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OF THE
UNITED STATES OF AMERICA

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

By electronic submission: www.regulations.gov

RE: Removal of International Entrepreneur Parole Program
83 Fed. Reg. 24415 (May 29, 2018)
RIN 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 *Removal of International Entrepreneur Parole Program*, 83 Fed. Reg. 24415 (May 29, 2018) (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 submitted comments on the initial notice of proposed rulemaking for the International Entrepreneur Rule published in August 2016. The Chamber appreciated DHS's desire to promote entrepreneurship in the U.S. through the creation of this parole program, but we were very concerned with the prior administration's focus on using the parole process as the means to achieve that end. The lack of certainty that the parole process provides to the entrepreneur, their businesses, and the investors who fund their operations, left us convinced that this NPRM would fall far short of the Department's goal of fostering entrepreneurship in the U.S. The final International Entrepreneur Rule did not incorporate any changes that would provide putative entrepreneur parolees with the means to obtain the type of lawful status in the U.S. that is associated with an immigrant or nonimmigrant visa.[1] As such, the Chamber's

[1] 82 Federal Register 5238 (January 17, 2017).

concerns regarding the International Entrepreneur Rule's ability to incentivize small-business start-up activity were not assuaged in the promulgation of the final rule.

While the International Entrepreneur Rule might be an imperfect approach, incentivizing entrepreneurship and business formation is a laudable goal that DHS should pursue, both on its own and in conjunction with other federal agencies. DHS should not simply rescind this rule and move on from the issue of promoting entrepreneurship in the U.S. As of 2016, over 40% of Fortune 500 companies were founded by an immigrant or the children of immigrants.[2] Other studies indicate that immigrants are "almost twice as likely as the native-born to become entrepreneurs."[3] To that end, other studies find that 18% of business owners in the U.S. were foreign-born—higher than the immigrant share of the population (13%) or labor force (16%).[4]

A recent report from the Kauffman Foundation indicates that while business start-up formation is rebounding from the 2008 recession, new firm formation remains in a long-term deficit, roughly half of where it was a generation ago.[5] Given this state of affairs, immigrant entrepreneurs could help return business formation levels to where they should be, which would help spur economic growth and job creation for American workers.

While the Department is correct in its assertion in its latest NPRM that the E-2 and EB-5 categories are available avenues for certain entrepreneurs,[6] many entrepreneurs will not meet the qualifications of these programs. Both of these programs require the individual to make significant capital expenditures in U.S. businesses. With respect to the E-2, only nationals from countries that the U.S. has a Treaty of Friendship, Commerce, and Navigation (or its equivalent) with can avail themselves of that visa category; this leaves nationals from many countries, such as Brazil, India, Israel, among others, unable to use this category.

More importantly, the existence of these categories should not preclude the Department from proposing changes to existing regulations, guidance documents, and administrative interpretation that could better serve our nation's economic interests by promoting entrepreneurship in the U.S. Policies that attract international entrepreneurs to launch their businesses in the U.S. will create jobs and opportunities for American citizens. These are the

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[2] *The Immigrant Entrepreneurs Behind Major American Companies*, September 28, 2016, available at https://www.freeenterprise.com/immigrant-entrepreneurs-behind-major-american-companies/.

[3] See Robert W. Fairlie, et.al., 2015: The *Kauffman Index: Startup Activity, National Trends* (Kansas City, MO: Ewing Marion Kauffman Foundation, June 2015), p. 6, available at http://www.kauffman.org/~/media/kauffman_org/research%20reports%20and%20covers/2015/05/kauffman_index_startup_activity_national_trends_2015.pdf.

[4] David Dyssegaard Kallick, "Bringing Vitality to Main Street: How Immigrants Small Business Help Local Economies Grow," Fiscal Policy Institute and Americas Society/Council of the Americas, January 2015, p.2, available at http://www.as-coa.org/articles/bringing-vitality-main-street-how-immigrant-small-businesses-help-local-economies-grow.

