



# Unauthorized Aliens: Policy Options for Providing Targeted Immigration Relief

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## Summary

The 113<sup>th</sup> Congress is expected to consider comprehensive immigration reform legislation. If and when it does, a key challenge will be how to address the unauthorized alien population, estimated to number some 11 million. The unauthorized alien population is often treated as if it were monolithic, but it is, in fact, quite diverse. It includes individuals who entered the United States in different ways, for different reasons, and who have different types of connections to the United States. The circumstances of individuals who compose the unauthorized alien population affect their treatment under immigration law, especially with respect to prospects for obtaining legal status in the United States. Relevant immigration status-related factors include mode of entry into the United States, length of unlawful presence in the country, and the existence of family or employment connections.

The differences in circumstances among unauthorized aliens are particularly relevant in the context of current discussions about how to address this population. In past years, immigration proposals on unauthorized aliens often called for the establishment of broad legalization programs to enable large numbers of unauthorized aliens to become U.S. legal permanent residents (LPRs) or, conversely, included provisions aimed at promoting the departure of large numbers of unauthorized aliens from the country over time. More recently, there has been discussion of developing policies to provide targeted immigration relief to unauthorized aliens. *Immigration relief* is a broad term that encompasses relief from removal from the United States without the granting of a legal immigration status as well as relief in the form of a legal immigration status.

A main focus of recent discussions has been making eligibility for legal status available to certain segments of the unauthorized population. Aliens with approved immigrant visa petitions, especially those with U.S. citizen or LPR family members, seem to be of particular interest. Selected segments of the unauthorized alien population without an affirmative pathway to legal status, such as students who entered the United States as children and beneficiaries of long-term humanitarian relief, have also been the subject of policy proposals.

Policies to provide targeted relief to unauthorized aliens could be legislative or administrative. Legislative options could include amending existing statutory provisions to make it easier for certain unauthorized aliens to obtain LPR status. They also could include establishing statutory mechanisms to enable certain subgroups of unauthorized aliens to become LPRs who may not have pathways to do so under current law, as in the case of the Development, Relief, and Education for Alien Minors (DREAM) Act.

Unauthorized aliens also could receive temporary relief from removal through administrative action. The Department of Homeland Security's Deferred Action for Childhood Arrivals (DACA) program, which was established in the absence of congressional action on DREAM Act legislation and includes similar eligibility criteria, provides a recent example. Such administrative actions can provide temporary relief, but, unlike legislative enactments, cannot provide beneficiaries with a legal immigration status.

## **Contents**

Introduction.....	1
Estimates of the Unauthorized Resident Population.....	1
Current Law on Obtaining Legal Immigration Status .....	2
Nonimmigrant Admissions.....	3
Permanent Admissions .....	4
Family-Based Immigration .....	4
Employment-Based Immigration .....	5
Adjustment of Status .....	5
Admissibility .....	6
Other Avenues to Legal Immigration Status.....	7
Registry .....	7
Asylum .....	7
Cancellation of Removal.....	8
Other Forms of Immigration Relief.....	8
Immigration Status-Related Factors .....	10
Mode of Entry.....	10
Length of Unlawful Presence in the United States.....	11
Family Connection .....	12
Employment Connection.....	12
Criminal History/Security Concerns .....	13
Subgroups of the Unauthorized Alien Population .....	13
Beneficiaries of Family- or Employment-Based Immigrant Visa Petitions .....	13
Battered Alien Spouses and Children.....	14
Asylum Seekers.....	14
Aliens with Temporary Protected Status or Other Temporary Relief from Removal.....	14
Aliens with Other Pending Applications for Legal Status.....	15
Aliens Without Other Status or Avenues for Affirmative Relief .....	15
Potential Targeted Policy Options.....	16
Unauthorized Aliens with Approved Immigrant Visa Petitions.....	16
Unauthorized Aliens Who Arrived as Children.....	18
Unauthorized Aliens with Needed Employment Skills .....	19
Long-Term Holders of Temporary Humanitarian Relief.....	20
Conclusion .....	21

## **Contacts**

Author Contact Information.....	21
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## Introduction

For many years, the unauthorized alien population has been seen as a public policy challenge.<sup>1</sup> Addressing this population, estimated to number more than 11 million today, may take on added urgency in 2013 if the 113<sup>th</sup> Congress tackles comprehensive immigration reform.<sup>2</sup> Despite longstanding concern about the unauthorized population, however, there has not been much discussion about its composition. While the individuals included in this population at any point in time are officially categorized as unauthorized, they may differ significantly in their particular status-related circumstances under immigration law. For example, some unauthorized aliens in the United States have U.S. citizen or LPR family members or employers who are petitioning for them to become legal permanent residents (LPRs) of the United States<sup>3</sup> under current law; others have no such sponsors.

The variety of status-related circumstances among unauthorized aliens warrants attention because some immigration reform policy options under discussion would make distinctions based on individual circumstances. While there continue to be proposals seeking to establish statutory legalization programs to enable large numbers of unauthorized aliens to become LPRs or, conversely, proposals aimed at promoting the departure of large numbers of unauthorized aliens from the country over time, there also has been discussion of developing policies to provide targeted immigration relief to the unauthorized alien population. *Immigration relief* is a broad term that encompasses relief from removal from the United States without the granting of a legal immigration status as well as relief in the form of a legal immigration status, which could be a temporary immigration status or a permanent immigration status.

A main focus of these various discussions about targeted relief has been limiting eligibility for legal status to certain segments of the unauthorized population. To help inform policy discussions about addressing the unauthorized alien population in these targeted ways, this report will analyze components of the unauthorized population and discuss policy options to provide relief to selected subgroups of particular congressional and public interest.

## Estimates of the Unauthorized Resident Population

According to recent estimates by the Department of Homeland Security (DHS), the unauthorized resident alien population totaled 11.5 million in January 2011.<sup>4</sup> Using different sources, the Pew

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<sup>1</sup> There are starkly differing views, however, about what types of action should be taken. See CRS Report R41207, *Unauthorized Aliens in the United States*, by Andorra Bruno.

<sup>2</sup> In the recent past, unauthorized immigration has been among the most controversial components of comprehensive immigration reform legislation, which typically has also encompassed border security, employment eligibility verification, temporary worker programs, and permanent admissions, among other issues. For a summary of key immigration reform issues, see CRS Report R41704, *Overview of Immigration Issues in the 112th Congress*, by Ruth Ellen Wasem.

<sup>3</sup> *Legal permanent residents*, also known as *immigrants* and *green card holders*, are noncitizens who are legally authorized to reside permanently in the United States.

<sup>4</sup> U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, by Michael Hofer, Nancy Rytina, and Bryan C. Baker, March 2012 (hereinafter cited as DHS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*). These estimates are based on data from the Census Bureau's American Community Survey and other sources.

Hispanic Center estimated the unauthorized resident population at 11.1 million for March 2011.<sup>5</sup> Both sets of estimates include individuals who are sometimes described as being “quasi-legal” because they have temporary authorization to remain in the United States but do not have a legal immigration status. These individuals include applicants for asylum (see *Asylum* under *Other Avenues to Legal Immigration Status*) and persons with Temporary Protected Status (TPS) (see *Other Forms of Immigration Relief*).

DHS and Pew have analyzed the demographic characteristics of the unauthorized alien population.<sup>6</sup> These characteristics help determine an individual’s status-related prospects. Among the DHS and Pew findings, DHS estimated that about 85% of the unauthorized population in January 2011 had entered the country before 2005.<sup>7</sup> With respect to labor force participation, Pew estimated that there were 8.0 million unauthorized aliens in the labor force in 2010, representing almost four of every five unauthorized adults in the United States that year.<sup>8</sup>

Pew also considered the U.S. families of unauthorized aliens, estimating that about half of all unauthorized adults (about 5 million individuals) were in families with minor children in 2010. About 1 million of these children were unauthorized aliens; another estimated 4.5 million children in families with at least one unauthorized parent were U.S.-born citizens. According to the Pew analysis, at least 9 million adults and children were in mixed-status families (i.e., families with at least one unauthorized parent and at least one U.S.-born child) in 2010.<sup>9</sup>

## **Current Law on Obtaining Legal Immigration Status**

Under the Immigration and Nationality Act (INA),<sup>10</sup> the basis of current immigration law, unauthorized aliens are typically unable to be legally employed and are subject to being removed from the country. They also have limited opportunities to obtain legal status while remaining in the United States.

