AMERICAN IMMIGRATION LAWYERS ASSOCIATION

July 10, 2015

Department of Homeland Security
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, NW
Washington, DC 20529

Submitted via: public.engagement@uscis.dhs.gov

Re: "Significant Public Benefit" Parole for Entrepreneurs

To Whom It May Concern:

On November 20, 2014, DHS Secretary Jeh Johnson directed U.S. Citizenship and Immigration Services (USCIS) to create a series of new policies and regulations with an eye toward supporting high-skilled businesses and workers, growing our economy, and creating U.S. jobs.[1] In an effort to promote research and development in the United States, Secretary Johnson specifically directed USCIS to propose a program that would permit DHS to grant parole status, on a case-by-case basis, "to inventors, researchers, and founders of start-up enterprises who may not yet qualify for a national interest waiver, but who have been awarded substantial U.S. investor financing or otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting edge research."[2]

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes promoting justice and advancing the quality of immigration law and practice. AILA members regularly advise and represent businesses, entrepreneurs, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

On June 25, 2015, USCIS conducted a stakeholder listening session in an effort to obtain feedback and information from the public on the proposed "significant public benefit" parole program for entrepreneurs. USCIS also announced that it will receive written feedback on the proposed program through July 10, 2015. We appreciate the opportunity to provide these comments and hope that USCIS will find them informative.

Background

DHS is granted parole authority under INA §212(d)(5)(A) which provides:

[1] Memorandum from DHS Secretary Jeh Charles Johnson, "Policies Supporting U.S. High-Skilled Businesses and Workers" (Nov. 20, 2014), published on www.AILA.org at Doc. No. 14112009.
[2] *Id.* at 4.

> The [Secretary of Homeland Security] may … in his discretion parole 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 any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the [Secretary of Homeland Security], have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Though three DHS component agencies (USCIS, ICE, and CBP) have the authority to grant parole, USCIS has been responsible for adjudicating requests for parole under a number of programs and initiatives such as: humanitarian parole (urgent medical, family, and related needs); Moscow Refugee Parole Program (MRPP); certain Cuban parole programs; and parole for family members of members of the U.S. Armed Forces.[3] As described in Secretary Johnson's memorandum, USCIS would also be responsible for adjudicating requests for "significant public benefit" parole for entrepreneurs.

Significant Public Benefit Parole for Entrepreneurs Must Be Sufficiently Flexible to Achieve the Stated Objectives of Encouraging Foreign Inventors, Researchers, and Start Up Founders to Conduct Research and Development and Create Jobs in the United States.

Immigrant entrepreneurs and innovators have long been integral to the economic vitality of the United States – creating jobs, bringing revenue, and growing industries.[4] Fortune 500 companies started by immigrants employ over 3.6 million people, and are responsible for $1.7 trillion in revenues.[5] Additionally, "although many people recognize the giants of immigrant entrepreneurship, such as Sergey Brin of Google and Pierre Omidyar of eBay, thousands of other science and technology businesses are quietly making a difference by creating almost half a million jobs for Americans and generating revenue of more than $50 billion."[6]

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[3] Memorandum of Agreement, "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. 2008); USCIS Policy Memorandum, "Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i)," PM 602-0091 (Nov. 15, 2013).

[4] See generally, American Immigration Council, *Growing the Economy and Creating Jobs: Immigrant Entrepreneurs and Innovators across the United States* (Mar. 2014), *available at* http://www.americanimmigrationcouncil.org/sites/default/files/docs/factsheet_unitedstates_entrepreneurshipinnovation.pdf; Marcia Hohn, Ed.D.; and *Immigrant Entrepreneurs: Creating Jobs and Strengthening the Economy* (Jan. 25, 2012), *available at* http://www.immigrationpolicy.org/special-reports/immigrant-entrepreneurs-creating-jobs-and-strengthening-economy.

[5] American Immigration Council, *Growing the Economy and Creating Jobs: Immigrant Entrepreneurs and Innovators across the United States* (Mar. 2014) at 1.

[6] Marcia Hohn, Ed.D., *Immigrant Entrepreneurs: Creating Jobs and Strengthening the Economy* (Jan. 25, 2012) at 1.

