



**Cornell University
Law School**

Lawyers in the Best Sense

IMMIGRATION LAW AND POLICY PROGRAM

Stephen Yale-Loehr, Director

Myron Taylor Hall

Ithaca, New York 14853-4901

T: 607.379.9707

E: swyl@cornell.edu

To: Interested Parties

From: Cornell Law School Immigration Law and Policy Program (Stephen Yale-Loehr, Marielena Hincapie, and Dan Berger)

Re: Legal Authority for USCIS to Grant Parole

Date: October 17, 2023

This memo addresses the legal authority for the United States Citizenship and Immigration Services (USCIS) to grant parole for undocumented spouses of U.S. citizens, including parole in place (PIP)¹ for those physically present in the United States, and humanitarian or significant public benefit parole² for those outside the United States.

Background

Parole is a discretionary authority created by Congress³ authorizing the Secretary of the Department of Homeland Security (DHS) "in his discretion (to) parole into the United States temporarily under such conditions as he may prescribe ... on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission into the United States...." The statute does not define "humanitarian reasons or significant public benefit." Over the years, the U.S. government has exercised its parole authority in a wide variety of ways to support policy goals.

Before 1980, administrations used parole to react quickly to crises abroad, inviting groups of Hungarians, Soviet Jews, etc. In 1980, Congress passed the Refugee Act, which focused humanitarian admissions on the refugee program and clarified parole as an option for targeted situations.⁴ The legislative history

¹ Currently, USCIS has instructions for PIP for military family members but not for other situations. See

[https://www.uscis.gov/sites/default/files/document/brochures/Brochure-](https://www.uscis.gov/sites/default/files/document/brochures/Brochure-Immigration%20Options%20for%20Family%20of%20Certain%20Military%20Members%20and%20Veterans.pdf)

[Immigration Options for Family of Certain Military Members and Veterans.pdf](https://www.uscis.gov/sites/default/files/document/brochures/Brochure-Immigration%20Options%20for%20Family%20of%20Certain%20Military%20Members%20and%20Veterans.pdf) and

<https://www.uscis.gov/military/discretionary-options-for-military-members-enlistees-and-their-families>.

²<https://www.uscis.gov/humanitarian/humanitarian-parole/guidance-on-evidence-for-certain-types-of-humanitarian-or-significant-public-benefit-parole-requests>.

³ INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

⁴ For historical background on parole, see generally Deborah Anker and Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego Law Review 1 (1981),

<https://digital.sandiego.edu/cgi/viewcontent.cgi?article=1735&context=sdlr>; Dan Berger and Michael Turansick, USCIS Processing of Humanitarian Parole Applications for Afghan Nationals, 27 *Bender's Immigration Bulletin* 3, 9 (January 1, 2022); 5 Charles Gordon, Stanley Mailman, Stephen Yale-Loehr and Ronald Wada, *Immigration Law and Procedure* Chapter 62.

shows that both Republican and Democratic policymakers understood the importance of using parole for broader categories of groups for national interest benefits, and to ensure that the United States could cope with arising emergency or refugee challenges. Notably, Senator Strom Thurmond (R-SC) noted in 1965 that despite a House report attempting to limit parole for large groups of refugees, “I would expect this general rule of thumb not forego in all cases the use of [parole] for the conditional entry of refugees if such were deemed in the national interest.”⁵ In 1973, Representative Peter Rodino (D-NJ) commented that the combination of parole and the refugee program provides “maximum flexibility in the pursuit of humanitarian and foreign policy objectives. The United States would be better able to cope with any arising emergency or refugee problem in a manner consistent with broader objectives.”⁶

Legal Authority

Does USCIS have authority to grant parole in such situations?

Yes. A 2008 DHS memorandum of understanding⁷ delegates USCIS with primary responsibility for individual parole applications. Anyone can be granted parole, even if that person is inadmissible, or ineligible for a visa, refugee, or other immigration status.⁸

Individuals who entered the United States in a nonimmigrant status such as a B-2 tourist visa, and then overstayed, are not eligible for PIP.

