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US IMMIGRATION & NATIONALITY LAW

PAROLE IN PLACE – A MEANS TO AN END OR AN END IN ITSELF?

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On June 18, 2024, President Biden announced new measures aimed at ensuring that "U.S. citizens with noncitizen spouses and children can keep their families together". One of these measures provides a discretionary grant of parole in place ("PIP") to individuals who: are present in the United States without admission or parole; have been continuously physically present in the United States since at least June 17, 2014; have a legally valid marriage to a U.S. citizen on or before June 17, 2024; have no disqualifying criminal history and otherwise are not deemed to be a threat to public safety, national security, or border security; and submit biometrics and undergo required background checks and national security and public safety vetting. Individuals whose PIP applications are approved will be able to remain in the U.S. and apply for work authorization. Moreover, the intent of the program is to provide a path to permanent residence. A grant of parole in place "satisfies the requirement under INA section 245(a) that the requestor has been inspected and paroled by an immigration officer". Qualifying family members of noncitizens granted PIP can file I-130 petitions on their behalf, and the noncitizens can then apply for adjustment of status.

PIP under DHS's Implementation of the Keeping Families Together program in the Federal Register poses a philosophical question, however - is the measure a means to an end or an end in itself? The intent of the program is for a noncitizen granted PIP to ultimately be able to be able to adjust status under INA 245(a). When PIP is granted, though, DHS does not require requestors to establish that they are not inadmissible or ineligible for adjustment of status. Although the grant of PIP is only for 3 years, unless extended, requestors can

remain in the U.S. and apply for employment authorization upon being granted in PIP. This in itself is a benefit, albeit temporary, and may allow requestors who face grounds of inadmissibility or ineligibility for adjustment of status additional time to overcome these barriers before they file an I-485 adjustment of status application.

There are clearly explicit criminal grounds that would disqualify a PIP application. On the other hand, if a requestor may be potentially inadmissible that in itself would not preclude them from requesting PIP.

The Federal Register notice implementing PIP states the following regarding inadmissibility:

DHS additionally considered requiring the requestor to demonstrate that they are not inadmissible under any ground set forth in INA section 212(a), 8 U.S.C. 1182(a), to be granted parole under this process. This parole in place process is meant for those requestors who are otherwise eligible to adjust status. As noted elsewhere in this notice, serious criminal convictions, including certain convictions that would render the requestor inadmissible and therefore ineligible for adjustment of status, will be disqualifying for this process; other criminal convictions, as well as prior, unexecuted removal orders, will trigger a rebuttable presumption of ineligibility for this process. However, detailed consideration of grounds of inadmissibility—including whether applicable grounds can be waived—is a complex analysis undertaken during the Form I-485 adjustment of status adjudication. Requiring parole in place adjudicators to conduct the inadmissibility analysis that is normally conducted at the adjustment of status stage would be an inefficient, duplicative, and costly use of USCIS resources. Therefore, when assessing eligibility for parole in place, while DHS will consider the requestor's criminal and immigration history and any other adverse factors that could bear upon admissibility, it will not import the admissibility analysis conducted at the Form I-485 stage into the parole adjudication.

Therefore, requestors who are likely inadmissible but feel that they will be able to overcome these grounds can still apply for PIP. A requestor, for example, who believes that they will not at present be able to overcome the public charge grounds of inadmissibility because the petitioner lacks sufficient income, for example, can still apply for PIP as they may hope that the petitioner's future tax returns will reflect an income that exceeds 125% of the relevant poverty guideline. Similarly, a requestor who has committed fraud,

such as filing a fraudulent asylum applicant in the past, can still apply for PIP and file an I-601 waiver with the I-485, even if the high standard for demonstrating extreme hardship to a qualifying relevant may not be met at the time of requesting PIP but may be satisfied at a later point. For example, having additional US citizen children in the near future would render it more difficult for the US citizen spouse to take care of children if the noncitizen spouse is hypothetically removed from the US. Requestors in these scenarios would still derive the benefits of PIP in good faith and be able to apply for EADs.

An individual requesting PIP could also be prima facie ineligible for adjustment of status if they are subject to an unexecuted removal order for example. The requestor would need to reopen the removal order, most likely though a joint motion with the government, which may or may not occur. Even though a certain fact pattern presented by the requestor could make it difficult to convince an ICE OPLA attorney to agree to join in a motion to reopen, the requestor can still apply for PIP. The Federal Register notice states the following with regards to prior removal orders:

DHS considered whether noncitizens with unexecuted final removal orders should be eligible for this process. DHS determined that noncitizens with unexecuted final removal orders will be presumptively ineligible for parole under this process. DHS recognizes that a noncitizen may have grounds to request that an immigration judge or the BIA reopen their immigration proceedings when they are otherwise eligible for adjustment of status, and thus determined that categorical ineligibility for this parole process would be inappropriate. As a result, DHS will evaluate, in the exercise of its discretion on a case-by-case basis, the facts and circumstances underlying the unexecuted final removal order and all other mitigating factors presented in determining whether the noncitizen may overcome the rebuttable presumption of ineligibility and be granted parole in place.

Of course, each noncitizen considering requesting PIP must make these assessments themselves. Even if there is no chance that the I-485 will ever get approved, it may be beneficial to request PIP for a 3 year period along with a grant of employment authorization. On the other hand, the Federal Register notice clearly states that there is no assurance that the information provided by the noncitizen in the PIP request will not be used against them:

DHS generally will not use information contained in a request for parole in place under this process for the purpose of initiating immigration enforcement action

against the requestor unless DHS determines, in its discretion, the requestor poses a threat to national security, public safety, or border security. This process does not preclude DHS from, in its discretionary authority, taking enforcement actions as deemed appropriate, in accordance with the INA and consistent with governing policies and practices, against noncitizens who may be eligible or who have pending applications for parole under this process. Information provided under this process may be otherwise disclosed consistent with statutory authorities, obligations, and restrictions, as well as governing privacy and information-sharing policies.

Requestors need to decide on a case by case basis whether it is worth obtaining PIP and work authorization for at least a 3 year period even if they do not ultimately get permanent residence through adjustment of status, and instead get removed from the US. Indeed, there are other risks that could expose the requestor to enforcement action independent of whether the I-485 may be filed and approved. On August 23, 2024, Texas and 15 other Republican states filed a lawsuit in federal court on the ground that the PIP has violated the INA, the Administrative Procedure Act and the Take Care Clause of the US Constitution. Although in the opinion of the authors the lawsuit is not meritorious as parole is clearly authorized under INA 212(d)(5), it is likely that a judge may preliminarily enjoin the program and a higher court may find it unlawful. Under this circumstance, information provided in the PIP could potentially be used against the noncitizen in an enforcement action regardless of whether the I-485 application may get granted or not.

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