We strongly support the development of the significant public benefit parole program so that the U.S. can continue to support and benefit from these important economic contributors. However, in order to achieve the objectives outlined in Secretary Johnson's memorandum, the guidelines and criteria must be sufficiently flexible to recognize the realities of start-up businesses and the constraints that may be imposed upon those just embarking on what will eventually become ground-breaking innovations and research. For example, USCIS should not impose a strict baseline dollar amount of investor financing, impose rigid rules for the presentation of business plans, or set forth a strict set of evidentiary criteria, when determining whether an individual "hold[s] the promise of innovation and job creation through the development of new technologies or the pursuit of cutting edge research."

As noted in INA §212(d)(5)(A), parole is not an "admission" and therefore, while allowing presence in the U.S., does not confer a specific lawful status upon the alien. Parole is terminated automatically upon departure from the United States, or with notice if it is determined that the purpose for which parole was authorized has been accomplished or DHS determines the public benefit no longer warrants the continued presence of the alien in the United States.[7] Given the inherent lack of stability imparted by the grant of parole, should USCIS erect too many barriers for qualifying or impose overly strict evidentiary criteria, the overall purpose of the "significant public benefit" parole initiative will be frustrated, and entrepreneurs, inventors, and founders will simply turn to other countries whose immigration policies and laws are friendlier to job creators.

Substantial U.S. Investor Financing

In its June 30 e-mail to stakeholders, USCIS poses a number of technical questions relating to average and median investment amounts, average and median fully diluted equity stakes, the percentage of investors in start-up enterprises who realize a return on their investment, and the percentage of start-ups that earn at least $1 million in annual revenues, among others. However, rather than focus on establishing a strict baseline dollar amount of U.S. investor funding, USCIS should instead develop a flexible approach that recognizes that capital requirements for start-ups are dependent upon a number of factors, and vary significantly across industries and sub-industries and in geographic locations.

The E-2 treaty investor regulation at 8 CFR §214.2(e)(14), which defines a "substantial amount of capital," provides an example of the kind of regulatory flexibility that would further the purpose of the "significant public benefit" parole program. The factors outlined are:

(i) Substantial in relationship to the total cost of … creating the type of enterprise under consideration;

(ii) Sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and

(iii) Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise….

[7] 8 CFR §212.5(e)(1) and (2).

In addition, it should be noted that establishing a baseline dollar amount of *secured* investor financing may not be feasible because some venture capital firms and U.S. investors may not invest unless the immigrant founder or entrepreneur has a stable immigration status in the United States. To avoid this "chicken and egg" situation, USCIS should allow for the "promise of" substantial U.S. investor financing, in the same way that the memorandum allows for "promise of innovation and job creation."

Promise of Innovation and Job Creation through the Development of New Technologies or the Pursuit of Cutting-Edge Research

As an alternative to an award of "substantial U.S. investor financing," the proposed program purports to make parole available to those who "hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting edge research." Again, USCIS should refrain from creating a rigid set of criteria and evidentiary requirements and instead propose a program that provides flexibility and recognizes the wide variety of the types of evidence that *could be* presented, but are not *required* to be presented to demonstrate eligibility. Though USCIS should refrain from establishing criteria that mirrors that which is outlined in the O-1 context, an evidentiary approach similar to that which is presented in the EB-1 and O-1 regulations could be instructive. Such an approach would allow the entrepreneur or inventor to present a minimum of 2 or 3 out of 8 to 10 listed criteria with the inclusion of an "other comparable evidence" clause. For example, an entrepreneur or inventor might be able to present evidence of one or more patents to establish one criterion; a business plan with projections for growth and job creation for a second criterion; and letters from interested investors or partners as a third criterion. Appropriate training on the preponderance of the evidence standard would be essential to this approach.

USCIS Should Establish Centralized Filing and a Special Team of Highly Trained Adjudicators to Handle Significant Public Benefit Parole Adjudications.

