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Re: International Entrepreneur Rule: Delay of Effective Date
82 Fed. Reg. 31887 (July 11, 2017)
DHS Docket No. USCIS–2015–0006

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Immigration Council) respectfully submit the following comments in response to the Department of Homeland Security (DHS) notice, "International Entrepreneur Rule: Delay of Effective Date," published in the Federal Register on July 11, 2017.[1]

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. Our members' collective expertise and experience make us particularly well-qualified to offer comments on this matter.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council has played an instrumental role in highlighting the important economic contributions of immigrants at the local and federal levels. In addition, through its work on the economic benefits of immigration reform, the Immigration Council has helped to establish baseline standards for understanding the

[1] 82 Fed. Reg. 31887 (July 11, 2017).

important role immigration plays in shaping and driving a twenty-first century American economy.

Introduction

Entrepreneurs are responsible for contributing a significant amount of wealth to the U.S. economy and creating jobs.[2] Thus, supporting and retaining foreign entrepreneurs in the United States is an essential component of a strong U.S. economy and workforce.[3] Nevertheless, our immigration laws, which fail to take into account that immigrants play a significant role in business creation, are unnecessarily crippling our ability to compete for talent in the global marketplace. Until our laws can be reformed to provide flexibility for entrepreneurs and reflect modern business practices, DHS should strive to create opportunities within our existing legal structure to attract and retain foreign entrepreneurs and create jobs for U.S. workers. The International Entrepreneur Rule (IER), which would provide parole for foreign entrepreneurs who provide a significant public benefit to the United States, is a temporary means for foreign entrepreneurs to concentrate on growing their businesses while potentially becoming eligible for a more long-term visa option that would allow them to continue running their businesses in the United States.

Our comments to the IER as it was initially proposed were intended to make it more practical for entrepreneurs to qualify, and we were pleased that the Final Rule reflected some of our recommendations. At this time, in addition to commenting on the postponement of the rule's effective date, we explain why the rule should be retained, and offer suggestions as to how it can be further improved to facilitate international entrepreneurship that can best grow our nation's economy.

DHS Failed to Establish "Good Cause" for Delaying the Effective Date without Full Notice and Comment

By delaying the effective date of the IER until March 14, 2018 without first providing notice to the public and the opportunity to comment, DHS has violated the requirements of the Administrative Procedure Act (APA). In order to forego notice and comment rulemaking, DHS must establish "good cause" that notice and comment is "impracticable, unnecessary, or contrary to the public interest."[4] In explaining the reason for the delay, DHS states that it is necessary so that it can consider the IER in light of Executive Order (EO) 13767, which requires DHS to

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[2] *See* Tim Kane, *The Importance of Startups in Job Creation and Job Destruction*, EWING MARION KAUFFMAN FOUNDATION (July 2010), http://www.kauffman.org/what-we-do/research/firm-formation-and-growth-series/the-importance-of-startups-in-job-creation-and-job-destruction (finding that without startups, there would be no net job growth in the U.S. economy).

[3] *See* Stuart Anderson, *Immigrants and Billion Dollar Startups*, NATIONAL FOUNDATION FOR AMERICAN POLICY (Mar. 2016), http://nfap.com/wp-content/uploads/2016/03/Immigrants-and-Billion-Dollar-Startups.NFAP-Policy-Brief.March-2016.pdf (finding that immigrant entrepreneurs have a track record of success in creating American powerhouses, such as Intel, eBay, and Tesla, and "have started more than half (44 of 87) of America's startup companies valued at $1 billion or more.").

[4] 5 USC §553(b)(B).

"ensure" that parole authority under INA §212(d)(5) "is exercised only on a case-by-case basis in accordance with the plain language of the statute."[5] In justifying the lack of notice and comment, DHS relies exclusively on the "contrary to the public interest" provision of the APA.[6] This provision excuses notice and comment in "emergency situations" or where delay "could result in serious harm."[7] Here, there is no emergency. Instead, DHS offers two reasons why full notice and comment would be "contrary to the public interest."

