

TEXAS YOUNG LAWYERS ASSOCIATION

BREATHE FREE:

*A Guide To
Immigration*



Breathe Free: A Guide To Immigration

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I. INTRODUCTION TO IMMIGRATION LAW

The United States is a nation of immigrants. Almost every person in the United States is either an immigrant or the descendant of an immigrant. Immigration law, which sets forth the rules on when and how a non-U.S. citizen may enter the country, is an integral part of our society. An individual may gain permanent or temporary legal immigration into the United States in a number of ways. The Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) is the government agency charged with granting non-immigrant and immigration benefits based on current immigration law and policy. Although the immigration process is very complex, this guide is intended to give you a broad understanding of the immigration process.

II. THE IMMIGRATION SELECTION SYSTEM

A. Qualifying as an Immigrant

A person is considered an immigrant if he or she comes to the United States with the intent to live there on a permanent basis. A lawful permanent resident or legal immigrant is an individual who has been granted an immigrant visa (also known as a "green card"). A person may live and work in the United States indefinitely, so long as he or she does not commit an offense that leads to deportation.

A person may become a legal permanent resident or legal immigrant in one of three ways: (1) family-based sponsorship (for individuals sponsored by certain relatives who are U.S. citizens or legal permanent residents); (2) employment-based sponsorship; or (3) or through certain humanitarian programs.

B. Entering as a Non-immigrant

A foreign national who is permitted to enter the United States for a limited time is considered a non-immigrant. Non-immigrants may enter the United States for a variety of reasons, including travel, school, temporary employment, or business investment.

The purpose and length of time a non-immigrant can stay is limited by the status under which he or she is admitted or remains in the United States. Not all

non-immigrants are required to obtain a visa before entering the United States. Whether a person is required to have a visa depends on his or her country of origin, among other factors.

III. ADMISSION PROCEDURES

“Admission” refers to the lawful entry of an alien into the United States after inspection and authorization by U.S. Customs and Border Protection (CBP) Officers. The Officers conduct the immigration, customs, and agriculture components of the inspections process at the port-of-entry, which is either an airport, seaport, or land border. Generally, shortly prior to or upon arrival at a port-of-entry, an alien will be given a Customs Declaration form. After arrival, aliens are queued in an inspection line to speak with a CBP Officer. With some exceptions, each alien is required to present a passport and valid visa issued by a U.S. Consular Official. In addition to ensuring that each alien has the proper documents, the CBP Officer will verify why each alien is coming to the United States and determine how long the alien should be permitted to stay in the United States. This is typically a very brief process, and, if the alien is permitted to enter the United States, the CBP Officer will place an admission stamp in the alien’s passport and Customs Declaration form. The alien may and should retrieve Form I-94 (the electronic arrival/departure record), which contains the date of admission, class of admission, and how long the alien is allowed to stay in the United States. The Form I-94 can be found at http://cbp.gov/xp/cgov/travel/id_visa/i-94_instructions/.

IV. VISA APPLICATIONS

As noted above, in most cases entry to the United States requires a valid visa. There are three types of visas (A) immigrant visas, and (B) non-immigrant visas.

A. Immigrant Visas

Immigrant visas are divided into three main categories. In order to be eligible to apply, the foreign citizen must be sponsored by a U.S. citizen, U.S. lawful permanent resident, or by a prospective employer. To obtain a visa, a petition must be filed with USCIS naming the immigrant as a beneficiary.

1. Family-Based Visas

Family-Based Visas are divided into two general categories: Immediate Relatives and Family-Based Preference categories. To obtain a family based petition, a sponsor must submit Form I-130, which can be obtained at <http://www.uscis.gov/i-130>.

Immediate Relatives (IR) are based on a close family relationship with a United States citizen. There are no numerical limitations for IR's and include the following categories:

- IR-1: Spouse of a U.S. Citizen.
- IR-2: Unmarried Child Under 21 Years of Age of a U.S. Citizen.
- IR-3: Orphan adopted abroad by a U.S. Citizen.
- IR-4: Orphan to be adopted in the U.S. by a U.S. citizen.
- IR-5: Parent of a U.S. Citizen who is at least 21 years old.

