



Looking Beyond DACA/DAPA Using Advance Parole to Make Immigrants Eligible to Apply for Lawful Permanent Residence

Presented By

Peter Schey

Executive Director

Center for Human Rights and Constitutional Law

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Executive Summary

The focus of this practice briefing is on how “advance parole” can be used by many immigrants who have approved visa petitions or pending visa petitions to briefly travel abroad and return “with inspection” and become eligible for adjustment of status.

It has been clear for several years that comprehensive legislative immigration reform is not possible given the absence of anything close to consensus about the terms of a comprehensive statutory remedy.

At some point, stakeholders, community-based organizations and legal services providers must face up to this reality and “reset” the debate to focus on what may actually be achievable through a process of Executive Immigration Reform -- what we may call “EIR.”

With the Supreme Court’s rejection of the expanded DACA and DAPA programs the Obama Administration attempted to implement in 2015, advocates and human rights defenders must re-examine both advocacy strategies and administrative steps that may be taken in the representation of immigrants to legalize the status of substantial numbers of immigrants *without* requiring the passage of legislation by Congress.

Other practice advisories we will issue will focus on various remedies immigrants may pursue despite the absence of Congressional reform and the Supreme Court’s affirming of lower court decisions holding that the Obama Administration violated the U.S. Administrative Procedures Act when it issued the expanded DACA and DAPA programs as agency policies rather than as formal regulations. This practice advisory will focus on advance parole as one such potential remedy that could help hundreds of thousands of people to legalize their status if this or the next Administration decided to reach that result.

We recommend a strategy with at least two parts: (i) Advocacy at local and national levels seeking to liberalize the circumstances under which immigrants may be granted advance parole and (ii) Individual representation of immigrants seeking advance parole who may subsequently qualify to adjust status.

I. Political Context

Immigrants' rights advocates have long been concerned with strategies for legalization of persons who lack lawful immigration status in the United States. Many immigrants have strong equities in their favor, including lengthy periods of residence in the country, close familial relationships to U.S. citizens and lawful residence, and other humanitarian concerns. Regardless of many of these equities, due in large part to far reaching limitations on immigration relief imposed by the Illegal Immigration Reform and Immigrant Responsibility Act adopted in 1996, the vast majority of undocumented immigrants in the United States are ineligible for available pathways to legalization of status. Unlawful presence bars, the oversubscription of certain visa categories, and other bureaucratic technicalities often have real and devastating impacts on individual immigrants and their U.S.-based family members.

A. Deferred Action for Childhood Arrivals (DACA), Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), and Expanded DACA

In 2012, the Deferred Action for Childhood Arrivals (DACA) program was implemented by then DHS Secretary Janet Napolitano. The

program permits young adults born outside the United States, but raised in this country, to apply for deferred action status and work permits for two years. The DACA program is premised on the enforcement authority that the DHS maintains, just as any other law enforcement agency, to prioritize its resources in favor of its most pressing objectives. This sort of prosecutorial discretion, which is generally available to the DHS, has been focused over time through executive policy memoranda, and more recently, with the adoption of explicit and detailed policies, including DACA.

The Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) was announced by DHS Secretary Johnson on November 20, 2014, and grants deferred action status and temporary work permits for three years to most parents of U.S. citizens and lawful permanent residents provided they have lived in the United States continuously since January 1, 2010, and pass required background checks. Also in November 2014, the DHS Secretary Johnson announced a policy expanding the population eligible for the 2012 DACA program to people of any current age who entered the United States before the age of 16 and lived in the United States continuously since January 1, 2010, and extending the period of DACA and work authorization from two to three years.

B. Texas v. United States

The Obama Administration's failure to propose and formally adopt regulations on DAPA/expanded DACA left these remedies without adequate legal grounding, and vulnerable to judicial challenge. In December 2014, various states filed a legal challenge to these policies. Implementation of DAPA and expanded DACA has been blocked by a preliminary injunction issued by the District Court in Brownsville, Texas, and upheld by the Fifth Circuit Court of Appeals because of the lack of a regulatory framework and complete absence of a rule-making process. There has been no effort to block implementation of the DACA program that started in 2012.

