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# THE GEORGE WASHINGTON UNIVERSITY

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WASHINGTON, DC

Public Interest Comment<sup>1</sup> on  
The Department of Homeland Security's Proposed

## International Entrepreneur Rule

Docket ID No. USCIS-2015-0006  
RIN: 1615-AC04

October 17, 2016

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### The George Washington University Regulatory Studies Center

The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Department of Homeland Security's (DHS) proposed rule broadening its use of discretionary parole authority to facilitate foreign entrepreneurs to oversee and grow a U.S. startup entity does not represent the views of any particular affected party or special interest, but is designed to evaluate the effect of DHS's proposal on overall societal welfare.

## Introduction

The Department of Homeland Security's proposed rule would expand the use of its discretionary authority to parole individuals into the United States for reasons of "significant public benefit" to include foreign entrepreneurs looking to start a business in the U.S. DHS recognizes that "the full potential of foreign entrepreneurs to benefit the U.S. economy is presently limited since many...do not qualify under existing nonimmigrant and immigrant classifications." The rule proposes several criteria for approving applicants on a case-by-case basis.

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<sup>1</sup> This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://research.columbian.gwu.edu/regulatorystudies/research/integrity>.

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A decision by U.S. Citizenship and Immigration Services (USCIS) to approve an applicant would grant an initial parole providing a stay of up to 2 years; DHS also proposes separate criteria specifying conditions under which USCIS could approve a parole extension (re-parole) of up to an additional 3 years. This rule is designed to “facilitate the applicant’s ability to oversee and grow his or her start-up entity in the United States.” Additionally, parole can be approved for up to 3 entrepreneurs associated with the same business. Parole would also confer benefits to qualifying members of an entrepreneur’s immediate family.

The criteria proposed by DHS are designed to limit the use of parole to applicants whose business “would provide a significant public benefit through the substantial and demonstrated potential for rapid business growth and job creation.” In particular, DHS looks to target a subset of businesses known as “high-growth firms.” Experts disagree regarding what constitutes a high-growth firm, but these are generally firms that are responsible for a disproportionality large share of economic gains related to growth in: total factor productivity, job creation, innovation, and GDP.<sup>3</sup>

DHS’s proposed rule is a welcome step in reducing barriers to foreign entrepreneurship in the U.S. However, the criteria proposed for approving parole need to strike a balance between restricting the use of parole to high-growth firms without creating unnecessarily stringent restrictions that result in excluding a large number of firms that would otherwise create a significant public benefit. This comment proposes several changes that DHS could make to its proposed rule to maximize its potential benefits. These include:

- **Reducing the amount of investment required for an applicant to qualify for initial parole.** DHS based its threshold of \$345,000 on the mean amount of combined capital investment “typically obtained in early rounds of investment from venture capital firms or angel investors” in the U.S. However, this amount is likely too restrictive (i.e., the datasets used by DHS include firms in New York likely to require significantly more capital than firms in Houston).<sup>4</sup>
- **Expanding qualified sources of investment capital to include foreign investors and crowdfunding.** It seems reasonable to extend DHS’s definition of a “qualified investor” to foreign investors. Including capital raised via crowdfunding for consideration of parole

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<sup>3</sup> See Clayton et al. “High-employment-growth firms: defining and counting them,” Office of Industry Employment Statistics, Bureau of Labor Statistics (BLS), Monthly Labor Review (June 2013), p.1-2 Available at: <http://www.bls.gov/opub/mlr/2013/article/pdf/clayton.pdf>. For the relationship between high-growth firms and the economy, see: Haltiwanger et al. “Who Creates Jobs? Small vs. Large vs. Young,” the National Bureau of Economic Research. NBER Working Paper No. 16300. August 2010. Available at: <http://www.nber.org/papers/w16300>

<sup>4</sup> Examples of significant differences in aggregate valuations for all industries solely based on location within the U.S. can be found here: <https://angel.co/valuations>

is in line with the policy priorities of the Jumpstart our Business Startups Act (JOBS Act) to encourage funding of U.S. small businesses.

