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U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C. 20529-2020

By electronic submission: www.regulations.gov

RE: International Entrepreneur Rule
81 Fed. Reg. 60130 (August 31, 2016)
RIN Number 1615-AC04

Dear Chief Deshommes:

The U.S. Chamber of Commerce writes in response to the request for comments by the Department of Homeland Security (hereinafter referred to "DHS" or "Department") to the Notice of Proposed Rulemaking entitled *International Entrepreneur Rule*, 81 Fed. Reg. 60130 (August 31, 2016) (hereinafter referred to as "NPRM," or "proposal"). The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region, as well as state and local chambers and industry associations, and is dedicated to promoting, protecting, and defending America's free enterprise system.

The Chamber and its members appreciate that the Department issued this NPRM to effectuate the Secretary of Homeland Security's desire to increase entrepreneurship in the U.S. The Chamber shares the Secretary's desire. Unfortunately, the Department's narrow focus on the parole process in its proposal is going to seriously hinder the ability of the Department to substantially increase entrepreneurship. Admittedly, avenues to migrate to the U.S. through entrepreneurship are quite limited under our current immigration system; the Department's proposal would indeed provide another avenue for entrepreneurs to come to the U.S. and build businesses. However, the lack of certainty that the parole process provides to the entrepreneur, their businesses, and the investors who fund their operations, leaves us convinced that this proposal, as is, would fall far short of the Department's goal of fostering entrepreneurship in the U.S.

There are many things the Department can do to make this rule more effective. The Department should consider expanding the scope of the National Interest Waiver under the Second Preference in the Employment-Based Immigrant Visa category. The Department should also consider providing the firms that employ these alien entrepreneurs the ability to petition for an H-1B visa for the entrepreneur. Once again, providing such an option to entrepreneurs would provide them with the type of certainty that only aliens who have been legally admitted to the U.S. can obtain. Parole status may be terminated at any time under the discretion of the Department. The fact that an individual, who is integrally important to the success of a business start-up, has an uncertain status in the U.S., imposes an immense amount of risk upon already risky endeavors in starting new business ventures. Simply put, if the Department wants a truly effective proposal, these are the types of things that need to be considered to make this option attractive to entrepreneurs and the investors who fund them.

UNNECESSARILY STRINGENT REQUIREMENTS ARE TOO BURDENSOME FOR MANY ENTREPRENEURS TO QUALIFY

Proposal Background

Under the Department's proposal, an interested entrepreneur who is considering whether he or she wants to seek this proposed parole benefit would need to have a significant ownership stake (at least 15%)[1] of a start-up entity formed within 3 year period preceding the individual's application.[2] In addition, the entrepreneur has to show that the business has, within the 365 day period immediately preceding his or her initial application for parole, met at least of the following criteria:

- Received at least $345,000 from one or more qualified investors;
- Received at least $100,000 through one or more qualified government grants, or
- Partially meets one or both of the aforementioned criteria and provides other reliable and compelling evidence of the business's substantial potential for rapid growth and job creation.[3]

If the entrepreneur can meet these specified criteria, he or she may qualify for an initial period of parole of up to 2 years.[4]

After the initial grant of parole, entrepreneurs are able to apply for an additional 3 year period of parole, giving the individual a maximum total of 5 years in the U.S. pursuant to this proposed parole benefit.[5] In order to qualify, the alien must show they continue to be an entrepreneur of a start-up entity, which requires the entrepreneur to maintain a 10%

[1] See proposed 8 C.F.R. §212.19(a)(1), 81 Fed. Reg. 60130, 60164 (August 31, 2016).
[2] See proposed 8 C.F.R. §212.19(a)(2), 81 Fed. Reg. 60130, 60164-5 (August 31, 2016).
[3] See proposed 8 C.F.R. §212.19(b)(2)(ii-iii), 81 Fed. Reg. 60130, 60165-6 (August 31, 2016).
[4] See proposed 8 C.F.R. §212.19(d)(2), 81 Fed. Reg. 60130, 60166 (August 31, 2016).
[5] See proposed 8 C.F.R. §212.19(c)(1) and §212.19(d)(3), 81 Fed. Reg. 60130, 60166 (August 31, 2016).