How is PIP currently used, and how could it help some undocumented spouses of U.S. citizens?

The USCIS Policy Manual has only one specific example of PIP - military family members.⁹ Current or former service members, or their spouse, child, or parent, can seek PIP by applying to a USCIS field office on Form I-131 and providing evidence of service and the relationship (usually birth or marriage certificate), passport photos and an explanation of any humanitarian factors. Each local office has a process for submitting the application, and the process tends to be efficient and straightforward.

PIP is not possible for those who entered with valid immigration status and overstayed. PIP also may not cure certain grounds of inadmissibility such as a false claim to U.S. citizenship¹⁰ or the so-called “permanent” bar for re-entry after removal or unlawful presence.¹¹

A second example could be added to the USCIS Policy Manual indicating that spouses of U.S. citizens who entered without inspection could apply for PIP. Nothing in the statute prohibits USCIS from

⁵ 111 Cong. Rec. 24,237 (1965).

⁶ Proposed Amendments to the Immigration and Nationality Act: Hearings on H.R. 9112, H.R. 15092 and H.R. 173370 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 91st Cong., 1st Sess. 40 (1970), at 58.

⁷ <https://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf>.

⁸ For more general information on parole, see the [excellent advisory from CLINIC](#) (updated August 2021), Immigration Law and Procedure § 62.04, and Chapter 5 of ILRC’s [Parole in Immigration Law](#). See also the discussion of the potential use of parole for DACA-eligible students at <https://www.law.uh.edu/iheig/documents/ExecutiveAuthorityForDREAMRelief28May2012withSignatures.pdf>.

⁹ USCIS Policy Manual, Volume 7 Part B Chapter 2 Subsection A(3).

¹⁰ I.N.A. 212(a)(6)(c)(ii), 8 U.S.C. § 1182(a)(6)(c)(ii).

¹¹ <https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-inadmissibility>. These would need to be addressed separately to make this a meaningful relief for undocumented spouses of U.S. citizens.

providing other examples. The USCIS Policy Manual is a work in progress, adding guidance from previous memos, letters, and the now retired Adjudicator's Field Manual. Examples have been added for additional clarity for more common situations, such as STEM workers in the O-1A temporary status context,¹² or for specific situations in the relatively new adoption section.¹³ The purpose here would be the same: to provide a lawful entry to the United States so that a marriage-based permanent residence application could be filed for those who qualify in the United States.

PIP authority is supported by earlier guidance preceding the USCIS Policy Manual.¹⁴ Without a grant of PIP, spouses of U.S. citizens who qualify for a marriage-based green card (but for an unlawful entry) would have to go through two difficult additional steps to move into status.

First, the spouse would have to file an I-601A Application for Provisional Unlawful Presence Waiver, arguing extreme hardship to the U.S. citizen if the undocumented spouse were not able to stay in the United States.¹⁵ These applications are discretionary, have a relatively high bar, and are currently quite slow.¹⁶ The I-601A is a major hurdle for spouses in paying for legal counsel or finding nonprofit legal services, and in the effort in preparing the case and gathering evidence.

The second additional step is travel. When and if the I-601A is approved, the spouse must leave the United States for an interview and medical exam at a U.S. consulate abroad. That is not only an additional expense (both travel and lost work) but an added uncertainty, since processing times at U.S. consulates vary. If there is a delay or additional investigation into the case, the spouse must wait until this is resolved. In many cases, even a short trip can be a hardship for the U.S. citizen spouse and for their children who remain in the United States. Cases where children have special needs or medical conditions are particularly challenging. The uncertainty of the time away also impacts employers who may be able to provide a short leave of absence but not an indefinite one.

Co-author Dan Berger's immigration law firm has agreements with thedream.us, and quite a few universities to do screening consultations with undocumented students. Over the past year, we have seen a significant number of undocumented graduate students who are married to U.S. citizens and who could benefit from PIP. Some of the mixed status families who are most often discussed in the media are older, but with initial DACA applications on hold since 2017, there is a new generation of students and recent graduates who are unable to work in their field. PIP could be one tool to help some of them move into status.

