



FEDERATION FOR AMERICAN IMMIGRATION REFORM

Executive Amnesty Will Give Illegal Aliens Taxpayer Funded Benefits

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The full extent of President Obama's forthcoming executive amnesty is far greater than is being reported. In addition to shielding millions of illegal aliens from deportation and rewarding them with work authorization, the Obama Administration is poised to give these amnestied illegal aliens taxpayer funded benefits that could end up costing U.S. citizens billions of dollars.

While the President has been considering numerous options for his executive amnesty, there are two methods President Obama is expected to use in order to shield illegal aliens from deportation: parole and deferred action.

Aliens with parole or deferred action are eligible for many benefits even though they are still illegal aliens. This is so despite laws Congress adopted in 1996 to restrict alien eligibility for benefits programs. For example, in the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Congress provided that an alien must be a "qualified alien" to receive "federal public benefits." (8 U.S.C. § 1611) It also provided that qualified aliens must wait five years before they are eligible for any "Federal means-tested public benefit." (8 U.S.C. § 1613) However, through a combination of definitions and exceptions in the statutes and regulations, these limitations often do not apply to aliens with deferred action or parole.

Below, FAIR has set forth an explanation of how aliens with parole or deferred action are eligible for certain major benefits programs. This summary is not intended to cover all programs. Indeed, depending on a variety of circumstances and details of the executive action, President Obama may make illegal aliens eligible for even more benefits.

PAROLE

Parole, otherwise known as "humanitarian parole," is authorized by Section 212 of the Immigration and Nationality Act (INA). Section 212 grants the Executive Branch discretion to "parole **into** the United States **temporarily** under such conditions as [it] 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." (INA § 212(d)(5)(A)(emphasis added)) Although Congress intended this statute to permit the entry of aliens *outside* the U.S. on a temporary and a case-by-case basis – not to permit illegal aliens in the U.S. to stay permanently – the Clinton Administration, through a legal memo, determined that it had the authority to grant parole to illegal aliens residing in the country. (Read the 1998 memo [here](#)) "Parole in place," as it is now called, has **no statutory or regulatory basis**. Nevertheless, the Obama administration has

already granted parole in place to illegal aliens and is expected to expand this practice. (See e.g., [FAIR Legislative Update](#), Nov. 20, 2013)

Aliens with parole generally receive work authorization and are eligible for most benefits under federal law. This is true regardless of whether they have humanitarian parole or parole in place because the eligibility rules for benefits programs make no distinction between the two. Indeed, the longer an alien's parole, the more benefits he is eligible to receive.

Aliens Paroled Into the U.S. for Less than a Year

Aliens paroled into the U.S. for less than a year are eligible for **Obamacare**—officially known as the Affordable Care Act (ACA). In the text of the ACA, Congress expressly limited enrollment in the healthcare exchanges to “lawfully present” individuals, but did not define the term. (Pub. L. 111-148 and Pub. L. 111-152 (collectively the Affordable Care Act) § 1312(f)(3); 42 U.S.C. § 18032(f)(3)) Subsequent regulations implementing the law define “lawfully present” to include aliens with parole for less than one year. (45 C.F.R. § 155.20; 26 C.F.R. § 1.36B-1(g); see also [Healthcare.gov](#))

Not only are aliens with parole for less than one year eligible for Obamacare, they are immediately eligible. Despite the fact that Obamacare might appear to be a “federal public benefit,” and thus restricted to “qualified aliens” and the five-year bar, the Department of Health and Human Services (HHS) has not included it in the regulatory definition of either “federal public benefit” or “federal means-tested public benefit.” (See 63 Fed. Reg. 41658 – 41611; 62 Fed. Reg. 45256; see also Health and Human Services Assistant Secretary for Planning and Evaluation, [Summary of Immigrant Eligibility Restrictions Under Current Law](#), updated April 28, 2011) Thus, there is no conflict between the eligibility rules for Obamacare and PRWORA. This means that aliens may enroll if they are “lawfully present,” and they are not required to be “qualified aliens” nor wait five years to participate pursuant to the PRWORA restrictions. (See 8 U.S.C. §§ 1611, 1613)