ownership stake in the company,[6] and that the business entity has accomplished one of the following:

- Received at $500,000 in qualifying investment during the initial parole period;
- 10 qualified jobs were created at the entity during the initial parole period; or
- The entity reached at least $500,000 in annual revenue and averaged 20% annual revenue growth during the initial parole period.[7]

Similar to the process governing the initial grant of parole, an entrepreneur may show that they only partially meet one of the aforementioned growth criteria if they submit other reliable and compelling evidence of the business' substantial potential for rapid growth and job creation.[8]

While the Chamber appreciates the Department's need to set some sort of parameters that determine eligibility for the program, many of the parameters the Department set forth in its proposal will only serve to make using this immigration option more difficult for stakeholders. The Department justifies many of these requirements as necessary to prevent fraud. While the desire to prevent fraudulent activity is understandable, the notion that the types of requirements the Department proposed will stop potential fraud is unconvincing. The likely result of these requirements is that legitimate business activity will not occur in the U.S. because these requirements are more burdensome than they otherwise need be.

Maximum Length of Parole Allowed Under This Proposal

The maximum amount of time an individual could stay in the country under this parole program would only be five years. The problem with this approach is that in many cases, it takes considerably more time than 5 years before start-up firms can reach their full potential. Using the story of Facebook as an example, the product that the Facebook developed was created in 2004 and the company did not take itself public until 2012. This proposal has the potential to cut off a business of extremely important human capital because of the arbitrary limits the Department has placed upon individuals who would avail themselves of this benefit. One way to address this problem would be to simply extend the amount of time an individual entrepreneur can stay in this country under this parole option. Another way the Department could address this is by providing avenues for these parole recipients to obtain some form of status through an immigrant visa or a nonimmigrant visa, which are discussed in fuller detail in subsequent sections of these comments.

Substantial Ownership Interest

The Chamber appreciates and understands the Department's requirement that an entrepreneur have some sort of ownership interest in the entity. However, setting arbitrary

[6] See proposed 8 C.F.R. §212.19(a)(1), 81 Fed. Reg. 60130, 60164 (August 31, 2016).
[7] See proposed 8 C.F.R. §212.19(c)(2)(ii)(B), 81 Fed. Reg. 60130, 60166 (August 31, 2016).
[8] See proposed 8 C.F.R. §212.19(c)(2)(iii), 81 Fed. Reg. 60130, 60166 (August 31, 2016).

ownership percentages required of the entrepreneur is likely to make the business operations of these firms needlessly more complicated than is necessary to ensure that stakeholders are using the program in the way the Department intended. The Department is correct that active ownership and participation provide stronger justifications for parole based on significant public benefit than investment alone.[9] However, under the Department's proposal, the entrepreneurs cannot invest their own money into their own businesses and count that as part of the "qualified investment" for this form of parole.[10] Moreover, in ensuring that a business succeeds, especially a start-up firm, the central and active role of said entrepreneur in managing the day-to-day affairs of the business is significantly more important than the precise level of his or her ownership stake in the company.

It is not unusual for start-up firms to go through multiple rounds of financing, which oftentimes means multiple corporate restructurings in order to obtain said financing. The stated goal by the Department is that it is wants to use its authority to "increase and enhance entrepreneurship, innovation, and job creation in the United States."[11] In particular, the arbitrary 10% ownership level needed during the individual's application for re-parole should be relaxed by the Department. If the Department insists that the initial grant of parole is only 2 years, the struggles that many start-up firms go through sometimes require the business to be restructured in ways that would dilute the entrepreneur's ownership stake in the company. If the Department is sincere in its desire to increase innovation and job creation in the U.S., then the ownership stake requirements, especially the 10% requirement during the application for re-parole, must be revisited and relaxed. Forcing an entrepreneur to leave the U.S. when their business is growing because his or her ownership stake is less than 10% would be incredibly disruptive to innovation and job creation. At the same time, preventing a business from accessing much needed capital because the entrepreneur cannot have less than a 10% stake in the company is an unwarranted interference in the ongoing affairs of a business that the Department states it wants to help increase and enhance.[12] The Department needs to rethink these requirements and at the very least, should decrease the minimum ownership level required for entrepreneurs to avail themselves of this parole opportunity.

