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IN FOCUS

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Deferred Action, Advance Parole, and Adjustment of Status

The Obama Administration's recent announcement that it is expanding its Deferred Action for Childhood Arrivals (DACA) initiative, and creating a DACA-like program for unlawfully present aliens whose children are U.S. citizens or lawful permanent residents (LPRs), has prompted questions about whether and how deferred action beneficiaries could acquire LPR status as the result of a grant of advance parole. DACA beneficiaries may currently be granted advance parole for humanitarian, educational, or employment purposes, and the Executive is expected to make similar provisions for the aliens granted deferred action through its new initiatives.

As explained below, some aliens granted advance parole could potentially acquire LPR status because of how certain provisions of the Immigration and Nationality Act (INA) are construed. However, there are statutory limits upon who may acquire LPR status in this way, and a grant of advance parole is not the only way such aliens could become LPRs.

Basic Legal Framework

The INA's provisions regarding adjustment of status, parole, and the 3- and 10-year bars upon the admission of aliens who have been unlawfully present in the United States for more than 180 days apparently have been construed to permit aliens to acquire LPR status as the result of advance parole.

Adjustment of Status Pursuant to INA §245(a)

INA §245(a) generally permits the Secretary of Homeland Security, "in his discretion and under such regulations as he may prescribe," to adjust the status of any alien "who was inspected and admitted or paroled into the United States" to that of an LPR provided the alien is "admissible ... for permanent residence," among other things. (Adjustment is also possible under other provisions of the INA, but the discussion in this "In Focus" is limited to adjustment pursuant to INA §245(a).)

The requirements that an alien (1) has been "inspected and admitted or paroled" and (2) is admissible as an LPR generally serve to limit unlawfully present aliens' eligibility to adjust their status while within the United States, even if the alien has a family member or an employer who is able and willing to sponsor the alien for an immigrant visa.

Aliens who are unlawfully present as the result of having entered the United States without authorization generally cannot satisfy the requirement that an alien have been "inspected and admitted or paroled" in order to qualify for adjustment of status. Under the INA, *admission* specifically refers to the "lawful entry of an alien ... after inspection and authorization by an immigration officer," while *parole* refers to an entry–which does not constitute an admission – that is also authorized by immigration officials. *See* INA §101(a)(13)(A), 8 U.S.C. §1101(a)(13)(A) (admission); INA §212(d)(5)(A), 8 U.S.C. §1182(d)(5)(A) (parole).

Aliens who are unlawfully present, either as the result of an unauthorized entry or because they overstayed a visa or otherwise violated the conditions of their temporary presence in the United States, are also often inadmissible pursuant to INA §212(a)(9)(B)(i), 8 U.S.C. §1182(a)(9)(B)(i). INA §212(a)(9)(B)(i) generally bars aliens who have been unlawfully present in the United States for a period of more than 180 days and less than 1 year from admission within 3 years of their "departure or removal." Those who are unlawfully present for one year or more are generally barred from admission for 10 years.

Advance Parole Pursuant to INA §212(d)(5)(A)

A grant of advance parole pursuant to INA §212(d)(5)(A) could, however, help an alien to qualify for adjustment of status by enabling the alien to (1) leave the United States and return to it in such a way that the alien is seen to have been "inspected and admitted or paroled" and (2) avoid the 3- and 10-year bars on admission that would generally be triggered by the "departure" of aliens who have been unlawfully present in the United States for over 180 days (and thus potentially be "admissible...for permanent residence").

"Inspected and Admitted or Paroled"

Advance parole is one type of "parole" pursuant to INA §212(d)(5)(A), which generally grants the Secretary of Homeland Security broad authority to permit the entry of any alien applying for admission into the United States, "under such conditions as he may prescribe," on a "case-by-case basis for urgent humanitarian reasons or significant public benefit." Specifically, advance parole has been used to permit the return to the United States of certain aliens who have been physically present within the country, but lack any generally recognized legal right to return to the country after leaving it.

Aliens who leave the United States and return pursuant to a grant of advance parole have historically been seen to have been "inspected and admitted or paroled," and, thus, as having met the first requirement for adjustment of status.

When are aliens granted advanced parole?