Aliens with parole for less than one year are also immediately eligible for **unemployment benefits**. Although the unemployment insurance program is administered by the states, it is based upon the Federal Unemployment Tax Act (FUTA), which specifically says that aliens paroled into the U.S. for less than one year are eligible for unemployment benefits provided they otherwise meet the program's other requirements. (See 26 U.S.C. § 3304(a)(14)(A)) Moreover, like Obamacare, unemployment benefits are not considered a “federal public benefit” or a “federal means-tested public benefit.” (See 63 Fed. Reg. 41658 – 41611; 62 Fed. Reg. 45256; see also Health and Human Services Assistant Secretary for Planning and Evaluation, [Summary of Immigrant Eligibility Restrictions Under Current Law](#), updated Apr. 28, 2011) Thus, aliens with parole for less than one year are not required to be “qualified aliens,” are not subject to the five-year waiting period, and are immediately eligible for unemployment benefits.

Aliens with parole for less than a year are also eligible for retirement benefits under **Social Security**, so long as they meet other eligibility requirements (usually 40 quarters coverage). (See [42 U.S.C. 414](#)) By statute, Congress exempted retirement benefits under Social Security from the list of federal public benefits for which an alien must be a “qualified alien” and wait five

years for eligibility pursuant to PRWORA. (8 U.S.C. § 1611(b)(2)) Instead the Social Security Act only requires that aliens be “lawfully present.” (See USC § 1611(b)(2); 42 U.S.C. § 402(y)) The regulation that defines “lawfully present” for retirement benefits includes aliens paroled into the U.S. for less than one year. (8 C.F.R. § 103.12(a)(3))

- Note that once an alien receives a Social Security Number, the alien is eligible to claim the **Earned Income Tax Credit (EITC)**. (See 26 U.S.C. § 32(m); [IRS.gov](https://www.irs.gov), updated Aug. 26, 2014)

Aliens with parole for less than a year are also eligible for **Medicare**. Medicare Part A (inpatient) benefits are available to aliens who are at least 65 years old and eligible for Social Security retirement (Title II) benefits if eligibility is based on authorized work history. (42 U.S.C. § 1395c; 8 U.S.C. § 1611(b)(3)) As described above, aliens paroled into the U.S. for less than a year are eligible for retirement benefits under Social Security. (See 42 U.S.C. § 402(y); 8 U.S.C. § 1611(b)(2); 8 C.F.R. § 103.12(a)(3)) Therefore, aliens with parole for less than one year who are eligible for Social Security based on authorized work history are eligible for Medicare Part A. [Note that depending on prior periods of authorized work, if any, a paroled alien may have to work additional years with work authorization to claim Medicare benefits.] In addition, individuals eligible for Medicare part A, including aliens with parole for less than a year, are also eligible for Medicare Part B (outpatient) and Part D (prescription drugs). (42 U.S.C. § 1395o; 42 U.S.C. § 1395w-101(a)(3)(A))

Again, like Social Security, aliens are not required to be a “qualified alien” to receive Medicare and are not subject to the five-year waiting period, because Congress by statute exempted Medicare from the list of federal public benefits for which an alien must be a “qualified alien.” Instead, Congress only required that the alien be “lawfully present” with sufficient authorized work history. (8 U.S.C. § 1611(b)(3)).