Qualified Investor Definition

The Chamber is concerned about the Department's proposed limitations on what types of investments can qualify for the purposes of this program, as well as the strict requirements on the types of investors who are able to provide these start-up firms with qualified investments. The proposal requires that entrepreneurs, at the initial application for parole, must show that they received a substantial investment of capital from "established U.S. investors with a history of successful investments in start-up entities."[13] In doing so, the

[9] 81 Fed. Reg. 60130, 60138 (August 31, 2016).
[10] See proposed 8 C.F.R. §212.19(a)(4), 81 Fed. Reg. 60130, 60165 (August 31, 2016).
[11] 81 Fed. Reg. 60130, 60130 (August 31, 2016).
[12] Id.
[13] 81 Fed. Reg. 60130, 60139 (August 31, 2016).

parole applicant must show that the business has received at least $345,000 from an individual or organization that, during the preceding 5 years before the parole application, has:

- Made investments in start-up entities in exchange for equity or convertible debt in at least 3 separate calendar years, comprising a total of no less than $1 million in said five year period, and
- The investments in at least 2 of those start-ups each created at least 5 qualified jobs or generated at least $500,000 in revenue with average annualized growth of at least 20%.[14]

The convoluted nature of these definitional terms makes the ability to obtain qualifying capital needlessly difficult for putative international entrepreneurs that want to make use of this opportunity. For instance, an entrepreneur could find a successful venture capital investor who has invested more than 1 million dollars in start-up firms that have created dozens of jobs since he or she has made those investments. Unfortunately, if said person has made these types of investments in only 2 of the previous 5 calendar years, as opposed to 3 of the previous 5 calendar years, these investments would not qualify under the rule. These types of absurd results highlight the arbitrariness of these requirements, and we hope that the Department looks for ways to make the qualified investor definition more flexible so as to encourage more entrepreneurship, innovation, and job growth in the U.S.

One way to do this would be to remove the requirements that an investor must have made these investments in 3 out of the 5 years preceding the entrepreneur's parole application. Another way would be to relax the requirements that 2 of the investments made by the qualifying investor have to generate at least $500,000 in revenue with average annualized growth of 20%. It is obvious that the Department thinks these criteria signify that a company is realizing the proposal's goal of a business that is rapidly growing and creating jobs, but sometimes investments take more time to blossom. The Department's approach should take this into account.

Another idea the Department should seriously consider in revisiting its proposed qualified investor rules would be to examine the definition of an accredited investor used by the Securities and Exchange Commission (hereinafter "SEC").[15] The SEC's definition of this term sets the requirements and tests that properly define individuals who have the sophistication to make all sorts of investments, particularly investment in risky propositions such as start-up companies. With all due respect to DHS, the SEC has much more subject-

[14] See proposed 8 C.F.R. §212.19(a)(5), 81 Fed. Reg. 60130, 60165 (August 31, 2016).
[15] See SEC, *Report on the Review of the Definition of "Accredited Investor,"* (Dec. 18, 2015). The SEC's defines an accredited investor as a natural person whose incomes exceeds $200,000 in each of the two most recent years (or $300,000 in joint income with that person's spouse) and they reasonably expect to reach same income level in the current year. Natural persons are also accredited investors if their net worth exceeds $1 million (individually or jointly with their spouse) excluding the value of the individual's primary residence. The SEC also defines certain entities as accredited investors if they have over $5 million in assets. Other regulated entities e.g. banks and registered investment companies, are not subject to some type of assets test but can still qualify as an accredited investor under the SEC's rules.

matter expertise in this field, and the SEC's definition is less rigid and less stringent than that suggested by DHS in this proposal. The SEC definition uses objective criteria to define an "accredited investor" and the Chamber believes that is a more optimal approach to use in this proposal, given the SEC's expertise in the field.

