Advising the Undocumented Military Spouse

BY CAPTAIN AARON R. PETTY, USAF

A junior enlisted member makes a legal assistance appointment for himself and his wife regarding "immigration." You escort them back to your office and after explaining that your discussions are confidential, you learn the member was born in California and the member's wife entered the United States illegally at age nine, and has been living here ever since. The couple, who are both now 24, met in high school, and married a little over two years ago. The wife was previously granted deferred action under the Deferred Action for Childhood Arrivals ("DACA") program, but it is about to expire. They want to know whether they should renew it and whether they have other options.

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Few first-assignment captains will have the expertise necessary to fully answer these concerns. Indeed, some clients who have been navigating the immigration system on their own for years will have a better understanding of what types of relief are available than many attorneys. Moreover, describing the immigration system as merely "complex"[1] is charitable.[2] Immigration law is as intricate as any highly regulated field such as securities, tax, or telecommunications;[3] changes in substance and enforcement priorities are relatively frequent, and the consequences can be life-changing.[4] Accordingly, it is exceedingly difficult for the occasional practitioner to remain abreast of every relevant development, and even more so for attorneys with limited experience in the field. There are, however, some steps legal assistance attorneys can take short of simply handing over a list of local immigration lawyers.

KNOW YOUR CLIENTS

First, make sure the member is a citizen because the ability to petition for immigration benefits for a family member is generally reserved to citizens.[5] For officers, citizenship is nearly always a requirement for obtaining a regular commission,[6] but enlistment by lawful permanent residents and, in some cases, noncitizens who lack even that status is permitted.[7] Often noncitizens who enlist will naturalize shortly after enlistment,[8] so except in rare cases, the member will be a citizen.

Determining the spouse's status may be more challenging. If, as in the example above, the spouse entered without inspection as a child, the spouse may have no documentation of their foreign citizenship or immigration status at all. In some cases, birth or baptismal records may be available. In many cases, the attorney will have to rely solely on the information provided by the client.

In those cases, it is important to inquire what steps, if any, have been taken with respect to the spouse's immigration status, and also what steps, if any, the government has taken against him or her. Has the spouse applied for asylum? DACA? Parole in place? Has U.S. Immigration and Customs

Enforcement issued a Notice to Appear in immigration court that initiates removal (i.e. deportation) proceedings? What is the current status of any applications or proceedings? Does the spouse have a criminal history?

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Let's assume there are no pending removal proceedings and the spouse has no prior convictions. A military spouse who entered the United States without authorization will likely have two objectives: first, avoiding removal and, second, obtaining some form of permanent lawful status, ideally U.S. citizenship. To become a citizen on the basis of marriage to a U.S. citizen, one must first be a lawful permanent resident for three years.[9] Lawful permanent residency (i.e., a "green card"), in turn, requires the applicant to be "admissible."[10]

The problem for the spouse in this scenario is that physically entering the United States without being inspected and admitted or paroled[11] by an immigration officer renders the spouse inadmissible.[12] The spouse would therefore be ineligible for lawful permanent residency. In addition, the spouse's presence in the United States without being admitted or paroled potentially subjects them to removal.[13]

PAROLE IN PLACE

The best solution to cure a lack of admission or parole is, not surprisingly, to be admitted or paroled; however this is not always a simple matter to accomplish. Historically, grants of admission or parole could only be done by leaving the United States and applying for an immigrant visa at an embassy or consulate abroad.[14] Furthermore, any alien who is physically in the United States for more than 180 days after having entered without inspection, and who applies for an admission (including adjustment of status) within three years of that unlawful presence, requires a discretionary waiver before they may be admitted again.[15] If the unlawful presence was more than a year, then a waiver is required to be admitted again within ten years of their unlawful presence.[16]

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For military families, these requirements have proven especially onerous.[17] The need for a spouse to leave the country to regularize their status impacts readiness due to the spouse's time away from home, the expense of travel, and because the departure comes without an assurance of lawful return.[18]

To address these challenges, the Department of Homeland Security may grant a type of relief known as "parole in place" to the spouses of military members.[19] The phrase "in place" signifies that, although parole is typically granted to permit an arriving alien to physically enter the United States while admissibility is determined (e.g., for urgent humanitarian reasons), parole is granted to these individuals as already physically present in the United States.

