



Practice Manual: Labor-Based Deferred Action¹
 March 24, 2023

<i>I. Introduction</i>	2
<i>II. Applying for Labor-Based Deferred Action</i>	3
A. What is Deferred Action?	3
B. Who is Eligible for Labor-Based Deferred Action?	5
1. Identifying and Reporting Labor and Employment Law Violations	7
2. Obtaining a Labor or Employment Agency Statement of Interest	10
C. Screening & Counseling for Labor-Based Deferred Action	13
1. Immigration Screening Interview	13
2. Understanding Immigration and Criminal History—FOIAs & Other Record Requests	15
3. Counseling	17
D. Preparing a Labor-Based Deferred Action Application	20
1. Contents of Deferred Action and Employment Authorization Packet	21
2. Jurisdiction Over the Deferred Action Application—USCIS vs. ICE	26
3. Timing & Expedite Requests	27
4. Follow-Up & Troubleshooting	28
5. Responding to Requests for Evidence (RFE)	29
6. Approval of Labor-Based Deferred Action	29
7. Denials	29
E. Special Circumstances	30
1. Labor-Based Deferred Action Applicants with Significant Negative Equities (Criminal/Immigration History)	30
2. Applying for only Labor-Based Deferred Action, without Applying for Work Authorization	30

¹ The manual is intended for authorized immigration practitioners and is not a substitute for independent legal advice provided by immigration practitioners familiar with a client’s case. Practitioners should independently confirm whether the law has changed since the date of this publication. The authors of this practice manual are Mary Yanik (Tulane Immigrant Rights Clinic), Jessica Bansal (Unemployed Workers United), Ann Garcia (National Immigration Project (NIPNLG)), and Lynn Damiano Pearson (National Immigration Law Center). The authors would like to thank Bliss Requa-Trautz (Arriba Las Vegas Workers Center), Cal Soto (National Day Laborer Organizing Network), Debbie Smith and Claudia Lainez (Service Employees International Union), Shelly Anand, Elizabeth Zambrana, and Alessandra Stevens (Sur Legal Collaborative), Angel Graf (Immigration Center for Women and Children), Stacy Tolchin (Law Offices of Stacy Tolchin), Audrey Richardson (Greater Boston Legal Services), Anna Hill Galendez (Michigan Immigrant Rights Center), Michelle Lapointe (National Immigration Law Center), Lisa Palumbo (Legal Aid Chicago), Kristen Shepherd (University of Georgia School of Law Community Health Partnership Clinic), Laura Garza (Arise Chicago), and Christina Maloney (Centro de los Derechos del Migrante, Inc.) for their review and contributions to the practice manual.

III. Subsequent Requests for Deferred Action after Initial Approval (Renewals)	32
IV. Other Types of Immigration Relief Stemming from Labor Disputes	33
A. Prosecutorial Discretion in Removal Proceedings	33
B. Parole in Place	34
C. Requests for Noncitizens Presently Outside the United States	36
D. Other related relief–T & U Nonimmigrant Visas	38
1. Identifying Labor Trafficking & Eligibility for T Nonimmigrant Status	40
2. Identifying Labor-Based Qualifying Crimes for Eligibility for U Nonimmigrant Status	40
V. Frequently Asked Questions	42
A. Advance Parole & Travel Outside the United States	42
B. Civil Rights Cases & Private Rights of Action	43
VI. Appendices	44
Appendix 1: Timeline of Prior DHS Guidance on Labor Disputes	44
Appendix 2: Template Request for a Statement of Interest from Labor or Employment Agency	47
Appendix 3: Intake Form for Labor-Based Deferred Action and Employment Authorization	49
Appendix 4: Sample Labor Agency Statements of Interest	57
Appendix 5: Sample Cover Letter Requesting Labor-Based Deferred Action	57
Appendix 6: Sample Declaration Regarding Employment and Request from Labor-Based Deferred Action Applicant	57
Appendix 7: Sample I-765 Worksheet	57
Appendix 8: Redacted Labor-Based Deferred Action Approval Letter	57

I. Introduction

On January 13, 2023, the Department of Homeland Security announced “a streamlined and expedited deferred action request process” for non-citizen workers who experience or witness labor rights violations [hereinafter, “Labor-Based Deferred Action”].² Guidance on the process emphasizes DHS’s role in supporting federal, state, and local labor and employment agency efforts to enforce labor and employment law and hold abusive employers accountable. Labor-Based Deferred Action confers deferred action and work authorization for a two-year period. Those approved may make subsequent requests for additional two-year grants of Labor-Based Deferred Action if supported by the labor or employment agency. Labor-Based Deferred Action represents the culmination of over a decade of worker-led organizing to demand concrete protections against immigration-based retaliation by exploitative employers. It is a testament to the courage of immigrant workers who have stood up for workers’ rights in the face of retaliatory immigration enforcement.

² Press Release, U.S. Dep’t of Homeland Sec., DHS Announces Process Enhancements for Supporting Labor Enforcement Investigations (Jan. 13, 2023), <https://www.dhs.gov/news/2023/01/13/dhs-announces-process-enhancements-supporting-labor-enforcement-investigations> [hereinafter “DHS Announcement”].

This Practice Manual is intended for immigration practitioners representing workers applying for Labor-Based Deferred Action. Part II describes who is eligible and explains the application process, including components of the application packet and practice advice. Part III addresses subsequent requests (renewals) after the initial two-year period. Part IV describes related relief, such as prosecutorial discretion in removal proceedings, parole, and U and T Visas. Finally, Part V answers frequently asked questions. Publicly available appendices begin with a timeline of key DHS memoranda and agreements that incrementally addressed the conflict between immigration and labor enforcement, laying the groundwork for the January 13 guidance, and also include a template request for a Statement of Interest from a labor or employment agency and an intake form. Practitioners may view the five additional appendix documents referenced throughout this practice manual by completing the following form: https://tulane.co1.qualtrics.com/jfe/form/SV_3TYmLAhHX5k2hBY.

For immigration-related technical assistance questions on Labor-Based Deferred Action, practitioners may contact: Mary Yanik (myanik@tulane.edu), Lynn Damiano Pearson (daforworkers@nilc.org), and Ann Garcia (members of the National Immigration Project (NIPNLG) only, ann@nipnlg.org).

II. Applying for Labor-Based Deferred Action

A. What is Deferred Action?

Deferred action is a discretionary determination by DHS to defer removal as an act of prosecutorial discretion.³ The legacy Immigration and Naturalization Service formally recognized deferred action as a form of prosecutorial discretion in 1975, indicating that deferred action was warranted when “adverse action would be unconscionable because of the existence of appealing humanitarian factors.”⁴ While DHS has therefore long held authority to consider deferred action for a variety of humanitarian reasons, the application process has been obscure. DHS has not published information on how to apply for deferred action generally, although it has sometimes provided policy guidance on how the agency will consider requests from certain applicants, such as families of U.S. Armed Forces members.⁵

³ See U.S. Dep’t of Homeland Sec., DHS Support of the Enforcement of Labor and Employment Laws, <https://www.dhs.gov/enforcement-labor-and-employment-laws> (last updated Feb. 3, 2023) [hereinafter “DHS FAQ”]. While the DHS guidance issued on January 13, 2023 specifically references both deferred action and parole-in-place as forms of prosecutorial discretion available to the agency, the Labor-Based Deferred Action Process relies exclusively on deferred action. *Id.* For more on parole in place, see *infra* Part IV Section B.

⁴ (Legacy) Immigration and Naturalization Service, Operating Instructions, O.I. § 103.1(a)(1)(ii) (1975).

⁵ See Memorandum from Jeh Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship & Immig. Servs., Families of U.S. Armed Forces Members and Enlistees (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf; see also U.S. Citizenship & Immig. Servs., Discretionary Options for Military Members, Enlistees, and their Families, <https://www.uscis.gov/military/discretionary-options-for-military-members-enlistees-and-their-families> (last updated Apr. 25, 2022).

DHS makes determinations to grant or deny deferred action on a case-by-case basis and a grant of deferred action can be terminated at any time at the agency's sole discretion. There is no statutory or regulatory limit to the length of time for which deferred action can be granted. However, historically, deferred action has been granted for periods of two to three years.⁶ Individuals with deferred action are eligible for an employment authorization document with a basic showing of economic necessity.⁷ Through applying for employment authorization, or separately, deferred action recipients can also apply for a Social Security card.⁸ Social Security cards issued to deferred action recipients state, "Valid for Work Only with DHS Authorization," because they do not establish employment eligibility on their own, so they must be presented with evidence of employment authorization when used for employment eligibility verification.⁹

Only noncitizens residing in the U.S. can seek deferred action. Deferred action does not authorize entry into the U.S. Therefore, noncitizens who receive deferred action will not be able to travel and re-enter the country without separate authorization.¹⁰

A grant of deferred action authorizes the noncitizen's presence in the United States. Therefore, while deferred action does not cure unlawful presence already accrued for the purposes of the 3- and 10-year bars, time spent in the U.S. under deferred action will not count toward the accumulation of unlawful presence.¹¹

⁶ See Ben Harrington, Cong. Research Serv. R45158, An Overview of Discretionary Reprieves from Removal: Deferred Action, DACA, TPS, and Others (2018), <https://crsreports.congress.gov/product/pdf/R/R45158>; but see U.S. Citizenship & Immig. Servs., National Engagement - U Visa and Bona Fide Determination Process - Frequently Asked Questions, <https://www.uscis.gov/records/electronic-reading-room/national-engagement-u-visa-and-bona-fide-determination-process-frequently-asked-questions> (last updated Sept. 23, 2021) (stating that the initial Bona Fide Determination Deferred Action grant is valid for four years).

⁷ 8 C.F.R. § 274a.12(c)(14). While USCIS is not permitted to waive the employment authorization application fee for applicants for DACA, 8 C.F.R. § 274a.12(c)(33), that provision does not prohibit fee waiver for other types of deferred action, including Labor-Based Deferred Action.

⁸ The Social Security Administration and USCIS have now streamlined the process for requesting a SSN such that relevant questions are included in the I-765. A SSN is automatically sent if employment authorization is approved. For more on this streamlined process, as well as what to do if your client does not receive the SSN, see Soc. Sec. Admin., Apply For Your Social Security Number While Applying For Your Work Permit and/or Lawful Permanent Residency, <https://www.ssa.gov/ssnvisa/ebe.html> (last visited March 10, 2023).

⁹ U.S. employers fill out Form I-9 for each person they hire to verify the employee's identity and employment authorization based on the documents they present. For more information about the I-9 form and the list of acceptable documents, see U.S. Citizenship & Immig. Servs., I-9: Employment Eligibility Verification (Dec. 20, 2022), <https://www.uscis.gov/i-9>.

¹⁰ It is not yet clear how USCIS will adjudicate requests for advance parole for travel from Labor-Based Deferred Action recipients. For further discussion of advance parole, see *infra* Part V Section A.

¹¹ Adjudicator's Field Manual, U.S. Citizenship & Immig. Servs., ch. 40.9(b)(3)(J); *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 974 (9th Cir. 2017) (en banc); *Texas v. United States*, 809 F.3d 134, 147–48 (5th Cir. 2015) (explaining that deferred action recipients are "lawfully present" based on agency memoranda); see also DHS FAQ, *supra* note 3 ("a noncitizen granted deferred action is considered lawfully present in the United States for certain limited purposes while the deferred action is in effect").

Those who receive deferred action, employment authorization, and a Social Security number are eligible to receive valid state identification, including driver’s licenses, in every state.¹² Deferred action grantees can receive Social Security benefits if they are otherwise entitled to them.¹³ However, deferred action grantees are not considered “qualified aliens” for purposes of receiving federal public benefits.¹⁴

B. Who is Eligible for Labor-Based Deferred Action?¹⁵

Labor-Based Deferred Action is available to “[n]oncitizen workers who are victims of, or witnesses to, the violation of labor rights.”¹⁶ As a threshold matter, to establish eligibility, workers must provide “[a] letter or Statement of Interest from a [federal, state, or local] labor or employment agency addressed to DHS supporting the request.”¹⁷ [hereinafter, “Statement of Interest”]. Applications submitted without a Statement of Interest will be rejected. Generally, labor and employment agencies will issue Statements of Interest only in connection with agency investigations or enforcement efforts (including, in some cases, closed investigations).

¹² DHS Guidance on DACA makes clear that those with DACA or other deferred action are considered lawfully present. *See* U.S. Citizenship & Immig. Servs., Consideration of Deferred Action for Childhood Arrivals (DACA) Frequently Asked Questions (Nov. 3, 2022), <https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions#miscellaneous> (see questions Q4, explaining that DACA is identical to any other grant of deferred action, and Q5, explaining that those with deferred action are lawfully present for the purposes of certain public benefits). This means that deferred action recipients can receive federally recognized driver’s licenses or identification that are valid under the REAL ID Act. *See* Nat’l Immigr. Law Ctr., REAL ID and Deferred Action for Childhood Arrivals (DACA) (Jan. 2023), <https://www.nilc.org/issues/daca/real-id-and-daca/>. While some states have attempted to deny licenses to noncitizens with deferred action, those efforts have been stymied by litigation or legislative action and all states are currently issuing state identification to deferred action grantees. For information on further developments in this area, see Nat’l Immigr. Law Ctr., Access to Driver’s Licenses for Immigrant Youth Granted DACA (Jul. 22, 2020) <https://www.nilc.org/issues/drivers-licenses/daca-and-drivers-licenses/>.

¹³ Noncitizens in the U.S. must be in lawfully present to receive Social Security Benefits. *See* 42 U.S.C. § 402(y).

¹⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104–193, 110 Stat. 2105 (Aug. 22, 1996), § 431(b). For more information on benefit eligibility, *see* Tanya Broder, Gabrielle Lessard, & Avidah Moussavian, Nat’l Immigr. Law Ctr., *Overview of Immigration Eligibility for Federal Programs* (Oct. 2022), https://www.nilc.org/issues/economic-support/overview-immeligfedprograms/-_ftnref1.

¹⁵ This Section includes a cursory overview of labor and employment aspects of the Labor-Based Deferred Action process. A separate practice resource is forthcoming that will specifically focus on the labor and employment issues involved in Labor-Based Deferred Action. It will be co-authored by Jobs with Justice, the National Employment Law Project (NELP), and the National Immigration Law Center (NILC).

¹⁶ DHS Announcement, *supra* note 2.

¹⁷ DHS FAQ, *supra* note 3.

To be eligible for Labor-Based Deferred Action, a worker must therefore: (1) Witness or experience a violation of labor or employment law or other labor dispute;¹⁸ (2) File a complaint with a federal, state, or local labor or employment agency or identify an existing agency investigation related to the violation;¹⁹ and (3) Obtain a Statement of Interest.

