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Submitted via portal: http://www.regulations.gov

Jeh Charles Johnson,
Secretary of Homeland Security
Department of Homeland Security
c/o United States Citizenship and Immigration Services
Office of Policy and Strategy
Chief, Regulatory Coordination Division
20 Massachusetts Avenue NW
Washington, DC 20529-2140

RE: Comment of Alliance of Business Immigration Lawyers (ABIL) on International Entrepreneur Rule - Docket ID USCIS-2015–0006

Dear Secretary Johnson:

The Alliance of Business Immigration Lawyers (ABIL) submits these comments on the proposed rule of your component agency, U.S. Citizenship and Immigration Services (USCIS), at 81 Fed. Reg. 60,130 (Aug. 31, 2016) which would implement discretionary parole authority for qualifying international entrepreneurs.

ABIL is comprised of 19 of the top U.S. business immigration law firms and practice groups, each led by a prominent member of the U.S. immigration bar. ABIL member firms employ over 250 attorneys (700+ total staff) devoted to business immigration in 25 major U.S. cities, and 25 international destinations. A number of our ABIL members have served as a past President or as members of the Board of Governors of AILA (the American Immigration Lawyers Association), the 11,000-member organization comprised of most U.S. immigration lawyers. Our ABIL lawyers are also immigration law professors at prominent law schools, and have written well regarded immigration treatises and textbooks. ABIL regularly comments on proposed rules and draft agency memoranda. More information about ABIL is available at www.abil.com.

Overview

ABIL appreciates that USCIS has endeavored in the proposed rule to implement President Obama's November 14, 2014 executive action to facilitate the entry of international entrepreneurs. The proposed rule purports to offer "general criteria for the use of parole [by foreign entrepreneurs] of start-up entities whose entry into the United States would provide a significant public benefit through the substantial and demonstrated potential for rapid growth and job creation." 81 Fed. Reg. 60130, 60131 (Aug. 31, 2016). Regrettably, however, ABIL believes that the effort misses the mark by a wide margin. If enacted in substantially its proposed form, the draft rule would apply to precious few of the inestimable population of prospective entrepreneurs and would therefore, in the aggregate, contribute scant momentum to the President's laudable goal of "rapid growth and job creation."

As our comments reflect, the USCIS proposal falls short in several material ways, *e.g.*, by:

- requiring voluminous and burdensome documentation to prove, by a preponderance of the evidence, "the substantial and demonstrated potential" likelihood that a start-up venture backed by a foreign entrepreneur will grow in revenue and add jobs rapidly,

- offering no way for a parolee to switch from or to another lawful immigration status in the United States,

- permitting start-ups and parolees too short a runway of initial and extended time for lift-off and stable cruising at higher elevations,

- mandating an unreasonably high investment amount, limiting the source of start-up capital to a small group of venture capitalists, and barring consideration of "friends and family"-backed investments,

- requiring re-submission of evidence and re-adjudication of the parole benefit virtually every time -- as often happens -- the entity's ownership, or strategic direction, or the job duties assigned to the foreign entrepreneur, may change after the initial approval of parole, and

- omitting any direct path for the parolee to become a lawful permanent resident through the adjustment of status process, and then proceed to citizenship.

Our recommendations follow:

1. Start-up companies in "stealth mode" must be allowed to participate in this program.

Proposed 8 C.F.R. § 212.19(b)(2)(ii)(A) states that "an applicant would generally be expected to submit supporting documentation concerning the entity's business and its substantial potential for rapid growth and job creation." The agency suggests this expectation can be met by specific types of supporting documentation.

While ABIL appreciates the agency's willingness to consider a variety of credible evidence suggesting the entity's growth potential and the entrepreneur's ability to develop and advance the business within the U.S., the proposal creates a fundamental obstacle in requiring copious forms of documentation that are only attainable if the company is public-facing. Innumerable start-up entities working on highly innovative and proprietary technology or business process frequently operate in "stealth mode" during the research and development phase of operation.[1]

Essentially, a company in stealth mode routinely operates on a temporary basis in secret, relying on intellectual property protection and non-disclosure agreements so that it prevents publicity about its existence, operations, or achievements. Companies engage in this behavior for many reasons, including: (1) avoiding alerting competitors to its development of intellectual property, launch date, or other business initiatives; (2) allowing the business sufficient space and time to solidify a strategy that would add new capabilities, rather than spend resources and funds in premature branding; and (3) maintaining customer interest and avoiding the risk of being overshadowed by a larger company's comparable products or services. This pervasive phenomenon has characterized the start-up landscape for decades.

ABIL believes that evidence of significant capital investments from law-abiding investors in itself should be sufficient evidence of the start-up entity's ability for rapid growth and job creation, as investors would not put significant capital at risk without a reasonably sufficient belief in the potential for a significant return. To require each applicant to collect and submit documentation such as letters of attestation from various sources and evidence of media articles and attention is simply unrealistic given the business climate and strategies frequently employed within the stealth-mode, start-up landscape.

2. The final rule should lower the parole and re-parole capital thresholds.

Proposed 8 C.F.R. § 212.19(a)(1) would require a parole applicant to prove a fifteen percent ownership interest in his/her start-up entity to receive the initial two-year grant of parole. The

[1] See, e.g., Christine Lagorio-Chafkin, "The First Rule of Stealth Mode Is…," *Inc. Magazine*, Jan. 21, 2014, *at* http://www.inc.com/christine-lagorio/lets-talk-about-stealth-mode.html.

proposed rule would also require an entrepreneur to maintain at least a ten percent ownership interest in the start-up entity at all times thereafter.

