

## New DHS Guidance on Prosecutorial Discretion for Labor Disputes (Updated March 8, 2023)

On January 13, 2023, the Department of Homeland Security (DHS) released [guidance](#) that outlines a new, streamlined process for immigrant workers to obtain temporary protection from deportation and work authorization if they are involved in a labor dispute.<sup>1</sup> Specifically, this new guidance clarifies that immigrant workers may be granted prosecutorial discretion—primarily in the form of deferred action—if they are victims of, or witnesses to, labor exploitation under investigation by a federal or state labor agency and the labor agency supports their request.

This guidance follows the [Worksite Enforcement Memo](#) released by DHS on October 12, 2021, in which Secretary Mayorkas announced pivotal changes to DHS worksite immigration enforcement practices designed to “facilitate the important work of the Department of Labor” and “increase the willingness of workers to report violations.”<sup>2</sup> Consistent with the directives in that memo, this new guidance authorizes U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration and Customs Enforcement (ICE) to exercise their discretion, on a case-by-case basis, in support of the enforcement interests of labor and employment law enforcement agencies.

This announcement comes after years of organizing by immigrant workers demanding protections when they seek to improve their workplaces, form unions, combat wage theft, defend civil rights, challenge harassment, and report unsafe working conditions. Their vulnerability to deportation has impeded their ability to speak out about labor violations and build power on the job, which in turn has driven down wages and working conditions and undermined the enforcement of our country’s core labor standards – to the detriment of all workers. Together with the policies announced by the [U.S. Department of Labor](#) and [National Labor Relations Board](#) in the last two years, these new protections represent a momentous victory that demonstrate the powerful wins workers can achieve when they organize.

The following FAQ explains both the January 13, 2023, DHS guidance as well as the processes outlined by labor agencies for workers to request their support in seeking prosecutorial discretion from DHS.

### Overview & Definitions

#### 1. What is the rationale behind the new guidance?

This new streamlined process facilitates more robust enforcement of U.S. labor laws by protecting immigrant workers from retaliation and immigration enforcement while labor agencies investigate or

<sup>1</sup> “DHS Announces Process Enhancements for Supporting Labor Enforcement Investigations”, January 13, 2023, <https://www.dhs.gov/news/2023/01/13/dhs-announces-process-enhancements-supporting-labor-enforcement-investigations>.

<sup>2</sup> Homeland Security Secretary Alejandro N. Mayorkas Memorandum to Immigration and Customs Enforcement Acting Director Tae D. Johnson, “Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual,” October 12, 2021, [https://www.dhs.gov/sites/default/files/publications/memo\\_from\\_secretary\\_mayorkas\\_on\\_worksite\\_enforcement.pdf](https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf). For additional background, see the NILC fact sheet “Department of Homeland Security’s Worksite Enforcement Memorandum: What You Need to Know”, November 3, 2021, <https://www.nilc.org/wp-content/uploads/2021/11/Website-Summary-of-Oct-2021-DHS-Worksite-Enforcement-Memo-2021-11-03.pdf>.

prosecute a labor dispute. It further promotes fairness, safety, and a level playing field for all workers in the U.S. by strengthening labor agencies' ability to enforce labor and employment standards. While the guidance is new, the policy behind it is rooted in longstanding inter-agency cooperation between labor agencies and DHS and draws on existing DHS authority to exercise prosecutorial discretion.<sup>3</sup>

## **2. What is prosecutorial discretion in this context?**

Prosecutorial discretion refers to DHS' longstanding authority to choose whether to take enforcement actions against individuals under the laws it enforces, based on the priorities DHS has established for administering our immigration laws.<sup>4</sup> DHS has long exercised prosecutorial discretion to defer or decline to pursue different forms of enforcement against individuals in the U.S. for specific reasons and on an individualized basis.<sup>5</sup> For this process, a worker's involvement in a labor dispute — and the government's corresponding interest in labor law enforcement — are the primary basis for discretion, with DHS also considering other positive and negative equities on a case-by-case basis.

