long-term investments such as by buying homes, pursuing higher education, or starting a business.

Nonetheless, the experience of people who have benefited from similar programs, such as DACA and TPS, has shown that protection from deportation and work authorization offer significant benefits, and those who have these protections are generally better off than the unauthorized. They are able to obtain important documentation, such as Social Security numbers and driver's licenses.<sup>79</sup> DACA has been shown to increase high school attendance and graduation rates, and to give beneficiaries access to new educational opportunities.<sup>80</sup> Both DACA and TPS have allowed immigrants to move into better jobs.<sup>81</sup> DACA has led to higher incomes for holders, as has TPS for male TPS holders.<sup>82</sup>

### Addressing Barriers to Legal Status under Existing Law

Aside from creating new legalization programs, Congress could amend existing laws to eliminate current barriers to obtaining legal status. Many noncitizens are eligible for LPR status under current immigration law but are prevented from obtaining it due to changes to immigration law in the 1990s. Addressing those disqualifying factors could benefit large segments of the current unauthorized population.

77 *Securing America's Future Act of 2018*, HR 4760, 115th Cong., 2nd sess., *Congressional Record* 164, no. 6, daily ed. (January 10, 2018): H131.

78 Cecilia Menjivar, *Temporary Protected Status in the United States: The Experiences of Honduran and Salvadoran Immigrants* (Lawrence, KS: University of Kansas, 2017).

79 Kara Cebulko, "Documented, Undocumented, and Liminality Legal: Legal Status During the Transition to Adulthood for 1.5-Generation Brazilian Immigrants," *The Sociological Quarterly* 55, no. 1 (2014): 143-67.

80 Elira Kuka, Na'ama Shenhav, and Kevin Shih, "Do Human Capital Decisions Respond to the Returns to Education? Evidence From DACA" (working paper 24315, National Bureau of Economic Research, Cambridge, MA, February 2018); Tom K. Wong et al., "DACA Recipients' Livelihoods, Families, and Sense of Security Are at Stake This November," Center for American Progress, September 19, 2019.

81 Menjivar, *Temporary Protected Status in the United States*; Pia Orrenius and Madeline Zavodny, "The Impact of Temporary Protected Status on Immigrants' Labor Market Outcomes" (working paper 1415, Federal Reserve Bank of Dallas, Dallas, TX, December 2014); Jie Zong, Ariel G. Ruiz Soto, Jeanne Batalova, Julia Gelatt, and Randy Capps, *A Profile of Current DACA Recipients by Education, Industry, and Occupation* (Washington, DC: MPI, 2017).

82 Orrenius and Zavodny, "The Impact of Temporary Protected Status;" Wong et al., "DACA Recipients' Livelihoods, Families, and Sense of Security."

### *Eliminating the Three- and Ten-Year Bars*

Many noncitizens eligible for green cards through family or employer sponsorship are barred from getting them inside the United States because of their initial unlawful entry. But they can obtain them at a U.S. consulate abroad. However, if they have stayed unlawfully in the United States for longer than six months, they are subject to a three-year bar on re-entry, and to a ten-year bar if their unlawful stay is longer than one year, as discussed earlier. The three- and ten-year bars are triggered by leaving the United States for any reason, including pursuing a visa application at a U.S. consulate.

These bars can be waived upon an application for those whose absence from the country would cause extreme hardship to a U.S.-citizen or LPR spouse or parent, but since there is no guarantee that these unlawful presence waivers will be granted, most noncitizens are unwilling to take the risk for fear that, if denied, they would be unable to return to the United States. Even for those who

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*Ironically, the three- and ten-year bars intended by Congress in 1996 to deter long-term unlawful stay have created a perverse incentive for foreign nationals to prolong their stay in the United States.*

are provisionally approved for a waiver before they leave the United States, there is always the risk that they could be denied their visa at the consulate. Thus, ironically, the three- and ten-year bars intended by Congress in 1996 to deter long-term unlawful stay have created a perverse incentive for foreign nationals to prolong their stay in the United States, when they are otherwise eligible to receive permanent residence through family or employment sponsorship. Eliminating the unlawful presence bars would clear the way for sizeable numbers of individuals residing in the United States to obtain permanent residence. MPI estimates suggest that 1.4 million unauthorized immigrant spouses of U.S. citizens and permanent residents and the (likely overlapping) at least 1.7 million unauthorized immigrants who may be more likely to be sponsored by an employer, as described above, could benefit from this change.

