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## AMERICANS IN WAITING<sup>1</sup>: FINDING SOLUTIONS FOR LONG TERM RESIDENTS

*Shoba Sivaprasad Wadhia\**

### INTRODUCTION

For more than a century, U.S. immigration law has recognized long-term residence as a primary factor in granting formal relief or protection. The rationale for regularizing the status of long-term residence is both clear and multifaceted. Over time, long-term residents in the United States build families, buy homes, and integrate into their communities.<sup>2</sup> These equities, coupled with long-term residence, are reflected in the laws used to legalize and protect noncitizens. Many of these laws include a discretionary component, which is itself a powerful sword used by judges and officers when making immigration decisions. As the Supreme Court said in *Arizona v. United States*:

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service.<sup>3</sup>

This paper explores the history and role of long-term residence in immigration law and offers solutions for long-term residents in the United States without status or with short-term status vulnerable to expiration.

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<sup>1</sup> HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2007). This term was first coined by Hiroshi Motomura in this work.

<sup>2</sup> See, e.g., Jeffrey S. Passel and D'Vera Cohn, *Overall Number of U.S. Unauthorized Immigrants Holds Steady Since 2009*, PEW RESEARCH CTR. (Sept. 20, 2016), <http://www.pewhispanic.org/2016/09/20/overall-number-of-u-s-unauthorized-immigrants-holds-steady-since-2009/>; CAP Immigration Team and Michael D. Nicholson, *The Facts on Immigration Today: 2017 Edition*, CTR. FOR AM. PROGRESS (Apr. 20, 2017, 9:00 AM), <https://www.americanprogress.org/issues/immigration/reports/2017/04/20/430736/facts-immigration-today-2017-edition/>.

<sup>3</sup> *Arizona v. United States*, 567 U.S. 387, 396 (2012).

The legal recognition of long-term residence is complicated by other factors and features in U.S. immigration law. For example, those who entered without inspection into the United States may be prohibited from reentering the country in the future or obtaining a green card based on marriage to a United States citizen, despite a long-term residence in this country.<sup>4</sup> Further, noncitizens who entered on a valid visa and remain in the United States for lengthy periods may still be deportable for overstaying the visa or committing an act that is labeled as a “crime” or “terrorist” activity.<sup>5</sup> The interplay between long-term residence and adverse factors is featured prominently in U.S. immigration law. For example, a person may qualify for protection based on ten years of continuous presence in the United States but still may be ineligible because of prior criminal conduct.<sup>6</sup>

Beyond the law, the policy debate around immigration is also complicated by the temptation to divide immigrants into a “deserving” and “not deserving” category. Does the immigrant with fifteen years of residence in the United States and two United States citizen children deserve to stay in the United States? Does this answer change if this same person has committed a crime? This paper does not resolve these policy questions, nor does it seek to critique the disqualifying factors that prevent a long-term resident from achieving long-term status in the United States. Instead, this paper seeks to summarize the legal history and remedies available under United States immigration law for those individuals who have lived in the United States for lengthy periods.

## I. THE LEGAL HISTORY OF LONG-TERM RESIDENCY

Until the late nineteenth century, borders were open and immigration encouraged, with the exception of Chinese immigration.<sup>7</sup> Congress recognized the positive elements of residence in 1891 when it enacted a statute authorizing deportation of those who became public charges within one year of arrival.<sup>8</sup> As described by historian Mae Ngai, “Deportation was thus conceived as appropriate only for persons with limited length of stay in the country.”<sup>9</sup> Congress later extended the statute of limitations from one to five years, recognizing that after a period of

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<sup>4</sup> See, e.g., Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(6)(A), 1182(a)(9), 1225 (2013).

<sup>5</sup> See generally *id.* at § 1227(a) (2008).

<sup>6</sup> *Id.* at § 1229b(b)(1) (2008).

<sup>7</sup> See MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 17-18 (2004).

<sup>8</sup> Mae M. Ngai, ‘Historically, America both legalized and deported migrants— since 1996, it only deports’, BOS. REVIEW (May/June 2009), <http://bostonreview.net/archives/BR34.3/ngai.php>.