These ownership thresholds will act to discourage rapid growth, job creation, and in particular efforts to obtain venture capital funding. The proposal runs directly counter to the stated objectives of seeking to encourage growth in revenues and jobs through entrepreneurship.

Start-up ventures often have several co-founders. For example, Y Combinator, recognized by many as the world's most powerful start-up accelerator, states that it ideally wants to invest in a company that has two or three founders.[2] Further, it adds that the firm will consider companies with four or five co-founders but are "reluctant to accept one-person companies."[3]

Assume a promising start-up has four co-founders, two of which are foreign nationals who want to take advantage of the proposed parole rule. As reported in *Entrepreneur* magazine by David Young, a seasoned start-up lawyer ("4 Common Venture Capital Myths"), the original co-founders typically are divested of most of the equity once a start-up begins raising successive rounds of venture capital funding -- a goal that most top tier start-up entities will seek to achieve, one that aligns with the spirit of the proposed rule. The life cycle of typical equity dilution of the founders' stake during a venture capital round of funding looks like this:

- **Lead Venture Capital Investor**: 20 to 25 percent. Venture capital (VC) firms typically insist on owning at least 20 percent of all early-stage portfolio companies.

- **Co-Investor VC**: 20 to 25 percent. Most VCs prefer to invest alongside a co-investor.

- **Option Pool [for employees]**: 15 to 20 percent.

- **Founders**: Any remaining equity.

Thus, in a typical real-world scenario where a start-up entity is owned by four co-founders who obtain venture-backed financing, the co-founders might be left with equity in the range of 30% – 45% to be divided among themselves. If we assume an even split between the co-founders, each co-founder would have between 7.5% - 11.25% equity remaining. This ownership percentage under the USCIS proposal would result in disqualifying two of the four co-founders from parole or parole re-eligibility. This result runs directly counter to the spirit and goal of the proposed rule.

Accordingly ABIL recommends that the final rule reduce the initial parole threshold from fifteen percent to ten percent and reduce the re-parole threshold from ten percent to five percent.

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[2] Y Combinator, "How Do We Choose Who to Fund?," https://www.ycombinator.com/apply/.
[3] *Id.*

3. Qualifying investment amounts obtained within three years after creation of the start-up should count towards the USCIS-proposed threshold of $345,000.

The proposed rule would only count money invested in the prior year toward the threshold of $345,000. That is too restrictive. ABIL proposes instead allowing money invested within the past three years, as well as money pledged as accessible contingent upon the approval of parole (and as noted below, to reduce significantly the $345,000 stated minimum).

For example, some start-ups might receive initial funding through incubator or accelerator programs but then take more than twelve months to secure subsequent rounds of capital. Even assuming that the start-up's business model or innovation offers a promising valuation, the proposed rule fails to consider the typically drawn-out process involved in finding the right group of investors and satisfying certain short-term agreed targets, whether in product development, user acquisition, or other metrics.

4. The final rule should reduce the investment threshold of $345,000 for initial parole to $120,000.

ABIL recommends lowering the initial parole investment threshold of $345,000 to $120,000. For example, Y Combinator provides its start-up entities with $120,000 in funding. Based on their model for funding and selecting start-ups, Y Combinator boasted in 2013 that out of 511 companies that graduated from their program, 37 companies were worth over $40 million (http://www.businessinsider.com/y-combinator-2013-5).

If $120,000 is a funding level that allows promising start-ups to move on to raise future funding and to grow into multi-million-dollar, job-creating entities, the final rule should recognize this lesser sum as a satisfactory initial funding threshold for parole in attempting to encourage comparable levels of innovation and high growth businesses that Y Combinator and other incubator programs support. Whatever the proper minimum level of investment capital, ABIL suggests that the funding requirements in the proposed rule are too onerous. ABIL agrees with Drew Hendricks, author of "6 $25 Billion Companies That Started in a Garage,"[4] when he concluded:

> All of these renowned companies [Google, Microsoft, Apple, Amazon, Disney and Hewlett-Packard] have proven that success truly depends on determination, faith, and hard work. **No matter** where you start your business or **how much money you originally put into it**, passion, commitment, and courage are often all you need to make your company a success. (Emphasis added.)

[4] *Inc. Magazine*, published online, July 24, 2014, and accessible at: http://www.inc.com/drew-hendricks/6-25-billion-companies-that-started-in-a-garage.html.

5. The final rule should revise the definition of "well-positioned" to substantially assist a start-up.

Proposed 8 C.F.R. § 212.19(a)(1) would require an international entrepreneur to prove that he or she "is well-positioned, due to his or her knowledge, skills, or experience, to substantially assist the entity with the growth and success of its business." The proposed rule nowhere describes how an applicant would demonstrate this requirement. While a parole applicant's knowledge, skills, or experience can be viewed as augmenting evidence, ABIL recommends that satisfaction of the "substantial ownership interest" test should create a rebuttable presumption that the entrepreneur is "well-positioned" and that the "significant capital financing" requirements in the proposed rule reflect the market demand for the entrepreneur to grow the business.