Aliens with parole for less than a year, and who are children or pregnant women, are also eligible for **Medicaid and State Children’s Health Insurance Program (SCHIP)** health care benefits in states that have opted to cover them. Under the Children’s Health Insurance Program Reauthorization Act of 2009 (CHIPRA), Congress granted the states the option to offer health care benefits to “lawfully residing” children (under the age of 21) and pregnant women through Medicaid and SCHIP. (CHIPRA § 214, [Pub. L. 111-3](#)) Congress specified that the states could provide these benefits despite federal laws limiting alien eligibility for federal public benefits, including the requirement that aliens must be “qualified aliens” and wait five years to be eligible. (CHIPRA § 214(a)(2))

Aliens with parole for less than a year will be eligible for these benefits. In 2010, HHS issued a letter advising states that it would define the term “lawfully residing” for purposes of CHIPRA § 214 to mean aliens who are lawfully present and residing in the relevant state. (CMS [letter](#), July 1, 2010) This includes aliens with deferred action, parole for less than a year, and qualified aliens. (*Id.*) Indeed, it was this HHS definition that eventually became the definition of “lawfully present” for Obamacare. (See [77 Fed. Reg. 52615](#))

Paroled Aliens Who Are in the U.S. for More than a Year

Paroled aliens who are in the U.S. for more than a year become “qualified aliens” under federal law, putting them on par with legal permanent residents (green card holders). (8 U.S.C. § 1641(b)(4)) Qualified aliens are eligible for “federal public benefits,” which by statute is defined as “any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit....” (8 U.S.C. § 1611(c)(1)(B)) By regulation, HHS has defined “federal public benefits” to include numerous programs including Medicaid, SCHIP, and Temporary Assistance for Needy Families (TANF). ([63 Fed. Reg. 41658](#))

As “qualified aliens,” aliens with parole for more than one year remain eligible for all of the benefits they were eligible for as aliens paroled for less than one year. These include Obamacare, unemployment benefits, Social Security, Medicare, and health coverage for children and pregnant women under state Medicaid and SCHIP laws. (45 C.F.R. § 152.2; 26 U.S.C. § 3304(a)(14)(A)); see [Department of Labor Policy Interpretation](#); 8 C.F.R. § 103.12(a)(1); 42 U.S.C. § 1395c; 42 U.S.C. § 1395o; 42 U.S.C. § 1395w-101(a)(3)(A); CMS [letter](#), July 1, 2010)

Five years after becoming a “qualified alien,” aliens with parole will also be eligible for **SCHIP** and **TANF**. Both programs fall under the HHS definitions of “federal public benefits” and “federal means-tested public benefits.” (See 63 [Fed. Reg. 41658 – 41611](#); 62 Fed. Reg. 45256; see also Health and Human Services Assistant Secretary for Planning and Evaluation, [Summary of Immigrant Eligibility Restrictions Under Current Law](#), updated Apr. 28, 2011) Thus “qualified aliens,” including aliens with parole for more than one year, are eligible. (See 8 U.S.C. § 1611; 8 U.S.C. § 1641(b)(4)) However, qualified aliens are barred from receiving Federal “means-tested benefits” for five years after becoming qualified aliens. (8 U.S.C. § 1613(a)) Thus, aliens with parole will become eligible for SCHIP and TANF after six years: one year to become a “qualified alien” plus the five-year bar.

DEFERRED ACTION

U.S. Citizenship and Immigration Services (USCIS) describes deferred action as “a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion.... An individual who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect. However, deferred action does not confer lawful status upon an individual, nor does it excuse any previous or subsequent periods of unlawful presence.” (USCIS [Frequently Asked Questions](#), updated Oct. 23, 2014) In addition, aliens with deferred action generally receive work authorization. (*Id.*)

Deferred action, like parole in place, has **no statutory basis**. (See USCIS Ombudsman [memo](#), Apr. 6, 2007) Indeed, the concept of deferred action is *merely referenced* in federal regulations as a class of aliens who must apply for work authorization. (8 C.F.R. § 274a.12(c)(14))

Importantly, the decision by the Executive Branch to grant deferred action is unreviewable by the courts. (*Reno v. American Arab Anti-Discrimination Comm.*, 525 U.S. 471, 119 S.Ct. 936 (1999))

