NISKANEN CENTER

Regulatory Comment

Comments submitted to the Department of Homeland Security in the Matter of:

REMOVAL OF INTERNATIONAL ENTREPRENEUR PAROLE PROGRAM

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INTRODUCTION

The Niskanen Center believes that regulations establishing criteria to allow international entrepreneurs (IE) entry into the United States on a case-by-case basis is not only legitimate and appropriate under the parole authority, but strongly serves the public interest by contributing to innovation, economic growth, and job creation. The president has tasked the Department of Homeland Security with protecting the interests of Americans; ending the IE parole program is contrary to that objective.

Niskanen believes the current regulations could be revised to address persisting concerns. Even short of revisions, however, the existing regulations offer sufficient protections that outweigh those concerns. Therefore in reply to DHS's call for comments, the Niskanen Center encourages DHS *not* to remove the IE parole program regulations.

The Niskanen Center appreciates the opportunity to comment and intends to (I) show that the IE program is well-aligned with present DHS priorities under the president's relevant executive orders and (II) answer the department's concerns about the justification of the program under the parole authority of the Secretary and establish why proposed alternatives for immigrant entrepreneurs are not substitutes for the IE program. The comments conclude with some recommendations that would mitigate some of the harm done to investors and entrepreneurs by a transition if the department ultimately decides to end the rule.

I. THE IE PAROLE PROGRAM IS ALIGNED WITH DHS'S CURRENT POLICY DIRECTIVES

The president's Executive Order 13767, "Border Security and Immigration Enforcement Improvements," signed on January 25, 2017 instructed DHS in section 11(d) DHS to "take appropriate action to ensure that parole authority…is exercised only on a case-by-case basis in accordance with the plain language of the stature, and in all circumstances only when an individual demonstrates urgent humanitarian reasons or a significant public benefit derived from such parole."[1] The department indicates that the order contradicts the program's authorization, and therefore prompted the decision to propose removing the IE Final Rule. This is an unnecessary conclusion. The case-by-case basis of parole authority is discretionary. Establishing guidance does not eliminate the case-by-case nature of discretion, it simply establishes general criteria to make that case-by-case discretion more predictable and transparent. The proposal describes ending the rule as a choice "to exercise [the secretary's] discretionary parole authority…more narrowly than [the secretary's] predecessor(s)." Even if the decision will mean that discretionary parole authority is used less *frequently*, the authority is not being wielded any more narrowly, since the lack of any guidance will mean agents will have to rely *more* on their own personal discretion. Indeed, if DHS followed a heuristic against entrepreneurs *as a class*, it could mean cases aren't being decided on a case-by-case basis, against the instruction of EO 13767 and the statute.

The question at hand that prompted the guidance and should guide whether it should be removed is how best to use parole discretion, not whether it exists. In a decision of the U.S District Court for the District of Columbia, the opinion explains that DHS "retains that [parole] authority today. The IE Final Rule simply provides guidance as to how DHS should assess whether a foreign entrepreneur satisfies the 'significant public interest' prong of the parole test. Even without that Rule, any agent could theoretically exercise her discretion to find in [the entrepreneur's] favor."[2] In other words, the guidance relates to the degree of arbitrariness and transparency will be associated with discretion. The discretion itself exists without question.

The case against removing the IE Final Rule is made stronger by another order from the White House. EO 13788 states that, "in order to create higher wages and employment rates for workers in the United States, and to protect their economic interests, it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad."[3] While this clearly refers to preventing illegal entry of laborers who might compete with American workers, it equally applies to rigorous use of the law to allow the entry of those who would create higher wages and employment for Americans. Indeed, it would be against both the letter and spirit of that line to *not* use a legal tool governing entry (like parole) that would raise American wages and employment.

Given directives from the White House requiring agencies to support policymaking that raises employment and wages, it follows that the IE Final Rule ought to remain since the rule itself has job creation criteria to ensure it is creating American jobs. According to research by the New American Economy Research Fund and based on DHS's own projections, IE-firms would generate at least 135,240 new jobs and potentially as much as 429,714 within ten years if the rule were preserved. [4] The executive order also emphasizes American

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[1] "Border Security nd Immigration Enforcement Improvements" Executive Order 13767, 82 FR 8793, January 25, 2017.