In the months since the challenge was filed, immigrants' rights advocates have dedicated a significant amount of time, energy, and resources into defending DACA, DAPA, and expanded DACA, on political, legal, and discursive levels. Given that comprehensive immigration reform appears less and less likely, as partisan politics take hold in the Congress and as election year politicking sets in, protecting these limited but promising executive measures has become the main focus of much of the advocacy community.

C. United States v. Texas

On June 23, a divided Supreme Court issued a 4-4 tied decision, indicating that the decision to grant a preliminary injunction on DAPA/expanded DACA, which was upheld by the Fifth Circuit Court of Appeals, was affirmed by an equally divided Supreme Court. This means that people cannot apply for these programs if and until they survive the legal challenge which remains pending on its merits in the District Court in Brownsville, Texas.

In addition, regardless of whether these programs survive judicial scrutiny, the fact that the only legal basis for granting relief are executive policies that have no grounding in regulations means that those persons who have applied for and been issued work authorization under DACA or DAPA could find themselves at risk of deportation proceedings or even being targeted for removal under a possible “tough on immigrant” incoming President and administration. Even if the legal challenges reaches the Supreme Court on the merits, the Supreme Court is likely to agree that the DAPA/Expanded DACA program should have been issued as formal regulations, not just as a “policy” of the Department of Homeland Security. Ironically, CHRCL has argued from the start that these programs should have been issued as formal regulations because this would have greatly strengthened the rights extended to

immigrants granted benefits under DAPA/Expanded DACA. A simple “policy” can be changed overnight by any Administration, while rights extended by a formal federal regulation have the force of law and can only be amended if the Government goes through formal “rule-making” procedures, including inviting public comment and considering those comments, a process that can take about a year to complete. Immigrants granted DAPA/Expanded DACA would also have been able to argue that once granted, the benefit could not be withdrawn until the benefit actually expired.

It seems the Administration insisted it did not wish to create the DAPA/Expanded DACA programs by formal regulation solely because entrenched forces within USCIS and USICE have as long as I can remember opposed granting immigrants rights through formal regulations. These officials much prefer to extend benefits through informal “policy” which the agencies can easily and quickly modify or retract. Now, it is precisely the reluctance to grant DAPA/Expanded DACA benefits by formal regulation, and the policy’s failure to grant USCIS officers with greater discretion to grant to deny benefits, that gave the federal courts the basis for blocking enforcement of these programs.¹ It is

¹ The Court of Appeals points out that “[a] binding rule is not required to undergo notice

highly unlikely the Obama Administration can be convinced to change course, issue DAPA/Expanded DACA as proposed regulations, somewhat expand the discretion officers would have to grant or deny benefits, consider public comments, and then issue the programs as formal regulations. *The question becomes, what can the Obama Administration do before it leaves office to extend legal rights to hundreds of thousands of immigrants?*

II. Where Next? Advance Parole

As the possibility of pursuing relief under DAPA/expanded DACA remains closed, immigrants' rights advocates should consider shifting their time and energy to other strategies that would bring significant relief to a large number of immigrants, are relatively straightforward to implement, and would not detract from the possibility of an immigrant-positive outcome

and comment [i.e. publication as a proposal regulation] if it is one 'of agency organization, procedure, or practice.'" Case No. 15-40238 at page 50, quoting 5 U.S.C. § 553(b)(A). "[T]he substantial impact test is the primary means by which [we] look beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation [i.e. publication as a formal regulation]." *Id.* "An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply." *Id.*

should US v. Texas be considered again on its merits.

“Advance parole” provides the basis for a new strategy for legalization advocates. Seeking advance parole on behalf of individual immigrants with approved visa petitions could facilitate their lawful “entry” into the United States and thus render them eligible to adjust their status by eliminating application of the entry-without-inspection grounds of admissibility. Similarly, advocating for more robust availability of advance parole would grant thousand of long-term resident immigrants the ability to obtain lawful permanent resident status.

A. What is Advance Parole?

The former INS and present DHS have over time developed a procedure called “advance parole” which permits certain immigrants present in the United States to obtain permission for brief departures from and re-entry to the United States. While “advance parole” is not specifically established in statute or regulations, is derived from general parole authority which is rooted in both statute and regulations. It is also discussed fully in the USCIS Adjudicator's Field Manual (AFM).