The Executive has generally broad discretion as to whether and when to grant advance parole. However, DHS's Frequently Asked Questions (FAQ) regarding the initial grant of DACA expressly provide that initial DACA beneficiaries, at least, may be granted advance parole to travel abroad for humanitarian, educational, or employment purposes. The FAQ further specify that humanitarian purposes may include medical treatment, funeral services for family members, or visiting ailing relatives; educational ones, semester-abroad programs or research; and employment ones, overseas assignments, interviews, conferences, training, or client meetings.

"Admissible ... for Permanent Residence"

As the result of a 2012 decision by the Board of Immigration Appeals (BIA), the highest administrative tribunal for interpreting and applying immigration laws, aliens who leave the United States and return pursuant to a grant of advance parole could also be seen to be admissible, notwithstanding the 3- and 10-year bars prescribed in INA §212(a)(9)(B)(i), and, thus, eligible for adjustment of status.

Prior to 2012, aliens who left the United States pursuant to a grant of advance parole after having been unlawfully present for more than 180 days were generally seen as inadmissible and, as a result, were considered ineligible for adjustment. This was because leaving the country pursuant to a grant of advance parole was seen as a "departure" for purposes of INA §212(a)(9)(B)(i). The BIA's 2007 decision in *Matter of Lemus*, 24 I. & N. Dec. 373 (BIA 2007), was generally seen to support this view by holding that the term "departure" is broadly construed:

> to encompass any 'departure' from the United States, regardless of whether it is a voluntary departure in lieu of removal or under threat of removal, or it is a departure that is made wholly outside the context of a removal proceeding.

The BIA there emphasized that its interpretation was based on the "plain meaning" of the statute, which, in its view, gave no "indication that Congress intended to limit the plain and ordinary meaning of the term 'departure'" to exclude aliens whose "departure" was not removal-related.

However, the BIA subsequently adopted a narrower interpretation of "departure" in its 2012 decision in *Matter of Arrabally and Matter of Yerrabelly*, 25 I. & N. Dec. 771 (BIA 2012). There, when specifically confronted with the cases of two aliens who had left the United States for India several times between 2004 and 2006 pursuant to a grant of advance parole, the BIA held that an alien who "has left and returned to the United States under a grant of advance parole has not made an 'departure from the United States' within the meaning of [INA §212(a)(9)(B)(i)]." The BIA reached this conclusion by distinguishing departure pursuant to a grant of advance parole from other departures, such as that at issue in *Lemus*. It also noted that, while the legislative history of INA §212(a)(9)(B)(i) is "rather sparse," Congress did not intend an alien to become inadmissible and, by extension, ineligible for adjustment "solely by virtue of a trip abroad that was approved in advance by the United States Government."

Limitations on Adjustment under INA §245(a)

Not all aliens granted advance parole will qualify for adjustment of status even after the BIA's 2012 decision, however. This is, in part, because other grounds of inadmissibility—beyond the 3- and 10-year bars—could still apply. These include criminal and security grounds.

Aliens who are not "immediate relatives" (e.g., spouses, minor children) of U.S. citizens are generally also ineligible for adjustment because INA §245(a) requires that an immigrant visa be "immediately available" to the alien at the time when s/he applies for adjustment. However, aliens who are not immediate relatives of U.S. citizens are generally subject to statutory caps on the number of immigrant visas issued per year that can delay the issuance of visas (i.e., make them not "immediately available").

In addition, INA §245(b) expressly bars certain aliens from adjustment of status, including aliens (other than "immediate relatives") who were employed while lacking employment authorization; have otherwise violated the terms of a nonimmigrant visa; or are not in legal status when they apply for adjustment.

Waivers of the 3- and 10-Year Bars Also Possible

It should also be noted that adjustment as the result of a grant of advance parole is not the only means by which aliens granted deferred action (among others) could acquire LPR status. INA §212(a)(9)(B)(v) expressly permits the Secretary of Homeland Security to waive the 3- and 10-year bars for aliens who are the spouses, sons, or daughters of U.S. citizens or LRPs, if the Secretary determines that refusing admission to the alien would result in "extreme hardship" to the alien's citizen or LRP spouse or parent. (Aliens are granted such waivers in conjunction with leaving the country to obtain an immigrant visa.)

Such waivers differ from a grant of advance parole, however, in that a waiver requires a finding of "extreme hardship" to a qualifying relative, while a grant of advance parole does not.

The Obama Administration's recent actions also call for the development of "additional guidance" on what constitutes "extreme hardship" for purposes of such waivers.

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