[2] National Venture Capital Association v. Duke, U.S District Court for the District of Columbia, Civil Action No. 17-1912, December 1, 2017.

[3] "Buy American, Hire American," Executive Order 13788, 82 FR 18837, April 29, 2017.

[4] "Opportunity Lost: The Cost of Rescinding the International Entrepreneur Rule," *New American Economy*, June 2018.

wages, which would rise, in study's pessimistic scenario by over $1.2 billion per year and in the optimistic one by over $3.8 billion per year.[5] The study finds that the economic benefits outside of wages/earnings are significant too, though those are outside the scope of EO 13788.

DHS conveyed some understandable concern about the potential risk to investors who might rely on parole. First, clear public guidance and policy stability gives investors more certainty and allows them to better evaluate risk than removing the rule. Second, investors must be able to determine their own subjective risk tolerance. A paternalistic regulation on American investors cannot justify ending a rule that furthers the goal established as the executive branch's top priority under presidential order, especially one that the department says will pay for itself through fees.

II. PAROLE AND ITS PROPOSED ALTERNATIVES

Congressional action is not a substitute for IE parole

1. *An IE parole program is different than an IE visa program*

In the proposal to remove the IE Final Rule, DHS concludes that an IE program is best left to Congress. But while we agree that Congress should seriously consider a visa classification like the StartUp Visa Act, which the department references positively,[6] the department should not cede its own authority pertaining to foreign entrepreneurs.

IE parole is not a substitute for IE visa classification because they represent two distinct policies that require different sources of authorization and confer different rights, privileges, responsibilities, and eligibility criteria. They are not two alternate ways of establishing a unitary policy toward all IEs.

Parole, unlike a visa category, is by its very nature designed *not* to offer a unique durable immigration status, and it does not establish an alien as having been admitted into the United States. Each can be judged and enacted on its own merits, and without reference to whether the other policy is in effect or not.

We agree with the department that "Congress is uniquely well-positioned to balance the many competing and complex policy priorities in attracting and retaining entrepreneurs" because *retaining* entrepreneurs implies some greater status than that afforded by parole, which is inherently temporary, and does not afford a unique basis for changing to nonimmigrant or immigrant status. Any policy intended to retain entrepreneurs would *have* to come from Congress. But Congress has elected to grant the secretary discretionary parole authority outside of existing visa pathways to offer temporary status. That Congress has (at least so far) not decided to grant an immigration pathway for entrepreneurs is orthogonal to whether the secretary should temporarily parole similar entrepreneurs under the parole power.

Many of the expected benefits of an IE parole program (see section I) are admittedly similar in character and kind to the expected benefits of a new visa classification. However, merely because a parole program and a proposed visa program may be used by similar people or generate similar benefits does not mean that they are substitutes for one another. On the contrary, a parole program and a hypothetical congressionally-authorized program raise different political questions and tradeoffs, with unique costs and benefits. The existence or non-existence of one neither does nor should influence the existence or non-existence of another.

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[5] Ibid.

[6] "Removal of International Entrepreneur Parole Program," U.S. Citizenship and Immigration Services, DHS, CIS No. 2572-15; DHS Docket No. USCIS-2015-0006.

For example, both the nonimmigrant worker classifications and the employment-based immigrant categories have significant overlap in their beneficiaries and benefits. Both are intended to increase the labor supply for certain groups, but that is not seen as an argument in favor of eliminating one or the other. Instead, they are generally seen as complements. We have both because while they may be used by similar people and create similar benefits, they have different processes and afford different rights and obligations.

Our immigration policies are meant to accomplish clusters of similar objectives through a multiplicity of statuses. One implication of the multiplicity of status categories for similar groups is that a debate about whether a group should have one kind of status should not bear on whether that group should have another kind of status. So, the fact that foreign entrepreneurs are not granted durable immigration status under the parole program does not justify removing the program.

The department expresses that their intention by proposing to eliminate the IE Final Rule is to defer to Congress "on whether, and if so how to best create a special immigration pathway that addresses the unique and varied characteristics of foreign entrepreneurs." But they *must* defer to Congress on the question of a special immigration pathway, whether or not they remove the IE Final Rule.

