AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

October 17, 2016

Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529

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

Re: Proposed International Entrepreneur Rule
81 Fed. Reg. 60130 (Aug. 31, 2016)
DHS Docket No. USCIS–2015–0006

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Immigration Council) submit the following comments in response to the Department of Homeland Security's (DHS) proposed "International Entrepreneur Rule," published in the Federal Register on August 31, 2016.[1]

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Since 1946, our mission has included the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council has played an instrumental role in highlighting the important economic contributions of immigrants at the local and federal levels. In addition, through its work on the economic benefits of immigration reform, the Immigration Council has helped to establish baseline standards for understanding the important role immigration plays in shaping and driving a twenty-first century American economy.

[1] 81 Fed. Reg. 60130 (Aug. 31, 2016).

We appreciate the opportunity to comment on this proposed rule and believe that our collective expertise and experience make us particularly well-qualified to offer views that will benefit the public and the government.

INTRODUCTION

The efforts of the Administration to find ways to support and retain foreign entrepreneurs is an important recognition that our immigration laws have not kept pace with modern business practices and that immigrants play a significant role in business creation. We applaud these efforts, welcome that recognition, and hope to continue to partner with DHS in exploring opportunities within our existing legal structure to attract and retain foreign entrepreneurs. However, we are deeply concerned that the proposed regulation, as currently written, will not be a practical tool for attracting and retaining promising businesses and their founders. Our comments focus on modifying and clarifying the program so that it can fully support entrepreneurs and innovators who seek to build their businesses in the United States.

SHORTCOMINGS OF PROPOSED REGULATORY CRITERIA FOR INITIAL PAROLE AND RE-PAROLE AND PROPOSED MODIFICATIONS TO MAKE PAROLE A MORE VIABLE OPTION FOR ENTREPRENEURS

Many of the proposed criteria for both an initial grant of parole and re-parole could only be satisfied by a company in a fairly advanced stage of operations. A foreign national who has successfully built a U.S. business to the extent contemplated by the rule likely holds some type of nonimmigrant visa status – such as an E-2, L-1 or O-1 – and therefore would not need parole. Instead, the proposed parole program will likely attract F-1 students who are starting a business as a part of their MBA studies.[2] Unfortunately, the requirements for parole as proposed would be incredibly challenging, if not impossible, for foreign students working in their own start-up companies to meet.

The proposed rule necessitates a high level of outside investment, contains burdensome qualifications for the source of the investment, requires the entrepreneur to have a large percentage of ownership interest, and demands that the entrepreneur maintain a relatively sizeable yearly income. In addition, foreign students working on Optional Practical Training (OPT) who wish to seek parole would need to file the parole application at least three to six months prior to the expiration of OPT. This would effectively afford foreign students only six to nine months to grow their businesses in a way that would make them eligible for parole status.

---

[2] Many U.S. business schools have entrepreneur programs and courses, and numerous U.S. businesses have been started from such programs. *See, e.g.*, Massachusetts Institute of Technology, MBA Entrepreneurship & Innovation Track, available at http://entrepreneurship.mit.edu/mba-entrepreneurship-innovation/ and 2016 Facts. *Entrepreneurship and Innovation*, available at http://web.mit.edu/facts/entrepreneurship.html; University of Chicago Booth School of Business, *Entrepreneurship*, available at https://www.chicagobooth.edu/programs/full-time/academics/curriculum/entrepreneurship; University of Maryland Robert H. Smith School of Business, Full-time MBA, available at http://www.rhsmith.umd.edu/programs/full-time-mba/about-us. However, foreign students in MBA programs are generally not eligible for an extension of Optional Practical Training (OPT) beyond the standard one year, and may not be eligible for a different visa status to develop and grow a fledgling business. As a result, promising ideas that may lead to U.S. job creation are abandoned or pursued in other countries.

Quite simply, this is not enough time to build a business and attract the required investors under the proposed regulation.

Rather than create a set of burdensome criteria and an alternative path fraught with uncertainty, we urge DHS to embrace a program with a realistic framework that would be truly accessible to those who have only recently graduated from a U.S. university or graduate school and are using their OPT work authorization to launch a promising start-up.