The INA prescribes pathways through which a foreign national can obtain legal temporary status and legal permanent status while in the United States. *Nonimmigrants* comprise the main category of legal temporary admissions. They include tourists, foreign students, and temporary workers, among others. *Immigrants*, synonymous with *legal permanent residents*, comprise the main category of legal permanent admissions. They consist primarily of family-based admissions (foreign nationals admitted on the basis of family ties) and employment-based admissions (foreign nationals admitted on the basis of employment ties or abilities). Also included among

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<sup>5</sup> *A Nation of Immigrants*, Pew Hispanic Center, January 29, 2013. These estimates are based on data from the March Current Population Survey, which is conducted jointly by the Census Bureau and the Department of Labor’s Bureau of Labor Statistics, and other sources.

<sup>6</sup> See CRS Report R41207, *Unauthorized Aliens in the United States*.

<sup>7</sup> DHS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*.

<sup>8</sup> Jeffrey S. Passel and D’Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, Pew Hispanic Center, February 1, 2011.

<sup>9</sup> Paul Taylor, Mark Hugo Lopez, Jeffrey Passel, and Seth Motel, *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, Pew Hispanic Center, December 1, 2011. Also see CRS Report R41207, *Unauthorized Aliens in the United States*.

<sup>10</sup> Act of June 27, 1952, ch. 477, codified at 8 U.S.C. §1101 et seq.

permanent admissions are humanitarian cases, such as individuals granted asylum on the basis of persecution claims.

Foreign nationals in the United States—whether legally present or illegally present—who want to become LPRs and who are not eligible for humanitarian relief may lack the requisite family or employment relationships to obtain LPR status under the permanent family-based or employment-based immigration systems. In addition, the INA includes mechanisms, such as the grounds of inadmissibility, that may bar an unauthorized alien with the requisite ties from obtaining legal immigration status. In order to be eligible for a nonimmigrant or immigrant visa and for admission to the United States, a foreign national must be found to be admissible to the country. The INA enumerates grounds of inadmissibility—grounds upon which aliens are ineligible for visas and admission. They include health-related grounds and security- and terrorism-related grounds as well as grounds concerning illegal entrants, public charge (the likelihood that an alien will require public support), and other issues. Some grounds of inadmissibility may be waived, as specified in the INA. Selected grounds of inadmissibility, including those related to illegal entrants and illegal presence in the United States, are discussed separately below (see “Admissibility”).

The following are key provisions in current law relevant to gaining legal nonimmigrant or immigrant admission to the United States while in the country. The provisions are introduced generally here to provide the background information necessary to discuss their application to unauthorized aliens. As explored briefly here and more fully in subsequent sections of this report, current law provides potential pathways for some components of the unauthorized resident population to obtain legal status, but not for others. Those without existing pathways would require new legislative enactments to become eligible for legal immigration status.

## **Nonimmigrant Admissions**

Nonimmigrants are foreign nationals who are admitted to the United States for a temporary period of time and a specific purpose. Typically, they are admitted from abroad. The INA provides for *lawfully admitted* nonimmigrants to change from one nonimmigrant classification to another in the United States, with some exceptions and subject to certain conditions.<sup>11</sup> It does not generally allow for unauthorized aliens to obtain legal nonimmigrant status.

Unauthorized aliens, however, are able to obtain legal nonimmigrant status in limited cases. Under the INA, the Secretary of Homeland Security has broad discretionary authority to waive grounds of inadmissibility, including those related to illegal entry and unlawful presence, in the case of certain nonimmigrant categories. These categories include the “T” category for alien victims of severe forms of trafficking in persons and the “U” category for aliens who have suffered substantial physical or mental abuse as a result of being a victim of certain criminal activities.<sup>12</sup> The INA also provides for eligible T nonimmigrants and U nonimmigrants to obtain LPR status under special provisions.<sup>13</sup>

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<sup>11</sup> INA §248.

<sup>12</sup> The DHS waiver authority with respect to “T” and “U” nonimmigrants can be found at INA §212(d)(13) and §212(d)(14), respectively. Also see CRS Report RL34317, *Trafficking in Persons: U.S. Policy and Issues for Congress*, by Alison Siskin and Liana Sun Wyler.

<sup>13</sup> INA §§245(l), (m).

More limited statutory exceptions to the INA inadmissibility provisions apply in the case of the “V” category for certain LPR spouses and children with pending immigrant visa petitions or pending applications for an immigrant visa or for adjustment of status. *Adjustment of status*, which is the subject of a succeeding section, is the process of becoming an LPR in the United States without having to go abroad to apply for a visa. Individuals in the United States applying for a V visa are not subject to the grounds of inadmissibility for illegal entrants, documentation, or unlawful presence (see “Admissibility,” below).<sup>14</sup> Unlike T nonimmigrants and U nonimmigrants, however, V nonimmigrants need to adjust status under existing law.

## **Permanent Admissions**

The INA provides for specified family members of U.S. citizens or LPRs and specified categories of workers to be admitted to the United States for permanent residence as LPRs. Both family-based immigration and employment-based immigration are subject to a complex set of preference categories and numerical limits. The process of becoming an LPR through either route has multiple steps. In most cases the sponsoring family member or employer must file an immigrant visa petition on behalf of the alien with DHS’s United States Citizenship and Immigration Services (USCIS).<sup>15</sup> There is no statutory restriction on submitting a visa petition on behalf of an illegally present alien.

If the family-based or employment-based petition is approved, the State Department then must determine if a visa number is immediately available to the alien. Because of the numerical limits and their allocation among the various preference categories and countries of origin, it can take many years between the time an immigrant petition is filed and a visa number becomes immediately available to an alien.<sup>16</sup> When a visa number becomes immediately available, the alien beneficiary can apply for assignment of a visa number. Aliens applying for visas abroad are subject to admissibility checks as part of that application process. Individuals who are issued visas become LPRs upon admission to the United States.

Aliens eligible to adjust status, that is, obtain LPR status within the United States, do not have to go through the visa application process. They, however, are subject to admissibility checks as part of the adjustment of status process. Under current law, there are only limited opportunities for unauthorized aliens in the United States (with the requisite family or employment ties) to adjust to LPR status in the United States (see “Adjustment of Status,” below). Leaving the country to apply for a visa abroad, however, may pose risks (see “Admissibility,” below).

## **Family-Based Immigration**

Family-based immigrants are defined in the INA, by category. Top priority is given to *immediate relatives* of U.S. citizens. Immediate relatives include children,<sup>17</sup> spouses, and, if the citizen is at

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<sup>14</sup> INA §214(q)(3).

<sup>15</sup> Certain prospective family-based immigrants, such as the battered spouses of U.S. citizens or LPRs, and certain prospective employment-based immigrants, such as aliens with extraordinary ability in their field of work, do not need sponsors and are able to self-petition for immigrant status.

<sup>16</sup> See CRS Congressional Distribution Memorandum, *Approved Legal Permanent Resident Petitions Pending for 2012*, by Ruth Ellen Wasem, May 2, 2012 (available from the author).