Qualified Investment Definition

The U.S. Chamber is concerned about the Department's insistence on limiting the funding sources that would qualify under this program to only funds received from qualified investors and qualified government awards. Of particular significance is the exclusion of any investments that are made directly by the entrepreneur or the entrepreneur's family members. The policy justification offered by the Department for not including the entrepreneur's own money or that of his family members to be included in the total amount of money that is considered a "qualified investment" is "to ensure that the money was the receipt of an arm's length transaction and a bona fide investment."[16] The notion that certain money is not to be considered a "bona fide investment" because that money belongs to the individual entrepreneur is ridiculous. Any money that an entrepreneur puts into his or her business should count as a qualified investment because that entrepreneur has arguably more at stake in the business's survival than any angel investor or government grant program could have in said venture. The same can be said for money invested by a family member of the entrepreneur.

Data contained in a 2015 report by the Kauffman Foundation casts doubt on the workability of the Department's proposal. The report surveyed firms on Inc. Magazine's 5,000 fastest growing companies in the U.S. and the report focused on the funding sources for these firms. 67.2% of the companies surveyed used personal savings to fund their operations and 20.9% of those firms used funds from family members.[17] The percentage of those companies that used angel investors was only 7.7%, whereas 6.5% used money from venture capital sources and a paltry 3.8% used government grants.[18] Using one's own money or money from one's family does not mean that such funding sources are illegitimate; these funds should be counted in some manner under the qualified investment going into the business enterprise.

If the Department is seriously concerned by the potential fraud that could occur by allowing the entrepreneur or the entrepreneur's family to invest in the business, the Department can look to other investment programs as a model to help ensure that the source of the money funding this business is legitimate. The current regulations governing the EB-5 Immigrant Investor program require the petitioner to show that the money invested was

[16] 81 Fed. Reg. 60130, 60141 (August 31, 2016).
[17] Jason Wiens and Jordan Bell Masterson, Ewing Marion Kauffman Foundation, *Entrepreneurship Policy Digest: How Entrepreneurs Access Capital and Get Funded* (June 2, 2015), http://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/how-entrepreneurs-access-capital-and-get-funded.
[18] Id.

capital obtained by lawful means.[19] These regulations require that the petitioner submits evidence, such as foreign business registration records, tax return records for the previous 5 years, evidence identifying other sources of income, and certified copies of monetary judgments against the petitioner from any court within the past 15 years.[20] While this might not be the perfect corollary for this particular proposal, it shows that the Department does have the means to ensure that any money that it might generally view as questionable can be verified as legitimate. If said funds are legitimate and the entrepreneur can prove that to the Department, then these funds should be counted in the calculations for the qualifying investment under this proposal.

Qualified Investment Levels

The Chamber worries that the capital investment requirements for parole applicants are too high for this program to be effective in attracting international entrepreneurs. To qualify for parole under this proposal, the entrepreneur must have received $345,000 from one or more qualified investors or $100,000 from one or more qualified government grant programs in the federal, state, or local government.[21]

The Chamber is particularly perturbed by the amount of money that an entrepreneur must receive in order to qualify for parole. The Department settled on the $345,000 figure in examining a 2015 report that calculated the average investment amounts received by start-up entities.[22] While the Department relies on this study for reaching the $345,000, a more in-depth analysis of the data used in that report breaks down the receipt of angel investor capital at various stages of the business' development. For example, only 28% of these angel investments were made during the seed and startup stage of the business.[23] Under the study the Department chose to justify this proposed investment, 72% of the funds awarded by angel investors to start-up firms were awarded to those companies after the seed and startup stages. Moreover, the Department's decision to average of all the investment data has the effect of skewing the data when significantly higher amounts of capital flow to these startups in the early, expansion, and late stages, as opposed to the seed and startup stages.

