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THE SPIRIT IS AT THE AIRPORT, BUT THE FLESH IS IN THE UNITED STATES: UNDERSTANDING PAROLE

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One immigration concept which sometimes gives rise to confusion is that of "parole". The most common use of parole at present is to allow in, pursuant to an "advance parole" authorization, aliens who have a pending application for adjustment of status under INA § 245 or certain other relief. Perhaps because of how routine it is for an applicant for adjustment of status to seek and utilize advance parole (although it can be extremely dangerous for applicants with previous unlawful presence in the United States), it is easy to forget how unusual parole really is, as a matter of what one might call immigration metaphysics.

Section § 212(d)(5)(A), which provides the authority to parole aliens into the United States temporarily, specifies that parole "shall not be regarded as an admission of the alien" and that after the purposes of a parole have been served "the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant to the United States." According to INA §101(a)(13)(B), as well, "n alien who is paroled under section 212(d)(5) . . . shall not be considered to have been admitted." Parole can be considered a "lawful immigration status" in some contexts, such as the list in 8 C.F.R. § 245.1(d)(1)(v) of how one may maintain status for adjustment purposes, but it is not an admission. The question arises, if an alien who is paroled into the United States shall not be considered to have been admitted, what should we consider has happened to him?

The Supreme Court has previously described an alien granted parole as "in theory of law at the boundary line" and not "legally 'within the United States'".

Leng May Ma v. Barber, 357 U.S. 185, 189-190 (1958); *Kaplan v. Tod*, 267 U.S. 228, 230 (1925). In *Leng May Ma*, the Supreme Court denied an alien the opportunity to apply for what was then called withholding of deportation (the predecessor of what is now withholding of removal under INA § 241(b)(3)), on the theory that the statutory provision applying to aliens "within the United States" who would face persecution if returned to their home countries did not apply to a parolee.

To make the issue somewhat more understandable to nonlawyers, the author of this posting sometimes explains to clients that in effect their spirit has remained at the airport, and only their body has been allowed into the United States. They may think that they have been allowed into the United States, but actually they have only been allowed to physically wander around the country while DHS decides whether they should in fact be let in.

Appreciating the nature of parole can provide useful insight into otherwise-mysterious immigration phenomena. One which has been obscure to some is the policy announced in a 2000 memorandum of INS Acting Associate Commissioner Cronin, under which certain aliens formerly in H-1B status who re-enter the United States pursuant to a grant of advance parole rather than on their H-1B visa can seek and be granted extensions of stay as H-1B nonimmigrants. Being able to "extend" H-1B status would seem to imply that one had that status in the first place, and some have understood the Cronin memorandum to imply a sort of latent or inchoate H-1B status for parolees with an extant valid H-1B petition on their behalf. But this author believes that a Cronin memorandum "extension" is better understood as delayed admission of the paroled alien into the United States in H-1B status. As the Cronin memorandum puts it, "If the Service approves the alien's application for an extension of nonimmigrant status, the decision granting such an extension will have the effect of terminating the grant of parole and admitting the alien in the relevant nonimmigrant classification."

If a paroled alien is considered, as a matter of law, still to be waiting at the airport during the period of the parole, then DHS can decide to admit her in H-1B status as a new arrival would be admitted in H-1B status. Just as an alien who has entered on advance parole is often subsequently admitted as a lawful permanent resident by the grant of her adjustment application – analogous to an immigrant who is admitted as an LPR following consular processing of an immigrant visa, except that no actual visa is required – an alien on advance

parole can under the Cronin memorandum be admitted as an H-1B nonimmigrant instead.

One interesting implication of this view is that it suggests that unauthorized employment or other violations of the terms of H-1B employment by a paroled alien prior to an application for a Cronin memo "extension" should be disregarded by USCIS. Ordinarily, an admitted alien seeking an extension of stay must demonstrate continuity of status and a lack of status violation, although USCIS does have the authority to excuse a gap in status pursuant to 8 CFR 214.1(c)(4) if "he alien has not otherwise violated his or her nonimmigrant status," 8 CFR 214.1(c)(4)(ii). But there is no requirement as a matter of statute or regulation that an alien seeking admission as a nonimmigrant have previously maintained status, at least so long as the alien has not accumulated 180 days of unlawful presence as that term is defined in INA § 212(a)(9)(B) (which does not include many status violations). This is why it is sometimes possible for an alien with a valid nonimmigrant visa to resolve a prior status violation simply by exiting the United States, and being readmitted on that visa. Therefore, if we understand a Cronin memorandum "extension" as an admission of an alien whose spirit had remained at the airport, this admission can take place regardless of how the alien may or may not have been employed during the period of parole, for prior failure to maintain status or unauthorized employment would not bar admission as a nonimmigrant. On this analysis, the only difference between an alien who takes a trip outside the United States in order to return on a valid visa, and an alien who obtains a Cronin memorandum "extension", would be that the latter did not need to leave the country because as a matter of law he or she was never truly here in the first place!

This analysis of the Cronin memorandum process could be useful in the context of an alien seeking adjustment of status under INA § 245(k), which forgives certain employment-based immigrants for periods of unauthorized employment or time out of status totaling less than 180 days. USCIS has asserted, in a July 14, 2008 memorandum from Acting Associate Director Donald Neufeld, that unauthorized employment continues to accrue for these purposes even after the filing of an adjustment application. But in the § 245(k) context, as the Neufeld memorandum acknowledges, the total amount of time under the 180-day clock is measured from the alien's most recent admission. Since parole is not an admission according to INA § 212(d)(5)(A) and §

101(a)(13)(B) (and according to the Neufeld memorandum), but it appears that an "extension" under the Cronin memorandum is an admission, an alien subject to the Cronin memorandum who has entered on advance parole should be able to reset his or her § 245(k) clock to zero simply by obtaining admission as an H-1B nonimmigrant via a Cronin memo "extension". The prior time on the § 245(k) clock should then be wiped out just as it would had the alien left the United States and been readmitted as an H-1B nonimmigrant.

The here-but-not-here nature of parole as explained in *Leng May Ma* and its predecessors has other interesting implications, as well. Strictly speaking, although the author knows of no case in which this argument has been made, *Leng May Ma* implies that parolees whose parole expires or is revoked cannot then become inadmissible under INA § 212(a)(9) for unlawful presence accrued between that time and their subsequent departure from the United States—because as a matter of law, they were never here! It is difficult to see how an alien can be unlawfully present if he or she is not present.

Some provisions of the INA, such as that in INA § 240A(b)(1)(A) authorizing cancellation of removal for certain nonpermanent residents, refer to an alien who "has been physically present" in the United States for a particular amount of time, which would include a paroled alien whose body is physically within the United States even if as a matter of law the alien is not really here. However, INA § 212(a)(9)(B) does not include such a reference. Although Congress apparently knew how to differentiate between mere physical presence and full-fledged legal presence, in INA § 212(a)(9)(B) they referred to an alien who is "unlawfully present in the United States," defined further in § 212(a)(9)(B)(ii) as one who "is present in the United States after the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." The even-harsher so-called "permanent bar" provision at INA § 212(a)(9)(C)(i), regarding aliens who enter without inspection after previous unlawful presence, similarly refers to one who is "unlawfully present". The statute could have referred to one "unlawfully physically present in the United States" or "physically present in the United States after the period of stay authorized by the Attorney General", but it did not. Thus, the argument can be made that a parolee whose parole has expired or been revoked should not be deemed unlawfully present for purposes of § 212(a)(9)(B)-(C), because under *Leng May Ma* and *Kaplan* he or she has never truly come into the United States at all.