<sup>17</sup> The term *child* is defined in the immigration subchapter of the INA as an unmarried person under age 21. INA §101(b)(1).

least age 21, parents. This “age 21” sponsorship requirement is relevant for unauthorized aliens with U.S. citizen children; as noted, there were an estimated 4.5 million children in 2010 in families with at least one unauthorized parent. Immediate relatives are the only family-based immigrants admitted outside the preference system. They do not have to wait for a visa number to become available and are not subject to direct numerical limits. Other family-based immigrants, by order of preference, are: (1) unmarried adult sons and daughters of U.S. citizens; (2) spouses, children and unmarried adult sons and daughters of LPRs; (3) married adult sons and daughters of U.S. citizens; and (4) brothers and sisters of U.S. citizens.<sup>18</sup>

## **Employment-Based Immigration**

Employment-based immigration is subject to a ranked system similar to family-based immigration, with five preference categories. The categories are: (1) priority workers; (2) members of the professions holding advanced degrees or persons of exceptional abilities; (3) skilled workers, professionals, or unskilled workers; (4) special immigrants; and (5) employment creation investors.<sup>19</sup> The unskilled worker classification under category (3) explicitly excludes individuals performing temporary or seasonal work, the type of work presumably being done by many unauthorized workers.

The admissions process for prospective employment-based immigrants is similar to that for family-based immigrants but may require an additional step at the beginning of the process. In some preference categories, before an employer can file an immigrant petition on behalf of an alien, the employer must first apply for labor certification from the U.S. Department of Labor (DOL). Labor certification reflects a finding by DOL that there are not sufficient U.S. workers available to perform the work, and that the employment of alien workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

## **Adjustment of Status**

As mentioned, aliens who are in the United States when a visa number becomes immediately available to them may be able to apply to adjust to LPR status without going abroad to obtain a visa. Section 245 of the INA sets forth the eligibility requirements for adjustment of status. The main provision (§245(a)) generally allows an alien to adjust to LPR status in the United States if the alien has been legally admitted or paroled<sup>20</sup> into the United States, is eligible to receive an immigrant visa, is admissible to the United States, and has an immigrant visa number immediately available. Certain aliens who otherwise meet these requirements, however, are ineligible to adjust status under §245(a), including those in unlawful immigration status at the time of filing the adjustment of status application.<sup>21</sup> At the same time, there are limited exceptions to ineligibility due to unlawful status or unauthorized employment (see “Family Connection,” below). INA §245(a) primarily benefits legal nonimmigrants who are eligible for LPR status.

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<sup>18</sup> INA §203(a). See CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*, by Ruth Ellen Wasem.

<sup>19</sup> INA §203(b). See CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*.

<sup>20</sup> *Parole* is discretionary authority that may be exercised by DHS to allow an alien to enter the United States temporarily (without being formally admitted) for urgent humanitarian reasons or when the entry is determined to be for significant public benefit.

<sup>21</sup> INA §245(c).

In 1994, adjustment of status became more widely available to unauthorized aliens when a new, temporary subsection (i) was added to INA §245. INA §245(i) enables an alien who entered the United States unlawfully or is otherwise ineligible for adjustment of status to adjust status in the United States if he or she is eligible to receive an immigrant visa, is admissible for permanent residence, has a visa number immediately available to him or her, and pays an additional fee. Currently, to be eligible to adjust status under INA §245(i), which was last extended by a 2000 law, an alien must be the beneficiary of a family-based petition or a labor certification application filed by April 30, 2001. Given this 2001 cut-off date, a diminishing number of aliens are covered by this provision.<sup>22</sup>

An individual who has properly filed an adjustment of status application is considered by DHS to be in an authorized period of stay (but not to have lawful immigration status); will not accrue unlawful presence during the pendency of the application; and is eligible to apply for employment authorization. Having a pending adjustment application does not provide protection from removal, although, according to USCIS, “an immigration judge may, in his or her discretion, consider whether an alien has any avenue for relief prior to issuing a final order [of removal].”<sup>23</sup>

## **Admissibility**

In order to be issued a nonimmigrant or immigrant visa, to adjust to LPR status, or to otherwise be granted admission to the United States, an alien must be admissible to the United States. Determinations about admissibility are based on the INA grounds of inadmissibility, as mentioned.<sup>24</sup> Some grounds of inadmissibility relate to aliens who seek to enter the United States without required documentation. Among these is a ground of inadmissibility for aliens without properly issued documents,<sup>25</sup> and a ground of inadmissibility for certain prospective employment-based immigrants who lack DOL labor certification<sup>26</sup> (see “Employment-Based Immigration” under “Permanent Admissions,” above).

Certain inadmissibility grounds directly address illegal entrants and illegal presence. For example, INA §212(a)(6)(A) states: “An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.” Another ground of inadmissibility (INA §212(a)(9)(B)) makes aliens who in the past were illegally present in the United States inadmissible to the country for a period of time. Known as the 3- and 10-year bars, these provisions were added to the INA by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.<sup>27</sup> They apply to all aliens except LPRs. Under INA §212(a)(9)(B): (1) an alien who was unlawfully present in the United States for more than 180 days but less than one year, voluntarily departed, and seeks

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<sup>22</sup> See archived CRS Report RL31373, *Immigration: Adjustment to Permanent Resident Status Under Section 245(i)*, by Andorra Bruno.

<sup>23</sup> USCIS written responses to CRS questions about unauthorized aliens, dated July 27, 2012, provided by e-mail, July 31, 2012.

<sup>24</sup> The main grounds of inadmissibility, enumerated in INA §212(a), are: health-related grounds; criminal grounds; security and terrorist grounds; public charge; seeking to work without proper labor certification; illegal entrants and immigration law violators; ineligible for citizenship; and aliens previously removed. See CRS Report R41104, *Immigration Visa Issuances and Grounds for Exclusion: Policy and Trends*, by Ruth Ellen Wasem.

<sup>25</sup> INA §212(a)(7).

<sup>26</sup> INA §212(a)(5).

<sup>27</sup> IIRIRA is Division C of P.L. 104-208, September 30, 1996.

admission within three years is inadmissible, and (2) an alien who has been unlawfully present in the United States for one year or more and seeks admission within 10 years of such alien's departure or removal date is inadmissible.

With the addition of the 3- and 10-year bars to the INA grounds of inadmissibility, the ability of unlawfully present prospective immigrants to adjust to LPR status in the United States took on greater significance because aliens who were unlawfully present in the country for more than 180 days and went abroad to obtain their visas could be found to be subject to the bars upon seeking admission.

Some grounds of inadmissibility have exceptions and/or may be waived, as specified in the INA. For example, the grounds of inadmissibility under both INA §212(a)(6)(A) and INA §212(a)(9)(B) include exceptions for certain battered aliens. Among the other exceptions under INA §212(a)(9)(B) is one for minors; any period of time in which an alien is under 18 does not count as unlawful presence for purposes of the 3- and 10-year bars. In addition, an alien who is found to be inadmissible under §212(a)(9)(B) may be eligible for a discretionary waiver. To obtain a waiver, an alien, who must be the spouse, son, or daughter of a U.S. citizen or LPR, must establish that the refusal of admission would result in extreme hardship to the citizen or LPR spouse or parent. (A related USCIS proposed rule that would make changes to the unlawful presence waiver application process for certain immediate relatives of U.S. citizens is discussed under "Unauthorized Aliens with Approved Immigrant Visa Petitions," below.)

## **Other Avenues to Legal Immigration Status**

In addition to nonimmigrant admissions and permanent family-based or employment-based admissions, the immigration system includes other pathways to legal status for unauthorized aliens who meet the applicable requirements. Special rules concerning the INA grounds of inadmissibility (discussed in the preceding section) are specified in these provisions. The three provisions described here—registry, asylum, and cancellation of removal—are avenues to LPR status.

### **Registry**

Long-resident unauthorized aliens may be able to acquire lawful permanent residence through the INA registry provision.<sup>28</sup> Last updated by a 1986 law, this provision allows for the creation of a record of lawful admission for permanent residence for an alien who lacks such a record; has continuously resided in the United States since before January 1, 1972; and meets other specified requirements.<sup>29</sup> With the requirement for continuous residence since 1972, a decreasing number of individuals have adjusted status under this provision in recent years.

### **Asylum**

Asylum represents a form of humanitarian relief available to legal and unauthorized aliens in the United States. The INA provides that any alien who is in, or who arrives in, the United States,

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<sup>28</sup> INA §249.

