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HOW THE HUMANITARIAN PAROLE PROGRAM AT THE BORDER CAN SERVE AS A TEMPLATE FOR FURTHER RELIEF UNDER THE BROKEN IMMIGRATION SYSTEM

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Restive people at the U.S.- Mexico border for entry into the United States is not the new norm for the United States government. The usual procedure is to seek humanitarian relief through asylum under Title 8 of the United States Code citing a credible fear of persecution or other threats in their home country regardless of the wait period. However, in fiscal year 2020 with the outbreak of the coronavirus, the number of encounters at the border declined. As Covid became less acute, encounters at the border rebounded sharply in fiscal year 2021 and increased in fiscal year 2022 according to recently published data from U.S. Customs and Border Protection (CBP), the federal agency that encompasses the Border Patrol.

In March 2020, the Department of Health and Human Services (HHS) implemented Title 42 through the Centers for Disease Control and Prevention (CDC) under the Trump administration after the coronavirus outbreak. Title 42 of the United States Code is the code that addresses public health, social welfare, and civil rights. It grants the government the ability to take emergency action to stop the "introduction of communicable diseases." But the purpose to invoke Title 42 under the Trump administration was not to control the virus but to use the health ground as a pretext for depriving people of their right to apply for asylum when they came to the United States.

Title 42 has been implemented poorly and widely criticized by immigration and humanitarian groups. It is being continued pursuant to a court order even

though President Biden tried to end it. People expelled are usually driven by bus to the nearest port of entry without their luggage or their belongings. Lateral flights are limited for families with young children. Opportunity to seek asylum has been denied not only to individuals crossing the border between ports of entry, but also applies equally to individuals seeking asylum at ports of entry. Cases of kidnapping, torture, rape or other violent attacks on people have increased. Nevertheless, the Biden administration has continued to expel migrants under Title 42, though to a lesser extent than the Trump administration. Although the Supreme Court has currently stayed the district court's decision setting aside Title 42, the following extract from Justice Gorsuch's dissent is worth noting:

> *But the current border crisis is not a COVID crisis. And courts should not be in the business of perpetuating administrative edicts designed for one emergency only because elected officials have failed to address a different emergency. We are a court of law, not policymakers of last resort.*

Depriving asylum seekers of their right to apply for asylum by blocking them under Title 42 has been roundly criticized by asylum rights advocates, although one positive initiative of President Joe Biden has been to expand the parole program initially launched for Ukraine and Venezuela last year. The expansion of the parole program will allow 30,000 qualifying nationals of Cuba, Haiti, Nicaragua and Venezuela per month to be admitted to the United States for up to two years and will be eligible for work authorization. They must have a U.S. based supporter who agrees to provide them with financial support for the duration of their parole in the United States. Individuals and representatives of organizations seeking to apply as supporters must declare their financial support, and they must pass security background checks to protect against exploitation and abuse. For additional information on the process and eligibility requirements, please see the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans page. Also, the applicants must apply through an online CBP One app. Applicants will be considered on a case-by-case basis at the discretion of immigration officers and must pass rigorous biometric and biographic national security and public safety screening and vetting; and complete vaccination and other public requirements. Individuals who enter the United States, Mexico, or Panama without authorization will generally be ineligible for these processes. It

further confirms that nationals from Venezuela, Cuba, Haiti, and Nicaragua who do not avail themselves of this process, attempt to enter the United States without authorization, and cannot establish a legal basis to remain will be removed or returned to Mexico, which will accept returns of 30,000 individuals per month who fail to use these new pathways.

This expansion has not ruled out the existence of Title 42 public health order. It will be used alongside the provisions of the Immigration and Nationality Act (INA) under Title 8 of the United States Code for those migrants who cannot be expelled pursuant to Title 42. INA § 235 allows for the prompt removal of those who do not claim a fear of persecution or torture or are determined not to have a credible fear after an interview with an Asylum Officer, in accordance with established procedures. Also, the CBP One app can be accessed on or after January 12, 2023 to all asylum seekers claiming Title 42 exemption. Each day at a set time, new appointment slots will be released, and one can schedule appointments fourteen (14) days in advance. Access to making an appointment will be "geofenced" to individuals who are physically located at the U.S.-Mexico border and in some major population centers in Central and Northern Mexico. Although the process is free, that's too short a period for booking the slots, maybe it will end up in jamming the network. Further, some Title 8 relief such as asylum may not be available for those who have significant criminal history, prior removals under Title 8, or could pose a risk to national security. The objective is to have an improved removal process in existence when the Title 42 public health order is lifted.