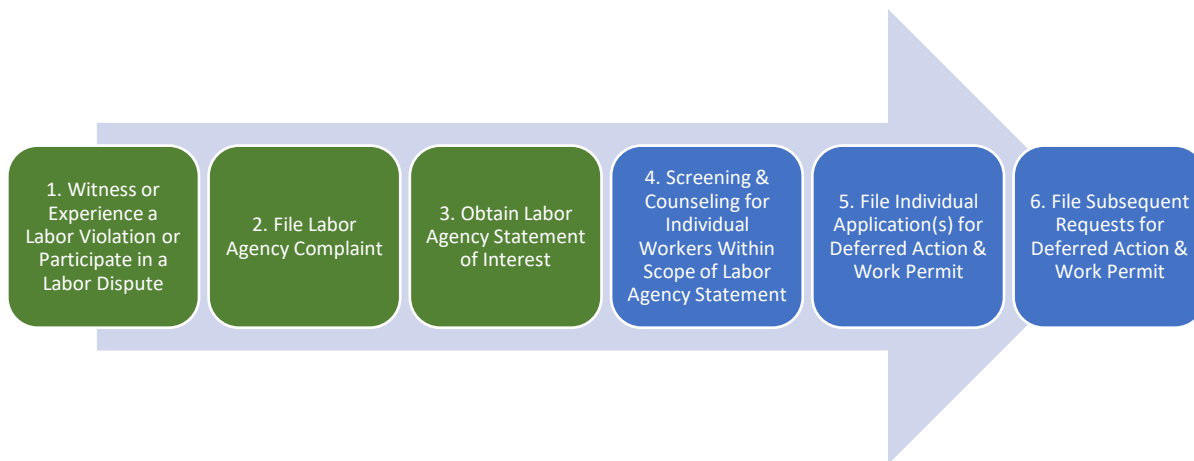
Labor and employment agency complaint and Statement of Interest request processes are generally intended to be accessible to workers proceeding *pro se*. However, in practice, assistance from experienced attorney or non-attorney advocates is often necessary to ensure a strong complaint, thorough investigation, and successful request.²⁰ Workers centers, unions, labor organizers, and labor and employment attorneys are often experts in this area. Immigration practitioners are not typically involved unless they are experienced in labor and employment law or partner with others who are. Accordingly, in most cases, immigration practitioners will become involved in the case *after* the worker has requested or obtained a Statement of Interest from the labor agency.²¹

¹⁸ Department of Labor (DOL) guidance on the process for requesting DOL support for Labor-Based Deferred Action describes workers who experience or witness violations of labor or employment law as “workers involved in labor disputes.” U.S. Dep’t of Labor, Process for Requesting Department of Labor Support for Requests to the Department of Homeland Security for Immigration-Related Prosecutorial Discretion During Labor Disputes (Jul. 6, 2022), <https://www.dol.gov/sites/dolgov/files/OASP/files/Process-For-Requesting-Department-Of-Labor-Support-FAQ.pdf> [hereinafter “DOL FAQ”]. The term “labor dispute” is broadly defined as “a labor-related dispute between the employees of a business or organization and the management or ownership of the business or organization concerning the following employee rights: the right to be paid the minimum legal wage, a promised or contracted wage, and overtime; the right to receive family medical leave and employee benefits to which one is entitled; the right to have a safe workplace and to receive compensation for work-related injuries; the right to be free from unlawful discrimination; the rights to form, join or assist a labor organization, to participate in collective bargaining or negotiation, and to engage in protected concerted activities for mutual aid or protection; the rights of members of labor unions to union democracy, to unions free of financial improprieties, and to access to information concerning employee rights and the financial activities of unions, employers, and labor relation consultants; and the right to be free from retaliation for seeking to enforce the above rights.” U.S. Dep’t of Homeland Sec. and U.S. Dep’t of Labor, 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.

¹⁹ Note that some labor and employment agencies allow anonymous and/or third-party complaints.

²⁰ This is particularly true where workers face barriers to navigating agency processes (such as fear of government officials in the U.S., literacy, and language).

²¹ Immigration practitioners are nonetheless encouraged to screen potential clients for labor abuses as they may identify potential eligibility for Labor-Based Deferred Action or other types of labor-based immigration relief. Practitioners should consider identifying labor rights organizations in their communities where they can refer workers who need assistance reporting labor and employment law violations and potentially requesting Statements of Interest. For further discussion of screening best practices, see *infra* Section II Part C.



1. Identifying and Reporting Labor and Employment Law Violations

Generally, labor and employment agencies issue Statements of Interest only in connection with agency investigations or enforcement efforts. If a worker has experienced or witnessed a violation that relates to an existing agency investigation or enforcement effort, the worker does not need to file a new complaint with the agency before requesting a Statement of Interest. Rather, as described below in Part II Section B, the worker can simply describe how their experience relates to the agency’s existing investigation or enforcement effort.²² If a worker has experienced or witnessed a violation that is not already the subject of an agency investigation or enforcement effort, the worker may be able to initiate an investigation by filing their own complaint.²³

While a full discussion of labor and employment law is beyond the scope of this Practice Manual, Table 1 provides a very basic overview of some of the principal federal laws enforced by key federal labor and employment agencies, with links to agency complaint processes. Practitioners should be aware that coverage varies from law to law and is sometimes limited to employers with a certain number of employees or volume of business, and/or employees with a

²² See U.S. Equal Employment Opportunity Commission, EEOC’s Support for Immigration-Related Deferred Action Requests to the DHS Frequently Asked Questions, <https://www.eeoc.gov/faq/eeocs-support-immigration-related-deferred-action-requests-dhs> (last visited Mar. 10, 2023) [hereinafter “EEOC FAQ”].

²³ Often, the best way to determine whether there is already a pending investigation is to ask the worker if they are aware of anyone else filing a complaint about the violation. In addition, it may be helpful to search publicly available case databases maintained by the NLRB, Nat’l Labor Relations Bd., Cases & Decisions, <https://www.nlr.gov/cases-decisions> (last visited Mar. 10, 2023), and the DOL, U.S. Dep’t of Labor, Data Enforcement, <https://enforcedata.dol.gov/views/search.php> (last visited Mar. 10, 2023). For a general guide on intake to screen for labor disputes relevant to prosecutorial discretion, see Screening for Civil and Labor Rights Violations in Support of Prosecutorial Discretion (Aug. 5, 2021), <https://www.nelp.org/wp-content/uploads/Intake-Guide-Screening-Civil-and-Labor-Rights-Violations-in-Support-of-Prosecutorial-Discretion-8-5-2021.pdf>.

certain amount of time worked.²⁴ State and local labor laws may provide more expansive labor protections than federal law, and state and local labor agencies often have their own complaint processes.

Table 1: Overview of Principal Federal Labor and Employment Laws and Enforcing Agencies

AGENCY	LAWS ENFORCED	EXAMPLES OF VIOLATIONS	TYPICAL STATUTE OF LIMITATIONS	COMPLAINT PROCESS
National Labor Relations Board (NLRB)	National Labor Relations Act <ul style="list-style-type: none"> • <i>Right to unionize</i> • <i>Right to organize and engage in “protected concerted activity,” free of retaliation</i> 	An employer cuts a worker’s hours for talking to co-workers about poor working conditions. An employer fires a worker for supporting the union.	6 months	https://www.nlr.gov/guidance/fillable-forms
USDOL Wage and Hour Division (WHD)	Fair Labor Standards Act (FLSA) <ul style="list-style-type: none"> • <i>Minimum wage</i> • <i>Overtime</i> • <i>Child labor</i> • <i>Retaliation</i> 	Workers work over 40 hours in a workweek but do not receive overtime pay.	2 years (3 years for willful violations)	https://www.dol.gov/agencies/whd/contact/complaints
	Family Medical Leave Act <ul style="list-style-type: none"> • <i>Unpaid, job-protected leave for certain family and medical needs</i> 	A new parent is fired for requesting 12 weeks off to care for their newborn.	2 years (3 years for willful violations)	https://www.dol.gov/agencies/whd/contact/complaints
	Labor standards protections of H-2A, H-2B, and H-1B programs <ul style="list-style-type: none"> • <i>Wage, housing, transportation, and disclosure standards</i> 	An employer pays their H-2A agricultural workers by piece rate, and the resulting wage is below the local prevailing wage for U.S. workers in the same occupation.	Best to file as soon as possible, and within 2 years, because of legal ambiguity on the statute of limitations	https://www.dol.gov/agencies/whd/contact/complaints

²⁴ For example, the Fair Labor Standards Act (FLSA) applies only to employees who: (1) are involved in interstate commerce; (2) work for a business that has at least two employees and does an annual business of at least \$500,000; or (3) work for hospitals or certain businesses providing medical or nursing care. U.S. Dep’t of Labor, Fact Sheet #14: Coverage Under the Fair Labor Standards Act (July 2009), <https://www.dol.gov/agencies/whd/fact-sheets/14-flsa-coverage>.

<p>USDOL Occupational Safety and Health Administration (OSHA)</p>	<p>Occupational Safety and Health Act</p> <ul style="list-style-type: none"> • <i>Health and safety standards</i> • <i>Whistleblower protections</i> 	<p>A construction worksite fails to provide proper fall protection training.</p> <p>An employer gives a worker a less favorable job assignment because they filed an OSHA complaint.</p>	<p>6 months for health and safety violations</p> <p>30-180 days for whistleblower violations, depending on type of violation</p>	<p>https://www.osha.gov/workers/file-complaint</p>
<p>USDOL Office of Federal Contract Compliance Programs (OFCCP)</p>	<p>Executive Order 11246 and other anti-discrimination laws and regulations applicable to federal contractors and subcontractors</p> <ul style="list-style-type: none"> • Prohibiting discrimination based on race, color, sex, sexual orientation, gender identity, religion, national origin, or veteran status • Prohibiting retaliation for inquiring about or disclosing compensation <p><i>Note that OFCCP refers complaints alleging individual discrimination based on race, color, religion, sex, or national origin to EEOC.</i></p>	<p>A business with federal government contracts fires a worker for talking with co-workers about how much she is paid.</p> <p>A business with federal government contracts discriminates against workers based on sexual orientation.</p>	<p>180 days for discrimination based on race, color, religion, sex, sexual orientation, gender identity, national origin, or compensation inquiries/disclosure</p> <p>300 days for discrimination based on disability or protected veteran status</p>	<p>https://www.dol.gov/agencies/ofccp/contact/file-complaint</p>

Equal Employment Opportunity Commission (EEOC)	Federal Anti-Discrimination Laws (inc. Title VII and the ADA) <ul style="list-style-type: none"> • <i>Prohibiting discrimination based on race, color, religion, sex, gender identity, sexual orientation, national origin, age, or disability</i> 	An employer uses racial slurs, creating a hostile work environment.	180 or 300 days depending on state/locality	https://www.eeoc.gov/filing-charge-discrimination
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2. Obtaining a Labor or Employment Agency Statement of Interest

a) *What is a Labor or Employment Agency Statement of Interest?*

A labor or employment agency Statement of Interest is a written request from a federal, state, or local labor or employment agency “asking DHS to consider exercising its discretion on behalf of workers employed by companies identified by the agency as having labor disputes related to laws that fall under its jurisdiction.”²⁵ Importantly, Statements of Interest generally identify a workplace or employer, rather than specific worker(s). A Statement of Interest typically asks DHS to use its discretion to protect workers who are or were employed at a particular worksite(s) or by a particular employer during a time relevant to an agency investigation (and who are therefore potential victims or witnesses). For example:

Example 1: The EEOC is investigating charges from several workers that, from November 2021 through the present, their employer subjected them to harassment due to their race and national origin. The EEOC issues a Statement of Interest requesting a favorable exercise of prosecutorial discretion for workers employed by the employer at any time from November 2021 through the present.

Example 2: DOL’s Wage and Hour Division is investigating violations of the Fair Labor Standards Act’s minimum wage and overtime provisions by a company with worksites throughout the state of Ohio. DOL issues a Statement of Interest requesting a favorable exercise of prosecutorial discretion for workers employed by the company at any worksite in Ohio over the past three years.

Example 3: The NLRB is investigating unfair labor practice charges filed by several employees. The NLRB issues a Statement of Interest requesting a favorable exercise of prosecutorial discretion for workers employed by the employer from January 2021 through the present, the time-period during which the employer allegedly engaged in the unlawful practices.

²⁵ See DHS Announcement, *supra* note 2.

Redacted Statements of Interest from each federal labor agency are available by request only in Appendix 4.

Practitioners should note that Labor-Based Deferred Action does not currently provide any means for family members to receive deferred action as derivatives of the principal beneficiary. In the vast majority of cases so far, Statements of Interest covered only workers, not family members.²⁶

b) How to Obtain a Statement of Interest

Labor and employment agency processes to request Statements of Interest vary.

To request a Statement of Interest from the NLRB, workers or their advocates or representatives should send a written request to the Board Agent assigned to their case, the Regional Director, and the Immigration Coordinator (if known).²⁷

To request a Statement of Interest from the U.S. DOL (including the Wage and Hour Division, the Occupational Safety and Health Administration, and the Office of Federal Contract Compliance Programs), workers or their advocates or representatives should send an email to statementrequests@dol.gov describing: (1) “the labor dispute and how it is related to the laws enforced by DOL;” (2) related retaliation the workers witnessed or experienced, if any; and (3) how the chilling effect of potential immigration consequences may deter workers from reporting violations or otherwise cooperating with DOL. Note that while workers should include information about retaliation where applicable, there is no requirement that worker have witnessed or experienced retaliation in order to qualify for a Statement of Interest. DOL’s Frequently Asked Questions provides further details and requirements.²⁸

To request a Statement of Interest from the EEOC, workers or their advocates or representatives should contact the District Director and Regional Attorney at their local EEOC Field Office. Requests should: (1) “[I]dentify the workplace involved in the relevant EEOC investigation or litigation;” (2) provide “information about retaliation, whether immigration-related or otherwise, or fear of such retaliation, that is likely to deter employees from reporting to the EEOC or

²⁶ The only exception was in a case involving deceased workers whose family members were potential witnesses in the agency investigation. There is a strong argument that labor and employment agencies *should* issue Statements of Interest covering workers’ family members whenever needed for workers to feel safe reporting violations, participating in agency investigations, or otherwise exercising their labor rights. The DOL appears to acknowledge this by recognizing that “undocumented workers who experience labor law violations may fear that cooperating with an investigation will result in the disclosure of their immigration status *or that of family members*, or that it will result in immigration-based retaliation from their employers and adverse immigration consequences for themselves *or their family*.” DOL FAQ, *supra* note 18 (emphasis added).

²⁷ See Jennifer A. Abruzzo, Gen. Counsel, Nat’l Labor Relations Bd., Ensuring Rights and Remedies for Immigrant Workers under the NLRA, Memo 22-01, (Nov. 8, 2021), <https://apps.nlr.gov/link/document.aspx/09031d45835cbb0c>; Joan Sullivan, Assoc. Gen. Counsel, Nat’l Labor Relations Bd., Ensuring Safe and Dignified Access for Immigrant Workers to NLRB Processes, OM 22-09 (May 2, 2022), <https://apps.nlr.gov/link/document.aspx/09031d458375a553>.

²⁸ See DOL FAQ, *supra* note 18.

participating in its investigations or litigation;” and (3) include the Requestor’s contact information.²⁹ The EEOC’s Frequently Asked Questions provide further details and requirements.³⁰

A template Statement of Interest request is included in Appendix 2. Note that the request need not name specific workers and should not disclose any worker’s immigration status or contain sensitive personally identifiable information. The request should, however, frame the time period relevant to the labor or employment law violation, worksite(s), and employer(s) as broadly as possible to cover all current and former employees who could potentially be victims of, or witnesses to, the violation. Specifically, the request should list *all* relevant employers (including any possible joint employers and subcontractors), *all* relevant worksites, and the relevant time period (including the earliest date of evidence of a labor violation through the filing of the agency complaint and anticipated further proceedings, including compliance and monitoring). These details will define the scope of workers who are eligible to file for Labor-Based Deferred Action, and so the request is a key opportunity to ask for the class of affected workers to be as broad as possible. If the agency may be inclined to limit the scope of the Statement of Interest in any way that might exclude potential witnesses, the request should explicitly address why the Statement of Interest should be broad to prevent or counteract retaliation and facilitate the participation of all potential witnesses.

As of the publication of this Practice Manual, no state and or local labor or employment agency has yet published guidance for seeking a Statement of Interest. The absence of published guidance does not mean an agency will *not* issue a Statement of Interest. In fact, a number of state labor agencies have already issued Statements of Interest. A worker seeking a Statement of Interest from a labor or employment agency without published guidance should contact the agency to ask how it wishes to receive Statement of Interest requests. They may also wish to put the agency in touch with DHS. DHS has indicated that labor and employment agencies seeking more information about Statements of Interest and Labor-Based Deferred Action may contact laborenforcement@dhs.gov.

When a labor or employment agency decides to issue a Statement of Interest, it will submit the Statement to DHS and allow DHS up to three days to review before distributing to the requestor.³¹ If the labor or employment agency decides not to issue a Statement of Interest, then the agency should not communicate with DHS about that request.³²

c) A Note on Worker Organizing and Information Sharing

Practitioners representing workers applying for Labor-Based Deferred Action should be aware that workers may have invested (or be prepared to invest) significant effort and courage, potentially as part of collective organizing efforts, in coming forward to report labor and employment law violations. Particularly where Statements of Interest cover many workers, practitioners may be asked to coordinate with unions, workers centers, and other advocates and

²⁹ See EEOC FAQ, *supra* note 22, at Q5.

³⁰ *Id.*

³¹ DHS FAQ, *supra* note 3.

