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MEMORANDUM FOR EMPLOYEES OF:
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
U.S. CUSTOMS AND BORDER PROTECTION
U.S. CITIZENSHIP AND IMMIGRATION SERVICES

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SUBJECT: **Supplemental Parole Guidance for Certain Noncitizen Current and Former Service Members and Qualifying Family Members of Current and Former Service Members Seeking to Return to the United States**

Purpose

This guidance provides policy and operational instructions and defines DHS agency and office roles in accepting and considering requests for parole from noncitizen current and former military service members and their qualifying family members who are outside of the United States.[1]

In recognition of the profound commitment and sacrifice that current and former military service members and their families make and have made to the United States, the U.S. Department of Homeland Security (DHS) will accept and consider, on a case-by-case basis, parole requests under section 212(d)(5) of the Immigration and Nationality Act (INA)[2] from certain noncitizen current and former military service members and qualifying family members of current and

[1] *See* 8 C.F.R. §§ 2.1, 212.5; *see also* Memorandum of Agreement Between United States Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP) For the purpose of Coordinating the Concurrent Exercise by USCIS, ICE, and CBP, of the Secretary's Parole Authority under INA § 212(d)(5)(A) with Respect to Certain Aliens Located Outside of the United States (Sept. 29, 2008) (DHS Parole MOA).
[2] 8 U.S.C. § 1182(d)(5).

former military service members who are outside the United States, so that they may seek return to the United States to better avail themselves of U.S. legal counsel and systems and gain access to certain veterans' benefits.

The July 2, 2021 DHS Component Memorandum for the Secretary of Homeland Security states, in pertinent part, that DHS Components will:

> Use DHS's prosecutorial discretion and other legal authorities to receive and review requests from certain previously removed former noncitizen service members and immediate family members of service members to return to the United States to facilitate better access to appropriate Veterans Affairs (VA) benefits, legal counsel, and the U.S. legal system for purposes of requesting post-conviction relief or reopening of removal proceedings, if warranted. We will develop a Department-wide approach to reviewing requests for relief from removal by previously removed noncitizen service members and immediate family members of service members to support humane and consistent outcomes.[3]

Background

Throughout U.S. history, noncitizens have honorably served in the U.S. Armed Forces. Although the INA contains specific provisions allowing noncitizen service members to apply for naturalization,[4] some noncitizen current and former service members may not have applied for naturalization or may have been denied naturalization and became subject to civil immigration enforcement and removal due to several possible factors, including criminal behavior. However, prior removal, or certain criminal behavior, does not automatically disqualify some individuals from naturalization or other immigration benefits. Additionally, prior removal or criminal behavior does not automatically disqualify former service members from benefits administered by the VA based on their prior service. Allowing certain individuals to return to the United States to apply for and fully access these benefits will yield a significant public benefit by fulfilling our obligation to support the men and women who defend our Nation and to care for them and their families.

Military personnel are commonly exposed to health-harming conditions during their service, resulting in higher rates of physical and mental health conditions compared with the general population.[5] Studies have shown that military veterans report higher rates of many health conditions compared with the general population, including physical health symptoms (e.g., pain, fatigue), chronic conditions (e.g., diabetes), mental health disorders (e.g., post-traumatic stress disorder, depression) and harmful substance use. In many cases, barring a former service member from entering the United States limits their access to VA health services to which they

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[3] See DHS's Commitment to Supporting Noncitizen Service Members, Veterans, and Immediate Family Members of Service Members Memorandum (July 2, 2021).
[4] INA § 329, 8 U.S.C. § 1440.
[5] Horyniak D., et al., *Deportation of Non-Citizen Military Veterans: A Critical Analysis of Implications for the Right to Health*, Global Public Health (Dec. 15, 2017), available at https://pubmed.ncbi.nlm.nih.gov/29243564/.

may otherwise be entitled. Availability of, and access to, healthcare while living outside of the United States may be limited for reasons including barriers to enrolling in public insurance plans, challenges navigating unfamiliar health systems, and stigma and discrimination towards deported former service members. Additionally, the quality of available care may be sub-optimal due to limited expertise in service-related health issues and lack of evidence-based treatment for some health conditions (e.g., substance use dependence).