Statutory Authority

The authority of the DHS to grant parole is based on INA § 212(d)(5)(A) which gives the Secretary the

discretion, on a case-by-case basis, to “parole” into the United States temporarily,

“for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the [Secretary] 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 for admission to the United States.”

Regulatory Authority

In addition to the general parole powers granted in the INA, the regulations establish the procedures for parole, its application to detention, and even foresee the possibility of advance parole. In particular, 8 CFR § 212.5(f) provides that “[w]hen parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued an appropriate document authorizing travel.”

The regulations also provide: (1) "The authority of the Secretary to continue an alien in custody or grant parole under section 212(d)(5)(A) of the Act shall be exercised by the Assistant Commissioner, Office of Field Operations; Director, Detention and

Removal; directors of field operations; port directors; special agents in charge; deputy special agents in charge; associate special agents in charge; assistant special agents in charge; resident agents in charge; field office directors; deputy field office directors; chief patrol agents; district directors for services; and those other officials as may be designated in writing, subject to the parole and detention authority of the Secretary or his designees. The Secretary or his designees may invoke, in the exercise of discretion, the authority under section 212(d)(5)(A) of the Act."

B. Eligibility for Advance Parole

Parole of any type effectively allows an otherwise inadmissible person to physically proceed into the United States under certain safeguards and controls. It allows individual aliens to physically enter into the United States for a specific purpose, including the continued processing of an application for immigration benefits.

Advance parole is available for individuals who are currently in the United States. It allows the alien to seek permission to re-enter prior to departure, thereby providing him with authority to enter the United States when he may otherwise be admissible.

Most practitioners will be familiar with advance parole in it cases where it is required to avoid abandonment of a

pending application for benefits. Generally, an alien who is present in the United States and has applied for adjustment of status to that of a lawful permanent resident will have that application deemed abandoned if he or she leaves the United States without first obtaining an Advance Parole Document. However an immigrant need not apply for adjustment in order to seek advance parole. USCIS' instructions to Form I-131 describe advance parole availability for persons who have or have pending applications for TPS, who have been granted U or T visas, DACA recipients, and other categories. While the particular circumstances justifying advance parole vary depending on the underlying benefit sought or received, the application for advance parole only requires that the person be present in the United States.

Because advance parole is an exercise of discretion, eligibility requires a showing that the applicant warrants a favorable exercise of discretion. The instructions for advance parole applications issued by USCIS draw from the text of INA § 212(d)(5)(A) and provide that advance parole may be granted for "urgent humanitarian reasons" or in furtherance of a "significant public benefit," which may include a personal or family emergency or bona fide business reasons." Additionally, a 1992 INS memo from Puleo, Associate Commissioner for Adjudications, bona fide business or

personal reasons includes “travel for any reason which is not contrary to law or public policy.” This is to “accommodate the legitimate travel of persons inconvenienced by visa numbers becoming unavailable after they filed adjustment applications.” Memo CO 212.28-C.

C. Effects of Advance Parole

Advance parole allows the alien to seek permission to re-entry prior to departure, thereby providing him with authority to enter the United States when he may otherwise be admissible. However a departure from the United States pursuant to a grant of parole has additional consequences.

1. Advance Parole Can Facilitate an Entry With Inspection

The 1996 signing into law of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) resulted in the adoption of a series of “bars” that would block millions of immigrants from legalizing their status, even though they qualified for immigrant visas through their U.S. citizen or lawful resident spouses, parents, or children. These provisions of IIRAIRA now account for about two million undocumented immigrants living in the United States with approved visa petitions, but unable to legalize their status.

One such statutory bar to legalization applies to any immigrant who entered the United States without inspection and has been present without lawful status for twelve months or longer. Such individuals face a ten-year bar, and thus must remain outside the country for ten years before they can obtain lawful permanent residence, despite having an approved visa petition.

Since 1996, millions of immigrants who entered the country without inspection became eligible for permanent resident status through marriages to U.S. citizens or their U.S. citizen parents or other close family members. Their family members applied for family-based visas and the Government approved these petitions. By entering the visa system, these immigrants have played by the rules. DHS knows exactly who they are, where they live, and when and where they were born. Despite their approved petitions, they remain undocumented and cannot legalize their status unless they leave the United States, and their U.S.-based family members, for ten years.