6. The final rule should define "start-up entity" more clearly and accept reputable expert witness testimony.

Proposed 8 C.F.R. § 212.19(a)(2) would define a start-up entity as "a U.S. business entity that was recently formed, has lawfully done business during any period of operation since its date of formation, and has substantial potential for rapid growth and job creation." The proposed regulation defines "recently formed," but fails to specify how a start-up entity can demonstrate it has "lawfully done business" or "has substantial potential for rapid growth and job creation." ABIL recommends revising the definition to more closely align with 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) and (H) by instead requiring evidence that the entity is or will be engaged in the regular, systematic, and continuous provision of goods and/or services. ABIL also suggests that the submission of expert witness testimony by a reputable third party -- such as a recognized professor or leader in the start-up's proposed field -- should be given deference and treated under the final rule as a rebuttable presumption establishing that the start-up "has substantial potential for rapid growth and job creation."

7. The final rule should allow parole for entrepreneurs in start-up companies formed more than three years before the parole application is filed.

Proposed 8 C.F.R. § 212.19(a)(2) would require an entity that is the basis for seeking parole to be considered "recently formed" if it is less than three years old at the time of filing the parole application. ABIL recommends that if a time limit is required,[5] the proposal be rephrased so that the start-up must be formed in the last 10 years. The limit in the proposed rule on the entity's time in existence runs counter to the realities of how long some of the most well-known and

[5] By comparison, the EB-5 Immigrant Investment Program -- which likewise encourages investment leading to job creation -- defines "new" as "established after November 29, 1990," the effective date of the Immigration Act of 1990. See 8 C.F.R. § 204.6(e).

profitable companies have taken to launch and gain traction before realizing their potential for revenue growth and job creation. A few key examples are listed below:[6]

- Microsoft – Bill Gates founded Microsoft in 1975 to develop and sell BASIC interpreters for the Altair 8800. It took him six years to land a contract with IBM to provide their IBM PC base operating system.

- Apple - Established in Cupertino, California in 1976, Apple really did not get on the map until the advent of the Macintosh in 1984, eight years later. Even then, it struggled through the 80's and 90's until the advent of the iMac and consumer products.

- Google - Larry Page and Sergey Brin started working on Google in 1996. Three years later, few people had even heard of it. However, the company's growth exploded shortly thereafter, and in the next five year, it went public in 2004 with a market capitalization of $23 billion.

- Facebook - Mark Zuckerberg, while attending Harvard as a sophomore, concocted "Facemash" in 2003 to get a lost girlfriend off his mind. He later changed the name to Facebook. In 2005, Facebook still showed a yearly net loss of $3.63 million. But within five years it became an overnight success, and now has about 1.7 billion users worldwide.

Given the unpredictable nature of how long it may take a start-up entity to realize its potential for exponential growth, ABIL suggests that an entity be considered a start-up entity for purposes of the proposed rule if it has been formed with the last ten years. We also recommend that where applicable, DHS accept alternative evidence to determine and establish that the company is a "start-up" entity. Such evidence could include letters of attestation from investors, industry experts within a particular niche field, and government agencies that speak to the average growth cycle of a new company within a particular area.

8. The final rule should define "capital" broadly.

Proposed 8 C.F.R. § 212.19(a)(4) fails to define capital for purposes of a qualifying investment. ABIL recommends that the final rule should define capital broadly to include cash, cash equivalents, secured or unsecured loan proceeds, payments for or obligations under binding leases, the value of goods, equipment, and intangible property such as patent rights, trademarks, trade secrets, and distinctive "know how."

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[6] Martin Zwilling, "How Long Should It Take For a Startup to Succeed?" blog.startupprofessionals.com, Aug. 6, 2013, *at* http://blog.startupprofessionals.com/2013/08/how-long-should-it-take-for-startup-to.html.

9. The final rule should allow investments from family members and close friends.

Proposed 8 C.F.R. § 212.19(a)(4) would prohibit family members from investing in an entrepreneur's start-up. There is no reason for this ban. Data from the Global Entrepreneurship Monitor show that more than 80% of funding for new businesses comes from personal savings and friends and family.[7]

Multiple sources of capital investment spur economic growth in the U.S. The 2014 findings of the Ewing Marion Kauffman Foundation (Kauffman Foundation) should be considered. The Kaufman Foundation assessed businesses listed since 1996 by *Inc. Magazine* in its annual list of the 5,000 fastest growing companies.[8] The Kauffman Foundation reported that angel investors constituted only 7.7% of all sources of investment in these entities. Alternative sources of investment included:

- 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%)

Although government grants are covered elsewhere in the proposed rule, there is no avenue in the rule to allow for these other sources of investment. USCIS should permit an entrepreneur to put his or her own personal savings at risk and/or reasonably incur debt to spur the business growth and job creation, or, if family members, business acquaintances or friends are amenable, they she should be allowed to do contribute to the capital stack. Venture capital firms and angel investors do not live charmed lives in a rarified atmosphere where they consistently bat 1,000. As every investment prospectus notes, past performance is not necessarily indicative of future results. The proposed rule's reliance solely on venture capital firms, angel investors and

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[7] Aimee Groth, "Entrepreneurs Don't Have a Special Gene for Risk—They Come From Families with Money," *Quartz*, July 17, 2015, *at* http://qz.com/455109/entrepreneurs-dont-have-a-special-gene-for-risk-they-come-from-families-with-money/.