For all these reasons, PIP for spouses of U.S. military personnel has been a clear success, and PIP for qualifying undocumented spouses of U.S. citizens would provide a similar significant benefit.

¹² <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/21/fact-sheet-biden-harris-administration-actions-to-attract-stem-talent-and-strengthen-our-economy-and-competitiveness/>.

¹³ <https://www.uscis.gov/policy-manual/volume-5>.

¹⁴ USCIS Adjudicator's Field Manual (AFM) Chapter 21.1(c)(1), at <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm21-external.pdf> ("Parole in place may be granted only to individuals who are present without admission and are therefore applicants for admission."). See also legacy INS General Counsel Opinion 98-10, 1998 WL 1806685.

¹⁵ <https://www.uscis.gov/family/family-of-us-citizens/provisional-unlawful-presence-waivers>.

¹⁶ <https://www.americanimmigrationcouncil.org/litigation/class-action-lawsuit-challenging-uscis-delay-deciding-applications-provisional-unlawful>.

How could humanitarian parole support spouses of U.S. citizens who are abroad?

USCIS also has authority to grant parole to individuals outside the United States. By regulation, parole applications are reviewed on a case-by-case basis.¹⁷ USCIS has articulated factors to be considered. Examples include the U visa derivative parole¹⁸ and the Cuban, Venezuela, Cuban, and Haitian parole guidelines.¹⁹ Another recent example of the administration's use of parole is the successful "Uniting for Ukraine"²⁰ program, which recognized the humanitarian relief needed.

Humanitarian parole could be offered on a case-by-case basis to those spouses of U.S. citizens who would be eligible to apply for permanent residence in the United States (with a waiver of inadmissibility, if needed). Like the "Uniting for Ukraine" program, where Ukrainians had to prove they had a sponsor in the United States who would support them financially, this would allow spouses of U.S. citizens to enter on parole and be with their U.S. citizen spouses (and often children) while going through the green card process. Guidance on parole refers to family reunification, with humanitarian factors as one example.²¹ This was one basis for the recent Family Reunification Parole Process, which allows spouses from certain Western Hemisphere countries to come to the United States while waiting for long green card backlogs.²²

Conclusion

There is clear legal authority and precedent for granting PIP and Humanitarian Parole for certain undocumented spouses of U.S. citizens. Many immigrant spouses of U.S. citizens have been in the country for over 10 years, and are paying federal, state, and local taxes. Spouses outside the United States are often supported by their U.S. citizens sending remittances. Providing undocumented spouses of U.S. citizens the opportunity to apply for parole will benefit local economies, as such spouses could put their skills to use in meeting the nation's labor market needs.

Family values are an essential tenet of our immigration system. U.S. citizen voters should be able to fall in love with whoever they want and have the freedom to live safely together to support each other and thrive as they contribute to their loved ones, local communities, culture, society, and economy.

Providing parole for this targeted population is a focused and practical solution that would promote more efficient use of USCIS resources and staffing, as it would eliminate the need for the agency to process I-601A provisional waiver applications. Creating a process by which spouses of U.S. citizens can apply for and be granted parole would add value to the orderly operation of our immigration laws, and relieve some of the pressures on other parts of the immigration system that may require more complex solutions.

¹⁷ [8 C.F.R. § 212.5](#).

¹⁸ https://www.dhs.gov/sites/default/files/publications/2016-0818_cisomb_formal_recommendation_on_u_parole_signed.pdf.

¹⁹ <https://www.uscis.gov/CHNV>.

²⁰ <https://www.nbcnews.com/politics/immigration/us-admits-271000-ukrainian-refugees-russia-invasion-biden-rca72177>.

²¹ <https://www.uscis.gov/humanitarian/humanitarian-parole/guidance-on-evidence-for-certain-types-of-humanitarian-or-significant-public-benefit-parole-requests>. See also the 2017 USCIS Parole training module made public through a Freedom of Information Act request at <https://refugeerights.org/wp-content/uploads/2020/04/HP-FOIA-min.pdf> (pages 49-52 on family unity).

²² <https://www.uscis.gov/FRP>.