

## USCIS PROPOSES INTERNATIONAL ENTREPRENEUR RULE

### SUMMARY & INITIAL RECOMMENDATIONS

TODAY, AUGUST 31, 2016, the U.S. Citizenship and Immigration Services (USCIS) published a proposed regulation in the Federal Register that would provide a new immigration option for a small but important group of international entrepreneurs. The proposed rule is available on the Federal Register website: [www.federalregister.gov/articles/2016/08/31/2016-20663/international-entrepreneur-rule](http://www.federalregister.gov/articles/2016/08/31/2016-20663/international-entrepreneur-rule).

#### BACKGROUND

Except for the EB5 immigrant investor green cards (which require a very substantial investment and can take many years, see [www.millermayer.com/immigration-lawyers/eb-5/eb-5-investors](http://www.millermayer.com/immigration-lawyers/eb-5/eb-5-investors)) or the E nonimmigrant visas that arise out of certain commerce or investment treaties between the US and certain countries (see [travel.state.gov/content/visas/en/fees/treaty.html](http://travel.state.gov/content/visas/en/fees/treaty.html) for the list of countries and generally [usaie.org/e-2-visas-for-entrepreneurial-investors](http://usaie.org/e-2-visas-for-entrepreneurial-investors)), there is no entrepreneur category in U.S. immigration law. This is a major gap, especially given the wave of efforts by government, private foundations and universities to support and teach entrepreneurship, and the importance of new businesses as drivers of economic growth, technological innovation and job creation.

#### RESPONSE

USAIE applauds the USCIS for proposing this rule. USAIE also appreciates the tone of the proposed rule, which recognizes that there may be a wide variety of metrics for showing the potential for an entrepreneur to benefit the U.S. economy:

*"DHS recognizes that start-up investment is a rapidly evolving field, and welcomes additional feedback, including data on trends in investment that may be available, as feedback and data may impact the minimum threshold in the Department's final rule."<sup>1</sup>*

Over the next 45 days, USAIE will work with key stakeholders - university accelerators, venture capitalists, academics, government economic development corporations, etc. - to provide detailed comments and recommendations on the 155-page proposed regulation. USAIE will also provide additional suggestions for small, targeted updates to other existing visa categories to promote entrepreneurial activity by foreign nationals in the United States.

<sup>1</sup> While there is room to discuss the exact thresholds of investment and ownership, it is much appreciated that DHS is looking for reasonable metrics from the business world, such as setting the minimum government investment at \$100,000 -- the amount of the Phase I Small Business Administration SBIR grant. And the \$345,000 figure for US investment comes from analyzing data on angel investors.

# USAIE SUMMARY OF THE PROPOSED RULE

## PAROLE TO CERTAIN IMMIGRANT ENTREPRENEURS

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The category is narrowly defined, and estimated by DHS that there will be fewer than 3,000 people approved per year. The proposed rule would grant “parole” to certain immigrant entrepreneurs. See generally [www.uscis.gov/humanitarian/humanitarian-parole](http://www.uscis.gov/humanitarian/humanitarian-parole). Parole involves granting someone an “entry” to the United States that is not part of an established visa category. It is not, in immigration language, an “admission.”

The new rule proposes a relatively new use of parole. In the past, the U.S. government generally granted parole for humanitarian reasons, such as for Cuban family members, medical conditions, military family members, or for the benefit of the U.S. government, such as a person needed to testify in a trial. The proposed entrepreneur rule would rely on the relatively little-used “significant public benefit” part of the parole authority, based on job creation as a public benefit.

To qualify for parole under the proposed rule, an international entrepreneur would have to meet specific guidelines. Parole can be granted to someone in or outside the U.S. for an initial period of two years, with only one possible three-year extension -- for a total of five years maximum.

## EMPLOYMENT AUTHORIZATION

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Employment authorization would be “incident to status,” and granted immediately upon approval, rather than having to apply for a work card which can take several months as other parolees do. Parole can be extended to a spouse and minor children. The spouse (but not children) would also be able to work incident to their parole status. The classification on entry would be PE-1 for the entrepreneur.

## FILING FEES

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The base filing fee would be \$1200 for the principal applicant plus \$85 for biometrics (fingerprinting for a security check), and \$550 for dependents. None of the standard “grounds of inadmissibility” (such as criminal issues) apply to parole in general, but could be used to deny a particular application on a discretionary basis.

## INCOME REQUIREMENTS

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The applicant would have to demonstrate an income of at least 400% of the U.S. federal poverty guideline for the family (see [www.federalregister.gov/articles/2016/01/25/2016-01450/annual-update-of-the-hhs-poverty-guidelines](http://www.federalregister.gov/articles/2016/01/25/2016-01450/annual-update-of-the-hhs-poverty-guidelines)). The entrepreneur would not be eligible for the government health exchange or other Affordable Care Act benefits.

{NEXT PAGE: PROPOSED REQUIREMENTS}

# PROPOSED REQUIREMENTS FOR OBTAINING PAROLE AS AN INTERNATIONAL ENTREPRENEUR

The proposed rule would set a maximum of three parolees per company, and the investment must have come within the past year. Each parolee must report “material changes” that could affect eligibility for parole, such as change to ownership interest. This could be a significant challenge, and requires further clarification, as startups are constantly evolving entities.