## **3. What types of prosecutorial discretion are workers eligible for? How long do they last?**

The DHS guidance sets forth a process to request prosecutorial discretion in the form of deferred action — and states that these grants "will typically last for a period of two years."<sup>6</sup> Although the guidance also references another form of prosecutorial discretion called parole in place, it is not part of the new streamlined filing process.

## **4. What is deferred action?**

The new guidance defines deferred action as follows: "Deferred action is a form of prosecutorial discretion to defer removal action (deportation) against a noncitizen for a certain period of time. Although deferred action does not confer lawful status or excuse any past or future periods of unlawful presence, a noncitizen granted deferred action is considered lawfully present in the United States for certain limited

---

<sup>3</sup> See, e.g., Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites, March 31, 2021,

<https://www.dol.gov/sites/dolgov/files/ofccp/regs/compliance/directives/files/DHSICE-DOLMOU-Final3-31-2011ESQA508c.pdf>; Memorandum of USCIS Director John Morton to All Field Officers, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs," July 17, 2011,

<https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf>;

Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, "Exercising Prosecutorial Discretion," Nov. 17, 2000, available at <https://www.aila.org/infonet/ins-memo-on-prosecutorialdiscretion>; See also NILC fact sheet "*Immigration and Labor Enforcement in the Workplace: The Revised Labor Agency–DHS Memorandum of Understanding*," May 2016,

<https://www.nilc.org/issues/workerrights/revised-labor-agency-dhs-mou/> and NILC fact sheet "Prosecutorial Discretion & Immigrant Workers, Recommendations For Implementation," March 2012, <https://www.nilc.org/wp-content/uploads/2015/11/PD-imm-workers-recommendations-2012-03-22.pdf>.

<sup>4</sup> See generally, Shoba Sivaprasad Wadhia, "Understanding Prosecutorial Discretion in Immigration Policy and Recommendations for Moving Forward", April 19, 2021, <https://www.acslaw.org/expertforum/understanding-prosecutorial-discretion-in-immigration-policy-and-recommendations-for-moving-forward/>.

<sup>5</sup> See generally, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1906 (2020).

<sup>6</sup> See *supra* FN1.

purposes, while the deferred action is in effect. If granted deferred action, a noncitizen may be eligible for employment authorization.<sup>7</sup>

#### **5. What is a labor dispute in this context?**

A labor dispute is broadly defined as a labor-related dispute between the employee(s) and employer regarding their rights to fair wages, workplace safety, and organizing.<sup>8</sup> In this context, a labor dispute generally refers to a case where a complaint or charge has been filed with a federal, state, or local agency that enforces labor laws and that agency is taking some sort of action to investigate and/or resolve the potential labor law violation. Labor dispute cases can be initiated by a worker or group of workers and are often filed with the assistance of worker centers, organizers, and/or attorneys.

#### **6. What is a labor agency?**

A labor agency is a government body that is authorized to enforce labor laws. They include the federal labor agencies of the U.S. Department of Labor (DOL), the National Labor Relations Board (NLRB), and the Equal Employment Opportunity Commission (EEOC) as well as state and local labor enforcement agencies, state attorneys general, and municipal-level labor and enforcement agencies.

### **Eligibility**

#### **7. Who is eligible to apply?**

Immigrant workers who "fall within the scope of a labor agency investigation" for which the labor agency has issued a Statement of Interest to USCIS are eligible to request deferred action under the new guidance.<sup>9</sup> The exact set of individuals eligible to apply with a particular labor agency letter will depend on the specific terms of the letter itself, such as whether an individual was employed by an employer during the time period in which that employer is under investigation. Generally speaking, DHS has set out an inclusive standard that is meant to address the broad chilling effect of immigration enforcement on labor standards investigations and may include workers who have not personally been subject to direct threats of retaliation.

#### **8. Does this process apply to all noncitizen workers regardless of whether they are currently in removal proceedings?**

Yes. This process applies to workers who have or have not had prior interaction with ICE and/or the immigration courts, as well as those currently in removal proceedings. A number of individuals who came forward as part of this process prior to DHS releasing the new guidance and who were issued deferred action had not previously been in contact with DHS.