However, like paroled aliens, aliens with deferred action are eligible for many benefits programs. First, aliens with deferred action are eligible for **Obamacare**, officially called the Affordable Care Act (ACA). In the ACA, Congress specifically limited eligibility to aliens who are “lawfully present” in the U.S., but did not define the term. (Pub. L. 111-148 and Pub. L. 111-152 (collectively the Affordable Care Act) § 1312(f)(3); 42 U.S.C. § 18032(f)(3)) However, by regulation, HHS interpreted “lawfully present” aliens to include aliens granted deferred action. (45 C.F.R. § 152.2; 45 C.F.R. § 155.20; 26 C.F.R. § 1.36B-1(g); see also Healthcare.gov)

Like paroled aliens, aliens with deferred action may also immediately enroll in Obamacare. As described above, HHS has not designated Obamacare as a “federal public benefit” or “federal means-tested public benefit” by including it in the regulatory definitions of those terms. (See 8 U.S.C. §§ 1611, 1613; See 63 Fed. Reg. 41658 – 41611; 62 Fed. Reg. 45256; see also Health and Human Services Assistant Secretary for Planning and Evaluation, [Summary of Immigrant Eligibility Restrictions Under Current Law](#), updated Apr. 28, 2011) Thus, aliens are not required to be “qualified aliens” nor wait five years to participate, as would otherwise be required by law to enroll in a federal benefits program.

Aliens with deferred action are also immediately eligible for **unemployment benefits**. As described above, Section 3304 of FUTA provides that aliens who are “lawfully present” are eligible for unemployment benefits. (26 U.S.C. § 3304(a)(14)(A)) Department of Labor policy interprets “lawfully present” for purposes of unemployment eligibility to include aliens with deferred action. (See [Department of Labor Policy Interpretation](#)) Moreover, as described above, unemployment benefits are not considered a “federal public benefit” or “federal means-tested public benefit.” (See 63 Fed. Reg. 41658 – 41611; 62 Fed. Reg. 45256; see also Health and Human Services Assistant Secretary for Planning and Evaluation, [Summary of Immigrant Eligibility Restrictions Under Current Law](#), updated Apr. 28, 2011) Therefore, aliens are not required to be “qualified aliens” to be eligible, not subject to the five-year waiting period, and are immediately eligible so long as they are lawfully present.

Aliens with deferred action are eligible for retirement benefits under **Social Security**. By statute, an alien is eligible for retirement benefits under Social Security if he is lawfully present—he is not required to be a “qualified alien.” (42 U.S.C. § 402(y)) The regulation that defines “lawfully present” for Title II benefits includes aliens with deferred action. (8 C.F.R. § 103.12(a)(4)(vi)) Because an alien does not have to be a qualified alien to be eligible for Social Security, the five-year waiting period does not apply. (See 8 U.S.C. § 1613)

- Note once an alien is eligible for Social Security and receives a Social Security Number, the alien is eligible to claim the Earned Income Tax Credit. (See 26 U.S.C. § 32(m); IRS.gov, updated Aug. 26, 2014)

Aliens with deferred action are also eligible for **Medicare**. Under federal law, Medicare Part A (inpatient) benefits are available to aliens who are at least 65 years old and eligible for Social

Security retirement (Title II) benefits based on authorized work history. (42 U.S.C. § 1395c; 8 U.S.C. § 1611(b)(3)) As described above, aliens with deferred action are eligible for Social Security. (See 42 U.S.C. § 402(y); 8 U.S.C. § 1611(b)(2); 8 C.F.R. § 103.12(a)(4)(vi)) Therefore, aliens with deferred action who are eligible for Social Security based on authorized work history are eligible for Medicare Part A. Additionally, an individual eligible for Medicare Part A is also eligible for Medicare Part B (outpatient) and Medicare Part D (prescription drugs). (42 U.S.C. § 1395o; 42 U.S.C. § 1395w-101(a)(3)(A)) Thus, aliens with deferred action who are eligible for Medicare Part A are also eligible for Medicare Part B and Medicare Part D.