<sup>9</sup> *Id.* “Public charge” is a term of art in the immigration statute that makes certain immigrants ineligible for permanent status in the United States. See, e.g., Immigration and Nationality Act § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2013) (makes an immigrant ineligible from admission to the United States as a green card holder if “at the time of application for admission or adjustment of status, is likely at any time to become a public charge”). See also *Public Charge Fact Sheet*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (last updated Oct. 16, 2019),

<https://www.uscis.gov/news/fact-sheets/public-charge-fact-sheet>.

time noncitizens establish ties in the United States that no longer make deportation desirable or suitable.<sup>10</sup> Ngai states that “this policy recognized an important reality about illegal immigrants: [t]hey settle, raise families and acquire property—in other words, they become part of the nation's economic and social fabric. In the first decades of the 20th century, it was considered unconscionable to expel such people.”<sup>11</sup>

Registry<sup>12</sup> is a remedy contained in the Immigration and Nationality Act (“INA”) Section 249, which extends to those who: entered the United States prior to January 1, 1972; can show continuous residence since such entry; are persons of good moral character; are not ineligible to citizenship; and are not deportable for national security-related reasons.<sup>13</sup> One who is granted registry receives lawful permanent residence or a green card. Today, a person who has resided in the United States for more than four decades qualifies for registry.<sup>14</sup> Registry was first introduced into the law in 1929, and initially the cut-off date for entry was set at June 3, 1921.<sup>15</sup> The cut-off date of January 1, 1972 was created by Congress after it passed the Immigration Reform and Control Act (“IRCA”).<sup>16</sup> Between 1985 and 2001, about 61,000 people acquired lawful permanent residence through the registry provision.<sup>17</sup>

Beyond registry, IRCA also provided a long-term solution for certain noncitizens with continuous residence in the United States since January 1, 1982.<sup>18</sup> Again, this illustrates how Congress recognized a period of residence in the United States as a primary factor in determining a person’s future status in the United States. Finally, IRCA enabled certain agricultural workers to legalize their status.<sup>19</sup> As summarized by scholar and author Hiroshi Motomura: “Almost 1.7 million noncitizens obtained lawful status under the general legalization program, and another 1.3 million obtained lawful status through the SAW program. Together, the

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<sup>10</sup> Mae M. Ngai, *We Need a Deportation Deadline*, WASH. POST (June 14, 2015), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/13/AR2005061301460.html>.

<sup>11</sup> *Id.*

<sup>12</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986), (amending scattered sections of 8 U.S.C.).

<sup>13</sup> 8 U.S.C. § 1259 (1996).

<sup>14</sup> *Id.*

<sup>15</sup> CONG. RESEARCH SERV., RL30578, IMMIGRATION: REGISTRY AS MEANS OF OBTAINING LAWFUL PERMANENT RESIDENCE, (2001), <https://www.everycrsreport.com/reports/RL30578.html>; see also *Yearbooks of Immigration Statistics, 2002-2017*, U.S. DEPT. OF HOMELAND SECURITY, <https://www.dhs.gov/immigration-statistics/yearbook>.

<sup>16</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

<sup>17</sup> CONG. RESEARCH SERV., *supra* note 15; see also Nolan Rappaport, *Undocumented Aliens Who Entered the United States Before 1972, and Have Resided Here Continuously Since Then, May Be Eligible for Lawful Status Under the Little-Known Registry Legalization Program*, ILW (2016), <http://www.ilw.com/articles/2016-531-Rappaport.pdf>.

<sup>18</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); see also Hiroshi Motomura, *What is “Comprehensive Immigration Reform?” Taking the Long View*, 6 ARK. L. REV. 225, 225 (2010) (discussing the “special agricultural worker” or “SAW” program).

<sup>19</sup> Motomura, *supra* note 18, at 226.

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general and SAW programs legalized over sixty percent of the pre-IRCA undocumented population.”<sup>20</sup>

Suspension of deportation (“suspension”) is a remedy that was enacted by Congress in 1990, and is available to those in deportation proceedings who can show seven years of continuous presence in the United States, good moral character, and that deportation would cause “extreme hardship” to one’s self or a qualifying family member.<sup>21</sup> Suspension was repealed in the wake of a 1996 immigration law, known as the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRAIRA”),<sup>22</sup> and replaced by a new remedy called “Part B” Cancellation of Removal. Importantly, qualifying individuals who were placed in deportation proceedings prior to the effective date of IIRAIRA may still apply for suspension.<sup>23</sup> One who is granted suspension receives lawful permanent residence or a green card. Significantly, suspension hinges on longtime residence and other factors, and highlights the role such residence has played as a defense to removal for nearly thirty years.