³² See DOL FAQ, *supra* note 18, at Q11; EEOC FAQ *supra* note 22, at Q7.

organizers in assisting workers applying for Labor-Based Deferred Action. Practitioners are encouraged to see Labor-Based Deferred Action as an opportunity not only to assist individual workers, but also to contribute to a larger effort, decades in the making, to build power for immigrant workers, including via the powerful DALE campaign.³³ Labor and employment attorneys, non-attorney advocates, and organizers may be instrumental in the labor agency process and can serve as important resources for the immigration practitioner. Workers may have longstanding relationships of trust with these advocates and may seek their support in making significant decisions and navigating the process of seeking Labor-Based Deferred Action. Because of these considerations, practitioners should discuss with each worker their preferences for sharing information with other advocates working on the matter, making sure to explain all relevant confidentiality considerations, and respect the worker's preferences.

C. Screening & Counseling for Labor-Based Deferred Action

Once a Statement of Interest has been, or is likely to be, issued, the next step is for an immigration practitioner to conduct a thorough screening.

1. Immigration Screening Interview

As with any other client seeking an immigration benefit, it is critical to individually assess the worker's complete history to evaluate their eligibility for Labor-Based Deferred Action and other forms of immigration relief, and to consider the prospects of success as well as any risks in applying. Workers may have questions about deferred action or other immigration paths and they should have the opportunity to receive counseling tailored to their case.

Through the intake, practitioners should assess:

- 1) whether the noncitizen falls within the scope of the Labor Agency Statement of Interest (i.e., whether the worker worked at the covered worksite(s) and/or for the covered employer(s) during the covered time period);
- 2) complete immigration history, as relevant to equities for discretion, and whether USCIS or ICE would have jurisdiction to adjudicate deferred action;
- 3) criminal history, as relevant to equities for discretion;
- 4) biographic information and family ties; and
- 5) ability to pay the Employment Authorization application fee or eligibility for a fee waiver.

Although a standard immigration intake form, such as the example provided by ILRC, will generally suffice,³⁴ a form tailored to this Labor-Based Deferred Action process is available in Appendix 3, which aims to gather all the information needed to fill out the forms required for this process (including a fee waiver, if needed). As detailed in the chart below, the information

³³ See Nat'l Day Laborer Organizing Network, DALE: Desde Abajo Labor Enforcement, <https://ndlon.org/dale-campaign/> (last visited Mar. 10, 2023).

³⁴ Immig. Legal Res. Ctr., Sample Client Intake Form, https://www.ilrc.org/sites/default/files/resources/ilrc_sample_intake_form_-_sept_2019_0.pdf (last updated Sep. 2019).

gathered in the interview (especially with regard to criminal or immigration history) can inform whether the practitioner will advise the client to file record requests before proceeding to apply for deferred action. These are the key areas where practitioners should screen workers in order to advise on Labor-Based Deferred Action eligibility, flag any issues that may complicate the case or pose risks, and identify other potential forms of relief (each of which is discussed in greater detail in subsequent sections).

Table 2: Immigration Screening Criteria for Labor-Based Deferred Action

ISSUE	RELEVANCE TO THIS PROCESS	CONSIDERATIONS FOR COUNSELING & CASE STRATEGY
Immigration History	<ul style="list-style-type: none"> • The new guidance states that in cases where workers are in removal proceedings or have prior orders of removal, USCIS will “forward” their applications to ICE for review. It is not yet known if the ICE forwarding processing will cause delays in adjudication. • As a discretionary form of relief, USCIS may deny deferred action based on negative immigration history. Therefore, negative history may require additional evidence of positive equities to support the worker’s application. <i>See infra</i> Part II Section E.1. 	<ul style="list-style-type: none"> • Advocates should consider filing a FOIA for prior immigration records, or FBI/State background check to adequately assess risk. • Advocates should advise client about information being shared with ICE if application will be forwarded to ICE for review. • Advocates should counsel clients about risks of applying and need for positive equities evidence if there is substantial negative immigration history (including multiple removals or re-entries, or prior denials of affirmative applications). Workers in removal proceedings or with prior removal orders may need to separately request prosecutorial discretion from OPLA to terminate (or reopen and terminate proceedings).
Criminal History	<ul style="list-style-type: none"> • Although there is no specific criminal bar to applying for Labor-Based Deferred Action, criminal history that is undisclosed in the initial request may result in a Request for Evidence (RFE). The immigration agencies may also request additional records for even disclosed history through RFEs. • As a discretionary form of relief, USCIS may deny deferred action based on negative criminal history. Therefore, negative history may require additional evidence of positive equities to support the worker’s application and should prompt practitioners to engage in a thorough assessment of application risks. <i>See infra</i> Part II Section E.1. 	<ul style="list-style-type: none"> • Advocates should request records from the jurisdiction of conviction and/or a state or FBI background check. • Advocates should advise workers, depending on their individual criminal history, about the possibility of a denial, as well as whether they are generally removable—apart from this application—because of their criminal history. • Advocates should affirmatively submit criminal dispositions with additional evidence of positive equities.
Other Immigration Relief	<ul style="list-style-type: none"> • Workers should receive a full immigration screening, both to determine 	<ul style="list-style-type: none"> • Workers can apply for both Labor-Based Deferred Action and U/T visa, either at the

	<p>U/T visa eligibility arising from the labor dispute,³⁵ as well as any other forms of immigration relief that may provide a viable path to permanent status.</p> <ul style="list-style-type: none"> • Workers who have qualifying U.S. citizen relatives (or are Cuban nationals) may wish to apply for parole in place to be eligible to adjust status if the worker previously entered without inspection. <i>See infra</i> Part IV Section B for a discussion of applying for parole in place in labor cases. 	<p>same time or in sequence. Practitioners should advise workers on other potential benefits stemming from these visa programs, such as Continued Presence (for victims of trafficking) and Bona Fide Determination/4-year Deferred Action status for U visa applicants. <i>See infra</i> Part IV, Section D.</p> <ul style="list-style-type: none"> • The new guidance offers no specific process for applying for parole in place in labor cases. Consequently, parole in place applications will be filed at local USCIS field offices and may be subject to existing backlogs and/or to additional filing requirements and fees. <i>See infra</i> Part IV Section B. Thus, advocates should advise workers of the greater uncertainty of filing for parole in place.
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2. Understanding Immigration and Criminal History—FOIAs & Other Record Requests

Depending on what a worker discloses in their screening interview, practitioners should submit FOIA or other record requests to various government agencies to review any negative immigration and criminal history. Depending on the agency or sub-agency, responses to these record requests vary from 30 days to many months. FOIA requests to USCIS’s National Records Center for the A File currently have short processing times, and the A File should generally contain most relevant immigration history. Practitioners should weigh the potential delay as well as potential uncertainty of any negative immigration or criminal history based on what worker discloses during the screening interview and then discuss any risks with the worker so they can make an informed decision to either proceed with filing or wait for records. Table 3 below offers guidance on when to request certain records and what to expect to receive from each agency.³⁶

³⁵ *See infra* Part IV Section D.

³⁶ For detailed instructions how to file FOIA requests to DHS sub-agencies, *see* Immig. Legal Res. Ctr., *A Step-by-Step Guide to Completing FOIA Requests with DHS* (Dec. 2021), https://www.ilrc.org/sites/default/files/resources/new_foia_dhs_practice_advisory_-_2021.pdf.

Table 3: Records Requests

RECORDS TYPE	AGENCY	CONSIDER FILING IF...	RESULTS
Immigration History ³⁷	USCIS	... worker reports any prior immigration history that suggests they may have a removal order, even if they never went to court, and/or interaction with border officials.	This request should provide the worker’s “A-File” containing some but not all records of immigration history. A-File requests are currently processed in approximately 30 business days if filed online. ³⁸
	CBP ³⁹	... worker reports any interactions with border agents, “border police,” etc. as they entered the U.S. that may have resulted in a removal order including “turn backs” and/or voluntary returns.	This request should reveal any border arrests, border interrogations, entries/exits, and expedited orders of removal issued by Customs & Border Protection.
	EOIR	... worker reports receiving a Notice to Appear in immigration and/or appearing before immigration court. If the client was detained at the border and released with paperwork, they may have a removal or deportation proceeding before immigration court. ⁴⁰	This file should contain all records from removal proceedings in immigration court.

³⁷ If the client does not have an A-number, be sure to include all spellings and versions (including past misspellings) of a worker’s name to better ensure all their records are located in requests to immigration agencies.

³⁸ For more information on FOIA requests for A-files, *see* Nat’l Immig. Litig. All., Am. Immig. Council, Nw. Immig. Rts. Project, and Law Offs. of Stacy Tolchin, *Nightingale v. USCIS and FOIA Requests for Immigration Case Files (A-Files)* (Jan. 18, 2023), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/nightingale_foia_advisory_updated.pdf.

³⁹ Practitioners can also file a FOIA request to OBIM in conjunction with a request to CBP. OBIM requests will return records of any biometrics taken pursuant to a border arrest. *See* ILRC guide, *supra* note 36.

⁴⁰ Practitioners should probe whether the worker ever received a 9-digit A-number. Many individuals are not aware they received one but may have paperwork from being processed at the border or a Notice to Appear—either of which will include the A-number. With an A-number, practitioners can easily use EOIR’s online case portal to confirm whether the worker is in removal proceedings or has a final order of removal (including in absentia order, but *not* expedited removal orders). A-Numbers may be searched on Executive Office of Immigration Review (EOIR), Automated Case Information, <https://acis.eoir.justice.gov/en/> (last visited Mar. 10, 2023).

Criminal History	FBI Background Check	... worker reports arrest(s) or conviction(s), federal charges, and/or does not know the jurisdiction of conviction to request them directly. Practitioners should inquire about various scenarios including traffic stops, being handcuffed, or taken to a police station, and/or appearing before a judge.	This report <i>should</i> include state and federal arrests and convictions, including border arrests (though is often incomplete). This requires submitting fingerprints in addition to a form, which can be filed online and are typically processed faster than FOIAs. FBI reports also frequently contain information on border arrests. ⁴¹
	State/County Records	... worker reports prior criminal history and knows the local jurisdiction where the arrest or conviction occurred, including traffic violations.	These records should include arrest and court records including final dispositions. ⁴²

3. Counseling

a) Benefits of Approval, Prospects of Success, and Limitations of Temporary Status

Practitioners should review with workers the benefits of deferred action, including work authorization, a Social Security number, access to apply for state identification or a driver’s license, and the tolling of unlawful presence, as described in more detail above, see Part II Section A.

Practitioners should also note that, although DHS should show deference to the labor agency’s enforcement interest and statement of interest in the case, the agency will still use its discretion to balance individual positive and negative equities. Accordingly, workers with significant negative immigration or criminal history may receive requests for more evidence, or even denial, even with the significant positive equity of their involvement in the labor dispute. In some of the early cases—processed in various USCIS Field Offices without the benefit of trained, specialized adjudicators—workers with some negative criminal or immigration history were approved for deferred action. Practitioners should assess and advise each client based on the equities of their individual case.

⁴¹ Fed. Bureau of Investigations, FBI: How Can We Help You, Identity history Summary Checks, <https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/identity-history-summary-checks> (last visited Mar. 10, 2023).

⁴² Every state has a law that mirrors FOIA, often referred to as Public or Open Records Requests or other names. If the county of conviction is known, there may be an online system to request criminal records. Practitioners may want to consult local criminal defense attorneys or public defender’s officers, where they exist, for help in quickly locating state or country criminal records and deciphering them.

b) Sharing Information and Possible Future Immigration Enforcement

Practitioners should counsel each individual client on the risks of providing their personal information to DHS through an application for Labor-Based Deferred Action according to the specific facts of their case.

DHS has not made any formal guarantee that information in an application for Labor-Based Deferred Action will not be used against a worker in a future proceeding or action. However, current USCIS Guidance on the Referral of Cases and Issuance of Notices to Appear provides that USCIS will refer denied cases to ICE for the purpose of initiating removal proceedings only under limited circumstances, including in cases involving substantiated fraud, “egregious public safety” cases involving arrests or convictions for certain enumerated offenses, or national security cases.⁴³ It is important to be familiar with this guidance in order to advise workers whether they are currently at risk of being referred for removal if their applications are denied. It is also important to note, however, that agency guidance could change, especially in the event of an administration that harbors an anti-immigrant sentiment.

Practitioners should advise workers who are in removal proceedings or have final removal orders that their applications will be adjudicated by ICE, rather than USCIS, which may entail different risks. USCIS has provided a centralized filing location, regardless of workers’ current immigration status. However, where USCIS determines that an applicant is in removal proceedings or has a final removal order, USCIS will “forward” the request to ICE for adjudication.⁴⁴ It is our understanding that Homeland Security Investigation’s Parole and Law Enforcement Programs Unit (HSI PLEPU) unit will adjudicate these cases, in consultation with the relevant ERO and OPLA offices. Practitioners should consider whether ICE already has access to a worker’s current address and personal information in assessing the risk of providing that information via a Labor-Based Deferred Action Application. Practitioners should explain the involvement of ICE and its subagencies in these cases so that clients can make an informed decision to proceed or not in submitting an application. Practitioners should also note that it is unclear what legal standard ICE will apply in determining whether to pursue enforcement against those who are denied deferred action.⁴⁵

⁴³ Policy Memorandum, U.S. Citizenship & Immig. Servs, Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens, PM-602-0050 (Nov. 7, 2011), <https://www.uscis.gov/sites/default/files/document/memos/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf>.

⁴⁴ See DHS FAQ, *supra* note 3 (“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.”).

⁴⁵ Because the September 30, 2021 Mayorkas general priorities memo remains under litigation, *see* Appendix 1, individual ICE officials currently have wide discretion in enforcement decisions. DHS officials have attempted to reassure that ICE officials should make decisions “in a way that best protects against the greatest threats to the homeland.” Ellen M. Gillmer, *Immigrant Arrests Targets Left to Officers With Biden Memo Nixed*, BLOOMBERG LAW (Jul. 26, 2022), <https://news.bloomberglaw.com/immigration/immigrant-arrest-targets-left-to-officers-with-biden-memo-nixed>.

c) Fears of Employer Retaliation

Neither USCIS nor ICE will contact an applicant's employer when adjudicating an application for Labor-Based Deferred Action. If an employer learns that a worker is seeking immigration protection from another source, such as from another worker or a news article discussing the case, it is unlikely that the employer will be able to gain access to the Labor-Based Deferred Action application via a FOIA request.⁴⁶

Some labor rights advocates have expressed concern that an employer could use a worker's request for immigration relief against them if there is litigation of their labor case, such as when the employer contests the labor agency's fines and/or if worker files a private civil action against the employer. For example, an employer may try to intimidate a worker by seeking aggressive discovery into their requests for immigration relief or, in the rare cases that proceed to depositions or trial, an employer may try to cast doubt on a worker's testimony by suggesting the worker is exaggerating or fabricating labor law violations to obtain immigration relief. In either situation, there are potentially effective strategies to respond, including using standard strategies to rehabilitate witness credibility, seeking a protective order against immigration-related discovery, or filing motions in limine to exclude such evidence at trial.⁴⁷ Strategies will vary depending on the type of case being investigated or litigated, and the role of the labor agency involved. However, these strategies are not foolproof. In particular, the availability of protective orders may vary across different jurisdictions, and employers may serve broad discovery requests that encompass workers' request for immigration relief even if employers were not previously aware workers made such requests. Accordingly, in an abundance of caution, practitioners should advise workers about the possibility their employer may try to obtain information about their request for immigration relief and/or use that request to discredit them in their labor case. Practitioners may also want to advise workers that keeping their requests for immigration relief confidential will decrease the likelihood their employer will raise these arguments in litigation, so that workers may make an informed decision about whether and with whom to share the fact that they have applied for Labor-Based Deferred Action.

d) Fears of Criminal Consequences of Applying

Immigration practitioners should note that a range of state and federal laws prohibit the use of—and sometimes specifically working under—false names or Social Security numbers, and that negative immigration consequences could accrue from this practice.⁴⁸ Although disclosing “other

⁴⁶ USCIS generally does not release records to third parties absent the subject's consent unless the requestor can show “there is no privacy interest in the records, or . . . there is a public interest in the records that outweighs the subject's privacy interests.” U.S. Citizenship & Immig. Servs., Form G-639, Freedom of Information/Privacy Act Request, 8 (Nov. 3, 2022),

<https://www.uscis.gov/sites/default/files/document/forms/g-639.pdf>. Applications for Labor-Based Deferred Action may also be exempt from disclosure under FOIA Exemption 7.

