

IMMIGRATION JUSTICE CAMPAIGN



Parole from ICE Detention: An Overview of the Law

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Introduction

ICE has broad authority to release noncitizens from detention – at any state in their immigration hearing process— via what is known as “parole.” ICE has wide latitude to determine whom to release on parole, as well as what, if any conditions to impose upon a person it paroles.

ICE’s parole authority derives from the Immigration and Nationality Act (INA, which allows two “versions” of parole. The first is found at INA 212(d)(5) (8 USC 1182(d)(5)). The other is found in INA 236(a) (8 USC 1226(a)), which allows for “conditional parole.” These two types of parole differ in their eligibility requirements, what benefits they convey, and which U.S. government agencies may grant them. This is an overview of the law regarding parole. For instructions on how to apply for said parole with ICE, see our Practice Guide.

Parole under INA 212(d)(5)

Who is eligible for this kind of parole?

Parole under INA 212(d)(5) is available to any “Applicant for Admission”¹ who is not otherwise subject to mandatory detention. An *applicant for admission* is defined as “an alien who is present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival [...]).”² Thus detainees who have not been “admitted,” including both Arriving Aliens and people who Entered Without Inspection (“EWI”) can be released under this section of the statute³.

But wait a minute: everything I have read says parole is only for “arriving aliens”

This is a common misconception. “Arriving aliens” are not the only detainees eligible for parole. “Arriving alien” is a term from the INA that describes non-citizens who come to a U.S. port of entry (such as a

¹ 8 USC 1182(d)(5)

² 8 USC 1225(a)(1)

³ In comparison, someone who is a Lawful Permanent Resident or entered the US with a valid visa is not eligible for parole under 212(d)(5).

border processing station or an airport) asking to be admitted, but who lack valid entry documents, such as a valid U.S. visa and/or a valid passport. Arriving aliens who are in full removal proceedings (unlike people who enter the U.S. without inspection), are *only* eligible for release from detention by ICE under INA 212(d)(5)⁴, which is why most practice materials for parole is designed for them. In fact, ICE has the authority to release any applicant for admission on parole under 212(d)(5) and does so all the time.

Ok, my client is an applicant for admission. What are the factors for release on 212(d)(5) parole?

ICE makes parole determinations under 212(d)(5) on a “case-by-case” basis for “urgent humanitarian reasons or significant public benefit.”⁵ ICE generally interpreters “significant public benefit” to refer to people who are of interest for law enforcement (such as witnesses)⁶ or for whom parole is in the interest of national or domestic policy.⁷ The regulations further delineate which types of people in detention should be considered for release on parole for humanitarian reasons or for significant public benefit:

- 1) Aliens⁸ with serious medical conditions
- 2) Women who are pregnant
- 3) Aliens who are minors
- 4) Aliens who are to be witnesses in judicial, administrative or legislative proceedings in the US
- 5) Aliens “whose continued detention is not in the public interest”⁹

In addition to demonstrating that your client falls within one of these enumerated categories, you must also demonstrate that your client is neither a security risk nor a flight risk.¹⁰

⁴ 8 CFR 253.5(c)

⁵ 8 USC 1182(d)(5)

⁶ Parole Authority Memorandum of Agreement, 2008 <https://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf>

⁷ <https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-individuals-outside-united-states> While this is guidance for USCIS, who administer parole applications from people who are not physically in the US or for other types of parole not discussed here, they are applying the same statute and regulations discussed in this memo, so their interpretation is used as guidance.

⁸ While the statute and regulations consistently use the legal term “alien” to refer to anyone who was born outside of the United States, this is a term only to be used when citing the legal statute, as it is used here. It is otherwise nearly universally considered a derogatory word.

⁹ 8 CFR 212.5(b)(3).

¹⁰ *Id*

Humanitarian Reasons

The term “humanitarian parole” is used in several different contexts to mean slightly different things. Often, when practitioners refer to “humanitarian parole” they mean a program administered by USCIS to allow people in the US to apply for family members who are outside the US to enter via parole, or some people who apply for parole themselves while outside of the United States. While this program is administering parole under the same statute section (INA 212(d)(5)), it has a different application process and slightly different criteria. Sometimes, “humanitarian parole” is used to distinguish from parole based on a positive CFI—which is discussed below. Most parole requests during the COVID-19 pandemic will be based on humanitarian reasons—both a client’s personal underlying medical condition and the possible medical risks they are exposed to by continued detention.

Significant public benefit

This part of the statute is less commonly invoked. It is usually a basis for parole when another US government entity is seeking to bring a person into the United States for their purposes, without having to grant an “admission” via a visa or other process. *However*, we recommend that for parole requests during the COVID-19 pandemic you also argue that release from detention serves a significant public benefit because of its effect of reducing the overall number of immigrants in detention, where the virus can spread easily.

Isn’t there a special kind of parole for arriving aliens who passed a credible fear interview?