Family-Based Preference categories are specifically for more distant family relationships with a U.S. citizen and in some cases with a Lawful Permanent Resident. There are limits on the number of family preference immigrants allowed into the United States each year, and these are shown at the end of each category.

The family preference categories are:

- Family Based First Preference (FB1): Unmarried sons and daughters of U.S. citizens, and their minor children, if any. (23,400)
- Family Based Second Preference (FB2): Spouses, minor children, and unmarried sons and daughters (age 21 and over) of Lawful Permanent Residents. At least seventy-seven percent of all visas available for this category will go to the spouses and children; the remainder is allocated to unmarried sons and daughters. (114,200)
- Family Based Third Preference (FB3): Married sons and daughters of U.S. citizens, and their spouses and minor children. (23,400)
- Family Based Fourth Preference (FB4): Brothers and sisters of U.S. citizens, and their spouses and minor children, provided the U.S. citizens are at least 21 years of age. (65,000)

Note: Grandparents, aunts, uncles, in-laws, and cousins cannot sponsor a relative for immigration.

2. Employment-Based Visas

Employment-Based Visas are made available to qualified applicants under the provisions of U.S. immigration law. Employment-based immigrant visas are divided into five preference categories. Certain spouses and children may accompany or follow-to-join employment-based immigrants.

- EB1– a First Preference applicant must be the beneficiary of an approved Immigrant Petition for Foreign Worker, Form I-140, filed with USCIS (available at <http://www.uscis.gov/i-140>) and labor certification is not required for any of the Priority Worker subgroups. There are three sub-groups within this category:
 - (1) Persons with extraordinary ability in the sciences, arts, education, business, or athletics;
 - (2) Outstanding professors and researchers with at least three-year's experience in teaching or research, who are recognized internationally; and
 - (3) Multinational managers or executives who have been employed for at least one of the three preceding years by the overseas affiliate, parent, subsidiary, or branch of the U.S. employer.
- EB2– a Second Preference applicant must generally have a labor certification approved by the Department of Labor. A job offer is required and the U.S. employer must file an Immigrant Petition for Foreign Worker, Form I-140, filed with USCIS and the applicant must apply for an exemption from the job offer and labor certification if the exemption would be in the national interest. There are two subgroups within this category:
 - (1) Professionals holding an advanced decree or a baccalaureate degree and at least five years progressive experience in the profession; and
 - (2) Persons with exceptional ability in the sciences, arts, or business (Exceptional ability means having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business).
- EB3– a Third Preference applicant must have an approved Immigrant Petition for Foreign Worker, Form I-140, filed with USCIS and generally

require labor certification approved by the Department of Labor. There are three subgroups within this category:

- (1) Skilled workers are persons whose jobs require a minimum of 2 years training or work experience that are not temporary or seasonal;
 - (2) Professionals are members of the professions whose jobs require at least a baccalaureate degree from a U.S. university or college or its foreign equivalent degree; and
 - (3) Unskilled workers (Other workers) are persons capable of filling positions that require less than two years training or experience that are not temporary or seasonal.
- EB4– a Fourth Preference applicant must be the beneficiary of an approved Petition for Amerisian, Widow(er), or Special Immigrant, Form I-360 filed with USCIS (available at <http://www.uscis.gov/i-140>) and a labor certification is not required. There are many subgroups within this category. For a complete list please visit the U.S. Department of State or the USCIS website.
 - EB5– a Fifth Preference applicant is known as the “Investor Visa.” An Investor Visa generally requires that the person invest \$1,000,000 in a new commercial enterprise in the U.S. and employ at least 10 people not including the investor’s family. Person making the investment must be coming in for day-to-day management or in some sort of executive-type position

3. Diversity Visa Program

Diversity Visa Program is used to promote diversity in immigration for under-represented immigrants. Visas provided are drawn from countries with low rates of immigration to the U.S. Unlike other immigrant types, Diversity Visas (DV) do not require a U.S. sponsor, and therefore a petition is not needed.