[8] Ewing Marion Kauffman Foundation, Entrepreneurship Policy Digest, June 2, 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.

governments is far too circumscribed. All legitimate sources of investment should be deemed to be qualifying investments under the final rule.

ABIL therefore recommends that a qualified investor also include the entrepreneur, the parents, spouse, brother, sister, son, or daughter of the entrepreneur, close friends of the entrepreneur, or any corporation, limited liability company, partnership, or other entity in which the entrepreneur or his/her parents, spouse, brother, sister, son, or daughter, or close friend(s) of the entrepreneur directly or indirectly hold(s) any ownership interest. If the investor has received the funds by legitimate means, e.g., savings, gift, inheritance, contest, the proceeds of secured or unsecured loans and other assets noted above, and has control and possession over the funds or property, the final rule should confirm that merely the suitable deployment of the funds for the benefit of the start-up entity should constitute a qualifying investment.

10. The final rule should include a more flexible definition of full-time employment.

Proposed 8 C.F.R. § 212.19(a)(6) and (8) are too restrictive in requiring a qualified job to be filled for at least one year and by failing to recognize job-sharing arrangements. ABIL proposes the amending the rule to align with the definition of full-time employment found at 8 C.F.R. § 204.6(e), and to include job sharing arrangements where two or more qualifying employees share a full-time position as constituting full-time employment if the hourly requirement per week is met.

11. The proposed rule's requirement to file a new parole application whenever a material change occurs is impractical and onerous.

Proposed 8 C.F.R. § 212.19(j) would require an entrepreneur to file a new parole application any time a material change occurs. The proposed rule would define material change as "any change in facts that could reasonably affect the outcome of DHS's determination that the entrepreneur provides, or continues to provide, a significant public benefit to the United States." The proposed rule then sets forth a laundry list of potential events that would constitute a material change.

Many start-ups have ownership changes or funding changes. The founding entrepreneur may also change job titles, say, from CEO to Chief Technology Officer, as professionals experienced in leading larger entities are brought onboard. If a larger company buys a start-up, the applicant may lose all or most ownership but remain essential for the success of the entity. Under the proposed rule, all those events would require a new parole application, which would trigger a lengthy period toxic uncertainty about the future prospects of the start-up if USCIS were ultimately to deny a reasonable re-parole period.

ABIL's concerns also rest upon the non-exclusive nature of the proposal's list of "material changes." Given the onerous burden placed upon each potential applicant entrepreneur and entity to file a continuing parole application every time it goes through a foreseeable change typical to

a start-up entity, DHS should provide clearer guidelines regarding what constitutes a "material change" within the meaning of the rule.

The first few years of any start-up entity's existence are particularly crucial to its future success. Because of the inherent uncertainty associated with a renewed adjudication on the merits by DHS every time a supposed "material change" occurs, ABIL is concerned that a potential applicant entrepreneur's continued work authorization and presence in the United States would be easily compromised. Uncertainty about the outcome of repeated re-adjudication of parole applications by itself creates a detrimental effect on the company's ability to reach its full growth potential and to benefit the public -- an adverse outcome that contradicts the spirit and purpose of the proposed rule.

The nature of start-up entities, including market competitiveness and the recurring need to pivot and change focus at this early stage, requires a level of flexibility that would be undermined by over-burdening and distracting entrepreneurs with excessive immigration filings. USCIS should not require the submission of an entirely new petition each time there is foreseeable change in the life cycle of most start-ups. Foreign entrepreneurs and their capital backers should be allowed to focus all their time and effort in scaling the business.

ABIL therefore suggests that the final rule should expressly exempt from the definition of "material change" transitions that are typical within start-ups, such as a company: (1) pivoting their products/services; (2) bringing on board a significant round of funding which may dilute the entrepreneurs ownership interest; (3) changing the role of a founder to meet the needs of the growing company; or (4) by virtue of a foreseeable stock or asset acquisition, a merger into or with a related or unrelated entity, or some other form of corporate restructuring.

Rather, ABIL suggests that USCIS should expressly exempt from a re-parole request changes that in essence mirror the salutary provision in 8 CFR § 274a.2(b)(1)(viii)(A)(7) which obviates the obligation to complete a new Form I-9 (Employment Eligibility Verification) where "an individual continues his or her employment with a related, successor, or reorganized employer, . . . " including "(ii) An employer who continues to employ some or all of a previous employer's workforce in cases involving a corporate reorganization, merger, or sale of stock or assets . . ."

Accordingly, ABIL recommends that the final rule should therefore expressly provide that all of these foreseeable and customary changes do not require the submission of an application for re-parole, and that USCIS only require a notification to the agency of truly material changes rather than a full-blown adjudication. USCIS would then be required, if it so inclined, to issue a notice of intention to revoke parole (and accord the entrepreneur and start-up with at least 90 days within which to respond). By placing the responsibility to revoke parole on USCIS rather than obliging the agency to re-adjudicate prior grants of parole, there would be no needless additions to USCIS's already unmanageable adjudication backlogs and further additional processing delays.

