

Statement by Legal Practitioners and Scholars

Published March 1, 2018

We are legal practitioners and scholars with years of experience in the field of immigration. We write to underscore the urgency of passing a “clean” DREAM Act. As discussed in detail below, we also write to provide a legal context for Deferred Action for Childhood Arrivals (DACA) and the H program to explain the importance of H-4 reform. We are concerned about attempts to divide communities impacted by one program or another and support a focus on legal solutions.

DACA was implemented in 2012 as a form of a temporary immigration relief for individuals who, among other requirements, had no lawful immigration status in the United States as of June 15, 2012, came to the United States before the age of 16, and are currently in school or graduated.¹ DACA has allowed almost 800,000 young people to live, work, and study in the U.S.² DACA was rescinded on September 5, 2017 and since this date 122 people have been losing DACA every day.³

To humanize the impact, Bupen Ram is a DACA recipient of Indian ethnicity and from Fiji whose family came to the United States on tourist visas to escape a political coup.⁴ Ram’s parents successfully applied for and received protection under asylum, but the immigration attorney inexplicably failed to include Ram in the asylum application, as the law entitled the attorney to do.⁵ Ram lived his youth under the constant threat of removal, but excelled in his education, obtaining an undergraduate degree from California State University – Fullerton and later pursuing a Master’s degree in communication. Says Ram “I hope my degree will allow me to effectively highlight the plight of undocumented students around the country and to push for immigration reform. With my DACA status, I can now get entry-level positions and internships to build up my resume and advance in the field of diversity and inclusion.”⁶ The status of DACA is now uncertain and Ram’s future, like many others, has become unclear.

¹ *Consideration of Deferred Action for Childhood Arrivals (DACA)*, United States Citizenship and Immigration Services, <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca#guidelines> (last visited Feb. 27, 2018).

² *The Education and Work Profiles of the DACA Population*, Migration Policy Institute, <https://www.migrationpolicy.org/research/education-and-work-profiles-daca-population> (last visited February, 28 2018). See also *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics, and Case Status*, United States Citizenship and Immigration Services, <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-821d-deferred-action-childhood-arrivals> (follow “Deferred Action for Childhood Arrivals Process (Through Fiscal Year 2017, 4th Qtr.) (PDF, 218 KB)” hyperlink) (last updated September 30, 2017).

³ Tom Jawetz and Nicole Prchal Svajlenka, *Thousands of DACA Recipients Are Already Losing Their Protection From Deportation*, Center for American Progress, (November 9, 2017, 6:00 a.m.), <https://www.americanprogress.org/issues/immigration/news/2017/11/09/442502/thousands-daca-recipients-already-losing-protection-deportation/>.

⁴ *Bupendra (Bupen) Ram*, South Asian Americans Leading Together (SAALT), <http://saalt.org/policy-change/immigrant-rights/daca-stories/bupendra-bupen-ram/> (last visited Feb. 27, 2018).

⁵ INA § 208(b)(3)(A); 8 U.S.C. § 1158(b)(3)(A).

⁶ *Bupendra (Bupen) Ram*, South Asian Americans Leading Together (SAALT), <http://saalt.org/policy-change/immigrant-rights/daca-stories/bupendra-bupen-ram/> (last visited Feb. 27, 2018).

The H-1B visa is a type of non-immigrant (temporary) visa that allows individuals with specialty occupations to live and work in the United States through a specific employer who must among other requirements guarantee to pay the higher of either the prevailing or actual wage for the job.⁷ The immigration statute defines a specialty occupation as an occupation involving a theoretical or practical application of a body of highly specialized knowledge and attainment of a bachelor's degree (or its equivalent) for that specialty.⁸ Examples of workers who often qualify for H-1B status include, but are not limited to, architects, engineers, IT specialists, mathematicians, and administrative specialists.⁹ H-1B visas are subject to an annual cap of 65,000, with an additional 20,000 available to foreign nationals holding a master's or higher degree from U.S. universities.¹⁰ Spouses and minor children can accompany the principal H-1B applicant to the United States as dependents under the H-4 category.¹¹ The legal immigration status of an H-4 is directly tied to the principal H-1B holder. Necessarily, H-4 children were brought to this country before the age of 21, and many were of tender age when they arrived in the United States.¹²

