United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

October 18, 2016

VIA ELECTRONIC TRANSMISSION

The Honorable Jeh Johnson
Secretary
Department of Homeland Security
Washington, DC 20528

Dear Secretary Johnson:

We write to express our concern about the manner in which the Administration continues to abuse its immigration parole authority, in particular with respect to the recently proposed parole program for foreign "entrepreneurs."[1] Instead of asking Congress to consider a new visa program for foreign entrepreneurs, or waiting to see if Congress enacted pending legislation on the matter, your Department has simply decided to unilaterally establish such a visa program completely outside its scope of legal authority. Sadly, as is described in the letter Senators Grassley, Sessions, and Lee sent you on November 3, 2015, such abuse of the parole authority by your Department is not unprecedented, but this latest action is particularly troubling and breathtaking in its audacity.[2] What your Department is doing now, and has been doing for some time with the parole authority, is not lawful, undermines the integrity of the immigration laws, and infringes on the primacy of Congress in setting immigration policy. It needs to stop.

The regulation that your Department is proposing would authorize the grant of parole to "entrepreneurs" running startup entities "whose stay in the United States would provide a significant public benefit through the substantial and demonstrated potential for rapid business growth and job creation."[3] Under this proposed rule, DHS would parole into the United States for a period of two years foreign nationals who have a significant ownership interest in a startup

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[1] International Entrepreneur Rule, Proposed Rule, DHS; United States Citizenship and Immigration Services, 81 Fed. Reg. 60,130 (Aug. 31, 2016), available at https://www.gpo.gov/fdsys/pkg/FR-2016-08-31/pdf/2016-20663.pdf.
[2] Letter to Jeh Johnson, Secretary of Homeland Security, from Senator Grassley, Senator Sessions, and Senator Lee (Nov. 3, 2015), available at http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2015-11-03%20CEG,%20Sessions,%20Lee%20to%20DHS%20(Immigration%20Parole).pdf.
[3] "USCIS Proposes Rule to Welcome International Entrepreneurs," News Release, United States Citizenship and Immigration Services (Aug. 26, 2016), available at https://www.uscis.gov/news/news-releases/uscis-proposes-rule-to-welcome-international-entrepreneurs.

(at least 15 percent) that was formed in the United States within the past three years. The start-up would also have to show evidence of 1) capital investment of at least $345,000 from certain qualified U.S. investors; 2) receipt of awards or grants of at least $100,000 from certain federal, state or local government entities; or 3) partial satisfaction of 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."[4] The "entrepreneur" could have his parole extended for up to three additional years "if the entrepreneur and the startup entity continue to provide a significant public benefit as evidenced by substantial increases in capital investment, revenue or job creation."[5]

Parole authority is exercised under section 212(d)(5)(A) of the Immigration and Nationality Act, which provides that the Secretary of Homeland Security "may ... in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States[.]" The "case-by-case" restriction was inserted into the law in 1996 after years of abuse of the parole authority under which whole classes of favored aliens who didn't qualify for admission as refugees or under any existing visa programs were being paroled into the country by the President. The whole point of the restrictions on the parole authority enacted in 1996 was (1) to ensure that the parole authority would be used only on behalf of *individual* aliens, rather than groups; and (2) to prevent the Executive Branch from using parole to go around Congress and let entire groups of people into the country who do not qualify under any existing immigration categories. As the House Judiciary Committee stated at the time: "[Parole] should not be used to circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories."[6]

In light of the letter of the law and the history behind it, this proposed parole program for "entrepreneurs" is without question unlawful.

First, the program would let into the country an unlimited number of people who satisfy certain pre-established eligibility criteria for parole; the eligibility criteria clearly describe *an entire class* of potentially thousands of aliens. Yet, when this criticism has been raised in the past, your Department has argued that the case-by-case requirement is not violated because the

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[4] Id.

[5] Id.

[6] Section 523, House Rept. 104-469 (March 4, 1996), at 140-41 (available at https://www.congress.gov/104/crpt/hrpt469/CRPT-104hrpt469-pt1.pdf). *See also* Cruz-Miguel v. Holder, 650 F.3d 189, 198-200 (2nd Cir. 2011), footnote 15 (stating that Congress' concern in enacting amendments to the parole authority was that "parole under § 1182(d)(5)(A) was being used by the executive to circumvent congressionally established immigration policy."); and "Memorandum of Agreement Between U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. 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" (Sep. 2008), at 2 (available at http://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf) ("Parole is an extraordinary measure, sparingly used only in urgent or emergency circumstances, by which the Secretary may permit an inadmissible alien temporarily to enter or remain in the United States. Parole is not to be used to circumvent normal visa processes and timelines.").

decision to grant parole, even if made according to class-wide criteria, is made one alien at a time, as each individual alien presents him- or herself for inspection at a port of entry. As Senators Grassley, Sessions, and Lee stated in their November 3 letter, this tortured, ultra-legalistic justification undercuts the goal of Congress in creating that requirement in the first place and renders the case-by-case requirement in the statute meaningless, as *every* parole determination is necessarily made one alien at a time.

