

## **Practice Pointer: Humanitarian Parole for Afghan Nationals in 3<sup>rd</sup> Countries**

### **Background**

In response to the Afghan crisis, many AILA members have filed humanitarian parole applications for individuals in Afghanistan and those who are in third countries. Given that Afghans cannot be finally adjudicated for parole in Afghanistan, there have been questions about the impact of being in a third country on pending humanitarian parole applications. This practice pointer outlines some important legal and policy considerations when representing individuals applying for humanitarian parole from third countries.<sup>1</sup>

#### **1) The Law**

The Refugee Act of 1980, Section 202 amended 8 U.S.C. § 1182 on the Admission of Immigrants into the United States. Section 202(3)(B) states that “the Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207.” In short, if the noncitizen is considered a refugee, then they are not eligible for humanitarian parole unless the Attorney General<sup>2</sup> makes a discretionary decision to admit them.

From the definition of refugee, once a person is outside their country of nationality due to persecution or a fear of persecution based on a protected ground, he or she is generally considered a refugee. The countries that have subscribed to the UN Refugee Convention or Protocol have agreed to the standards for treatment and protection of refugees. The Refugee Act of 1980 has a near-identical definition of refugee.

#### **2) The Issue**

On August 31, 2021, the United States Embassy in Kabul, Afghanistan suspended its operations. There is no other option within Afghanistan for Afghans to continue the processing of visa or related applications. Consequently, Afghans seeking humanitarian parole or any other status must enter a third country and process their applications via the U.S. embassy there.

For purposes of the present inquiry, a key question is whether Section 202(3)(B)’s use of the phrase “who is a refugee” refers to persons who *already have been determined* to satisfy the definition of refugee, or whether it captures persons who have left their country of nationality but who have not proceeded through a formal refugee status determination process. Specifically, would an Afghan who travels to a third country for consular processing be considered a “refugee” within the meaning of Section 202(3)(B).

On the one hand, such individuals might be considered refugees because they will be outside of their country of nationality and likely fear persecution in Afghanistan on some ground. Based on

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<sup>1</sup> Special thanks to American University Washington College of Law students, Kaylette Clark and Joe Mitchell, and their clinic supervisor, AILA member Jayesh Rathod, for drafting this practice pointer.

<sup>2</sup> Since 2002, the reference to the AG refers to the DHS Secretary under the Homeland Security Act.

the plain language of the “refugee” definition, they might appropriately be called refugees. On the other hand, USCIS has clarified that the prohibition in 202(3)(B) may not apply to those who have not received a formal determination of refugee status. The USCIS International Operations Officer Training Manual on Humanitarian and Significant Public Benefit describes the prohibition and states, “It generally is not applicable to the situations when someone seeks parole for reasons of protection from harm, but USCIS is not making a formal determination that the individual is a refugee.”<sup>3</sup> This interpretation from USCIS may be dispositive on the question, indicating that “a refugee” refers to persons who already have been formally determined to satisfy the definition of refugee.

### 3) The Exception

Assuming *arguendo* that an Afghan who travels to a third country, but who is not in a formal refugee determination process *is* considered a refugee within the meaning of Section 202(3)(B), the second issue is whether an exception to the prohibition can be applied.

Several historical examples help to understand the meaning and uses of the exception to the prohibition against paroling those who are “refugees.” The examples will identify the hurdles to the successful deployment of humanitarian parole for certain people, as well as when and how those hurdles have been cleared.

#### a. Interpreting the Exception

The language of the exception in 8 U.S.C. § 1182 reads “The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that *compelling reasons in the public interest* with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207.” The USCIS International Operations Officer Training Manual interprets the phrase “compelling reasons of public interest” to apply to those who have “a reasonable fear of persecution in the country of their nationality.”<sup>4</sup> This bolsters the view that people who have not yet applied for refugee status should be able to be paroled.

#### b. Historical uses and objections to the Exception

The Cuban Adjustment Act of 1966 was reinterpreted in 1995 (after which the policy was called the “wet-foot dry-foot” policy) to allow Cuban nationals who made it to U.S. soil to be paroled. The policy continued until 2017.

In 1989, the Lautenberg Amendment provided a path to lawful permanent residence for Soviet and Indochinese nationals who were granted parole *after being denied refugee status*. At the same time, and only ending in 2011, USCIS enacted a policy of granting parole to certain religious minorities who did not qualify for refugee status.<sup>5</sup>

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<sup>3</sup> <https://refugeerights.org/wp-content/uploads/2020/04/HP-FOIA-min.pdf> at FN 17.

<sup>4</sup> *Id.* at pp 65 and 69.

<sup>5</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, Green Card for a Lautenberg Parolee, <https://www.uscis.gov/green-card/other-ways-get-green-card/green-card-lautenberg-parolee>.

Between 2014 and 2017, under the Central American Minors (CAM) program, some minors who were ineligible for refugee status could be paroled instead. The eligibility criteria stated “[T]o grant parole under this program, USCIS must find that the individual is at risk of harm in his or her country and that the applicant merits a favorable exercise of discretion.”<sup>6</sup>

In 1996, the House Judiciary Committee objected to language in the *Immigration in the National Interest Act of 1995*, a predecessor to IIRIRA that changed “for emergent reasons or for reasons deemed strictly in the public interest” to “on a case-by-case basis for urgent humanitarian reasons or significant public benefit.” They argued that the plain language of the prohibition in the Refugee Act required a case-by-case analysis, and prohibited parole based on identification with a class.