For an H-1B worker who seeks to become a lawful permanent resident (green card holder) either through an employer or in some cases through self-sponsorship, there is a maximum number of employment-based green cards that can be issued worldwide in a given fiscal year.¹³ Although the H-1B visa is a temporary visa, the law allows the H-1B worker to be sponsored for permanent residence.¹⁴ The annual ceiling on employment-based visas is 140,000.¹⁵ There are also per-country caps that limit the number of visas that can be issued to natives of any one country each year.¹⁶ As with the H-1B category, H-4 spouses and minor children can get permanent residence with the principal applicant who is sponsored for a permanent immigrant visa under an employment-based category, but these dependents are counted toward both the worldwide and per-country numerical limits.¹⁷ In practice, this means individuals with nonimmigrant visas who wish to acquire lawful permanent residence under one of the employment-based grounds may be subject to long wait times because of the statutory worldwide ceilings and per-country caps. For example, an Indian-born worker with an advanced degree and seeking admission under the second employment-based immigrant visa category (jobs that require a master's degree or a bachelor's degree plus 5 years of experience) known as "EB-2" faces a wait time of more than 10 years from

⁷ 20 C.F.R. § 655.705(d)(1)(2018); *See also* Richard A. Boswell, *Essentials of Immigration Law* 126 (4th ed. 2016) ("The employer will pay a wage that is no less than the [actual] wage paid to similarly qualified workers or, if greater, the prevailing wage for the position in the geographic area.").

⁸ INA § 214(i)(1)(A)-(B); 8 U.S.C. 1184 § (i)(A)-(B).

⁹ *Number of H-1B Petition Filings; Applications and Approvals, Country, Age, Occupation, Industry, Annual Compensation (\$), and Education*, United States Citizenship and Immigration Services, <https://www.uscis.gov/tools/reports-studies/immigration-forms-data> (follow "H-1B Trends: 2007 to 2017: PDF version (PDF, 92 KB)" hyperlink) (last updated November 15, 2017); *See also* 8 C.F.R. § 214.2(h)(1)(ii)(b)(1).

¹⁰ H-1B nonimmigrants who work or have been offered employment at institutions of higher education, nonprofit entities affiliated with institutions of higher education, or nonprofit governmental research organizations, are exempt from the 65,000 ceiling. These exemptions (along with H-1B extension approvals) allow for the actual approved number of petitions to surpass the 85,000 cap. 8 C.F.R. § 214.2(h)(8)(ii)(F)(2018).

¹¹ 8 C.F.R. § 214.2(h)(9)(iv) (2018).

¹² 8 C.F.R. § 214.2(h)(9)(iv) (2018); INA § 101(b)(1) (2018); 8 U.S.C. § 1101(b)(1) (2018).

¹³ INA § 201(d) (2018).

¹⁴ INA § 214(b) (2018); 8 U.S.C. § 1184(b) (2018).

¹⁵ INA § 201(d) (2018).

¹⁶ INA § 202(a)(2)(2018); 8 U.S.C. § 1152(a)(2)(2018). Certain types of LPRs, including immediate relatives, are exempt from the country caps. INA § 201(b)(2018); 8 U.S.C. § 1151(b)(2018).

¹⁷ INA § 201(c)(2)(2018); 8 U.S.C. § 1151(c)(2)(2018).

the time his or her labor certification or immigrant visa petition is filed.¹⁸ According to the National Foundation for American Policy, an H-1B sponsored for an employment-based visa born in India could theoretically wait 70 years to receive a green card.¹⁹ For H-4 children living in the United States, a long wait time can mean a loss of immigration status because of how the immigration law treats age. H-4 children who turn 21 before a visa becomes available will automatically be disqualified from obtaining a green card through their parents' applications.

For example, Shynitha Pulluri is a high school student with H-4 status who has studied in the United States for six years. She wants to become a cardiologist in the United States. During this time, she has received numerous awards and has excelled in school. Once she turns 21, Shynitha will lose her H-4 status and be forced to return to her home country of India.²⁰ If she returns to the United States on a student visa and thereafter seeks a green card based on her skills, she will acquire her green card only at the age of 50 or above.²¹ Our country will be diminished by the loss of young people like Shynitha.

Providing solutions for DACA recipients and H-4 children who may potentially “age out” requires a legislative fix that includes a durable status for both populations and a pathway to permanent residency. The DREAM Act has been introduced by Congress in many forms, but the goal remains the same: to provide conditional permanent residence with a pathway to lawful permanent residence (and eventually citizenship).²² The need to pass a “clean” DREAM Act is urgent.

For the H-4 population, Congress should pass legislation to eliminate or increase the per country caps, and exempt spouses and children from or increase the 140,000 employment-based worldwide cap as this would substantially decrease or eliminate existing wait times even for derivative and principal applicants alike.