<sup>29</sup> See archived CRS Report RL30578, *Immigration: Registry as Means of Obtaining Lawful Permanent Residence*, by Andorra Bruno.

regardless of his or her status, may apply for asylum.<sup>30</sup> Aliens may apply for asylum affirmatively, or they may apply defensively, while in removal proceedings. To be eligible for asylum, an alien must show that he or she has been persecuted or has a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion and must meet other requirements. If asylum is granted, the alien may legally live and work in the United States and, after one year, may apply to adjust to LPR status, subject to a set of requirements.<sup>31</sup>

## **Cancellation of Removal**

Cancellation of removal is a discretionary form of relief authorized by the INA that an alien can apply for while in removal proceedings before an immigration judge.<sup>32</sup> If cancellation of removal is granted, the alien's status is adjusted to that of an LPR. The INA authorizes the cancellation of removal/adjustment of status of certain "nonpermanent residents" (those who are not LPRs) who are inadmissible to or deportable from the United States.<sup>33</sup> To be eligible for this form of relief, the alien, among other requirements, must have been continuously physically present in the United States for the prior 10 years and must establish that removal would result in "exceptional and extremely unusual hardship" to the alien's citizen or LPR spouse, parent, or child. There is a statutory cap of 4,000 on the number of aliens who can be granted cancellation of removal in any fiscal year.<sup>34</sup>

## **Other Forms of Immigration Relief**

Through the mechanisms described above, an eligible unauthorized alien may obtain legal permanent status or, in the case of nonimmigrant admissions, legal nonimmigrant status. Other forms of relief enable unauthorized aliens to remain in the United States temporarily but do not grant them a legal status. For this reason, beneficiaries of these types of relief are sometimes referred to as "quasi-legal." These types of relief, some of which are applied as blanket relief to members of a designated class and some of which are applied on a case-by-case basis, have historically been provided for humanitarian purposes.<sup>35</sup>

There are several forms of blanket relief that have been provided for humanitarian purposes over the years. In most cases, this relief has been provided on a discretionary basis administratively, by the Attorney General or, more recently, by the Secretary of Homeland Security. Individuals granted blanket relief typically can apply for employment authorization. The most common discretionary procedures to provide blanket relief have been extended voluntary departure (EVD), and deferred departure or deferred enforced departure (DED). Over the years, EVD and DED have been provided to otherwise deportable aliens of various nationalities, including Ethiopians,

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<sup>30</sup> INA §208.

<sup>31</sup> INA §209(b). See CRS Report R41753, *Asylum and "Credible Fear" Issues in U.S. Immigration Policy*, by Ruth Ellen Wasem.

<sup>32</sup> INA §240A.

<sup>33</sup> INA §240A(b). A separate set of requirements for the cancellation of removal/adjustment of status of LPRs is at INA §240A(a).

<sup>34</sup> INA §240A(e).

<sup>35</sup> For further information on these forms of relief, see CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester.

Iranians, Afghans, Poles and Salvadorans. Currently, certain Liberians in the United States have DED.<sup>36</sup>

While EVD and DED do not confer legal status, in the past legislation has been enacted to grant LPR status to members of specified groups with these forms of relief. For example, legislation enacted by the 100<sup>th</sup> Congress in 1987 provided for the adjustment of status of aliens who were provided with, or allowed to maintain, EVD on the basis of a nationality group determination during the previous five years.<sup>37</sup> Nationality groups covered by this language included Ethiopians, Afghans, and Poles.

One form of blanket relief—Temporary Protected Status (TPS)—is authorized by the INA.<sup>38</sup> The Secretary of Homeland Security, in consultation with the Secretary of State, may designate a foreign state or part of a foreign state for TPS in certain situations, including in cases of ongoing armed conflict or environmental disaster, as specified in the INA. A foreign state can be designated for TPS for a period of between 6 and 18 months, subject to extension. To obtain TPS, eligible aliens report to USCIS, pay a processing fee, and receive registration documents and a work authorization.<sup>39</sup> As of January 2013, the following countries are designated for TPS: El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, and Syria. The INA provision authorizing TPS, however, places restrictions on congressional consideration of legislation to grant those with TPS a legal immigration status (see “Aliens with Temporary Protected Status or Other Temporary Relief from Removal,” below).<sup>40</sup>

Rather than being applied as blanket relief to members of a designated class, relief from removal can also be applied on a case-by-case basis. The discretionary procedure of deferred action provides relief, on an individual basis, to a particular individual for a specific period of time. Individuals granted deferred action may apply for employment authorization.

The USCIS *Adjudicator’s Field Manual* describes deferred action, as follows:

A DHS field office director may, in his or her discretion, recommend deferral of (removal) action, an act of administrative choice in determining, as a matter of prosecutorial discretion, to give some cases lower enforcement priority....

Accrual of unlawful presence stops on the date an alien is granted deferred action and resumes the day after deferred action is terminated.<sup>41</sup>

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<sup>36</sup> For a list of major administrative directives on deferral of deportation, see appendix to CRS Congressional Distribution Memorandum, *Analysis of June 15, 2012 DHS Memorandum, “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,”* by Andorra Bruno, Todd Garvey, Kate Manuel, and Ruth Ellen Wasem, July 13, 2012 (available to congressional staff from the authors) (hereafter cited as CRS Congressional Distribution Memorandum, *Analysis of June 15, 2012 DHS Memorandum*).

<sup>37</sup> P.L. 100-202, December 22, 1987.

<sup>38</sup> INA §244.

<sup>39</sup> See CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*.

<sup>40</sup> INA §244(h) states that any bill, resolution, or amendment to grant either lawful temporary status or LPR status to those with TPS requires an affirmative vote of three-fifths of all Senators.

<sup>41</sup> U.S. Citizenship and Immigration Services, *Adjudicator’s Field Manual* (Redacted Public Version), Section 40.9.2(b)(3)(J).

DHS and its predecessor, the former Immigration and Naturalization Service (INS), have utilized deferred action to provide relief to members of defined groups. For example, in 1997, INS issued a guidance memorandum concerning deferred action in cases of battered aliens who were self-petitioning for immigrant status in accordance with the 1994 Violence Against Women Act (VAWA).<sup>42</sup> More recently, as described below under “Unauthorized Aliens Who Arrived as Children,” DHS established a Deferred Action for Childhood Arrivals (DACA) program.

Another form of case-by-case relief for unauthorized aliens falls under DHS’s parole authority, as set forth in the INA.<sup>43</sup> Parole is discretionary authority that may be exercised by DHS to allow an alien to enter the United States temporarily (without being formally admitted) for urgent humanitarian reasons or when the entry is determined to be for significant public benefit. Granting parole to unauthorized aliens already in the United States is known as parole-in-place.<sup>44</sup> In recent years, parole-in-place has been used to enable the spouses and children of military service members to adjust status in the United States. As discussed, aliens who have been paroled into the United States are eligible to adjust status under the main INA §245(a) adjustment of status provision.

## Immigration Status-Related Factors

While a stereotypical view of an unauthorized alien may be of a young man with no connections to the United States who crosses the Southwest border illegally in search of work, in reality the unauthorized alien population includes individuals who entered the country in different ways, for different reasons, and who have different types of connections to the United States. The circumstances of individuals who compose the unauthorized alien population affect their treatment under current immigration law as well as their future status-related prospects. The following factors are relevant to a consideration of the treatment and status prospects of unauthorized aliens in the United States.

## Mode of Entry

Unauthorized aliens enter the United States in three main ways: (1) some, known as *visa overstays*, are admitted to the United States on valid nonimmigrant visas (e.g., as visitors or students) or on border-crossing cards and either remain in the country beyond their authorized period of stay or otherwise violate the terms of their admission; (2) some are admitted based on fraudulent documents (e.g., fake passports) that go undetected by U.S. officials; and (3) some, known as *illegal entrants*, enter the country illegally without inspection (e.g., by crossing over the Southwest or northern U.S. border).

