



Buying Your Way into the USA: Entrepreneur Parole

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On August 31, 2016, United States Citizenship and Immigration Services (USCIS) published a proposed rule for what it is calling “International Entrepreneur Parole.” If implemented, this rule would allow Department of Homeland Security (DHS) to parole eligible “entrepreneurs of startup enterprises”:

- Who have a significant ownership interest in the startup (at least 15 percent) and have an active and central role to its operations;
- Whose startup was formed in the United States within the past three years; and
- Whose startup has substantial and demonstrated potential for rapid business growth and job creation, as evidenced by:
 - Receiving significant investment of capital (at least \$345,000) from certain qualified U.S. investors with established records of successful investments;
 - Receiving significant awards or grants (at least \$100,000) from certain federal, state or local government entities; or
 - Partially satisfying one or both of the above criteria in addition to other reliable and compelling evidence of the startup entity’s substantial potential for rapid growth and job creation.
- USCIS estimates that the Entrepreneur Parole program will attract approximately 2,940 entrepreneurs and 3,234 dependents each year. (No source is provided for these numbers.)¹

What does this mean? It is difficult for anyone to predict. The plan’s details are buried in 155 pages of confusing Federal Register text. But Entrepreneur parole appears to suffer from at least three obvious and significant problems: 1) It grossly exceeds USCIS’ legitimate parole authority. 2) Even if it were a legitimate exercise of USCIS authority, the program makes little sense from a business perspective. 3) The overall nature of the program renders it susceptible to fraud and abuse.

The Program Grossly Exceeds USCIS' Legitimate Parole Authority

The Constitution grants Congress the power to “establish a uniform Rule of Naturalization.”² In addition, the Supreme Court has concluded that Congress holds plenary authority to pass laws regulating immigration.³ This means that without express legislative permission, the Executive Branch may not create new avenues for immigrating to the United States. But the Entrepreneur Parole program appears to be exactly that—the Executive Branch attempting to change laws without Congressional authorization.

The narrow authority to parole aliens into the United States is granted to DHS by statute.⁴ Specifically, DHS has the authority to parole aliens who should otherwise be taken into custody because they are inadmissible to the United States. Parole may only be granted to an alien who does not pose a threat to security or a risk of absconding. Aliens who have been paroled into the United States are legally considered to be detained at the border awaiting a determination of their admissibility.⁵ After the purpose of the parole has been served, the alien is theoretically required to leave the country.⁶

Parole is a limited administrative measure, a fact that USCIS clearly states on its Humanitarian Parole website, which notes that “parole is used sparingly to bring someone who is otherwise inadmissible into the United States for a temporary period of time due to a compelling emergency.”⁷ Similarly, the Department of State’s Foreign Affairs Manual describes parole as “an extraordinary measure, sparingly utilized to permit an otherwise inadmissible alien to enter the United States for a temporary period due to an urgent humanitarian reason or for significant public benefit.”⁸ Parole was never intended to enable the Executive Branch to circumvent the legislative process and create new immigration programs by pre-approving broad classes of aliens for parole.⁹

In addition to exceeding the scope of executive parole authority, the Entrepreneur Parole program unlawfully expands the classes of persons to which parole may be granted. The current restrictions on the use of parole (*i.e.* use only on a case-by-case basis for “urgent humanitarian reasons” or for a “significant public benefit”) were enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), in direct response to Executive abuse of the parole authority.¹⁰

Significant public benefit parole involves aliens who will participate in investigations, be witnesses in judicial, administrative or legislative hearings in the United States, or whose continued detention is not in the public interest.¹¹ The significant benefit gained by the public is the prosecution of a crime, the orderly completion of hearings and the provision of relevant testimony or the release of an alien whose detention is not in the diplomatic interests of the United States. Alien investment in startup companies does not create significant public benefit within the meaning of the relevant statute and regulations. Any claims that it does are highly suspect from both an objective and a legal perspective.

The program makes little sense from a financial perspective.

Investment-based immigration schemes focused on generating capital for the host nation typically tie eligibility to a specific level of capital outlay through a government designated fund. For example, Hungary has strict requirements mandating that alien investors place 300,000 Euros (approximately \$350,000) in Hungarian government bonds for a minimum investment period of five years.¹² Similarly, Malta's Individual Investor Program requires a 650,000 Euro (approximately \$730,000) non-refundable donation to Malta's National Development and Social Fund for the principal alien and a 25,000 to 50,000 Euro donation (approximately \$28,000-\$56,000) for each dependent spouse and or child.¹³ (Even the troubled EB-5 program nominally requires the investment of one million dollars in a U.S. business or \$500,000 in specially designated businesses.)

