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# HARMONIOUS COEXISTENCE: NEW PAROLE FOR INTERNATIONAL ENTREPRENEURS AND OLD ENTREPRENEUR PATHWAYS PORTAL

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U.S. Citizenship and Immigration Services (USCIS) proposed a rule allowing certain international entrepreneurs to be considered for parole (temporary permission to be in the United States) so they may start or scale their businesses in the United States. This is not the first administrative initiative for entrepreneurs. In 2011 the USCIS provided guidance on how foreign entrepreneurs could use the existing nonimmigrant visa system to establish startups in the United States, which culminated in the Entrepreneur Pathways portal. Both the parole rule and the Entrepreneur Pathways should exist alongside each other. Neither is perfect, especially in the absence of a Congressionally mandated startup visa, but if an entrepreneur cannot qualify under the parole policy, every encouragement must be given for the entrepreneur to qualify for a visa through his or her startup under the existing visa system, such as through an H-1B visa.

First, we introduce the proposed parole rule for international entrepreneurs.

The proposed rule would allow the Department of Homeland Security (DHS) to use its existing discretionary statutory parole authority for entrepreneurs of 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." Under this proposed rule, DHS may parole, on a case-by-case basis, 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.

Under the proposed rule, entrepreneurs may be granted an initial stay of up to two years to oversee and grow their startup entities in the United States. A subsequent request for re-parole (for up to three additional years) would be considered only 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.

USCIS proposes that once the application for entrepreneurial parole is approved, the applicant and family members must leave the United States to be granted parole; they may not change to nonimmigrant status within the United States. Proving eligibility as an International Entrepreneur will require a $1,200 filing fee, completion of an Application for Entrepreneur Parole (Form I-941) and the submission of extensive evidence. USCIS will review the evidence and approve or deny the application with no right of rehearing or appeal. Meanwhile, the notice of proposed rulemaking in the Federal Register invites public comment on or before October 17, 2016, after which USCIS will address the comments received. The proposed rule does not take effect with the publication of the notice of proposed rulemaking. It will take effect on the date indicated in the final rule when it is published in the Federal Register.

While the proposed rule comes as a long needed respite to a foreign national entrepreneur in the absence of an actual startup visa, it may not meet the needs of all entrepreneurs who aspire to build great companies in the US. For example, a foreign student on F-1 OPT, who has developed an innovative mobile phone application, and who wants to market it and sell it through his or

her own company, may not be able to attract investment capital of $345,000 or receive a governmental grant of $100,000. Many startups can be established for far less than $345,000. In some situations, a family member may invest money in the enterprise on behalf of the foreign student, but under the proposed rule, investment from a family member does not count. Also, the parole rule will only allow a 5 year period in the United States with no pathway to permanent residence. The USCIS can revoke parole, and there will be no administrative or judicial review over a denial or a revocation. Of course, the final rule can be substantially improved based on comments from interested parties and stakeholders.

Still, if an entrepreneur cannot qualify under the parole rule, it is vitally important for this individual to try his or her luck under the H-1B visa via the policy set forth in Entrepreneur Pathways. If a foreign student has a "Facebook" type of idea, he or she can start a business, according to Entrepreneur Pathways, while in F-1 Optional Practical Training provided the business is directly related to the student's major area of study. After completing F-1 OPT, and note that the new STEM OPT rule requires the entrepreneur to be part of a training program, even through his or her own startup, this student can potentially switch to H-1B visa status (provided there are H-1B visa numbers at that time). Regarding the startup owner being able to sponsor himself or herself on an H-1B, the Entrepreneur Pathways insists that there must be a valid employer-employee relationship under the Neufeld Memo, and that the entity has a right to control the employment. This can be a challenge if the founder exercises total control over the startup. Still, the USCIS suggests that a startup may be able to demonstrate this if the ownership and control of the company are different. This can be shown through a board of directors, preferred shareholders, other investors, or other factors that the organization has the right to control the terms and conditions of the beneficiary's employment (such as the right to hire, fire, pay, supervise or otherwise control the terms and conditions of employment). Some of the suggested evidence could include a term sheet, capitalization table, stock purchase agreement, investor rights agreement, voting agreement or organization documents and operating agreements. Further details on how an entrepreneur can successfully petition for an H-1B visa are provided in a prior blog entitled The Sweet Smell of Success: H-1B Visas for Entrepreneurs. Although there is a shortage of H-1B visas each year, certain H-1B visas would be cap-exempt if filed concurrently

with employment through a cap-exempt university or non-profit affiliated with a university, or if the beneficiary works at cap-exempt university even though the petitioner is a cap-subject private H-1B employer. Many local governments have started programs to attract foreign entrepreneurs through cap-exempt H-1B collaborations with universities, the most recent being the initiative launched by New York City and the City University of New York.

We hope that H-1B petitions filed pursuant to Entrepreneur Pathways continue to be approved fairly despite the existence of the parole rule for entrepreneurs. USCIS adjudicators should not now be of the mindset that just because there is a parole rule for entrepreneurs, the H-1B visa program is no longer open for business to them. It should further be noted that Entrepreneur Pathways also provides guidance for entrepreneurs to use other existing visa classifications, such as the L-1, O, and E visas. Many of these visa categories could be more advantageous to the entrepreneur than the parole rule, and so adjudicators must continue to approve petitions in the spirit of the generous guidance set forth in Entrepreneur Pathways. The unique requirements under the parole rule, such as a set investment amount, should not be allowed to bleed into the adjudicatory process concerning visas that have been traditionally used by entrepreneurs. Every effort must be made to encourage foreign entrepreneurs to establish their startups in the United States, and so it is important that the parole rule and the Entrepreneur Pathways coexist and complement each other like Siamese twins joined together at the hip. Indeed, the Entrepreneurs Pathways is recognized in the preamble to the parole rule, as well as the acknowledgement that many will remain on a traditional visa "because the ability to be admitted to the United States as a nonimmigrant offers materially more benefits and protection than parole." Moreover, there are ancillary conditions that must be fulfilled under the parole rule, such as maintaining a household income of greater than 400 percent of the poverty line and that the qualifying startup capital cannot come from family members. These limitations do not exist when entrepreneurs use the L, O and E visas, although with respect to the H-1B visa, the entrepreneur must be paid at least the prevailing wage through the startup.

Finally, it will still not be a perfect world even if both the parole rule and Entrepreneur Pathways coexist harmoniously. There must also be a pathway for permanent residence. The parole rule has a maximum validity of only five years; the H-1B is for six years. The DOL does not encourage a labor

certification to be filed if the beneficiary is also a substantial owner. There must also be guidance to allow entrepreneurs to apply for permanent residence through the extraordinary ability and national interest waiver green card categories. It is therefore encouraging that the While House blog indicates that the DHS will soon publish guidance as to when an entrepreneur can self-petition for a green card. While such administrative efforts are small steps in the right direction, it is important for Congress to ultimately pass legislation that would allow entrepreneurs of all stripes, so long as their enterprises hold out promise, to be able to easily enter on a visa and shortly thereafter apply for permanent residence.