May 31, 2024

The President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Executive authority to authorize parole-in-place for spouses of U.S. citizens

Dear President Biden,

As law professors and scholars,[1] we write to express our position on the scope of executive branch legal authority to grant parole in place (PIP) for the undocumented spouses[2] of U.S. citizens who are present in the United States, who entered without inspection, and who the executive branch determines otherwise deserve parole status. We do not take a position on what steps the administration should take.[3] Rather, we offer our view of the executive branch's statutory authority to grant PIP.

Section 212(d)(5)(A) of the Immigration and Nationality Act (INA) identifies specific requirements for when the executive branch can grant parole. It states:

> The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States[.][4]

This provision thus grants the executive branch discretion to grant parole to a noncitizen as long as four requirements are met. First, the noncitizen must be "applying for admission." Second, the grant of parole must be "temporary." Third, the grant of parole must be "on a case-by-case basis." And fourth, the parole must be granted for "urgent humanitarian reasons or significant public benefit." Identifying undocumented spouses of U.S. citizens as generally eligible for PIP if they entered without inspection and are otherwise found to deserve parole status meets each of these criteria.

First, undocumented noncitizens who are present in the United States and entered without inspection are "applying for admission." The INA itself makes this clear: "An alien present in

[1] All institutional affiliations are for identification purposes only and do not signify institutional endorsement of this letter.
[2] Though this letter focuses on spouses, the same reasoning would apply to other "immediate relatives" as defined in INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).
[3] The USCIS Policy Manual on PIP recognizes broad authority and provides an example (military PIP). https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-2 (Section A. subsection 3). USCIS could choose to add spouses of U.S. citizens as another example of when discretion could be recognized.
[4] INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

the United States who has not been admitted . . . shall be deemed for purposes of this Act an applicant for admission."[5]

Second, the grant of PIP would be "temporary," since the grant of parole is time limited, with the possibility that the noncitizen could reapply at the end of that period. That is how USCIS structured the parole program for nationals of Cuba, Haiti, Nicaragua, and Venezuela (CHNV parole program).[6]

The grant of PIP would also be "temporary" because most undocumented spouses of U.S. citizens could, if granted parole, apply for adjustment of status to become lawful permanent residents.[7] In the context of humanitarian parole for individuals outside the United States, USCIS has identified the "means to obtain lawful immigration status during the parole authorization period" as a positive factor in deciding whether to grant parole, presumably because the ability to obtain such status would make the parole period "temporary."[8] That same reasoning would apply to the grant of PIP to an undocumented spouse of a U.S. citizen.

Third, the grant of PIP would be "on a case-by-case basis." That case-by-case requirement would likely prohibit a categorical rule granting PIP to every undocumented spouse of a U.S. citizen who entered the United States without inspection. But it should not prohibit the executive from identifying, as a factor that weighs in favor of a grant of PIP, the fact that a noncitizen is present in the United States and is the spouse of a U.S. citizen. Of course, the executive could still deny PIP to any spouse of a U.S. citizen based on other discretionary factors such as insufficient time living in the United States.

USCIS regularly identifies factors that weigh in favor of a grant of parole without violating the case-by-case requirement. For instance, USCIS has identified as a factor that "ordinarily weighs heavily in favor of parole in place" the fact that a noncitizen is "a spouse, parent, son, or daughter of an Active Duty member of the U.S. Armed Forces, an individual in the Selected Reserve of the Ready Reserve, or an individual who previously served on active duty in the U.S. Armed Forces or the Selected Reserve of the Ready Reserve."[9] Identifying such factors that weigh in favor of a grant of parole does not violate the case-by-case requirement, but simply provides guidance to ensure that the exercise of the discretionary power to grant parole is carried out in a consistent and uniform manner. Indeed, as DOJ recently argued in defending the CHNV parole program, the executive is free to "use . . .

[5] INA § 235(a)(1), 8 U.S.C. § 1225(a)(1).

[6] Process for Cubans, Haitians, Nicaraguans, and Venezuelans, https://www.uscis.gov/CHNV (describing a "temporary period of parole for up to two years").

[7] INA § 245(a), (c), 8 U.S.C. § 1255(a), (c).

[8] USCIS, Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States, https://www.uscis.gov/humanitarian/humanitarian_parole.