Although they are unwilling to abandon the United States for ten years, from time to time, these immigrants travel to their home countries to visit family or for other legitimate reasons. Under long-standing government policy, a small number are given permission to leave the United States and return with

inspection if they can document a family emergency such as the death of an immediate family member. They are granted “advance parole” as authorization to travel so that the Government knows when they leave and when they return.

Departing the United States pursuant to a grant of advance parole allows immigrants to be inspected upon their arrival into the country, rather than avoiding inspection by attempting to enter illegally. In addition to promoting safe and normal migration, and thereby preserving CBP's limited enforcement resources, advance parole allows individual immigrants to enter the United States with the consent of the Government, thereby executing a formal “entry” even if they are not “admissible” under the INA. Because the most recent entry is with inspection, the ten-year-bar or inadmissibility does not apply. Consequently, those who enter the United States pursuant to a grant of parole would not face entry-related limitations on their ability to adjust status. For those who have approved visa petitions, most could become lawful residents months after returning with inspection.

2. Advance Parole Renders Alien Subject to Grounds of Inadmissibility

An individual who is paroled into the United States is not “admitted” and remains an “applicant for admission,” even while paroled. The Board of

Matter of G-A-C-22 I&N Dec. 83 (BIA 1998); see also Matter of Torres, 19 I&N Dec. 371 (BIA 1986).

An applicant for asylum who departed the United States after having been granted an advance authorization for parole, and who, on his return, was paroled into this country under the provisions of section 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5) (Supp. V 1993), was properly placed in exclusion proceedings following the Immigration and Naturalization Service's denial of his application for asylum and revocation of his parole. Navarro-Aispura v. INS, 53 F.3d 233 (9th Cir. 1995); and Barney v. Rogers, 83 F.3d 318 (9th Cir. 1996), distinguished (The reviewing court affirmed the decision, holding that petitioner, who was granted advance parole for travel outside the United States, did not lose his right to a deportation hearing upon subsequent denial of his application for a discretionary grant of registry.)

Immigration Appeals established in Matter of G-A-C-, that an alien who leaves the United States and returns under a grant of advance parole is subject to the grounds of inadmissibility once parole is terminated, even if he had been “deportable” rather than “inadmissible” before the trip’s commencement. Matter of G-A-C-, 22 I&N Dec. 83 (BIA 1998); see also Matter of Torres, 19 I&N Dec. 371 (BIA 1986). Thus, while the alien’s re-entry in the United States may be effected pursuant to the advance parole, the DHS is not prevented in any way from initiating removal proceedings against him in which he would be charged with inadmissibility.

This is an important consideration when deciding whether an individual immigrant should seek advance parole in order to facilitate adjustment, as departure from the country might have the effect of rendering him unable to adjust on grounds other than “entry without inspection.” For example, an individual immigrant present in the United States may have left the country unlawfully, been apprehended upon arrival, and removed pursuant to an expedited removal order. Even though he may have been able to re-enter the United States without inspection, the nature of his most recent entry is not the only bar to his adjustment. The fact that this individual immigration was ordered removed subjects him to a separate five-year bar on his adjustment

application. While advance parole may still be in the interest of the individual, if a I-212 waiver is available, for example, careful assessment of each case is necessary to protect the individual from unintended consequences of his departure.

3. Advance Parole Cannot Create Inadmissibility

Although departing the United States renders an immigrant subject to grounds of inadmissibility, that departure cannot in itself create inadmissibility if it is authorized by advance parole. In 2012, the Board of Immigration Appeals published a precedential decision on the issue of whether leaving the United States pursuant to a grant of advance parole was a “departure” that could produce inadmissibility related to unlawful presence. Matter of Arrabally and Yerrabelly, 25 I&N Dec. 771 (BIA 2012). Relying on the congressional intent of the inadmissibility grounds and the fact that advance parole authorizes an alien to depart the country and be readmitted without compromising pending applications for immigration benefits, the Board held that “an alien cannot become inadmissible under section 212(a)(9)(B)(i)(II) solely by virtue of a trip abroad undertaken pursuant to a grant of advance parole” and cannot become ineligible for adjustment of status on that basis. *Id.* at 780. In essence, an alien’s use of an approved

**Matter of Arrabally and Yerrabelly,
25 I&N Dec. 771 (BIA 2012)**

An alien who leaves the United States temporarily pursuant to a grant of advance parole does not thereby make a “departure . . . from the United States” within the meaning of section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2006).

advance parole document to travel outside the U.S. is not considered a “departure” and, as a result, will not trigger a 3 or 10 year bar for unlawful presence.