This is actually a sub-category of humanitarian and significant public benefit parole. In 2009, ICE issued a policy memo stating that arriving aliens in particular (not all applicants for admission) who have received a positive determination on a credible fear interview *should* be granted parole unless there are mitigating circumstances.¹¹ As the memo explains, ICE determined as a general rule that detaining arriving aliens who have had a positive credible fear determination is not in the public interest, and therefore those people fall within the 5th category for parole above.

While many people refer to this parole as distinct from “humanitarian parole,” it is really just a sub-category under 212(d)(5) parole. It is significant to note, however, that this policy memo does, at least in theory, give arriving aliens who have a positive CFI determination a better chance at obtaining parole, because it instructs that ICE *should* grant parole unless there are other circumstances that mitigate against release. While this memo was issued in 2009, the government has affirmed it is still in force.

Who has the authority to grant parole under 212(d)(5)?

ICE, USCIS, and CBP (which are all sub-agencies of DHS) all divided up authority over adjudicating parole requests under 212(d)(5). For people in ICE detention, only ICE can grant parole under 212(d)(5).

¹¹ Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture, Issued Dec. 2009 https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf

Can I ask a judge for parole under 212(d)(5)?

No, only the agencies listed above can grant parole under 212(d)(5). However, judges *can* grant “conditional parole”, discussed further below. Immigration judges also don’t have the authority to review a denial of parole by ICE. For clients in immigration detention, ICE is the only agency from which they can request parole under 212(d)(5).

What kind of status does a client receive if s/he is released under 212(d)(5)?

Parole under 212(d)(5) is temporary.¹² It is not considered an “admission” into the U.S., which is significant for other kinds of applications your client may want to make in the future. However, parole under 212(d)(5) is considered “parole” for the purposes of an application for a green card, known as “Adjustment of Status” (AOS). For certain clients who have special rules for AOS (Cubans, for example), obtaining this kind of parole is very significant for their opportunity to adjust status in the future. A client could apply for a work permit.

Conditional Parole Under INA 236(a)¹³

Who is eligible for conditional parole under INA 236(a)?

The factors for release via conditional parole under INA 236(a) are even simpler than those for 212(d)(5) parole. Conditional parole is available to everyone detained and in removal proceedings *except* arriving aliens – in other words, it is available to detainees who entered the U.S. without inspection, as well as to detainees who were “admitted” to the U.S. – who entered *with* inspection. This includes people with green cards, and people who entered the U.S. on a visa. However, anyone who is subject to “mandatory detention,”¹⁴ as described in INA 236(c), is not eligible for release under conditional parole.

What does my client have to demonstrate to be granted conditional parole?

Unlike the distinct categories for release eligibility under 212(d)(5), release under conditional parole is “merely release[] from detention pending a decision on whether the alien is to be removed from the

¹² 8 CFR 212.5

¹³ 8 USC 1226(a)

¹⁴ For an explanation of Mandatory Detention, please see: https://www.ilrc.org/sites/default/files/resources/mandatory_detention_ice_hold_policy_handout.pdf

United States.”¹⁵ You must demonstrate that your client 1) does not pose a danger to property or persons and 2) is likely to show up to future proceedings.¹⁶

Who has the authority to grant conditional parole?

In general, ICE’s parole documents are geared towards parole under 212(d)(5). However, both ICE and the immigration judges have the authority to release an eligible person on conditional parole. Therefore, we recommend that you include a request for release on conditional parole in all requests for parole from ICE (except if your client is an Arriving Alien—Please see our Templates) as well as in Motions for Custody Redetermination before immigration judges.¹⁷

Conditional parole sounds easier—why don’t I just try for that?

While conditional parole has fewer requirements, ICE is generally less familiar with it. Most ICE officers need to be reminded (often more than once) that you are requesting release under a different section of the INA that has different requirements. Similarly, while immigration judges can release a person on conditional parole, rather than bond, it is almost unheard of these days for judges to do this.

Finally, conditional parole is not “parole” for the purposes of other sections of the INA. For example, the same Cuban detainee who could apply for Adjustment of Status if he was released on parole under 212(d)(5) does not have the same opportunity if he is released under 236(a).¹⁸ Finally, conditional parole, in contrast to 212(d)(5) parole, does not provide eligibility for work authorization.¹⁹

Conclusion

Parole is a critical tool in a practitioner’s toolbox for getting your client out of immigrant detention. Because an ICE officer can deny a subsequent request for parole due to not having new evidence from a previous request, **we strongly suggest you combine all of the relevant parole arguments laid out in this document into *one* request for parole.**

We hope this overview provides the framework needed to actively advocate for your client’s release.

¹⁵ *Matter of Castillo-Padilla*, 25 I&N Dec. 257 (2010)

¹⁶ 8 CFR 236.1(c)(8)

¹⁷ See IJC’s website section on bond for more

¹⁸ *Matter of Castillo-Padilla*

¹⁹ 8 USC 1226(a)(3)