DHS Should Reduce the Required Amount of Outside Investment and Modify the Growth Requirements

The qualifying investment threshold of $345,000 is prohibitively high. We suggest that DHS lower this amount to $120,000, which would bring the required investment in line with that which is provided by some of the top accelerators. For example, Y Combinator generally provides its start-up entities with $120,000 in funding.[3] In 2013, based on its model for funding and selecting start-ups, 37 of the 511 companies that graduated from Y Combinator's program were worth at least $40 million.[4] If $120,000 is a funding level that allows promising start-ups to raise future funding and to grow into multi-million dollar entities, this should be a satisfactory initial funding threshold for the parole program, which similarly seeks to encourage innovation and the development of high-growth businesses. A lower investment threshold would also create more opportunities for promising start-ups founded by foreign students in U.S. MBA entrepreneurship programs. Similarly, the investment requirement of $500,000 for re-parole is too high. Since our recommended initial investment is roughly 35% of DHS' proposal, we recommend that the re-parole requirement be no greater than 50% of DHS' proposal, which would be $250,000.

In cases where the threshold investment is not met, an applicant may provide "other reliable and compelling evidence" of the entity's substantial potential for rapid growth and job creation.[5] DHS has not defined the type of evidence that might be deemed "reliable and compelling," but notes that such evidence would need to be "particularly persuasive."[6] Though we appreciate DHS's efforts to extend parole to individuals who might only partially meet the proposed regulatory criteria, we are concerned that this alternative standard is too vague. With respect to other immigration benefits that permit an applicant or petitioner to demonstrate eligibility through a similar provision, our experience has been that adjudicating officers more often than not zealously adhere to the prescribed benchmarks, rendering the alternative criteria provision meaningless. Thus, in order to ensure that deserving entrepreneurs are able to qualify for parole, it is imperative that DHS reduce the required investment, and make other changes described herein.

[3] *See* Y Combinator, Frequently Asked Questions, "How Much Do You Invest?" available at http://www.ycombinator.com/faq/.
[4] *See* Megan Rose Dickey, "Why Y Combinator Is The Hottest Startup School In Silicon Valley," Business Insider May 28, 2013, available at http://www.businessinsider.com/y-combinator-2013-5.
[5] Proposed 8 CFR §212.19(b)(2)(iii).
[6] 81 Fed. Reg. at 60141-42.

We also suggest that a formal recommendation from a governmental economic development council or similar agency should be specifically mentioned as a form of "other reliable and compelling evidence" that would create a rebuttable presumption that the business has the "potential for rapid growth and job creation." These agencies have significant expertise in evaluating a start-up company's potential for growth. This change would also reduce the evidentiary burden on both applicants and adjudicators.

DHS Should Revise the Definition of a "Qualified Investor" and Broaden the Acceptable Sources of Investment

The proposed rule states that a "qualified investor" must be a U.S. citizen (USC), Lawful Permanent Resident (LPR) – or a U.S. entity that is majority owned and controlled by USCs or LPRs – with a proven track record of having made investments in other start-up entities in at least three separate calendar years totaling no less than $1,000,000, and that at least two of those entities created five "qualified jobs" or generated $500,000 in revenue with an average annualized growth of at least 20%.[7] These limitations on "qualified investors" are extremely stringent and disregard critical ways in which entrepreneurs often fund their growing enterprises, such as personal investments, bank loans, friends and family, business acquaintances, venture capitalists, and government grants.[8]

For example, a report from the Global Entrepreneurship Monitor shows that more than 80% of funding for new businesses comes from personal savings and friends and family.[9] Thus, a qualified investor should include the entrepreneur, his or her parents, spouse, brother, sister, son, or daughter, or any corporation, limited liability company, partnership, or other entity in which the entrepreneur or his or her family members has any direct or indirect ownership interest. As long as the entrepreneur has received the funds by legitimate means and from a lawful source, and has control and possession over the funds, the funds should be counted towards the qualifying investment.

