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Immigration Fact and Fiction for the U.S. Employer: Abrupt Change to Advance Parole Adjudications Without Clear Policy Objective – A Modest Proposal

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A learned colleague, Rob Cohen blogged, what could be called “a cry into the wilderness” in 2014 suggesting that the regulation at 8 C.F.R.§245.23(j) be amended so that an individual who departed the United States before an application for “Advance Parole Authorization” was adjudicated would not have been deemed to have abandoned her application for adjustment of status.[1] He described a compelling case of an applicant with a dying father and the logistic nightmare she went through to obtain Advance Parole authorization on an expedited basis.

The wilderness has now become even more unfriendly, as apparently USCIS has advised that if an individual departs the United States while an application for Advance Parole is pending, even if legitimately so under current regulation or policy, in possession of a valid H-1 or L-1 visa or alternatively, a previously issued Advance Parole Authorization that has not expired, the new application for Advance Parole Authorization will be denied and deemed as abandoned.

Of course, the underlying Application for Adjustment of Status (hereinafter AOS) remains valid, but this certainly constitutes a new and unnecessary inconvenience to travelers.

There are two significant ironies to the assertion of this new policy.[2] The first irony is that it is futile, expensive, and serves no enforcement initiative or concern of the Department of Homeland Security.

This policy applies to individuals who already have authorization to depart and return to the United States, either because they have bona fide H-1 visas or L-1 visas or because they are already traveling on a previously issued Advance Parole Authorization.

It is expensive and futile because it puts these travelers in the position of having to re-file new Advance Parole Authorization applications upon return to the United States, often at no cost to the applicant in accordance with current policy relating to the filing of the Advance Parole Authorization when Adjustment of Status applications are pending and the original filing fee has been paid.

The second irony is that this implementation of policy goes contrary to the entire history of the Advance Parole Authorization Program, which has been modified over the years to accommodate the real world needs of applicants for permanent residence, and nothing has changed in terms of the environment in which such applications are filed, that would indicate a need to reverse this trend.

ADVANCE PAROLE AUTHORIZATION – A HISTORY

Advance parole is a travel authorization and is commonly sought by individuals in the United States with pending applications for AOS. Historically, advance parole was an extraordinary request only reserved for unique circumstances. However, over the past 25 years advance parole has gone from the extraordinary to the routine and applicants in several nonimmigrant visa categories have been exempted from the application completely. Moreover, AOS applicants can file advance parole applications without paying an additional filing fee.

Until recently it had been USCIS practice to continue to adjudicate advance parole applications for those individuals with a separate valid parole document or for those nonimmigrants specifically exempted from the requirement regardless of their travel. However, USCIS has started to deny advance parole if the applicant departed the United States while the application was pending. The administration’s sudden shift in policy warrants a review of the history of advance parole to see how we got here and why USCIS’s actions have taken both practitioners and beneficiaries by surprise.

Advance Parole Overview and Legal Authority

For years all AOS applicants were required by regulation to obtain an advance parole in order to travel internationally and return to the United States without abandoning their pending AOS applications.[3] There is no separate statutory provision governing advance parole. Instead, the general parole authority in the Immigration and Nationality Act (INA) provides the statutory basis for advance parole and, as such, prescribed the standard for adjudication as for either "urgent humanitarian reasons or significant public benefit."[4] Therefore, without guidance to the alternative, all AOS applicants were expected to remain in the United States until their applications were adjudicated unless extraordinary circumstances warranted their travel.

Puleo and Virtue Memos Expand Eligibility and the Standard for Adjudications

A significant shift regarding advance paroles occurred in 1992 after then INS Associate Commissioner James Puleo's memorandum addressing eligibility and the standard for adjudications. At the time AOS applications were taking longer to adjudicate and the immigration service had applications that could not be completed due to a visa number retrogression. It was in this context that Commissioner Puleo instructed that if an applicant's AOS could not be completed because a visa number was unavailable, an advance parole could be granted for a bona fide business or personal reason. Further, he provided that a "bona fide business or personal reason" should be understood as *travel for any reason which is not contrary to law or public policy*.***[5]***

Commissioner Puleo once again addressed the standard for advance parole adjudications in 1995 after the implementation of 245(i) of the INA resulted in a substantial spike in AOS applications. In the face of adjudication backlogs, Commissioner Puleo amended INS Operations Instructions to provide that advance parole requests by AOS applicants could be approved for any bona fide business or personal reason. Moreover, they could be granted for multiple entries for a period not to exceed one year.[6]

The standard set by the 1995 Puleo memo was then reaffirmed by INS Executive Associate Commissioner Paul Virtue in a 1997 memo in which he confirmed that advance parole requests by AOS applications should be approved for "any legitimate business or personal reason."[7]

Regulatory Carve Outs For Certain Nonimmigrant Categories

In addition to relaxing the eligibility for advance parole, the agency has also exempted several nonimmigrant categories from the requirement of obtaining an advance parole document altogether. H-1's, L-1's and their dependent family members were exempted from the advance parole requirement as of July 1999.[8] Since that time AOS applicants who are in valid H-1, H-4, L-1, or L-2 status need not obtain an advance parole document, but may return to the United States on valid H or L visas without abandoning their green card applications.[9] Recognizing that these nonimmigrant categories have dual intent, the Service in what became known as the Cronin memo, also explicitly permitted H-1's and L's who entered under an advance parole to file for nonimmigrant extensions during the pendency of an AOS application.[10]

Aside from H-1's and L-1's the Legal Immigration Family Equality (LIFE) Act of 2000 created new nonimmigrant categories that were also carved out from the advance parole requirement. Specifically, regulation now excuses the K-3, K-4 and V from obtaining an advance parole without endangering the status of their AOS applications.[11]

Notable Changes to Filing Fees and the Document Itself

Another significant change to advance parole occurred in the summer of 2007 when USCIS exempted I-485 AOS applicants from a separate filing fee for the advance parole application. The new fee schedule incorporated a biometrics fee into the AOS application, but then included applications for advance parole and employment authorization for every applicant.[12] Therefore, since the summer of 2007, advance parole and employment authorization applications, and the subsequent extensions, are filed as a matter of course with AOS applications for no additional fee.

