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US IMMIGRATION & NATIONALITY LAW

# PAROLE IN PLACE: THE SECRET SAUCE FOR ADMINISTRATIVE IMMIGRATION REFORM

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On November 15, 2013, the USCIS issued a Policy Memorandum formalizing the granting of parole to persons who are present in the United States without admission or parole and who are spouses, children and parents of US citizens serving in the US military or who previously served in the US military. While parole traditionally applies to those who seek to come to the United States, the expansion of this concept to those already here is known as "parole in place".

According to this memo, military preparedness can be potentially adversely affected if active members of the military worry about the immigration status of their spouses, parents and children. The memo makes a similar commitment to veterans who have served and sacrificed for the nation, and who can face stress and anxiety because of the immigration status of their family members. Such persons can now formally apply for parole in place (PIP) through a formal procedure pursuant to the ability of the government to grant parole under INA section 212(d)(5)(A). PIP would allow them to adjust status in the US rather than travel abroad for consular processing of their immigrant visas and thus potentially triggering the 3 or 10 year bars.

As a quick background, an individual who is in the US without admission or parole cannot adjust status through an immediate relative such as a US citizen spouse, parent or son or daughter. This person is inherently inadmissible under INA section 212(a)(6)(A)(i), which provides:

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

Section 212(a)(6)(A)(i) renders an alien inadmissible under two related grounds: 1) an alien present in the US without being admitted or paroled or 2) an alien who arrives in the United States at any time or place other than as designated by the Attorney General.

The grant of PIP to a person who is present in the US without being admitted or paroled can wipe out the first ground of inadmissibility in section 212(a)(6)(A)(i). PIP would then also allow this person to adjust status in the US under section 245(a) – as the person needs to have been "inspected and admitted or paroled" – without needing to leave the US. The ability to adjust status through PIP would obviate the need to travel overseas and apply for the visa, and thus trigger the 3 or 10 year bar pursuant to INA section 212(a)(9)(B)(i) and (ii). Since there will be no departure triggering the 3 and 10 year bars, this person would no longer need to file a waiver or an advance provisional waiver by demonstrating extreme hardship to a qualifying US citizen relative to overcome the 3 and 10 year bars before leaving the US.

So far so good, but how does one overcome the second ground of inadmissibility in section 212(a)(6)A)(i), which relates to "an alien who arrives in the United States at any time or place other than as designated by the Attorney General?" The memo skillfully interprets this clause as relating to an alien who is in the process of arriving in the US without inspection. Thus, the second ground only applies to an alien who is presently arriving in the US while the first ground applies to an alien who already arrived in the US without admission or parole. If the second ground is interpreted as applying to an alien who arrived in the past, then it would make the first ground superfluous, according to the memo. It would also then make the 3 year bar under INA section 212(a)(9)(B)(i) superfluous as a person who at any point arrived, if used in the past tense, at a place or time other than designated by the Secretary of Homeland Security would be permanently inadmissible rather than inadmissible for only 3 years. Thus, if the second ground of inadmissibility is no longer applicable with respect to an alien who has already arrived in the US, then the grant of PIP would allow such a person to adjust in the US by overcoming the first ground under INA section 212(a)(6)(A)(i).

The extension of PIP to the families of current or former military service men and women is a proper recognition of their contribution to the nation and an attempt to benefit those who have given so much to the rest of us. While such logic is compelling, why not expand its application to other instances where

aliens have served and strengthened the national interest or performed work in the national interest? How about granting PIP to families of, outstanding researchers striving to unlock the mysteries of science and technology, those with exceptional or extraordinary ability, and key employees of US companies doing important jobs for which qualified Americans cannot be found? And there is also a compelling interest in ensuring family unification so that US citizens or permanent residents may feel less stressed and can go on to have productive lives that will in turn help the nation. All such people do us proud by making our cause their own and the need of their loved ones to come in from the shadows is real and present. Indeed, the non-military use of PIP was advocated by top USCIS officials several years ago in a memo to USCIS Director Mayorkas, a memo leaked by its critics who wished successfully to kill it.

In the face of inaction on the part of the GOP controlled House to enact immigration reform, granting PIP to all immediate relatives of US citizens would allow them to adjust in the US rather than travel abroad and risk the 3 and 10 year bars of inadmissibility. Such administrative relief would be far less controversial than granting deferred action since immediate relatives of US citizens are anyway eligible for permanent residence. The only difference is that they could apply for their green cards in the US without needing to travel overseas and apply for waivers of the 3 and 10 year bars.