[5] See *Zero Barriers: Three Mega Trends Shaping the Future of Entrepreneurship*, Ewing Marion Kauffman Foundation, 2017, available at https://www.kauffman.org/what-we-do/resources/state-of-entrepreneurship-addresses/2017-state-of-entrepreneurship-address, and see Ewing Marion Kauffman Foundation, *Entrepreneurship is on the Rise but Long-Term Startup Decline Leaves Millions of Americans Behind* (Press Release) (February 16, 2017) available at https://www.kauffman.org/newsroom/2017/2/entrepreneurship-is-on-the-rise-but-long-term-startup-decline-leaves-millions-of-americans-behind.

[6] 83 Fed. Reg. at 24418 (May 29, 2018).

types of policies that DHS should pursue. Two such policies that could promote entrepreneurship in the U.S. would be expanding the scope of EB-2 National Interest Waivers and clarifying certain H-1B guidance to aid more entrepreneurs in obtaining H-1B visas.

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

The United States Citizenship and Immigration Services (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.[7] 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.[8] Specifically, the statute 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.[9] The current regulations, which are inconsistent with the statute, only provide those applicants who claim exceptional ability in the sciences, arts, or business with the ability to obtain a waiver from the job offer requirement.[10]

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.[11] 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 refer to "individuals with advanced degrees." On the other hand, the "individuals with exceptional ability" refers only to an 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 in the U.S. who have studied at American colleges and universities want to start businesses here. 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

[7] 8 U.S.C. §1153(b)(2)(A).
[8] 8 U.S.C. §1153(b)(2)(B).
[9] 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.
[10] 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."
[11] INA §203(b)(2)(B), 8 U.S.C. §1153(b)(2)(B).

experience to show they possess said ability in their field of employment. 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's intent as expressed in the statutory text.

Redefining the relevant regulations would go a long way in promoting the Department's stated goal. The Chamber suggests that the regulatory text in 8 C.F.R. §204.5(k)(4)(ii) 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 would be extremely helpful in promoting entrepreneurship in the United States. International entrepreneurs will have more interest in locating their businesses in the U.S. because our policies will be offering them a rational incentive – the opportunity to become a lawful permanent resident of the U.S. – to do so. As compared to the parole program contemplated by the prior administration, the ability to obtain lawful permanent residency provides these entrepreneurs with the certainty they need to focus on building their business and creating jobs for Americans. The Chamber understands that this type of change requires a separate notice-and-comment rulemaking effort and we stand ready to work with the Department should they decide to pursue these types of changes.

Update Guidance Memoranda to Provide Entrepreneurs the Ability to Obtain H-1B Visas

Another idea DHS should consider is updating guidance memoranda to specifically allow the companies these entrepreneurs helped establish obtain H-1B status for the foreign-born entrepreneur. Providing entrepreneurs with the ability to obtain a nonimmigrant status in the U.S. provides the individual with much more certainty than parole does. That added certainty will help these businesses to grow and thrive.

The Department, through USCIS, should consider issuing updated guidance memoranda to inform agency adjudicators of the types of circumstances where these entrepreneurs can be beneficiaries 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. However, the guidance does not explicitly speak to this;[12] 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.

[12] See 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), p. 5-6. The self-employed beneficiaries example discusses circumstances where the lack of separation between the beneficiary and the employing entity precludes the establishment of a valid employer-employee relationship under the H-1B program. However, providing additional examples to show that immigrant entrepreneurs can establish a valid employer-employee relationship in different circumstances would encourage more immigrant entrepreneurship in the U.S.

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.[13] 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.[14] 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 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 start-up companies, it is common for the business to be run by several individuals and 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, the facts and circumstances would lead one to 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 acknowledges that the Department does not believe that a program based on parole provides a sound footing for a policy to promote entrepreneurship in the U.S. However, the Department should not rescind this rule and then decline to pursue other policies that promote business creation in the U.S. There are several ideas that the Department should pursue to promote immigrant entrepreneurship that will drive economic growth and job creation in the U.S.

Thank you for considering our views.

Sincerely,

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U.S. Chamber of Commerce

[13] Id, at p. 4-7.
[14] Id, at p. 5-6.