The concept of suspension was introduced by Congress more than seventy-five years ago with the Alien Registration Act of 1940.<sup>24</sup> The pertinent section of the Act provided for suspension of noncitizens “if not racially inadmissible or ineligible to naturalization in the United States if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien.”<sup>25</sup> Presumably because the standard of “economic detriment” was viewed as too generous, Congress tightened the standard when it passed the Immigration and Nationality Act of 1952 by creating a requirement of “exceptional and extremely unusual hardship” to the noncitizen or to his spouse, parent, or child.<sup>26</sup> Under this version, an applicant could obtain suspension only if a very high level of hardship upon removal existed. As Elwin Griffith stated, “Perhaps this time Congress went too far.”<sup>27</sup> The statute was amended ten years later in 1962 by creating two different channels for suspension depending on the background of the applicant, and by reducing the hardship requirement to “extreme hardship” in the case of individuals with or without less

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<sup>20</sup> *Id.*

<sup>21</sup> 8 C.F.R. § 240.65(b) (2019); *see also* Immigration and Nationality Act, Pub. L. No. 101-649, § 302(a), 104 Stat. 4978 (1990) (current version at 8 U.S.C. § 1254(a)).

<sup>22</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

<sup>23</sup> 8 C.F.R. § 240.65(c) (2019).

<sup>24</sup> For a fascinating and comprehensive history of suspension of deportation and cancellation of removal, *see* Elwin Griffith, *The Transition between Suspension of Deportation and Cancellation of Removal for Nonpermanent Residents under the Immigration and Nationality Act: The Impact of the 1996 Reform Legislation*, 20 IMMIGR. & NAT'LITY L. REV. 279 (1999).

<sup>25</sup> Alien Registration Act, Pub. L. No. 76-670, § 20, 54 Stat. 670, 672 (1940).

<sup>26</sup> *See* Ngai, *supra* note 10; Immigration and Nationality Act, Pub. L. No. 82-414, § 244, 66 Stat. 163, 214 (1952).

<sup>27</sup> Elwin Griffith, *The Transition between Suspension of Deportation and Cancellation of Removal for Nonpermanent Residents under the Immigration and Nationality Act: The Impact of the 1996 Reform Legislation*, 20 IMMIGR. & NAT'LITY L. REV. 279, 282 (1999).

serious criminal histories.<sup>28</sup> Both versions of suspension conferred lawful permanent residence to the applicant.<sup>29</sup>

Cancellation of Removal (“cancellation”) was introduced by Congress in 1996,<sup>30</sup> replacing two earlier programs known as “suspension of deportation” (outlined above) and a special waiver for green card holders deportable for certain crimes known as the “212” waiver. The terms of cancellation are more onerous than were the terms for its predecessors. But importantly, cancellation continues to recognize the element of long-term residence in the United States. There are three versions of cancellation,<sup>31</sup> but the version most relevant to the theme of this paper is “Part B” cancellation. “Part B” cancellation is reserved for certain individuals who can show continuous physical presence for at least ten years, good moral character, a minor or zero criminal history, “exceptional and extremely unusual hardship” to a spouse, parent, or child who hold a green card or United States citizenship, and eligibility as a matter of discretion.<sup>32</sup> Qualifying for “Part B” cancellation is no easy task, as it often requires compelling facts and high quality legal representation. By its terms, any person eligible for cancellation bears the equities that Congress and the courts have long recognized as worthy of protection.<sup>33</sup> The ceiling on cancellation grants is 4,000 annually, which limits the number of people who can receive cancellation.<sup>34</sup> Those who receive cancellation of removal acquire lawful permanent residence or a green card. The legislative transition from suspension to cancellation by Congress reveals its intent to tighten the standard for noncitizens who are undocumented but with strong ties to the United States.

