



## SUMMARY OF PROPOSED INTERNATIONAL ENTREPRENEUR RULE 81 Federal Register 60130 (Aug. 31, 2016)

### Introduction and Background

On August 31, 2016, DHS published a Notice of Proposed Rulemaking (NPRM) in the Federal Register, "[International Entrepreneur Rule](#)."<sup>1</sup> If finalized, the rule would add new provisions to Title 8 of the Code of Federal Regulations, under the authority of INA §212(d)(5), permitting the use of parole for "entrepreneurs of start-up entities whose entry into the United States would provide a significant public benefit through the substantial and demonstrated potential for rapid business growth and job creation."<sup>2</sup> The proposed rule is a product of President Obama's November 2014 executive actions on immigration. On November 21, 2014, DHS Secretary Johnson directed USCIS to "propose a program that will permit DHS to grant parole status, on a case-by-case basis, to inventors, researchers, and founders of start-up enterprises who may not yet qualify for a national interest waiver, but who have been awarded substantial U.S. investor financing or otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting-edge research."<sup>3</sup> DHS estimates that as many as 2,940 entrepreneurs could be eligible for parole under this program on an annual basis.<sup>4</sup> Comments to the NPRM are due October 17, 2016.

### Proposed Requirements for an Initial Grant of Parole

**General Criteria.** An entrepreneur may be considered for parole if he or she demonstrates that parole "will provide a significant public benefit to the United States based on his or her role as an entrepreneur of a start-up entity."<sup>5</sup> To do so, applicants must demonstrate that they:

- (A) Meet the definition of "**entrepreneur**" and "**start-up entity**," AND
- (B) Establish that the entity has:
  - (1) Received within 365 days preceding the filing the application, a **qualified investment** of at least \$345,000 from one or more **qualified investors**; OR
  - (2) Received within 365 days preceding the filing of the application, at least \$100,000 through one or more **qualified government awards or grants**.<sup>6</sup>

In order to meet the definition of "**entrepreneur**," the applicant must possess "a substantial ownership interest in a start-up entity" and have "a central and active role in the operations of that entity, such that [he or she] is well-positioned, due to his or her knowledge, skills, or

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<sup>1</sup> 81 Fed. Reg. 60130 (Aug. 31, 2016).

<sup>2</sup> *Id.* INA §212(d)(5) provides the Secretary of Homeland Security with discretionary authority to grant parole to individuals on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit."

<sup>3</sup> "[Policies Supporting U.S. Businesses and High-Skilled Workers](#)," (Nov. 21, 2014).

<sup>4</sup> 81 Fed. Reg. at 60133.

<sup>5</sup> Proposed 8 CFR §212.19(b)(2)(i),

<sup>6</sup> Proposed 8 CFR §212.19(b)(2)(ii).

experience to substantially assist the entity with the growth and success of its business.”<sup>7</sup> To be considered “substantial,” the applicant’s ownership interest in the start-up entity must be at least 15% for an initial parole application.<sup>8</sup>

In order to meet the definition of “**start-up entity**,” the entity must be a “**U.S. business entity**” that was formed within the 3 years immediately preceding the filing of the initial parole application, must have lawfully done business since the date of formation, and have substantial potential for rapid growth and job creation.<sup>9</sup> A “**U.S. business entity**” is any corporation, LLC, partnership, or other entity organized under federal or state law, that conducts business in the United States and is not an investment vehicle.<sup>10</sup> In other words, the entity must provide or seek to provide good or services.<sup>11</sup> Entities that will not qualify are “small businesses with limited growth potential created by entrepreneurs for the sole or primary purpose of providing income to the entrepreneur and their families.”<sup>12</sup>

A “**qualified investment**” is as an investment made in good faith of lawfully derived capital that is a purchase from the start-up entity of equity or convertible debt. Investments made by the entrepreneur or his/her parent, spouse, sibling, or child do not qualify, nor do investments made by a corporation, LLC, partnership, or other entity where the entrepreneur or his or her parent, spouse, sibling, or child has any direct or indirect ownership interest.<sup>13</sup>