Given the Department's focus on start-ups in the early stages of business development, the capital threshold should reflect the amount of capital that should be required of an entrepreneur seeking parole under this rule. Even if the Department were to simply just take their $345,000 and multiply it by .28, the amount of qualified investment dollars that would be required to obtain parole through this program would be $96,600, which is still a

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[19] See 8 C.F.R. §204.6(j)(3)
[20] Id.
[21] See proposed 8 C.F.R. §212.19(b)(2)(ii)(B), 81 Fed. Reg. 60130, 60165 (August 31, 2016).
[22] See Jeffrey Sohl, "The Angel Investor Market in 2015: A Buyers' Market," Center for Venture Research (May 25, 2015), available at: https://paulcollege.unh.edu/sites/paulcollege.unh.edu/files/webform/Full%20Years%202015%20Analysis%20Report.pdf.
[23] Id.

significant amount of money for a start-up firm. The Department needs to revisit this part of its proposal and make a more informed determination as to what the proper investment amounts should be for these requirements.

RISKS ASSOCIATED WITH PAROLE WILL HINDER THE ABILITY TO FOSTER INNOVATION AND JOB CREATION IN THE U.S.

Acknowledging the stringent requirements associated with this proposal, it is important for the Department to understand that for all the trouble that entrepreneurs are going to endure to come to the U.S., the benefit they will receive for all of their trouble is the ability to be paroled into the U.S. for 2 years. If the entrepreneur is lucky enough to meet the requirement to obtain an additional period of parole, then the entrepreneur will be awarded with another 3 years of parole in the U.S. During that maximum period of 5 years, the entrepreneur will be able to work with the start-up entity. If the entrepreneur has a spouse and children, they can accompany him or her to the U.S. and the spouse can apply for employment authorization in the U.S.

While the Chamber acknowledges that this is an option being made available to an international entrepreneur that does not currently exist, the Department acknowledges in its proposal that parole decisions are discretionary determinations and that being paroled into the U.S. is not an admission to the U.S.[24] Moreover, a grant of parole into the U.S. may be terminated at any time in the Department's discretion.[25] While DHS has the authority to set the terms and conditions of any grant of parole, every agency with some authority over immigration matters within DHS – U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection – has been delegated parole authority under the Immigration and Nationality Act.[26] As such, USCIS can approve a request for parole under this proposal while the alien is outside of the country, but once that alien arrives at a U.S. port of entry, the CBP official inspecting this individual still retains the authority to deny parole to that individual or modify the length of time wherein the alien can stay in the U.S. under a grant of parole.[27]

When all of this is factored into the decision making process, the entrepreneur considering this option must take into account that his or her ability to stay in the U.S. and work in the U.S. on their start-up business does not have the type of certainty that is concomitant with a status associated with an admission into the U.S. To that end, putative investors who would consider investing in these types of businesses would need to factor in the lack of certainty associated with that individual's presence in the U.S. as they consider investing a significant amount of capital in a start-up entity, which tend to be risky propositions when the entrepreneurs are U.S. citizens and there is no risk that the all-

[24] See INA §101(a)(13)(B), 8 U.S.C. §1101(a)(13)(B).
[25] See 8 C.F.R. §212.5(e)
[26] 81 Fed. Reg. 60130, 60134 (August 31, 2016).
[27] Id, referencing 8 C.F.R. §212.5(c).

important element of human capital at the firm will be forced out of the country at any given time in the future. If the Department does not consider ways to provide these entrepreneurs with more certainty as it pertains to their status in the U.S., the Chamber fears that the Department's effort will have been a missed opportunity because the terms and conditions of this proposal simply will not be attractive enough to entice foreign-born entrepreneurs to start businesses in the U.S. and create jobs for Americans.

THE DEPARTMENT HAS MULTIPLE OPTIONS TO IMPROVE ITS PROPOSAL AND EXPAND ENTREPRENEURSHIP IN THE U.S.