Our goal is to provide the legal landscape of DACA and H-4 and support solutions that are legally sound and consistent with our American aspirations. We urge Congress to pass a “clean” DREAM

¹⁸ The EB-2 is an employment-based second preference for professionals holding advanced degrees, or for persons with exceptional ability in the arts, sciences, or business who will substantially benefit the national economy or culture. The EB-2 applicant must be “sought by an employer in the United States.” INA § 203(b)(2)(A) (2018); 8 U.S.C § 1153(b)(2)(A) (2018). *See also* Richard A. Boswell, *Essentials of Immigration Law* 158 (4th ed. 2016). *Visa Bulletin Immigrant Numbers for February 2018*, United States Department of State Bureau of Consular Affairs, (February 2018) https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_February2018.pdf.

¹⁹ Stuart Anderson, *Waiting and More Waiting: America's Family and Employment-Based Immigration System*, National Foundation for American Policy http://www.nfap.com/pdf/WAITING_NFAP_Policy_Brief_October_2011.pdf (last visited Feb. 27, 2018) (“The 70-year wait estimate is derived from calculating that there exists a backlog of 210,000 or more Indians in the most common skilled employment-based category (the 3rd preference or EB-3) and dividing that by the approximately 2,800 Indian professionals who receive permanent residence in the category each year under the law.”).

²⁰ H4 DREAMERS, [siia.us https://siia.us/h4-dreamers/](https://siia.us/h4-dreamers/) (last visited Feb. 27, 2018).

²¹ H4 DREAMERS, [siia.us https://siia.us/h4-dreamers/](https://siia.us/h4-dreamers/) (last visited Feb. 27, 2018).

²² The most current version of the DREAM act, introduced in the Senate on July 20, 2017, grants conditional permanent residence to “any alien who is inadmissible or deportable or is in temporary protected status who: (1) has been continuously physically present in the United States for four years preceding this bill's enactment; (2) was younger than 18 years of age on the initial date of U.S. entry; (3) is not inadmissible on criminal, security, terrorism, or other grounds; (4) has not participated in persecution; (5) has not been convicted of specified federal or state offenses; and (6) has fulfilled specified educational requirements.” Dream Act of 2017, S.1615, 115th Cong. § 3(b) (2017). <https://www.congress.gov/115/bills/s1615/BILLS-115s1615is.pdf> (last visited Feb. 27, 2018)

Act as soon as possible. We hope it can be a foundation to address reforms for H-4 children. Both populations present compelling equities and contribute or have the potential to contribute to the United States in meaningful ways.

**All institutional affiliations are for identification purposes only and do not signify institutional endorsement of this letter*

Shoba Sivaprasad Wadhia

Shoba Sivaprasad Wadhia*
*Samuel Weiss Faculty Scholar and Clinical Professor of Law
Founding Director, Center for Immigrants' Rights Clinic
Penn State Law, University Park*

James Alexander
*Managing Shareholder
Maggio Kattar Nahajzer + Alexander PC*

Sameer Ashar
*Clinical Professor of Law
University of California, Irvine*

Lenni Benson
*Professor of Law
Founder and Senior Advisor, Safe Passage Project
New York Law School*

Anil Kalhan
*Associate Professor of Law
Drexel University Kline School of Law*

Stephen H. Legomsky
*John S. Lehmann University Professor Emeritus
Washington University School of Law*

Cyrus D. Mehta
*Founder and Managing Partner of Cyrus D. Mehta & Partners, PLLC
Adjunct Professor of Law, Brooklyn Law School*

Hiroshi Motomura
*Susan Westerberg Prager Professor of Law
School of Law, University of California, Los Angeles (UCLA)*

Michael A. Olivas
William B. Bates Distinguished Chair in Law
University of Houston Law Center

Jayesh Rathod
Professor of Law
Director, Immigrant Justice Clinic
American University, Washington College of Law

Denyse Sabagh
Partner, Duane Morris LLP

Careen Shannon
Partner at Fragomen, Del Rey, Bernsen & Loewy, LLP
Former Adjunct Professor of Law, Cardozo Law School

Anita Sinha
Assistant Professor of Law
Director, International Human Rights Clinic
American University, Washington College of Law

Greg Siskind
Partner, Siskind Susser, PC - Immigration Lawyers

William Stock
Partner, Klasko Immigration Law Partners

Stephen W. Yale-Loehr
Miller Mayer, LLP
Professor of Immigration Law Practice
Cornell Law School