- **Considering taxes paid as an additional criterion for re-parole.** DHS asked the public to provide additional criteria it might consider in evaluating parole applications. Although DHS would have to decide on both a threshold and the type of tax to consider (e.g., the start-up's or the entrepreneur's, Federal or state, etc.), this might provide an additional and easily verifiable criterion for USCIS adjudicators to consider.
- **Planning for retrospective review.** DHS should add a section within the proposed rule that indicates how it will analyze the program's effects once implemented. This will allow the agency to better plan for retrospective evaluation of the program's effects as directed by Executive Order 13563.<sup>5</sup>

## Statutory Authority

The Immigration and Nationality Act (INA) grants the Secretary of Homeland Security “the discretionary authority to parole individuals into the United States, on a case-by-case basis, for urgent humanitarian reasons or significant public benefit.”<sup>6</sup> It also gives the Secretary the authority “to establish rules and regulations governing parole.”<sup>7</sup> Additionally, the Secretary is granted “general authority to extend employment authorization to noncitizens in the United States.”<sup>8</sup> Finally, as DHS points out in its preamble, its efforts to reduce barriers to entrepreneurship via regulatory reforms directly addresses its mandate to “ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.”<sup>9</sup>

## Qualifications for Initial Parole

DHS's initial parole for foreign entrepreneurs would grant applicants the ability to stay in the United States for up to two years; the proposed rule would limit the number of entrepreneurs granted parole associated with the same business to three. Approval of parole would also authorize the entrepreneurs to work in the U.S. but only at their own start-up entity. Additionally, an approval would also grant parole to an entrepreneur's spouse and any minor, unmarried children (under 21 years of age). Finally, an applicant's spouse would be extended employment authorization not limited to work at the entrepreneur's start-up. The following summarizes the proposed guidelines for USCIS adjudicators in determining eligibility for parole.

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<sup>5</sup> Exec. Order No. 13563, Improving Regulation and Regulatory Review

<sup>6</sup> 8 U.S.C. §1182(d)(5)

<sup>7</sup> 8 U.S.C. §1103(a)(1), (3)

<sup>8</sup> 8 U.S.C. §1324a(h)(3)(B)

<sup>9</sup> 6 U.S.C. §111(b)(1)(F)

## **Formation of New Start-Up Entity**

To be qualified for parole DHS requires that “the applicant has recently formed a new entity in the United States that has lawfully done business...within the 3 years preceding the date of filing of the initial parole application.”

### **Applicant is an Entrepreneur**

DHS proposes to ensure that applicants are not being granted parole simply for investing in a U.S. business. To this end, DHS requires applicants to demonstrate that they are necessary to “advance the entity’s business.” This requires that the applicant possess a significant ownership interest in the entity (DHS proposes an ownership interest of at least 15%), but the applicant must also have “an active and central role in the operations and future growth of the entity, such that his or her knowledge, skills, or experience would substantially assist the entity in conducting and growing its business in the United States.”

### **Substantial Potential for Rapid Growth and Job Creation**

DHS proposes several ways for entrepreneurs to demonstrate that their start-up has substantial potential for rapid growth and job creation. Applicants would qualify if their start-up receives either a significant investment of capital from qualified U.S. investors or significant awards or grants from Federal, State, or local governments. Alternative criteria are also provided if an applicant only partially meets either of these criteria.

#### **Investments from Established U.S. Investors**

An applicant would qualify if their start-up received investments of capital totaling \$345,000 from “certain qualified U.S. investors” with “established records of successful investments.” It is worth noting here that DHS’s proposed definitions for what constitute qualified investors and established records of successful investment are well beyond the Security and Exchange Commission’s (SEC) definition of an “accredited investor.”<sup>10</sup> DHS defines a qualified U.S. investor as someone who has made at least one investment within the past five years of no less than \$1 million. Additionally, for investors to qualify as having an established record of success, their investments must have either: created 5 qualified jobs or been in businesses which generated annual revenues of at least \$500,000 with annual growth rates of at least 20%.

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<sup>10</sup> To qualify as an accredited investor under SEC Regulation D requires “income exceeding \$200,000 annually for the two most recent years (or \$300,000 in joint income with a person’s spouse)” or a net worth exceeding \$1 million (excluding the value of their one’s primary residence). <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>

## Government Grants

An applicant could also qualify if their start-up received awards or grants from Federal, State, or local government entities “with expertise in economic development, research and development, and/or job creation” totaling \$100,000. Note that the threshold to qualify is lower than the capital requirement from the private sector. DHS asserts that “government entities are by definition formed to serve the public” and weighs a “government entity’s independent assessment” of a decision to fund a start-up much more heavily.

## Alternative Criteria

If an applicant only partially meets either of the previous requirements for capital investments in their start-up, DHS proposes to consider “additional reliable and compelling evidence” that an entity would provide a significant public benefit to the United States. The proposed language creates a large amount of discretion for USCIS adjudicators to determine what is “reliable and compelling evidence.” DHS mentions that this might include submissions such as proof that an entity “has been selected to participate in...or has graduated from one or more established and reputable start-up accelerators (or incubators).”

It is worth noting that DHS also proposes to include a requirement that applicants maintain a household income greater than 400 percent of the Federal poverty line for their household size as defined by the Department of Health and Human Services (HHS) to continue being eligible for parole.<sup>11</sup>

## DHS Should Consider Lowering its \$345,000 Threshold

DHS explains that its \$345,000 threshold is “nearly a mid-point across the various data and sources” that it reviewed for typical capital investments for high-growth startups—data that the agency cites as publically available and reputable. It is commendable that DHS used publicly available data to estimate its threshold requirements, since this increases transparency by making clear the agency’s assumptions. However, there are at least two reasons to believe that a threshold of \$345,000 is too high.

First, using a median investment derived from datasets that include firms with a high degree of heterogeneity masks an important characteristic: where a firm is located in the U.S. has a significant bearing on how much investment capital it needs to raise to cover expenses. Second, the median investment used does not take into account the industry of the start-up (e.g., manufacturing might require significantly more capital than software development). Both of these characteristics make it likely that a threshold of \$345,000 excludes areas within the U.S.

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<sup>11</sup> Proposed 8 CFR 212.19(i)

with lower capital costs—particularly those that might stand to benefit the most from economic growth.

For example, publically available data<sup>12</sup> on the average valuation of start-ups indicates that comparing Detroit to Silicon Valley yields roughly a 50% higher valuation for the latter. Although differences due to industry or location might not always yield such a stark contrast, it is nonetheless instructive of the issue with relying on the median value for start-ups to set the threshold for capital investment requirements across the entire U.S. DHS should consider a lower threshold that takes these differences into account.

## **DHS Should Expand what it Considers a Qualified Investment**

As currently proposed, DHS would only consider investments that originate from a very narrow group of U.S. investors. At a minimum, DHS should expand its criteria to include foreign investment. Not only is the United States a significant recipient of foreign direct investment (FDI) inflows,<sup>13</sup> but there are significant, publicly available data<sup>14</sup> on reputable, international investors (e.g., angel investor firms in Brazil, Germany, etc.) with a history of successful investments across various countries.<sup>15</sup>

Additionally, DHS should consider adding capital raised via crowdfunding to its definition of a qualified investment; both the President and Congress have worked to facilitate the use of crowdfunding to spur economic growth via increased private investment in start-ups. President Obama signed the JOBS Act into law in 2012, and its final rules went into effect in May 2016.<sup>16</sup> Currently, via crowdfunding businesses can raise well above DHS’s currently proposed threshold to qualify for parole.<sup>17</sup>

Other reasons to consider crowdfunding as a qualified investment include: the fact that investment via crowdfunding is growing exponentially and is set to overtake venture capital investment within the U.S.,<sup>18</sup> and research indicates that innovations within financial markets are

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<sup>12</sup> <https://angel.co/valuations>

<sup>13</sup> Inflows of FDI into the U.S. likely exceeded \$300 billion in 2015.