First, DHS claims that by proceeding with notice and comment and allowing the rule to move forward, even temporarily, USCIS would incur expenditures that it is "unlikely ever" to recoup from filing fees.[8] However, DHS did not provide any explanation of the costs associated with implementing the IER as scheduled or the purported insufficiency of fees collected. Claims of financial necessity have been rejected when they lack "factual findings supporting the reality of the threat."[9] DHS also references its "limited resources" to support its "good cause" argument. But the good cause exception "should not be used … to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them."[10]

DHS also claims that implementing the IER and then conducting notice and comment would confuse the public and "likely cause the waste of resources by multiple stakeholders with interests in this rulemaking."[11] Common sense suggests that it is far more likely that stakeholders—entrepreneurs, U.S. investors, and other entities and individuals supporting the start-ups—have already expended time and money in anticipation of the IER taking effect. It defies logic that stakeholders would wait until six days before the rule's effective date to begin the process of meeting the eligibility requirements.

The International Entrepreneur Rule is Consistent with the Immigration and Nationality Act's Parole Authority under INA §212(d)(5)(A)

The IER falls squarely within the scope of DHS's parole authority at INA §212(d)(5)(A). In describing the rule in the delay notice, DHS states:

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[5] 82 Fed. Reg. at 31887.
[6] 82 Fed. Reg. at 31888.
[7] *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (citations omitted).
[8] 82 Fed. Reg. at 31888.
[9] *Sorenson Comm. Inc. v. FCC*, 755 F.3d 702, 706-07 (D.C. Cir. 2014).
[10] *U.S. Steel Corp. v. USEPA*, 595 F.2d 207, 214 (5th Cir. 1979), *reh'g granted on other grounds*, 598 F.2d 915 (5th Cir. 1979).
[11] 82 Fed. Reg. at 31888. The two cases cited by DHS in support of this second reason are not dispositive. *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) just repeats the general principle that exceptions to notice and comment are intended for those situations where the policies of public participation are outweighed by other considerations. *Mid-Tex Elec. Coop. v. FERC*, 822 F.2d 1123, 1132-34 (D.C. Cir. 1987), is distinguishable as FERC originally adopted its policy after a "lengthy" comment period, and the interim rule issued without prior notice and comment promoted the continuity of the process while it underwent a new comment period; FERC was not being dilatory in issuing the interim rule; and the "irremediable financial consequences" if the interim rule did not take effect immediately involved long-term capital construction. By contrast, stakeholders here are far more likely to have already suffered financial consequences as a result of DHS's postponement of the IER's effective date.

> The IE Final Rule amended DHS regulations to include criteria that would guide the implementation of the Secretary of Homeland Security's discretionary case-by-case parole authority as applied to international entrepreneurs. Specifically, it applied to international entrepreneurs who can demonstrate that their parole into the United States under [INA § 212(d)(5)] would provide a significant public benefit to the United States.[12]

A case-by-case determination as to whether an applicant would provide a "significant public benefit to the United States" is precisely what the statute requires. The preamble to the Final Rule included a lengthy discussion of the legal authority for its promulgation, along with careful consideration of the public comments and explanations for changes between the rule as proposed and the final rule.[13] The IER was promulgated in accordance with the notice and comment procedures of the APA and, as discussed above, full notice and comment is required before DHS can delay its implementation.

The International Entrepreneur Rule Should be Retained and Further Improved to Provide Greater Benefits to the United States

Investment Amounts and Qualified Investors

The minimum investment amount of $250,000, although reduced from $345,000 as originally proposed, is still unreasonably high and not typical for a start-up organization, especially in the service sector. The regulation itself recognizes this reality by permitting an alternative investment of $100,000 in the form of a federal, state or local government grant. AILA and the Immigration Council's comments to the proposed rule, which were submitted on October 17, 2016, suggested a minimum investment of $120,000, based upon data from top accelerators pointing to $250,000 as the typical *maximum* initial investment.