A “**qualified investor**” is defined as a U.S. citizen (USC) or lawful permanent resident (LPR) or an organization located in the United States that operates through a legal entity organized under U.S. federal or state law, that is majority owned and controlled by USCs and LPRs. In addition, the investor must, within the past 5 years:

- (i) Have made investments in start-up entities in exchange for equity or convertible debt in at least 3 separate calendar years totaling no less than \$1,000,000; and
- (ii) Subsequent to such investment, at least 2 entities each created at least 5 **qualified jobs** or generated at least \$500,000 in revenue with an average annualized revenue growth of at least 20%.<sup>14</sup>

A “**qualified job**” is defined as **full time employment** (paid employment, at least 35 hours per week, may not combine part-time positions) 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).<sup>15</sup>

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<sup>7</sup> Proposed 8 CFR §212.19(a)(1).

<sup>8</sup> In addition, the entrepreneur must continuously maintain at least a 10% ownership interest in the entity throughout the duration of parole, including any re-parole period.

<sup>9</sup> Proposed 8 CFR §212.19(a)(2). An entity may also “be considered recently formed if it was created within the 3 years immediately preceding the receipt of the relevant grant(s), award(s), or investment(s).”

<sup>10</sup> Proposed 8 CFR §212.19(a)(9).

<sup>11</sup> 81 Fed. Reg. at 60137.

<sup>12</sup> *Id.* at 60138.

<sup>13</sup> Proposed 8 CFR §212.19(a)(4).

<sup>14</sup> Proposed 8 CFR §212.19(a)(5). Excluded from the definition of “qualified investor” are individuals or organizations that have violated securities laws. See proposed 8 CFR §212.19(a)(5) for details.

<sup>15</sup> See proposed 8 CFR §212.19(a)(6)–(8).

A “**qualified government award or grant**” is an award or grant for economic development, research and development, or job creation (or other similar monetary award typically given to start-up entities) made by a federal, state, or local government entity that regularly provides such awards or grants to start-up entities. Contractual commitments for goods and services are excluded.<sup>16</sup>

**Alternative Criteria.** An individual who meets the definition of “**entrepreneur**” and “**start-up entity**” but only partially meets one or both of the criteria under §212.19(b)(2)(ii)(B) may still qualify if they can provide “other reliable and compelling evidence” of the entity’s substantial potential for rapid growth and job creation.<sup>17</sup> 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.”<sup>18</sup>

### Proposed Application Process for an Initial Grant of Parole

**Form, Fees, Biometrics.** An applicant requesting an initial grant of parole would file new Form I-941, Application for Entrepreneur Parole, along with supporting evidence, a biometrics fee, and a filing fee of \$1,200.<sup>19</sup> Applicants who file while in the United States will have biometrics collected at an Application Support Center. Applicants who are outside the United States will have biometrics collected overseas, after parole is authorized but before the travel document is issued.<sup>20</sup>

**Suggested Evidence.** Though not included in the text of the proposed rule, the Supplementary Information includes a list of evidence that may be submitted, in addition to evidence of the capital investment or government funding criteria under 8 CFR §212.19(b)(2)(i)(B), to meet the standards under proposed 8 CFR §212.19(b)(2)(i)(A) [definition of “**entrepreneur**” and “**start-up entity**”]. Such evidence may include:

- Evidence of capital investments from qualified investors, or government awards or grants, other than those relied on to satisfy proposed 8 CFR §212.19(b)(2)(i)(B);
- Letters from relevant government entities, qualified investors, or established business associations with knowledge of the entity’s research, products, or services and/or the applicant’s knowledge, skills, or experience that would advance the entity’s business;
- Newspaper articles or other similar evidence that the applicant or entity has received significant attention or recognition;
- Evidence that the applicant or entity has been recently invited to participate in, is currently participating in, or has graduated from one or more established and reputable start-up accelerators;
- Evidence of significant revenue generation and growth in revenue;
- Patent awards or other documents indicating that the entity or applicant is focused on developing new technologies or cutting-edge research;
- Evidence that the applicant has played an active and central role in the success of prior start-up entities;

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<sup>16</sup> Propose 8 CFR §212.19(a)(3).