Additionally, the proposed rule would only count money invested in the prior year toward the threshold of $345,000.[10] This is unnecessarily restrictive and will eliminate businesses that may have received funding at formation, and then additional funding within the prior 12 months. For example, some start-ups receive funding through incubator or accelerator programs, but then take more than 12 months to secure subsequent rounds of funding due to the process involved in finding the right group of investors and having to hit short-term, investor-created targets in

[7] Proposed 8 CFR §212.19(a)(5).
[8] *See* Ewing Marion Kauffman Foundation, Entrepreneurship Policy Digest, June 2, 2015, *"How Entrepreneurs Access Capital and Get Funded,"* available at http://www.kauffman.org/what-we-do/resources/entrepreneurship-policy-digest/how-entrepreneurs-access-capital-and-get-funded.
[9] 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/. *See also* Robert W. Fairlie, *Immigrant Entrepreneurs and Small Business Owners, and their Access to Financial Capital* at 21 (May 2012) ("The most common source of startup capital" for businesses started in the U.S. by foreign nationals "is from personal or family savings"), available at https://www.sba.gov/sites/default/files/rs396tot.pdf.
[10] Proposed 8 CFR §212.19(b)(2)(ii).

product development or user acquisition. We suggest that DHS change the rule to require the enterprise to have received its qualifying funding within three years prior to applying for parole.

Lastly, proposed 8 CFR §212.19(a)(4) fails to define "capital" for purposes of a qualifying investment. The final rule should define capital to include cash, payments for leases or rents, the value of goods or equipment, and intangible property.

DHS Should Decrease the Required Ownership Interest, Remove the Three Person Limitation, and Modify the Definition of an Entrepreneur

Proposed 8 CFR §212.19(a)(1) would require a parole applicant to have a 15% ownership interest in the entity to obtain an initial two-year grant of parole, and maintain at least 10% ownership in the entity at all times thereafter. These ownership thresholds will discourage rapid growth, job creation, and, in particular, the ability to obtain venture capital-based funding. This contradicts the objectives of the program, and may stall business development.

In a typical first round of venture capital (VC) financing, the equity divestment might be as follows: [11]

- *Lead VC Investor*: 20-25%. VCs typically insist on owning at least 20% of all early stage portfolio companies.
- *Co-Investor VC*: 20- 25%, alongside co-investor VC.
- *Option Pool* (for employees): 15-20%.
- *Founders*: Remainder.

In addition, start-up ventures often have several co-founders. For example, Y Combinator, recognized by many as the leading start-up accelerator, ideally seeks to invest in companies with two or three founders, will consider companies with four or five founders, but is "reluctant to accept one-person companies."[12] Based on the figures noted above, and the reality that there are typically two to four co-founders in any given start-up,[13] it could easily be the case that the co-founders would own 7.5% to 11.25% of the start-up entity. Accordingly, setting the minimum ownership interest for parole at 10%,[14] and for re-parole at 5%, would represent more realistic ownership interests for an international entrepreneur.

Consistent with encouraging innovation and job creation, USCIS should consider the size and scale of a start-up, rather than rigidly imposing a three-person limit on the number of entrepreneurs.[15] As noted above, there are situations where Y Combinator, the well-known start-up accelerator, will consider investing in companies with four or five founders.

---

[11] *See* Entrepreneur Magazine, December 9, 2007, *"4 Venture Capital Myths,"* available at www.entrepreneur.com/article/204198, *See also* http://fundersandfounders.com/how-funding-works-splitting-equity./

[12] *See* Y Combinator "How do we choose who to fund?" available at http://www.ycombinator.com/apply/.

[13] *See id*.

[14] For example, Y Combinator requires only 10% equity to be considered a founder. *See id*.

[15] Proposed 8 CFR §212.19(f).

We also recommend that DHS clarify the definition of "entrepreneur," which currently requires the individual to be "well-positioned, due to his or her knowledge, skills, or experience … to substantially assist" in growing the business in the United States,[16] but does not explain how an applicant would demonstrate this requirement. We suggest that the "substantial ownership interest" test in the same provision be utilized as a rebuttable presumption that the entrepreneur is "well-positioned," and that the "significant capital financing" requirements reflect the market demand for the entrepreneur to grow the business.