For many military spouses who entered the United States without being admitted or paroled, parole in place will make them eligible for lawful permanent residency while simultaneously eliminating what may be the only legal basis for their removal. In addition, the U.S. Citizenship and Immigration Services (USCIS) has interpreted the three- and ten-year bars (and the necessity of an unlawful presence waiver) not to apply to recipients of parole in place who do not depart the country.[20] Thus, a grant of parole in place will enable a military spouse who unlawfully entered the United States to apply for adjustment of status based on their marriage to a U.S. citizen.

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To apply for parole in place, the spouse must complete a Form I-131, writing in "Military PIP" in Part 2 rather than checking a box, and submit it to the USCIS office with jurisdiction over either the spouse's place of residence or the member's duty station, along with evidence of the family relationship, sponsor's military service, two passport photographs, and (optionally) any other favorable evidence.[21] There is no fee for filing the application.

Once the spouse is granted parole in place, the military member may petition to classify the spouse as an "immediate relative" by submitting a Form I-130 to the USCIS.[22] Once the marital relationship is established, the spouse may apply for adjustment of status to lawful permanent resident (i.e., apply for a "green card") by submitting a Form I-485.[23] The I-130 and I-485 may also be submitted concurrently for faster processing.[24]

DEFERRED ACTION FOR CHILDHOOD ARRIVALS

Clients may also inquire about the DACA program.[25] As the name implies, this program offers "deferred action"—essentially an exercise of prosecutorial discretion not to initiate removal proceedings for a limited period of time—against removable aliens who meet specific additional criteria and merit a favorable exercise of discretion.[26] In September 2017, the U.S. Department of Homeland Security announced the DACA program would be wound-down,[27] but this has been preliminarily enjoined in multiple courts on a nationwide basis with respect to renewal applicants,[28] and one other court has entered a permanent injunction on a nationwide basis with respect to both renewal and initial applicants.[29]

If a client has already been granted parole in place or has an application for parole in place pending, then DACA likely provides no further benefits. DACA does not provide any sort of legal status and does not provide a path toward lawful permanent residency or citizenship, as parole in place does.[30] Moreover, once a spouse is granted parole in place, the spouse will no longer be removable for being present without admission or parole (and, assuming the spouse has no criminal history, will likely not be removable at all). Thus, once granted, there will no longer be any potential "action" to "defer."

CONCLUSION

Although both parole in place and DACA may offer the undocumented military spouse peace of mind, parole in place offers a path to permanent legal status, potentially including citizenship, and eliminates one of the most common legal bases for removal. Legal assistance attorneys should ensure clients fully understand the benefits and limitations of each type of relief, as well as the eligibility criteria for both.

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ENDNOTES

[1] Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

[2] Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003) (noting "the labyrinthine character of modern immigration law—a maze of hyper-technical statutes and regulations…"); Kwon v. INS, 646 F.2d 909, 919 (5th Cir. 1981) ("Whatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon."); Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) ("Congress…has enacted a baffling skein of provisions for the I.N.S. and courts to disentangle."); Yuen Sang Low v. Att'y Gen., 479 F.2d 820, 821 (9th Cir. 1973) ("[W]e are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say."); Kevin R. Johnson, *Ten Guiding Principles For Truly Comprehensive Immigration Reform: A Blueprint*, 55 Wayne L. Rev. 1599, 1637 (2009) ("…the accretion of complex provisions upon complex provisions making the laws complex, obtuse, and, at times, unintelligible.").

[3] Elizabeth Hull, Without Justice for All 107 (1985) ("The immigration laws are second only to the Internal Revenue Code in complexity.").

[4] Joseph E. Mascaro & Robert W. Cassot, *Malpractice Risks in Immigration Law, in* New Developments in Immigration Enforcement and Compliance 106 (2011) ("Indeed, the changing nature of immigration law can make it more difficult than tax law, and therefore more challenging for the occasional practitioner.").

[5] Lawful permanent residents may also petition for certain family members, subject to numerical limitations. 8 U.S.C. §§ 1151 & 1153 (2017).

[6] 10 U.S.C. § 532 (2017); 32 C.F.R. § 66.6(b)(2)(ii) (2017).

[7] 10 U.S.C. § 504(b) (2017); 32 C.F.R. §66.6(b)(2)(i) (2017).