4. Advance Parole Empowers Immigration Court Jurisdiction Over Denied Adjustment Applications

If an individual is who was granted advance parole is placed in removal proceedings following re-entry into the United States, his application for adjustment of status must first be considered by USCIS and may only be considered by an Immigration Judge once it has been denied. The regulations implementing the changes wrought by IIRAIRA establish that USCIS has exclusive jurisdiction to adjudicate adjustment applications of arriving aliens. 8 C.F.R. § 245.2(a)(1). The regulations also provide an exception when an alien who leaves the United States while an adjustment application is pending with the USCIS and returns pursuant to a grant of advance parole, as well as place in removal proceedings. *Id.* The regulations give the immigration judge authority to adjudicate a renewed application only where the USCIS has denied the application. *Id.* A new adjustment application, based on an underlying visa not previously considered by USCIS, may not properly be considered by an Immigration Judge. *Matter of Silitonga*, 25 I&N Dec. 89 (BIA 2009).

Matter of Silitonga, 25 I&N Dec. 89 (BIA 2009).

Under 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(1)(ii) (2009), Immigration Judges have no jurisdiction to adjudicate an application filed by an arriving alien seeking adjustment of status, with the limited exception of an alien who has been placed in removal proceedings after returning to the United States pursuant to a grant of advance parole to pursue a previously filed application.

However, the jurisdiction of the immigration court is limited by the Board of Immigration Appeal's decision in in Matter of Martin, 24 I&N Dec. 778 (BIA 2009). Although there was prior Board precedent enabling the Immigration Judge to consider applications under the Cuban Refugee Adjustment Act filed in the first instance immigration court, the Board held that an alien who has been placed in removal proceedings after returning to the United States pursuant to a grant of advance parole to pursue a previously filed application may have that application reviewed by an Immigration Court, if denied by USCIS. Id.

Matter of Martin, 24 I&N Dec. 778 (BIA 2009).

Under 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(1)(ii) (2008), Immigration Judges have no jurisdiction to adjudicate an application filed by an arriving alien seeking adjustment of status under the Cuban Refugee Adjustment Act of November 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161, as amended, with the limited exception of an alien who has been placed in removal proceedings after returning to the United States pursuant to a grant of advance parole to pursue a previously filed application.

III. How to apply

Given this understanding of advance parole and how it can serve for overcoming unlawful presence bars to adjustment, it is important to review the practical requirements for applications.

Generally, to apply for advance parole, an alien must submit an Application for Travel Document, Form I-131, concurrently with or after the filing of an Application to Register Permanent Residence or Adjust Status (Form I-485). The applicant should indicate that he or she is “applying for an Advance Parole to allow me to return to the United States after temporary foreign travel,” at option 1-d on the current Form I-131. The alien must

concurrently submit a copy of any document issued by USCIS related to status, including an approved visa petition, as well as an explanation or other evidence showing the circumstances that warrant the issuance of an advance parole document. Particularized requirements exist depending on status, including for DACA recipients, as discussed below, but those immigrants who have no lawful status in the United States but have an approved visa petition should submit the approval notice with relevant documentation justifying travel to their home country.

In addition to a completed I-131 application, those filing for Advance Parole will need:

- An official photo identity document
- Explanation of travel
- 2 photos
- \$360 filing fee (unless submitted concurrently with Form I-485)
- Supporting documentation (this will vary depending on whether the applicant has DACA or other status.)

All materials should be submitted to the USCIS office designated for that jurisdiction, pursuant to the information referenced in the instructions to Form I-131.