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<sup>28</sup> Pub. L. No. 87-855, § 4, 76 Stat. 1247, 1247-48 (1962). The pertinent language read as follows: “(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or “(2) is deportable under paragraphs (4), (5), (6), (7), (11), 8 use 1251. (12), (14), (15), (16), (17), or (18) of section 241(a); has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.”

<sup>29</sup> *Id.*

<sup>30</sup> See Pub. L. No. 104-208, 100 Stat. 3009 (1996) (codified at Immigration and Nationality Act, 8 U.S.C. § 1229b (1996)).

<sup>31</sup> See generally *id.*

<sup>32</sup> *Id.* at § 1229(b)(1) (2018).

<sup>33</sup> See, e.g., *Arizona v. United States*, 567 U.S. 387, 396 (2012) (“The equities of an individual case may turn on many factors, including whether the alien has any children born in the United States, long ties to the community, or a record of distinguished military service.”).

<sup>34</sup> Immigration and Nationality Act, 8 U.S.C. § 1229b(e)(1) (2018).

The Nicaraguan Adjustment and Central American Relief Act (“NACARA”)<sup>35</sup> is a remedy available to certain nationals from Guatemala, El Salvador, and former Soviet Bloc countries.<sup>36</sup> NACARA was a political response to nationals who had lived in the United States for a long period of time but who were impacted negatively by harsh new laws imposed by Congress in 1996.<sup>37</sup> Many individuals who qualify for NACARA came to the United States as a result of wars in their home countries.<sup>38</sup> Those who are eligible may apply for “special rule cancellation” or suspension of deportation if they can show they are: 1) not inadmissible for specific criminal, fraud, or other reasons; 2) physically present in the United States for a continuous period of seven years immediately preceding the date the application was filed; 3) a person of good moral character during the required period of continuous physical presence; and 4) removal from the United States would result in extreme hardship to the individual, or to his or her spouse, parent, or child who is a citizen or a lawfully permitted resident (“LPR”).<sup>39</sup> The historical events leading to Section 203 of the NACARA are rich and based in part on the idea that new laws should not be applied retroactively to those who would have benefited from an earlier version of the law.<sup>40</sup> The creation of regulations to govern Section 203 also serves as an important reminder of the role of advocacy and the executive branch in interpreting statutes fairly.<sup>41</sup>

Beyond the remedies and benefits that provide a permanent solution are the long-standing remedies that provide a temporary one. To illustrate, holders of a statutory form of protection known as “temporary protected status” have been

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<sup>35</sup> Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 201, 111 Stat. 2160 (1997).

<sup>36</sup> *Id.* at 2193 (1997) (as amended by the Technical Corrections to the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-139, § 1, 111 Stat. 2644 (1997)); *See also*, *Nicaraguan Adjustment and Central American Relief Act (NACARA) 203: Eligibility to Apply With USCIS*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Sept. 21, 2017), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/nicaraguan-adjustment-and-central-american-relief-act-nacara-203-eligibility-apply-uscis>.

<sup>37</sup> Lourdes A. Rodriguez, *Understanding the Nicaraguan Adjustment and Central American Relief Act*, 5 ILSA J. INT’L & COMP. L. 501, 502 (1999).

<sup>38</sup> *See, e.g.*, Susanne Jonas, *Guatemalan Migration in Times of Civil War and Post-War Challenges*, MIGRATION POL’Y INST. (Mar. 27, 2013), <https://www.migrationpolicy.org/article/guatemalan-migration-times-civil-war-and-post-war-challenges>; *History*, CARECEN (last visited June 26, 2019), <http://carecencdc.org/about/history/>.

<sup>39</sup> 8 C.F.R. §§ 240.65(a), 240.66(a) (2019); *See also*, *Nicaraguan Adjustment and Central American Relief Act (NACARA) 203: Eligibility to Apply With USCIS*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (last updated Sept. 21, 2017), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/nicaraguan-adjustment-and-central-american-relief-act-nacara-203-eligibility-apply-uscis>.