The Diversity Immigrant Visa Program is congressionally mandated to make available up to 55,000 diversity visas annually, drawn from random selection among all entries to persons who meet strict eligibility requirements from countries with low rates of immigration to the United States. These visas are commonly known as the “lottery.”

B. Non-Immigrant Visas

Non-Immigrants are those persons who have a permanent home outside of the United States, have no intention to abandon their home country, and are coming to the United States only for a temporary visit and particular purpose, such as temporary employment sponsored by a U.S. employer. Applicants must submit an application at a United States consulate outside the U.S. For the most part the applicant is required to have a valid passport that will remain valid for 6 months beyond the date of stay in the United States. Visas are issued by the Department of State. There are close to 32 available visas that, depending on the purpose of the intended travel and other facts, will determine what type of visa is required under U.S. immigration law. For a complete list of requirements and types of visas please visit http://travel.state.gov/visa/temp/types/types_1286.html.

V. PROCEEDINGS

A. Immigration Proceedings

Immigration proceedings are any hearings dealing with the exclusion or deportation of a person from the United States and are typically held in special courts called “administrative courts” by an immigration judge. All administrative immigration hearings are initiated by the U.S. Department of Homeland Security (“DHS”) through a written document called a “Notice to Appear.” This notice is required to inform the alien of: (1) the nature of the proceedings, (2) the legal authority for the hearing, (3) the conduct or acts of the alien that allegedly violated the law, (4) the charges against the alien, (5) the alien’s right to legal representation, and (6) the requirement that the alien provide the attorney general with their address and telephone number. A removal hearing is then conducted to determine whether an alien is removable (meaning deportable) from the country, and if so, whether he or she is entitled to any relief from removal.

B. Removal Proceedings

The two grounds for initiating removal proceedings against an alien are “inadmissibility” or “deportability.” Deportability applies to aliens who have entered the U.S. legally while inadmissibility applies to aliens who have entered illegally. Charges of inadmissibility and deportability however are generally referred to simply as “charges

of removal.” Although an alien in a removal proceeding does not have the same rights as a defendant in a criminal trial, the alien has the right to an interpreter during the hearings, to contact an attorney or legal representative, to have legal representation at no expense to the government, and to contact a consular official from his or her home country.

If an alien denies the charge of removal, then an immigration judge must determine whether the alien is actually removable as charged. If an alien is subsequently found to be removable as charged, then the proceedings shift to the “relief phase” and an alien is given the opportunity to present one or more applications for relief.

If these applications are submitted, then an alien will receive a “merits hearing” to determine whether the alien is entitled to relief. During the merits hearing, an alien may testify as to his or her eligibility for the relief sought, present witnesses, and introduce documentary evidence. Once the merits hearing has concluded, the immigration judge will then make either a written or oral decision on the case. Both the alien and the government have the opportunity to appeal the decision to the Board of Immigration Appeals (BIA) within thirty days.

C. Expedited Removal

Certain aliens are not entitled to a full hearing before an immigration judge and may be removed administratively.

First, an “arriving” or “recently-arrived” alien (i.e., an alien who has been in the United States less than two weeks and is encountered within 100 miles of the border) who has not been admitted to the United States and who lacks a valid immigration document or who is inadmissible because of a fraudulent or willful misrepresentation, is subject to an expedited removal by a designated DHS official. DHS officials also may administratively remove an alien who has not been admitted to the United States and who has been convicted of an aggravated felony.

Aliens who are admitted into the country through a visa waiver program may also be administratively removed. Beginning in 1986, aliens from certain countries (see below) have been allowed to enter the United States for a short period of time without first having to obtain a tourist visa. However, other than asylum, those aliens are required to waive any right they may have to contest removal from the United

States. It should also be noted that not every alien who enters the United States from these countries does so pursuant to the visa waiver program. If an alien who is permitted entry through the visa waiver program fails to depart, then that alien may also be removed through an administrative order.

An alien may also be subject to administrative removal when a prior removal action is “reaffirmed” through a reinstatement of a prior removal. DHS can reinstate the previous removal order and enforce it against the individual, in which case he or she will not be entitled to a hearing before an immigration judge.

