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October 17th, 2016

VIA EMAIL AND ELECTRONIC SUBMISSION

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, D.C. 20529

Re: Comments on Proposed Rule, "International Entrepreneur Rule," Department of Homeland Security Docket No. USCIS–2015–0006

Dear Ms. Deshommes:

Berry Appleman & Leiden LLP (BAL) submits this letter in response to a request for comments on the proposed regulation the Department of Homeland Security (DHS) published in the Federal Register on August 31, 2016, entitled "International Entrepreneur Rule."

Founded in California over thirty-five years ago, BAL is a leading global corporate immigration law firm that represents employers and their personnel around the world. With deep roots in Silicon Valley, our firm has had the privilege of working with thousands of start-up companies. Many of those companies have gone on to become multi-national enterprises that not only employ tens of thousands of U.S. workers, but also support and fund the next generation of start-ups and entrepreneurs. Through that lens, we see day to day how the U.S. immigration system helps grow the economy and create jobs for U.S. workers.

But as a firm that operates on six continents and works with start-ups all around the world, we also see how other countries are modernizing their immigration laws and policies to attract talent and money away from the U.S. Countries are affirmatively using immigration laws to improve their market position in the race for global talent. Our comments below are built upon our unique perspective of helping entrepreneurs and start-up companies, whether they are in Silicon Valley or Shanghai, navigate immigration laws.

BAL APPLAUDS THE AGENCY'S EFFORTS TO WELCOME ENTREPRENEURS

Though economic security and growth has always been an integral part of U.S. immigration policy, and dozens of visa categories allow foreign nationals to enter and work in the U.S., the U.S. government has until this point been reluctant to formally recognize that our country's economic interests are a significant public benefit and that a foreign entrepreneur may qualify for parole under section 212(d)(5) of the Immigration and Nationality Act by demonstrating that he or she is engaged in business activity that will grow the economy, create jobs, and increase investment in the U.S.

So while we have concerns with where the agency is proposing to draw lines of eligibility for entrepreneur parole, we would be remiss if we did not first recognize that the proposed regulation constitutes a major, positive development in U.S. immigration law. We applaud the agency taking this first, critical step towards improving the U.S. immigration system to make the U.S. more competitive.

Immigrant entrepreneurs are vital to the United States economy.

Immigrants account for around a quarter of U.S. entrepreneurs, and this share has increased dramatically since the mid-1990s.[1] Fifty-one percent of the country's $1 billion start-up companies had at least one immigrant founder.[2] More than 40 percent of the Fortune 500 companies were founded by immigrants or their children, and these companies employ more than 10 million people worldwide.[3] To compete in the increasingly global economy, the United States must encourage talented immigrant entrepreneurs to bring their innovative ideas to this country.

The country's immigration laws discourage individuals from pursuing start-up businesses in the U.S.

Entrepreneurs have few options for starting their businesses in the U.S. under the current immigration system. Most nonimmigrant employment-based visa categories require that an established employer petition on behalf of its employee, and the H-1B visa category continues to be oversubscribed. More than 236,000 applications were filed in 2016 for just 85,000 available visas. In addition, due to staggering green card backlogs, individuals seeking to come to the U.S. permanently to work must often wait over a decade to obtain one of the 140,000 employment-based green cards authorized to be issued each year.

Intracompany transferees who come to the U.S. to work on an L-1 visa may only work for a multinational company in the U.S. where they have worked for a related entity abroad. Though current law provides for the E-2 "treaty investor" category for individuals who invest in a new or existing U.S. business, this category is limited to nationals of certain countries. Simply put, current law does not provide a clear path to the U.S. for an individual who seeks to start a business here.

BAL RECOMMENDS IMPROVEMENTS TO THE PROPOSED REGULATION

The agency should clarify that potential applicants currently in the U.S. in nonimmigrant status do not violate their existing visa status when taking steps necessary to establish eligibility for significant public benefit parole.