<sup>40</sup> Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 203, 111 Stat. 2160, 2193 (1997). For a short history of 203 NACARA, *see* Eli Coffino, *A Long Road to Residency: The Legal History of Salvadoran & Guatemalan Immigration to the United States with a Focus on Nacara*, 14 CARDOZO J. INT’L & COMP. L. 177 (2006); *see also* Mary Giovagnoli, *Using All the Tools in the Toolbox: How Past Administrations Have Used Executive Branch Authority in Immigration*, IMMIGR. POL’Y CTR. AT THE AM. IMMIGR. COUNCIL, 8-9 (Sept. 2011), [https://www.americanimmigrationcouncil.org/sites/default/files/research/Using\\_All\\_the\\_Tools\\_-\\_NACARA\\_090111.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/Using_All_the_Tools_-_NACARA_090111.pdf).

<sup>41</sup> Giovagnoli, *supra* note 40, at 8-9.

identified and included in legislative proposals for “comprehensive immigration reform.”<sup>42</sup> Such proposals have enabled certain noncitizens with ties to the United States, qualifying relationships to a family member or employer, and who are otherwise admissible to apply for a two-step reprieve that ultimately leads to a permanent status.<sup>43</sup>

Temporary Protected Status (“TPS”) was introduced by Congress in 1990 and is currently codified in the immigration statute.<sup>44</sup> TPS is available to certain nationals who are residing in the United States, but who are unable to return to their homeland because of an ongoing conflict such as a civil war; an environmental disaster in the state such as an earthquake, flood, or epidemic; or other related conditions.<sup>45</sup> Many TPS holders have lived in the United States for more than a decade, exclusively because of ongoing conditions or conflict in their home countries. Research by the American Immigration Council shows that more than half of Salvadorans and Hondurans with TPS have lived in the United States for at least two decades.<sup>46</sup> One who receives TPS obtains temporary legal status in the United States.

Beyond those with TPS, many immigrants living in the United States with a temporary reprieve through prosecutorial discretion in the United States have been considered in legislative proposals aimed at legalizing long term residents. Prosecutorial discretion refers to the choice made by the Department of Homeland Security (“DHS”) (and previously the Immigration and Naturalization Service) about whether to enforce the full scope of the immigration law against a person or group of persons. The use of prosecutorial discretion is inevitable. According to one guideline from 2011, the government only has the resources to remove about 400,000, or less than four percent, of the roughly 11.2 million people living in the United States without documentation.<sup>47</sup> This section spotlights two forms of prosecutorial discretion that have been used to protect long-term residents from deportation.

Deferred action is a form of prosecutorial discretion that has operated in the immigration system for decades. The first written policy on deferred action was

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<sup>42</sup> See JILL H. WILSON, CONG. RES. SERV., RS20844, TEMPORARY PROTECTED STATUS: OVERVIEW AND CURRENT ISSUES, 4 (2019).

<sup>43</sup> See, e.g., *Side-by-Side Comparison of 2013 Senate Immigration Bill with 2006 and 2007 Senate Legislation*, MIGRATION POL’Y INST. (Apr. 2013), <https://www.migrationpolicy.org/research/side-side-comparison-2013-senate-immigration-bill-2006-and-2007-senate-legislation>; see also, Shoba Sivaprasad Wadhia, *Immigration: Mind Over Matter*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 201 (2005), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1346586](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1346586).

<sup>44</sup> Immigration and Nationality Act, 8 U.S.C. § 1254a (2018).

<sup>45</sup> *Id.* at § 1254a(b)(1)(B) (2018).

<sup>46</sup> *Temporary Protected Status in the United States: Beneficiaries from El Salvador, Honduras, and Haiti*, AM. IMMIGR. COUNCIL, 1 (Oct. 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/temporary\\_protected\\_status\\_in\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/temporary_protected_status_in_the_united_states.pdf).

<sup>47</sup> Memorandum from John Morton, Dir., U.S. Immigr. and Customs Enf’t (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>; see also SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 29-61 (2019).



revealed in the 1970s in connection with a lawsuit brought by Leon Wildes, the immigration lawyer representing a former Beatle known as John Lennon. That policy was framed as “Operations Instructions” (“O.I.”) and required the agency to consider the following factors during the course of a deferred action case: (i) young or old age; (ii) years present in the United States; (iii) health condition requiring care in the United States; (iv) impact of removal on family in United States; and (v) criminal or other problematic conduct.<sup>48</sup> The Operations Instructions required consideration for deferred action “[i]n every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors . . . .”<sup>49</sup>