Second, the "entrepreneurs" being paroled into the country under this program are *already* able to enter the country to run their businesses under a variety of existing visa programs.[7] The most obvious visa categories for such endeavors are the E-2 visa category, which allows foreign nationals to come to the U.S. to direct and develop the operations of a business which they have established and in which they have invested, and the EB-5 immigrant visa category for "alien entrepreneurs" engaging in a new commercial enterprise in which they have invested the required amount.[8] With the creation of this parole-based visa program for entrepreneurs, the Department is in effect saying that it doesn't think the programs created by Congress are sufficient, and is substituting its will for the will of Congress.

Third, this proposed program goes around Congress in yet another way by effectively implementing, by means of parole, the substance of a bill that was introduced in Congress but was never taken up for consideration: the StartUp Visa Act, initially introduced in 2010 and re-introduced various times, with slight modifications, since that time.[9] The StartUp Visa Act, like the proposed DHS parole program, would grant lawful status (in the case of the Act, a Green Card) to foreign nationals (1) establishing a start-up enterprise with certain required amounts of financial backing from a qualifying investor or venture capitalist; and (2) whose commercial activities will generate certain required levels of employment, revenue, or capital investment.

This sort of action by your Department is not unprecedented. The Deferred Action for Childhood Arrivals (DACA) program effectively implements the key elements of the DREAM Act, which Congress had earlier rejected. More recently, the Department announced it will allow certain family members of Filipino-American World War II veterans to request parole to come to the United States to provide support and care to their Filipino veteran family members who are U.S. citizens or Lawful Permanent Residents.[10] That proposed program is de facto implementation, by parole, of the Filipino Veterans Family Reunification Act of 2015 and earlier substantively identical bills, which, like the Start Up Visa Act and the DREAM Act, was never passed by Congress.[11] The parole authority isn't a magic wand that the Department can use whenever it wants to create a visa program that Congress has, for whatever reason, chosen not to pass or even consider.

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[7] U.S. Citizenship and Immigration Services (USCIS) itself has touted several "visa pathways" for entrepreneurs in its online "Entrepreneur Visa Guide." Entrepreneur Visa Guide, U.S. Citizenship and Immigration Services, available at https://www.uscis.gov/eir/visa-guide/entrepreneur-visa-guide.

[8] Section 203(b)(5) and 216A of the Immigration and Nationality Act.

[9] StartUp Visa Act, S. 3029 (111th Cong); StartUp Visa Act of 2011, S. 565 (112th Cong.); StartUp Visa Act of 2013, S. 189 (113th Cong.).

[10] The White House, Modernizing and Streamlining Our Legal Immigration System for the 21st Century (July 2015), at p. 38 (available at https://www.whitehouse.gov/sites/default/files/docs/final_visa_modernization_report1.pdf)

[11] S. 733 (114th Cong.) (Hirono bill); S. 1141 (112th Cong.) (Akaka bill).

We are aware that USCIS is also working on guidance to "clarify" when "entrepreneurs" who have been paroled into the country under this program may self-petition for lawful permanent residence.[12] This is the inevitable complement to the parole program, supplying the missing element in de facto implementation of the Start Up Visa Act by creating a path to permanent residence, and thereafter U.S. citizenship, for these parolees. The way that your Department intends to open a path to permanent residence for these paroled "entrepreneurs" is by manipulating the criteria for a Green Card under the "National Interest Waiver" program.[13] Although these criteria have historically been extremely narrowly interpreted, we are certain the Department will have little compunction in cracking the current interpretation as wide as it needs to be to accommodate these paroled "entrepreneurs."

If the Department is able to create at will, and with impunity, parole-based visa programs with elaborate eligibility criteria that establish new pathways to temporary and/or permanent status in the United States, then there really are no practical limits at all to the President's power in this area except his own subjective determination of what constitutes a visa program creating "significant public benefit." In such circumstances, what point is there in Congress spending any time at all creating or amending visa categories in the Immigration and Nationality Act? This abuse of the parole authority threatens the integrity of our immigration laws and we urge you to terminate this program.