#### **9. Does the new process apply to workers who have been previously excluded from federal protections such as guestworkers, farmworkers, and domestic workers?**

---

<sup>7</sup> "DHS Support of the Enforcement of Labor and Employment Laws," January 13, 2023, <https://www.dhs.gov/enforcement-labor-and-employment-laws>. For further background, see *Reno v. Amer.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999); 8 U.S.C. § 1154(a)(1)(D)(i)(II).

<sup>8</sup> Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites, Dec. 7, 2011.

[https://www.dol.gov/sites/dolgov/files/OASP/DHS-DOL-MOU\\_4.19.18.pdf](https://www.dol.gov/sites/dolgov/files/OASP/DHS-DOL-MOU_4.19.18.pdf).

<sup>9</sup> See *supra* FN7, DHS guidance from January 13, 2023.

Yes. This process is open to anyone currently out of status or in a precarious form of status, including guestworkers on H-2A or H-2B visas. The inclusion of state and local agencies means states with stronger protections for farmworkers, domestic workers, and others excluded from federal labor laws may request support from those agencies.

**10. Does the process apply to workers without formal employment agreements such as day laborers, resilience workers, and independent contractors?**

Yes. So long as the name/address of the employer can be identified, these workers can file a complaint or charge with the appropriate labor agency and subsequently request a letter of support/statement of interest for prosecutorial discretion.

**11. Are family members of workers eligible to apply?**

Family members are not specifically included in the new DHS guidance. However, they may be eligible if a labor agency letter specifically includes them due to concerns about threats and/or retaliation by the employer.

**12. What are the steps for a worker to receive deferred action under this process?**

In a typical case, there will be five steps for a worker to receive this benefit: 1) a labor dispute occurs that is reported to a labor agency; 2) a worker or advocate submits a request to the labor agency for a letter supporting prosecutorial discretion (known as a "Statement of Interest"); 3) the labor agency agrees to support the request for prosecutorial discretion and sends a Statement of Interest to USCIS with a copy to the requester; 4) workers covered by the Statement of Interest submit requests for deferred action and work authorization to USCIS concurrently, and 5) if DHS approves the request, the worker receives a letter granting deferred action for a two year period along with a work authorization card.

## Labor Agency Process

**13. Which labor agencies may issue Statements of Interest? Does this process include state and local labor agencies?**

All federal, state, and local labor and employment law enforcement agencies may issue statements of interest (i.e., letters of support) to DHS as part of this process. See Q6.

**14. How does a worker obtain a Letter of Support/Statement of Interest from a labor agency?**

Workers and advocates may send a request for a statement of interest to the labor agency where the labor dispute is pending. The [DOL](#) and [EEOC](#) have provided specific instructions for these requests in the form of FAQs on their websites, and the NLRB has issued a [memo](#) regarding its support for this process.<sup>10</sup> NILC has also published an [explainer](#) on filing these requests with DOL.<sup>11</sup>

---

<sup>10</sup> "US Department of Labor posts process for seeking its support for immigration-related prosecutorial discretion during labor disputes." July 6, 2022, <https://www.dol.gov/newsroom/releases/sol/sol20220706>; "General Counsel Jennifer Abruzzo Releases Memo on Ensuring Rights and Remedies for Immigrant Workers," November 8, 2021, <https://www.nlrb.gov/news-outreach/news-story/general-counsel-jennifer-abruzzo-releases-memo-on-ensuring-rights-and>.

<sup>11</sup> "U.S. Department of Labor's New Frequently Asked Questions Regarding Immigration-Related Prosecutorial Discretion: What You Need to Know," <https://www.nilc.org/wp-content/uploads/2022/07/Factsheet-on-DOL-FAQs-Deferred-Action-2022-07-07.pdf>.

**15. What should be included in the workers' request to the labor agency?**

- ▶ The worksite at issue (so the labor agency can identify the worksite);
- ▶ The labor dispute and how it relates to laws enforced by the labor agency;
- ▶ Any coercion, retaliation, or threats of retaliation the worker(s) witnessed or experienced;
- ▶ How workers' fear of potential immigration-based retaliation or immigration enforcement is likely to scare workers from reporting violations or cooperating with the labor agency; and
- ▶ Contact information for the requester or their representative.