Aliens are not required to be a “qualified alien” to receive Medicare and are not subject to the five-year waiting period, because Congress by statute exempted Medicare from the list of federal public benefits for which an alien must be a “qualified alien.” Instead, Congress only required that the alien be “lawfully present” and eligible for Social Security based on authorized work history. (8 U.S.C. § 1611(b)(3))

Aliens with deferred action, and who are children or pregnant women, are also eligible for **Medicaid and SCHIP** health care benefits in states that have opted to cover them. Under the Children’s Health Insurance Program Reauthorization Act of 2009 (CHIPRA), Congress granted the states the option to offer health care benefits to “lawfully residing” children (under the age of 21) and pregnant women through Medicaid and SCHIP. (CHIPRA § 214, [Pub. L. 111-3](#)) Congress specified that the states could provide these benefits despite federal laws limiting alien eligibility to federal public benefits, including the requirement that aliens must be “qualified aliens” and wait five years to be eligible. (CHIPRA § 214(a)(2))

Aliens with deferred action will be eligible for these benefits. As described above, HHS defined the term “lawfully residing” for the purposes of CHIPRA § 214 to include aliens with deferred action. (CMS [letter](#), July 1, 2010; 8 U.S.C. § 1611)

DEFERRED ACTION FOR CHILDHOOD ARRIVALS

Although aliens with deferred action are generally eligible for Obamacare, there is one notable exception. In 2012, after the creation of Deferred Action for Childhood Arrivals (DACA), which dramatically expanded the number of individuals receiving deferred action, the Obama Administration decided to exclude DACA beneficiaries from eligibility for Obamacare (as well as state-based Medicaid and SCHIP programs) by issuing a new regulation. Specifically, the regulation states that aliens “with deferred action under the Department of Homeland Security’s deferred action for childhood arrivals process, **as described in the Secretary of Homeland Security’s June 15, 2012, memorandum**, shall not be considered to be lawfully present...” for determining eligibility for Obamacare. (See [HHS Letter](#), Aug. 28, 2012; [HHS Letter](#), July 1, 2010; [77 Fed. Reg. 52614](#) (2002) (emphasis added); see also [FAIR Legislative Update](#), Sept. 24, 2012)

The wording of the regulatory exception to Obamacare eligibility is significant. A new deferred action program, or even expansion of the DACA program, would likely not fall under the exclusion because it will not meet the requirement “**as described in**” the Secretary of Homeland Security’s [June 15, 2012 memorandum](#). Thus, the new grant of deferred action would make these illegal aliens eligible for all the benefits described above. Additionally, because DACA beneficiaries are barred from enrolling in Obamacare by regulation, not legislation, HHS could revoke the eligibility bar at any time.

CONCLUSION

Through a maze of statutes and regulations, aliens granted deferred action or parole in place will be eligible for many public benefits. **This is true even though they are still illegal aliens.** To summarize:

Aliens with **parole for less than a year** are eligible for Obamacare, Social Security, EITC, Unemployment, and Medicare (with sufficient authorized work history). Paroled aliens, whether for less than a year or greater, who are children and pregnant women are also eligible for health care benefits through Medicaid and SCHIP in states that have opted to cover them.

Aliens with **parole for more than a year** retain their eligibility for Obamacare, Social Security, EITC, Unemployment, and Medicare. If they are children or pregnant women, they are also eligible for health care benefits through Medicaid and SCHIP in states that have opted to cover them. Finally, because paroled aliens become qualified aliens after a year, paroled aliens become eligible for all federal public benefits after 6 years, including SCHIP and TANF.

Finally, aliens with **deferred action** are eligible for Obamacare, Social Security, EITC, Unemployment, Medicare (with sufficient authorized work history). If they are children and pregnant women, they are also eligible for health care benefits through Medicaid and SCHIP in states that have opted to cover them.