Justification for Considering Parole Requests from Current and Former Military Members and Their Families

The Secretary of Homeland Security, in his discretion, may parole an individual "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."[6] The Secretary may set the duration of the parole based on the purpose for granting the parole request. Parole is neither an immigration status nor an admission to the United States,[7] and individuals who may be otherwise inadmissible may be paroled into the United States. DHS may terminate the parole at any time and the individual's case shall continue "in the same manner as that of any other applicant for admission to the United States."[8]

Parole for noncitizen current and former military service members and their families outside the United States (to include those who were removed from the United States) generally would provide a significant public benefit to the United States by recognizing the profound commitment and sacrifice that military service members and their families have made to the United States. A grant of parole may promote family unity among military service members or assist former military service members (and their family members) who may be eligible for naturalization or other immigration benefits or post-conviction relief. In certain cases, there also may be an urgent humanitarian reason to permit former service members (or their family members) to return to the United States to receive medical treatment and access VA benefits, including care for physical and mental health conditions arising from their service, that may only be available in the United States. The decision whether to grant a parole request will be determined on a case-by-case basis and upon a thorough review of the request and other relevant information related to the noncitizen.

Jurisdiction Over Parole Requests from Current and Former Military Members and Their Families.

Under current DHS guidelines, ICE generally has jurisdiction over parole requests for individuals who are in removal proceedings, have final orders of removal or have been removed, and individuals granted deferred action by ICE at any point after the commencement of removal proceedings.[9] Parole requests from previously removed service members and certain qualifying

[6] INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).
[7] INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).
[8] *Id.*; *see also* 8 C.F.R. § 212.5(c)-(e).
[9] *See* DHS Parole MOA (Sept. 29, 2008).

family members will therefore generally fall under ICE jurisdiction. For other individuals who do not fall under ICE's jurisdiction, USCIS will generally have jurisdiction to adjudicate the parole request. CBP has jurisdiction over all parole requests at the port of entry regardless of the applicant having pending removal proceedings or having previously been removed and does not require advance filing of a Form I-131, *Application for Travel Document*. The Component that adjudicates the parole requests for these individuals should also adjudicate the requests of any derivative family members, whether accompanying the principal or following to join later.

Certain current and former service members and their qualifying family members residing outside the United States, as described in this policy, may file a Form I-131 to request parole into the United States from USCIS or ICE. All Form I-131 filings will continue to be filed with a USCIS Lockbox. If the parole applicant falls under ICE jurisdiction as described above, USCIS will direct the case to, or coordinate with ICE, as appropriate. If the Form I-131 is approved by USCIS or ICE, the individual may be issued an Advance Parole Document that allows the individual to request parole at a port of entry where a CBP officer inspects the individual and determines whether to authorize parole and the length of their parole period.

Specialized Training for DHS Officers Considering Parole Requests from Current and Former Military Members and Their Families

Considering the unique circumstances and significant U.S. equities in supporting current and former members of the military and their families, any officer who is assigned to review Form I-131 parole requests under this guidance must receive specialized training developed in coordination with the VA.

Expedited Handling and Supervisory Level Review

All parole requests that fall within these guidelines will be reviewed expeditiously and must receive a supervisory review at the level determined by the component having jurisdiction over the case, prior to issuing a final decision. When the component with jurisdiction for the request completes its review, the case will be forwarded to the supervisor for concurrence. The component will report decisions to the Immigrant Military Members and Veterans Initiative (IMMVI) Interagency Group for tracking and reporting purposes.[10]

If a final decision cannot be reached within 90 days of receipt at the reviewing office, the reviewing office will provide progress updates to the IMMVI Interagency Group at 60-day intervals until a final determination is made. The IMMVI Interagency Group will have a strictly consultative and coordinating role and will not provide a binding or determinative opinion or recommendation.

[10] The Immigrant Military Members and Veterans Initiative (IMMVI) is an interagency working group made up of representatives from USCIS, ICE and CBP, the VA, and Department of Defense.

Fees

The USCIS Director will exercise the authority under 8 CFR 103.7(d) to approve exemptions from any fee required by 8 CFR 103.7(b)(1)(i) for the initial Form I-131 and the initial Form I-765, *Application for Work Authorization*, (if applicable), as it is in the public interest and consistent with other applicable policy related to current and former members of the military. Family members must submit the appropriate fees with the forms or accompanying fee waiver request, using Form I-912, *Request for Fee Waiver*.