<sup>17</sup> Proposed 8 CFR §212.19(b)(2)(iii).

<sup>18</sup> 81 Fed. Reg. at 60141-60142. DHS also notes that the necessary amount and weight of such evidence will depend on the degree to which the applicant meets one or both of the capital investment or government funding criteria. For example, a person whose entity has received only \$200,000 in qualifying capital investment would need to provide more “reliable and compelling” evidence than a person whose entity received \$300,000.

<sup>19</sup> Proposed 8 CFR §103.7(b)(1)(i)(FFF).

<sup>20</sup> Proposed 8 CFR §212.19(e); 81 Fed. Reg. at 60142.

- Degrees or other documentation indicating that the applicant has knowledge, skills, or experience that would significantly advance the entity's business;
- Payroll, bookkeeping, salary, or bank records or other documents related to jobs created prior to filing the request for parole; and
- Any other relevant, probative, and credible evidence indicating the entity's potential for growth and/or the applicant's ability to advance the entity's business in the United States.<sup>21</sup>

For purposes of documenting the required ownership interest (15% for initial parole), the applicant should provide copies of legal or financial documents, "such as formation and organizational documents, equity certificates, equity ledgers, ownership schedules, or capitalization tables...."<sup>22</sup>

### Adjudication of Initial Parole Application

**Discretionary Authority.** In adjudicating the application, USCIS will "consider and weigh all evidence including any derogatory evidence" such as criminal activity or national security concerns and may deny parole as a matter of discretion, even if the regulatory criteria are met.<sup>23</sup>

**Period of Parole.** Initial parole may be granted for up to 2 years, though DHS retains discretion to provide a shorter period of parole where appropriate.<sup>24</sup> Moreover, notwithstanding USCIS approval of the parole application, CBP retains the authority to deny parole or to modify the parole period when the individual appears at the port of entry.<sup>25</sup> Parolees will be issued a multiple entry travel document to permit travel for the duration of the parole period.<sup>26</sup> CBP will assign a new "PE-1" code of admission to entrepreneur parolees.<sup>27</sup>

**Authorized for Employment Incident to Status.** Once paroled, the entrepreneur parolee would be authorized for employment with the start-up entity incident to status. The entrepreneur is not authorized for employment with any other entity.<sup>28</sup>

**No Parole in Place?** The proposed regulations do not specifically mention parole in place as an option for entrepreneurs who may be present in the United States without authorization, nor do they explicitly prohibit 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. Moreover, DHS notes that a person lawfully admitted in a nonimmigrant status who is granted parole would be required to depart and apply for parole at a port of entry "as parole will not involve any direct change from other nonimmigrant status."<sup>29</sup>

### Proposed Requirements for Re-parole

**General Criteria.** In general, the parolee may be considered for re-parole if he or she demonstrates that a grant of parole will continue to provide a significant public benefit to the United States based on his or her role as an entrepreneur of a start-up entity.<sup>30</sup> To do so, applicants must demonstrate:

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<sup>21</sup> 81 Fed. Reg. at 60138.

<sup>22</sup> *Id.* at 60139.

<sup>23</sup> Proposed 8 CFR §212.19(d)(1).

<sup>24</sup> Proposed 8 CFR §212.19(d)(2); 81 Fed. Reg. at 60144.

<sup>25</sup> 81 Fed. Reg. at 60144.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 60145.

<sup>28</sup> Proposed 8 CFR §212.19(g) and 8 CFR §274a.12(b)(37),

<sup>29</sup> 81 Fed. Reg. at 60160.

<sup>30</sup> Proposed 8 CFR §212.19(c)(2)(i).

