

“Lawfully Present” Individuals Eligible under the Affordable Care Act

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Under the Affordable Care Act of 2010 (ACA),¹ individuals who are “lawfully present” in the United States will be eligible for new affordable coverage options after January 1, 2014.² In July 2012, the U.S. Department of Health and Human Services (HHS) defined “lawfully present” for purposes of eligibility for the ACA’s high-risk insurance pools, referred to as the Pre-Existing Condition Insurance Plans (PCIP).³ This definition, codified at 45 C.F.R. section 152.2, generally tracks the definition used in Medicaid and the Children’s Health Insurance Program (CHIP) to provide affordable coverage to low-income children and pregnant women who are lawfully residing in the U.S.⁴ Under the PCIP definition, “lawfully present” individuals include not only those classified as “qualified” immigrants,⁵ but several other categories of non-U.S. citizens who have permission to live and/or work in the U.S. HHS and the U.S. Department of Treasury adopted the PCIP definition of “lawfully present” in their final rules on eligibility to enroll in the state or federally-run health insurance exchanges⁶ and to apply for premium tax credits

¹ The Patient Protection and Affordable Care Act, Public Law 111–148, enacted on March 23, 2010, and the Health Care and Education Reconciliation Act of 2010 (Reconciliation Act), Public Law 111–152, enacted on March 30, 2010, collectively are referred to as the Affordable Care Act.

² See, e.g., section 1411(a)(1) of the ACA (eligibility for the health insurance “exchanges” and the related affordability tax credits).

³ 75 FR 45014 (July 30, 2010). See also 77 FR 52614 (Aug. 30, 2012) (excluding individuals granted relief under the “Deferred Action for Childhood Arrivals” policy from eligibility).

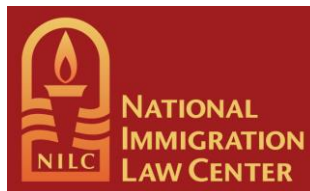
⁴ See CMS State Health Officials letter re: Medicaid and CHIP Coverage of “Lawfully Residing” Children and Pregnant Women (July 1, 2010), at www.cms.gov/smdl/downloads/SHO10006.pdf. See also CMS State Health Officials letter (Aug. 28, 2012), at www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO-12-002.pdf (excluding individuals granted relief under the “Deferred Action for Childhood Arrivals” policy from eligibility).

⁵ 8 U.S.C. § 1641.

⁶ 45 C.F.R. § 155.2; 77 FR 18310 (March 27, 2012).

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LOS ANGELES (Headquarters)
3450 Wilshire Blvd. #108 – 62
Los Angeles, CA 90010
213 639-3900
213 639-3911 fax



WASHINGTON, DC
1121 14th St., NW, Ste. 200
Washington, DC 20005
202 216-0261
202 216-0266 fax

to help make health insurance affordable.⁷ The immigration categories described below are considered “lawfully present” for ACA eligibility purposes.

Lawful Permanent Residents and Applicants for Adjustment

Lawful Permanent Residents (LPRs)

Lawful permanent residents have permission to live and work permanently in the U.S. They may travel abroad and then return to the U.S., as long as they have not abandoned their U.S. residence or committed acts that would make them inadmissible under immigration law. An LPR may apply for naturalization after living in the U.S. for five years (three years if married to a U.S. citizen, or one year for certain persons in the military and veterans). LPRs are “qualified” immigrants and are “lawfully present” in the U.S.

Applicants for Adjustment to LPR Status with Approved Visa Petitions

Individuals whose relatives or employers have petitioned to immigrate them (or, in some cases, who are petitioning for themselves) may be able to adjust to LPR status in the U.S. The qualifying relative (e.g., a U.S. citizen spouse, parent, adult child, or sibling, or an LPR spouse or parent) or employer must first file a petition for an immigrant visa on behalf of the intending immigrant. After the visa petition is approved, there may be a long waiting period before an eligible noncitizen may apply to adjust his or her status. There is no waiting period for “immediate relatives” (spouse, parent, or children) of U.S. citizens or for some employment categories. Individuals with approved visa petitions who have applied for adjustment to LPR status are “lawfully present.”

Persons Fleeing Persecution

Refugees

Refugees are noncitizens who, while outside the U.S. and their home country, were granted permission to enter and reside in the U.S. because they have a well-founded fear of persecution in their home country. Refugees are “qualified” immigrants and are “lawfully present” in the U.S.