Finally, the most recent and substantial change to advance parole for AOS applicants is the physical document. It is now frequently issued as a joint employment authorization and advance parole card. While advance parole and employment authorization remain separate applications in the AOS process, they are often filed together. USCIS determined in late 2010 that because these applications generally rely upon similar information it was more cost effective to adjudicate the applications together and issue a single document for both.[13]

More on the Cronin Memo

While the Cronin Memo does not specifically address the issue of departure while an Application for Advance Parole Authorization is pending, it makes some interesting observations and determinations which seem to establish a policy that departure and arrival in the United States, while an individual has H-1 classification, L-1 classification, or even a current Advance Parole Authorization should not be negatively impacted and the travel should not change the current status on validity of the documents. This principle should be applicable to a pending Application for Advance Parole Authorization and has been applicable until this recent new policy by USCIS.

Specifically, in this FAQ at Question 3, the Service indicates that an individual who returns to the United States on Advance Parole Authorization may in any event still treat her valid H or L petition as still in place and file an application for extension of the H or L petition, and stay even though the individual arrived in the United States under the Advance Parole Authorization.[14]

Furthermore, at Question 4, the Service indicates that even if the individual arrived on the “parole” document, the underlying authorization to work in H or L classification is not abrigated.

It would seem to be an absurdity that travel in and out of the United States doesn’t impact the H or the L even if you use the parole, but would impact an application for a new Advance Parole Authorization.

A MODEST PROPOSAL

Tongue in cheek, Jonathan Swift authored “A Modest Proposal”[15] which no reader believed he meant literally, but made the point that certain policies were downright silly, so here goes my modest proposal.

Attorneys, when preparing I-131 applications to be submitted in conjunction with an I-485 application, should prepare for their traveling clients, in advance, a dozen complete applications – simple enough to do, by copying the petition and supporting documents, and having them pre-signed.

Then, each and every time the client or family member travels out of the United States and returns, the applicant can pull out of the portfolio, his/her pre-prepared application and free of charge, resubmit it to USCIS. If all applicants nationwide participated in this initiative, it would be very dramatically demonstrated how silly this policy is.

Of course, Jonathan Swift never intended that his “Modest Proposal” actually be implemented.

[1] *Advance Parole Rules Need Review*; Rob Cohen, February 6, 2014. http://www.thinkimmigration.org/2014/02/06/advance-parole-rules-need-review/

[2] USCIS would claim that this policy was always in place, but not previously strictly implemented.

[3] 8 CFR §245.2(a)(4)(ii)(B).

[4] INA §212(d)(5)(A).

[5] Memo, Puleo, Assoc. Comm., Adjudications, CO 212.28-C (July 6, 1992), reprinted in 69 No. 26 *Interpreter Releases* 846, 851–52 (July 13, 1992).

[6] Memo, Puleo, Exec. Assoc. Comm., (Apr. 20, 1995), AILA Doc. No. 95042880.

[7] Memo, Virtue, Acting Exec. Assoc. Comm., HQ 120/17.2 (Aug. 15, 1997), AILA Doc. No. 97120290.

[8] Adjustment of Status; Continued Validity of Nonimmigrant Status, Unexpired Employment Authorization, and Travel Authorization for Certain Applicants Maintaining Nonimmigrant H or L Status, 64 Fed. Reg. 29208 (June 1, 1999). (It is interesting to note that at the time the service was also considering extending this exemption to several other nonimmigrant categories (E-1, E-2, F-1, J-1 and M-1’s), which did not make it into the final rule. *Id*.

[9] 8 CFR §245.2(a)(4)(ii)(C).

[10] Memo, Cronin, Acting Assoc. Comm., Office of Programs HQADJ 70/2.8.6, 2.8.12, 10.18 (May 25, 2000), AILA Doc. No. 00052603.

[11] 8 CFR §245.2(a)(4)(ii)(C); K Nonimmigrant Classification for Spouses of U.S. Citizens and Their Children Under the LIFE Act of 2000, 66 Fed. Reg. 42587 (August 14, 2001); 8 CFR §245.2(a)(4)(ii)(D); V Nonimmigrant Classification; Spouses and Children of Lawful Permanent Residents, 66 Fed. Reg. 46697 (September 7, 2001).

[12] Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 72 Fed. Reg. 29851 (May, 30, 2007). This new schedule ultimately went into effect on August 17, 2007 after USCIS received thousands of employment based green card applications in July 2007 from individuals relying upon a subsequently revised visa bulletin. See Removal of Temporary Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 72 Fed. Reg. 46142 (August 17, 2007).

[13] Policy Memo, USCIS, PM-602-0023, *Issuance of Advance Parole Employment Authorization Document* (Dec. 21, 2010), AILA Doc. No. 11040664; USCIS Update, *USCIS to Issue Employment Authorization and Advance Parole Card for Adjustment of Status Applicants* (Feb. 11, 2011), AILA Doc. No. 11021130.

[14] Cronin, *Supra*.

[15] Swift suggests that the impoverished Irish might ease their economic troubles by selling their children as food for rich gentlemen and ladies. This satirical hyperbole mocked heartless attitudes towards the poor, as well as British policy toward the Irish in general.https://en.wikipedia.org/wiki/A_Modest_Proposal

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