Demonstrating Current and Former Service Membership and Military Service

It is the applicant's burden to establish that they are a current or former service member or are a qualifying family member under this policy and is responsible for providing evidence to meet their burden. Documentation that supports military service include the Certificate of Release or Discharge from Active Duty (DD Form 214), National Guard Report of Separation and Record of Service (NGB Form 22), or other official service or discharge document.

Qualifying Familial Relationship

Military service sacrifice is not limited to the noncitizen current or former service member alone. To recognize that sacrifice and promote family unity, this guidance applies to certain family members of current and former service members. Qualifying family members are:

- A current spouse,[11] child,[12] or unmarried son or daughter and their unmarried children who are under 21, of a current or former service member.
- Any current legal guardian[13] or surrogate of a current or former service member when the guardian or surrogate files a Form I-131 to request parole concurrently with the service member's application for naturalization using Form N-400, *Application for Naturalization*.

There is generally a significant public benefit to the parole of the qualifying family member due to family unity considerations and to recognize their sacrifice as a family member of a current or former service member.

Each qualifying family member may file Form I-131 independently and must be individually eligible for parole, such that there are urgent humanitarian reasons or a significant public benefit for their parole, and that the family member merits a favorable exercise of discretion. A qualifying family member must provide all the required documentation to establish their family

[11] An individual is a spouse of the service member if the marriage was a valid marriage by the law of the place where the marriage was celebrated not contrary to U.S. public policy and is a bona fide marriage.
[12] *See* INA 101(b) and INA 101(c).
[13] A legal guardian or surrogate is a person designated by a court to exercise legal authority over the service member's affairs.

member's military service and a qualifying familial relationship, which may include a birth certificate, marriage certificate and prior divorce decrees, and court documentation of legal guardianship or surrogacy as applicable.

Exercise of Discretion

In evaluating parole requests on a case-by-case basis, DHS weighs all relevant considerations, including the significant public benefit interest and urgent humanitarian reasons for facilitating parole of current and former U.S. military members and qualifying family members residing outside the United States. Absent significant negative factors, including any factors indicating that the applicant poses a national security[14] or current public safety threat,[15] parole would generally be an appropriate exercise of discretion for certain current and former U.S. military service members and the qualifying family members described above. The applicant has the burden of establishing that he or she warrants a favorable exercise of discretion, and every application will be adjudicated and considered on a case-by-case basis, based on the totality of the facts and circumstances.

Additional Factors to Consider

The qualifying individual's military service or their qualifying family member's military service ordinarily weighs heavily in favor of parole, but this may be overcome if there is significant derogatory information indicating that the applicant poses a national security or current public safety threat. Officers should refer to the DHS Guidelines for the Enforcement of Civil Immigration Law when assessing the totality of the circumstances on a case-by-case basis, which include the following examples:[16]

- the gravity of the offense of conviction and the sentence imposed;
- the nature and degree of harm caused by the criminal offense;
- the sophistication of the criminal offense;
- use or threatened use of a firearm or dangerous weapon;
- a serious prior criminal record;
- advanced or tender age;
- lengthy presence in the United States;
- a mental condition that may have contributed to the criminal conduct, or a physical or mental condition requiring care or treatment;
- status as a victim of crime or victim, witness, or party in legal proceedings;
- the impact of removal on family in the United States, such as loss of provider or caregiver;

[14] DHS will determine whether a noncitizen poses a threat to United States sovereignty, territorial integrity, national interests, or institutions. General criminal activity does not amount to a national security threat.
[15] *See* Guidelines for the Enforcement of Civil Immigration Law. (Sept. 30, 2021).
[16] *Id.*

- whether the noncitizen may be eligible for humanitarian protection or other immigration relief;
- military or other public service of the noncitizen or their immediate family;
- time since an offense and evidence of rehabilitation; and,
- conviction was vacated or expunged.