**16. What should NOT be included in the labor agency request?**

The identifying information of individual workers should not be included in these requests for letters of support, as labor agency letters are typically issued worksite-wide for the timeframe that corresponds to the labor dispute and do not include the names of individual workers. DOL has specifically cautioned not to include the following information:

- ▶ Individual workers' particular immigration histories or needs;
- ▶ Sensitive personally identifiable information, including dates of birth, Social Security Numbers, or Alien Registration Numbers.

**17. What factors will the labor agency consider in granting the request?**

The DOL has provided the following factors to include (other labor agencies will likely consider similar factors):<sup>12</sup>

- ▶ The labor agency's need for witnesses to participate in its investigation and/or possible enforcement;
- ▶ Whether DHS's use of immigration-related prosecutorial discretion would support the law enforcement interest in holding labor law violators accountable for such violations;
- ▶ Whether workers are experiencing retaliation or threats of retaliation, or fear retaliation and/or may be "chilled" from reporting violations of the law or participating in labor agency enforcement;
- ▶ Whether immigration enforcement concerning workers who may be witnesses to or victims of a violation of laws within the agency's jurisdiction could impede the agency's ability to enforce the labor laws or provide all available remedies within its jurisdiction; and
- ▶ Likelihood that immigration enforcement could be an instrument used to undermine the labor agency's enforcement of laws in the geographic area or industry and/or give rise to further immigration-based retaliation.

Note that the DHS guidance instructs labor agencies seeking "DHS support in an ongoing investigation or enforcement action" to address the following factors in their statement of interest:

- ▶ The nature of their investigation and the need for DHS support;

---

<sup>12</sup> The EEOC has provided a shorter list of factors in its FAQ: 1) "Whether the request relates to an open or closed EEOC investigation or litigation, including later acts of related retaliation; and 2) Whether deferred action would help the EEOC carry out its enforcement mission and priorities. If so, and at its discretion, the EEOC may provide a "Statement of Interest" to DHS stating that the EEOC believes DHS's use of its prosecutorial discretion is necessary for the EEOC to effectively carry out its mission and that the EEOC supports the request for deferred action." See <https://www.eeoc.gov/faq/eeocs-support-immigration-related-deferred-action-requests-dhs>.

- ▶ The agency's enforcement interests that provide the basis for their request; and
- ▶ The worksite and the class of workers who may be helpful with the agency investigation.<sup>13</sup>

#### **18. Where should the workers' request to the labor agency be sent?**

DOL has created a special email for submitting these requests: [statementrequests@dol.gov](mailto:statementrequests@dol.gov) and has indicated requests should use the subject line: "Request for Statement of DOL Interest." For other labor agencies, the requests should be submitted to the leadership of the regional office where the labor dispute is pending, with copies to the designated point people within each labor agency for immigration-related concerns.<sup>14</sup>

#### **19. How long does it take to get a response from the labor agency?**

There has been wide variation in the response time, with some cases receiving letters in a matter of days while others wait for months. DOL has included language in their FAQs about who to contact if you have not received a response after 30 days.

#### **20. What happens when the labor agency decides to support a workers' request for prosecutorial discretion?**

The labor agency will send a "Statement of Interest" directly to USCIS requesting prosecutorial discretion for workers involved in a particular labor dispute with specific reasons why prosecutorial discretion is warranted. A copy of the statement will also be sent to the requester, and workers must include that copy in their deferred action requests. The DHS guidance gives labor agencies specific instructions on what to include in the statement and how they can request expedited processing.

#### **21. What does a "Statement of Interest" from the labor agency look like?**

The labor agency statement of interest is a letter addressed to the USCIS director supporting prosecutorial discretion for workers employed at a specific worksite. The letter will include the name of the employer and briefly describe the labor dispute. It will state the location of the worksite and the date range for which the agency supports prosecutorial discretion for workers, but will not name individual employees. The letters typically provide a 24-month range within which the workers may apply to USCIS for immigration protections. Some letters have specifically supported parole in addition to deferred action.

