

LAW REVIEW 13161
December 2013

**DHS Clarifies Immigration Benefits for Family
Members of Selected Reserve and Veterans**

By Lieutenant Colonel Margaret D. Stock, MP, USAR (Ret.)^[1]

9.0--Miscellaneous

On November 15, 2013, United States Citizenship & Immigration Services (USCIS), the United States Department of Homeland Security (DHS) sub-agency that administers immigration benefits, announced a new national “parole in place” policy that affects the immigrant parents, spouses, and children of current military members on active duty or who serve in the Selected Reserve of the Ready Reserve, or veterans of such service. The policy clarifies that USCIS should generally allow such immigrant relatives to be granted an immigration “parole” so that they may adjust to a lawful immigration status while in the United States. Previously, some USCIS offices had required these military family members to leave the United States in order to obtain a lawful immigration status, but the family members’ departure from the United States often triggered a lengthy separation—sometimes more than ten years—because of overseas visa processing rules.

United States immigration law has long been excessively complicated, [2] and one of the complications is an infamous “Catch-22” that affects the immigrant parents, spouses, and children of American citizens and lawful permanent residents. Noncitizens who are the parents, spouses, and children of American citizens are normally eligible for an immediate relative immigrant visa—but typically they cannot obtain lawful status in the United States based on that visa unless they can prove that they have been “inspected and admitted or paroled” into the United States by immigration authorities.[3] If they cannot prove that they have been admitted or paroled, they must depart the United States and apply for an immigrant visa outside the United States. Under Section 212(a)(9)(B) of the Immigration & Nationality Act; however, a person who leaves the United States after being unlawfully present for more than six months is punished by being prohibited from returning for a three-year or ten-year period, depending on how long the person has been unlawfully present.[4] This punishment does not kick in if the person does not leave the United States; but a person who has entered the United States without the permission of the United States Government is generally barred from adjusting to legal status in the United States, so such a person necessarily must leave the United States to obtain proper legal status by applying for a visa at a consulate outside the United States.

This Catch-22 has affected thousands of military family members adversely. In 2009, for example, a U.S. Army captain serving in Germany married a German woman and filed an

immigrant visa petition with USCIS to bring his spouse to the United States. Visa processing times are lengthy, and while the captain was waiting for USCIS to approve the visa petition, he received orders to return to the United States. On the advice of a military attorney, he brought his wife back to the United States with him—but when his wife entered the United States at Tampa, Florida with her family member ID card, she was never given an entry document by US Customs and Border Protection. As a German citizen, the wife was eligible to enter the United States for up to ninety days under a visa-free travel program that waives the visa rules for certain countries like Germany that have bilateral agreements with the United States. After residing with her husband on an Army post in the United States for more than a year and a half, the wife traveled back to Germany to attend her immigrant visa interview. At the interview, she was advised by a United States Department of State consular officer that she was banned from the United States for ten years because she had departed after being “unlawfully present” in the United States for more than a year; the consular officer took the position that she had only been admitted to the United States for ninety days, and she had stayed for more than a year after the initial 90-day period, and hence her departure to Germany to seek an immigrant visa had triggered a ten-year bar to her return to the United States. Luckily in this particular case, the U.S. Army captain was able to obtain an “extreme hardship” waiver after several months of effort, and his wife was allowed to return—but many military family members trapped in this dilemma have not been so fortunate or are not eligible for a waiver.

The United States Government has long recognized the dilemma posed by this legal Catch-22, and the law provides a remedy—DHS agencies are permitted by law to grant an immigration “parole in place” to anyone who has not been admitted or paroled previously, as long as the parole is “for urgent humanitarian reasons or significant public benefit.”[5] For decades, this parole authority has been used to benefit Cubans who have entered the United States unlawfully; such Cubans would normally be barred from adjusting status and would be required to return to Cuba to obtain an immigrant visa, but the immigration agencies have for decades had a formal policy of granting Cubans an immigration “parole in place” that allows them to adjust status in the United States, rather than forcing them to return to Cuba. The parole authority has similarly been used in the past to benefit other groups such as battered spouses or government informants.