Visa Waiver Program Countries: Andorra, Australia, Austria, Belgium, Bermuda, Brunei, Canada, Caribbean Countries, Czech Republic, Denmark, Estonia, Federated States Micronesia, Finland, France, Germany, Greece, Guam, Hong Kong, Hungary, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malaysia, Malta, Monaco, Nauru, The Netherlands, New Zealand, Norway, Papua New Guinea, Portugal, Rep. of the Marshall Islands, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Taiwan, United Kingdom.

D. Judicial Removal

Judicial removal is another form of removal and typically coincides with a federal criminal prosecution. At the request of the United States Attorney and with the concurrence of DHS, a federal district court may order the removal of an alien at the time of sentencing for a criminal offense. However, this form of removal is rarely exercised.

E. Relief from Removal

Once an immigration judge has determined that an alien is removable, the Judge must then determine whether the alien is entitled to any form of relief. There are several different types of relief available depending on each alien’s circumstances, but the most common are detailed below. In addition, an individual can apply for many of these forms of relief if he or she is not in removal proceedings.

1. Asylum

An alien may be entitled to asylum in the United States if they are able to show they qualify as a “refugee.” In order to make this showing, an alien must show

a well-founded fear of persecution if deported back to their country of origin. Persecution may be on account of race, religion, nationality, political opinion, or membership among a particular social group. If asylum is granted, then the alien will be allowed to remain in the United States and may apply for permanent resident status after one year.

2. Special Immigrant Juvenile Status

Alien youth who have been abused, abandoned, or neglected may be eligible for Special Immigrant Juvenile Status (SIJS) and protection from removal. In order to apply for SIJS, the young person must be under 21 and unmarried. The young person must have been adjudicated dependent on a juvenile court or placed in the custody of an individual or state agency/department. In addition, a court must have determined that the youth is unable to reunify with one or both parents due to abuse, abandonment, neglect, or other similar basis under state law and that it is not in the youth's best interest to return to his or her country or parent's country of origin or last habitual residence. Once approved for SIJS, the young person may be eligible to immediately apply for lawful permanent residence.

3. Protection for Survivors of Domestic Violence

The Violence Against Women Act (VAWA) provides protection from removal and a path to permanent residence for spouses and children of abusive U.S. citizens and lawful permanent residents. This protection also extends to parents of abusive U.S. citizens and spouses of U.S. citizens or permanent residents whose children were abused by the U.S. citizen or permanent resident. The abuse may be physical, threatened, or psychological in nature. Once approved for protection under VAWA, an individual may be eligible to apply for permanent residence.

4. U-Visa: Survivors of Certain Crimes

Survivors of certain crimes in the United States may apply for a U nonimmigrant visa. The individual must possess information about the crime and have assisted the prosecuting or investigating agency in the investigation of the crime. In addition, the applicant must show he or she has suffered substantial physical or mental abuse as a result of the crime. The U nonimmigrant visa is valid for four years and can benefit

certain family members of the recipient. After three years, U visa recipients can apply for permanent residence.

5. T-Visa: Survivors of Human Trafficking

Survivors of human trafficking may apply for a T nonimmigrant visa. Human trafficking is a form of “modern day slavery,” and includes exploitation for purposes of labor or sex trade. Labor trafficking involves the use of force, fraud or coercion to recruit, harbor, transport, obtain or employ a person for labor or services in involuntary servitude, peonage, debt bondage or slavery. Sex trafficking is a commercial sex act that is a) induced by force, fraud, or coercion, or b) is performed by a person under 18. The T nonimmigrant visa is valid for three years and can benefit certain family members of the recipient. After three years, T visa recipients can apply for permanent residence.

6. Cancellation of Removal for Non-Permanent Residents

Certain individuals who have been continuously physically present in the United States at least ten years prior to the issuance of their Notice to Appear in Immigration Court may be eligible to request that their removal be canceled if they can show that their U.S. citizen or permanent resident spouse, parent, or child would suffer exceptional and extremely unusual hardship upon their removal from the United States. These individuals must also show that they have good moral character.