DHS Should Reduce the Required Household Income Level for Entrepreneurs

The proposed rule would require as a parole condition that the entrepreneur maintain a household income that is greater than 400% of the federal poverty line for a household of his or her size. For a family of two, this would be $64,080 under the 2016 guidelines, and for a family of four, this would be $97,200. These amounts are prohibitively high. First, many entrepreneurs pay themselves a smaller salary during the initial years.[17] Second, the ability of the entrepreneur's spouse to contribute to the household income may be limited by factors such as childcare responsibilities or a visa status that prohibits employment. We suggest reducing the income requirement to 200% of the federal poverty line and permitting the alternative of demonstrating that the entrepreneur has sufficient personal funds – through savings, family money, or other sources – to adequately support him or her and any dependents while the enterprise is being launched.

DHS Should Implement a More Flexible Definition of Full-Time Employment

In order to be eligible for re-parole, the proposed rule would permit the applicant to demonstrate that the entity continues to have substantial potential for rapid growth and job creation through one of three criteria. One such criterion is that the entity created at least 10 "qualified jobs" during the initial parole period.[18] DHS defines "qualified jobs" as full-time paid employment located in the United States that has been filled for at least one year by a qualifying employee (a USC, LPR, or other immigrant lawfully authorized to be employed in the U.S. who is not an independent contractor, or an entrepreneur of the start-up, or the parent, spouse, sibling, or child of such entrepreneur).[19] The term "full-time employment" is further defined as paid employment of an employee by the entrepreneur's start-up entity in a position that requires a minimum of 35 working hours per week.[20] The final rule should have a more flexible definition of full-time

[16] Proposed 8 CFR §212.19(a)(1).
[17] A 2013 study found that 73% of start-up founders took a salary of $50,000 or less (not including ownership interest or additional benefits), irrespective of whether they had funding. *See* Compass, *73% of Startup Founders Make $50,000 Per Year or Less*, January 14, 2014, available at http://blog.compass.co/73-percent-of-startup-founders-make-50-dollars-000-per-year-or-less/. Articles also advise that founders begin with a minimum salary amount. *See, e.g.*, Ameen Khwaja (excerpted from The Small Business Encyclopedia), Entrepreneur Magazine *Paying Yourself: From Startup and Beyond* (typically takes three to six months to break even, but raising salary at that point can throw business into the "red"), available at https://www.entrepreneur.com/article/80024; Entrepreneur Magazine July 28, 2015, *How much should you pay yourself as a business owner?* (noting that most start-ups operate at a loss generally for six months and sometimes for up to two years and advising that salary start at the minimum range), available at https://www.entrepreneur.com/article/244991.
[18] Proposed 8 CFR §212.19(c)(2)(ii)(B)(2).
[19] *See* proposed 8 CFR §212.19(a)(6)-(7).
[20] *See* proposed 8 CFR §212.19(a)(8).

employment that does not require the job to be filled for at least one year and that recognizes job-sharing arrangements. We propose amending the rule to align with the definition of "full-time employment" found at 8 CFR §204.6(e), and specifically including job-sharing arrangements where two or more qualifying employees share a full-time position.

PROCEDURAL SHORTCOMINGS AND PROPOSED MODIFICATIONS TO MAKE PAROLE A MORE VIABLE OPTION FOR ENTREPRENEURS

DHS Should Explicitly Permit Parole in Place for Applicants in the United States

The proposed regulations do not prohibit parole in place as an option for entrepreneurs who may be present in the United States, nor do they explicitly allow it. However, proposed 8 CFR §212.19(d)(2) implies that a person who is in the United States who is granted parole would need to "appear at a port of entry to be granted parole" to assume parole status. DHS should amend the regulations to specifically articulate that parole in place may be granted to entrepreneurs and their dependents who are already in the United States so that they do not have to leave and potentially disrupt their business activities.