Conditional Entrants

Before “refugee” status was established in U.S. law by the Refugee Act of 1980, nationals of communist countries or of certain countries in the Middle East were admitted as “conditional entrants,” a status similar to refugee status. This classification has not been used since 1980. Conditional entrants are “qualified” immigrants and are “lawfully present” in the U.S.

Asylees

People already in the U.S. who fear persecution in their home country and satisfy the requirements for refugee status may apply for asylum in the U.S. With some exceptions, in order to qualify for asylum, individuals must apply within one year of their last entry to the

⁷ 26 C.F.R. § 1.36B-1(g); 77 FR 30377 (May 23, 2012).

U.S. A person granted asylum is an “asylee.” After one year in this status, asylees may apply to obtain LPR status. Asylees are “qualified” immigrants and are “lawfully present” in the U.S.

Granted Withholding of Deportation or Withholding of Removal

This status is similar to, but separate from, asylum, for persons whose life or freedom would be threatened if they return to their home country. To obtain “withholding,” individuals must meet a higher evidentiary standard than for asylum, but if they meet this standard they *must* be granted withholding; unlike asylum, the status is not discretionary. Persons granted withholding may be deported to a third country if one will accept them, but they may not be returned to their home country. Unlike refugee and asylum status, this status does not provide a path for individuals to obtain LPR status. Persons granted withholding of deportation or removal are “qualified” immigrants and are “lawfully present” in the U.S.

Granted Withholding of Deportation/Removal under the Convention Against Torture (CAT)

The Convention Against Torture, an international treaty that the U.S. Senate has ratified and the federal government has implemented, provides a separate basis for granting withholding of deportation or removal. People who have substantial grounds for believing that, if they were returned to their home country, they would be in danger of being subjected to torture may apply for withholding under the CAT. People granted withholding of deportation or removal under the CAT are “lawfully present” in the U.S.

Some applicants for relief under the CAT are granted a *deferral* of removal instead. Individuals granted deferral of removal may be released under an “order of supervision” and may obtain authorization to work on that basis. (See “Order of Supervision,” p. 7.) If they obtain a work authorization document, these people would be considered “lawfully present” in the U.S.

Applicants for Asylum or Withholding of Deportation/Removal

Applicants for asylum or withholding of deportation/removal (including withholding of deportation/removal under the CAT) who are over 14 years old are considered “lawfully present” for ACA eligibility purposes if they have been granted employment authorization. Applicants who are under 14 years of age are considered “lawfully present” if their application for asylum or withholding of deportation/removal has been pending for 180 days.

Other Humanitarian Immigrants

Cuban and Haitian Entrants

For health care eligibility purposes, this category includes nationals of Cuba or Haiti who (1) were paroled into the U.S., regardless of whether the parole document states “Cuban/Haitian entrant”; or (2) have a pending exclusion or deportation case, or applied for asylum, provided that they are not subject to a final order of deportation or exclusion. Cuban and Haitian entrants are “qualified” immigrants and are “lawfully present” in the U.S.

Paroled into the U.S.

Individuals paroled into the U.S. are permitted to enter the country for humanitarian or public interest reasons. Some parolees are allowed to enter the U.S. temporarily, e.g., to receive medical treatment. Others are permitted to enter with the understanding that they will remain permanently by applying for asylum or filing a family visa petition. Persons paroled into the U.S. are “lawfully present” — and those whose parole is expected to last at least one year are also “qualified” immigrants.

Temporary Protected Status (TPS)

Temporary protected status is granted to individuals physically present in the U.S. who are from countries designated by the secretary of the U.S. Department of Homeland Security as unsafe to accept their return. A listing of the countries currently designated for TPS can be obtained from the U.S. Citizenship and Immigration Services (USCIS) website. Persons granted TPS are authorized to remain in the U.S. for a specific, limited period. When this period expires, the DHS secretary may extend it for another specified period. Applicants for TPS must be granted employment authorization if they have filed a “prima facie” application for TPS. Persons granted TPS, and applicants for TPS who have been granted employment authorization, are “lawfully present.”

Deferred Enforced Departure (DED)

Deferred enforced departure is a status very similar to TPS. DED is granted to noncitizens from particular countries by presidential proclamation or other executive action. DED status was granted, for example, to nationals of the People’s Republic of China (1990), El Salvador (1994), Haiti (1997), and Liberia (1999). DED status allows eligible persons to remain lawfully in the U.S. for a limited, specified period and to receive employment authorization. Persons granted DED are “lawfully present.”

Deferred Action

Immigration officials may exercise prosecutorial discretion in favor of a noncitizen who otherwise would be subject to deportation or removal proceedings. Deferred action is granted by USCIS administratively for a limited number of reasons, including the age or physical condition of the person (if it affects his or her ability to travel), the likelihood that another country will accept the person or that he or she will qualify for some other status, the presence of “sympathetic factors,” and the adverse publicity that may result from the individual’s removal from the U.S. This relief most commonly has been used by USCIS to grant employment authorization to individuals who have petitioned for LPR status as abused spouses or children under the Violence Against Women Act (VAWA, described below) and for people with urgent medical needs. With the exception of the individuals described below, persons granted deferred action are “lawfully present.”

Deferred action recently became available to immigrant youth who came to the U.S. as children, have lived in the country for at least five years, and meet certain other criteria. On August 30, 2012, the Centers for Medicare and Medicaid Services (CMS) issued an interim final rule excluding individuals granted deferred action under the “Deferred Action for Childhood Arrivals” (DACA) policy from the “lawfully present” definition, for purposes of

PCIP eligibility.⁸ This policy, in effect, excludes this subgroup from eligibility for the health insurance exchanges and the premium tax credits. Individuals granted deferred action based on other administrative policies remain eligible as “lawfully present.”

Special Immigrant Juveniles

Special immigrant juvenile status is available to children who have been declared dependent upon a state court or placed by a state court into the custody of an individual or entity or state agency, after a determination by the court that reunification with one or both parents is not viable due to abuse, neglect, abandonment or a similar basis, and when a court or agency determines that return to their country of origin is not in their best interest. Children who have applied for special immigrant juvenile status by filing an I-360 petition with USCIS are “lawfully present.”

Survivors of Domestic Violence, Trafficking, and Other Serious Crimes

Domestic Violence Survivors

Battered spouses and children may be “qualified” immigrants and “lawfully present” if they have an approved (1) self-petition for an immigrant visa filed under the Violence Against Women Act (VAWA) or a prima facie case determination on a self-petition, (2) immigrant visa filed for a spouse or child by a U.S. citizen or LPR, or (3) application for cancellation of removal/ suspension of deportation under VAWA. The parent and/or child of a battered spouse or child are also “qualified” and “lawfully present.”

Victims of Trafficking and Their Derivative Beneficiaries

Immigrant survivors of a severe form of human trafficking who are certified by (or, if a minor, receive an eligibility letter from) HHS’s Office of Refugee Resettlement (ORR) are eligible for federal benefits, such as Medicaid and CHIP, to the same extent as refugees in every state. Severe forms of trafficking include sex trafficking and the forced or fraudulent recruitment, harboring, transport, or provision of a person for labor or services that subject an individual to involuntary servitude, peonage, debt bondage, or slavery. To be certified for federal benefits, an individual must have submitted a bona fide application for a T visa or have been granted “continued presence” in order to effectuate the prosecution of traffickers in persons. Trafficking survivors with a T visa or a prima facie case determination on a T visa application are “qualified” immigrants and are “lawfully present” in the U.S.

U Visa Holders

U visas are available to victims of serious crimes who possess information concerning this criminal activity; have been helpful, are being helpful, or are likely to be helpful to law

⁸ 77 FR 52614 (Aug. 30, 2012). Although this rule went into effect immediately, CMS will accept comments on or before October 29, 2012. CMS issued similar guidance, excluding individuals granted DACA from eligibility for Medicaid and CHIP under the state option to cover “lawfully residing” children and pregnant women. CMS State Health Officials letter (Aug. 28, 2012), www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO-12-002.pdf. Those granted deferred action based on other administrative policies remain eligible for Medicaid and CHIP under the state option.

enforcement in the investigation or prosecution of this criminal activity; and suffered “substantial physical or mental abuse” as a result of the victimization. Qualifying crimes include rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, conspiracy, solicitation, or attempt to commit any of these crimes. U visa holders, as individuals with a valid nonimmigrant status, are “lawfully present” in the U.S.

Persons with Valid Nonimmigrant Status

Nonimmigrant Visa Holders

Nonimmigrant visa holders include tourists, students, and visitors on business, as well as individuals who are permitted to live and work in the U.S. indefinitely. Nonimmigrants may have a status granted under 8 U.S.C. section 1101(a)(15)(A) through (V) or by a treaty such as the one described below. Some categories of nonimmigrant statuses allow the status holder to work and eventually to adjust to lawful permanent residence. Nonimmigrants who violate the terms of their status — for example, by overstaying a tourist visa or working without permission — may lose their nonimmigrant status and be considered undocumented. Nonimmigrants who have not violated the terms of their status are considered “lawfully present.”

Citizens of Micronesia, the Marshall Islands, and Palau

Citizens of the Federated States of Micronesia, the Marshall Islands, and the Republic of Palau have special rights under Compacts of Free Association signed by the U.S. They are nonimmigrants who are allowed to enter, reside, and work in the U.S. indefinitely, and are “lawfully present” in the U.S.

Longtime Residents

The “lawfully present” category also includes individuals who have been in the U.S. for a long period of time and who are completing the process of securing lawful permanent residence or who cannot be returned to their home country and are therefore likely to remain in the U.S.

Lawful Temporary Residents and Applicants for Legalization under IRCA

Under the Immigration Reform and Immigrant Control Act of 1986 (IRCA), two categories of noncitizens were allowed to legalize their status: (1) “General amnesty” or legalization immigrants, who had resided unlawfully in the U.S. since prior to January 1, 1982, and (2) “special agricultural workers” (SAWs) or “section 210” immigrants, who had performed agricultural work for a specified period prior to IRCA’s enactment. Legalization under IRCA was a two-stage process under which applicants first applied for and obtained lawful temporary resident (LTR) status. After obtaining LTR status, general amnesty immigrants were required to apply for lawful permanent resident status. SAW applicants, on the other hand, automatically became LPRs after having LTR status for a certain period of

time. Lawful temporary residents are “lawfully present.” Applicants for legalization who are granted work authorization are also “lawfully present.”

Legalization under the LIFE Act

The Legal Immigration and Family Equity (LIFE) Act, enacted in 2000, provides for the adjustment of status of individuals who filed written claims for class membership in one of three class action lawsuits that challenged the former Immigration and Naturalization Service’s implementation of the 1986 (IRCA) legalization program: *Catholic Social Services, Inc. v. Meese, vacated sub nom. Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993); *League of United Latin American Citizens v. INS, vacated sub nom. Reno v. Catholic Social Services, Inc.*, 509 U.S. (1993), or *Zambrano v. INS, vacated sub nom. Immigration and Naturalization Service v. Zambrano*, 509 U.S. 918 (1993). To adjust under LIFE, individuals must show, among other things, that they were continuously physically present in the U.S. during the period between November 6, 1986, and May 4, 1988, and that they applied for class membership before October 1, 2000. Applicants for adjustment under LIFE who have been granted employment authorization are “lawfully present.”

Family Unity

Family Unity status provides protection from deportation/removal and eligibility for employment authorization to the spouses and children of noncitizens who legalized under IRCA. To qualify for Family Unity, a person must have been the spouse or child of an amnesty immigrant as of May 5, 1988, and must have been residing in the U.S. since that date. In December 2000, the LIFE Act also extended Family Unity status to the spouses and unmarried minor children of individuals eligible to become permanent residents through the “late amnesty” legalization program of that law. To qualify for LIFE Act Family Unity, individuals must have been present and residing in the U.S. on December 1, 1988, and must currently be the spouse or minor child of an individual who is eligible for adjustment under LIFE. All persons granted Family Unity status are “lawfully present.”

Applicants for Cancellation of Removal or Suspension of Deportation

Individuals in removal proceedings who establish that they have been continuously present in the U.S. for at least ten years, that they have good moral character, and that their removal would cause “exceptional and extremely unusual hardship” to a U.S. citizen or LPR parent, spouse, or child may apply for the discretionary relief of cancellation of removal. For individuals in deportation rather than removal proceedings, suspension of deportation is available. Applicants for suspension must establish that they have seven years of continuous physical presence in the U.S. and good moral character, and demonstrate that their deportation would cause extreme hardship to themselves, or to a parent, spouse, or child. Applicants for cancellation of removal and suspension of deportation who are granted employment authorization are “lawfully present.”

Order of Supervision

Individuals with final orders of deportation or removal whom the immigration authorities are unable to remove may be released under an order of supervision. Individuals

under an order of supervision are eligible for employment authorization. Persons under an order of supervision who have employment authorization are “lawfully present.”

Registry Applicants

Individuals who have resided continuously in the U.S. since January 1, 1972, and who meet the requirements of LPR status may adjust their status by applying for “registry.” Applicants for registry who have been granted employment authorization on this basis are “lawfully present.”