7. Registry

An immigration judge may grant an alien lawful admission for permanent residence if the alien: (1) can establish entry into the United States prior to January 1, 1972; (2) can show continuous residence since entry; (3) can demonstrate good moral character, and (4) is eligible for citizenship.

8. Voluntary Departure

Voluntary departure may be granted in lieu of deportation if, (A) prior to the conclusion of proceedings an alien can show that a favorable exercise of discretion is warranted, or (B) at the conclusion of proceedings an alien can additionally show that: (1) they are ready, willing, and financially able to depart the United States at their

own expense; and (2) they have been of good moral character for the past five years. An alien who is granted a voluntary departure but subsequently fails to depart the United States will become ineligible for certain other forms of discretionary relief.

VI. DEFERRED ACTION FOR CHILDHOOD ARRIVALS (“DACA”)

A. What is DACA?

DACA is a Department of Homeland Security policy, the purpose of which is to allow the government to exercise discretion to defer the removal proceedings of certain eligible undocumented youths, for up to two years. In addition, youths would be given authorization to legally work in the United States of America. The policy was enacted on June 15, 2012.

B. Requirements

To be eligible for DACA, an individual must meet the following requirements:

1. under the age of 31 as of June 15, 2012;
2. entered the United States before the age of 16;
3. had continuous residence in the United States from June 15, 2007 through the present;
4. were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
5. entered without inspection before June 15, 2012, or your lawful immigration status expired as of June 15, 2012;
6. be currently in school, have graduated from high school, have obtained a GED, or be an honorably discharged veteran of the Coast Guard or U.S. Armed Forces; and¹
7. have not been convicted of a felony offense, a significant misdemeanor offense, three or more misdemeanor offenses, and/or pose a threat to national security or public safety.

1. Galveston, Boat People SOS-Houston, Inc., and others that can help you if you qualify for their support. Take your time in reviewing the various forms and applications. Hopefully, this pamphlet has been a helpful resource in helping you understand U.S. immigration law.

Additionally, the individual must be 15 years or older unless the individual is in removal proceedings or has a final order of removal or voluntary departure. The individual must also pass a background check and be able to show that he or she meets the above requirements through verifiable documentation.

C. How to Apply

In order to apply, the individual must submit the following to USCIS:

1. Completed Forms I-821D Consideration of Deferred Action, I-765 Application for Employment Authorization, and I-765WS Work Authorization Worksheet (all of these forms can be downloaded from www.uscis.gov);
2. Supporting documents demonstrating the individual meets each of the eligibility requirements above;
3. Two identical passport style photographs; and
4. Fee payment of \$465.

The mailing address to submit the documents is dependent upon the applicant's state of residence. An applicant can find the correct mailing address at www.uscis.gov/I-821D or by calling 1-800-375-5283.

D. Effect and Limitations of DACA

When a noncitizen is granted deferred action, the Department of Homeland Security is deciding not to take enforcement action against the individual for a specific period of time. However, deferred action has the following limitations: (1) it only provides temporary relief; (2) it can be terminated at any time at the option of the Department of Homeland Security; and (3) it does not give a permanent legal immigration status to noncitizens.