In 2014, DHS secretary Jeh Johnson initiated a parole-in-place policy for those whose national or LPR relatives are seeking to enter the U.S. armed forces,<sup>7</sup> so long as they have *not* entered the U.S. lawfully.<sup>8</sup> Similar to policy positions that exclude refugee-eligible applicants’ access to parole, such as the CAM policy and the Lautenberg Amendment, those who entered the U.S. lawfully under Johnson’s parole-in-place policy were *ineligible* for parole. Johnson stated his rationale for this use of parole *for an identified class*:

Although parole determinations must be made on an individualized basis, the authority has long been interpreted to allow for designation of specific classes of aliens for whom parole should be favorably considered, so long as the parole of each alien within the class is considered on a discretionary, case-by-case basis.<sup>9</sup>

By contrast, under the Trump administration in 2017, USCIS terminated two programs, the Haitian Family Reunification Parole program and the Filipino World War II Veterans Parole program. Then USCIS Acting Director Ken Cuccinelli stated, “*Under these categorical parole programs, individuals have been able to skip the line and bypass the proper channels established by Congress.*”

The above observations indicate two circumstances that could potentially be a barrier to a grant of parole but have been overcome in past instances. The first is whether the person is a member of a class or has undergone an individual analysis; some policies prefer those who have undergone an individual analysis, such as those leading to the definition of “refugee” in sec. 202 of the Refugee Act. Acting Director Cuccinelli and some members of Congress preferred not to allow group identification at all. However, those who are *a member of a designated class* have

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<sup>6</sup> U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, “In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM),” <https://www.uscis.gov/CAM>

<sup>7</sup> More info here: <https://www.uscis.gov/military/discretionary-options-for-military-members-enlistees-and-their-families>

<sup>8</sup> U.S. Department of Homeland Security, Memorandum to Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, from Jeh Charles Johnson, Secretary of Homeland Security, Families of U.S. Armed Forces Members and Enlistees, November 20, 2014 available at [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_parole\\_in\\_place.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf).

<sup>9</sup> *Id.*

been paroled, as in the case of Jeh Johnson's 2014 parole-in-place policy for relatives of citizens or LPRs who seek to enter the USAF.

The second is whether the person is eligible for refugee status; some policies prefer to only parole those who are *not* eligible for refugee status, as in the CAM policy and the Lautenberg Amendment. However, those who are quite proximate to the process of a refugee determination seem eligible for a grant of parole. This includes people who are likely eligible (Cubans), people who have been denied (Lautenberg), people who have humanitarian situations that don't quite fit the refugee definition (CAM). Finally, those who are *eligible to be considered refugees* can be paroled explicitly under the exception in sec. 202 of the Refugee Act when the DHS secretary determines that there are "compelling reasons in the public interest".

Overall, these observations suggest that a policy of paroling Afghan refugees is legally available, even if is done in a more aggregate way, and even if some might eventually qualify as refugees.

#### **4) Recommended Interpretations**

- a. Humanitarian Parole should be granted for Afghan nationals who are not having their refugee status formally determined by USCIS because the parole prohibition does not apply in these cases

The USCIS International Operations Officer Training Manual (2017) states that the prohibition against paroling those who are otherwise eligible for refugee status does not apply "to the situations when someone seeks parole for reasons of protection from harm, but USCIS is not making a formal determination that the individual is a Refugee". This appears to make Afghan refugees for whom USCIS is not making, or has not made, a formal determination that they are a refugee, eligible for humanitarian parole. There is no conflict in these cases with the Refugee Act or Refugee Convention because USCIS interprets the language of those instruments to limit the prohibition against parole to those people about whom USCIS is making a formal determination regarding their refugee status.

- b. Humanitarian Parole should be granted for Afghan nationals even if their refugee status is being formally determined by USCIS because the parole of each non-citizen within the class can be "considered on a discretionary, case-by-case basis"

Under the rationale of Jeh Johnson, which supported the implementation of the ongoing parole-in-place policy for immigrants whose citizen or LPR relatives are seeking to join the US armed forces, each member of a designated class is individually evaluated to determine whether they meet the criteria laid out in a policy. Under this rationale, a designated class can be determined to be eligible for humanitarian parole under the § 1182(d)(5)(B) "compelling reasons in the public interest" exception. This rationale ought to be used for Afghan nationals who are in third countries for purposes of consular processing and reasonably fear persecution in Afghanistan.

#### **Conclusion**

The DHS Secretary can establish a policy of granting HP to Afghan citizens in 3<sup>rd</sup> countries who reasonably fear persecution in Afghanistan. This is true even if they otherwise qualify for

refugee status (e.g., regardless of whether they are in countries that are party to the Refugee Convention).

Beyond the fact that such a policy would comport with existing law, there are several additional reasons to adopt the policy. Specifically, many Afghan nationals:

- Cannot return to Afghanistan for fear of persecution.
- Are in danger of persecution in the 3<sup>rd</sup> countries they are currently in.
- Are likely to be refouled if they remain in the 3<sup>rd</sup> countries they are currently in.
- Are unlikely to get status in the 3<sup>rd</sup> countries they are currently in.
- Have no family, friends, or acquaintances in the 3<sup>rd</sup> countries they are currently in.
- Do not speak any of the languages of the countries they are currently in.
- Are unlikely to be able to find work in the 3<sup>rd</sup> countries they are currently in.
- Are in danger in 3<sup>rd</sup> countries specifically for the aid they provided the U.S. and its allies against the Taliban.

### **Other recommendations**

Please note that although humanitarian parole may be a possible pathway for Afghan nationals in third countries, USCIS has made it very clear that humanitarian parole will be granted on limited basis and that the threshold to meet the targeted or individualized harm ground for humanitarian parole is very high, possibly higher than refugee determinations. If other relief may be available, such as nonimmigrant, immigrant, or special immigrant visas, those should be considered as alternatives.