Expand the Scope EB-2 National Interest Waiver to Include Entrepreneurship

USCIS should expand the use of the National Interest Waiver for EB-2 applicants to allow for more entrepreneurs to stay in the U.S. This can be done under the current statutory text. INA § 203(b)(2)(A) states that visas in this preference category are available to immigrants who are members of the professions holding advanced degrees or who because of their exceptional ability in the sciences, arts, or businesses, will substantially benefit prospectively…the U.S.[28] The statute's language allows for the labor certification requirement to be waived in instances where the Department deems it to be in the national interest for the beneficiary of the EB-2 visa to not be subject to this requirement.[29] Specifically, the statutory text governing the national interest waiver provisions is written in a way that allows for all types of applicants under the EB-2 category to be able to avail themselves of the national interest waiver should DHS determine that doing so would be in the national interest, not a given subset of EB-2 applicants.[30] This is inconsistent with the current regulations, which needlessly limit the ability to be exempt from a job offer only to those who claim exceptional ability in the sciences, arts, or business.[31]

The plain language of the statute says that the labor certification requirement under the EB-2 category can be waived under the discretion of DHS for an alien's services in the sciences, arts, professions, or business.[32] This section must be read in concert with the section that immediately precedes it in the Immigration and Nationality Act, which defines what types of aliens may be classified under the EB-2 preference category. In doing so, the words "members of the professions" in INA §203(b)(2)(A) only refers to "individuals with advanced degrees." On the other hand, the "individuals with exceptional ability" refers only to an

[28] 8 U.S.C. §1153(b)(2)(A).
[29] 8 U.S.C. §1153(b)(2)(B).
[30] See Id. and 8 U.S.C. §1153(b)(2)(A). The national interest waiver language is such that the Secretary (the statutory text still technically refers to the Attorney General) may waive the **requirement that an alien's services in the sciences, arts, professions, or business** be sought by an employer. §§ (A) of 8 U.S.C. §1153(b)(2) is broken into two sections, where it refers to 1) individuals who are members of the professions with advanced degrees or 2) individuals with exceptional ability in the sciences, arts, or business.
[31] See 8 C.F.R. §204.5(k)(4)(ii), which states, in relevant part, "the director may exempt the requirement of a job offer…for aliens of exceptional ability in the sciences, arts, or business if exemption would be in the national interest."
[32] INA §203(b)(2)(B), 8 U.S.C. §1153(b)(2)(B).

individual's ability in the sciences, arts, or business. When you read these two sections in concert, Congress clearly intended that both individuals with advanced degrees and individuals with exceptional ability should be able to avail themselves of the national interest waiver in this section of the INA.

Many individuals currently here in the U.S. who have studied at our colleges and universities want to start businesses here in the U.S. In a paradoxical twist of fate, many of these entrepreneurial individuals would not be able to avail themselves of the national interest waiver due to their exceptional ability in business because they do not have the requisite work experience to show they possess said ability in the field. However, if these individuals graduated from an American university with an advanced degree and were employed in a professional capacity, they could avail themselves of the national interest waiver under the EB-2 category if the agency were to revise the current regulations to fully encompass Congress' intent as expressed in the statutory text.

In light of the agency's desire to promote entrepreneurship in the U.S., redefining the regulations would go a long way to promoting the Department's stated goal. The specific regulatory text in 8 C.F.R. §204.5(k)(4)(ii) should be amended to read as follows (new language in bold):

> (ii) Exemption from job offer: The director may exempt the requirement of a job offer, and thus of a labor certification, **for aliens who are members of the professions holding advanced degrees or** for aliens of exceptional ability in the sciences, arts, or business if exemption would be in the national interest…

Making this change alone would be extremely helpful in promoting entrepreneurship in the United States. However, the Department should also consider updating relevant guidance memoranda to inform USCIS adjudicators that in examining petitions for national interest waivers under the EB-2 category, the entrepreneurship of a given individual whose business has the substantial for rapid growth and job creation for Americans are factors to be considered in determining whether the alien in question can avail themselves of this waiver. If they are able to do so, the interest level of international entrepreneurs will increase dramatically as U.S. policy will be offering them an opportunity to obtain permanent legal status in the U.S. This would allow these entrepreneurs to focus on their job and not on whether their parole status needs to be updated. The Chamber also suggests adding the following language at the end of proposed 8 C.F.R. §212.19(f):

> (f) *Limitations*.…No provision contained in this section (212.19) shall be deemed to prohibit the entrepreneur from pursuing other forms of legal status while present in the U.S. pursuant to his or her grant of parole. No provision of this section (212.19) shall be deemed to prohibit the start-up entity from pursuing any avenues to petition for said entrepreneur to obtain any other form of legal status under the Immigration and Nationality Act.