While the O.I. has since been repealed, several policy documents have named “deferred action” as a viable form of prosecutorial discretion.<sup>50</sup> Deferred action has also been recognized by Congress and the courts as a viable legal tool for protecting individuals for humanitarian reasons.<sup>51</sup> In the thousands of individual deferred action files I have studied over the last decade, long-term residence in the United States has served as a primary factor in case outcomes.<sup>52</sup> As one illustration, a 2013 sample of 578 deferred action cases reveals that grants were largely made for humanitarian reasons involving one or more of the following factors: (1) serious medical condition; (2) residence in the United States for five years or more; (3) advanced or tender age; and (4) family members with U.S. citizenship.<sup>53</sup>

Deferred Action for Childhood Arrivals (“DACA”) is a policy announced in 2012 by President Obama and implemented by the Secretary of Homeland Security in August of the same year.<sup>54</sup> To qualify for DACA, an individual must show that they were under the age of thirty-one as of June 15, 2012; came to the United States

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<sup>48</sup> *Operations Instructions*, (Legacy) U.S. IMMIGR. AND NATURALIZATION SERV., O.I. § 103.1(a)(1)(ii)(1975).

<sup>49</sup> *Id.*; see also Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. L. J. 243, 256 n.67 (2010), reprinted in 31 IMMIGR. & NAT'LITY L. REV. 961 (2010).

<sup>50</sup> See, e.g., Memorandum from Jeh Johnson, Sec'y of U.S. Dep't. of Homeland Sec., to Dirs., on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf); Memorandum from John Morton, Assistant Sec., ICE, on Civil Immigration Enforcement Priorities for the Apprehension, Detention and Removal of Aliens (June 30, 2010), [http://www.ice.gov/doclib/civil\\_enforcement\\_priorities.pdf](http://www.ice.gov/doclib/civil_enforcement_priorities.pdf); Memorandum from Doris Meissner, Comm'r of Immigr. and Naturalization Serv., on Exercising Prosecutorial Discretion (Nov. 17, 2000), <https://www.shusterman.com/pdf/prosecutorialdiscretionimmigration1100.pdf>.

<sup>51</sup> See, e.g., Letter from Law Professors to President Barack Obama (Sept. 3, 2014), [https://pennstatelaw.psu.edu/\\_file/Law-Professor-Letter.pdf](https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf); 8 U.S.C. § 1252(g) (2006); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

<sup>52</sup> See, e.g., SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* 54-88 (2015).

<sup>53</sup> Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285 (2015).

<sup>54</sup> Memorandum from Janet Napolitano, Sec'y of the U.S. Dept. of Homeland Sec. to Dirs., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

before reaching their sixteenth birthday; have continuously resided in the United States since June 15, 2007, up to the present time; were physically present in the United States on June 15, 2012, and at the time of making their request for consideration of deferred action with the United States Citizenship and Immigration Services; had no lawful status on June 15, 2012; are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.<sup>55</sup> Those who request and receive DACA are granted deferred action for a two-year period and eligibility to work pursuant to a regulation published in 1981 by the Ronald Reagan administration.<sup>56</sup> Of note, long-term residence was a criterion for the DACA policy. Given that one requirement for those requesting DACA is that they have continuously resided in the United States since June 15, 2007,<sup>57</sup> as of June 15, 2017, every person with DACA has lived in the United States for at least ten years.

Order of Supervision (“OSUP”) is another form of prosecutorial discretion in immigration law and is processed after the government orders removal. An OSUP may be issued by DHS after a person has been ordered to be removed and, when granted for discretionary purposes, might require the grantee to report to a local immigration office for “check-in” appointments periodically.<sup>58</sup> Many individuals with OSUP have resided in the United States for ten years or more. Some individuals complying with OSUP have become targets of immigration enforcement under the Trump administration.<sup>59</sup> Detaining and deporting individuals who comply with their OSUP and contribute in meaningful ways to society is deeply troubling and is one reason why critics call the current immigration enforcement landscape an “open season” on every undocumented immigrant.<sup>60</sup>

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<sup>55</sup> *Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (last updated Oct. 6, 2017), <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca>.

<sup>56</sup> 8 C.F.R. § 274a.12(c)(14) (2019).