ABIL also recommends that, if notification to USCIS is insufficient, and a material-change filing requires an adjudication, then the entrepreneur should only be required to file an update related to his or her changed role or circumstance as opposed to a duty to re-file an entire parole or re-parole application satisfying every requirement of the rule. The final rule should also create a rebuttable presumption that the same facts and circumstances described in the initial grant or renewal of parole remain accurate and valid, and the burden would be on USCIS to take those facts and circumstances as given, and focus instead on the record of proceedings contained in the particular a material-change submission.

12. The final rule should extend parole beyond five years and allow a pathway to permanent resident status.

ABIL recommends a provision be included in the final rule granting parole extensions beyond the five-year limit currently contemplated and allowing entrepreneurs to transition from parole to permanent resident status through self-sponsorship as permitted under the national interest waiver component of the employment-based second preference immigrant visa category or the extraordinary-ability first employment-based preference category.

International entrepreneurs must be provided with realistic options to allow them to remain and run their businesses in the United States beyond the five years currently proposed under the rule. Otherwise, the companies they have started may flounder and the jobs they created may be at risk.

Further, the NIW reference should include recognition that an entrepreneur who has moved through the five-year parole period and who has continued to show growth, including growth similar to that contemplated in the re-parole period (either growth in the number of employees, amount of investment, or revenue) should be considered to have qualified for a NIW based on the economic benefit to the nation. This rule could be used as a testing ground for the most sought-after entrepreneurs to prove themselves under parole in order to qualify for national interest waivers or extraordinary ability. All interests would be well aligned, as the DHS would in essence create a pipeline of international entrepreneurs vying to prove themselves by benefiting the U.S. economy and nation as a whole through economic stimulation and innovation.

Encouraging use of the national interest waiver would also align with the White House's report on visa modernization in 2015 by acting to provide "clarify[ing] guidance regarding the standard

by which a national interest waiver can be granted with the aim of promoting its greater use for the benefit of the U.S. economy."[9]

Parole holders should be allowed to apply directly for a national interest waiver before the expiration of their fifth year of parole and should be allowed to remain in the United States working with their start-up entities pending adjudication of their national interest waiver petition.

When USCIS announced its policy to encourage foreign entrepreneurs to take advantage of the existing immigration system on August 2, 2011, it provided Question and Answers on the Employment-based Second Preference[10] (EB-2 Q&A) suggesting that an entrepreneur can be sponsored through an NIW. The EB-2 Q&A acknowledged *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (INS Assoc. Comm'r 1998) (NYSDOT), which set forth a three-prong test, and how it could apply to entrepreneurs seeking a national-interest waiver.

With respect to the first two factors under NYSDOT, the petitioner must show that he or she will be employed "in an area of substantial intrinsic merit" and that the "proposed benefit will be national in scope." It was always difficult for an entrepreneur to show that localized employment through his or her enterprise would be national in scope. The EB-2 Q&A addressed this concern:

> For example, the entrepreneur might be able to demonstrate that the jobs his or her business enterprise will create in a discrete locality will also create (or "spin off") related jobs in other parts of the nation. Or, as another example, the entrepreneur might be able to establish that the jobs created locally will have a positive national impact.

The third criterion in NYSDOT is extremely nebulous and difficult to overcome since it requires a qualitative, subjective evaluation of evidence by a USCIS adjudicator who may not know much about the significance of a particular field of endeavor. Under prong 3 of NYSDOT the petitioner must demonstrate that "the national interest would be adversely affected if a labor certification were required for the alien. The petitioner must demonstrate that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the alien by making available to U.S. workers the position sought by the alien."

The EB-2 Q&A provides helpful guidance to the entrepreneur to overcome the third prong:

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[9] The White House, "Modernizing and Streamlining our Legal Immigration System for the 21st Century," at 19 (July 2015), *at* https://www.whitehouse.gov/sites/default/files/docs/final_visa_modernization_report1.pdf.

[10] See https://www.uscis.gov/news/employment-based-second-preference-immigrant-visa-category-frequently-asked-questions-regarding-entrepreneurs-and-employment-based-second-preference-immigrant-visa-category.

> The entrepreneur who demonstrates that his or her business enterprise will create jobs for U.S. workers or otherwise enhance the welfare of the United States may qualify for the [national-interest waiver]. For example, the entrepreneur may be creating new job opportunities for U.S. workers. The creation of jobs domestically for U.S. workers may serve the national interest to a substantially greater degree than the work of others in the same field.[11]

ABIL therefore suggests that the final rule should contain a rebuttable presumption stating that an international entrepreneur who has maintained parole status for five years is presumed to qualify for the national-interest waiver. Alternatively, because of prolonged visa quota backlogs, those which adversely affect persons in the EB-2 and EB-3 preferences such as beneficiaries born in India and China, ABIL suggests that entrepreneurial parolees be able to use the NYSDOT national-interest waiver standards to qualify as a person of extraordinary ability under INA § 203(b)(1)(A). Even if an entrepreneur cannot readily meet the three out of ten criteria under 8 C.F.R. § 204.5(h)(3), the petitioner can also qualify as a person of extraordinary ability by submitting comparable evidence under 8 C.F.R. § 204.5(h)(4). Hence, the final rule should expressly provide that comparable evidence includes (but is not limited to) proof that an entrepreneur meets the NYSDOT national-interest waiver criteria, and thus may qualify as a person of extraordinary ability.

The EB-2 Q&A appears to suggest that the entrepreneur can also be sponsored for a green card under the EB-2 through a labor certification. The U.S. Department of Labor (DOL), on the other hand, has always frowned upon an owner of an entity as the beneficiary of a labor certification. To obtain labor certification, the employer must establish that it has conducted a good faith test of the labor market and that no qualified U.S. workers were available for the position. The DOL has denied labor certification to both 100% and minority owners of companies who filed a labor certification on their behalf. *See ATI Consultores*, 07-INA-64 (BALCA Feb. 11, 2008); *M. Safra*

[11] Given the lack of certainty in an national-interest waiver adjudication due to NYSDOT, ABIL suggests that the seven factors set forth in the non-precedent decision of *Matter of Mississippi Phosphate*, EAC 92 091 50126 (AAU July 21, 1992) be reconsidered. The seven factors include 1) improving the U.S. economy; 2) improving wages and working conditions of U.S. workers; 3) improving education and training programs for U.S. children and underqualified workers; 4) improving health care; 5) providing more affordable housing for young and/or older, poorer U.S. residents; 6) improving the environment of the U.S. and making more productive use of natural resources; or 7) involving a request from an interested U.S. government agency. This decision provided good guidance for the national interest waiver petitioner as well as the adjudicating officer and seemed to signal an understanding of congressional intent.

& Co. Inc., 08-INA-74 (BALCA Oct. 27, 2008).[12] See also, *Modular Container Systems, Inc.* 89-INA-228 (BALCA July 16, 1991) (en banc), where BALCA applied a "totality of circumstances" test to determine whether there was a bona fide job offer to US workers.

An entrepreneur who successfully obtains parole nonetheless will most likely fail the *Modular Container Systems* "totality of circumstances" test. ABIL suggests therefore that USCIS consult with the DOL before finalizing the entrepreneur parole rule so that DOL will be receptive to the USCIS's new policy of encouraging entrepreneurs and liberally interpret *Modular Container Systems*. For example, an entrepreneur who qualifies for parole and owns a minority stake in the start-up company should still be able to obtain labor certification if he or she did not influence the recruitment, even if the entrepreneur may have been a founder or is on its board of directors.

13. The final rule must complement and not supplant prior USCIS policy on entrepreneurs.

The proposed parole rule is not USCIS's first administrative initiative for entrepreneurs. In 2011 the agency provided guidance[13] on how foreign entrepreneurs could use the existing nonimmigrant visa system to establish start-ups in the United States, a pronouncement which culminated in the Entrepreneur Pathways[14] portal. Both the parole rule and the Entrepreneur Pathways should exist alongside each other. Neither is perfect, but if an entrepreneur cannot qualify under the parole rule, USCIS should encourage the entrepreneur to qualify for a visa through his or her start-up under the existing visa system, such as through an H-1B visa.

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[12] *Modular Container Systems* considers whether the foreign national:

> a) Is in a position to control or influence hiring decisions regarding the job for which LC is ought;
> b) Is related to the corporate directors, officers or employees;
> c) Was an incorporator or founder of the company;
> d) Has an ownership interest in the company;
> e) Is involved in the management of the company;
> f) Is on the board of directors;
> g) Is one of a small number of employees;
> h) Has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; or
> i) Is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue without the foreign national.

[13] See https://www.dhs.gov/news/2011/08/02/secretary-napolitano-announces-initiatives-promote-startup-enterprises-and-spur-job.
[14] See https://www.uscis.gov/eir.

The proposed rule does not meet the needs of all entrepreneurs and start-ups aspiring to build great companies in the United States. For example, a foreign student on F-1 optional practical training who has developed an innovative mobile phone application, and who wants to market it and sell it through his or her own company, may not be able to attract investment capital of $345,000 or even the preferably lower sum that ABIL proposes, or receive a governmental grant of $100,000. Many start-ups can be established for far less than $345,000.[15] In some situations, a family member may invest money in the enterprise on behalf of the foreign student. Under the proposed rule, however, an investment from a family member would be wholly disregarded.

If an entrepreneur cannot qualify under the parole rule, the final rule should expressly include an amendment to the USCIS H-1B regulations which would allow approval of an H-1B petition under the policies set forth in Entrepreneur Pathways which states in relevant part:

> H-1B Specialty Occupation
>
> **You may be eligible for an H-1B visa if you are planning to work for the business you start in the United States** in an occupation that normally requires a bachelor's degree or higher in a related field of study (e.g., engineers, scientists or mathematicians), and you have at least a bachelor's degree or equivalent in a field related to the position. (Emphasis added.)

ABIL therefore urges that otherwise approvable H-1B petitions filed pursuant to the Entrepreneur Pathways policies continue to be approved despite the existence of the final international parole rule for entrepreneurs. USCIS adjudicators should see an express statement in the final rule that notwithstanding the existence of the parole rule for entrepreneurs, the H-1B program for working owners of start-ups remains available.

Entrepreneur Pathways also provides guidance for entrepreneurs to use other existing visa classifications, such as L-1, O, and E visas. Many of these visa categories could be more advantageous to the entrepreneur than the parole rule, and so adjudicators must continue to approve petitions in the spirit of the hospitable guidance set forth in Entrepreneur Pathways. The unique requirements under the parole rule, such as a set investment amount, should not be allowed to bleed into and taint the adjudicatory process for securing employment-based visas that have traditionally been used by entrepreneurs.

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[15] Compare, *Matter of Walsh and Pollard*, 20 I&N Dec. 60 (BIA 1988)("[Investment required to establish a viable and profitable business is not large." Requirement of a substantial investment for purposes of the E-2 treaty investor visa category is satisfied where investor pays sums sufficient to hire two employees, rents offices, purchases office furniture, and has $15,000 remaining in the commercial bank account).
https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3111.pdf

USCIS should encourage foreign entrepreneurs to establish their start-ups in the United States. For that reason the parole rule and the Entrepreneur Pathways should coexist and complement each other. Indeed, the Entrepreneurs Pathways is recognized in the preamble to the parole rule, as well as the acknowledgement that many will remain on a traditional visa "because the ability to be admitted to the United States as a nonimmigrant offers materially more benefits and protection than parole."

ABIL proposes that the final rule include the following: "Nothing in this rule affects the ability of an alien entrepreneur to apply for a visa described in the Entrepreneur Pathways Portal, as it existed on August 26, 2016, the date the proposed rule was published, https://www.uscis.gov/eir."

14. Spouses of entrepreneurial parole beneficiaries should automatically receive work authorization incident to status, i.e., without the need to apply separately for an Employment Authorization Document.

ABIL recommends that spouses of entrepreneurs should get work authorization automatically; they should not be required to apply for it.[16] Experience has shown that certain H-4 spouses who have become eligible for work authorization and have been required to apply separately face substantial delays in obtaining the much needed employment authorization document (EAD). The delay in receiving a new or renewed EAD results in the foreseeable loss of employment opportunities.

To attract the best entrepreneurial talent, it is imperative that USCIS eliminates obstacles for a spouse to obtain work authorization. Otherwise, the entrepreneur may establish his or her promising start-up in another country where the spouse may not face the same obstacle in obtaining employment authorization.

15. The final rule, and USCIS in implementing it, should authorize adjudication under the USCIS Premium Processing Service and expressly permit review by motion to reopen and reconsider and administrative appeal, likewise with Premium Processing, and, with the assured continuity of the parolee's employment authorization until the receipt of the final USCIS decision.

The Premium Processing Service, which provides accelerated adjudication, is available for employment-based petitions or applications. The preamble to the proposed rule makes clear that

[16] ABIL recommends that the final rule incorporate the welcome reasoning of the non-precedent decision, *Matter of Do Kyung Lee*, A-089-047-352 (BIA Nov. 5, 2013)(spouses of E principal visa holders may be employed incident to status without the need to file for an EAD), accessible at http://www.irac.net/unpublished/kyung-lee-a089-047-352-bia-nov-5-2013/.

international entrepreneurs may be paroled into the United States to start businesses expected to "provide a significant public benefit through . . . job creation."

Thus, ABIL recommends that the final rule, as well as USCIS in the rule's implementation, extend the privilege of receiving an expedited adjudication through the Premium Processing Service. The realization of these salutary public benefits would be thwarted by foreseeable backlogs in parole applications. Premium Processing thus provides the inestimable benefit of speed and certainty in the timing of the outcome. Fledgling Start-up entities, far more than established and admittedly deserving petitioners already enjoying the benefit of Premium Processing, need a speedy and assured time for an answer from USCIS on entrepreneurial parole applications.

In addition, ABIL believes that far too many lives and dollars often will be riding on the outcome of USCIS's adjudication of momentous parole applications. Denials of initial or renewal applications for parole will by definition be highly disruptive because an entity's investment readiness, its deployment of capital and job creation, and a parolee's employment authorization must all stop dead in their tracks if the agency refuses to approve initial or renewed grants of parole. For these reasons, ABIL urges that the final rule include provisions for submission of motions to reopen and reconsider and requests for review by the Administrative Appeals Office, while maintaining the *status quo*, which on parole-renewal applications necessarily should include uninterrupted employment authorization for the parolee.

16. The final rule should authorize parolees to switch status to or from all employment-based nonimmigrant visa categories and to qualify for adjustment of status.

ABIL also urges USCIS to include in the final rule essential flexibility measures which would avoid needless rituals. One such ritual is the requirement in the USCIS proposal that after a favorable USCIS parole adjudication, parole can only be granted upon travel abroad (often at substantial expense, especially if family members must accompany the parole applicant) and the submission of an application for admission on parole (which must then be re-adjudicated by a U.S. Customs & Border Protection inspecting officer). Nowhere is the proposed rule does USCIS explain the need for the applicant's ceremonial departure, travel abroad, turn-around and submission of an application for admission to the United States. USCIS clearly has the power to permit beneficiaries to switch back and forth from and to entrepreneurial parole status and a lawful nonimmigrant status. For example, USCIS permitted parole entrants through their employers to extend nonimmigrant H-1B and L-1 petition validity, have parole status terminated, and be granted extension of status to the corresponding visa category.[17] The Final Rule should

[17] See, *e.g.*, "AFM Update: Revision of March 14, 2000 Dual Intent Memorandum," a May 25, 2000 policy memorandum issued by Michael D. Cronin, Acting Associate Commissioner, Office of Programs, for the legacy Immigration and Naturalization Service, Answer to Question 3, (HQADJ 70/ 2.8.6, 2.8.12, 10.18, AD 00-03), which provides in relevant part:

expressly incorporate that authority and allow approved switch-backs between lawful nonimmigrant status and parole status without the formulaic requirement of travel and reentry.