The Department can still use similar criteria that they formulated in this proposal, and hopefully the Department would adopt the Chamber's suggested changes to the proposed requirements, to screen potential entrepreneurs, but by giving entrepreneurs with promising futures an opportunity to reside permanently in the U.S. and focus on their businesses would be a welcome development in this area. This would clearly expand the scope of this rulemaking effort, but the benefits associated with doing so would bring about significantly larger benefits to the American economy and the American worker than the current proposal could deliver to the U.S.

Allow Entrepreneurs to Obtain H-1B Visas

USCIS should specifically allow the companies that these entrepreneurs helped establish to be able to obtain H-1B status in order to make their status in the U.S. more certain. The added certainty of the entrepreneur's status will help these businesses to grow and thrive. The uncertainty posed by parole is not conducive to the survival, let alone the success, of these types of firms. If the Department were to include provisions in the proposed regulations that allowed entrepreneurs access to H-1B visas, this would be very beneficial to both the entrepreneur and the business because it would provide another avenue for the entrepreneur to obtain a status wherein he or she would be admitted to the U.S. This, in turn, would provide further benefits to both the entrepreneur and the business, which affords more certainty and protection to the American workers that these businesses would undoubtedly employ. The Chamber believes that the language suggested above to be added to the proposed 8 C.F.R. §212.19(f) would be sufficient to achieve this end.

The Department, through USCIS, should consider issuing updated guidance memoranda to inform agency adjudicators of the types of circumstances where these types of entrepreneurs can be the beneficiary of an H-1B petition. The current guidance memorandum on this particular subject can be read to allow certain entrepreneurs to avail themselves of the opportunity to apply for an H-1B visa through the start-up entity that they work for pursuant to their grant of parole. However, the guidance does not explicitly speak to this;[33] as such, further clarifying language should be incorporated in these types of memoranda to set forth the type of situations where international entrepreneurs can qualify for H-1B visas.

In relevant part, the Neufeld memo presents hypothetical examples that show when the requisite employer-employee relationship exists to allow for an employee to benefit from an H-1B visa.[34] In particular, the memo contains an example of a self-employed beneficiary where the individual who would benefit from an H-1B visa is the sole operator, manager, and employee of the company.[35] The beneficiary could not be fired, there is no outside entity exercising control over the beneficiary, and there is no evidence that the corporation will be

[33] Neufeld, Assoc. Director, Service Center Operations, USCIS, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions," HQ 70/6.2.8, AD 10-24 (Jan. 8, 2010).
[34] Id, at p. 4-7.
[35] Id, at p. 5-6.

controlling the beneficiary's work. In these circumstances set forth in the memo, there is no employer-employee relationship, thus an H-1B visa would be improper for the beneficiary.

However, in the circumstances that surround many of the types of start-up companies that are contemplated under this rule, in many cases the businesses are run by several individuals. As such, there is no sole ownership of the firm on the part of the international entrepreneur. In these situations, major decisions regarding the firm's business will be made by all owners of the firm, not just the alien entrepreneur(s) associated with the firm. To that end, the collective decision-making process will also control what the alien entrepreneur will do for the business on a daily basis, and the entrepreneur will report his/her progress to the other owners periodically. In these situations, one can look at all of the facts and circumstances and conclude that the petitioner, in this case the start-up company, has the requisite degree of control over the putative beneficiary, the alien entrepreneur, such that the Department's issuance of an H-1B visa to the entrepreneur would not be improper.

CONCLUSION

The Chamber appreciates the opportunity to comment on this proposal and the Department's desire to increase entrepreneurship. However, the Chamber hopes that the Department seriously considers providing more flexibility under this initiative, as well expand the scope of its proposal to provide more avenues for foreign-born entrepreneurs to come to the U.S. and do business here. Without making these much needed adjustments, this program will be unlikely to encourage the development of American businesses that will generate rapid growth and job creation.

Thank you for considering our views.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration and
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Jonathan B. Baselice
Director
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