<http://ofii.org/sites/default/files/Foreign%20Direct%20Investment%20in%20the%20United%20States%202016%20Report.pdf>

<sup>14</sup> Publically available data exists for various venture capital, angel investors, etc. (e.g., [http://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/Venture+Capital](http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Venture+Capital) or <https://angel.co/>)

<sup>15</sup> Ramadani, Veland. “The importance of Angel Investors in Financing the Growth of Small and Medium Sized Enterprises. International journal of academic research in business and social sciences. 2012.

<sup>16</sup> <https://www.sec.gov/spotlight/jobs-act.shtml>

<sup>17</sup> <https://www.entrepreneur.com/article/246063>

<sup>18</sup> <http://www.forbes.com/sites/chancebarnett/2015/06/09/trends-show-crowdfunding-to-surpass-vc-in-2016/#55e8e037444b>

changing the way that people prefer to invest their money in the U.S.<sup>19</sup> Expanding this criteria might also allow entrepreneurs who would be funded by family members to participate. As a final note, there is significant room to doubt the premise that a “qualified investor” (e.g., a venture capitalist) is more likely to successfully identify a potential high-growth business over other sources of investment.<sup>20</sup>

## **Qualifications for Re-Parole**

DHS proposes criteria for extending an applicant’s parole (re-parole) for up to three additional years. All of the benefits conferred to applicants and their families would be extended under re-parole. The following summarizes DHS’s proposals providing guidance for USCIS in determining eligibility for re-parole.

### **Continuation of Start-Up Entity**

An applicant for re-parole would be required to demonstrate that their entity continues to be a start-up entity as defined within the proposed rule.<sup>21</sup> For the purpose of re-parole, this means that the business “has continued to lawfully do business during the initial period of parole” and continues to have the potential for rapid growth.

### **Applicant Continues to be an Entrepreneur**

The applicant would be required to continue to possess a substantial ownership interest in the start-up and continue to serve “in a central and active capacity.” However, DHS proposes to lower the entrepreneur’s equity requirement from 15% to 10% to account for the possible need to raise additional capital by selling off a portion of ownership interest.

### **Continued Substantial Potential for Rapid Growth and Job Creation**

DHS proposes three additional ways for entrepreneurs to demonstrate that their start-up continues to have substantial potential for rapid growth and job creation. Applicants could qualify for re-parole if their start-up received additional capital investment from qualified U.S. investors or significant awards or grants from Federal, State, or local governments. Applicants could alternatively qualify under additional revenue or job creation requirements. Similar to initial parole, DHS proposes additional criteria in the event that an applicant only partially meets these requirements.

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<sup>19</sup> <http://crowdexpert.com/crowdfunding-industry-statistics/>

<sup>20</sup> <https://hbr.org/2013/05/six-myths-about-venture-capitalists>

<sup>21</sup> Proposed 8 CFR 212.19(a)(2)



### **1. Qualifying Funding From U.S. Investors or Government Entities**

DHS proposes a threshold of \$500,000 in additional funding received after initial parole was granted either by qualified U.S. investors, Federal, State, or local government entities, or a combination of these.

### **2. Substantial Revenue Generation**

Applicants could also demonstrate that their entity continues to have substantial potential for rapid growth and job creation if the entity “reached at least \$500,000 in annual revenue, with at least 20 percent average annual revenue growth, during the initial parole period.”

### **3. Job Creation**

Finally, DHS proposes to allow applicants to qualify for re-parole by demonstrating that the entity “created at least 10 qualified jobs<sup>22</sup> with the start-up entity for U.S. workers during the initial parole period.”

## **Alternate Criteria**

Similar to the alternate criteria considered during initial parole, if an applicant only partially meets the requirements for demonstrating that their business continues to exhibit a substantial potential for rapid growth and job creation, DHS proposes to consider alternate criteria for granting re-parole.

## **DHS Could Consider Taxes Paid as an Additional Criterion**

DHS asked the public to provide additional criteria it might consider in evaluating parole and re-parole applications. Although DHS would have to decide on both a threshold and types of taxes to consider (e.g., Federal, state, or a combination), this might provide an additional and easily verifiable criterion for USCIS adjudicators to consider.