The concept of PIP can be extended to other categories, such as beneficiaries of preference petitions, which the authors have explained in The Tyranny of Priority Dates. However, they need to have demonstrated lawful status as a condition for being able to adjust status under INA section 245(c)(2) and the memo currently states that "arole does not erase any periods of unlawful status." There is no reason why this policy cannot be reversed. The grant of PIP, especially to someone who arrived in the past without admission or parole, can retroactively give that person lawful status too, thus rendering him or her eligible to adjust status through the I-130 petition as a preference beneficiary. The only place in INA section 245 where the applicant is required to have maintained lawful nonimmigrant status is under INA section 245(c)(7), which is limited to employment-based immigrants. Family-based immigrants are not so subject. What about INA section 245(c)(2)'s insistence on "lawful immigration status" at the snapshot moment of I-485 submission? Even this would not be a problem. For purposes of section 245(c) of the Act, current regulations already define "lawful immigration status" to include "parole status which has not

expired, been revoked, or terminated." 8 C.F.R. section 245.1(d)(v). Indeed, even if one has already been admitted previously in a nonimmigrant visa status and is now out of status, the authors contend that this person should be able to apply for a rescission of that admission and instead be granted retroactive PIP. Thus, beneficiaries of I-130 petitions, if granted retroactive PIP, ought to be able adjust their status in the US.

There is also no reason why PIP cannot extend to beneficiaries of employment I-140 petitions. If this is done, would such persons be able to adjust status to lawful permanent resident without leaving the USA? In order to do that, they not only need to demonstrate lawful status, but also to have maintained continuous lawful nonimmigrant status under INA section 245(c)(7), as noted above. Is there a way around this problem? At first glance, we consider the possibility of using the exception under INA section 245(k) which allows for those who have not continuously maintained lawful nonimmigrant status to still take advantage of section 245 adjustment if they can demonstrate that they have been in unlawful status for not more than 180 days since their last admission. We would do well to remember, however, that 245(k) only works if the alien is "present in the United States pursuant to a lawful admission." Is parole an admission? Not according to INA section 101(a)(13)(B). So, while retroactive PIP would help satisfy the 180 day requirement imposed by INA section 245(k)(2), it cannot substitute for the lawful admission demanded by section 245(k)(1). Even if an out of status or unlawfully present I-140 beneficiary who had previously been admitted now received *nunc pro tunc* parole, the parole would replace the prior lawful admission. Such a person would still not be eligible for INA section 245(k) benefits and, having failed to continuously maintain valid nonimmigrant status, would remain unable to adjust due to the preclusive effect of section 245(c)(7). Similarly, an I-140 beneficiary who had entered EWI and subsequently received retroactive parole would likewise not be able to utilize 245(k) for precisely the same reason, the lack of a lawful admission. Still, the grant of retroactive PIP should wipe out unlawful presence and the 3 and 10 year bars enabling this I-140 beneficiary to still receive an immigrant visa at an overseas consular post without triggering the bars upon departure from the US. Thus, while the beneficiary of an employment-based petition may not be able to apply for adjustment of status, retroactive PIP would nevertheless be hugely beneficial because, assuming PIP is considered a lawful status, it will wipe out unlawful presence and will thus no longer trigger

the bars upon the alien's departure from the US.

There are two ways to achieve progress. Congress can change the law, which it persists in refusing to do, or the President can interpret the existing law in new ways, which he has done. The holistic approach to parole for which we argue is a prime example of this second approach. The term "status" is not defined anywhere in the INA. By ordinary English usage, "parolee status" is a perfectly natural way of describing someone who has been paroled. Parole is a lawful status in the sense that, by virtue of the parole, it is lawful for the parolee to remain in the United States, at least for the authorized period of time under prescribed terms and conditions. We credit David Isaacson for suggesting that there are other instances in the INA where lawful status does not automatically equate to nonimmigrant status: for examples, asylum status under INA Section 208 and refugee status under INA section 207 are lawful statuses, even though strictly speaking, neither an asylee nor a refugee is a nonimmigrant according to the INA Section 101(a)(15) definition of that term. The Executive can easily revise the memo for military families to declare parole under INA section 212(d)(5) a status because it has already declared parole a lawful status for NA 245(c)(2) purposes under 8 C.F.R. 245(d)(v), asylum a lawful status under INA section 208, and refugee a lawful status under INA section 207. *See* 8 C.F.R. 245.1(d)(iii)-(iv). In all three cases, people are allowed into the United States in a capacity that is nether legal permanent residence nor, strictly speaking, nonimmigrant. True, INA section 101(a)(13)(B) does say that parolees are not "admitted", but is one who enters without admission and is granted asylum under INA 208 ever been "admitted" per the statutory definition of that term? Yet, such a person has a lawful status.

One of the biggest contributors to the buildup of the undocumented population in the US has been the 3 and 10 year bars. Even though people are beneficiaries of immigrant visa petitions, they do not wish to risk travelling abroad and facing the 3 or 10 year bars, as well as trying to overcome the bars by demonstrating extreme hardship to qualifying relatives, which is a very high standard. Extending PIP to people who are in any event in the pipeline for a green card would allow them adjust status in the US or process immigrant visas at consular posts, and become lawful permanent residents. These people are already eligible for permanent residence through approved I-130 and I-140 petitions, and PIP would only facilitate their ability to apply for permanent residence in the US, or in the case of I-140 beneficiaries by travelling overseas

for consular processing without incurring the 3 and 10 year bars. PIP would thus reduce the undocumented population in the US without creating new categories of relief, which Congress can and should do through reform immigration legislation.

There is no doubt that the memo for military families is a meaningful example of immigration remediation through executive initiative. Yet, it is one step in what can and should be a much longer journey. In the face on intractable congressional resistance, we urge the President to take this next step.

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