⁴⁷ See, e.g., *Rivera v. Nibco, Inc.*, 364 F.3d 1057 (9th Cir. 2004).

⁴⁸ It is a federal felony to use a false Social Security Number with the intent to deceive and obtain something of value. See 42 U.S.C. 408(a)(7)(B). There is a circuit split on the immigration consequences of this crime. Compare *Munoz-Rivera v. Wilkinson*, 986 F.3d 587 (5th Cir. 2021) (holding that conviction for using a false SSN is a crime involving moral turpitude because it involves dishonesty) with *Beltran-*

names used” on immigration forms does not itself carry immigration or criminal consequences, where possible applicants should seek to establish proof of employment during the period of the labor dispute without using evidence that could expose them to criminal liability or immigration consequences.

e) Counseling Clients on Paying Work Authorization Application Fee or Seeking a Fee Waiver

There is no cost to request deferred action. However, the streamlined process for applying for Labor-Based Deferred Action requires that workers simultaneously apply for employment authorization. These streamlined applications must be accompanied by the appropriate fee for the I-765 application or a fee waiver, Form I-912.⁴⁹ Without a fee waiver, the application costs \$410 as of this writing.⁵⁰ The form to request a fee waiver is lengthy, and advocates report that USCIS is generally exercising increased scrutiny of fee waiver applications. To be successful, an applicant will often need to submit significant accompanying documentation, depending on the grounds for their eligibility. While applicants who receive a means-tested benefit can generally just submit proof of their eligibility, applicants seeking waiver of fees on the ground that their income is at or below 150 percent of the Federal Poverty Guidelines will generally be expected to produce tax returns, paystubs, and/or other documentation of their low income. As discussed in the preceding section, practitioners should not submit evidence that could expose applicants to criminal liability or immigration consequences (such as a paystub showing the use of a fake Social Security number that could constitute identity fraud). Practitioners should counsel the noncitizen on the time to fill out the fee waiver application and the expected supporting documentation, as some applicants may choose to pay the application fee rather than delay filing their application and still risk possible denial of the fee waiver, resulting in rejection and return of the underlying application.⁵¹

D. Preparing a Labor-Based Deferred Action Application

Once a worker who falls within the scope of an agency Statement of Interest has decided that they would like to proceed with applying for Labor-Based Deferred Action, the practitioner can assemble the full application packet. This section describes the components of the application packet, including both the forms and evidence, in general. Specific strategies to address significant negative equities are addressed in more detail in Part II Section E.1.

Tirado v. I.N.S., 213 F.3d 1179 (9th Cir. 2000) (holding that conviction under 42 U.S.C. 408(a)(7)(B) is not a crime involving moral turpitude because legislative history of Section 408 shows Congress did not believe using a false Social Security number to work constituted moral turpitude).

⁴⁹ U.S. Citizenship & Immig. Servs., Form I-912, Instructions for Request for Fee Waiver (Sept. 3, 2021), <https://www.uscis.gov/sites/default/files/document/forms/i-912instr.pdf>.

⁵⁰ U.S. Citizenship & Immig. Servs., Form I-765, Application for Employment Authorization, <https://www.uscis.gov/i-765>.

⁵¹ If the need to apply for work authorization is caused by an underlying labor violation, then the labor agency (specifically the NLRB) may seek reimbursement of the filing fee from the employer through the labor agency adjudication as part of a consequential damages award. Even in compelling cases that the NLRB is pursuing zealously, that reimbursement will likely take months or years.

Practitioners preparing these cases should remember that the Statement of Interest is a significant positive equity for the worker that speaks to the enforcement interests of a sister government agency that is enforcing labor and employment law under its statutory mandate.⁵² Therefore, in uncomplicated cases, additional positive equities are not necessarily required. Practitioners should also keep in mind that deferred action does not require a specific finding of substantial abuse, as for U nonimmigrant status, nor does it require a finding of extreme hardship, as for T nonimmigrant status or cancellation of removal. Finally, practitioners should consider that while adjudicators for these applications have received some specialized training, they are still immigration adjudicators who do not have the same expertise as labor agency officials in labor and employment law. Therefore, practitioners should describe the labor agency proceeding in accessible language, with reference to the Statement of Interest, but should refrain from either briefing the merits or severity of the labor violation, a factor which is not at issue before the adjudicator, or submitting voluminous labor agency records that will be difficult for an immigration adjudicator to decipher. Rather, practitioners should argue and present evidence that shows that the worker falls within the scope of the Statement of Interest.

In early Labor-Based Deferred Action cases—processed in various USCIS Field Offices that did not have the benefit of trained, specialized adjudicators—many workers with uncomplicated cases were approved without a declaration from the worker, without community support letters, and without evidence documenting individual harm or hardship from the labor violation.⁵³

1. Contents of Deferred Action and Employment Authorization Packet

The newly announced guidance includes a short list of requirements for a request for Labor-Based Deferred Action and work authorization. In addition to these components, practitioners should prepare a short cover letter, see Appendix 5, available by request only. The letter should generally be under five pages. In the letter, practitioners should address which sub-agency (USCIS or ICE) should adjudicate the case, with a brief discussion of relevant immigration history or lack thereof (including entries and exits). Practitioners should also briefly demonstrate that the worker falls within the scope of the Statement of Interest and highlight the labor agency's interest in the case, citing to the Statement. Practitioners should then address the compelling government interest served by granting the request, with emphasis on the labor agency interest as well as a short discussion of any relevant individual equities. Finally, if practitioners are requesting the application be expedited or a fee waiver, the letter should address the USCIS Expedite Criteria, see Part II Section D, or fee waiver criteria.

⁵² See Alejandro N. Mayorkas, Sec'y, U.S. Dep't of Homeland Sec., Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf (directing DHS component agencies, in considering case-by-case requests for deferred actions, that “the legitimate enforcement interests of a federal government agency should be weighed against any derogatory information to determine whether a favorable exercise of discretion is merited).

⁵³ Before the centralized adjudication of these applications, there was some regional variation in adjudication, with a few USCIS Field Offices issuing RFEs for significant evidence beyond the short list of components in the new DHS guidance.

Table 4: Contents of Labor-Based Deferred Action and Employment Authorization Packet

REQUIREMENT	SUGGESTED EVIDENCE OR ATTACHMENTS (see sample exhibits in cover letter in Appendix 5, available by request only)	ADDITIONAL NOTES
Form G-28 (if represented)	None.	The applicant must physically sign this and all immigration forms, and electronic signatures (such as through Adobe PDF) are not accepted. USCIS continues to accept photocopies or scans of signatures. ⁵⁴
Form G-325A: Biographic Information (for Deferred Action)	None.	Applicants should fill out all fields with accurate information, including disclosing any “other names used” as well as their residences for the past five years. Because this form specifically requests residence addresses, practitioners should not substitute an office mailing address for the client residence address.
Form I-765, Application for Employment Authorization	None. While the form instructions list passport-size photos as supporting evidence, no passport-size photos are required for submissions to Montclair because photos will be taken at the biometrics appointment.	See additional notes for G-325A. In Part 2, Item 27, the Eligibility Category is (c)(14) for noncitizen granted deferred action.
Form I-765WS, Worksheet	None.	Form I-765WS is submitted as part of DACA applications and in that context, work authorization has been routinely approved without additional documentary evidence in support of the noncitizen’s statement in this worksheet.
\$410 Fee ⁵⁵ or Form I-912	For fee, money order, personal check, cashier’s check, or Form G-1450 to pay by credit card. If submitting fee waiver, then submit evidence in support of the reason for which the	

⁵⁴ See Policy Manual, U.S. Citizenship & Immig. Servs., Volume 1, Part B, Chapter 2: Signatures, <https://www.uscis.gov/policy-manual/volume-1-part-b-chapter-2> (last visited Mar. 10, 2023).

⁵⁵ This is the current filing fee for the I-765. Practitioners can confirm the current filing fee for form I-765 on the USCIS website. See U.S. Citizenship & Immig. Servs., Filing Fees, <https://www.uscis.gov/forms/filing-fees> (last visited Mar. 10, 2023).

	noncitizen seeks to waive the fee (proof of receiving means-tested benefit, proof of income such as tax returns or W-2s, or proof of financial hardship such as medical bills and outstanding debt). ⁵⁶	
A written request signed by the noncitizen stating the basis for the deferred action	Cover letter requesting deferred action signed by applicant (see example in Appendix 5, available by request only). OR Short separate statement signed by the applicant submitted as an exhibit (see example in Appendix 6, available by request only).	Some advocates have satisfied this requirement by asking the applicant to sign the cover letter. Others have preferred to have the applicant submit a separate short statement (relating their assent to the practitioner’s filing of the application to seek immigration protection) that is attached as an exhibit, to allow the advocate to make last minute revisions to the cover letter. Note that the written request must be signed but does not need to be sworn to under penalty of perjury.
Statement of Interest from a labor or employment agency supporting the request	Statement of Interest from labor or employment agency requesting prosecutorial discretion for workers in a workplace during the time period of the labor dispute.	This letter should serve as evidence for establishing the labor agency’s interest in the case. We suggest that you do not submit voluminous documents from the labor agency proceeding, because USCIS is not expert in determining if a labor violation has occurred and should be deferring to the labor agency’s articulation of its enforcement interests. It is also not necessary to demonstrate individual harm or hardship from the labor violation, and so medical records or an individual declaration are not needed. Practitioners may include, however, a docket sheet from the case establishing that the case is pending.

⁵⁶ For more on this, see Am. Immig. Lawyers Assoc., Practice Pointer: Best Practices for Preparing and Filing Form I-912, Request for Fee Waiver (Oct. 26, 2021), <https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/practice-pointer-best-practices-preparing-filing>.

<p>Evidence to establish the worker falls within the scope of the Statement of Interest</p>	<p>Typically, this means proof of employment during time period of the labor dispute mentioned in the letter, such as:</p> <ul style="list-style-type: none"> • W-2s • Pay stubs • Timecards • Contracts or other documentary evidence • Labor agency records that list affected workers • Short declaration describing employment terms (dates, position, work site) (see example at Appendix 6, available by request only) 	<p>Note that the standard for this requirement is whether the worker falls within the scope identified in the Statement of Interest, and the individual worker does not need to demonstrate that they individually suffered the labor violation nor that they have offered any specific form of assistance to the labor agency. Workers can receive Labor-Based Deferred Action protection before they are interviewed by the labor agency.</p> <p>We recommend submitting evidence that clearly establishes that the applicant was working for the named employer during the labor dispute, without exposing the applicant to any other risks. For example, practitioners could prepare a short declaration describing the terms of employment or submit evidence of communication with the labor agency to avoid disclosing employment documents that use a pseudonym.</p>
<p>Evidence of any additional factors supporting a favorable exercise of discretion.</p>	<p>Proof of participation in the labor and employment dispute or agency proceedings⁵⁷</p> <ul style="list-style-type: none"> • Communications with the labor agency offering assistance from worker by name • Short agency records with the worker's name (for example, agency complaint, receipt of complaint, settlement agreement, or administrative or judicial order) • Other evidence of cooperation (worker affidavit, list of 	<p>Because the streamlined deferred action process is designed to protect potential witnesses even in early stages of the labor agency's investigation, individual workers applying for initial deferred action are not required to prove any specific helpfulness. However, where the worker actively participated in the labor dispute (organizing) or in the agency proceedings (filing the complaint, being interviewed, providing evidence, testifying, etc.), this will be a compelling positive equity. Practitioners should emphasize how the worker has supported or is supporting the agency's enforcement efforts in general terms</p>

⁵⁷ This positive equity may continue to be relevant beyond the initial application. For instance, participation may be relevant in subsequent requests for deferred action or in the event of an encounter like a criminal arrest where there is a risk that DHS may terminate the deferred action in their discretion.

	witnesses including the worker's name, etc.)	that are accessible to an immigration adjudicator that likely lacks familiarity with labor agency-specific processes.
	Records of criminal dispositions	Since deferred action is highly discretionary, USCIS will want to review any criminal history. It is important to disclose all criminal history to appropriately frame the incidents, knowing that the incidents will likely appear as a result of the biometrics appointment and background check. As in other USCIS cases, it is best practice to submit a certified record of disposition for a criminal case without submitting additional documents like the police report that may contain damaging and unproven allegations.
	Other equities evidence <ul style="list-style-type: none"> • Birth certificates or other proof of status for any U.S. citizen children or spouse that demonstrate ties. 	Other equities evidence like letters from community, political, or faith leaders and medical records are not likely needed unless there are significant negative equities like criminal history or immigration history (beyond a single entry without inspection).
Proof of identity and nationality	<ul style="list-style-type: none"> • Biographical page of a valid passport, if available • Birth certificate and translation, if available • Other validly issued identification document 	
If applicable, any document used to lawfully enter the U.S. or other evidence relating to	<ul style="list-style-type: none"> • I-94 and visa or travel document if the applicant was inspected and admitted 	If the noncitizen has never encountered immigration officials,

the noncitizen’s immigration history or status.	<ul style="list-style-type: none"> • Notice to Appear or other documents from immigration court, if in removal proceedings • Any removal order (expedited removal order, administrative removal order, final removal order, reinstated removal order) 	then there is no need to include documentation.
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2. Jurisdiction Over the Deferred Action Application—USCIS vs. ICE

The new guidance states, “USCIS will only forward to U.S. Immigration and Customs Enforcement (ICE) requests for deferred action that are submitted by noncitizens who are in removal proceedings or have a final order of removal. 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.”⁵⁸

Accordingly, applicants in removal proceedings before the Executive Office of Immigration Review (EOIR) and with final orders of removal⁵⁹ will still file applications for deferred action at USCIS’s “central intake point” in Montclair, CA. However, their applications will then be “forwarded” to ICE for adjudication. We understand that applications forwarded to ICE will be adjudicated by HSI’s Parole and Law Enforcement Programs Unit, which will consult with the relevant ERO and OPLA offices and render a decision. If ICE approves deferred action, then the USCIS adjudicators in Montclair will then consider the I-765 application for employment authorization. The grant of deferred action by ICE will not affect ongoing removal proceedings absent a separate request for prosecutorial discretion to OPLA.

As of this writing, the authors are not aware of any Labor-Based Deferred Action applications that have been referred to this unit or adjudicated, so it is difficult to know if ICE will scrutinize applications more or expect more evidence of positive equities. Practitioners may also be concerned that applications referred to ICE could result in workers being placed in an ongoing monitoring program (particularly for workers with *in absentia* orders or older orders of removal who are not currently reporting to ICE).⁶⁰ That outcome seems less likely because the ICE

⁵⁸ DHS FAQ, *supra* note 3.

⁵⁹ At this time, it is our understanding that cases with both executed and unexecuted orders of removal (meaning, respectively, individuals who were deported under a prior order and those who received an order who remained in the United States) will be forwarded to ICE for adjudication.

⁶⁰ The use of surveillance technology and programs such as Intensive Supervision Appearance Program (ISAP) and Alternatives to Detention (ATD)—which often involve use of ankle monitors, phone apps with GPS tracking, and various forms of routine reporting to ICE or private contractors—have increased dramatically over the last decade. See Just Futures Law & Mijente, *ICE Digital Prisons: The Expansion of Mass Surveillance as ICE’s Alternative to Detention* (May 2021),

<https://www.flipsnack.com/justfutures/ice-digital-prisons-1u8w3fnd1j/print-pdf.html>; Factsheet, Am. Immig. Council, Alternatives to Detention: An Overview (Mar. 2022),

adjudicators are within the HSI Parole Unit, but is still possible given the potential involvement of ERO field offices. The authors will be tracking cases referred to ICE to update this advisory with more information when it is available.

Practitioners should note that ICE approval of a request for Labor-Based Deferred Action will not have any automatic effect on ongoing removal proceedings or an outstanding final order of removal. Separate from this streamlined deferred action process, practitioners with clients in proceedings or with a final order of removal should consider seeking prosecutorial discretion from the relevant OPLA office. For more information on those requests, see Part IV Section A. If the removal proceedings are terminated, then any deferred action application will be adjudicated by USCIS. Practitioners may wish to draw the attention of the USCIS adjudicators to the fact of the termination in the application cover letter to minimize agency delay in adjudicating the application.

Where the applying noncitizen is not in removal proceedings and has not received a removal order, the USCIS adjudicators in Montclair will adjudicate both the deferred action and employment authorization applications. We understand that these adjudicators have received specialized training for Labor-Based Deferred Action cases.

3. Timing & Expedite Requests

When DHS announced the process enhancements for workers applying for deferred action, the agency emphasized that the centralized intake point “will allow DHS to efficiently review these time-sensitive requests.”⁶¹ The agency further recognized the “time-sensitive labor agency enforcement interests” and remarked that efficient processing of these applications will reduce the risk of retaliation from employers under investigation.⁶² But DHS has not published any goals for processing times for these requests, and neither the deferred action request (supplemented by Form G-325A) nor the (c)(14) category of I-765 adjudicated in Montclair are listed on the USCIS processing times tool as of this writing.⁶³

Before the announcement of the centralized intake at the Montclair address, there was wide variation in processing times for Labor-Based Deferred Action across different USCIS Field Offices.⁶⁴ As of this writing, the authors are not yet aware of any cases that have been fully adjudicated at the Montclair address. The authors are tracking cases submitted after the guidance to monitor processing times and will update this manual with more information when it is available.

https://www.americanimmigrationcouncil.org/sites/default/files/research/alternatives_to_detention_an_overview.pdf.

⁶¹ DHS Announcement, *supra* note 2.

⁶² DHS Announcement, *supra* note 2.

⁶³ See U.S. Citizenship & Immig. Servs., Check Case Processing Times, <https://egov.uscis.gov/processing-times/> (last visited Mar. 10, 2023).

⁶⁴ In the five USCIS Field Offices that had processed and approved these applications before the centralized intake announcement, processing time ranged from approximately one month (Boston, Chicago, and New Orleans), to 3 to 5 months (Las Vegas), to up to 9 months in some cases (Atlanta).

Some cases may be eligible for an expedite request under the USCIS Expedite Criteria,⁶⁵ which should speed up adjudication in these cases. The three expedite criteria most likely to be relevant to Labor-Based Deferred Action applications are: emergencies and urgent humanitarian reasons, non-profit organization interests, and U.S. Government interests.⁶⁶ The last criteria, relating to U.S. Government interests, specifically includes “cases identified as urgent by other government agencies, including labor and employment agencies.”⁶⁷ But not all Labor-Based Deferred Action cases will meet this expedite criteria, which requires the case be “of a scale or uniqueness that requires immediate action to prevent real and serious harm to U.S. interests” and that a “senior-level official” make the expedite request.⁶⁸ It is helpful that the criteria list seeking employment authorization for the purposes of an agency seeking back pay or reinstatement specifically as a meritorious expedite request.⁶⁹ The newly announced guidance on labor deferred action further references and reiterates these criteria in the section for labor agencies.⁷⁰

Any time-sensitive deadline, such as an upcoming hearing or other proceeding with the labor agency or the risk that a guestworker will fall out of status at the end of a post-termination grace period or otherwise depart the United States, should be immediately communicated to the labor agency and emphasized in the deferred action filing to USCIS. Consider large bold font on the first page of the cover letter to draw visual attention to a time-sensitive deadline.

4. Follow-Up & Troubleshooting

Following complete filings submitted to the Montclair address, both the applicant and the attorney should receive a receipt notice for the I-765, which serves as acknowledgement of the receipt of the entire application. USCIS does not generate a receipt notice for the deferred action application because there is no application form. Receipt notices should issue quickly, and applicants who do not receive a receipt notice within 3 weeks of filing should reach out to DHS through the DHS CRCL office at communityengagement@hq.dhs.gov.⁷¹

Following the receipt notice, the applicant and the attorney should receive notice of a biometrics appointment at the closest USCIS Field Office’s Application Support Center. This should be a single biometrics appointment for fingerprinting, signature, and picture for both deferred action and the employment authorization document. Because of this biometrics collection, Labor-Based Deferred Action applicants do not need to submit passport-size photos in the original application. Applicants who do not receive a biometrics appointment notice within 3 weeks of filing should reach out to DHS through the DHS CRCL office at communityengagement@hq.dhs.gov.

⁶⁵ Policy Manual, U.S. Citizenship & Immig. Servs., Chapter 5 - Requests to Expedite Applications or Petitions, <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-5> (last updated Mar. 7, 2023).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ DHS FAQ, *supra* note 3.

⁷¹ We understand that DHS CRCL may set up a dedicated separate email address for inquiries related to Labor-Based Deferred Action applications, but that in the meantime practitioners can use this general inbox.

5. Responding to Requests for Evidence (RFE)

Thus far, practitioners who filed requests prior to the newly issued guidance have reported varied and somewhat inconsistent RFEs, including more typical requests for additional evidence of immigration and criminal history, but also requests for medical records, passport-size photos, and other evidence that does not appear to be required or specifically relevant to labor-based cases. These inconsistencies may have been due to the process being new and being adjudicated by different field offices throughout the country. If an RFE is received from the new Montclair office, the best practice is to file a response with the best information available as soon as possible.

In unusual cases, it is possible that the case could be referred to the local USCIS Field Office for an in-person interview. This will likely only happen if there are significant negative equities or concerns about fraud.

6. Approval of Labor-Based Deferred Action

If the worker's application for Labor-Based Deferred Action is approved, USCIS will issue a one-page letter signed by the adjudicating office granting deferred action for a specific period, generally for two years. This letter is evidence of the worker's deferred action status, and they should carry a copy of it with them. Because the grant of deferred action is neither an admission nor a parole, the approval notice will not contain an I-94 record.

USCIS should consider the employment authorization application immediately after deferred action is approved. Because the new guidance streamlines this process, workers should not need to submit any additional evidence, unless the agency finds the initial packet inadequate and requests more evidence. DHS has not publicly committed to a timeline for these adjudications, but practitioners should expect to receive notice of a decision on the employment authorization application soon after receiving approval of the deferred action. If more than 3 weeks passes, practitioners should reach out for technical assistance to communityengagement@hq.dhs.gov.

Practitioners may want to directly inform the labor agency that issued the Statement of Interest or work with the labor/employment attorney or organizer in touch with that labor agency to inform the supporting agency that deferred action has been granted.

7. Denials

As with every affirmative immigration application, practitioners should prepare their clients for the possibility of a denial, including risks discussed in Part II Section C. DHS has not issued specific guidance on whether resubmission of a rejected application for deferred action is permitted, and if so, under what conditions. However, DHS has stated that the filing fee required to request employment authorization will not be returned to the requester in the event of a denial.⁷² This is generally the case with all USCIS benefit requests that are denied.

⁷² See DHS FAQ, *supra* note 3.

E. Special Circumstances

1. Labor-Based Deferred Action Applicants with Significant Negative Equities (Criminal/Immigration History)

Practitioners should consider submitting more robust equities evidence when applying for deferred action for workers with significant criminal history and/or negative immigration history (for example multiple removals and re-entries), or some combination of the two. Practitioners filing early cases before this recent guidance were generally guided by lessons from the exercise of discretion in other immigration adjudications such as waivers or prosecutorial discretion requests to OPLA. For example, workers with traffic violations or one or two entrances without inspection submitted the streamlined packets described in Part II Section D and generally received approvals, whereas workers with one or more felonies or serious misdemeanors (like DUIs) submitted more robust equities evidence.

Practitioners should also be guided by lessons learned from other discretionary forms of relief in identifying robust equities evidence to counterbalance significant negative criminal or immigration history. In these cases, a robust statement from the applicant may help to contextualize mitigating factors. Statements that authentically demonstrate the 3Rs (remorse, responsibility, and rehabilitation) may be most persuasive. Other positive equities such as support letters from members of the applicant's community, friends, and family and evidence of ties to a local, school, and/or faith community may also help. Evidence of U.S. family members is always recommended to show such ties. In these more complicated cases, practitioners may want to ask about other humanitarian factors, such as significant medical illness of the applicant or immediate family members, and consider submitting records documenting any illness or condition.⁷³

In addition to robust equities evidence, practitioners should prepare a more detailed cover letter that draws on that evidence to contextualize the negative equities and argue that positive equities outweigh and militate in favor of approval.

2. Applying for only Labor-Based Deferred Action, without Applying for Work Authorization

Applicants who wish to apply for deferred action without applying for employment authorization cannot apply to the Montclair address because their application will be rejected for failing to include a I-765, I-765WS, and I-912 or fee—all three of which are required components for the streamlined deferred action process. If applicants are seeking only deferred action and not employment authorization, they should apply to the local USCIS Field Office. Practitioners should briefly explain why the worker is applying at the Field office for deferred action rather than the Montclair address in the cover letter (for example, because the worker wishes to seek

⁷³ In early deferred action applications, at least one USCIS Field Office issued extensive RFEs in response to medical records in several cases, requesting proof from applicants that the labor violation resulted in significant medical harm. For this reason, practitioners may want to frame medical records as relevant for humanitarian purposes, rather than as evidence that the labor violation resulted in substantial harm (which is not legally required in discretionary deferred action applications).

only deferred action and not employment authorization). Deferred action applications sent to the Field Office will not receive any receipt notice or other acknowledgement of receipt,⁷⁴ though the application should generate a biometrics appointment notice. The biometrics appointment for deferred action from the Field Office will only collect biometrics information relevant to the processing of that application, and so the noncitizen will have to complete an additional appointment if they later decide to apply for employment authorization.

Before the streamlined process was announced through the new DHS guidance, all Labor-Based Deferred Action applicants submitted their deferred action applications to the local USCIS Field Office. This resulted in wide variation in adjudication practices, both in terms of delay,⁷⁵ expected evidence, and outcomes. Therefore, practitioners are encouraged to carefully counsel their client before pursuing this path because it may take significantly longer and require more evidence than the streamlined process. Applications should at minimum include the required evidence for the streamlined process, listed in Part II Section D, other than the I-765, I-765WS, and I-912 or fee, which are not required because the applicant is not seeking employment authorization. But even with that evidence, the Field Office may request more information. For example, prior to the issuance of guidance on the streamlined process, practitioners received RFEs from local USCIS Field Offices for the following evidence, none of which are required for the streamlined process:

- Passport-size photos
- Any marriage certificate
- Certified copy of birth certificate, with translation
- Medical records documenting harm from the labor violation
- Evidence that the labor agency proceeding is ongoing
- Evidence of state identification
- Current proof of residency within the Field Office's jurisdiction (such as apartment lease, electric bills, water bills, etc.)
- Detailed declaration from the applicant

Practitioners may consider reaching out to the USCIS Field Office Director or community outreach liaison before filing a Labor-Based Deferred Action application to discuss what evidence is required for adjudication.

If the local USCIS Field Office approves the application for deferred action, then the noncitizen could later request employment authorization. A I-765 based on approved deferred action should

⁷⁴ Because there is no form for requesting Labor-Based Deferred Action, you will not receive a receipt number and we believe USCIS databases are not tracking these applications. This means that online tools for tracking the application are not available and the USCIS Contact Center will have no record of the case.

⁷⁵ In early cases, applications were lost or misplaced by some USCIS Field Offices that did not have any protocol for how to route this type of application, delaying adjudication for weeks.

be submitted to the appropriate lockbox for the state of residence of the applicant.⁷⁶ The application will then be forwarded to the National Benefits Center. As of this writing, employment authorization applications sent to the National Benefits Center take approximately 3 months. Practitioners can seek to speed adjudication and draw extra attention to their case by including a cover page that says in large, bold letters “Labor Deferred Action EAD.”

The EAD packet sent to the appropriate lockbox address should include:

- ✓ Short Cover letter
- ✓ I-765 (Application for Employment Authorization)
 - use Category (c)(14) “Deferred Action Granted”
- ✓ I-765WS (Worksheet) (see Appendix 7, available by request only)
- ✓ G-28 (Notice of Entry of Appearance)
- ✓ Deferred Action Approval
- ✓ 2 Passport-size photos
- ✓ \$410 Filing fee or Fee waiver (see Part II Section C)

The I-765WS requires a showing of financial necessity to work. However, it does not require supporting documents and the requirement can usually be met by stating the worker needs to work to support themselves, family members, etc. Conversely, if a worker wishes to file a fee waiver instead of paying the filing fee, they will need to submit Form I-912 and will typically need to provide a statement and/or other evidence reflecting their inability to pay.⁷⁷

III. Subsequent Requests for Deferred Action after Initial Approval (Renewals)

It is not yet clear what criteria DHS will apply to subsequent requests for Labor-Based Deferred Action beyond the initial two-year approval period. DHS guidance states: “[t]he recipient [of Labor-Based Deferred Action] may . . . be eligible to make subsequent requests for deferred action, which will be adjudicated on a case-by-case basis when a labor agency provides a basis for such a request as it relates to the labor agency’s ongoing investigative or enforcement interests.”⁷⁸ Many labor agency Statements of Interest issued to date support deferred action for *the longer of* two years or the pendency of the agency’s investigation and any subsequent litigation, enforcement, or compliance efforts, the length of which vary widely from agency to agency. It seems likely labor and employment agencies will be willing to support, and DHS should be willing to grant, subsequent requests for Labor-Based Deferred Action while the labor or employment agency investigation, and related enforcement efforts, are ongoing.

⁷⁶ U.S. Citizenship & Immig. Servs., Direct Filing Addresses for Form I-765, Application for Employment Authorization, <https://www.uscis.gov/i-765-addresses> (last updated Feb. 28, 2023) (directing I-765s based on a grant of deferred action to the lockboxes for family-based forms); *see also* U.S. Citizenship & Immig. Servs., USCIS Lockbox Filing Locations for Certain Family-Based Forms <https://www.uscis.gov/uscis-lockbox-filing-locations-chart-for-certain-family-based-forms> (last updated Aug. 1, 2022) (directing to the appropriate lockbox filing address based on state of residence of the applicant).

⁷⁷ *See* Part II Section D (listing recommended evidence).

⁷⁸ DHS FAQ, *supra* note 3.

Although there is no requirement that a worker applying for Labor-Based Deferred Action specifically document their helpfulness in the labor or employment agency investigation, Practitioners may want to advise workers who receive Labor-Based Deferred Action to make themselves available to the labor or employment agency that issued the Statement of Interest, provide any relevant information or documents in support of the agency's efforts, and respond promptly to any request for assistance. Practitioners should consider documenting these offers of assistance to build a compelling case in favor of subsequent requests for Labor-Based Deferred Action, by showing the worker's continued presence is necessary to support labor and employment agency efforts to enforce labor and employment law and hold abusive employers accountable.

There is a strong argument that labor and employment agencies *should* support, and DHS *should* grant, subsequent requests for Labor-Based Deferred Action even after the labor or employment agency investigation concludes if continued protection is necessary to mitigate the worker's fear of immigration-based retaliation from participating in the labor or employment agency investigation or to address the potential chilling effect immigration enforcement action could have on other workers. Whether they will do so in practice remains to be seen.

IV. Other Types of Immigration Relief Stemming from Labor Disputes

A. Prosecutorial Discretion in Removal Proceedings

Applications for Labor-Based Deferred Action, even if approved, will not resolve open removal proceedings nor vacate final orders of removal. Therefore, practitioners may want to seek prosecutorial discretion from the relevant OPLA office. Practitioners can request prosecutorial discretion from OPLA at any time, including a) when the labor dispute is initiated b) when the Statement of Interest is received, or c) when deferred action is granted. One option is to file the request as early as possible in the labor dispute process and supplement the request later with the Statement of Interest, USCIS receipt, and/or approval notice as needed. Practitioners may want to seek termination, stipulations, administrative closure, continuance or other prosecutorial discretion, depending on whether the noncitizen wishes to pursue relief in removal proceedings.

In any such request, practitioners should cite to the October 12 Worksite Enforcement memo⁷⁹ as support for their request and may also consider referring to the 2011 Morton memo on prosecutorial discretion for victims, witnesses, and plaintiffs.⁸⁰ It is our understanding that OPLA offices have not received any further guidance from the ICE Principal Legal Advisor beyond

⁷⁹ Alejandro N. Mayorkas, Sec'y, U.S. Dep't of Homeland Sec., Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual, Policy Statement 065-06 (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf.

⁸⁰ John Morton, Dir., U.S. Immig. & Customs Enf't, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, Policy No. 10076.1 (June 17, 2011), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf>.

those memos. The September 30, 2021 Mayorkas memo remains under litigation, which means that OPLA attorneys are no longer considering those civil immigration enforcement priorities in making prosecutorial discretion decisions.⁸¹ It seems unlikely that DHS will issue any further OPLA guidance while the general enforcement priorities remain under litigation.

Because of the lack of guidance beyond the October 12 Worksite Enforcement memo, regional OPLA offices may vary in both the timeline and outcome of their decisions. At least one OPLA office has agreed to several joint motions to reopen and terminate for workers seeking Labor-Based Deferred Action, though that office did so only after the practitioner identified a pathway to permanent status beyond Labor-Based Deferred Action for each noncitizen. Practitioners may wish to consult with others who have submitted prosecutorial discretion requests to the relevant OPLA office to understand local practice.

B. Parole in Place

Parole in place features in the Labor-Based Deferred Action announcement only as an example of the mechanisms that exist in U.S. immigration law generally to protect noncitizens from removal.⁸² Labor-Based Deferred Action does not envision parole in place as the mechanism through which workers should apply for temporary relief from removal, and DHS officials have indicated that the central intake point in Montclair, CA is not prepared to accept parole in place requests at this point. However, practitioners should carefully study their clients' cases to determine if a parole application would be more appropriate in certain cases, for example if they have a qualifying relative through whom they could adjust status if granted parole. In cases where an application for parole in place may be more advantageous, practitioners may consider using the Statement of Interest as a positive equity weighing in favor of a grant of parole. Practitioners should note that USCIS charges \$575 to process humanitarian parole in place applications but does accept fee waiver requests.⁸³

Parole in place provides temporary protection from removal for noncitizens who are in the United States, typically for a set number of years.⁸⁴ DHS may grant parole in place to noncitizens on a case-by-case basis where there is urgent humanitarian reason or significant public benefit.⁸⁵ Parole in place programs have been sparse, but practitioners may be familiar with military parole in place and parole in place for families separated under the Trump administration's "zero

⁸¹ See *infra*, Appendix 1. DHS has reiterated that "OPLA attorneys, however, may—consistent with longstanding practice—exercise their inherent professional discretion on a case-by-case basis during the course of their review and handling of cases." U.S. Immig. & Customs Enf't, Prosecutorial Discretion & the ICE Office of the Principal Legal Advisor, <https://www.ice.gov/about-ice/opla/prosecutorial-discretion> (last updated Sept. 12, 2022). Sections of the Doyle memo that do not rely on the civil enforcement priorities outlined in the Mayorkas memorandum may still guide those decisions. *Id.*

⁸² See DHS Announcement, *supra* note 2.

⁸³ U.S. Citizenship & Immig. Servs., I-131, Application for Travel Document, <https://www.uscis.gov/i-131> (last updated Jan. 23, 2023); see also U.S. Citizenship & Immig. Servs., Instructions for Request for Fee Waiver Form I-912 (Sept. 3, 2021), <https://www.uscis.gov/sites/default/files/document/forms/i-912instr.pdf> (listing Form I-131 as eligible for fee waiver if applying for humanitarian parole).

⁸⁴ INA § 212(d)(5)(A).

⁸⁵ INA § 212(d)(5)(A).

tolerance” policy, both of which use DHS’s parole authority to prevent deportations and prevent family separation.⁸⁶

Parole in place is only available to noncitizens who are present in the U.S. without being inspected or admitted.⁸⁷ Since adjustment of status generally requires that a noncitizen be admitted or paroled, legal practitioners may argue that parole in place counts for purposes of adjustment to lawful permanent residence in cases where the noncitizen has a pathway to adjustment available to them and is not otherwise barred.⁸⁸

A grant of parole in place can be terminated by DHS at any time. A grant of parole makes a noncitizen eligible for an employment authorization document.⁸⁹ USCIS may waive fees associated with applications for employment authorization for parole in place grantees.⁹⁰ As with deferred action, parole authorizes the noncitizen’s presence in the U.S. Therefore, while parole does not cure unlawful presence already accrued for the purposes of the 3- and 10-year bars, time spent in the U.S. under parole will not count toward the accumulation of unlawful presence.⁹¹ Parole grantees are considered “qualified aliens” and are thereby eligible for some federal public benefits.⁹²

a) Choosing Between Deferred Action and Parole in Place

Even prior to the January 13 guidance clarifying the form, fee, and supporting materials one needs to gather to apply for relief for qualifying workers, deferred action has been the path workers have chosen in recent years. Parole in place, by contrast, has not been tested by workers with Statements of Interest, even though multiple labor agency letters have specifically supported it in addition to deferred action. It is our understanding that DHS is less prepared to adjudicate applications for parole in place and will only accept them at USCIS field offices, which will generally process them less expeditiously than applications for deferred action at the

⁸⁶ U.S. Citizenship & Immig. Servs., Discretionary Options for Military Members, Enlistees and Their Families, <https://www.uscis.gov/military/discretionary-options-for-military-members-enlistees-and-their-families> (last updated Apr. 25, 2022); U.S. Dep’t of Homeland Sec., Interagency Task Force on the Reunification of Families, Initial Progress Report ii (June 2, 2021), https://www.dhs.gov/sites/default/files/publications/21_0602_s1_family-reunification-task-force-120-day-progress-report.pdf.

⁸⁷ INA § 212(d)(5)(A).

⁸⁸ See INA § 245(a).

⁸⁹ 8 C.F.R. § 274.a12(c)(11).

⁹⁰ U.S. Citizenship & Immig. Servs., Instructions for Request for Fee Waiver Form I-912 (Sept. 3, 2021), <https://www.uscis.gov/sites/default/files/document/forms/i-912instr.pdf> (listing Form I-765 as eligible for fee waiver for categories of employment eligibility other than DACA).

⁹¹ INA § 212(a)(9)(B)(ii); Adjudicator’s Field Manual, U.S. Citizenship & Immig. Servs., ch. 40.9.2(b)(1), <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm40-external.pdf> (last visited Mar. 10, 2023) (“An alien does not accrue unlawful presence . . . if he or she has been inspected and paroled into the United States and the parole is still in effect.”).

⁹² PRWORA § 431(b)(4), *supra* note 14.

new Montclair filing location. Adjudication may therefore vary depending on the local USCIS field offices, with potential backlogs and untested filing requirements.⁹³

Practitioners weighing which form of affirmative relief to pursue on behalf of their client will need to weigh the pros and cons of the deferred action and parole in place mechanisms before counseling their client on the issue. For example, a practitioner representing a client who has not been admitted or paroled who otherwise has a clear path to adjustment to lawful permanent resident status might consider applying for parole in place based on the same labor-based criteria set forth for deferred action in the new guidance and including a Statement of Interest (many of which specifically include parole as an alternative form of prosecutorial discretion). Because this path is not yet tested, practitioners may want to engage with the local Field Office Director before or after submitting an application. Additionally, follow up from officials with the labor agency who issued the Statement of Interest could also be helpful.

Practitioners should note that nothing precludes noncitizens from applying for both deferred action and parole in place, though this strategy is untested and the applications will likely go to different offices and different adjudicators who are not in direct contact with each other. For instance, a streamlined deferred action application should be submitted to the Montclair address and will likely be adjudicated first, whereas the parole in place application will go to the local USCIS Field Office and will likely take much longer. It is possible that the USCIS Field Office adjudicator will not grant parole in place after deferred action is approved because the labor agency interest in protecting the worker from removal is covered by either of these forms of temporary protection.

C. Requests for Noncitizens Presently Outside the United States

Labor-Based Deferred Action is only available to those who are present in the United States, and so noncitizens who are covered by a Statement of Interest but are located outside the United States will need to obtain an entry document to cross the border. Workers who have returned to their home country, including undocumented workers and especially guestworkers (on H-2A, H-2B, H-1B, J-1 or other guestworker visas), may fall within this category. Unless the noncitizen is independently eligible for a visa or other permission to enter, the likely mechanism for permission to enter the U.S. is parole.

DHS can grant parole, in their discretion, to noncitizens seeking admission to the United States on a “case-by-case basis for urgent humanitarian reasons or significant public benefit.”⁹⁴ Parole is not a formal admission, but with parole, the noncitizen can obtain an entry document at a U.S. consulate or embassy and present that at the border to seek entry and permission to temporarily remain in the U.S. for the duration of the parole.

⁹³ In a stakeholder engagement, one local USCIS Field Office Director indicated that the agency would want more evidence of positive equities in an application for parole in place (as compared to an application for deferred action) because parole in place confers an additional immigration benefit in permitting path to adjustment of status for some noncitizens.

⁹⁴ INA § 212(d)(5)(A).

The guidance published on January 13, 2023 does not discuss parole into the U.S.⁹⁵ DHS has no other published guidance on whether or how the agency will consider requests for immigrants in labor disputes to enter the U.S. on parole. While there have been a few successful cases where an immigrant worker has obtained parole to enter the United States over the past decade, it is not clear what those cases mean for DHS treatment of labor-related parole requests in general. There are thus many unknowns in seeking permission for a noncitizen worker abroad to enter the U.S. based on their participation in a labor dispute.

The key open questions in this type of request are which sub-agency (USCIS, ICE, or CBP) will adjudicate these parole requests⁹⁶ and whether these requests will be considered humanitarian or significant public benefit parole.⁹⁷ Individuals can apply directly for humanitarian parole, but processing times can be very long,⁹⁸ and the criteria are not a perfect fit for noncitizen workers seeking to enter the U.S. to participate in agency proceedings.⁹⁹ Significant public benefit parole is generally faster and does not require a fee, but it must be requested directly by a government agency and sometimes entails ongoing monitoring.¹⁰⁰

It is our understanding that labor and employment agencies should reach out directly to DHS for support on inter-agency parole requests for noncitizens outside the United States.

⁹⁵ See DHS FAQ, *supra* note 3.

⁹⁶ Under a 2008 memo, DHS has allocated authority among its three sub-agencies for the different parole programs. Memorandum of Agreement Between DHS-USCIS, DHS-ICE, and DHS-CBP for the Purposes of Coordinating the Concurrent Exercise by USCIS, ICE, and CBP of the Secretary’s Parole Authority Under INA § 212(d)(5)(A) with Respect to Certain Aliens Located Outside of the United States (Sept. 29, 2008), <https://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf>. That allocation of authority does not specifically address request for immigrant workers in labor disputes, but three listed categories are relevant. First, requests based on urgent medical, family, and related needs are allocated to USCIS. *Id.* Second, requests for noncitizens who participate in “administrative . . . proceedings, and/or investigations, whether at the federal, state, local, or tribal level of government” are allocated to ICE. *Id.* Third, requests for noncitizens who will participate in civil proceedings where all parties are private litigants are allocated to USCIS. *Id.*

⁹⁷ While the INA refers only to a single, unitary authority to “parole” applicants for admission, DHS has administratively created distinct processing for two types of parole: humanitarian parole and significant public benefit parole. *Id.* DHS construes requests based on urgent medical, family, and related needs as requests for humanitarian parole. DHS treats requests by a law enforcement agency for persons of “law enforcement interest” such as witnesses as requests for significant public benefit parole. *Id.*

⁹⁸ Advocates report long delays as well as inconsistent adjudication of humanitarian parole applications. See generally Nat’l Immig. Forum, Explainer: Humanitarian Parole, Part III Section E (Mar. 24, 2022), <https://immigrationforum.org/wp-content/uploads/2022/03/Explainer-Humanitarian-Parole.pdf> (discussing backlogs and high rates of denials).

⁹⁹ U.S. Citizenship & Immig. Servs., Guidance on Evidence for Certain Types of Humanitarian or Significant Public Benefit Parole Requests, <https://www.uscis.gov/humanitarian/humanitarian-parole/guidance-on-evidence-for-certain-types-of-humanitarian-or-significant-public-benefit-parole-requests> (last updated June 23, 2022).

¹⁰⁰ There is not much public information about inter-agency significant public benefit parole requests. See U.S. Dep’t of Homeland Sec., Privacy Impact Assessment for the ICE Parole and Law Enforcement Programs Unit Case Management Systems DHS/ICE/PIA-049 (Dec. 3, 2018), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-plepucms-december2018.pdf>.

There are a number of considerations in deciding whether to seek humanitarian or significant public benefit parole from USCIS or ICE.¹⁰¹ Table 5 below outlines the significant differences as of this writing. Please reach out for technical assistance as you consider a parole request.

Table 5: Comparing Humanitarian and Significant Public Benefit Parole

	HUMANITARIAN PAROLE	SIGNIFICANT PUBLIC BENEFIT PAROLE
Adjudicating agency	ICE (if currently in removal proceedings or has been deported) or USCIS (if no removal proceedings or deportation)	ICE (to participate in administrative or judicial proceedings) or USCIS (in some other instances)
Who applies?	Individual seeking parole or a petitioner in the U.S.	Law enforcement agency
Application fee?	\$575, as of this writing, or can seek waiver of fees	None
Application requirements	I-131, I-134 (must have financial supporter)	Completed by law enforcement agency
Ongoing monitoring	Rare	Common
Processing Time	Months or years, as of this writing	Likely fast
Eligible for a work permit?	Agency has discretion to grant work authorization after entry into the U.S. if not inconsistent with purpose of the parole	Agency has discretion to grant work authorization after entry into the U.S. if not inconsistent with purpose of the parole

D. Other related relief—T & U Nonimmigrant Visas

The labor dispute underlying the worker’s eligibility for deferred action can potentially rise to eligibility for T/U Nonimmigrant Status depending on the facts of an individual worker’s case. As these statuses provide a pathway to legal permanent residency—and are not mutually exclusive to applying for deferred action—advocates should be sure to screen for them and employ a holistic strategy to the worker’s overall immigration case.

Many federal and state labor and employment agencies will consider requests for U or T certifications of helpfulness. This presents an alternative to traditional law enforcement certifiers (police, prosecutors, and courts), some of whom may view workplace crimes as primarily civil matters outside their purview. Some noncitizen crime victims are also more fearful of reporting to traditional law enforcement because of the association with policing, arrests, and jails—and, in some areas, information-sharing or even joint operations with ICE. Finally, labor and employment agencies hold particular expertise in understanding crimes related to workplace power dynamics and so they may be more equipped to investigate workplace crimes than traditional law enforcement.

¹⁰¹ USCIS acknowledges that a request for parole can be based on both humanitarian and significant public benefit reasons. U.S. Citizenship & Immig. Servs., Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States, <https://www.uscis.gov/humanitarian/humanitarianpublicbenefitparoleindividualsoutsideUS> (last updated Sept. 9, 2022).

Both T and U Nonimmigrant Status provide significant benefits including a path to long term status, inclusion of derivatives, and generous waivers of grounds of inadmissibility. T petitions have a significantly shorter backlog and do not require a law enforcement certification, which is required for U petitions. However, T petitions require that the petitioner suffered labor trafficking, whereas workers can seek U Nonimmigrant Status based on trafficking or other qualifying criminal activity. Practitioners should always screen for U and T eligibility and discuss these pathways to permanent status—and interim protections¹⁰² such as Continued Presence and Bona Fide Determination Deferred Action—with workers who might be eligible. Table 6 compares the various immigration benefits that may be available to workers.

Table 6: Comparison of Immigration Benefits

	U NONIMMI- GRANT STATUS	T NONIMMI- GRANT STATUS	CONTINUED PRESENCE¹⁰³	BONA FIDE DETERMINATION /DEFERRED ACTION FOR PENDING U PETITIONS	LABOR- BASED DEFERRED ACTION
Benefits	Protection from deportation, work permit	Protection from deportation, work permit	Protection from deportation, work permit	Protection from deportation, work permit	Protection from deportation, work permit
Eligibility	Must suffer <i>qualifying crime</i>	Must suffer <i>labor trafficking</i>	Must suffer <i>labor trafficking</i> and be eligible for T nonimmigrant status	Must suffer <i>qualifying crime</i> and have petitioned for U nonimmigrant status	Must fall within the scope of Statement of Interest
Backlog	10-15 years	1-3 years	None	5 years ¹⁰⁴	None
Length of Protection	4 years	4 years	2 years (renewable)	4 years (renewable)	Generally 2 years (potentially renewable)

¹⁰² ICE guidance additionally instructs its officials to refrain from taking civil immigration enforcement action against victims with pending applications for SIJ status, U status, T status, or VAWA relief absent exceptional circumstances. U.S. Immig. & Customs Enf't, Using a Victim-Centered Approach with Noncitizen Crime Victims, ICE Directive 11005.3 (August 10, 2021), <https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf>.

¹⁰³ Although Continued Presence offers similar benefits to deferred action, when available it is preferred because it provides greater access to federal benefits, as well as strong evidence of law enforcement cooperation in support of the T Nonimmigrant Status Petition. See U.S. Immig. & Customs Enf't, Center for Countering Human Trafficking, Continued Presence Resource Guide (July 2021), <https://www.ice.gov/doclib/human-trafficking/ccht/continuedPresenceToolkit.pdf>.

¹⁰⁴ See U.S. Citizenship & Immig. Servs., Check Case Processing Times, <https://egov.uscis.gov/processing-times/> (last visited Mar. 10, 2023).

Long-term Pathway	Pathway to Green Card	Pathway to Green Card	None (but see T Nonimmigrant Status)	None (but see U Nonimmigrant Status)	None
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1. Identifying Labor Trafficking & Eligibility for T Nonimmigrant Status

Labor trafficking occurs in all types of industries and workplaces under a wide variety of circumstances. While it is beyond the scope of this advisory to provide an in-depth discussion of the legal elements of labor trafficking,¹⁰⁵ practitioners should look for indications that the worker felt coerced into working against their will. Some other important practice pointers for screening are that labor trafficking:

- Does NOT need to involve movement or confinement—any type of exploitation where a person feels forced to provide labor involuntarily.
- Does NOT need to be the reason the worker initially entered the United States. They can be trafficked within the country after any type of entry (EWI, tourist or guestworker visa, etc.).
- Does NOT require workers to not have been paid so long as labor was obtained through force, fraud, or coercion.
- Can involve a range of labor abuse: threats against immigration status, sexual assault, physical confinement and withholding of payments, documents, or personal freedom.

2. Identifying Labor-Based Qualifying Crimes for Eligibility for U Nonimmigrant Status

Practitioners should screen for all qualifying crimes and consider all certifiers, including traditional law enforcement as well as labor and employment agencies.¹⁰⁶

DOL’s Wage & Hour Division (WHD) is authorized to certify eight Qualifying Crimes for U petitions. OSHA recently became a certifying agency and will now certify the same crimes as WHD as well as several others (see Table 7 below). Other federal and state labor agencies will certify to helpfulness to support a U petition for any qualifying crimes related to their enforcement mandate.

¹⁰⁵ The Coalition to Abolish Slavery and Trafficking (CAST) offers a range of trainings on identifying human trafficking, practice advisories on various topics, and ongoing technical assistance through a monthly working group call. *See* Coal. to Abolish Slavery & Trafficking, Training & Resources, <https://www.castla.org/training-resources/training/> (last updated Mar. 1, 2023).

¹⁰⁶ For a full list of U-Visa Qualifying Crimes, see U.S. Citizenship & Immig. Servs., Victims of Criminal Activity: U Nonimmigrant Status, <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status> (last updated Feb. 28, 2022).

Table 7: Labor Agencies Certifying U and T Visas

LABOR AGENCY	U/T CERTIFYING AUTHORITY?	CRIMES AGENCY WILL CERTIFY
U.S. DOL WHD ¹⁰⁷	Yes	Trafficking, Involuntary Servitude, Forced Labor, Peonage, Witness Tampering, Obstruction of Justice, Extortion, Fraud in Foreign Labor Contracting
U.S. DOL OSHA ¹⁰⁸	Yes	Trafficking, Involuntary Servitude, Forced Labor, Peonage, Witness Tampering, Obstruction of Justice, Extortion, Fraud in Foreign Labor Contracting, Murder, Manslaughter, and Felonious Assault ¹⁰⁹
EEOC ¹¹⁰	Yes	Trafficking, any qualifying crime related to its enforcement of discrimination laws
NLRB ¹¹¹	Yes	Trafficking, any qualifying crime related to its enforcement of labor laws
State Agencies ¹¹²	Varies by state	Varies by state

Given the extreme U visa backlogs, Labor-Based Deferred Action could provide a short-term path to work authorization. However, given that Bona Fide Determination Deferred Action is generally issued for a four-year term and is presumptively renewable while the U petition is pending, practitioners may consider using the Statement of Interest as a basis for a request to expedite the BFD adjudication. Practitioners can consider this strategy for all U petitioners with a pending U petition, including those based on a previous victimization unrelated to the labor dispute.¹¹³

¹⁰⁷ U.S. Dep’t of Labor, U and T Visa Certifications, <https://www.dol.gov/agencies/whd/immigration/u-t-visa> (last visited Mar. 10, 2023).

¹⁰⁸ Readout, U.S. Dep’t of Labor, U.S. Department of Labor expands OSHA’s Ability to Protect All Workers by Certifying Special Visa Applications to Ensure Effective Enforcement (Feb. 13, 2023), <https://www.osha.gov/news/newsreleases/readout/02132023>.

¹⁰⁹ James Frederick, Deputy Assistant Sec’y of Labor for Occupational Health and Safety, Press Conference Statement (February 13, 2023).

¹¹⁰ U.S. Equal Emp’t Opportunity Comm’n, EEOC Procedures: Requesting EEOC Certification for U Nonimmigrant Classification (U visa) Petitions in EEOC Cases, <https://www.eeoc.gov/eeoc-procedures-requesting-eeoc-certification-u-nonimmigrant-classification-u-visa-petitions-eeoc> (last visited Mar. 10, 2023).

¹¹¹ Richard A. Siegel, Assoc. Gen. Counsel, Nat’l Labor Relations Bd., Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings, Memorandum OM 11-62 (June 7, 2011), <https://apps.nlr.gov/link/document.aspx/09031d45818801f9>.

¹¹² For a list of state labor agencies that certify in California, New York, and Illinois, see Eunice Cho, Nat’l Emp. Law Project, *U-Visas for Victims of Crime in the Workplace: A Practice Manual* (May 2014), <https://www.nelp.org/wp-content/uploads/2015/03/U-Visas-for-Victims-of-Workplace-Crime-Practice-Manual-NELP.pdf>.

¹¹³ ASISTA offers trainings, practice advisories, and technical assistance for noncitizen crime survivors pursuing U or T Nonimmigrant Status and related protections. ASISTA, Trainings, https://asistahelp.org/inspire_events/ (last visited Mar. 10, 2023).

V. Frequently Asked Questions

A. Advance Parole & Travel Outside the United States

A grant of deferred action does not permit a grantee to travel abroad and reenter the United States in that same status. Nevertheless, recipients of deferred action may wish to travel outside of the United States while they hold this status. Advance parole is the traditional route to seek advance permission to re-enter the U.S. after travel abroad.¹¹⁴

USCIS has the authority to grant advance parole in its discretion,¹¹⁵ but it is not yet clear what standard the agency will apply for advance parole for recipients of Labor-Based Deferred Action or even if USCIS will grant advance parole to Labor-Based Deferred Action recipients at all. In some instances where USCIS has announced new guidance on deferred action, the agency has expressly foreclosed the availability of advance parole.¹¹⁶ The current DHS guidance on Labor-Based Deferred Action does not address advance parole at all.¹¹⁷ In the past, some practitioners have reported that USCIS has receipted and approved advance parole for non-DACA deferred action recipients in general, before the announcement of Labor-Based Deferred Action.¹¹⁸ This path is not yet tested for those who receive Labor-Based Deferred Action under the new DHS guidance.¹¹⁹

¹¹⁴ See generally Adjudicator's Field Manual, U.S. Citizenship & Immig. Servs., ch. 54, <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm54-external.pdf> (last visited Mar. 10, 2023); see also Elizabeth Carlson and Joanna Mexicano Furmanska, Cath. Legal Immig. Network, Inc., *All About Parole* 31 (Aug. 2022), <https://www.cliniclegal.org/resources/parole/all-about-parole-practice-advisory> (“The eligibility criteria [for advance parole] vary depending on the underlying basis for the advance parole request.”).

¹¹⁵ INA § 212(d)(5)(A).

¹¹⁶ See, e.g., U.S. Citizenship & Immig. Servs., Special Immigrant Juvenile Policy Update National Engagement (Apr. 27, 2022), https://www.uscis.gov/sites/default/files/document/outreach-engagements/National_Engagement-Special_Immigrant_Juvenile_Policy_Updates-Q%26A.pdf (“SIJ classified noncitizens granted deferred action under this policy will not be eligible to apply for advance parole.”).

¹¹⁷ DHS FAQ, *supra* note 3.

¹¹⁸ There is also an ambiguous reference to advance parole for non-DACA deferred action recipients in an old USCIS report. U.S. Citizenship & Immig. Servs., USCIS Advance Parole Documents, USCIS (Jan. 6, 2017), <https://www.dhs.gov/sites/default/files/publications/USCIS%20-%20USCIS%20Advance%20Parole%20Documents.pdf> (“As noted in the report, although USCIS is unable to provide volume data on non-DACA deferred action recipients who obtained advance parole documents because USCIS systems currently do not track this information electronically, USCIS is able to identify that individuals who obtained advance parole documents because DACA recipients were a small portion of the total group.”).

¹¹⁹ Non-DACA deferred action recipients seeking advance parole who seek to apply, understanding the risk of denial, could fill out Form I-131 Application for Travel Document, enclose a fee or fee waiver and other supporting evidence, and submit to the filing address for “All other applicants (including re-entry permit applicants).” U.S. Citizenship & Immig. Servs., Direct Filing Addresses for Form I-131 Application for Travel Document, <https://www.uscis.gov/i-131-addresses> (last updated Nov. 1, 2022); U.S. Citizenship & Immig. Servs., I-131 Application for Travel Document, <https://www.uscis.gov/i-131> (last updated Jan. 23, 2023).

Travel with advance parole satisfies the requirement that noncitizens seeking to adjust status be “inspected and admitted or paroled.”¹²⁰ But practitioners should be mindful of the fact that, even if advance parole is granted, deferred action grantees seeking to reenter the United States with advance parole are subject to inspection at the port of entry and could be barred from reentering. Customs and Border Protection (CBP) officers make case-specific determinations at the port of entry about whether a noncitizen who is seeking admission into the United States is inadmissible or should be denied entry for other reasons. For that reason, practitioners considering pursuing advance parole should carefully screen their client’s case for all grounds of inadmissibility because of the risk of being denied re-entry even with approved advance parole. The screening should include scrutiny to identify permanent bar issues,¹²¹ 3-and-10-year bar issues, and criminal grounds of inadmissibility.

Practitioners should note that deferred action grantees with unexecuted removal orders¹²² will likely be viewed as having executed the removal order upon departure from the United States.

B. Civil Rights Cases & Private Rights of Action

Many legal cases involving labor rights violations are brought as private civil actions. Moreover, other federal agencies also have interests in enforcing civil rights and other federal laws through individuals coming forward to file complaints and participate in investigations. Although not included in the new guidance, government officials have signaled an openness to considering deferred action for workers or other noncitizen complainants involved in private actions against employers or other entities that have violated their civil rights, including government agencies. Practitioners should be mindful, however, that only requests accompanied by a Statement of Interest from a labor or employment agency can be processed through the Montclair, California centralized process. Applications for deferred action that are not accompanied by a Statement of Interest should be submitted to the local USCIS Field Office.¹²³

¹²⁰ INA § 245(a).

¹²¹ *But see Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012) (travel outside of the United States on advance parole does not constitute a “departure” and does not trigger the unlawful presence 10-year bar under INA § 212(a)(9)(B)(i)(II)).

¹²² As described in Part II Section D, USCIS is unlikely to accept jurisdiction over cases where the applicant has a final order of removal or is in removal proceedings. However, individuals in that situation may have applied for deferred action with ICE ERO.

¹²³ *See* Part II Section E.

VI. Appendices

Appendix 1: Timeline of Prior DHS Guidance on Labor Disputes

Advocates and workers have been raising concerns about the conflict between immigration and labor enforcement for over a decade. Those efforts included high-profile organizing campaigns that generated public outcry over the excesses of immigration enforcement during the Bush and Trump administrations, such as mass worksite raids, impersonation of federal workplace safety inspectors to entrap immigrant workers, and immigration enforcement in retaliation against workers exercising their labor rights.¹²⁴ In response, DHS has increasingly recognized the enforcement interests of labor law agencies and the need for DHS to consider case-by-case prosecutorial discretion in immigration enforcement to further that interest.

Below is a timeline of the key DHS memos and agreements that have incrementally recognized the conflict between immigration and labor enforcement, laying the groundwork for the most recent guidance. All of the Obama-era memoranda and agreements have remained in effect since they were issued, including during the Trump administration when many other immigration enforcement memoranda were repealed. Every major guidance document on immigration enforcement priorities during the Biden administration has included some consideration of the exercise of labor rights, although some of those have been enjoined or remain the subject of litigation.

Over the course of this time period, in addition to these policy statements, DHS has granted several requests for deferred action for immigrant workers involved in labor disputes on a case-by-case basis.

- June 2011: Then-ICE Director John Morton issued a memo (“the Morton Memo”) to remind officers of their authority to exercise prosecutorial discretion “in removal cases involving . . . victims and witnesses” and ¹²⁵ that “[p]articular attention should be paid to: . . . individuals engaging in a protected activity related to civil or other rights (for example, union organizing or complaining to authorities about employment discrimination or housing conditions) who may be in a non-frivolous dispute with an employer, landlord, or contractor.”
- December 2011: ICE and the DOL signed an MOU that commits ICE to considering DOL requests for “a temporary law enforcement parole or deferred action to any witness needed for [an agency’s] investigation of a labor dispute during the pendency of the [agency’s] investigation and any related proceedings where such witness is in the country

¹²⁴ Steven Greenhouse, *U.S. Officials Defend Ploys to Catch Immigrants*, N.Y. TIMES, Feb. 11, 2006, <https://www.nytimes.com/2006/02/11/us/us-officials-defend-ploys-to-catch-immigrants.html>; see generally AFL-CIO, Am. Rights at Work Educ. Fund, Nat’l Emp’t Law Project, *ICED OUT: How Immigration Enforcement Has Interfered with Workers’ Rights* (March 2015), https://s27147.pcdn.co/wp-content/uploads/2015/03/ICED_OUT.pdf.

¹²⁵ John Morton, Dir., U.S. Immig. & Customs Enf’t, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, Policy No. 10076.1 (June 17, 2011), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf>.

unlawfully.”¹²⁶ The memo also created the deconfliction process, where ICE agrees to refrain from conducting worksite enforcement operations at worksites under investigation by the DOL for a labor dispute, subject to narrow exceptions.¹²⁷

- May 2016: ICE and the DOL, NLRB, and EEOC signed an addendum to the 2011 MOU, which, among other terms, included the NLRB and EEOC as agencies that could request temporary law enforcement parole or deferred action for witnesses.¹²⁸ The addendum also extends the deconfliction process to include labor dispute investigations by the NLRB and EEOC.
- May 2016: HSI updated the instructions to its agents on worksite immigration enforcement during labor disputes to reflect the agency’s commitments under the MOUs with the federal labor agencies. Those instructions require immigration agents to look for indications that immigration enforcement may be used to suppress the exercise of labor rights.¹²⁹
- May 2021: The memo to ICE’s Office of the Principal Legal Advisor (OPLA) (the “Trasviña memo”) on interim prosecutorial discretion priorities included “status as a victim, witness, or plaintiff in civil or criminal proceedings” as a mitigating factor supporting the exercise of discretion.¹³⁰ In addition, the memo expressly noted that cases “will merit dismissal in the absence of serious aggravating factors” where “a noncitizen is a cooperating witness or confidential informant or is otherwise significantly assisting state or federal law enforcement.” The memo defined “law enforcement” to include “enforcement of labor and civil rights laws.”¹³¹

¹²⁶ U.S. Dep’t of Homeland Sec. and U.S. Dep’t of Labor, 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

¹²⁷ *Id.*

¹²⁸ U.S. Dep’t of Homeland Sec., U.S. Dep’t of Labor, U.S. Equal Emp’t Opportunity Comm’n, Nat’l Lab. Rels. Bd., Addendum to the Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (May 5, 2016), https://www.nlr.gov/sites/default/files/attachments/basic-page/node-4684/dol-ice_mou-addendum_w.nlr_asha.pdf.