[9] USCIS Adjudicator's Field Manual Chapter 21.1(c)(1), https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm21-external.pdf; *see also* USCIS Policy Manual Vol. 7, Part B, Ch. 2, § A.3, https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-2.

parole for groups of individuals subject to the same qualifying 'urgent humanitarian reasons' and 'significant public benefit.'"[10]

Fourth, treating an immediate-family relationship with a U.S. citizen as a positive factor in deciding whether to grant PIP would be consistent with the "urgent humanitarian reasons or significant public benefit" requirement. The statute provides no definition of either term, which inherently gives the executive branch significant discretion in deciding what qualifies as an "urgent humanitarian reason[]" or "significant public benefit." Indeed, DOJ recently explained that the executive's "interpretation and application of those terms are . . . entitled to deference" specifically because the INA does not define those terms or impose numerical limits on the number of parolees and because the statute makes the executive branch "responsible for …[e]stablishing and administering rules … governing … parole."[11] Thus, as DOJ put it, "[s]ection 1182(d)(5)(A) sets no limit on how widespread an urgent humanitarian reason or significant public benefit may be as long as the agency determines it applies in an individual case."[12]

Avoiding the separation of U.S. citizen families through the removal of spouses of U.S. citizens falls within both statutory terms. Our immigration laws have long focused on "unit[ing] families and preserv[ing] family ties,"[13] so keeping U.S. citizen families together can certainly be understood as an "urgent humanitarian reason." And granting PIP to deserving spouses of U.S. citizens would also provide a "significant public benefit" given their contributions to our communities and our economy and the harm their removal would cause to their U.S. citizen family members.[14] Family unity has been a relevant factor for a variety of parole programs that have not been challenged in court - Cuban[15] and Haitian[16] Family Reunification, the general Family Reunification Parole program that now includes Ecuador,[17] and the Afghan Humanitarian Parole guidance.[18] And the challenge to the family-based Central American Minors (CAM) program was filed over two years ago, and that program has not been enjoined.[19]

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[10] Defendants' Post-Trial Brief at 41 (quoting 6 U.S.C. § 202(4)), Texas v. United States, S.D. Tex. No. 23-cv-00007, ECF No. 284 (Sept. 29, 2023) ("*Texas* Post-Trial Brief"); *see also* Defendants' Proposed Findings of Fact and Conclusions of Law at 45, Texas v. United States, S.D. Tex. No. 23-cv-00007, ECF No. 240 (Aug. 16, 2023) ("*Texas* Findings") ("Congress left open the possibility that urgent humanitarian reasons and significant public benefits under Section 1182(d)(5)(A) might be presented by many similarly situated noncitizens, and that the Executive could consider the aggregate benefits of paroling noncitizens because they fall within certain groups.").

[11] *Texas* Post-Trial Brief at 39 (quoting 6 U.S.C. § 202(4)).

[12] *Texas* Findings at 45.

[13] INS v. Errico, 385 U.S. 214, 220 (1966).

[14] *See, e.g.*, Miguel Pinedo & Carmen R. Valdez, Immigration enforcement policies and the mental health of U.S. citizens: findings from a comparative analysis, Am. J. Community Psychol. 2020 Sep; 66(1-2): 119–129.

[15] https://www.uscis.gov/humanitarian/humanitarian-parole/the-cuban-family-reunification-parole-program.

[16] https://www.uscis.gov/humanitarian/humanitarian-parole/the-haitian-family-reunification-parole-hfrp-program.

[17] https://www.uscis.gov/FRP.

[18] https://www.uscis.gov/humanitarian/humanitarian-parole/information-for-afghan-nationals-on-requests-to-uscis-for-parole.

[19] Texas v. Biden, 3:22-cv-780 (N.D. Tex. 2022).

Historically, the parole power has been used widely, and multiple efforts to limit the scope of parole authority in the negotiations over the Refugee Act of 1980 failed. Congress kept the parole authority as an important tool in addition to the refugee program.[20]

In conclusion, we believe the Biden administration has legal authority to grant PIP for the undocumented spouses of U.S. citizens who are present in the United States, who entered without inspection, and who the executive branch determines otherwise are eligible for parole status.

Respectfully yours,

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cc: White House Counsel Siskel
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[20] Deborah Anker & Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 1 (1981), https://digital.sandiego.edu/cgi/viewcontent.cgi?article=1735&context=sdlr.

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