Additional factors to consider that apply to certain current and former U.S. military members and qualifying family members, include:

- pathway to naturalization or other immigration status;
- a need to access the U.S. legal system to assist with appeals of criminal convictions, discharge upgrade requests, and reopening removal proceedings, if appropriate;[17]
- medical conditions related to military service; and,
- a need for medical services with the VA that can only be accessed in the United States.

In evaluating parole requests, DHS will consider, as an exceptionally strong favorable factor, the fact that an applicant, or the qualifying family member of such an applicant, has filed a Form N-400 and appears to be prima facie eligible for naturalization under INA § 329.[18]

If the current or former service member or their family member does not appear eligible for naturalization, or other immigration status, DHS will not consider this a strong negative factor.

[17] Evidence, such as an affidavit, that addresses the former service member's access to counsel at the time of any prior removal proceeding or whether counsel at the time of any prior criminal plea provided accurate information about the possible immigration consequences of all charges is now required for the plea to be constitutionally sufficient under *Padilla v Kentucky*, 559 U.S. 356 (2010). However, *Padilla*'s requirement that counsel advise a defendant of a guilty plea's immigration consequences does not apply retroactively to convictions that became final prior to the issuance of the *Padilla* decision on March 31, 2010. *Chaidez v. United States*, 568 U.S. 342, 358 (2013). In some circuits, however, the *Chaidez* holding on retroactivity of *Padilla* does not apply to cases in which counsel had engaged in a material misrepresentation of the federal immigration consequences of the criminal plea, *see, e.g., United States v. Castro-Taveras*, 841 F.3d 34 (1st Cir. 2016); *United States v. Chan*, 792 F.3d 1151 (9th Cir. 2015); whereas other circuit courts have held that *Chaidez* extends to attorney misadvice claims, *see, e.g., Chavarria v. United States*, 739 F.3d 360 (7th Cir. 2014). State courts have varying rules on the retroactive applicability of *Padilla*. If there is substantial and probative evidence that *Padilla* was violated or there was a material misrepresentation by counsel concerning the immigration consequences of a criminal plea, such evidence may tend to show that the applicant may benefit from improved access to the U.S. legal system to appeal a criminal conviction and thus may be considered a positive discretionary factor in the parole adjudication.

[18] See USCIS Policy Manual, Volume 12, Citizenship and Naturalization, Part I Military Members and their Families, Chapter 3, Military Service during Hostilities (INA 329) [12 USCIS-PMI.3] and Chapter 5, Application and Filing for Service Members (INA 328 and 329) [12 USCIS-PM I.5].

Documentation

It is the applicant's burden to establish that they are a current or former service member or are a qualifying family member under this policy and that they warrant a favorable exercise of discretion. [19] The applicant is responsible for providing evidence to meet their burden.

Parole Period and Re-Parole Requests

If discretion to grant parole is favorably exercised, the responsible DHS component should authorize parole for a period of up to 12 months with the option for additional periods of authorized parole, also known as re-parole, in increments of up to 12 months, as appropriate. When determining the initial period of parole, factors to be considered include the estimated time needed for proper medical treatment, family unity, the complicated nature of post-conviction relief, or processing time delays with the Executive Office for Immigration Review and USCIS, as applicable to the individual's case. DHS also may prescribe reasonable terms and conditions for the parole of any individual, including issuing parole for multiple entries, the giving of a bond, or periodic reporting of whereabouts.[20]

Employment Authorization

Recipients of parole under this policy may apply for employment authorization.[21] The favorable exercise of discretion to grant parole to these beneficiaries generally should lead to approving employment authorization. If approved, the employment authorization document should generally be issued to cover the same period as the parole.

Advance Parole Documents to Facilitate Return to the United States after Temporary Travel Abroad

If a beneficiary of this policy needs to travel outside the United States and return, the individual must file with USCIS a Form I-131 to request an Advance Parole Document prior to departing the United States. Advance Parole may be issued for single or multiple entries.

Parole in Place for Family Members of Current and Former U.S. Military Members

This memorandum does not replace or change current USCIS policy guidance related to parole-in-place for certain family members of current and former U.S. military members inside the United States.

[19] See INA 291; 8 U.S.C. 1361
[20] *See* INA § 212(d)(5)(A); 8 C.F.R. § 212.5(c).
[21] 8 C.F.R. § 274a.12(c)(11).

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