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<sup>42</sup> U.S. Immigration and Naturalization Service, Memorandum to Regional Directors, District Directors, Officers-in-Charge, and Service Center Directors, from Paul Virtue, Acting Executive Associate Commissioner, *Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues*, May 6, 1997. VAWA is title IV of the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322, September 13, 1994).

<sup>43</sup> INA §212(d)(5).

<sup>44</sup> Unauthorized aliens who were initially lawfully admitted to the United States but overstayed their visas are not eligible for parole-in-place. See draft memorandum to Alejandro N. Majorkas, U.S. Citizenship and Immigration Services director, from Denise A. Vanison, Roxana Bacon, Debra A. Rogers, and Donald Neufeld, “Administrative Alternatives to Comprehensive Immigration Reform,” (undated), available at <http://abcnews.go.com/images/Politics/memo-on-alternatives-to-comprehensive-immigration-reform.pdf> (hereafter cited as USCIS draft memo).

It is unknown what percentages of the current unauthorized resident population entered the United States in these different ways. In past years, researchers have endeavored to make this type of determination. For example, in 2006, the Pew Hispanic Center estimated that about 40% to 50% of the unauthorized aliens living in the United States that year had entered the country with inspection<sup>45</sup> and that the remaining 50% or more had entered the country without inspection.<sup>46</sup>

While visa overstays and illegal entrants are both considered to be unauthorized aliens, they are treated differently for some purposes under immigration law. For example, the ground of inadmissibility under INA §212(a)(6) concerning unlawful presence applies only to illegal entrants. By contrast, the 3- and 10-year bars to admissibility in INA §212(a)(9), which are based on periods of unlawful presence, apply to both illegal entrants and visa overstays.

An important difference in treatment between illegal entrants and visa overstays, with important implications for future status prospects, concerns the INA adjustment of status provisions (see “Adjustment of Status,” above). To adjust to LPR status under INA §245(a), an alien must have been inspected or paroled into the United States. An alien who legally enters the country and then overstays his or her visa satisfies this requirement; an illegal entrant does not. While, as a general rule, those who overstay their visas are not eligible to adjust status under INA §245(a), there are exceptions, as noted. To illustrate the difference in treatment, a visa overstay who marries a U.S. citizen today could adjust to LPR status under INA §245(a), if otherwise eligible. An illegal entrant who marries a U.S. citizen today could not adjust status in this way.<sup>47</sup> In order to obtain LPR status, the illegal entrant would have to return to his or her home country and apply for a visa once a visa number became available. The individual could be found to be inadmissible to the United States under the 3- or 10-year bars based on the alien’s prior unlawful presence.

## **Length of Unlawful Presence in the United States**

The length of an alien’s unlawful presence in the United States may affect the alien’s ability to obtain immigration benefits and relief. Under the INA ground of inadmissibility for unlawfully present aliens, as discussed, an alien who was unlawfully present for more than 180 days but less than one year, voluntarily departed, and seeks admission within three years is inadmissible, and an alien who has been unlawfully present for one year or more and seeks admission within 10 years of such alien’s departure or removal date is inadmissible. Unauthorized aliens who are unlawfully present for 180 days or less would not be subject to these bars.

On the other hand, some forms of immigration relief for unauthorized aliens require a multi-year period of presence. For example, the INA provision on cancellation of removal/adjustment of status for certain “nonpermanent residents” (non-LPRs) who are inadmissible to or deportable from the United States requires the alien to have been continuously physically present in the United States for the prior 10 years. While this provision does not specify 10 years of unlawful

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<sup>45</sup> This estimate includes both those who had entered on valid nonimmigrant visas and those who had entered using fraudulent documents that went undetected.

<sup>46</sup> See *Modes of Entry for the Unauthorized Migrant Population*, Pew Hispanic Center, fact sheet, May 22, 2006.

<sup>47</sup> This example assumes that no special circumstances apply (e.g., the alien is not eligible to self-petition as a battered spouse).

presence, the general legalization program enacted as part of the Immigration Reform and Control Act (IRCA) of 1986 did require continuous unlawful residence since 1982.<sup>48</sup>

## **Family Connection**

A primary route for aliens in the United States to become LPRs is through the family-based immigration system. As detailed above, this pathway requires a close family relationship with a U.S. citizen or LPR, and in most cases, it requires the U.S. citizen or LPR to file an immigrant visa petition on behalf of the foreign national (see *Family-based Immigration* under *Permanent Admissions*).

Close relatives of U.S. citizens and LPRs also can benefit from some special provisions and exceptions in immigration law. Of particular significance to unauthorized aliens in the United States who want to obtain LPR status are exceptions to the requirements for adjustment of status in the INA. Among these exceptions, the immediate relatives of U.S. citizens are excepted from the general provision that makes adjustment of status unavailable to individuals who, following legal entry, engage in unauthorized employment or who fail to continuously maintain a lawful immigration status.

A relationship to a U.S. citizen or LPR is likewise a prerequisite for some forms of immigration relief for unauthorized aliens. For example, one of the requirements for an unauthorized alien to be granted cancellation of removal/adjustment of status is that the alien must establish that removal would result in exceptional and extremely unusual hardship to the alien's citizen or LPR spouse, parent, or child (see "Cancellation of Removal" under "Other Avenues to Legal Immigration Status," above).

Similarly, an alien who is found to be subject to the 3- and 10-year bars on inadmissibility due to unlawful presence can apply for a discretionary waiver. To be granted a waiver, the alien must establish that the refusal of admission would result in extreme hardship to a citizen or LPR spouse or parent.

## **Employment Connection**

Aliens in the United States can also become LPRs through the employment-based immigration system, which, as described above, includes five preference categories.<sup>49</sup> The third preference category for skilled workers, professionals, and unskilled workers is likely to be the most relevant for unauthorized aliens. This category, which is not applicable to work of a temporary or seasonal nature, requires an employer sponsor and a labor certification determination by DOL (see "Employment-Based Immigration" under "Permanent Admissions," above). The potential utility of this category for unauthorized aliens, however, is limited both by the exclusion of temporary and seasonal work and by a statutory cap on admissions of unskilled workers under this category of 10,000 per year.<sup>50</sup>

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<sup>48</sup> INA §245A. Also see CRS Report R41207, *Unauthorized Aliens in the United States*.

<sup>49</sup> The preference categories are: (1) priority workers; (2) members of the professions holding advanced degrees or persons of exceptional abilities; (3) skilled workers, professionals, or unskilled workers; (4) special immigrants; and (5) employment creation investors.

<sup>50</sup> INA §203(b)(3)(A)(iii).

Prospective employment-based immigrants, like prospective family-based immigrants, benefit from some special provisions and exceptions in immigration law. Among these is an exception to the INA requirements for adjustment of status that is targeted at aliens who entered the U.S. legally and then violated the terms of their admission. More limited than the exception for immediate relatives of U.S. citizens, this provision enables certain prospective employment-based immigrants, including those applying under the third preference category for skilled workers, professionals, and unskilled workers, to adjust status in the United States. It applies to aliens who, for no more than 180 days after being legally admitted: failed to continuously maintain a lawful immigration status, engaged in unauthorized employment, or otherwise violated the terms and conditions of their admission.<sup>51</sup>

## **Criminal History/Security Concerns**

The INA grounds of inadmissibility (discussed under “Admissibility,” above) and the companion INA grounds of deportability include grounds related to criminal offenses and security concerns, which are particularly relevant to the consideration of eligibility for immigration relief. Some forms of immigration relief available to unauthorized aliens contain special requirements regarding these grounds and related issues. For example, the cancellation of removal/adjustment of status provisions for “nonpermanent residents” (non-LPRs) specify that this form of relief is not available to those who have been convicted of an offense under the INA criminal grounds of inadmissibility or deportability.