Many individuals who would seek parole under the proposed regulation are already present in the U.S. in various capacities, such as on a nonimmigrant student visa or an H-1B visa working for a U.S. company. The proposal sets forth extensive requirements relating to the start-up business that would form the basis for parole eligibility, but leaves ambiguity as to whether taking steps to start a business in this country would cause these individuals to violate their existing immigration status. For example, foreign students pursuing a course of study in the U.S. may only accept certain forms of approved employment under their visa, through Curricular Practical Training (CPT) or Optional Practical Training (OPT), and it is unclear whether pursuing a start-up would violate student status.

[1] Sari Pekkala Kerr and William R. Kerr, *Immigrants Play a Disproportionate Role in American Entrepreneurship*, Harvard Business Review (Oct. 3, 2016), available at https://hbr.org/2016/10/immigrants-play-a-disproportionate-role-in-american-entrepreneurship.
[2] Stuart Anderson, *Immigrants and Billion Dollar Startups*, National Foundation for American Policy (March 2016), available at http://nfap.com/wp-content/uploads/2016/03/Immigrants-and-Billion-Dollar-Startups.NFAP-Policy-Brief.March-2016.pdf.
[3] *The "New American" Fortune 500*, Partnership for a New American Economy (June 2011), available at http://www.renewoureconomy.org/wp-content/uploads/2013/07/new-american-fortune-500-june-2011.pdf.

To alleviate these concerns and encourage the largest possible number of talented entrepreneurs to pursue their start-ups and create jobs in the U.S., the agency should include a provision in the final regulation to clarify that steps to establish eligibility for the program would not result in a violation of nonimmigrant status. Specifically, we recommend that the agency clarify and restate existing policy that says that an individual who continues to comply with the principal purpose of his or her entry into the U.S. (e.g. an F-1 student continues to comply with course requirements), that individual does not violate his or her nonimmigrant status by engaging in business activities necessary to establish eligibility for significant public benefit parole.

USCIS should allow applicants to apply for and obtain parole from within the U.S.

As currently written, the regulation would require applicants to seek parole from outside the United States. This means if an applicant is currently in the U.S. in another immigration status, he or she must leave and re-enter the country. This requirement creates financial burdens for potential applicants and could even disrupt the business operations of their start-ups. It also creates uncertainty for immigrants, as one agency is not bound by the other agency's determination and there is no guarantee that two adjudicators will agree on the discretionary grant of parole.

The agency has authority to grant "parole in place" on a case-by-case basis to individuals already physically present in the U.S. Recently, DHS exercised this authority for families of members of the U.S. Armed Forces. We encourage the agency to consider permitting entrepreneurs to seek parole from within the U.S. to alleviate these burdens.

Income and start-up capital requirements in the proposed regulation are excessive. DHS should consider lower standards, particularly for foreign students at accredited U.S. universities.

In the proposed rule, the agency imposes a requirement that the applicant maintain a household income of over 400 percent of the poverty line. Given the limited salaries entrepreneurs typically earn in the beginning stages of growing their business, and the standard (and encouraged) practice of reinvesting any profits back into the business, this threshold will likely deter otherwise eligible applicants. As the agency notes in the proposal, due to the time period of parole permitted under this rule, parolees would generally not be eligible for federal public benefits in the U.S., regardless of their income level.[4]

The proposed regulation requires applicants to obtain $345,000 in investments from qualified investors or $100,000 in government grants or awards in the year preceding their application. These high thresholds do not take into account the wide variety of industries that may benefit from this rule, and do not reflect standard funding amounts that even technology start-ups receive in the early stages of development.[5] Though the proposal does allow applicants to submit alternative evidence of the entity's potential for growth and job creation, these figures would likely discourage applicants from attempting to meet "alternative" criteria that are only loosely defined.

Additionally, the proposal does not allow money contributed by applicants' family members to be included as qualifying start-up capital. The Small Business Administration (SBA) has found that personal or family savings were the source of startup capital for roughly two-thirds of immigrant-owned

[4] 81 Fed. Reg. 169 at 60143 (Aug. 31, 2016).
[5] John Mannes, *Newly proposed rules for foreign entrepreneurs will help some, but not all, found U.S. startups*, TechCrunch (Aug. 26, 2016), available at https://techcrunch.com/2016/08/26/newly-proposed-rules-for-foreign-entrepreneurs-will-help-some-but-not-all-found-u-s-startups/ ("Besides the fact that under this rule, a Y Combinator-backed startup that receives the standard $120,000 might not qualify, a requirement of having already raised money can force entrepreneurs into an awkward conversation with investors. Early-stage investors at the seed and Series A stage already have a lot of risk to deal with without fear that a founder will be denied parole status. Requiring $345,000 in previous investment, and even using investment as a metric for public good at all, is fraught with concern.").

businesses.[6] This restriction, coupled with the income requirement, is particularly onerous for a foreign student who is present in the U.S. on a student visa.

These standards are problematic for all foreign entrepreneurs, and we encourage the government to remove the income threshold, lower the investment requirements, and allow family members to contribute qualifying start-up capital. At the bare minimum, we recommend that the government modify the requirements for foreign students who are already present in the U.S. in legal status and enrolled at an accredited U.S. university. All students are subject to extensive screening and compliance with SEVIS reporting obligations. Additionally, international students contributed $30.5 billion to the U.S. economy in the 2014-2015 academic years and supported 373,000 jobs, according to the NAFSA Association of International Educators.[7] A survey by the National Venture Capital Association found that 38 percent of immigrant entrepreneurs at venture-funded companies first entered the U.S. as international students.[8] Given the current and potential contributions of international students to this country, and their limited earning potential while they are pursuing their studies, the government should ease requirements for these individuals.

The agency should facilitate the ability of the U.S. to retain entrepreneurs by reducing the green card backlog.

International entrepreneurs who receive parole under the proposed regulation would be permitted to stay for two years initially, with the opportunity to apply for a one-time three-year extension, for a total of five years. However, the regulation does not address any means by which a parolee may stay in the U.S. after that period to continue to grow his or her business. Given the limited period of time, and the revocable nature of parole, this uncertainty and absence of a clear path to permanent residence may discourage applicants from seeking parole under the program.

White House officials have stated that DHS will publish guidance to clarify when entrepreneurs may self-petition for lawful permanent residence. We encourage the agency to release this helpful guidance and to expand the use of the National Interest Waiver (NIW) to allow talented entrepreneurs to seek permanent residence in the U.S. We also recommend that the agency modify the regulation to provide that an individual granted parole under this program may apply for an extension of such parole if he or she is the beneficiary of a pending or approved application for labor certification or an immigrant petition.

Of course, the green card backlog continues to be the defining policy challenge for entrepreneurs and other high-skilled immigrants. Though the President committed to taking executive action to address that backlog, we continue to believe that additional, legally defensible options exist to reduce the wait time for foreign immigrants. First, DHS should "recapture" the several hundred thousand green cards that have gone unused due to agency processing delays and make them available to individuals waiting for a green card. Second, family members of workers are currently counted against the 140,000 cap, and account for more than half of employment-based admissions to the U.S. The agency should exempt family members from the annual cap, in order to ensure that the maximum number of highly skilled immigrants may access green cards. Though we recognize those changes are outside the scope of this regulation, we encourage the agency to continue to develop policy proposals to achieve those goals.

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[6] Robert W. Fairlie, PhD, *Immigrant Entrepreneurs and Small Business Owners, and their Access to Financial Capital*, Small Business Association (SBA) Office of Advocacy at iii (May 2012), available at https://www.sba.gov/sites/default/files/rs396tot.pdf.

[7] NAFSA International Student Economic Value Tool, National Association of International Educators, available at http://www.nafsa.org/Policy_and_Advocacy/Policy_Resources/Policy_Trends_and_Data/NAFSA_International_Student_Economic_Value_Tool/.

[8] Stuart Anderson, *American Made 2.0, How Immigrant Entrepreneurs Continue to Contribute to the U.S. Economy*, National Venture Capital Association at 16, available at http://nvca.org/?ddownload=668.

CONCLUSION

BAL encourages DHS to consider these recommendations for improvements to the proposal, and to finalize this regulation at the earliest possible convenience. We welcome the opportunity to work with the agency to improve our immigration system.

Sincerely,

Berry Appleman & Leiden LLP