Further, this expansion proposes a transit ban to those asylum seekers who had not previously applied for asylum in a third country before reaching the United States, as well as those who sought asylum without going through a new process at a port of entry. Individuals who cannot establish a valid claim to protection under the standards set out in the new rule will be subject to prompt removal under Title 8 authorities, which carries a five-year ban on reentry pursuant to INA § 212(a)(9)(A)(i). This rule will take some time to come in action as DHS and DOJ will invite public comment on the proposed rule.

Though the expansion through humanitarian parole has indubitably created some legal pathways for migrants from four countries, it has failed to address many questions such as:

- Will the migrants from these four countries be subject to Title 8 or Title 42,

if there is no financial supporter for them in the United States or a financial supporter is reluctant in supporting them or if they fail to pass the test of other requirements?

- The parole program confirms that one should apply for parole through the CBP One app, but it fails to contemplate what should be done in cases where someone does not have technological access to download CBP one app, or where access to the app will be tough for those who does not know English or speak indigenous dialects beyond Spanish as well as for those who cannot obtain legal representation to help them navigate the process.
- On being asked if the requirement to buy an airline ticket could prejudice or lean it toward wealthier migrants and make it harder for poorer migrants, President Biden replied yes and also said that "but there's also ways to get to ports of entry along the border as well". This is unclear. Did Biden mean that travelling by air is not essential and can be waived?
- Will this really protect asylum seekers? How does this program help those individuals who left their countries in rush, rescuing their lives, and without any resources? How will they apply for parole through the app?
- The proposed rule has been subject to criticism as this is the new version of the Trump version of the transit-ban on asylum seekers if they failed to seek protection in a third country before reaching the United States and if they "circumvent available, established pathways to lawful migration." A similar transit ban was introduced by the Trump administration which was blocked by the Ninth Circuit Court of Appeals and was ruled as unlawful, holding that failure to apply for asylum in a transit country "has no bearing on the validity of a person's claim for asylum in the United States;"
- No legal pathways for migrants from other countries have been explained, they will either face removal proceedings under Title 8 or be expelled under Title 42.
- Will this not suggest discrimination as humanitarian parole only applies to a narrow group of countries?

Despite all the flaws in the new process and Title 42 still being used, the humanitarian parole program under INA 212(d)(5) provides a template for President Biden to continue to expand his executive authority to provide relief when the immigration system has broken and the current Congress is too

polarized to fix it. Within days of the announcement, the first group of migrants have already come into the US. More than 600 additional migrants from these four crisis-stricken countries had been vetted and approved to come to the U.S. One noted commentator Ilya Somin who sponsored refugees from the Ukraine has reported that the results were astonishing. "Nine days after my wife and I submitted the sponsorship forms, the U.S. government authorized admission to three Ukrainian refugees — Ruslan Hasanov, his wife, Maya, and their 2-year-old daughter, Melissa. Less than five weeks after that they were here. This is little short of a miracle to those of us who have long lamented the sclerotic state of the U.S. refugee system." Although those who have entered the US under humanitarian parole can only remain for two years, they can apply for asylum once they have been paroled in the US. The humanitarian parole program allows private sponsors backed by business organizations to also support nationals from the designated countries to legally work in the US. The program thus creates a pathway for noncitizens from the designated countries to enter the US and work legally thus alleviating labor shortages in the US economy.

The possibilities of expanding parole to other immigrants also exist. For instance, beneficiaries of approved I-130, I-140 and I-526 petitions who are outside the US can be paroled into the US while waiting for their priority date under State Department Visa Bulletin to become current. However, due to a quirk in the law, beneficiaries of I-130 petitions should be able to file I-485 applications upon being paroled into the US since parole is considered a lawful status for purpose of filing an I-485 application. See 8 CFR 245.1(d)(1)(v). On the other hand, beneficiaries of I-140 petitions will not be eligible to file an I-485 application, even if paroled, since INA 245(c)(7) requires one who is adjusting based on an employment-based petition to be in a lawful nonimmigrant status. Parole, unfortunately, is not considered a nonimmigrant status. Such employment-based beneficiaries may still be able to depart the US for consular processing of their immigrant visa once their final action dates become current.

The parole of beneficiaries of approved petitions can be modelled on the Haitian Family Reunification Parole Program that allows certain beneficiaries of I-130 petitions from Haiti to be paroled into the US pursuant to INA 212(d)(5). The Filipino World War II Veterans Program also has a liberal parole policy for direct and derivative beneficiaries of I-130 petitions. Once the beneficiaries of I-130 petitions are paroled into the US, they can also apply for an EAD, and

adjust status once their priority date becomes current. The HFRPP concept can be extended to beneficiaries of all I-130, I-140 and I-526 petitions, and parole eligibility can trigger when either the petition is approved or at least when the Date for Filing (DFF) under the State Department Visa Bulletin is current for each petition. As proposed in a previous blog, the administration has the ability to move the DOF to close to current so long as it preserves one visa in each category. Beneficiaries of I-130 petitions may file adjustment of status applications, as under the HFRPP, once they are paroled into the US. On the other hand, Beneficiaries of I-140 and I-526 petitions, due to the limitation in INA 245(c)(7) would have to proceed overseas for consular processing once the FAD become current.

Similarly, a program similar to humanitarian parole can be devised for those who have not been selected under the H-1B lottery under INA 212(d)(5). An employer could be able to sponsor a beneficiary who was not selected under the H-1B lottery and whose OPT may have expired by submitting I-134. There is no reason why the programs similar to humanitarian parole cannot be deployed for those who were not able to successfully come to the US under the H-1B visa but who still have the same job offer for a temporary period of time. INA 212(d)(5) provides authority to parole a noncitizen on a "case-by-case basis for urgent humanitarian reasons or significant public benefit." Allowing a potential noncitizen who would have otherwise qualified for an H-1B visa parole into the US would potentially qualify as a significant public benefit.

The Biden administration's authority to provide relief to backlogged beneficiaries of I-140 petitions in the US through parole or other administrative actions can also be explored. The concept of parole in place has been applied to those who have entered without inspection and have been able to adjust status as immediate relatives. Most beneficiaries of I-140 petitions have been admitted in the US and are in valid status. However, deferred action may be considered for certain vulnerable beneficiaries. In May 2022, USCIS considered deferred action and related employment authorization for noncitizens classified as SIJs who are ineligible to apply for adjustment of status to LPR status solely because a visa is not immediately available. Deferred action and employment authorization will provide invaluable assistance to these vulnerable noncitizens who have limited financial and other support systems in the United States while they await an available visa number. The DHS has also recently made available deferred action and work authorization to noncitizen

workers who are victims of, or witnesses to, the violation of labor rights, Similarly, there is no reason why backlogged beneficiaries of I-140 petitions cannot avail of deferred action and work authorization on a case by case basis. How about allowing aging our and aged out children of beneficiaries of I-140 petitions who cannot seek the protection of the Child Status Protection Act to seek deferred action? This group of vulnerable noncitizens are deserving of relief through executive action.

Under 8 CFR § 204.5(p), an EAD may be issued to individuals in E-3, H-1B, H-1B1, O-1 or L-1 nonimmigrant status if they can demonstrate compelling circumstances and are the beneficiaries of approved I-140 petitions, but their priority dates are not current. “Compelling circumstances” have never been precisely defined, but DHS suggested some examples of compelling circumstances in the preamble to the high skilled worker rule, which include serious illness and disabilities, employer dispute or retaliation, other substantial harm to the worker, and significant disruptions to the employer. DHS has suggested loss of funding for grants that may invalidate a cap-exempt H-1B status or a corporate restructure that render an L-1 visa status invalid are examples of scenarios that might constitute significant disruption to the employer. Historically, USCIS has rarely issued EADs under compelling circumstances. Given the precarious situation that nonimmigrant workers who are impacted by layoffs will find themselves in, the Biden administration could instruct USCIS to employ this authority to generously grant EADs to individuals who have lost their jobs. Nonimmigrant workers who are laid off will be forced to uproot their lives on very short notice if they cannot find new employment within 60 days. Many nonimmigrant workers have lived and been employed in the United States for many years. Some have U.S. citizen children and spouses who have also built careers in the United States. Such individuals will face serious hardship if they are forced to abandon their lives in the United States and return to the countries of which they are citizens, a devastating situation that should be interpreted to readily constitute compelling circumstances. Noncitizens who can demonstrate compelling circumstances under 8 CFR § 204.5(p) should also be able obtain deferred action so that they can apply for advance parole to travel overseas.

There is much that the Biden administration can do in the next two years through humanitarian parole, deferred action and other administrative actions to provide relief to noncitizens while Congress remains paralyzed.

(This blog is for informational purposes and should not be viewed as a substitute for legal advice)

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