#### **22. What happens if the labor agency decides to deny a worker's request for prosecutorial discretion?**

As a purely discretionary process, there are no formal rights to appeal a labor agency decision to deny a request for a statement of interest. DOL has stated that it will not communicate with DHS about requests it decides not to support.<sup>15</sup> As an advocacy matter, it may be worth engaging the labor agency in a larger

---

<sup>13</sup> See *supra* FN7, DHS guidance from January 13, 2023.

<sup>14</sup> For further assistance in identifying the individuals to whom the request should be submitted, contact NILC.

<sup>15</sup> See "Process for Requesting Department of Labor Support for Requests to the Department of Homeland Security for Immigration-Related Prosecutorial Discretion During Labor Disputes," July 6, 2022, <https://www.dol.gov/sites/dolgov/files/OASP/files/Process-For-Requesting-Department-Of-Labor-Support-FAQ.pdf> ("If the Department decides not to provide a Statement of DOL Interest in a labor dispute, DOL will not communicate with DHS about the request.")

conversation to understand how the agency views its enforcement interests and attempt to persuade the agency that a particular case warrants support based on the factors described in Q17 above.

**23. What if there is no active investigation pending before a labor agency?**

If a worker reports labor abuses that have not yet been raised to a labor agency, advocates may assist the worker in filing a complaint or charge with the appropriate agency. For immigration practitioners or other advocates who may be unfamiliar with advocacy before labor agencies, consider consulting NILC and/or a local worker center or labor rights organization. Once the workers have filed a complaint with a labor agency, they may follow the above steps to request a statement of interest.

**24. What if the labor violation occurred months or years ago but was never reported?**

Every labor agency has its own statute of limitations for investigating labor violations (and sometimes multiple ones depending on the type of claim). Therefore, it may be too late to file certain claims. In addition to checking statutes of limitations on the labor agencies' respective websites, local worker centers and labor rights organizations can advise on the timing of filing a labor agency complaint.

**25. If the labor agency declines to investigate the worker's claim or charge, can the worker still request a statement of interest supporting deferred action?**

In most cases, no. Since the labor agency's interest in supporting deferred action is tied to its interest in investigating a dispute and enforcing labor laws, it will not be able issue a statement of interest to DHS if there is no investigation of a worker's claim. However, there may be some special circumstances where the labor agency continues to have an interest in a case that has been closed or settled.

## DHS Process

**26. What is the first step for workers seeking prosecutorial discretion before DHS?**

Like with any immigration benefit, workers should be screened by a qualified immigration practitioner who can advise on eligibility, risks, and any other potential forms of immigration relief that may be available. FOIA and/or other record requests may be necessary to ascertain a worker's immigration and/or criminal history.

**27. When can a worker submit a request for prosecutorial discretion to USCIS?**

Once a letter is received from a labor agency supporting prosecutorial discretion for a worksite, any worker covered by the terms of that letter may request prosecutorial discretion from USCIS.

**28. Should the worker apply for work authorization at the same time as prosecutorial discretion?**

Yes. To expedite this process, the DHS guidance instructs applicants to apply concurrently for both. Note that for cases filed prior to January 13, 2023, workers were required to first receive a grant of deferred action before USCIS would accept requests for employment authorization – but this aspect of the process changed with the new, streamlined process announced in the guidance of January 13, 2023.

**29. What should a request packet to USCIS contain?**

The guidance sets forth a detailed list of items to include in the USCIS submission. Please note that if the worker is represented before USCIS, the advocate should also include a Form G-28 (Notice of Entry of Appearance as Attorney or Accredited Representative):

- ▶ A written request signed by the noncitizen stating the basis for the deferred action request;

- ▶ A letter or statement of interest from a labor or employment agency supporting the request;
- ▶ Evidence to establish that the worker falls within the scope of workers identified in the labor or employment agency letter, such as W-2s, pay stubs, time cards, or other documentary evidence to demonstrate that the worker was employed during the period identified in the labor or employment agency statement;
- ▶ Evidence of any additional factors supporting a favorable exercise of discretion;
- ▶ Proof of the noncitizen's identity and nationality;
- ▶ If applicable, any document used to lawfully enter the United States or other evidence relating to the noncitizen's immigration history or status;
- ▶ [Form G-325A](#), Biographic Information (for Deferred Action);
- ▶ Form I-765, Application for Employment Authorization, with the appropriate fee or request for a fee waiver; and
- ▶ Form I-765WS, Worksheet.