In 2008, under the Bush Administration, the parole authority was first publicly used to benefit a military family member. Michael Chertoff, then the Secretary of DHS, ordered his agency to grant parole in place to the wife of a missing US Army soldier; the woman was then permitted to adjust status and obtain a “green card” without leaving the United States.[6] Following this incident, grants of parole in place to military family members became increasingly common, and in August 2010, Secretary of Homeland Security Janet Napolitano wrote to Congress that her agency was granting parole in place on a case-by-case basis to the parents, spouses, and children of members of the US Armed Forces.[7] The letter, however, was not a formal USCIS agency policy, and USCIS field offices differed widely in their interpretation of the Napolitano letter. Some offices, for example, would only grant parole-in-place to spouses, or would only grant the benefit to family members of active duty military members; or would only grant the benefit if a service member was deployed to a combat zone.

Accordingly, on November 15, 2013, USCIS published a formal policy memorandum directing that parole in place should ordinarily be granted to the parents, spouses, and children of current and past military members who have served on active duty or in the Selected Reserve of the Ready Reserve.[8] The policy does not change the law; it merely clarifies how the agency will apply the legal authority that it has been given by Congress.

The agency has stated that the policy is designed to reduce the “stress and anxiety” of military members and veterans who are worried about the immigration status of their family members in the United States; the policy is also designed to enhance military readiness. The policy does not apply to family members who have criminal convictions or “other serious adverse factors.”

Members or former members of the Selected Reserve of the Ready Reserve may benefit from this policy. The law defines the Selected Reserve as including those persons who (1) participate in at least forty-eight scheduled drills or training periods during each year and serve on active duty for training at least fourteen days each year, or (2) participate in training at encampments, maneuvers, outdoor target practice, or other exercises at least fifteen days each year.[9] Most members of the Army National Guard and Air National Guard are in the Selected Reserve of the Ready Reserve, as are persons who perform paid duty each year in the Army Reserve, Air Force Reserve, Navy Reserve, Marine Corps Reserve, and Coast Guard Reserve. The Selected Reserve of the Ready Reserve includes some members of the Individual Ready Reserve who perform duty each year, but does not include inactive or retired Reservists or IRR members who perform no duty in the course of a year.

Military members or veterans who have immigrant parents, spouses, and children present in the United States who do not currently have a proper immigration status should consult an experienced immigration attorney. As stated above, US immigration laws and regulations are extremely complex, and this policy may help a family member adjust his or her immigration status, but it does not apply to every family member. An experienced immigration attorney can help a military member or veteran determine if it is appropriate or necessary for a family member to apply for benefits under this new policy.

[1] Margaret D. Stock is an attorney admitted in Alaska who practices primarily in the areas of immigration, citizenship, and military law. She is the author of the book *Immigration Law and the Military*, published by the American Immigration Lawyers Association in 2012. She is also a Life Member of the Reserve Officers Association and a 2013 MacArthur Foundation Fellow.

[2] Karen Kraushaar, a spokeswoman for the former Immigration & Naturalization Service (INS), once famously said on the record in the Washington Post that “Immigration [law] is a mystery and a mastery of obfuscation . . .” See Washington Post, Apr. 24, 2001, at B1.

[3] Section 245(a) of the Immigration & Nationality Act requires persons who apply to adjust their status inside the United States to demonstrate that they have been “inspected and

admitted or paroled,” with few exceptions. The statute states that “[t]he status of an alien who was inspected and admitted or paroled into the United States . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and an immigrant visa is immediately available to him at the time his application is filed.”

[4] See INA §212(a)(9)(B) (“In general.--Any alien (other than an alien lawfully admitted for permanent residence) who--was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . , and again seeks admission within 3 years of the date of such alien's departure or removal, or has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.”).

[5] See INA §212(d)(5)(A) (“The Attorney General 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 . . .”).

[6] The author testified before Congress about this incident in 2008. See <http://judiciary.house.gov/hearings/pdf/Stock080520.pdf> (testimony of Margaret D. Stock, at pages 7-8)

[7] The Janet Napolitano letter to Congress may be found at page 60 of the hearing testimony for a House Judiciary subcommittee hearing held on July 26, 2011, see http://judiciary.house.gov/hearings/printers/112th/112-50_67575.PDF.

[8] The USCIS policy may be found at the following link:
http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf.

[9] See 10 United States Code §10143(a) (“Within the Ready Reserve of each of the reserve components there is a Selected Reserve. The Selected Reserve consists of units, and, as designated by the Secretary concerned, of Reserves, trained as prescribed in section 10147(a)(1) of this title or section 502(a) of title 32, as appropriate.”).