DHS Must Clarify the Evidentiary Standards

The Supplementary Information to the proposed rule 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" to meet the standards under proposed 8 CFR §212.19(b)(2)(ii)(A).[21] While we appreciate that DHS is willing to consider various types of evidence when assessing these requirements, we are concerned that the evidentiary burdens are too high.

First, much of the extensive documentation that will be required, such as newspaper articles and letters from third parties, is only attainable if the entity is public facing. Start-up entities working on highly innovative and proprietary technologies frequently operate in "stealth mode" while in the research and development phase of operations.[22] A company operating in stealth mode is marked by a temporary period of secrecy where it does not publicize its existence, operations, or achievements. This may be necessary to avoid alerting competitors to intellectual property developments, a target launch date, or other business initiatives; to allow the business to have sufficient space to solidify a strategy for adding new capabilities; or to maintain customer interest and avoid being overshadowed by a product from a larger company. This has been a regular practice in start-up entities for the last decade.[23] For such start-up entities, the risk of disclosure while documentation is being compiled may substantially outweigh any benefit to the founder in applying for parole.

Second, the amount of evidence that would be required to show that an applicant qualifies for parole would be overwhelming, and in this regard, DHS's estimate that it would take 1.33 hours

[21] 81 Fed. Reg. at 60138.
[22] 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.
[23] *See id.*

to compile the information and complete the application is far too low. Placing burdens of this magnitude on young start-ups, including those operating in stealth mode, could easily present roadblocks that would divert precious time and attention away from developing the business itself, at the cost of rapid growth and job creation.

Significant capital investment from qualified investors in and of 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 belief in the potential for a significant return. Alternatively, USCIS could create a process for accelerators and incubators to "register," and bypass the excessive paperwork requirements for each parole application. Accelerators are significant drivers of economic growth, and USCIS acknowledges that graduating from such a program can be a "strong indicator of the entity's potential."[24] The registration process could be similar to the L-1 blanket petition, whereby the necessary corporate relationship for L-1 status is predetermined to both speed up the visa application process and reduce the burdens on all parties.

If DHS elects to retain these onerous evidentiary requirements, it should make clear that the evidentiary standard is the "preponderance of the evidence" for all entrepreneur parole adjudications, including when an applicant seeks to satisfy 8 CFR §212.9(b)(2)(ii)(B) using alternative criteria. Entrepreneurs work in an extremely dynamic environment, and there are no set rules that uniformly apply to all start-up companies. Each is unique and finds its own individual path to success. Very often, breaking from convention is what allows an entrepreneur to succeed. To ensure that start-up businesses are allowed to flourish in the U.S., the evidentiary burdens should not be too onerous.

DHS Should Provide Automatic Work Authorization for Spouses

We applaud DHS for proposing that entrepreneurs who are granted parole will be authorized for employment incident to status, and for providing an automatic 240-day extension of work authorization while a re-parole application is pending.[25] However, we urge DHS to also allow spouses of parolees to be authorized to work and eliminate the requirement that they file a separate employment authorization application. In order to attract entrepreneurial talent, it is imperative that there not be unnecessary obstacles for family members. The spouses of entrepreneurs should also be permitted to contribute to the U.S. economy, and provide critical financial support to the household while the entrepreneur focuses on building the business. Obstacles that would keep them from doing so should be minimized or eliminated.

DHS Should Allow Premium Processing for Entrepreneur Parole Applications

DHS should allow for premium processing of entrepreneur parole applications in order to meet the fast-paced demands and changing contexts of start-ups. Recognizing the complexity of these cases, we recommend that the premium processing time be extended beyond the normal 15 days to 30 days.

[24] 81 Fed. Reg. at 60142.
[25] Proposed 8 CFR §212.19(g) and 8 CFR §274a.12(b)(37).