According to Forbes Magazine, a typical angel investment ranges from $25,000 to $100,000.[14] A recent study by the U.S. Small Business Administration included substantial documentation demonstrating that, by any measurement used by entrepreneurial forums, foreign countries, and studies relating to start-up investments, an investment amount of $250,000 is substantially higher than the norm.[15] In fact, according to that study, only 5.3 percent of immigrant-owned firms had start-up capital of more than $250,000 dollars. While start-ups typically have other sources of investment capital and/or investment capital from multiple angel investors, many high-potential entrepreneurs would fail to meet the parole requirement of $250,000 in investment at the time of parole. DHS should analyze the success rate for a variety of small business and assess whether

[12] 82 Fed. Reg. at 31887.
[13] *See* 82 Fed. Reg. 5238-5286 (Jan. 17, 2017).
[14] *20 Things All Entrepreneurs Should Know About Angel Investors*, FORBES MAGAZINE (Feb. 5, 2015), http://www.forbes.com/sites/allbusiness/2015/02/05/20-things-all-entrepreneurs-should-know-about-angel-investors/#684bd630483a.
[15] Robert W. Fairlie, *Immigrant Entrepreneurs and Small Business Owners, and their Access to Financial Capital*, SBA OFFICE OF ADVOCACY (May 2012), https://www.sba.gov/sites/default/files/rs396tot.pdf

the proposed threshold is unrealistic and could be more flexible.

DHS should also further expand the definition of "qualified investor" by broadening the acceptable sources of investment capital. In the proposed rule, DHS defined "qualified investor" as a U.S. citizen (USC), lawful permanent resident (LPR), or a U.S. entity that is owned and controlled by USCs or LPRs.[16] Furthermore, qualified investors would have to show a proven track record of investments in other start-up entities in at least three separate calendar years totaling not less than $1,000,000, with at least two of those entities creating five "qualified jobs" or generating $500,000 in revenue with an average annualized growth of at least 20 percent.[17] The proposed rule only counted money invested in the prior year toward the proposed threshold of $345,000.[18]

In the Final Rule, the minimum investment by the qualified investor was reduced from $1,000,000 to $600,000 and the requirement that investments be made in at least three separate calendar years was removed.[19] DHS also broadened the form of investment made by an individual or organization to include a "security convertible into equity commonly used in financing transactions within their respective industries."[20]

While these changes are welcome, we respectfully disagree with the decision to continue the narrow limit on the types of individuals and organizations that can make qualified investments. In the preamble to the Final Rule, DHS rejected several comments which suggested expanding the definition to make it consistent with the Securities and Exchange Commission (SEC) definition of an "accredited investor."[21] DHS also rejected comments calling for foreign investments to be counted, including personal funds or funds from friends and family.[22]

The focus on U.S. investors excludes sources of foreign capital that should be welcomed in helping American start-ups flourish. The location of the investor should not be the focus – rather, the focus should be on where the entrepreneurial enterprise is located and where jobs will be created. Thus, investments from foreign angel investors should be allowed. However, angel investors, regardless of location, are only one source of investment that can spur U.S. economic growth. In 2014, the Ewing Marion Kauffman Foundation (Kauffman Foundation) surveyed firms listed since 1996 in Inc. Magazine's annual list of the 5,000 fastest growing companies.[23] The Kauffman Foundation found that angel investors accounted for only 7.7 percent of investments in these companies. Other sources of investment capital include:

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[16] *See* proposed 8 CFR §212.19(a)(5), 81 Fed. Reg. 60130, 60165 (Aug. 31, 2016).
[17] *See id*.
[18] *See* proposed 8 CFR §212.19(b)(2)(ii)(B)(1), 81 Fed. Reg. at 60165.
[19] *See* 82 Fed. Reg. at 5287 [to be codified at 8 CFR §§212.19(a)(5)(i), 212.19(b)(2)(ii)(B)(1)].
[20] *See id*. [to be codified at 8 CFR §212.19(a)(5)(i)].
[21] *See* 82 Fed. Reg. at 5250.
[22] *See* 82 Fed. Reg. at 5251.We note that the agency regularly makes such evaluations when reviewing EB-5 and other investment-based applications and petitions.
[23] EWING MARION KAUFFMAN FOUNDATION, ENTREPRENEURSHIP POLICY DIGEST, HOW ENTREPRENEURS ACCESS CAPITAL AND GET FUNDED (2015), *available at* http://www.kauffman.org/~/media/kauffman_org/resources/2015/entrepreneurship%20policy%20digest/june%202015/how_entrepreneurs_access_capital_and_get_funded.pdf.

- Personal Savings (67.2%)
- Bank Loans (51.8%)
- Credit Cards (34%)
- Family (20.9%)
- Business Acquaintances (11.9%)
- Close Friends (7.5%)
- Venture Capitalists (6.5%)
- Government Grants (3.8%)

Investment capital coming from sources such as these should also be considered "qualifying" investments. If an entrepreneur is willing to put his or her own personal savings at risk and/or incur a reasonable amount of debt to spur the growth of a business and create jobs, or if family members, business acquaintances or friends are willing to do the same, they should be allowed to do so.

We understand DHS's interest in having a narrow set of criteria to make it as easy as possible to identify instances where granting parole would serve the public interest, and appreciate the inclusion of the "other reliable and compelling evidence" option if the investment threshold cannot be met.[24] However, the start-up must still have received funds from a "qualified investor" or have received some qualifying funds from a government entity. We recommend broadening this language by allowing for case-by-case considerations of alternative criteria to include instances when investment funds come from individuals or organizations that do not meet the "qualified investor" definition.

We also suggest that a formal recommendation from a governmental economic development council or similar agency should be given a rebuttable presumption as "reliable and compelling evidence" of the "potential for rapid growth and job creation" when the investment comes from alternative sources. These agencies have significant expertise in evaluating a startup company's potential for growth. This would also reduce the burden on applicants and adjudicators concerning the submission of extensive evidence to meet this requirement.

Required Household Income

The IER requires as a condition for parole that the entrepreneur maintain a household income greater than 400 percent of the federal poverty line for his or her household size.[25] For a family of two, this would be more than $64,960 under the 2017 federal poverty guidelines, and for a family of four, this would be more than $98,400. These amounts are prohibitively high. First, many entrepreneurs pay themselves a small salary during the initial years of their start-up.[26]

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[24] *See* 82 Fed. Reg. at 5287 [to be codified at 8 CFR §212.19(b)(2)(iii)].
[25] *See* 82 Fed. Reg. at 5288 [to be codified at 8 CFR §212.19(i)].
[26] A 2013 study found that 73 percent of start-up founders took a salary of $50,000 or less (not including ownership interest or additional benefits), irrespective of whether they had funding. *See 73% of Startup Founders Make $50,000 Per Year or Less*, STARTUP COMPASS INC. (Jan. 14, 2014), https://blog.compass.co/73-percent-of-startup-founders-make-50-dollars-000-per-year-or-less/. Articles also advise that founders begin with a minimum

Second, the ability of the entrepreneur's spouse to contribute to the household income may be limited by factors such as childcare responsibilities or a visa status that prohibits employment. We suggest reducing the income requirement to 200 percent of the federal poverty line and permitting, as an alternative, evidence that the entrepreneur has sufficient personal funds – through savings, family money, or other sources – to adequately support him or herself and any dependents.