- (A) That the alien continues to meet the definition of “**entrepreneur**” and the entity continues to meet the definition of “**start-up entity**”; AND
- (B) The entity has:
- (1) Received at least \$500,000 in **qualified investments, qualified government grants or rewards**, or a combination of such funding during the initial parole period;
  - (2) Created at least 10 **qualified jobs** with the start-up entity during the initial parole period; OR
  - (3) Reached at least \$500,000 in revenue and averaged 20% annual growth during the initial parole period.<sup>31</sup>

**Definition of “Entrepreneur” for Re-parole.** For purposes of re-parole, the entrepreneur will be considered to possess a substantial ownership interest if he or she maintains at least a 10% ownership interest in the start-up entity.<sup>32</sup>

**Alternative Criteria.** A person who continues to meet the definition of “**entrepreneur**” and whose entity continues to meet the definition of “**start-up entity**,” but who only partially meets one or all of the criteria in proposed 8 CFR §212.19(c)(2)(ii)(B) may still qualify by providing “other reliable and compelling evidence” of the start-up entity’s substantial potential for rapid growth and job creation.<sup>33</sup>

**Proposed Application Process for Re-Parole.** Beginning 90 days prior to the expiration of the initial grant of parole, the entrepreneur may submit a request for re-parole based on the same start-up entity by filing Form I-941 with all required fees (including biometrics fee) and supporting documents.<sup>34</sup>

**Period of Re-Parole.** Re-parole may be granted for up to 3 years. If the parolee is in the United States when re-parole is approved, parole is automatically extended. If outside the U.S., the parolee must appear at a port of entry to be granted re-parole.<sup>35</sup>

**240-Day Rule for Employment Authorization.** Employment authorization will be automatically extended for 240 days from the date of expiration of the initial parole period, or until USCIS makes a decision on the re-parole application, whichever is sooner, when a request for re-parole is timely filed by the entrepreneur.<sup>36</sup>

## Spouses and Minor Children

**Application and Fees.** The spouse and minor children of the parolee must individually apply for parole by completing Form I-131, Application for Travel Document, and including evidence of the qualifying relationship to the entrepreneur, as well as the I-131 filing fee and a biometrics fee.<sup>37</sup> Parole for spouses and children will also be considered on a case-by-case basis and may be denied

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<sup>31</sup> See above for definitions of highlighted terms.

<sup>32</sup> An initial parole applicant must have a 15% ownership interest in the start-up entity. The parolee must maintain at least 10% at all times during the parole period including re-parole.

<sup>33</sup> Proposed 8 CFR §212.19(c)(2)(iii).

<sup>34</sup> Proposed 8 CFR §212.19(c)(1). The “90-day rule” is set forth in the instructions to Form I-941.

<sup>35</sup> Proposed 8 CFR §212.19(d)(3).

<sup>36</sup> Proposed 8 CFR §274a.12(b)(37).

<sup>37</sup> Proposed 8 CFR §212.19(h)(1).

as a matter of discretion.<sup>38</sup> The period of parole granted for the spouse and children may be no longer than the period of parole granted to the entrepreneur.<sup>39</sup>

**Employment Authorization.** After having been paroled into the United States (no concurrent filing), the spouse is eligible for employment authorization but must apply on Form I-765, Application for Employment Authorization, and include evidence of eligibility and relationship to the entrepreneur. Children are not permitted employment authorization.<sup>40</sup>

### Obligations and Limitations on Parole for Entrepreneurs

**Maintenance of Household Income and “Other Reasonable Conditions.”** The parolee must maintain household income greater than 400% of the federal poverty line for his/her household size.<sup>41</sup> USCIS may impose “other such reasonable conditions” on the parolee in its discretion and may request proof of compliance with any such condition at any time.<sup>42</sup> Violation of any condition, including the household income condition, may lead to termination of parole.<sup>43</sup> USCIS may ask the applicant to verify his or her income at the time of application for re-parole, or upon notification to USCIS of a material change.<sup>44</sup>

**Time and Numerical Limitations.** No more than three entrepreneurs from the same entity may be granted parole and no more than 5 years of parole may be granted to any single entrepreneur based on the same entity.<sup>45</sup>

**No Appeal or Motion to Reopen.** There is no right to appeal the denial of parole, nor any right to a motion to reopen or reconsider, though DHS retains its authority to reopen/reconsider a case on its own motion (*sua sponte*).<sup>46</sup>