DHS Should Ensure Due Process in Parole Adjudications and Terminations

The Supplementary Information to the proposed rule states that parole decisions would be based on the totality of the evidence, including evidence obtained from background checks and "other means."[26] DHS should commit to issuing Requests for Evidence (RFE) if information from such sources raises questions of eligibility. This would be consistent with AFM Ch. 10.5, "Requesting Additional Information" and 8 CFR 103.2(b)(16)(i). Similarly, DHS should provide notice and an opportunity to respond before revoking or terminating parole in all cases. Entrepreneurs and their investors must have some certainty that the entrepreneur will not arbitrarily lose parole status without having an opportunity to confront the allegations.

DHS should also allow applicants to file appeals and/or motions to reopen or reconsider. Without an appeal or motions process, the only option for an individual who believes his or her application was wrongfully denied is to file a new application with a new filing fee, or hope that USCIS will exercise its *sua sponte* authority to reopen the case on its own motion. This policy will fail to hold USCIS adjudicators accountable for even the simplest of mistakes, and will decrease the public's trust in the program.

DHS Should Eliminate the Requirement that a New Application Be Filed for Every Material Change

Proposed 8 CFR §212.19(j) would require an entrepreneur to file a new parole application any time a material change occurs. The proposed rule defines 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 preamble indicates, and the broad language of the definition appears to confirm, that changes in ownership and financing, and other events common to start-ups, would constitute a material change and trigger this new application requirement. *See* 81 Fed. Reg. at 60146.

Having to file a new application each time there is a change that may be deemed "material" is too burdensome, costly, and time-consuming for entrepreneurs, who should be allowed to focus on their business. Start-ups are constantly evolving. Ownership changes and funding changes often shift as new waves of financing come through. The founding entrepreneur may change job titles, or add responsibilities to his or her portfolio. For example, it is not uncommon for a CFO with an engineering background to also work on product or business development. If a larger company buys the start-up, the parolee may lose some ownership but still remain essential to the entity's success. Under the proposed rule, all such changes would require a new parole application.

Moreover, changes like those described above often occur swiftly and in immediate succession, creating additional paperwork burdens and causing confusion when a new parole application is already pending. We suggest that the parole rules borrow from policies specific to the EB-5 immigrant investor program, where DHS gives deference to prior approvals as long as the changes meet certain conditions.[27] In the EB-5 context, DHS acknowledges that "the process of

[26] 81 Fed. Reg. at 60132.
[27] "EB-5 Adjudications Policy," PM-602-0083 (May 30, 2013), pp. 23-26.

establishing a new business and creating jobs depends on a wide array of variables over which an investor or the creator of a new business may not have any control."[28] We also recommend that DHS clarify what constitutes a "material change" given the rapidly evolving nature of start-ups. And lastly, if a material change filing is necessitated, the entrepreneur should only be required to file an update as opposed to having to re-file an entire parole or re-parole application.

FACILITATING PATHWAYS TO PERMANENT RESIDENCE

The proposed regulations do not address what will happen to entrepreneurs after the maximum of five years of parole time has expired. Many, if not most, successful entrepreneurs who use this parole regulation will not only want to stay in the United States beyond five years, but also will need to remain to continue their business activities. There are several actions that the administration should take to facilitate a path to permanent residence.

First, DHS should extend parole status for those who have employment-based second preference (EB-2) national interest waiver (NIW) petitions or other employment-based petitions pending or approved at the time of the five-year parole expiration, and permit parole to continue until the individual's employment-based priority date is current. DHS should work closely with the Department of State to expedite processing of these applicants, so that immigrant visa processing can be accomplished within one year after the priority date is current in order to facilitate business continuity.

Second, DHS should clarify the NIW eligibility criteria to create a rebuttable presumption that an entrepreneur who has been granted parole qualifies for an NIW based on economic benefit to the nation and/or job creation. On November 20, 2014, DHS Secretary Jeh Johnson issued a memorandum stating the NIW is "underutilized" and directing USCIS to issue guidance to "clarify 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." [29] Unfortunately, almost two years later, this guidance has not been issued. USCIS should not only make the guidance a priority, it should also incorporate this rebuttable presumption into it.