Particularized Requirements for DACA Recipients

Given that they have received an immigration benefit, DACA recipients

have more particularized and clearly delineated grounds on which to base a request for advance parole. For DACA recipients, advance parole will be granted for:

1. Humanitarian reasons
2. Education
3. Employment

Travel for vacation will not be approved by DHS for DACA recipients. Other immigrants may be eligible for advance parole without these restrictions. For DACA recipients, USCIS has provided the following guidance on possible evidence justifying humanitarian parole, which could prove useful for other advance parole applicants as well:

*Example of evidence for
Humanitarian Advance Parole:*

- Medical records of elderly or sick relative
- Birth certificates or documents proving family relationship

*Example of evidence for
Educational Advance Parole:*

- Acceptance to study abroad program
- Documentation of planned research trip
- Letter from professor or research advisor

*Example of evidence for
Employment Advance Parole:*

- Letter from employer
- Conference invitation

Other Recognized Categories of Eligible Applicants

The DHS has previously recognized the following categories of persons who may be granted advance parole, unless national security or public order dictates otherwise:

A member of the professions or a person having exceptional ability in the sciences or the arts who was granted voluntary departure before April 1, 1997 for the duration of the validity of a third- or sixth-preference petition approved on his behalf, or to such a member or person who is a Western Hemisphere native and applied for an immigrant visa and who was granted voluntary departure before April 1, 1997, who is going abroad in connection with the qualifying profession, art, or science, or to bring his or her spouse and children to the United States, and to the spouse and children of such member or person who are abroad, notwithstanding that the principal beneficiary may have filed an application for adjustment to permanent resident status.

A Cuban in refugee, parole, or voluntary-departure status who intends to depart temporarily to apply for a U.S. immigrant visa in Canada and is in possession of a U.S. consular officer's letter of invitation to apply.

An applicant for adjustment of status who seeks to depart temporarily from

the United States for any bona fide business or personal reason when his or her properly filed adjustment application cannot be completed solely because visa numbers became unavailable subsequent to filing or finds it necessary to depart temporarily for emergent personal or bona fide business reasons before a decision can be made on the pending application.

A lawful permanent resident who, before leaving the United States, has applied

to a DHS office abroad for a duplicate Form 1-551 or for a visa waiver under INA § 211(b), but who, because of emergent conditions, must embark before action can be completed on his or her application.

- A noncitizen who is not a J-1 exchange visitor subject to the foreign-1-essence requirement, is not the beneficiary of a private bill, and is not under removal proceedings, in whose case parole has been authorized because of emergent or humanitarian considerations.
- A noncitizen in whose case parole before leaving the United States has been authorized by DHS Headquarters.
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- A noncitizen who is a legalization applicant under the provisions of the LIFE Act, is inside the United States, and is seeking permission to travel abroad and return. 12

- A noncitizen in the United States who has an appointment to apply for an immigrant visa at a U.S. consulate in a foreign country and who needs advance parole to assure that country that he or she will be readmitted to the United States if the visa is not obtained. ¹³
- Certain foreign nationals living and working in the Commonwealth of the Northern Mariana Islands who do not possess U.S. lawful permanent residency or an appropriate U.S. visa (this authorization was available until December 31, 2014.)

- Expedited Advance Parole

In appropriate cases, requests for advance parole may be expedited. According to the Instructions to Form I-131:

“To request expedited processing of an application for a Reentry Permit, a Refugee Travel Document, or an Advance Parole Document for an individual outside the United States, other than under one of the Family Reunification Parole policies, type or print the word EXPEDITE in the top right corner of the application in black ink. USCIS recommends that you provide e-mail addresses and a fax number with any expedite request for a Reentry Permit, Refugee Travel Document, or Advance Parole Document.

Include a written explanation of the reason for the request to expedite with any supporting evidence available. The burden is on the applicant to demonstrate that one or more of the expedite criteria have been met. The criteria are as follows:

- 1. Severe financial loss to company or individual;**
 - 2. Extreme emergent situation;**
 - 3. Humanitarian situation; or**
 - 4. Non-profit status of requesting organization in furtherance of the cultural and social interests of the United States Department of Defense or National Interest Situation. (Note: The request must come from an official United States Government entity and state that a delay will be detrimental to the U.S. Government.)**
- “

IV. Strategies for Practitioners

A. Individual Cases

Advocates representing immigrants with approved visa petitions who are ineligible for adjustment of status because of old “illegal” entries, should work with their members and clients to prepare applications for advance parole even without a liberalization of policy, and make every effort possible to have their members/clients granted “advance parole” to visit family members abroad and return to the U.S. with “advance parole.” When these immigrants return to the United States with “advance

parole,” they enter with inspection and thus become eligible for the first time for “adjustment of status.” *It is precisely their long-past “illegal” entries barring them from “adjustment of status” even if they have an approved family-based visa petition.*