**Material Changes.** The parolee must “immediately” report any material changes to USCIS. If the entrepreneur continues to be employed by the entity and maintains a 10% ownership interest, material changes are reported to USCIS by filing a new Form I-941 with fee (no biometrics fee) and supporting documentation of the material change. If the parolee no longer owns 10% or ceases to be employed by the start-up entity, the parolee must notify USCIS of such in writing.<sup>47</sup>

“**Material change**” is defined as any change in facts that could reasonably affect the determination as to whether the parolee provides or continues to provide a significant public benefit to the United States. This includes, but is not limited to:

- Any criminal charge, conviction, no contest plea, or other criminal judicial determination concerning the entrepreneur or the entity;
- Any complaint, settlement, judgment, or other determination concerning the entrepreneur or entity in a judicial or administrative action brought by a government entity, or by a

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<sup>38</sup> 81 Fed. Reg. at 60144.

<sup>39</sup> Proposed 8 CFR §212.19(h)(2).

<sup>40</sup> Proposed 8 CFR §212.19(h)(3) and (4); Proposed 8 CFR 274a.12(c)(34).

<sup>41</sup> Proposed 8 CFR §212.19(i).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> 81 Fed. Reg. at 60143.

<sup>45</sup> Proposed 8 CFR §212.19(f).

<sup>46</sup> Proposed 8 CFR §212.19(d)(4).

<sup>47</sup> Proposed 8 CFR §212.19(j).

private individual or organization (other than proceedings involving claims for damages not exceeding 10% of the assets of the entrepreneur or entity);

- The sale or disposition of all or substantially all of the entity's assets;
- The liquidation, dissolution, or cessation of operations;
- The filing of a bankruptcy petition by or against the entity; or
- Any significant change to the entrepreneur's role in ownership and control, or any other significant changes in ownership and control of the entity.<sup>48</sup>

**Termination of Parole.** DHS may terminate parole at any time without notice or opportunity to respond if it determines that parole no longer provides a significant public benefit.<sup>49</sup>

**Automatic Termination.** Parole is automatically terminated without notice upon expiration of parole (unless a re-parole request is timely filed), if USCIS receives written notice from the parolee that he or she is no longer employed by the entity or no longer holds at least a 10% ownership interest. Parole of spouse and children is also automatically terminated, as is any EAD of the spouse.<sup>50</sup>

**Termination with Notice.** USCIS may issue a notice of intent to terminate if it believes the facts or information contained in the parole request were not true and accurate; the parolee failed to timely notify USCIS of a material change; the parolee is no longer employed in a central and active role with the entity or ceases to possess a 10% ownership interest; the alien otherwise violated the terms and conditions of parole; or parole was erroneously granted.<sup>51</sup> The parolee will be provided 30 days to respond. Failure to timely respond will result in termination of parole. No appeal or motion to reopen/reconsider on a decision to terminate, except sua sponte.<sup>52</sup>

## Miscellaneous

**Automatic Adjustment of Investment Amounts.** The investment and revenue amounts will be automatically adjusted every 3 years by the Consumer Price Index and posted on the USCIS website. Adjustments will apply to all applications filed on or after the beginning of the fiscal year for which the adjustment is made.<sup>53</sup>

**Employment Verification.** The entrepreneur's valid foreign passport with I-94 Arrival/Departure record containing an unexpired "PE-1" endorsement would be acceptable evidence of identity and employment authorization for entrepreneur parolees for employment verification (I-9) purposes.<sup>54</sup>

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<sup>48</sup> Proposed 8 CFR §212.19(a)(10).

<sup>49</sup> Proposed 8 CFR §212.19(k)(1).

<sup>50</sup> Proposed 8 CFR §212.19(k)(2).

<sup>51</sup> Proposed 8 CFR §212.19(k)(3).

<sup>52</sup> Proposed 8 CFR §212.19(k)(4).

<sup>53</sup> Proposed 8 CFR §212.19(l).

<sup>54</sup> Proposed 8 CFR §274a.2(b)(1)(v)(A)(5).