17. The final rule should apply the authority granted to approve applications for adjustment of status to that of a lawful permanent resident where the parolee's inability to adjust is "other than through no fault of his or her own or for technical reasons."

As USCIS knows, INA § 245(c)(2) adjustment of status is allowed notwithstanding an ineligibility to adjust where the bar to adjust status is "other than through no fault of his or her own or for technical reasons." The final rule should therefore also include an amendment to the agency's regulations incorporating this statutory allowance, 8 CFR § 245.1(d)(2), to include as a "no fault of the individual" or a "technical reason" that the adjustment applicant is an entrepreneurial parolee approved by USCIS for the purpose of fostering substantial economic growth and job creation.

Clearly, the proposed rule creates an anomaly. The benefit of entrepreneurial parole is clearly an employment-based classification (although apparently in the USCIS's view, it is not an employment-based nonimmigrant visa status). But parole classification cannot be converted through adjustment of status to lawful permanent resident status because of two adjustment bars, namely, INA § 245(c)(2)(effectively requiring continuous maintenance of "a lawful status since entry into the United States") and INA § 245(c)(7)(in effect requiring that "any alien who seeks adjustment of status to that of an immigrant under [INA § 203(b) -- the employment-based visa categories]" must be "in a lawful nonimmigrant status." Surely it is not a fault of the individual and it is a "technical reason" -- but a hyper-technical one at that -- for an entrepreneurial parolee authorized for employment to be ineligible for adjustment of status merely because USCIS -- without reliance on an express statutory requirement -- refuses to treat parole as an employment-based nonimmigrant status."

The reason USCIS has previously given for this distinction without a difference is that parole is not a visa status. Yet, the INA § 245(c)(2) and (c)(2) adjustment bars do not require the adjustment applicant to be in a lawful ***visa*** status; they only prohibit employment-based adjustment where the individual has either not maintained "a lawful status since entry into the United States" or is not "in a lawful nonimmigrant status" when the adjustment application is filed.

> [An] alien who was an L-1 or L-1 nonimmigrant, but who was paroled pursuant to a grant of advance parole, may apply for an extension of H-1 or L-I status, if there is a valid and approved petition. If the Service approves the alien's application for an extension of nonimmigrant status, the decision granting such an extension will have the effect of terminating the grant of parole and admitting the alien in the relevant nonimmigrant classification.

Notably, several federal courts have criticized USCIS and rejected the current version of 8 CFR § 245.1(d)(2) for its far too cramped allowable exceptions in comparison to the broadly worded parenthetical exemption from adjustment ineligibility in INA § 245(c)(2) if the event(s) barring adjustment are "other than through no fault" of the applicant or "for technical reasons."[18] See, *Alimoradi v. U.S. Citizenship and Immigration Services*, No. CV08-02529, at 8-14 (C.D. Cal. Feb. 10, 2009)(the exceptions in 8 CFR § 245.1(d)(2) are "manifestly contrary to the plain language of the statute" and "arbitrary and capricious" where concerns of U.S. public safety and national security are present); *Niu v. United States*, 821 F. Supp. 2d 1164 (2011)(injunction against USCIS granted because the agency's regulation [8 CFR § 245.1(d)(2)] "impermissibly narrow[ly]" interpreted the "through no fault of his own or for technical reasons" exemption in the statute [INA § 245(c)(2)]); and *Mart v. Beebe*, CIV. 99-1391, 2001 WL 13624 (D. Or. 2001)(forgiving a lapse in nonimmigrant visa status as a "technical reason" the Court held that USCIS's regulation [8 CFR § 245.1(d)(2)] "limits excusable unlawful status to four narrow circumstances" and "subverts the plain meaning of the statute [INA § 245(c)(2)]").

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[18]See, *Alimoradi v. U.S. Citizenship and Immigration Services*, No. CV08-02529, at 8-14 (C.D. Cal. Feb. 10, 2009)(the exceptions in 8 CFR § 245.1(d)(2) are "manifestly contrary to the plain language of the statute" and "arbitrary and capricious" where concerns of U.S. public safety and national security are present); *Niu v. United States*, 821 F. Supp. 2d 1164 (2011)(injunction against USCIS granted because the agency's regulation [8 CFR § 245.1(d)(2)] "impermissibly narrow[ly]" interpreted the "through no fault of his own or for technical reasons" exemption in the statute [INA § 245(c)(2)]); and *Mart v. Beebe*, CIV. 99-1391, 2001 WL 13624 (D. Or. 2001)(forgiving a lapse in nonimmigrant visa status as a "technical reason" the Court held that USCIS's regulation [8 CFR § 245.1(d)(2)] "limits excusable unlawful status to four narrow circumstances" and "subverts the plain meaning of the statute [INA § 245(c)(2)]").

Respectfully submitted,

* * *

For these reasons, Secretary Johnson, you should reject the miserly and inflexible provisions of the proposed rule. Rather, you should adopt and incorporate into the final rule the recommendations of ABIL and of many other knowledgeable business and professional associations, such as the U.S. Chamber of Commerce, the American Immigration Lawyers Association, and the Society for Human Resource Management's Counsel for Global Immigration.

The interests of the American people in the development on U.S. soil of growing companies that create numerous high-paying jobs requires no less.

Respectfully submitted on behalf of

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