¹²⁹ These instructions were referred to as Operating Instruction 287.3(a) when first published in 1996 and then later designated as ICE Special Agent’s Field Manual (SAFM) 33.14(h). Peter T. Edge, Exec. Assoc. Dir., Homeland Sec. Investigations, Guidance on Civil Inspections of the Employment Eligibility Verification Form (Form I-9) During Labor Disputes (May 10, 2016), <https://www.nilc.org/wp-content/uploads/2016/11/ICE-Guidance-on-I-9-Audits-During-Labor-Disputes-2016-05-10.pdf>.

¹³⁰ John D. Trasviña, Principal Legal Advisor, Immig. & Customs Enf’t, Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Procedures (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf.

¹³¹ This memo was suspended after an injunction of the interim prosecutorial discretion priorities on August 19, 2021. *See* Mem. Op. & Order, *Texas v. United States*, Civ. No. 6:21-cv-00016 (S.D. Tex. Aug. 19, 2021) (enjoining the implementation of interim prosecutorial discretion priorities contained in the January 20, 2021 Pekoske memo and the February 18, 2021 Johnson memo). The Trasviña memo was additionally superseded in 2022 by the Doyle OPLA memo.

- September 2021: Secretary Mayorkas issued a memo (“the Mayorkas memo”) to further define prosecutorial discretion priorities for DHS’s civil immigration enforcement.¹³² The memo recognizes the important benefit of immigrants participating in investigations and legal proceedings that enforce labor, housing, and other laws.¹³³
- October 2021: Secretary Mayorkas issued a memo (“Worksite Enforcement memo” or “October 12 memo”) outlining efforts at DHS to support the exercise of workplace rights, representing a significant shift toward developing a role to complement efforts to enforce labor and employment standards.¹³⁴ The memo calls for the agency to adopt “immigration enforcement policies to facilitate the important work of the Department of Labor and other government agencies to enforce wage protections, workplace safety, labor rights, and other laws and standards.” The memo directed DHS to develop recommendations for how the agency can “alleviate or mitigate” the fear immigrant workers experience when considering whether to report violations and cooperate with labor enforcement agencies. Notably, the memo states that plans should provide for consideration of deferred action, parole, and other available relief for workers. The memo also further instructs DHS to consider requests from DOL for deferred action for worker witnesses or complainants on a case-by-case basis, weighing the “legitimate enforcement interests of a federal government agency” against “any derogatory information to determine whether a favorable exercise of discretion is merited.”
- April 2022: A new OPLA prosecutorial discretion memo¹³⁵ (“the Doyle memo”) reiterated that “status as a victim of crime or victim, witness, or party in legal proceedings, including related to human trafficking and labor exploitation” is a mitigating factor to consider in assessing whether a noncitizen is a threat to public safety.¹³⁶

¹³² Alejandro N. Mayorkas, Sec’y, U.S. Dep’t of Homeland Sec., Guidelines for the Enforcement of Civil Immigration Law, (Sept. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

¹³³ This memo was vacated on June 10, 2022. Mem. Op. & Order, Texas v. United States, No. 6:21-cv-00016 (S.D. Tex. June 10, 2022). The federal government appealed that decision and then sought a stay and writ of certiorari before the U.S. Supreme Court, which heard argument in the case on November 29, 2022. A decision is expected sometime in 2023.

¹³⁴ Alejandro N. Mayorkas, Sec’y, U.S. Dep’t of Homeland Sec., Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf.

¹³⁵ Kerry E. Doyle, Principal Legal Advisor, Immig. & Customs Enf’t, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion (April 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

¹³⁶ OPLA has stated that OPLA attorneys are no longer applying sections of this memo that rely on the currently vacated September 30, 2021 Mayorkas Memo, which remains in litigation. U.S. Immig. & Customs Enf’t, Prosecutorial Discretion & the ICE Office of the Principal Legal Advisor, <https://www.ice.gov/about-ice/opla/prosecutorial-discretion> (last updated Sept. 12, 2022).

Appendix 2: Template Request for a Statement of Interest from Labor or Employment Agency

[AGENCY NAME AND ADDRESS]

XXX 202X

Re: Request for Statement of Interest
[Case Name] [Case/Inspection Number]

To Whom It May Concern:

I write as attorney for [CLIENT], worker complainant(s) and/or witness(es) in [CASE NAME], [CASE NUMBER] before [AGENCY]. We write to request [AGENCY] submit a Statement of Interest to support worker victims and witnesses in this case who may wish to apply to the Department of Homeland Security for prosecutorial discretion, including, but not limited to, deferred action or parole, and work authorization.

[DESCRIBE LEGAL BASIS OF COMPLAINT, CURRENT STATUS, AND CLIENT PARTICIPATION. E.g., CASE NAME alleges violations of the minimum wage and overtime provisions of the Fair Labor Standards Act. The case is currently pending before the Houston District Office of the Department of Labor’s Wage and Hour Division.]

[DESCRIBE STAKES of potential or actual retaliation on the labor investigation. E.g. Fear of immigration retaliation has made numerous workers, including CLIENT, reluctant to participate in DOL’s investigation. Workers’ fear is particularly acute in this case because their employer explicitly threatened to report several workers to immigration earlier this month after a meeting at the workplace during which workers complained about ongoing wage theft and other labor law violations. A history of worksite immigration raids in the region has further contributed to a pervasive chilling effect that is deterring worker cooperation in the ongoing DOL investigation.]

Therefore, we request [AGENCY] issue a Statement of Interest in this case to support individual applications for deferred action and/or parole, and work authorization, from workers to facilitate [AGENCY]’s [pending investigation, litigation, or enforcement interests] and to counteract the chilling effect on labor disputes caused by the fear of immigration-based retaliation, consistent with the criteria in [DOL or other agency’s]’s guidance on this process. [“Process for Requesting Department of Labor Support for Requests to the Department of Homeland Security for Immigration-Related Prosecutorial Discretion During Labor Disputes,” Department of Labor (July 6, 2022), available at <https://www.dol.gov/sites/dolgov/files/OASP/files/Process-For-Requesting-Department-Of-Labor-Support-FAQ.pdf>].

We request the Statement of Interest include all workers employed by [EMPLOYER] at [WORKSITE(S)] at any time from [DATES RELEVANT TO LABOR DISPUTE], as these workers are all potential victims and witnesses in [CASE NAME] during the pendency of the agency’s investigation and litigation, or during the period of any enforceable judicial order or decree, including any period of compliance and monitoring.

Thank you for your attention to this matter. If any further information is needed, please do not hesitate to contact me at [CONTACT INFO].

Best,

[PRACTITIONER NAME]
Counsel for [CLIENT]

Appendix 3: Intake Form for Labor-Based Deferred Action and Employment Authorization

Date: _____ Interviewer Name: _____

Last Name(s), First Name: _____

Preferred Language: _____

Date of Birth: _____

Best Contact: _____ Alternative Contact: _____

BIOGRAPHICAL INFORMATION

Fill out Form G-325 and save a PDF

EMPLOYMENT INFORMATION

Where do you work currently?

Industry: _____

Dates of employment at [Employer(s) listed in Statement of Interest]

Did you use your real name with this employer? Yes No

How did they pay you?

IMMIGRATION HISTORY

Do you have an immigration lawyer working on your case? Yes No

If so, who? _____

Do you give permission to contact your attorney? Yes No

Country/Countries of Origin, Nationality, or Citizenship:¹ _____

Current Immigration Status (*on work visa? expired work visa? no status?*)

If work visa expired, when? _____

¹ Check the current list of designations and redesignations for Temporary Protected Status for the worker's country of origin: <https://www.uscis.gov/humanitarian/temporary-protected-status>

Prior Entries & Exits

Date of Entry	Place of Entry	Status at Entry and Manner of Entry (<i>EWI, inspection and parole, inspection and admission</i>)	CPB/ICE Interaction at the border?	Date of Exit	Method of Exit (<i>travel via ground transportation or flight, voluntary departure, removal, etc.</i>)

For those who have received a visa: Have you ever stayed in the United States after your visa expired? Yes No

If so, when?

Have you ever left the United States after your visa expired? Yes No

If so, when?

Have you ever been arrested or detained by ICE or DHS? Yes No

If yes, explain (dates, applications, resolutions):

Have you ever had any hearings in front of an Immigration Judge? Yes No

If yes, explain (dates, applications, resolutions):

Have you ever been ordered removed by an immigration judge? Yes No

If yes, explain (dates, applications, resolutions):

Have you ever been deported? Yes No
 If yes, explain:

Has any family member filed an immigration petition on your behalf? Yes No
 If so, when? Was it approved? Where is it at now?

Have you ever applied for any immigration benefit yourself? Yes No
 If so, when?

Was it approved? Yes No

Family Ties to the United States

Name	DOB	Relationship ²	Health Issues ³ (if any, what are you doing to support them?)	Immigration Status	Permission to Contact?

Are you a member of any community organizations? (churches, clubs, unions etc.) Yes No
 If yes, which?

Do you have any health conditions for which you're receiving treatment? Yes No
 If so, explain and get contact info for treating medical professional:

² Workers with certain qualifying relatives (including parents, siblings, and children over 21) may be able to adjust status and obtain permanent status. If the worker has never been admitted or paroled into the U.S, practitioners evaluate the worker's eligibility for parole in place.

³ Workers who support relatives with serious health issues may be eligible for Cancellation of Removal if they meet other requirements.

CRIMINAL HISTORY

Have you ever been arrested or had trouble with the police in the U.S. or any other country?

Yes No

Charge	Date	Location and Arresting Agency	Court Location and Case Result	Penalty

Have you ever missed any court dates?

Yes No

If yes, explain why:

If any criminal convictions: Have you completed any programming related to these offenses (treatment for substance abuse driver's education and alcohol abuse for DUI, any counseling or therapy?)

LABOR-BASED RELIEF

Labor-Based U and T Visa⁴

Have you ever worked somewhere where you wanted to leave the job but you felt forced or tricked to keep working?

Yes No

What happened?

Has any employer (or someone who worked for them) ever threatened you?

Yes No

What did they say?

Has any employer (or someone who worked for them) ever threatened to deport you or commented on your immigration status?

Yes No

What did they say?

⁴ These questions are designed to flag issues that may require further investigation: they are not exhaustive and will not conclusively establish whether the worker may be eligible for a U or T visa based on trafficking or other qualifying crimes.

Has any employer (or someone who worked for them) ever tried to harm you by hitting you, threatening you with anything that could be a weapon, or touching you inappropriately? Yes No

Did the police or any other government agents ever come to your workplace? Yes No
If so, when and do you know why?

Have you ever been recruited for a job in the U.S. in your home country? Yes No
If so, were you told anything about the job that turned out to be not true, such as your pay, housing conditions, or immigration status?

OTHER RELIEF

U Visa

Have you been the victim of a crime in the US? Yes No
If yes, explain where, when, what happened:

If yes, did anyone call the police? Yes No

If yes, were you physically or emotionally harmed? Yes No

VAWA

If the person has a US Citizen or permanent resident spouse or parent

Have you been physically, sexually, verbally, or emotionally abused, assaulted, or otherwise hurt or mistreated by your US citizen or permanent resident spouse or parent? Yes No
If yes, explain.

Has your child been physically, sexually, verbally or emotionally abused, assaulted, or otherwise hurt or mistreated by your US citizen or permanent resident spouse or parent? Yes No
a. If yes, explain.

SIJS

If the person is under 21

Where are your parents now?

If either parent is absent, when was the last time you heard from them?

Does your mother care for you, provide housing, food and clothing, and talk to you a lot?
If no, explain. Yes No

Does your father care for you, provide housing, food and clothing, and talk to you a lot?
If no, explain. Yes No

Have you ever been harmed or neglected by either of them? Yes No
What happened?

Asylum/Withholding

Do you have fear of returning to your home country? Yes No

If so, why?

Have you ever requested asylum in any way before (at the border, in immigration court, with USCIS etc.) Yes No

If so, when and has there been a decision?

Military PIP

Do you have any family members serving the US military? Yes No

If yes, who and how are you related to them?

ASSESSING FOR I-765 WORKSHEET AND/OR I-912 FEE WAIVER FOR EAD

What do you do for work?

How often are you paid?

What is your typical paycheck?

Are you currently working right now? Yes No

If not, are you receiving unemployment benefits? Yes No

Are you the primary financial support for your household? Yes No

How many people live in your house?

How much money do the other people living in your house make each year?

What are your expenses during the year? How much do you spend on:

Rent/Mortgage:	
Food:	
Utilities:	
Childcare/care for your parents:	
Insurance:	
Loans/credit cards:	
Car payment:	
Commuting Costs:	
Medical Expenses:	
School Expenses:	
Anything else?	

Do you own property? Yes No

If yes, what? (home, land, car, truck, etc)

Approximate value of each asset:

IF NOT REQUESTING I-912 FEE WAIVER, STOP HERE.

Have you or anyone in your family ever received one of these benefits?

- Medicaid Supplemental Nutrition Assistance Program (SNAP, formerly called Food Stamps)
 Temporary Assistance to Needy Families (TANF), Supplemental Security Income (SSI)

Do you receive money from any of these sources?

- Money from your parents Money from your ex-spouse (Alimony) Child Support
 Educational stipends Pensions Unemployment benefits
 Social Security Benefits Veteran's Benefits
 Money from other people living in your household

Have you filed taxes? Yes No

Has anything significant changed in your life since you filed your tax returns (loss of job, significant expenses, promotion, etc.)?

Yes No

Have you had any situations recently that have caused you to spend more money (ex: eviction, family emergency, medical expenses)?

Yes No

Do you have the following documents (review and make a plan to gather documents relevant to eligibility)?

- If eligible based on income → Income Tax Forms (1040/1040EZ) or Other Proof of Income (Pay Stubs/W-2/Receipts from Check Cashing)
- If eligible based on means-tested benefit → proof of means-tested benefit
- If eligible based on financial hardship → Proof of Rent or Mortgage Payment (Lease, Rent Receipt); Proof of Utility Bills (Receipts or Bills); Other significant expenses (Receipts for food, gas, car payment, insurance, etc.); Proof of Income

LABOR-BASED DEFERRED ACTION WORKSHEET

Records to request from worker in all cases:

- ✓ Birth certificate and passport
- ✓ Any prior immigration documents
- ✓ Marriage certificate
- ✓ Birth certificate, green card or passport of any LPR or USC family members
- ✓ Any criminal records
- ✓ Proof of employment

Case-Specific Records & Next Steps

- Worker has prior immigration history
 - Worker can still apply, but case will be adjudicated by ICE if in proceedings/has removal order
 - Consider requesting PD from OPLA
 - FOIA needed: _____
- Worker has prior criminal history
 - Agency records _____
 - Gather additional mitigation evidence/positive equities
- Worker used other name/identity at worksite.
 - Avoid submitting documents that show false name or other PII
 - Seek alternative proof of employment such as declaration or proof of labor agency cooperation
- Worker appears eligible for labor-based T or U.
 - Additional eligibility screening
 - Assist worker with reporting/requesting cert from labor agency
 - Worker can apply for deferred action for short-term protection and EAD
- Worker may be eligible to adjust status.
 - Additional screening on bars
 - Consider parole in place if worker was never admitted or paroled
- Worker may be eligible/wishes to explore other forms of relief before applying.
 - Additional eligibility screening
 - Consider still apply for DA if other relief has long processing time.

IF NO BOXES CHECKED, WORKER CAN PROCEED WITH APPLYING FOR DEFERRED ACTION ONCE THEY ARE ADVISED OF RISKS AND BENEFITS.

Practitioners may view these documents by completing the following form:
https://tulane.co1.qualtrics.com/jfe/form/SV_3TYmLAhHX5k2hBY.

Appendix 4: Sample Labor Agency Statements of Interest

Appendix 5: Sample Cover Letter Requesting Labor-Based Deferred Action

Appendix 6: Sample Declaration Regarding Employment and Request from Labor-Based Deferred Action Applicant

Appendix 7: Sample I-765 Worksheet

Appendix 8: Redacted Labor-Based Deferred Action Approval Letter