<sup>57</sup> U.S. CITIZENSHIP AND IMMIGR. SERVS., *supra* note 39.

<sup>58</sup> Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & L. 1, 9 (2016).

<sup>59</sup> *See, e.g.*, Jesse Paul, *Mother of Four Living in Aurora is Detained by ICE After Years of Following Agency’s Orders, Lawyer Says*, DENVER POST (Apr. 14, 2017), <http://www.denverpost.com/2017/04/13/mother-of-four-living-in-aurora-is-detained-by-ice-after-years-of-following-agencys-orders-lawyer-says/>.

<sup>60</sup> *See, e.g.*, Dean DeChiaro, *‘Open Season’ on Immigrants as Discretion Fades*, ROLL CALL (Dec. 11, 2017), <https://www.rollcall.com/news/politics/open-season-on-immigrants>

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## II. FINDING SOLUTIONS TO LONG-TERM RESIDENCE

The federal government must continue to recognize long-term residence when creating immigration law and policy. The Pew Research Center estimates that in 2014, sixty-six percent of unauthorized immigrants had lived in the United States for a decade or longer.<sup>61</sup> This figure excludes the more than 300,000 individuals at risk of losing TPS if Congress fails to enact a long-term solution. Congress should support a permanent solution for individuals living in the United States for ten years or more and with other equities.

Under the current design, qualifying individuals may acquire lawful permanent residence (a green card) following a visa interview at a consulate or through “adjustment of status” if already present in the United States.<sup>62</sup> In 2017, forty-eight percent of the more than one million people who acquired lawful permanent residence did so through adjustment of status.<sup>63</sup> Over the years, laws have been enacted to adjust the status of certain noncitizens who have lived in the United States for a lengthy period of time. Some of these laws require an individual to pay a fee and petition the immigration agency (now DHS), while others require a qualifying applicant to seek the remedy as a defense to removal before an immigration judge.

Legal channels should be created for undocumented immigrants who have lived in the United States for at least a decade and are otherwise contributing in meaningful ways, such as caring for family members or steady employment in the United States. These legal channels could be created through legislation or regulations and could furthermore be made discretionary to provide some flexibility for adjudicators. One legislative solution Congress could take is to lift the current statutory cap on cancellation of removal cases and to restore the hardship requirement that existed prior to the 1996 immigration laws.

Congress should also pass legislation to provide a long-term solution for current, recent, and soon-to-be expired holders of DACA, TPS, or Deferred Enforced Departure who have lived in the United States for ten years or longer and who otherwise bear favorable equities like steady employment and family in the United States. Research conducted by the American Immigration Council shows that more than eighty percent of TPS holders from El Salvador, Honduras, and Haiti are in the labor force and that many have at least one child born in the United States.<sup>64</sup> Furthermore, research conducted by the Center for American Progress shows that ninety-seven percent of DACA recipients within the largest pool sampled are employed or in school.<sup>65</sup> One bill, H.R. 6 or the American Dream and Promise Act,

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<sup>61</sup> Jeffrey S. Passel and D’Vera Cohn, *Unauthorized Immigrant Population Stable for Half a Decade*, PEW RES. CTR. (Sept. 21, 2016), <http://www.pewresearch.org/fact-tank/2016/09/21/unauthorized-immigrant-population-stable-for-half-a-decade/>.

<sup>62</sup> *Adjustment of Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (last updated Dec. 28, 2017), <https://www.uscis.gov/greencard/adjustment-of-status>.

<sup>63</sup> *Annual Flow Report: Lawful Permanent Residents*, U.S. DEPT. OF HOMELAND SEC’Y (Aug. 2018), [https://www.dhs.gov/sites/default/files/publications/Lawful\\_Permanent\\_Residents\\_2017.pdf](https://www.dhs.gov/sites/default/files/publications/Lawful_Permanent_Residents_2017.pdf).

<sup>64</sup> AM. IMMIGR. COUNCIL, *supra* note 46.