The INA provisions on granting asylum provide another example. They explicitly exclude aliens based on criminal- or security-related concerns. These exclusions cover aliens who fall under specified INA security-related inadmissibility grounds concerning terrorist activity. They also cover other cases, such as where “the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States” and where “there are reasonable grounds for regarding the alien as a danger to the security of the United States.”<sup>52</sup>

## **Subgroups of the Unauthorized Alien Population**

Based on the factors discussed in the preceding section and other considerations, individuals in the unauthorized alien population can be grouped into various status-related categories. The subgroups listed here, which overlap and are fluid, reflect aliens’ current status and available avenues for immigration relief. While these subgroups cover the large majority of those considered to be unauthorized, they do not necessarily cover the entire population.

### **Beneficiaries of Family- or Employment-Based Immigrant Visa Petitions**

This subgroup includes unauthorized individuals who have approved or pending family-based or employment-based immigrant petitions. Depending on their particular circumstances, individuals

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<sup>51</sup> INA §245(k).

<sup>52</sup> INA §208(b)(2)(A).

with approved petitions may be able to adjust status in the United States (see “Adjustment of Status,” above). If they are not eligible to adjust status and opt to depart the United States to apply for a visa in their home country, they may be subject to a 3- or 10-year bar on admission based on their prior period of unlawful presence.

Others that may be considered as part of this subgroup are individuals who, based on existing family relationships, may be future beneficiaries of family-based immigrant petitions. Included in this possible future beneficiary group would be the unauthorized parents of U.S. citizen children. Under current immigration law, citizens must be at least age 21 in order to sponsor their parents for legal permanent residence. As immediate relatives of U.S. citizens, these unauthorized parents could adjust to LPR status in the United States, if otherwise eligible, provided that they originally entered the United States legally. If they originally entered the country without inspection, however, they would be ineligible to adjust status under current law and would have to return to their home countries to apply for a visa.<sup>53</sup>

### **Battered Alien Spouses and Children**

Battered spouses and children of U.S. citizens or LPRs and battered parents of U.S. citizens, as these groups are defined in the INA, are a unique class of prospective immigrants. They are subject to special INA provisions that enable them to self-petition for immigrant status and to adjust status under the main INA adjustment of status provision, regardless of whether they entered the country legally. Aliens self-petitioning for LPR status under these provisions are eligible for employment authorization. There is also a special cancellation of removal rule for battered spouses and children, through which eligible aliens can obtain LPR status during the removal process.

### **Asylum Seekers**

Aliens who are physically present in the United States or who arrive in the United States may apply for asylum. While an alien’s asylum application is being considered, he or she may remain in the United States but is not granted a legal immigration status. An asylum seeker is not entitled to employment authorization by law but may be granted it by regulation.<sup>54</sup> Successful asylum applicants are granted asylum status, and after one year, may apply to adjust to LPR status.<sup>55</sup>

### **Aliens with Temporary Protected Status or Other Temporary Relief from Removal**

As discussed, aliens with TPS or other forms of temporary relief from removal have protection from removal and can receive employment authorization, but are not granted a legal immigration status. This subgroup also includes those with pending applications for these various forms of relief.

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<sup>53</sup> This example assumes that no special circumstances apply (e.g., the alien is not eligible to self-petition as a battered spouse).

<sup>54</sup> As specified in INA §208(d)(2), an asylum applicant who is not otherwise entitled to employment authorization shall not be granted such authorization until at least 180 days after filing the asylum application, with some exceptions.

<sup>55</sup> See CRS Report R41753, *Asylum and “Credible Fear” Issues in U.S. Immigration Policy*.

Some groups granted administrative blanket relief, such as EVD and DED, have been able to adjust to LPR status under subsequent legislative enactments. In the case of TPS, however, which is authorized by the INA, there are statutory restrictions on the subsequent granting of legal immigration status. INA §244(h) states that any bill, resolution, or amendment to grant either lawful temporary status or LPR status to those with TPS requires an affirmative vote of three-fifths of all Senators.

## **Aliens with Other Pending Applications for Legal Status**

This subgroup includes unauthorized aliens who are prospective beneficiaries of special provisions in the INA that offer a pathway to legal status separate from the permanent family- or employment-based immigrant systems or the humanitarian avenues listed above. Among these individuals are applicants for a nonimmigrant T visa for trafficking victims or a nonimmigrant U visa for crime victims, as discussed above under “Nonimmigrant Admissions.” This subgroup also encompasses certain unauthorized applicants for LPR status, such as those eligible for the special immigrant juveniles (SIJ) program.<sup>56</sup> The SIJ program is intended to provide relief to foreign-born children who have been victims of abuse, neglect, or abandonment.<sup>57</sup> Aliens with SIJ status can adjust to LPR status, if eligible.

## **Aliens Without Other Status or Avenues for Affirmative Relief**

Another subpopulation of unauthorized aliens in the United States can be distinguished from the subgroups discussed above. This subpopulation is composed of individuals who do not have an affirmative pathway to a legal immigration status under current law—through a family or employment connection, asylum, nonimmigrant categories for certain trafficking or crime victims, etc.—and are not eligible for other forms of humanitarian relief from removal. These aliens also would not typically be eligible for work authorization.

Aliens in this subgroup may apply for cancellation of removal in removal proceedings if they have a citizen or LPR spouse, parent, or child. As noted, requirements for cancellation of removal in the case of unauthorized aliens include 10 years of continuous physical presence in the United States and establishment that removal would result in exceptional and extremely unusual hardship to the alien’s citizen or LPR spouse, parent, or child. If cancellation of removal is granted, the alien’s status is adjusted to that of an LPR.<sup>58</sup>

For a number of years, unauthorized alien students who were brought to the United States as children comprised a prominent segment of this subgroup. For several Congresses, these students have been the subject of DREAM Act legislation,<sup>59</sup> which would enable eligible individuals to obtain LPR status. In 2012, in the absence of congressional action on DREAM Act legislation,

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<sup>56</sup> INA §101(a)(27)(J).

<sup>57</sup> The INA provides for the granting of SIJ status in cases in which a state court in the United States has declared a juvenile to be a dependent of the court or has legally placed him or her with a state agency or other entity, and for whom it has been determined that it would not be in the juvenile’s best interest to be returned to his or her home country.

<sup>58</sup> Aliens in this subgroup also may file an asylum claim in removal proceedings depending on their country of origin.

<sup>59</sup> Following common usage, the term *DREAM Act* is used in this report to refer to bills entitled, the Development, Relief, and Education for Alien Minors (DREAM) Act, as well as other similar bills.

DHS established an administrative process, known as Deferred Action for Childhood Arrivals (DACA), to provide temporary relief to certain unauthorized alien residents who entered the country before age 16 and satisfy other requirements (see “Unauthorized Aliens Who Arrived as Children,” below).

## **Potential Targeted Policy Options**

There has been increasing discussion in recent years of developing policies to provide targeted relief to unauthorized aliens. These policies could take a variety of forms. They could be legislative or administrative, and could provide different types of relief to different subgroups of the unauthorized population. A main focus of these policy discussions has been unauthorized aliens with approved immigrant visa petitions, especially those with U.S. citizen or LPR family members. Selected segments of the unauthorized alien population without an affirmative pathway to legal status, such as students who entered the United States as children and aliens with long-term TPS, also have been the subject of policy proposals.

### **Unauthorized Aliens with Approved Immigrant Visa Petitions**

Unauthorized aliens in the United States with approved family-based or employment-based immigrant visa petitions may face difficulties under current law in obtaining LPR status. As discussed, those who are not eligible to adjust status under current law and decide to return to their home country to apply for a visa may be found to be inadmissible to the United States for 3 or 10 years based on their prior unlawful presence.<sup>60</sup> Unlawful presence for one year or more, which triggers the 10-year inadmissibility bar, is among the top grounds of refusal for an immigrant visa, according to State Department data.<sup>61</sup>

A prospective immigrant who is found to be ineligible for a visa by DOS based on prior unlawful presence may be eligible for a waiver. DHS may grant an alien a discretionary waiver if the alien is the spouse or son or daughter of a U.S. citizen or LPR, and it is established that refusal of admission to the alien would result in extreme hardship to the citizen or LPR spouse or parent. Currently, an alien must wait until he or she receives an ineligibility finding from DOS during the overseas immigrant visa process before applying for a waiver, if eligible.