USCIS should also make it clear that job creation is a benefit that is *per se* national in scope for purposes of a national interest waiver, and should amend AFM 22.2(2)(C), which lists the criteria for establishing exceptional ability, to provide examples of qualifying "comparable evidence" that would apply to entrepreneurs, such as holding patents or securing financial commitments from outside investors. Adding clarifications to the AFM will help to promote and encourage foreign entrepreneurs to start businesses in the United States, and facilitate the process of adjudicating those petitions.

[28] *Id*. at 24.
[29] *DHS Memo on Policies Supporting U.S. High-Skilled Businesses and Workers*, AILA Doc. No. 14112009 (November 14, 2015), available at http://www.aila.org/infonet/dhs-memo-on-policies-supporting-us-high-skilled.

ADDITIONAL PROPOSALS TO ATTRACT AND RETAIN FOREIGN ENTREPRENEURS

As noted, we welcome the efforts of DHS to explore opportunities to attract and retain talented foreign nationals who wish to start promising enterprises in the United States. Parole for entrepreneurs is an important piece of the puzzle that will benefit a small, but critical group of entrepreneurs. However, the Administration should also take the following, additional steps to encourage and aid other entrepreneurs who wish to build their businesses in the United States.

DHS Should Increase the Initial Period of Stay for L-1 Nonimmigrants Starting a New Office in the U.S.

When a multinational entity has just begun operations in the U.S. or has been doing business less than one year, an L-1 nonimmigrant classification is available for a one-year period. If the petition is for a managerial or executive position, DHS requires evidence about the office's business operations and financial goals, among other requirements, to demonstrate that the office can support an executive or manager within that year. If the petition is for a specialized knowledge position, DHS requires evidence that the petitioner can commence doing business to support a specialized knowledge worker. In all cases, DHS requires evidence that there are sufficient physical premises for the U.S. operations and financial ability to pay the transferee and operate the business. *See* 8 CFR §214.2(*l*)(3)(v)-(vi). DHS should increase the initial period of stay for an L-1 nonimmigrant starting a new office in the United States from one to two years, and provide reasonable criteria for the approval of new office L petitions. As is recognized in the proposed parole regulations, it often takes more than one year for a new business to be launched and achieve some level of stability.[30] With respect to L-1 visa classifications for those who will open new offices, RFEs are very common and cause substantial adjudicatory delays, such that often the one-year regulatory approval period is truncated to less than one year. We suggest that USCIS amend the regulation governing L-1 visa classifications for new offices to provide a full two-year period of initial stay, starting from the date the petition is approved.

DHS Should Provide an Additional Period of OPT for Entrepreneurs

DHS should provide an additional period of OPT for students specializing in entrepreneurship or enrolled in entrepreneurship programs at graduate business schools in the United States.[31]

DHS Should Expand On-Campus Employment Options for F-1 Students

DHS should expand permissible on-campus employment opportunities for F-1 students with university-affiliated incubators, entrepreneur programs, and accelerators.

---

[30] See 81 Fed. Reg. at 60144 and proposed 8 CFR §§212.19(d)(2)-(3).

[31] A recent study of 87 privately held U.S.-based start-up companies valued at $1 billion determined that "nearly one-quarter (20) of [these] companies had a founder who first came to America as an international student" and that 51% (44) "had at least one immigrant co-founder." *See* Stuart Anderson, National Foundation For American Policy, Policy Brief, *Immigrants and Billion Dollar Start-Ups* at 4-5 (March 2016), available at http://nfap.com/wp-content/uploads/2016/03/Immigrants-and-Billion-Dollar-Startups.NFAP-Policy-Brief.March-2016.pdf.

Clarify H-1B Cap Exemptions

DHS should clarify that work at a university-affiliated incubator, entrepreneur program or accelerator is exempt from the H-1B cap. For this purpose, "affiliated" should mean an incubator, entrepreneur program or accelerator for which the school has provided physical premises on its campus or which is connected to the school by contractual relationship.

CONCLUSION

We thank DHS for providing the opportunity to comment on these proposed rules and look forward to continuing the dialogue on this important topic.

Respectfully Submitted,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL