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Navigating Parole, Deferred Action, and TPS recipients toward Permanent Residency

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Immigration attorneys must often strategize the short-term solution for clients with an eye toward lawful permanent residency through a family or employment-based immigration process. The goal of permanent residency becomes all the more challenging when people are in a "quasi-immigration status" such as Deferred Action, TPS, or DACA. This paper aims to provide an overview of each of these and possible pathways toward lawful permanent residency.

Parole

"The Attorney General [the Secretary of Homeland Security] may … 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, 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 Attorney General, 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."[1]

Parole could be considered a sort of quasi-immigration status as the Department of Homeland Security is tolerating the noncitizen's presence in the United States. In some cases, a person who is paroled can apply for work authorization. *See* 8 C.F.R. § 274a.12(c)(11).[2] But such parole "shall not be considered to be an admission." [3]

Parole is also a legal fiction that says that the paroled noncitizen does not acquire more legal rights than they had at the time of parole, but as a matter of constitutional law, the extent a noncitizen develops ties in the United States, he could challenge as a matter of due process procedures invoked against him, for example, executing an expedited removal order years later.[4]

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[1] The Supplemental Information for the Implementation of the Keeping Families Together regulation provides an excellent overview of parole, parole in place, and applicants for admission. See 89 FR. 67459, *et seq* (August 20, 2024); https://www.federalregister.gov/documents/2024/08/20/2024-18725/implementation-of-keeping-families-together

[2] Sometimes when ICE paroles a noncitizen, they will note on the I-94 or interim parole document that work is not authorized.

[3] INA § 212(d)(5).

[4] *See Osorio-Martinez v. Attorney General*, 893 F.3d 153, 158 (3d Cir. 2018) (finding that the limited habeas review under INA § 242(e)(2) violated the plaintiff's due process rights, given that the plaintiffs had been accorded Special Immigrant Juvenile (SIJ) status. *See generally Landon v. Plasencia*, 459 U.S. 21, 32 (1982). ("Once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.").

Any parole (other than a conditional parole under INA § 236, is an INA §212(d)(5) parole. This includes humanitarian parole, parole in place, parole pursuant to CBP One, etc.).

Who can be paroled?

A noncitizen "applying for admission" can be paroled.[5] Who is an applicant for admission?

a. Arriving aliens (non-citizens seeking admission at port of entry).[6]

b. Aliens Present Without Admission. Under INA § 235(b)(a)(1), besides applicants arriving at a port of entry and aliens interdicted in international waters, a noncitizen who has "not been admitted … shall be deemed an applicant for admission." This is why noncitizens present in the United States without admission can be paroled in place.

Admitted aliens are not applicants for admission so they could not be paroled (unless they depart the United States and return on a parole).

Note that a conditional parole under INA § 236 is not a section 212(d)(5) parole. *See Matter of Cabrera-Fernandez*, 28 I&N Dec. 747, 749 (BIA 2023). Conditional parole is a release of a noncitizen on their own recognizance.[7] See *Ortega-Cervantes v. Gonzalez*, 501 F.3d 1111, 1115 (9th Cir. 2007).

Who must be paroled and not released under INA § 236?

Applicants in expedited removal proceedings or transferred to INA § 240 proceedings from expedited removal proceedings may only be paroled, not released under INA § 236 by an immigration judge. *See Matter of M-S*, 27 I&N Dec. 509 (A.G. 2019). Also, a noncitizen apprehended seeking admission at a port of entry could only be paroled. *Matter of M-S,* 27 I&N Dec. at 513 (noting that an immigration judge lacks bond jurisdiction for an arriving alien).

To the extent DHS errs and purportedly releases such a noncitizen under INA § 236, ERO or some other DHS entity should be willing to parole such a person.

What about noncitizens apprehended near the border who are present without admission but who are not initially put into expedited removal proceedings? Must such noncitizens apprehended at or near port of entry be paroled? BIA says no.[8]

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[5] INA 212(d)(5).

[6] INA § 235(a)(1). See 8 C.F.R. § 1.2 for definition of an "arriving alien."

[7] INA § 235(a)(1). See 8 C.F.R. § 1.2 for definition of an "arriving alien."

[8] *See Matter of Cabrera-Fernandez*, 28 I&N Dec. 747, 749 (BIA 2023) (noncitizen present without admission apprehended less than a mile from the southern border was lawfully released under INA § 236, not under INA § 212(d)(5).

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