In January 2013, USCIS issued a final rule,<sup>62</sup> effective March 4, 2013, which seeks to administratively facilitate the immigration process for certain prospective immigrants with approved visa petitions. The rule would make changes to the unlawful presence waiver application process for certain immediate relatives of U.S. citizens by establishing a provisional unlawful presence waiver. According to the rule summary, DHS “anticipates that these changes

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<sup>60</sup> As noted, there are some statutory exceptions in determining the period of unlawful presence for purposes of the 3- or 10-year bars.

<sup>61</sup> In FY2011, there were 25,790 visa ineligibility findings based on this ground. U.S. Department of State, *Report of the Visa Office 2011*, table XX, [http://www.travel.state.gov/visa/statistics/statistics\\_5641.html](http://www.travel.state.gov/visa/statistics/statistics_5641.html).

<sup>62</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, “Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives,” final rule, 78 *Federal Register* 536-578, January 3, 2013.

will significantly reduce the length of time U.S. citizens are separated from their immediate relatives who engage in consular processing abroad.”<sup>63</sup>

Under the final rule, a beneficiary of an approved immediate relative petition could apply for and receive a provisional waiver of the unlawful presence ground of inadmissibility while still in the United States, if the alien met all the applicable requirements, including demonstrating that a U.S. citizen spouse or parent would experience extreme hardship if the alien were denied admission to the United States as an LPR. In the supplementary information accompanying the rule, USCIS stated that it “is not modifying how it makes extreme hardship determinations or how it defines extreme hardship.”<sup>64</sup>

A recipient of a provisional waiver could depart the United States to attend the immigrant visa interview with a DOS consular officer abroad. If the consular officer determined that the applicant, given the approved waiver, was admissible to the United States and eligible for a visa,<sup>65</sup> the officer would issue the immigrant visa, which the individual could then present at a port-of-entry to gain lawful admission to the United States. Under the final rule, once a provisional unlawful presence waiver takes full effect, “the period of unlawful presence for which the provisional unlawful presence waiver is granted is waived indefinitely.”<sup>66</sup>

Another administrative option to facilitate the acquisition of LPR status by illegal entrants with approved family-based or employment-based immigrant petitions, or by some subset of this larger group, would be parole-in-place. Under the INA, DHS can grant parole for urgent humanitarian reasons or for significant public benefit. Although parole does not constitute formal admission, aliens granted parole-in-place are eligible to adjust status in the United States; they do not have to travel to their home countries for consular processing. As noted, parole-in-place has been used recently to enable certain dependents of military service members to adjust status in the United States.

Alternatively, legislation could be enacted to provide immigration relief to unauthorized aliens who are otherwise eligible prospective family-based or employment-based immigrants. One set of options would involve modifying existing statutory barriers to the acquisition of LPR status. As an example, the unlawful presence ground of inadmissibility could be amended to add additional

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<sup>63</sup> Ibid., p. 536.

<sup>64</sup> In the supplementary information accompanying the final rule, USCIS explained that *extreme hardship* is not defined in the INA and has not been specifically defined by federal courts through case law. It further noted:

The BIA [Board of Immigration Appeals in the Department of Justice] has stated that extreme hardship is not a definable term of fixed and inflexible meaning, but that the elements to establish extreme hardship are dependent upon the facts and circumstances of each case. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). When USCIS assesses whether an applicant has established extreme hardship, USCIS looks at the totality of the applicant’s circumstances and any supporting evidence to determine whether the qualifying relative will experience extreme hardship.

Ibid., p. 551. At the same time, lowering the evidentiary standard for extreme hardship in the context of unlawful presence waivers has been offered as a possible administrative option to promote family unity in the absence of enactment of comprehensive immigration reform legislation. See USCIS draft memo, pp. 4-5.

<sup>65</sup> If the consular officer determined that the individual was subject to grounds of inadmissibility beyond unlawful presence, the approved provisional waiver would be automatically revoked.

<sup>66</sup> Section 212.7(e)(13) in U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, “Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives,” final rule, 78 *Federal Register* 578, January 3, 2013.

exceptions to the 3-and 10-year bar provisions for certain family-based or employment-based immigrants.

A more direct, legislative option to facilitate the adjustment to LPR status of unauthorized aliens who are prospective immigrants would involve amending the INA adjustment of status provisions (see “Adjustment of Status,” above). As discussed, INA §245(i) enables an alien who entered the United States unlawfully to adjust status in the United States if he or she is eligible to receive an immigrant visa, is admissible for permanent residence, has a visa number immediately available to him or her, and pays an additional fee. Under current law, INA §245(i) applies only to beneficiaries of family-based petitions or labor certification applications filed by April 30, 2001.

Legislation could be enacted to enable illegal entrants with approved immigrant visa petitions to adjust status in the United States by updating this April 30, 2001, cutoff date or making INA §245(i) or a similar provision permanent. Such legislation has been proposed in past Congresses.<sup>67</sup> Adjustment of status could be made available to all illegal entrants who meet the existing INA §245(i) criteria or, alternatively, to a subset of illegal entrants who meet a different set of criteria. As an example of a potential subset, legislation has been introduced in recent Congresses to enable the immediate family members of certain U.S. citizen or LPR military service personnel to adjust status in the United States regardless of the immediate family members’ immigration status.<sup>68</sup>

## **Unauthorized Aliens Who Arrived as Children**

Another subgroup of unauthorized aliens that has received considerable attention in the last few years consists of aliens who came to the United States as children. These aliens have been the subject of legislation, commonly referred to as the DREAM Act,<sup>69</sup> to provide them relief. Under traditional DREAM Act bills, unauthorized aliens who meet specified age, physical presence, educational, and other requirements would be able to adjust to LPR status in the United States through cancellation of removal (see “Cancellation of Removal” under “Other Forms of Immigration Relief,” above).<sup>70</sup> Successful applicants would first be granted conditional LPR status. After meeting additional requirements, including two years of either college or service in the uniformed services, the aliens could apply to have the condition on their status removed and become full-fledged LPRs.<sup>71</sup>

For many years DREAM Act bills have followed this basic outline.<sup>72</sup> Since 2011, however, some alternative versions of the DREAM Act also have been introduced in Congress. For example,

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<sup>67</sup> See, for example, H.R. 47, §321, in the 108<sup>th</sup> Congress, and H.R. 264, §805, in the 111<sup>th</sup> Congress.

<sup>68</sup> For example, S. 2757 in the 111<sup>th</sup> Congress and S. 1109/H.R. 2638 and S. 1258 in the 112<sup>th</sup> Congress would have provided for the adjustment of status of certain immediate relatives of U.S. citizen or LPR Armed Forces members who served on or after October 7, 2001. The family members would need to be admissible to the United States, but certain grounds of inadmissibility, including those related to illegal entrants, illegal presence, labor certification, and properly issued documents, would not apply.

<sup>69</sup> Following common usage, the term *DREAM Act* is used in this report to refer to bills entitled, the Development, Relief, and Education for Alien Minors (DREAM) Act, as well as other similar bills.

<sup>70</sup> Under DREAM Act bills, aliens could affirmatively apply for cancellation of removal without first being placed in removal proceedings

<sup>71</sup> See CRS Report RL33863, *Unauthorized Alien Students: Issues and “DREAM Act” Legislation*, by Andorra Bruno.