### **30. Does the worker need to provide their own address?**

Yes. The G-325A specifically asks for current and prior addresses of the application.<sup>16</sup> If a worker is represented by an attorney or DOJ representative, they will have the option to have legal documents mailed to them or their legal representative.

### **31. What should the written statement look like?**

These statements can be fairly short, with the worker requesting deferred action, stating their employment at the worksite being investigated, and briefly describing their reasons for seeking immigration protection (though there are no specific requirements). Cases involving negative equities such as criminal history may have longer statements explaining mitigating factors. The statement does not need to be signed under penalty of perjury or notarized like declarations or affidavits.

### **32. What does DHS mean by “Evidence of Additional Factors Supporting a Favorable Exercise of Discretion?”**

With any discretionary immigration benefit, USCIS weighs the positive and negative equities of each case in rendering its decision. For this labor-based deferred action process, the primary evidence supporting discretion is the labor agency's statement of interest. However, in some cases workers or practitioners may wish to submit additional positive equities evidence (such as evidence of US citizen family members or other community ties), especially to mitigate negative equities such as criminal history.

### **33. Where should the request be submitted?**

DHS has created a “single intake point” with a “centralized intake process” for these requests.<sup>17</sup> Requests under this new process — for deferred action AND applications for work authorization — should be submitted to the following address:

**USCIS**  
**Attn: Deferred Action**

---

<sup>16</sup> There may be an exception for workers with pending applications that entitle them to VAWA confidentiality protections to use a “safe address.” See 8 U.S.C. Section 1367.

<sup>17</sup> See *supra* FN1.

**10 Application Way**  
**Montclair, CA 91763-1350**

If a worker wants to request deferred action but does not want to request employment authorization, they should send their request to their local USCIS Field Office.

**34. Is there anything else I need to submit to receive work authorization?**

For deferred action, the appropriate subcategory on Form I-765 is (c)(14). Although there is no filing fee for a deferred action request, the filing fee for the I-765 is \$410. The I-765WS also requires a showing of financial need, though this can typically just be stated on the form since supporting documents are not required.

**33. What if the worker cannot pay the \$410 filing fee for the work authorization application?**

At this time, the new Montclair filing location is not accepting applications unless they include both the deferred action and the I-765 applications. For workers who cannot pay the fee, the alternative options are: 1) submitting USCIS Form I-912 for a fee waiver (please note that unlike the I-765WS, it requires supporting documentation to show poverty level and inability to pay) or 2) filing the deferred action application at the local field office (which has no fee) without applying for work authorization.

**35. Will workers receive a filing receipt?**

Yes. Although the deferred action application does not have a receipt associated with it, applicants will receive a receipt for the I-765 application.

**36. Will the worker have to give biometrics and are there any fees for it?**

Biometrics is a process common to all USCIS filings where the applicant must go to a designated office for fingerprinting and photos. Workers should receive an appointment notice within a few weeks of applying. There is no separate fee for this process, though workers may need to miss work to attend the appointment.

**37. What is the timeline after submitting the applications to USCIS?**

A worker should expect to receive a receipt and biometrics appointment within a few weeks of filing. Although there are no official processing times, the DHS announcement highlights that "given the often time-sensitive labor agency enforcement interests, efficient processing of deferred action and related applications for employment authorization will reduce potential risks to workers and retaliation by their employers under investigation."<sup>18</sup> Anecdotally, cases before the January 13, 2023 guidance were processed within a few months or even weeks, depending on whether USCIS issued any Requests for Evidence (RFEs).

**38. Is there a contact for filing issues or delays with the Montclair office?**

Yes. If there are delays in receiving an I-765 receipt, biometrics notice, and/or adjudication, or if there are other filing issues that arise, DHS officials have instructed advocates to reach out to the following email: [communityengagement@hq.dhs.gov](mailto:communityengagement@hq.dhs.gov). Officials have also indicated that a dedicated mailbox may be set up

---

<sup>18</sup> Id.

for this process at a later date. Advocates are encouraged to contact NILC if they do not receive a response or have recurring issues with filing.

## Special Considerations

### **39. What if a worker is in removal proceedings or has an order of removal?**

USCIS will accept all complete applications under this process regardless of an individual's current immigration status. However, if USCIS determines the applicant is currently in removal proceedings or has a prior order of removal, it will "forward" their request to ICE. Then, "USCIS and ICE, as appropriate, will consider and make a case-by-case determination of the deferred action request and USCIS will consider all related Forms I-765, if submitted."

### **40. Can this process help with dismissal or termination of removal proceedings?**

Yes. Although the deferred action process at USCIS is a separate adjudication, a worker may also request prosecutorial discretion from the Office of the Principal Legal Advisor (OPLA, the branch of ICE that prosecutes removal cases) to dismiss, terminate or administratively close the removal case. For those with final orders of removal, a worker would request that OPLA agree to reopen and then terminate proceedings. These requests can be filed at the same time the deferred action request is filed with USCIS or after the deferred action has been granted.

### **41. What if a worker has had prior contact with the criminal legal system?**

DHS has not provided specific guidance on how it will consider criminal history in this process. Advocates should request records from the relevant state and federal agencies to determine the extent of an individual's criminal history so that they can advise the worker on whether to proceed with applying for deferred action and what documentation to submit.

### **42. What workers may benefit from Parole in Place?**

Parole in place is another form of prosecutorial discretion that DHS can grant for humanitarian reasons to individuals physically present in the U.S. on a case-by-case basis.<sup>19</sup> Individuals granted parole in place are eligible to apply for employment authorization.<sup>20</sup> Certain workers, such as those with qualifying US citizen relatives, may be to adjust status and apply for permanent residence if they are granted parole in place. Although the new DHS guidance does not provide a specific process for applying, some labor agency letters expressly include parole in place and given the potential for permanent status, workers may wish to discuss this option with a qualified immigration practitioner.

### **43. Can I request Parole in Place at the new Montclair Office?**

No. The new process only applies to deferred action. Applicants for Parole in Place must be filed at the local field office using Form I-131.

### **44. What if a worker is also eligible for other relief such as a T or U Visa?**

---

<sup>19</sup> See INA § 212(d)(5)(A); USCIS, Humanitarian, <https://www.uscis.gov/humanitarian>

<sup>20</sup> See generally USCIS, *Discretionary Options for Military Members, Enlistees, and Their Families*, <https://www.uscis.gov/military/discretionary-options-for-military-members-enlistees-and-their-families>

The DHS guidance acknowledges that workers who are victims of labor abuse involving trafficking or certain crimes may be eligible to apply for a T or U visa, both of which provide a path to permanent status.<sup>21</sup> Workers who are eligible for these other forms of relief may still wish to request deferred action under this process in order to have short-term immigration protections as they await adjudication of their U or T applications. T applicants may also be eligible for Continued Presence designation,<sup>22</sup> while U-Visa applicants are also for Bona Fide Determinations/deferred action, both of which also provide work authorization.<sup>23</sup>

**45. What if a worker has a civil action pending in court against an employer for labor violations?**

The DHS announcement states that "requests for deferred action submitted through this centralized process must include a letter (a Statement of Interest) from a federal, state, or local labor agency."<sup>24</sup> Workers pursuing private litigation in state or federal courts are encouraged to contact NILC to strategize how best to articulate the government's labor law enforcement interests in their case to DHS.

**46. Does this process apply in the context of other types of violations, such as civil rights or housing rights violations?**

While the new guidance published by DHS only applies to labor agency investigations, DHS may consider requests to use its discretionary authority in other situations where fear of immigration enforcement inhibits the participation of victims or witnesses in the legal process. Advocates involved in such cases are encouraged to contact NILC regarding possible strategies for requesting immigration protections.

**47. What if a worker has returned to their home country but the labor dispute is ongoing?**

Deferred action is only available to individuals currently in the United States. The new guidance is silent as to whether there will be a remedy for workers who have already departed but are involved in a labor dispute to reenter the United States and receive immigration protections.