### *Restoring In-Country Inadmissibility Waivers*

Similar to eliminating the three- and ten-year bars, restoring a provision of immigration law known as Section 245(i), which was enacted in 1994 but has since lapsed, would remove additional obstacles for unauthorized immigrants who are otherwise eligible for green cards.

Section 245(i) permitted unauthorized immigrants to receive their green cards from within the United States if sponsored by a qualifying family member or employer and if they paid a penalty, rather than being required to apply at a U.S. consulate abroad. The fee was five times the standard fee to adjust status. Originally intended to reduce consular workloads and lessen travel burdens for immigrants applying for adjustment while still imposing a penalty for breaking the law,<sup>83</sup> it became especially advantageous once the unlawful presence bars were imposed in 1996, as it allowed immigrants who would have been subject to the bars if they left the country to adjust status from within the United States.<sup>84</sup>

<sup>83</sup> CRS, *Immigration: Adjustment to Permanent Resident Status Under Section 245(i)* (Washington, DC: CRS, 2003).

<sup>84</sup> CRS, *Immigration: Adjustment to Permanent Resident Status*.

The provision expired in October 1997 but was extended twice. The last extension, which remains in effect today, allows unauthorized immigrants who were in the United States on December 21, 2000, to adjust status from within the United States if a sponsor had filed a petition for a green card or labor certification for them by April 30, 2001 and if they paid a \$1,000 fine, in addition to the existing fee to apply for adjustment.<sup>85</sup>

For a renewed version of 245(i), the \$1,000 fee from the latest extension of 245(i), adjusted for inflation, would be just under \$1,500 in 2020. If the fee were to be five times the fee to adjust status, as in the 1994 formulation of 245(i), it would be \$5,700. The same immigrants who would stand to benefit from a repeal of the three- and ten-year bars—those with potential sponsors as described in the previous subsection—would benefit from a reinstatement of 245(i).

### *Reconfiguring Cancellation of Removal*

Cancellation of removal, known as suspension of deportation until 1996, has been part of U.S. immigration law since 1940. It evolved over the years, with the final version pre-1996 allowing unauthorized immigrants who had resided in the United States for at least seven years, shown good moral character, and demonstrated that their deportation would cause extreme hardship to them or to their U.S.-citizen or resident spouse, child, or parent to seek suspension of their deportation proceedings and subsequently become permanent residents. Somewhat like a statute of limitations, it acknowledged the greater utility of regularizing the legal status of long-term U.S. residents in hardship circumstances, rather than expending resources trying to deport them.

IIRIRA imposed limitations on this process and renamed it cancellation of removal. It removed the possibility that an applicant could meet the hardship standard by showing hardship to themselves and raised the standard that an applicant had to meet. At present, noncitizens other than LPRs in removal proceedings who have resided in the United States for ten years, demonstrated good moral character, and lack certain criminal convictions must show that their deportation would cause “exceptional and extremely unusual hardship” to their LPR or U.S.-citizen spouse, child, or parent in order to have their removal proceedings cancelled and adjust to LPR status. Annual grants of cancellation and LPR status for unauthorized immigrants also have been capped at 4,000.

Between 1945 and 1996, 65,373 applications for suspension of deportation were granted, and between 1997 and 2019, another 80,694 were approved.<sup>86</sup> The increase post-1996 may be due to the growth of the long-term unauthorized population in the last 25 years. There were an estimated 30,000 cancellation cases waiting to be adjudicated as of 2019.<sup>87</sup> Additionally, the only way to apply for cancellation of removal is

85 Ariel Brown, “245(i): Everything You Always Wanted to Know but Were Afraid to Ask” (practice advisory, Immigrant Legal Resource Center, Washington, DC, June 2018).