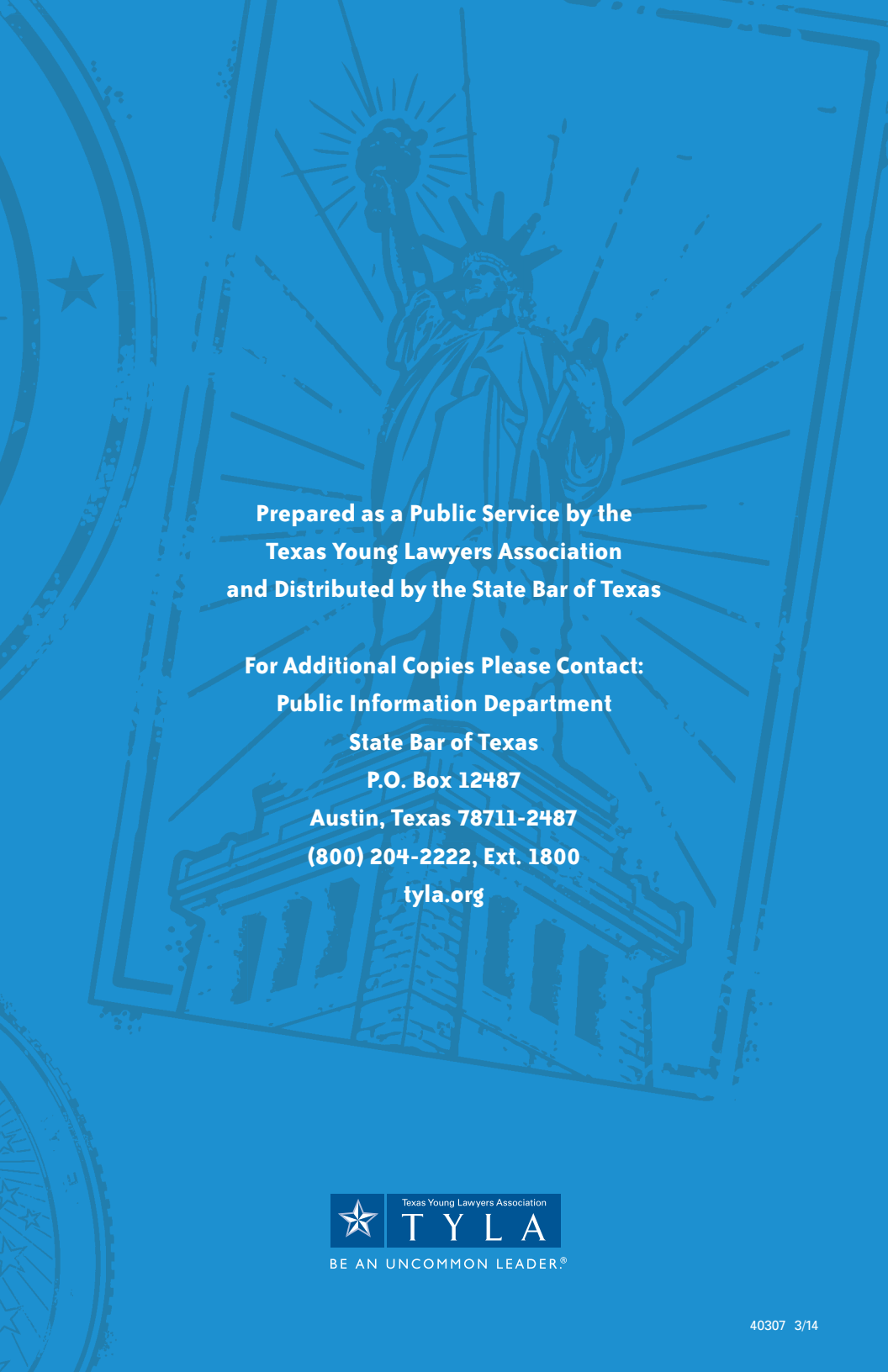
E. Development, Relief, and Education for Alien Minors ("DREAM Act")

The DREAM Act is an American legislative proposal introduced in 2001, which has never been passed. If passed, the DREAM Act would provide conditional permanent residency to certain immigrants of good moral character who are under the age of 30 (or possibly 35), arrived in the United States as a minor, graduated from

a United States high school and live in the United States continuously for the five years prior to the bill's enactment.

VII. CONCLUSION

Immigration law can be complex and challenging to understand. The first place to go to learn about U.S. immigration law is the USCIS's website at www.uscis.gov. You may also want to consult an attorney prior to applying for (or having a sponsor petition for) the various visas or other applications described in this pamphlet. If you cannot afford an attorney, know that there are organizations like the Lone Star Legal Aid, Texas Rio Grande Legal Aid, Legal Aid of Northwest Texas, Houston Volunteer Lawyers Program, Catholic Charities of the Archdiocese of Galveston, Boat People SOS-Houston, Inc., and others that can help you if you qualify for their support. Take your time in reviewing the various forms and applications. Hopefully, this pamphlet has been a helpful resource in helping you understand U.S. immigration law.



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