We thank you for your attention to our letter and ask that you respond to our concerns and the questions attached to this letter by November 8, 2016. Should you have any questions, please contact Kathy Nuebel Kovarik of the Senate Judiciary Committee staff at (202) 224-5225

Sincerely,

Charles E. Grassley
Chairman, Committee on the Judiciary

Jeff Sessions
Chairman, Subcommittee on
Immigration and the National Interest

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[12] Tom Kalil and Doug Rand, "Welcoming International Entrepreneurs: Obama administration announces new steps to attract the best and brightest," The White House (Aug. 26, 2016), available at https://medium.com/the-white-house/welcoming-international-entrepreneurs-d27571475dfd#.pba7kafzt; Tom Kalil and Doug Rand, "Entrepreneurs Wanted: The President's Actions on Immigration," The White House, (Nov. 26, 2014) ("As defined by Congress, the 'EB-2' visa category is available to applicants who can demonstrate either an advanced degree or exceptional ability. Typically, a U.S. company must sponsor the application, but this requirement can be waived if it would be in our national interest. DHS will provide a detailed standard for this 'national interest waiver,' so that entrepreneurs have greater clarity on when they might self-petition for a green card on this basis. With this clarity, we hope to promote greater use of this immigration option in order to boost job creation and grow our economy."), available at https://www.whitehouse.gov/blog/2014/11/26/entrepreneurs-wanted-president-s-actions-immigration.

[13] See Matter of New York State Department of Transportation, 22 I&N Dec. 215 (Comm'r 1998); National Interest Waiver, USCIS, available at https://www.uscis.gov/eir/visa-guide/eb-2-employment-based-second-preference/national-interest-waiver.

Michael S. Lee
U.S. Senator

David B. Vitter
U.S. Senator

Questions

1. Please explain how the E-2 Treaty Investor and EB-5 Immigrant Investor programs allow entrepreneurs to establish businesses in the United States.
2. The proposed rule states that applicants for parole for "entrepreneurs" must pay an application fee of $1,200.
   a. How was the $1,200 amount determined?
   b. Please give a breakdown of the cost elements of the $1,200 fee.
   c. Why is a fee being charged at all? Wouldn't revenue from the I-765 application for an Employment Authorization Document (EAD) cover all adjudication costs the same way that USCIS maintains such revenue covers the cost of adjudication of a DACA application?
   d. Why wasn't the same procedure used to determine the amount of the $1,200 application fee used to determine the true cost of adjudication of an I-821D DACA application prior to announcing that no fee would be collected for the Form I-821D?
3. Why is a DACA application referred to as a "request" (Form I-821D), while an application for parole for "entrepreneurs" is being referred to as an "application"?
4. Would a foreign national who has been granted parole under the proposed parole for "entrepreneurs" program be able to adjust to lawful permanent resident status?
5. Could a foreign national who is inadmissible under any of the grounds set forth in section 212 of the Immigration and Nationality Act nevertheless be eligible for parole under the proposed parole for "entrepreneurs" program?
6. Could a person who is currently unlawfully present in the United States be eligible for parole under the proposed parole for "entrepreneurs" program?
7. a. Could a person who was previously unlawfully present in the United States, but currently outside the United States, be eligible for parole under the proposed parole for "entrepreneurs" program?
   b. Could such a person be paroled into the United States under the proposed parole for "entrepreneurs" program despite being subject to the 3- or 10-year bar under INA 212(a)(9)(B)?
8. Will a CBP officer at a Port of Entry be authorized to deny parole to an alien whose application for parole under the parole for "entrepreneurs" program has been approved by USCIS? If so, what, if any, restrictions or limitations are there on a CBP officer's authority to deny such parole?
9. Do you agree or disagree with this statement? – Parole should not be used to circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories.
10. Do you agree or disagree with this statement? – To permit aliens to circumvent the restrictions enacted by Congress in those sections of the law authorizing employment-based visa programs is inconsistent with both the language and the legislative intent of the Immigration and Nationality Act.
11. Though the parole for "entrepreneurs" program is being sold as a "job creation" program, job creation is only a *possible* way to satisfy the requirements for extension of the parole period beyond the initial 2-year period; the alien start-up founder could also satisfy the requirements by raising $500,000 in investments or generating $500,000 in revenue, while creating no jobs

at all. Please confirm that an alien could be granted parole for the initial 2-year period, plus "re-parole" for an additional period of up to 3 years, without having created a single U.S. job.

12. Please comment on this criticism:

> The proposed parole program for "entrepreneurs" would potentially create power inequities between the U.S. investor or venture capital firm and the alien start-up founder, as the alien's lawful status (as a parolee) would be dependent on the U.S. investor's agreement to invest the required amount. Investors could use that leverage to then impose onerous terms on the alien founder that could, for example, require that the investor be granted an overwhelmingly controlling percentage of equity ownership, bleed the nascent company of profits in the interest of short-term gain, or otherwise reduce the founder's incentives to develop the start-up.
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> The favorable (to the U.S. investors) terms that venture capitalists would be able to impose on alien start-up founders could also create an incentive for venture capitalists to invest their money with companies founded by foreigners acquiring parole through this proposed program rather than with start-ups founded by U.S. citizens, who would not be subject to the same sort of leverage as the foreign start-up founders.