Because the Hungarian and Maltese programs tie participation to the investment of specific amount, they can at least claim that participants have directly infused cash into their national economies. But USCIS' proposed rule never clearly states a required minimum buy-in requirement. Nor does it clearly specify that the startup must possess a set amount of initial capitalization or engage a set number of initial employees. Therefore, it appears that alien entrepreneurs who own 15% of a U.S. startup company, that has attracted \$345,000 in capital that was already present in the U.S., or \$100,000 in taxpayer-derived public funds, could obtain Entrepreneur Parole with a relatively small outlay of personal cash. They would not be obligated to employ a specific number of American workers at the time the initial parole application is filed. And they would bear no obligation to attract any additional capital that is not already present in the U.S. investment market.

How could the interests of the American people be served by admitting low-capital investors to manage startup businesses that are highly likely to fail and introduce only negligible amounts of capital into the U.S. economy? USCIS has not made that clear. It seems wedded to the questionable proposition that startup companies are most likely to experience rapid business growth and job creation. But the business community's assessment is not as optimistic. According to Forbes Magazine, startups fail at the rate of 90 percent.¹⁴

USCIS is proposing a program that relies heavily on speculative pop-culture notions about innovation and startups - notions that are not supported by any objective financial or economic evidence. The primary capital infusions will come from domestic investors or taxpayer-funded government grants. And the program appears to create few incentives that will draw stable investments into the U.S. from international capital markets. In fact, it seems more likely to accomplish the exact opposite by creating a large pool of unstable financial vehicles that discourage investors from placing capital at risk. Therefore, it is unclear how the Entrepreneur Parole program will stimulate economic activity in the United States.

Furthermore, the program appears to be a blatant end-run around the H-1B and EB-5 annual caps. It enables individuals who are essentially self-employed to avoid the legislative requirements imposed on applicants in other employment-based nonimmigrant classes. Although not admissible in any other nonimmigrant visa category entrepreneur parolees will be able to enter, and remain, in the United States while they seek any available avenue for permanent residence.

The overall nature of the program makes it susceptible to fraud and abuse.

Pay-for-status programs that require immigration benefit seekers to start and maintain a business in the United States present a number of challenges. First, they shift attention away from the legitimate aim of any business – generating profit. Instead, the business becomes a vehicle for obtaining an immigration status. And with a relatively generous limit of three alien entrepreneurs allowed to obtain status through the same startup, this program compounds the problem. Startups will inevitably spin off more startups to gain immigration benefits for additional investors. The net result is that promised benefits – job creation, capital investment, tax revenue, etc. – take a backseat to immigration concerns and are rarely achieved.

An ancillary effect is that these programs become a magnet for fraud and abuse. The security of any immigration benefits program is dependent upon USCIS' ability to conduct background checks of applicants and verify the materials submitted in support of their applications – a process commonly known as “vetting.” But USCIS can only engage in successful vetting of immigration applicants when they are required to prove eligibility for benefits by submitting evidence that is both persuasive and objectively verifiable.

Programs like Entrepreneur Parole, which require applicants to meet vague eligibility requirements, make it extremely difficult for USCIS to detect and deter fraud. For example, USCIS requires an alien investor to own a 15 percent interest in a startup company to be eligible for the proposed program. However, it never defines what “interest” means. Are parole seeking investors required to have put up 15 percent of the initial capital required to start the business entity, are they required to own a fixed number of the available shares of common stock at any point, or may they qualify based on some other type of ownership? Likewise, “company” is never defined. Generally speaking, “company” is a colloquial term that means any kind of commercial business. But the legal form in which a business is incorporated (*e.g.*, sole proprietorship, corporation, limited liability corporation, *etc.*) has a significant bearing on how, by whom and in what proportion the company is owned.