2. Preserving the IE parole program helps rather than hinders Congress in deciding policy regarding IE visas

Congress may at any time, with or without the IE Final Rule in place, decide to open a special immigration pathway for international entrepreneurs and/or restrict parole authority from applying to international entrepreneurs. It is a plausible concern however that while Congress could theoretically determine IE visa policy, an IE parole program would remove any pressure from Congress and removing the IE Final Rule would allow Congress a special opportunity. This concern is contradicted by the history of the parole authority; throughout the existence of the parole power, Congress has not shied from instructing the executive on its use, reforming it, or creating new visa pathways for groups who had previously predominantly used parole. Instead, the history shows Congress being able to learn how to craft a visa policy from a trial-run afforded by parole.

The parole power has existed in some form since 1952 (at that time under the Attorney General). It was widely used to allow refugees to enter the United States throughout the next few decades: Hungarians refugees in 1956, Cuban refugees after 1959, refugees from Hong Kong in 1962, Czechoslovak refugees in 1968, Soviet refugees in 1971, Ugandan-Asian refugees in 1972, Vietnamese refugees in 1975, etc.[7] Some of those uses were encouraged and recommended by Congress.

Further, that period saw three major laws passed by Congress affecting refugees, parole authority, and visa pathways: the Migration and Refugee Assistance Act of 1962, the Immigration and Nationality Act of 1965, and the Refugee Act of 1980. Therefore, the history seems to undermine the idea that the use of parole inhibits or disempowers Congress. There should be little doubt that the same would be true under the IE parole program. Congress, as they have done before, could observe what works and does not under parole before offering durable legal status.

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[7] "History of the Use of Parole," Box 10, Folder "Indochina Refugees—Parole Authority (2)," Theodore C. Marrs Files, Gerald R. Ford Presidential Library.

Existing visa categories are not substitutes for IE parole

The department's other major alternative for entrepreneurs outside of Congress is existing visa pathways, drawing particular attention to E-2 and EB-5. The department concedes, however, that "these classifications do not encompass the entire population of entrepreneurs addressed in the IE Final Rule."

Those programs fall sufficiently short for the IE population that it is misleading to describe them as alternatives in the first place. E-2 excludes some of the largest potential country sources for entrepreneurs: China, India, and Indonesia, for example. By virtue of requiring majority ownership, E-2 also handicaps any entrepreneur trying to grow her startup by raising funding. In fact, she could find herself in breach of status if she attracted investors.

EB-5 is similarly unsuited for the business model the IE parole program is tailored for. It would require significant investment from the immigrant herself, at thresholds many times higher than an entrepreneur is likely to *receive*, let alone *have*. And it can take years before she would be able to travel to the United States, during a critical time during the life of a startup.

Neither E-2 nor EB-5 can capture the significant public benefits associated with companies founded, but not necessarily funded, by their foreign founders.

CONCLUSION

Ending the IE Final Rule would be harmful not only to would-be future employees, investors, and consumers of companies founded by IEs, but would expose present American investors to harm, risk, and uncertainty. Investors and entrepreneurs have made business decisions based on the premise that the IE Final Rule would be in effect, that submitted petitions would be processed and approved under the rule, and approved petitioners paroled. The department has expressed concern for the "additional degree of risk and unpredictability for the U.S. investors who may not be able to achieve the anticipated return on their investment." While *ending* the rule in any manner would add to the degree of risk and unpredictability even more so than preserving the rule, it can best mitigate the effects of unpredictability by allowing expiration of initial period of parole for individuals paroled as IEs, granting affirmative parole determinations for USCIS-approved IE parole applicants who have not yet been paroled, and adjudicating pending parole applications under the IE Final Rule for individuals whose parole applications are pending.

Investors in the United States have made decisions with expectations about what future policy would be. While no transition would provide the most policy certainty, if there must be a transition, the longest runway possible would minimize the harm to investors and the depressing future effects of policy uncertainty on corporate investment.[8]

Ending the IE Final Rule does not narrow parole authority—it merely makes it more arbitrary and less predictable by leaving more ambiguous what qualifies as a significant public benefit. That is neither good for the economy nor the integrity of our immigration laws.

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[8] Huseyin Gulen and Mihai Ion, "Policy Uncertainty and Corporate Investment," *Review of Financial Studies* 29:3, 2016, 523-564.