For those with already approved visa petitions who entered the country without inspections it is possible for one to utilize a grant of advance parole to adjust your status. One of the main roadblocks that many immigrants with already approved visa petitions face is the fear of triggering the unlawful presence bars which are laid out in INA §212(a)(9)(B):

ALIENS UNLAWFULLY
PRESENT.-

(i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the

date of such alien's departure or removal from the United States is inadmissible.

Because of these illegal entries from many years ago, the vast majority of these immigrants (probably over 90%) cannot adjust their status in the U.S. and must return to their home countries for ten years before obtaining lawful resident status because they have lived in the U.S. for more than one year in undocumented status (so-called "ten year bar"). However, once they enter with "advance parole" they could be granted lawful permanent resident status.

If upon returning with a grant of advance parole, an individual immigrant meets the requirements of INA §245(a) they are eligible to Adjust their status to that of a Lawful Permanent Resident. INA §245(a) provides:

- (a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if
 - (1) the alien makes an

application for such adjustment,
(2) the alien is eligible to receive
an immigrant visa and is
admissible to the United States
for permanent residence, and
(3) an immigrant visa is
immediately available to him at
the time his application is filed.

Applicants for Adjustment of Status
must also not be otherwise excluded
under INA § 245(c), which provides:

(c) Other than an alien having an
approved petition for
classification as a VAWA self-
petitioner, subsection (a) shall
not be applicable to
(1) an alien crewman;
(2) subject to subsection (k), an
alien (other than an immediate
relative as defined in section
201(b) or a special immigrant
described in section
101(a)(27)(H) , (I) , (J) , or (K))
who hereafter continues in or
accepts unauthorized
employment prior to filing an
application for adjustment of
status or who is in unlawful
immigration status on the date of
filing the application for
adjustment of status or who has
failed (other than through no
fault of his own or for technical
reasons) to maintain
continuously a lawful status since
entry into the United States;
(3) any alien admitted in transit
without visa under section

212(d)(4)(C) ;
(4) an alien (other than an immediate relative as defined in section 201(b)) who was admitted as a nonimmigrant visitor without a visa under section 212(l) or section 217 ;
(5) an alien who was admitted as a nonimmigrant described in section 101(a)(15)(S) ;
(6) an alien who is deportable under section 237(a)(4)(B) ;
(7) any alien who seeks adjustment of status to that of an immigrant under section 203(b) and is not in a lawful nonimmigrant status; or
(8) any alien who was employed while the alien was an unauthorized alien, as defined in section 274A(h)(3) , or who has otherwise violated the terms of a nonimmigrant visa.

It should be noted that Immediate Relatives are specifically exempt from 245(c) bars. That aside, if someone is barred based on any of the categories laid out in 245(c) they cannot apply for adjustment, instead they must consular process when their priority date is current.

V. Risks of Advance Parole: Inadmissibility

As noted above, advance parole allows the recipient to leave the United States and to return, rendering him or her an applicant for admission at the border.

This means that all inadmissibility grounds may be considered with regards to the parolee, and that any applicable grounds may be charged against him or her in removal proceedings. Entry with inspection pursuant to advance parole does not affect the applicability of other inadmissibility grounds unrelated to the individual's manner of entry into the United States. Thus, for example, if an individual immigrant has a criminal record or other factors that may lead to inadmissibility, extreme caution should be exercised before advising such a client to seek advance parole and travel outside of the United States. Persons who physically leave the United States and attempt to re-enter, even if granted advance parole, are still reviewed under the admissibility rubric (INA § 212) which imposes more unforgiving conditions than the deportability criteria (INA § 237) which would normally apply to persons already present and previously admitted to the United States.

Potential Inadmissibility

Concerns

Potential inadmissibility risks include:

- Health-related grounds;
- Criminal-related grounds (more expansive than deportability counterparts);
- National security grounds;
- Public charge;
- Labor protection;
- Fraud or misrepresentation;
- Documentation requirements;

- Prior removals; and
- Other miscellaneous grounds

Waivers of Inadmissibility

While there are waivers for some of these grounds of inadmissibility, they have varying requirements and are always discretionary. Waivers generally require a showing that inadmissibility should be waived for humanitarian purposes, to assure family unity, or because it is otherwise in the public interest.