86 MPI calculation based on DHS, Office of Immigration Statistics, *Yearbook of Immigration Statistics* (various years); Department of Justice, *Statistical Yearbook of the Immigration and Naturalization Service* (various years); Department of Justice, *Annual Report of the Immigration and Naturalization Service* (various years). Calculations do not include cancellation of removal under the *Violence against Women Act*, or under the *Nicaraguan Adjustment and Central American Relief Act* (NACARA); they also do not include suspension of deportation for crewmen on board ships or aircraft who entered before July 1, 1964, as permitted by the 1965 *Immigration and Nationality Act*.

87 As of April 2019, there were 30,000 cases in the affirmative asylum backlog that were filed more than ten years after the applicant arrived in the United States, which are likely to be cases where an applicant is trying to open removal proceedings to apply for cancellation.

to have a case pending before an immigration judge. This creates incentives for people not in removal proceedings to try to be placed in them, most often by submitting an asylum application that will not be granted and then referred to an immigration court for removal.

A pragmatic way to avoid this misuse of court proceedings would be to open an application process where people eligible for cancellation could affirmatively apply for it with USCIS. An immigration officer would adjudicate such requests using the same criteria that immigration judges do in removal proceedings. This would help reduce backlogs in both the asylum and immigration court systems. Restoring the hardship criteria to their pre-1996 form, which was not being abused; removing the numerical cap; and/or creating an affirmative path to open cancellation proceedings all would facilitate the use of this existing legalization mechanism for hardship cases.

## B. *Executive Action*

In the absence of legislation to provide legal status for all or portions of the unauthorized population, the executive branch could provide a certain degree of protections through administrative actions. Such protections are less enduring and would be narrower in scope than legislation. However, as a practical matter, executive actions have generally been used as an alternative—or a bridge—to legislation in the absence of congressional action.

*Although executive action cannot provide relief to the entire unauthorized population, it could protect certain subgroups.*

Though Biden has forwarded a blueprint for legalization to Congress, immigrant-rights advocates may press to see quicker executive action. This will be especially true because Congress is unlikely to be able to act on legislation soon. Further, the COVID-19 pandemic may present a strong case to extend some protections quickly, especially to protect

essential workers. Although executive action cannot provide relief to the entire unauthorized population, it could protect certain subgroups, particularly while legislation is being developed by Congress.

The options available to the executive branch for granting administrative relief to subgroups of the population are as follows:

- ▶ **Deferred action.** This is an exercise of prosecutorial discretion by DHS not to remove a noncitizen. The most prominent example of such discretionary relief is DACA, but deferred action has also been granted to other classes of immigrants; for example, in 2009 it was extended to widows of U.S. citizens who were prevented from adjusting to LPR status because they had not been married long enough.<sup>88</sup> DACA and deferred action for widows of U.S. citizens have validity periods of two years, but there is no statutory time limit for issuances of deferred action.<sup>89</sup> Immigrants with deferred action are eligible for work authorization if they can demonstrate economic necessity.<sup>90</sup> Instructions to consider certain

88 Memorandum from Donald Neufeld, Acting Associate Director, Office of Domestic Operations, USCIS, to field leadership, "Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children," June 15, 2009.

89 Ben Harrington, *An Overview of Discretionary Reprieves from Removal: Deferred Action, DACA, TPS, and Others* (Washington, DC: CRS, 2018).

90 "Classes of Aliens Authorized to Accept Employment," 8 *Code of Federal Regulations* 274.a12(c)(14).

noncitizens for deferred action have been set out via USCIS policy guidance in the past, but deferred action eligibility criteria could also be issued by regulation.