## Renewals, Denials & Expiration

**48. What happens if USCIS denies the request? Will the case be referred to USCIS?**

If a request is denied, the worker will remain in their current status. DHS's current policy is to only refer cases to ICE that involve serious public safety or national security risks, though that could change in the

---

<sup>21</sup> For more information on T visas, see "T visas and Human Trafficking", <https://asistahelp.org/resource-library/t-visas/>. For more information on U visas, see "U Visas in the Employment Context" at <https://asistahelp.org/u-visa-2-copy/> and "Workplace U Visa Resources" at <https://www.nationalimmigrationproject.org/UVisa.html>.

<sup>22</sup> Continued Presence also provides a 2-years status and work authorization but has the further benefit of providing evidence of law enforcement cooperation in support of a T-visa and entitles designees to the same federal benefits as refugees. See Continued Presence Resource Guide, available at: <https://www.ice.gov/doclib/human-trafficking/ccht/continuedPresenceToolkit.pdf>.

<sup>23</sup> U-based deferred action based on a bona fide determination provides a 4-year work authorization, but typically have much longer processing delays. See [https://www.ilrc.org/sites/default/files/resources/u\\_nonimmigrant\\_status\\_bona\\_fide\\_determination-nov.2021-dg.ak\\_.pdf](https://www.ilrc.org/sites/default/files/resources/u_nonimmigrant_status_bona_fide_determination-nov.2021-dg.ak_.pdf).

<sup>24</sup> See *supra* FN1.

future.<sup>25</sup> Before applying, workers should be advised of the potential risks of a denial with a qualified immigration practitioner. The filing fee for the employment authorization request will not be returned to the requester in the event of a denial (as is generally the case with all USCIS benefit requests that are denied).

#### **49. Can workers apply for renewals?**

Yes. DHS states that renewals may be available "if a labor agency has a continuing investigative or enforcement interest in the matter identified in their original letter supporting DHS use of prosecutorial discretion."<sup>26</sup> Since no cases have yet reached the point of renewal, it is too soon to know how the agencies will apply this standard.

#### **50. What happens if deferred action is not renewed?**

Once the 2-year period of the deferred action approval expires, if it is not renewed, the worker will revert back to whatever status they had previously, which for undocumented workers will mean they are without lawful status or work authorization.

#### **51. What if the labor dispute ends before the two-year deferred action expires?**

Once deferred action is granted, the protection is granted for two years regardless of the outcome of the labor dispute. Although the January 13, 2023 guidance notes "DHS can terminate deferred action at any time, at its discretion," we do not anticipate that conclusion of the labor dispute would trigger a termination of deferred action status.

### **Additional Resources**

#### **52. Are there any community-facing and/or multi-lingual resources available?**

Yes. NIPNLG and NILC collaborated on a shorter community-facing FAQ about this new process. It is currently available in English and Spanish on NILC's [website](#), with additional languages coming soon. Alliance for Immigrant Survivors have published a community facing bilingual explainer in [English](#) and [Spanish](#). Lastly, Sur Legal has created a series of bilingual community education videos explaining this new process and other labor rights issues via its TikTok and Instagram handles, [@surlegal\\_atl](#).

#### **53. Are there additional resources for immigration practitioners?**

Yes, a practice advisory geared towards immigration practitioners will be published in March 2023 in partnership with NILC, NIPNLG, Tulane University Immigrant Rights Clinic, and Unemployed Workers United.

This FAQ was prepared by Jessie Hahn, NILC Senior Labor and Employment Policy Attorney, and Lynn Damiano Pearson, NILC Consulting Attorney. If you have other questions or need technical assistance with this process, please contact [daforworkers@nilc.org](mailto:daforworkers@nilc.org).

---

<sup>25</sup> See Memorandum, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens, November 7, 2011,

<https://www.uscis.gov/sites/default/files/document/memos/NTA%20PM%20Approved%20as%20final%2011-7-11>; see also CLINIC Legal, "Biden Rescinds 2018 USCIS Notice to Appear Guidance," February 23, 2021, <https://www.cliniclegal.org/resources/removal-proceedings/biden-administration-rescinds-2018-uscis-notice-appear-guidance>.

<sup>26</sup> See *supra* FN1.



*Updated March 8, 2023*