Parole in Place for Applicants in the United States

DHS declined to adopt parole in place as an option for entrepreneurs who may be present in the United States. The regulation requires a person who is already in the United States and who is deemed to meet the IER criteria to appear at a port of entry outside the United States in order to be granted parole.[27] DHS should change the rule to permit "parole in place" to be granted to entrepreneurs and their dependents who are already in the United States. Requiring them to depart the United States could result in a disruption to their business operations, potentially costing U.S. jobs.

Work Authorization for Spouses of Entrepreneurs

We applaud DHS for providing that entrepreneurs who are granted parole will be authorized for employment incident to their parole, and for providing an automatic 240-day extension of work authorization while a re-parole application is pending.[28] However, we urge DHS to also allow spouses of parolees to be authorized to work and eliminate the requirement that they file a separate employment authorization application. To attract entrepreneurial talent, it is imperative to eliminate any unnecessary obstacles that would prevent family members from accompanying the entrepreneur. Spouses of entrepreneurs should also be permitted to contribute to the U.S. economy, and to provide critical financial support to the household while the entrepreneur focuses on building the business. Obstacles that would keep them from doing so should be minimized or eliminated.

Premium Processing for Entrepreneur Parole Applications

DHS should allow for premium processing of entrepreneur parole applications to meet the fast-paced and highly competitive demands of start-ups. Recognizing the complexity of these cases, we recommend extending the premium processing time beyond the normal 15 days to 30 days.

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salary amount. *See, e.g.*, *Paying Yourself: From Startup and Beyond*, ENTREPRENEUR MAGAZINE , https://www.entrepreneur.com/article/80024 (excerpted from The Small Business Encyclopedia and noting that it typically takes three to six months to break even, but raising salary at that point can throw business into the "red"); *How much should you pay yourself as a business owner?* ENTREPRENEUR MAGAZINE (July 28, 2015), https://www.entrepreneur.com/article/244991 (noting that most start-ups operate at a loss generally for six months and sometimes for up to two years and advising that salary start at the minimum range),

[27] *See* 82 Fed. Reg. at 5288 [to be codified at 8 CFR §212.19(d)(2)].

[28] *See* 82 Fed. Reg. at 5288-89 [to be codified at 8 CFR §§212.19(g), 274a.12(b)(37)].

Due Process in Parole Adjudications and Terminations

The IER states that parole decisions will be based on the totality of the evidence and that USCIS will "consider and weigh all evidence, including any derogatory evidence or information, such as but not limited to, evidence of criminal activity or national security concerns."[29] Though we understand there may be limitations when national security concerns arise, DHS should commit, to the extent possible, to providing notice to the entrepreneur and the opportunity for the entrepreneur to respond if information from background checks raises questions regarding eligibility. This would be consistent with the Adjudicator's Field Manual, ch. 10.5, "Requesting Additional Information" and 8 CFR §103.2(b)(16)(i).[30] Similarly, DHS should provide notice and an opportunity to respond before terminating parole in all cases. Entrepreneurs and investors must have some certainty that parole will not be arbitrarily terminated without first having an opportunity to respond.

DHS also should allow applicants to file appeals and/or motions to reopen or reconsider the denial or termination of parole. Without an appeal or motions process, the only option for an individual who believes his or her application was wrongfully denied is to file a new application with a new filing fee, or hope that USCIS will exercise its *sua sponte* authority to reopen the case on its own motion. This policy will fail to hold USCIS adjudicators accountable for even the simplest of mistakes, and will decrease the public's trust in the program.

Conclusion

We thank DHS for providing the opportunity to comment on this notice and hope that DHS will maintain and improve the rule in accordance with the suggestions herein.

Respectfully Submitted,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL

[29] *See* 82 Fed. Reg. at 5288 [to be codified at 8 CFR §212.19(d)(1)].
[30] The regulation requires the Service to advise the applicant or petitioner if a decision will be adverse and is based on derogatory information and offer an opportunity to rebut the information before the decision is rendered, unless based on classified information.