[8] 8 U.S.C. § 1440(a) (2017) (authorizing naturalization of noncitizens who serve honorably in the armed forces during period of armed conflict with a hostile foreign force); Exec. Order No. 13,269, 67 Fed. Reg. 45,287 (July 3, 2002) (declaring the "period of war against terrorists of global reach" to be a period of conflict with a hostile foreign force for purposes of Section 1440(a), retroactive to Sept. 11, 2001). Since October 2017, the Department of Defense has required 180 consecutive days on active duty, one year in the Selected Reserve, or one day of active duty in- or in direct support of- a combat zone (which qualifies the member for hostile fire or imminent danger pay) to certify a military member's service as honorable for purposes of expedited citizenship under 8 U.S.C. § 1440. *See* A. M. Kurta, Certification of Honorable Service for Members of the Selected Reserve of the Ready Reserve and Members of the Active Components of the Military or Naval Forces Purposes of Naturalization (Oct. 13, 2017), https://dod.defense.gov/Portals/1/Documents/pubs/Naturalization-Honorable-Service-Certification.pdf (last visited Sept. 6, 2018).

[9] 8 U.S.C. § 1430(a) (2017).

[10] 8 U.S.C. § 1255(a) (2017).

[11] "Admission" means "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13) (2017). "Parole" is temporary lawful physical presence in the United States while seeking admission. *See* 8 U.S.C. § 1182(d)(5) (2017); 8 C.F.R. § 212.5 (2017).

[12] 8 U.S.C. § 1182(a)(6)(A)(i) (2017).

[13] 8 U.S.C. § 1229a(a)(2) (2017).

[14] Expansion of Provisional Unlawful Presence Waivers of Inadmissibility, 81 Fed. Reg. 50, 244, 50,244-45 (July 29, 2016) ("Individuals present in the United States without having been inspected and admitted or paroled are typically ineligible to adjust their status in the United States. To obtain LPR status, such individuals must leave the United States for immigrant visa processing at a U.S. Embassy or consulate abroad. But because these individuals are present in the United States without having been inspected and admitted or paroled, their departures may trigger a ground of inadmissibility based on the accrual of unlawful presence in the United States.").

[15] 8 U.S.C. § 1182(a)(9)(B)(i)(I) & (a)(9)(B)(v) (2017).

[16] 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2017).

[17] Margaret D. Stock, *Parole in Place for Military Families*, https://www.americanbar.org/content/dam/aba/events/legal_assistance_military_personnel/ls_lamp_cle_nov11_session3_parole_in_place.authcheckdam.pdf (last visited Sept. 6, 2018).

[18] U.S. Citizenship and Immigration Services, PM-602-0091 (2013).

[19] *Id.*

[20] *Id.*

[21] U.S. Citizenship and Immigration Services, *Discretionary Options for Military Members, Enlistees and Their Families*, https://www.uscis.gov/military/discretionary-options-military-members-enlistees-and-their-families (last visited Sept. 6, 2018), (hereinafter "*Discretionary Options for Military Members*").

[22] 8 C.F.R. § 204.2(a)(1) (2017); I-130, *Petition for Alien Relative*, https://www.uscis.gov/i-130 (last visited Sept. 6, 2018).

[23] 8 C.F.R. § 245.2(a) (2017); I-485, *Application to Register Permanent Residence or Adjust Status*, https://www.uscis.gov/i-485 (last visited Sept. 6, 2018).

[24] 8 C.F.R. § 245.2(a)(2)(i)(B)-(C) (2017); *Concurrent Filing of Form I-485*, https://www.uscis.gov/greencard/concurrent-filing-form-i-485 (last visited Sept. 6, 2018).

[25] *Remarks by the President on Immigration*, June 15, 2012, https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration (last visited Sept. 6, 2018); *Consideration of Deferred Action for Childhood Arrivals (DACA),* https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca (last visited Sept. 6, 2018).

[26] *Discretionary Options for Military Members*, *supra* note 21.

[27] Elaine C. Duke, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)* (Sep. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca (last visited May 31, 2018).

[28] Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 436-38 (E.D.N.Y. 2018); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1048-49 (N.D. Cal. 2018).

[29] NAACP v. Trump, Nos. 17-cv-1907 & 17-cv-2325, 2018 WL 1920079, *24-*25 & *28 (D.D.C. Apr. 24, 2018). The decision is currently pending on appeal to the U.S. Court of Appeals for the D.C. Circuit. NAACP v. Trump, No. 18-5243 (D.C. Cir., filed Aug. 6, 2018).

[30] *Discretionary Options for Military Members, supra* note 21. DACA does, however, provide an opportunity to apply for work authorization. *Id.*