## **Regulatory Analysis**

DHS states that it “does not expect the rule to generate significant costs or negative consequences.” Additionally, it proposes to offset any potential costs to the U.S. government by charging applicants for any requirements related to submitting applications for consideration of parole. The costs charged to those filing for parole would cover: DHS labor hours in processing applications, biometrics required for background checks of applicants and their families, etc. DHS estimates various costs associated with these activities, but U.S. citizens are not estimated to bear these costs. It is worth noting here that DHS also proposes a biennial fee review to ensure

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<sup>22</sup> DHS’s definition of a “qualified job” is similarly defined by the U.S. Department of Labor. The general requirement includes working at least a 35-hour week. <http://www.bls.gov/bls/glossary.htm#F>



that fees charged to applicants are sufficient to cover program expenses; this is a commendable example of writing retrospective review into rules that clearly states how DHS intends to modify its assumptions against future available program data.

Although difficult to quantify, DHS states, “the proposed rule is expected to generate important net benefits to the United States economy.” Among the benefits, DHS lists: job creation, spending on research and development, increases in total factor productivity, and innovation including technological spillovers into other areas of the economy.

## Retrospective Review

DHS should plan to perform retrospective review by including a section within the proposed rule that indicates how it will analyze the program’s effects once implemented. Executive Order 13563 states that agencies should:

consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.<sup>23</sup>

Although it seems intuitive that reducing barriers to entrepreneurship would generate significant economic gains for the U.S. economy, DHS should detail its plan for data collection and availability within its proposed rule. The aforementioned differences in the characteristics of start-ups across the United States indicate that DHS might improve the future effectiveness of its program by comparing its assumptions with data collected regarding start-up performance under its parole scheme. E.O. 13563 and the Office of Management and Budget’s implementation memo on retrospective review both suggest that “agencies should incorporate specific plans for retrospective review<sup>24</sup> and ex post evaluation into the text of their final rules.”<sup>25</sup>

## Recommendations

DHS’s proposed rule is a welcome step in reducing barriers to foreign entrepreneurship in the U.S. However, several of its current assumptions might be too stringent—creating unnecessary

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<sup>23</sup> Exec. Order No. 13563, Improving Regulation and Regulatory Review, § 6(a).

<sup>24</sup> United States. Office of Management and Budget. Office of Information and Regulatory Affairs. MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: Retrospective Analysis of Existing Significant Regulations. By Cass Sunstein. April 25, 2011.

<sup>25</sup> Sofie E. Miller “Learning from Experience: Retrospective Review of Regulations in 2014,” Working Paper, The George Washington University Regulatory Studies Center, November 2015. Available at: [https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/Retrospective%20Review%20in%202014\\_MillerS\\_11\\_3.pdf](https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/Retrospective%20Review%20in%202014_MillerS_11_3.pdf)

restrictions that exclude too many firms that would otherwise create a significant public benefit. In particular, DHS's proposed threshold for a capital investment of \$345,000 seems likely to exclude a significant number of start-ups from consideration simply because they would be located in relatively lower-cost areas of the U.S. or in lower cost economic sectors. Lowering this threshold and expanding the definition of qualified investments to include foreign capital would likely improve the potential for this rule to spur economic growth via increased entrepreneurship.

This comment also proposes additional criteria that USCIS adjudicators might consider for approving applicants during re-parole and suggest that DHS should explicitly state its plans for conducting retrospective review within its rule. Although it seems fairly intuitive that this rule is likely to result in considerable economic benefits with little foreseeable costs to the U.S., DHS should plan to conduct a retrospective review of its regulation pursuant to E.O. 13563. Making the data available to the public could aid DHS in future efforts to revise or expand the program. The following summarizes the changes proposed here:

- **Reduce the amount of investment required for an applicant to qualify for initial parole.**
- **Expand qualified sources of investment capital to include foreign investors and crowdfunding.**
- **Consider taxes paid as an additional criterion for approving applicants during re-parole.**
- **Prepare for retrospective review by including DHS's plans for collecting and sharing data on its program's outputs and outcomes; this will help the agency re-visit its assumptions against real-world results and modify or expand the program accordingly.**