The concepts that will be inherent in the adjudication process for significant public benefit parole will undoubtedly be complex. Therefore, installing a cadre of highly trained USCIS adjudicators and supervisors will be key to ensuring the success of this program. Preferably, these officers will be in a centralized unit, similar to that which is employed in the VAWA, U and T adjudications context at the Vermont Service Center, and in the Immigrant Investor Program Office supporting EB-5 adjudications. Importantly, the training program and accompanying materials should be developed in cooperation with a team of entrepreneurs, inventors, and business/start-up experts who can also be called upon after implementation to evaluate the success of the program. Training must also include detailed guidance on the preponderance of the evidence standard and incorporate real-world fact patterns and examples of cases across a broad spectrum of industries.

USCIS Should Allow Certain Categories of EB-5 Investors Whose Permanent Residence Is Delayed as a Result of Lengthy Processing Times or Priority Date Backlogs to Qualify for Significant Public Benefit Parole.

With immigrant visa processing for EB-5 investors often taking years as a result of lengthy processing times and priority date backlogs, it is essential that certain categories of direct EB-5 investors, who are required to "be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation"[8] be eligible for significant public benefit parole under the proposed program for entrepreneurs. For example:

- **EB-5 investors with an approved I-526 petition**. An approved I-526 is prima facie evidence that USCIS is satisfied with the bona fides of the investment and the job creation requirement. These individuals, whose immigrant visas may be delayed due to backlogs and the establishment of a priority date cut-off, should be eligible for parole and work authorization so that they can enter the United States and develop/manage their investment.

- **EB-5 investors with a pending I-526 petition who would otherwise qualify for an E-2 visa but for the lack of a bilateral investment treaty**. Many EB-5 investors who are stuck outside the U.S. due to lengthy I-526 processing times and visa backlogs have no viable means of entering the United States to develop and direct their investment on a temporary basis while they await processing of their immigrant visa. USCIS should consider individuals who, but for the lack of a bilateral investment treaty, would qualify for an E-2 investor visa, to be eligible for parole. This would include investors from China, Russia, Brazil, Venezuela, and India.[9]

- **Graduating F-1 students with pending I-526 petitions**. Many F-1 students with pending I-526 petitions are unable to stay in the United States to continue their work and oversee their investment due to a lack of temporary visa options and unprecedented demand for the very limited number of H-1B visas. Rather than forcing these students to abandon their work, USCIS should permit them to apply for significant public benefit parole and remain in the U.S. and contribute to our economic development.

Investment through the EB-5 program has indisputably injected much needed capital into the U.S. economy resulting in significant job creation. With growing immigrant visa processing times and priority date retrogression, it is essential that individuals who have invested tremendous sums of money in the U.S. be provided with the ability to enter the U.S. and develop and direct their investments while their permanent residence applications are finalized.

[8] 8 CFR §204.6(j)(5).
[9] Once the I-526 petition is filed, it is difficult, if not impossible, for an investor to obtain or extend a B-1/B-2 visa. In addition, CBP is equally reluctant and often refuses to admit EB-5 investors on existing B-1/B-2 visas.

The Significant Public Benefit Parole Program Must Be Implemented in a Manner that Sets Entrepreneurs Up for Success

In addition to making the guidelines and criteria sufficiently flexible, USCIS must ensure that the significant public benefit parole program takes into account business realities and sets entrepreneurs and innovators up to succeed. For example, USCIS should grant parole for a minimum of 3 years to allow sufficient time for individuals to efficiently and effectively build their business. In the L-1 context, we have seen too many U.S. branches and affiliates that were forced to shut down due to the unnecessary and confining one-year limitation on "new office" Ls. Similarly, USCIS should allow for certain program participants to be re-paroled from inside the U.S. if they continue to provide a significant public benefit, and for individuals to be re-paroled into the U.S. after travel abroad for business or personal reasons that will inevitably arise during their parole period.[10] Additionally, USCIS should allow entrepreneurs to apply for parole and work authorization at the same time to ensure their seamless transition into the U.S. and so that they can immediately begin running their businesses. Failing to recognize these important implementation issues could make it too difficult, costly, or risky for individuals to start their businesses in the U.S., leading to vast underuse of the program.

Conclusion

We thank USCIS for taking important steps to develop the proposed significant public benefit parole program for entrepreneurs, and for providing us with this opportunity to submit comments.

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[10] Pursuant to 8 CFR §212.5(e)(1), parole is automatically terminated without written notice when the alien departs the U.S.

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