## #1: “SUBSTANTIAL POTENTIAL”

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The parolee would have to show a significant investment showing “substantial potential” from U.S. investors with good track record of success. The proposed rule defines investors as green card holders or U.S. citizens, or entities such as venture capital firms, angel investors, or start-up accelerators owned by U.S. investors. The initial investment would have to be at least \$345,000 within one year of the filing date, and cannot be family money; significant grants or awards from U.S., state or local government entities “provided support for economic, research and development; or job creation purposes” (not contracts for good or services, must be \$100,000 or more); or “reliable evidence of job creation” and “rapid growth.” The proposed rule includes a detailed list of evidence that can be presented.

USCIS proposes to limit investors to those who have “an established track record of successful investments in start-up entities.” This means in the five-year period before the parole application, the investor has put money into a start-up in at least three separate calendar years “in exchange for equity or convertible debt comprising a total of no less than \$1,000,000... and to show that after the investments, “at least 2 such entities each created at least 5 qualified jobs or achieved at least \$500,000 in revenue with average annualized revenue growth of at least 20%.”

## #2: “SUBSTANTIAL OWNERSHIP INTEREST”

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The proposed rule would also require the applicant to have a “substantial ownership interest” of at least 15%; play an active and central role in operations, and assist the company’s ability to do research and development, and grow.

## #3: EXTENSION POSSIBILITIES

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If the entrepreneur wants to apply for the three-year extension, the ownership interest can be down to 10%, with \$500,000 total investment by the time of re-application, and 20% annual growth. The parole extension is intended for startups that are doing well, not ones that have stumbled and are re-grouping - the company must show “substantial and rapidly increasing” growth.

{NEXT PAGE: INITIAL RECOMMENDATIONS FROM USAIE}

# USAIE'S INITIAL RECOMMENDATIONS ON THE PROPOSED RULE

International entrepreneurs should work together to suggest additional or revised metrics for how to judge the potential of a foreign national to contribute to the U.S. economy through job creation and economic growth.

The proposed rule now states that parole decisions would be based on the totality of the evidence, including evidence from "other means," which presumably includes Internet searches and information from other government agencies. **USAIE recommends that these situations require a formal Request for Evidence if USCIS plans to deny the parole on the basis of what it found from other sources.**

**A formal recommendation from a governmental economic development council or similar agency should be given a reputable presumption as "reliable evidence of job creation and rapid growth potential"** to support the third alternative (where the threshold investment has not been met). These agencies have significant stake and expertise in evaluating the potential for growth, but may have limited resources.

The **USCIS should create a process to allow major accelerators or incubators to register** so that they do not have to provide copious evidence for each parole application that arises from that organization. Accelerators are significant drivers of economic growth, and USCIS acknowledges that graduating from such a program one can be a "strong indicator of the entity's potential."

The final rule should provide **more clarification on what constitutes a "material change,"** subject to reporting and possible revocation of parole. The final rule should also create an option to argue that even if such material change falls below the threshold investment or ownership, the entrepreneur's activity still has the potential for job creation and rapid growth.

The final rule should **specifically address parole for inventors and researchers**, two categories included in early discussions of entrepreneur parole by USCIS. This could include valuing intellectual property as part of the investment, and creating a track for a key researcher in a start-up company that has an international entrepreneur that meets the proposed criteria.

The final rule should **clarify that parole can be granted for someone who is already in the U.S.** This is implied by the explanation in the proposed rule that someone who loses parole reverts back to the immigration status before parole.

The final rule should **clarify if any foreign investor can contribute directly to the startup**, including family members, and if so, up to what percentage of the total investment.

The final rule should **clarify what percentage**, if any, of ownership of a venture capital firm, angel investor group, or start-up accelerator can be owned by foreign investor.

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# CONTINUED: USAIE'S INITIAL RECOMMENDATIONS

Understanding that the parole regulation is a limited immigration option for significant investments, one that is estimated to cover just a few thousand people a year, **USAIE recommends small, targeted updates to other established categories of visas to promote economic growth.** Most immigration categories were created long before the current wave of entrepreneur programs, funds, etc.

In particular, we recommend:

1. Adding that **E visa holders** are employment authorized incident to status, including spouses, for the same reasoning used to avoid a lengthy work card process for entrepreneur parolees and their spouses.
2. Clarifying that on-campus employment for **F-1 students** includes work at an affiliated incubator, entrepreneur program, or accelerator. For this purpose affiliated should mean on the campus, or connected to the school by contractual relationship.
3. Clarifying that an **exemption to the H-1B cap** results from work at an affiliated incubator, entrepreneur program or accelerator. For this purpose affiliated will mean either physically on the campus, or connected to the school by contractual relationship.
4. As originally discussed by USCIS, **parole should be a pathway to the self-petition entrepreneur National Interest Waiver (NIW) green card.** See [www.uscis.gov/news/employment-based-second-preference-immigrant-visa-category-frequently-asked-questions-regarding-entrepreneurs-and-employment-based-second-preference-immigrant-visa-category](http://www.uscis.gov/news/employment-based-second-preference-immigrant-visa-category-frequently-asked-questions-regarding-entrepreneurs-and-employment-based-second-preference-immigrant-visa-category). This can be clarified by creating a rebuttable presumption that five years of entrepreneur parole creates eligibility for an entrepreneur NIW self-petition.

# FOR FURTHER INFORMATION

For further information about the proposed rule or any other immigration issue, contact USAIE. We offer consultations and targeted presentations to individuals, companies, and startup incubators. For more info, contact us or visit our website.

[WWW.USAIE.ORG](http://WWW.USAIE.ORG)



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