Sorting out this information is a challenge for government agencies charged with regulating businesses and financial institutions. The Department of the Treasury, the Department of Commerce and the Securities and Exchange Commission employ legions of economists, statisticians, accountants, MBA's and experienced attorneys to administer their programs. They also have decades of institutional knowledge relating to business, economics and finance. USCIS does not. Apart from a small staff of Ph.D. economists, USCIS does not employ anyone with a significant background in business. Rather, its institutional knowledge is focused on areas like geopolitics, global migration flows and family law. Simply put, USCIS lacks the personnel, technical expertise and immigration knowledge to administer this type of program. Should the proposed rule be implemented, USCIS is setting itself up for more problems like those the EB-5 program commonly experiences.¹⁵

Conclusion

Admitting low-capital investors to manage fiscally immature businesses in the vain hope that they will attract wealth to the United States does not serve the interests of the American people. It also makes little sense to expand asset-based immigration arrangements when USCIS finds itself unable to effectively administer its existing investment programs. In addition, the Entrepreneur Parole program's effects – if implemented – would range well beyond investment-based immigration. The program unlawfully expands the classes of persons to whom parole may be granted. Therefore, it sets a dangerous precedent for Executive Branch abuse of a statutory authority that has been clearly limited by the legislature. Congress should take appropriate action to block the implementation of this ill-considered program and curb ongoing Executive Branch abuse of immigration parole.

¹ USCIS, "USCIS Proposes Rule to Welcome International Entrepreneurs" (2016)

<https://www.uscis.gov/news/news-releases/uscis-proposes-rule-to-welcome-international-entrepreneurs>

² U.S. Const. art I, § 8, cl. 4 http://www.archives.gov/exhibits/charters/constitution_transcript.html

³ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)

<https://www.law.cornell.edu/supremecourt/text/130/581>

² U.S. Const. art I, § 8, cl. 4 http://www.archives.gov/exhibits/charters/constitution_transcript.html

³ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)

<https://www.law.cornell.edu/supremecourt/text/130/581>

⁴ 8 U.S.C. § 1182(d)(5)(A) (INA § 212(d)(5)(A)) https://www.gpo.gov/fdsys/pkg/USCODE-1994-title8/pdf/USCODE-1994-title8-chap11-subchapII_2-partII-sec1182.pdf;

8 C.F.R. § 212.5, *Parole of aliens into the United States*, <https://www.gpo.gov/fdsys/granule/CFR-2012-title8-vol1/CFR-2012-title8-vol1-sec212-5/content-detail.html>

⁵ See *Lynch v. Cannatella*, 810 F.2d 1363, 1370 (5th Cir. 1987).

⁶ See *Ibragimov v. Gonzales*, 476 F.3d 125, 134 (2d Cir. 2007) (discussing the purposes and limits of parole).

⁷ USCIS, "Humanitarian Parole," available at: <https://www.uscis.gov/humanitarian/humanitarian-parole>

⁸ 9 FAM 202.3-2, *Parole – Overview*, <https://fam.state.gov/FAM/09FAM/09FAM020203.html>

⁹ See *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958).

¹⁰ Chuck Grassley, "Press Release: Administration's Immigration Parole Practices Exceed Congressional Authorization," (Nov. 4, 2015) available at: <http://www.grassley.senate.gov/news/news-releases/administration%E2%80%99s-immigration-parole-practices-exceed-congressional-authorization>

¹¹ *Memorandum of Agreement Between United States Citizenship and Immigration Services (USCIS), United States Immigration and Customs Enforcement (ICE), United States Customs and Border Protection (CBP) For the purpose of Coordinating the Concurrent Exercise by USCIS, ICE and CBP of the Secretary's Parole Authority Under INA § 212(d)(5)(A) With Respect to Certain Aliens Located Outside of the United States* (Sept. 01, 2008) <https://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf>

¹² Embassy of Hungary, Beijing China, "Program overview of the Hungarian Investment Immigration Program" available at:

http://www.mfa.gov.hu/kulkepviselet/CN/en/en_Konzuliinfo/hu_investment_program_overview.htm

¹³ Government of Malta, "Introduction to: Malta's Individual Investor Programme," available at: <http://iip.gov.mt/>

¹⁴ Neil Patel, "90% Of Startups Fail: Here's What You Need To Know About The 10%", *Forbes*, Jan. 26, 2015, <http://www.forbes.com/sites/neilpatel/2015/01/16/90-of-startups-will-fail-heres-what-you-need-to-know-about-the-10/#288cf8b55e19>

¹⁵ See Department of Homeland Security Inspector General's report "United States Citizenship and Immigration Services' Employment-Based Fifth Preference (EB5) Regional Center Program" https://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-19_Dec13.pdf and the Government Accountability Office's report "IMMIGRANT INVESTOR PROGRAM: Additional Actions Needed to Better Assess Fraud Risks and Report Economic Benefits" <http://www.gao.gov/assets/680/671940.pdf>