<sup>72</sup> Among the traditional DREAM Act bills introduced in the 112<sup>th</sup> Congress were S. 952 and H.R. 1842.

some recent proposals would have first granted beneficiaries conditional *nonimmigrant* status (rather than conditional LPR status) and would have required the aliens to apply to have that conditional nonimmigrant status extended before they could adjust to LPR status.<sup>73</sup> These and other new elements were incorporated in a pair of bills introduced in the 112<sup>th</sup> Congress, which, unlike traditional DREAM Act bills, would have established separate military and higher education pathways to LPR status, each with its own set of eligibility requirements.<sup>74</sup> In the case of the higher education pathway, for example, an alien granted conditional nonimmigrant status would have had to graduate from an accredited *four-year* institution of higher education in the United States in order to stay on track to be eligible for LPR status.<sup>75</sup>

While the granting of legal immigration status to this subgroup of unauthorized aliens would require enactment of the DREAM Act or other legislation, more limited relief from removal could be provided administratively, and DHS has established a program to do so. In June 2012, in the absence of legislative action on DREAM Act bills, DHS issued a memorandum announcing that certain individuals who were brought to the United States as children and meet other criteria would be considered for deferred action<sup>76</sup> for two years, subject to renewal.<sup>77</sup> DHS began accepting requests for consideration of deferred action for childhood arrivals, or DACA, as the program is known, in August 2012. The eligibility criteria for DACA are similar to those for relief in DREAM Act bills, and include, among other requirements, that the alien: entered the United States before age 16, has been continuously resident for at least five years, and either is in school, has a high school diploma or the equivalent, or has been honorably discharged from the Armed Forces. Aliens granted deferred action can apply for employment authorization. The DACA program, however, provides no pathway to a legal immigration status.

## **Unauthorized Aliens with Needed Employment Skills**

For many years, legislation has been introduced in Congress to establish a legalization program for agricultural workers, based, in part, on a belief that there is an inadequate supply of U.S. farm

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<sup>73</sup> In the 111<sup>th</sup> Congress, the House approved a DREAM Act proposal of this type as part of an unrelated bill, the Removal Clarification Act of 2010 (H.R. 5281). The Senate subsequently failed, on a 55-41 vote, to invoke cloture on a motion to agree to the House-passed DREAM Act amendment, and the bill died at the end of the Congress. Among the implications of such revisions to the traditional DREAM Act adjustment of status process, beneficiaries would have to wait a longer time before they could go through the naturalization process and become U.S. citizens. See CRS Report RL33863, *Unauthorized Alien Students: Issues and “DREAM Act” Legislation*.

<sup>74</sup> The bills are the Adjusted Residency for Military Service (ARMS) Act (H.R. 3823) and the Studying Towards Adjusted Residency Status Act (STARS) Act (H.R. 5869).

<sup>75</sup> For further information about DREAM Act bills introduced in the 112<sup>th</sup> Congress, see CRS Report RL33863, *Unauthorized Alien Students: Issues and “DREAM Act” Legislation*.

<sup>76</sup> Deferred action is “a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion.” U.S. Department of Homeland Security, “Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities,” <http://www.dhs.gov/files/enforcement/deferred-action-process-for-young-people-who-are-low-enforcement-priorities.shtm>. Also see CRS Congressional Distribution Memorandum, *Analysis of June 15, 2012 DHS Memorandum*.

<sup>77</sup> U.S. Department of Homeland Security, Memorandum to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, John Morton, Director, U.S. Immigration and Customs Enforcement, from Janet Napolitano, Secretary of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012, <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

workers.<sup>78</sup> A longstanding proposal, known as the Agricultural Job Opportunities, Benefits, and Security Act, or AgJOBS, would couple a legalization program for farm workers with provisions to reform the H-2A temporary agricultural worker program. Under AgJOBS legislation, eligible farm workers could obtain LPR status through a two-stage process, with work requirements at each stage. To be eligible for temporary legal status in the first stage of the legalization program, an alien would have to show that he or she had performed a requisite amount of agricultural work during a prescribed period, among other requirements. To be eligible to adjust to LPR status in the second stage of the program, the alien would have to perform additional agricultural work and satisfy other requirements.<sup>79</sup> An alternative proposal would pair an AgJOBS-like agricultural worker legalization program not with changes to the H-2A program, but with other provisions on agricultural labor.<sup>80</sup> While agriculture is considered to be a unique industry in various ways, a similar approach could conceivably target unauthorized workers in other relatively low-skilled industries where U.S. workers are seen to be in short supply.

A discussion is also underway about the need for foreign workers with graduate-level training in certain fields. Many policymakers argue that the United States should take steps to retain U.S.-educated foreign nationals with degrees in science, technology, engineering, or mathematics (STEM). At the same time, there is considerable debate about if, and how, the United States should create *STEM visas* to accomplish this. The term *STEM visas* refers to expedited avenues for foreign nationals with graduate degrees in STEM fields to adjust to LPR status. Typically, STEM students first enter the United States legally as foreign students on nonimmigrant visas, and much of the discussion about these students centers on facilitating their adjustment from nonimmigrant to LPR status.<sup>81</sup> It is unknown how many unauthorized aliens there may be among STEM graduates, but they could be addressed as part of broader STEM legislation.

## **Long-Term Holders of Temporary Humanitarian Relief**

Another subgroup of unauthorized aliens that has been targeted for immigration relief consists of aliens who are long-term holders of temporary protected status, or in the case of Liberia, temporary protected status and deferred enforced departure. Some countries, including El Salvador, Honduras, Nicaragua, and Somalia, have had TPS designations for more than 10 years; Liberians were first granted TPS in 1991 and have had DED since 2007.

Aliens with TPS or DED can legally remain in the United States and receive employment authorization while the designations remain in place, but neither TPS nor DED is considered a legal immigration status and neither provides a pathway to a legal status. Moreover, as discussed, the INA requires that any bill, resolution, or amendment to grant either lawful temporary status or LPR status to those with TPS receive an affirmative vote of three-fifths of all Senators.

Legislation has been introduced in recent Congresses that would facilitate the adjustment to LPR status of certain aliens in the United States with TPS or DED. Some DREAM Act bills would

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<sup>78</sup> See CRS Report R42434, *Immigration of Temporary Lower-Skilled Workers: Current Policy and Related Issues*, by Andorra Bruno.

<sup>79</sup> In the 112<sup>th</sup> Congress, AgJOBS was included in the Comprehensive Immigration Reform Act of 2011 (S. 1258). See CRS Report R42434, *Immigration of Temporary Lower-Skilled Workers: Current Policy and Related Issues*.

<sup>80</sup> See Agricultural Labor Market Reform Act of 2011 (H.R. 3017) in the 112<sup>th</sup> Congress.

<sup>81</sup> See CRS Report R42530, *Immigration of Foreign Nationals with Science, Technology, Engineering, and Mathematics (STEM) Degrees*, by Ruth Ellen Wasem.

explicitly extend coverage to those with TPS; under these bills, aliens with TPS could apply to adjust to LPR status, provided that they meet the eligibility requirements.<sup>82</sup> Other bills have focused on Liberian nationals. These bills would establish a mechanism for Liberians who have been continuously present in the United States since a specified date and who meet other requirements to adjust to LPR status.<sup>83</sup> Similar legislation could be developed to target other long-term beneficiaries of temporary humanitarian relief.

## Conclusion

Considering targeted immigration relief for unauthorized aliens may offer policymakers new options for tackling the vexing issue of unauthorized immigration. Pursuing a targeted approach, however, would require policymakers to make distinctions among members of the unauthorized population to determine what type of relief to make available to what subgroup. Among the many related questions that could arise may be whether to limit the prospect of legal status to those who qualify under current law, whether to provide pathways to permanent legal status as well as temporary legal status, and whether to place any numerical limits on any new forms of relief. Also important would be questions about which subgroups of unauthorized aliens in the United States would *not* be covered by targeted immigration relief options under discussion and what policies would be pursued toward them.

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<sup>82</sup> See S. 952 and S. 1258 in the 112<sup>th</sup> Congress.

<sup>83</sup> See Liberian Refugee Immigration Fairness Act of 2011 (S. 656/H.R. 1293) and S. 1258, §372, in the 112<sup>th</sup> Congress.