- ▶ **Parole in place.** This is an extension of the Homeland Security Secretary’s authority to parole noncitizens applying for admission into the United States for humanitarian purposes or significant public benefit.<sup>91</sup> Parole in place allows noncitizens already living in the United States who have not been lawfully admitted to the country to stay legally, though it does not constitute a lawful admission or a legal status. USCIS has made parole in place available to spouses, children, and parents of certain members of the military and veterans since November 2013 and of certain military recruits since November 2016, both through policy guidance.<sup>92</sup> While the parole-in-place authority was first formally recognized in a 1998 legal opinion by the Immigration and Naturalization Service (the precursor agency to DHS), it did not appear in statute until 2020.<sup>93</sup> The *National Defense Authorization Act for Fiscal Year 2020* reaffirmed “the importance of the parole-in-place authority of the Secretary of Homeland Security,” and included the eligibility criteria for relatives of members of the military. While classes of noncitizens have been designated as potentially eligible for parole in place, their applications are nonetheless adjudicated on a case-by-case basis. Those granted relief are authorized to stay in the United States for one year and can apply for work authorization if they demonstrate economic necessity.<sup>94</sup>
- ▶ **Deferred Enforced Departure (DED).** This form of relief provides temporary protection from removal to nationals of certain countries.<sup>95</sup> In the past, it has been used in the same manner as TPS, to protect certain noncitizens already in the United States from being sent back to unstable conditions in their country of origin. DED has been granted to noncitizens from El Salvador, China, the Persian Gulf, Haiti, and Liberia.<sup>96</sup> The authority was most recently used on January 19, 2021, when outgoing President Donald Trump extended DED to Venezuelan migrants in the country illegally.<sup>97</sup> MPI estimates there are a little under 150,000 Venezuelans in the United States who could be eligible. DED is typically issued by a presidential order. The president’s directive sets out eligibility criteria, validity period, and can allow beneficiaries to apply for work authorization. Unlike deferred action and parole in place, there is no application process for DED—anyone who meets the criteria is considered to be covered; however, DED holders who want to work lawfully need to apply for work authorization, and their eligibility is then assessed.<sup>98</sup>

91 “Inadmissible aliens,” 8 *United States Code* 1182(d)(5)(A).

92 USCIS Policy Memorandum, “Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i),” November 15, 2013; USCIS Policy Memorandum, “Discretionary Options for Designated Spouses, Parents, and Sons and Daughters of Certain Military Personnel, Veterans, and Enlistees,” November 23, 2016.

93 Memorandum from Paul W. Virtue, General Counsel, Immigration and Naturalization Service (INS), to Executive Associate Commissioner for Policy and Planning, Executive Associate Commissioner for Field Operations, All Regional Counsels, All District Counsels, and All Sector Counsels, “Authority to Parole Applicants for Admission Who Are Not Also Arriving Aliens,” August 21, 1996; *National Defense Authorization Act for Fiscal Year 2020*, Public Law 116-92 *U.S. Statutes at Large* 133 (2019): 1198-2316.

94 USCIS, *Adjudicator’s Field Manual* (Washington, DC: USCIS, n.d.), 2-4.

95 USCIS, *Adjudicator’s Field Manual*.

96 Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues* (Washington, DC: CRS, 2020), 5.

97 White House, “Deferred Enforced Departure for Certain Venezuelans,” *Federal Register* 86, no. 14 (January 25, 2021): 6845-46.

98 USCIS, *Adjudicator’s Field Manual*.

- ▶ **Temporary Protected Status.** DHS can grant TPS, described in more detail in Section 2.A., to nationals of certain countries who are already in the United States if there are temporary conditions in their home country that would make returning dangerous. This is done through a notice in the *Federal Register*. In late 2020, the governments of Guatemala and Honduras requested that the U.S. government grant TPS to their nationals because of two hurricanes that caused severe, widespread damage in those countries.<sup>99</sup> DHS had not designated these countries for TPS as of January 2021. There are a little over 750,000 Guatemalan and 500,000 Honduran immigrants in the United States who could be covered by this relief if invoked.