Advocates should exercise great caution and thoroughly assess the individual immigrant's case to determine whether a combination of advance parole and a waiver of inadmissibility would facilitate the processing of the individual's adjustment application, as well as whether an individual would be eligible for the applicable waiver of inadmissibility.

According to USCIS Policy Manual, the following grounds of inadmissibility cannot be waived:

- Controlled Substance Traffickers – [INA 212\(a\)\(2\)\(C\)](#)
- Espionage; Sabotage; Illegal Export of Goods, Technology, or Sensitive Information; Unlawful Overthrow or Opposition to U.S. Government – [INA 212\(a\)\(3\)\(A\)](#)

- Terrorist Activities – [INA 212\(a\)\(3\)\(B\)](#) (Note: Exemptions for some of these grounds exist)
- Adverse Foreign Policy Impact – [INA 212\(a\)\(3\)\(C\)](#)
- Participants in Nazi Persecutions or Genocide – [INA 212\(a\)\(3\)\(E\)](#)

Applying for Waivers of Inadmissibility

Individual immigrants who are inadmissible due to prior removal orders must seek consent to reapply for admission from the DHS, using Form I-212. On this form, you must provide detailed information about the prior removal, indicate the immigration status you seek as well as any familial relationships with U.S. citizens and/or permanent residents, as well as evidence demonstrating eligibility according to the relevant standard, including extreme hardship to those relevant family members.

Other grounds of inadmissibility subject to waiver must be sought using Form I-601. Waivers of inadmissibility should be the subject of a separate training.

A. Avoiding “Parole-in-Place”

“Parole-in-Place” has been used from time to time to create the fiction that the immigrant departed the U.S. and returned lawfully (wiping out a previous illegal entry) even though the immigrant never actually left the U.S. I

do *not* recommend “parole in place” because it is a legal fiction and would likely generate a political and legal backlash that may be avoided by granting traditional “advance parole” to immigrants “already in the system” as recommended in this report.

B. Policy Changes

On a policy level, the immigrants’ rights community should push President Obama to promptly issue a policy or adopt regulations allowing all immigrants eligible for family or employment-based visas under existing law to apply for and be granted “advance parole” (permission to travel abroad and return to the U.S. through a port of entry) for personal or business purposes. This would not require the creation of any additional pathways to legal status, but rather would alleviate the pressure on deserving immigrants who are already eligible for lawful status under existing provisions.

This is a sensible “border enforcement” proposal. It is well known that undocumented immigrants, including immigrants with pending or approved visa applications, who are playing by the rules and are “in the system,” travel abroad to see family and for other personal reasons. When they return to their residences in the U.S., they do so without inspection, crossing mountains and deserts with the help of human smugglers. The journey is dangerous and diverts the limited resources of the

Customs and Border Protection agency (CBP). Allowing these immigrants to return lawfully through normal ports of entry can be accomplished with “advance parole.” This would remove the dangers of returning illegally and preserve CBP’s limited enforcement resources. Simply put, these immigrants would return through a normal inspection process rather than traveling across the Southern border entering with the help of human traffickers.

To accomplish this, the Administration need only widen the group of immigrants to whom it extends “advance parole.” Right now, immigrants with sick or dying relatives or other family emergencies (or business reasons) can seek and obtain “advance parole.” This benefit could easily be extended to any immigrant who has applied or been approved for issuance of a permanent resident visa and who wishes to travel abroad for lawful reasons (for example visit family). *This modification in policy could be accomplished in about one or two sentences in a DHS policy memo or amended regulation.*

VI. Recap

Those who have fought for comprehensive immigration reform should swiftly initiate:

- Advocacy urging the Administration to expand the availability of “advance parole.” The

policy change required is minimal and easily accomplishable.

- Representation of individual persons in advance parole applications in order to facilitate their eligibility for adjustment of status.

The Center for Human Rights and Constitutional Law is available to provide unions, non-profit groups, churches, legal aid programs, etc. with technical assistance to prepare applications for “advance parole” for members and clients.