<sup>65</sup> Tom K. Wong et al., *DACA Recipients’ Economic and Educational Gains Continue to Grow*,

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would place more than 2 million Dreamers, TPS, and DED holders on a path to permanent residency.<sup>66</sup> Immigration expert, Tom Jawetz, discusses the ways a legislative solution can help restore the rule of law.<sup>67</sup>

If our collective goal is to create policy that upholds the rule of law in the U.S. immigration system—where we all live by a fair and humane system of rules that is transparent, consistent, and aligned with everyday realities—there can be no question that the nation must provide a path to permanent legal status for those already here. They are full and contributing members of U.S. communities—raising families, paying taxes, and enriching society in myriad ways.<sup>68</sup>

Beyond Congress, the DHS must replace its broadly-scoped immigration enforcement policy with one that is measured and reflects a wise use of resources. DHS must use its discretion fairly and consider long-term residence as a strong criterion for protection from removal. The changes described above face challenges given the current political climate, but they are ultimately what is necessary to create a humane immigration system.

While this essay recommends a permanent solution for those noncitizens who have lived in the United States for an extended period of time and contribute to communities and the nation in meaningful ways, the challenges associated with making this recommendation a reality are plentiful and worthy of discussion. First, the immigration court system, housed by the Department of Justice in a unit called the Executive Office for Immigration Review<sup>69</sup> (“EOIR”) is overwhelmed. DOJ data from the case backlog in the EOIR found more than 800,000 cases were pending at the start of fiscal year 2019 in the nation’s fifty-eight immigration courts.<sup>70</sup> Because of the backlogs in our courts, it is possible for an individual placed into the removal process to wait for up to three years before appearing before an immigration judge to challenge removability or apply for relief.<sup>71</sup> However, resolving the challenge of overwhelmed courts requires the investment of more resources into our immigration courts and the exploration of other solutions such as an independent court, both of which are beyond the scope of the paper.

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CENTER FOR AM. PROGRESS (Aug. 28, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/08/28/437956/daca-recipients-economic-educational-gains-continue-grow/>.

<sup>66</sup> H.R. 6, 116<sup>th</sup> Cong. (2019).

<sup>67</sup> See generally Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, CENTER FOR AM. PROGRESS (July 22, 2019), <https://www.americanprogress.org/issues/immigration/reports/2019/07/22/472378/restoring-rule-law-fair-humane-workable-immigration-system/>.

<sup>68</sup> *Id.*

<sup>69</sup> *Executive Office for Immigration Review*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/eoir/about-office>.

<sup>70</sup> *Executive Office for Immigration Review Adjudication Statistics*, U.S. DEPT. OF JUSTICE (July 24, 2019), <https://www.justice.gov/eoir/page/file/1060836/download>.

<sup>71</sup> U.S. DEPT. OF JUSTICE, *supra* note 69.

Another challenge is the potential criticism by those who claim undocumented immigrants should get “back in line” to avoid having an unfair advantage over those currently “waiting in line” under the existing legal category. However, creating a legal channel for those who have lived in the United States for a decade or more, often times with other equities like contributions to the economy and family ties, is distinguishable from the backlogs people currently face with our legal immigration system and is resolvable with broader changes to the immigration system, which again are beyond the scope of this paper.

Finally, the policy gains of enacting a permanent solution for long-term residents are plentiful. First, those who call America home will have the opportunity to live in the United States with dignity, support their families, enhance diversity in our educational institutions, and build the economy. Second, identifying and collecting information from would-be applicants would only improve national security by allowing the government to have information about the background and identity of the individual applicant (although, it should also be noted that in many cases, the government may already have this information through programs such as DACA and TPS). Finally, conferring permanent status to this class is in line with America’s identity as a nation of immigrants and the values we place on those who have laid roots in the United States and contributed in meaningful ways. Long-term residents in the United States deserve security and the tools to continue to thrive, not vulnerability and fear that they might be separated from their family and deported.

The federal government has long recognized the role of residence in the United States as a factor in creating rules or making discretionary decisions about who qualifies for a benefit or protection from deportation under United States immigration law.<sup>72</sup> Understanding the history and current legal landscape is critical, in light of the growing number of unauthorized immigrants living in the United States for lengthy periods of time. This paper shows how the creation of solutions for immigrants with long periods of stay are consistent with history and current immigration laws.

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<sup>72</sup> Though continuous “residence” and continuous “physical presence” are separate terms of art in immigration law, this paper uses both terms interchangeably except when quoting or summarizing the requirements of a statute.