These executive actions can generally be implemented through DHS guidance or memoranda, presidential orders, or regulations (although TPS can be done only by regulation). Of them, policies implemented through regulation take longer but are the most secure against a legal challenge. The process—governed by the *Administrative Procedures Act*—requires issuing a proposed regulation, with a public comment period, followed by promulgating a final regulation. It typically takes several months or more to complete. An expansion of DACA, as described in Section 2.A., or a version of DAPA could be implemented through regulations for increased security. The Obama administration’s DAPA program, for example, was initially struck down by a federal judge not on the merits but because it did not go through the notice-and-comment period required by the *Administrative Procedures Act*.<sup>100</sup>

The four types of executive action described here vary slightly from each other. Deferred action in the past has been issued for two-year periods, while parole in place has had one-year validity. Courts have split on whether someone who has received parole and has a valid sponsor is eligible to adjust to permanent residence. Someone granted deferred action is clearly not automatically eligible to adjust.<sup>101</sup> TPS is the most insulated from court challenges out of these four actions, but it can only be issued based on nationality and country conditions, so it cannot be used to protect other subgroups of the unauthorized population described above, such as parents of U.S. citizens and LPRs or essential workers. While DED has also traditionally been used to protect people of designated nationalities from repatriation, there is nothing in statute or regulations that limits it in this way, so it could conceivably be used to protect other populations, though such a usage would be without precedent, thus perhaps more susceptible to a legal challenge.

Each of these administrative forms of relief, while not opening new pathways to permanent residence, would provide significant protections against removal and the ability to work lawfully to segments of the unauthorized population.

99 Presidency of Honduras, “Honduras pide a Estados Unidos un nuevo TPS tras desastre por Eta y Iota” (news release, December 4, 2020); Reuters, “United States Asked to Allow Guatemalans to Stay on Humanitarian Grounds After Storm,” Reuters, November 11, 2020.

100 *State of Texas et al. v. United States of America et al.*

101 Some DACA recipients have been able to adjust status after receiving a grant of advanced parole, which allows them to re-enter the United States after traveling abroad, despite being legally inadmissible to the country. See Roxana Kopetman, “Students, Who Entered the U.S. Illegally, Travel to Mexico Before Trump Becomes President,” *Orange County Register*, December 23, 2016. For a discussion of the use of advance parole to adjust status, see Ben Harrington, *Legalization Framework Under the Immigration and Nationality Act (INA)* (Washington, DC: CRS, 2019), 12-16.

## 4 Conclusion

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With its sweeping Day One immigration proposal, the Biden administration has put legalization back on the table, declaring it key to any attempt to reform or rethink the U.S. immigration system. The profiles and policy options presented in this report provide a jumping-off point to determine the many ways such efforts could be accomplished, whether by legislation or executive action. There are various approaches and combinations of approaches that could address the decades-long immigration policy failings that have resulted in one-fourth of the foreign-born population in the country without the protections of a legal status—60 percent of whom have lived in the United States for a decade or more.

In today's polarized political climate, legislation that legalizes large swaths of the unauthorized immigrant population will be difficult to achieve. Those who oppose legalization argue that it rewards lawbreakers and invites further illegal immigration, while proponents point to the strong equities most in the unauthorized population have because of their contributions to the broader well-being of the country and the communities in which they have lived for many years.

As a renewed debate between these contending views returns, the policy approaches and new data presented in this report can provide a guide to policymakers as they seek to break the legalization impasse that has for too long paralyzed Congress from making much-needed changes to modernize the nation's immigration laws and system.

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*The Biden administration has put legalization back on the table, declaring it key to any attempt to reform or rethink the U.S. immigration system.*



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Doris Meissner, former Commissioner of the U.S. Immigration and Naturalization Service (INS), is a Senior Fellow at MPI, where she directs the Institute's U.S. immigration policy work. Her responsibilities focus on the role of immigration in America's future and on administering the nation's immigration laws, systems, and government agencies. Her work and expertise also include immigration and politics, immigration enforcement, border control, cooperation with other countries, and immigration and national security.

From 1993 to 2000, she served in the Clinton administration as Commissioner of the INS. Her accomplishments included reforming the nation's asylum system; creating new strategies for managing U.S. borders; improving naturalization and other services for immigrants; shaping responses to migration and humanitarian emergencies; strengthening cooperation with Mexico, Canada, and other countries; and managing growth that doubled the agency's personnel and tripled its budget.

In 1986, Ms. Meissner joined the Carnegie Endowment for International Peace as a Senior Associate. There, she created the Endowment's Immigration Policy Project, which evolved into MPI in 2001.

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