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DHS Docket No. USCIS-2015-0006: Public Comment of the Immigration Reform Law Institute Regarding Removal of International Entrepreneur Parole Program

Dear Chief Deshommes:

The Immigration Reform Law Institute ("IRLI") submits the following public comment to the U.S. Citizenship and Immigration Services ("USCIS") of the Department of Homeland Security ("DHS") in response to the agency's proposed rule: Removal of International Entrepreneur Parole Program, as published in the Federal Register on May 29, 2018 at 83 Fed. Reg. 24415.

This public comment supports USCIS' proposed removal of the International Entrepreneur Rule ("IER") and restates IRLI's concerns regarding the lawfulness of the program per its public comment on the original rule, *see* ***International Entrepreneur Rule***, 82 Fed. Reg. 5238 (Jan. 17, 2017). IRLI is a non-profit public interest law organization that exists to defend the rights of individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, or local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

IRLI agrees that the IER is "not the appropriate vehicle" for bringing international entrepreneurs into the U.S. and maintains that the IER violates the Administrative Procedure Act ("APA") as an *ultra vires*

action in conflict with controlling statutes, based on an arbitrary and capricious statement of need. Furthermore, IRLI believes that DHS lacks the authority to parole unadmitted "entrepreneurs" and their spouses into the United States or to grant them work authorization based on their status as IER parolees. The scope and content of the IER would extend so egregiously beyond the comprehensive statutory scheme, which regulates both entry under parole and immigration based on employment or entrepreneurial activity, that rescission is the only viable administrative option.

A. The legislative record is unambiguous that parole authority to DHS from Congress is not without limit; rather, Congress has progressively restricted such authority.

The agency's view of the intent and actions of Congress as expressed in the IER was both arbitrary and inaccurate. The legislative history establishes that Congress enacted a statutory prohibition on pre-IIRIRA practices of the categorical exercise of agency discretion out of concern that parole under pre-IIRIRA was being used by the executive to circumvent congressionally established immigration policy. *Cruz-Miguel v. Holder*, 650 F.3d 189, 198–200 (2d Cir. 2011) (citing H.R. Rep. No. 104-169, pt.1, at 140–41 (1996)).

First, it is not in dispute that DHS has been barred by law since enactment of the INA in 1952 from treating parole as an admission to the United States or its equivalent.[1] *See* 82 Fed. Reg. 5241; INA § 101(a)(13)(B); 8 C.F.R. § 1.2. Second, more than 45 years of relevant federal legislation has shown a consistent intent by Congress to restrict the use of parole on a categorical basis. The U.S. Supreme Court permits examination of this legislative history at stage one of the *Chevron* test, as a check on novel agency interpretations which claim to be derived from text and structure. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, (2000) (using later congressional Acts which spoke "more specifically to the topic at hand" to determine whether a statute evidenced a clear congressional intent in *Chevron* step one).

In 1962, Congress added "parole" language to INA § 245(a) as part of a joint resolution authorizing the parole of certain refugees into the United States. H.R.J. Res. 397, 86th Cong., Pub. L. No. 86-648, § 10, 74 Stat. 504, 505 (1960). Between 1952 and enactment of the Refugee Act of 1980, the INA authorized the Attorney General to parole aliens into the United States without a grant of admission, only for: (1) "emergent" reasons, or (2) reasons "deemed strictly in the public interest." INA § 212(d)(5)(A). Even in that era, Congressional intent was always unambiguous:

> The parole provisions [of the INA] were designed to authorize the Attorney General to act only in emergent, individual, and isolated situations, such as the case of an alien who

[1] *See* INA, Pub. L. No. 82-414, 66 Stat. 188 (1952).

> requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of the law.

Senate Rep. No 89-748, at 17 (1965); *accord* H.R. Rep. No. 89-745, at 15–16 (1965).[2]

However, in practice the INS resisted this Congressional action to limit the agency's bureaucratic prerogatives. Emphasizing the lack of express statutory prohibitions on categorical grants of parole, between 1959 and 1961, for example, the INS paroled more than 20,000 Cubans into the United States.

In the 1980 Refugee Act, Congress reacted to what was perceived as a pattern of agency abuse of discretion by prohibiting the discretionary exercise of parole for any "alien who is a refugee," unless the Attorney General determined that "compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207." INA § 212(d)(5)(B).[3]

In 1996, Congress acted yet again to rein in agency abuse of discretion to parole aliens into the United States. Congress adopted the phrase "for urgent humanitarian reasons or significant public benefit language" in IIRIRA to *narrow* the circumstances in which aliens could qualify for "parole into the United States" under INA § 212(d)(5)(A). *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1119 (9th Cir. 2007). IIRIRA expanded the prohibition on blanket or categorical parole from refugees to all aliens. IIRIRA § 602 amended INA § 212(d)(5)(A) to authorize discretionary grants of parole by the agency "only" where multiple conditions have been met. Since 1996, parole may only be granted: (1) temporarily, (2) "on a case-by-case basis," (3) for no other purpose than "urgent humanitarian reasons or significant public benefit," (4) if the parolee was in the "custody" of DHS at the time of the grant of parole, and (5) if the grant of parole is never ("shall not be") "regarded as an admission of the alien." IIRIRA § 602, Pub. L. No. 104-208 (1996).

Each of these new elements restricted the agency's parole power as it may have operated pre-IIRIRA. Pre-IIRIRA, "emergent reasons" had meant merely unexpected needs for entry. The

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[2] When Congress intends to create loopholes or exceptions to its bar on the INA § 212(d)(5) parole of groups of excludable aliens, it knows how to do so. *See, e.g.*, P.L. 86-648, § 3, 74 Stat. 504-5 (July 1, 1960) (authorizing parole of a quota of "refugee-escapees" subject to the proviso that such parole would terminate after two year's presence in the United States.)

[3] Pub. L. No. 96-212 §203(f). For certain favored ethnic groups, including Soviet Jews, Laotians, and Cambodian, in 1990 Congress did provide a "public interest parole," popularly known as the Lautenberg Amendment, which allowed members of these ethnic groups who did not qualify as refugees under the 1980 Act to be paroled into the United States and granted adjustment of status, as if they had been admitted as refugees. Pub. L. No. 101-167 (1990). This limited statutory loophole, which has no relation whatsoever to INA § 212(d)(5)(A) significant public benefit parole, has been extended on annual basis as part of the Foreign Operations Appropriations Act. *Kurzban*, at 615.

deletion of this phrase by Congress eliminated the agency's prior discretion to grant parole based solely on sympathy or concern about an alien's unplanned inability to qualify for entry on statutory grounds. The addition of "temporarily" by IIRIRA clearly added a requirement that a specific time limit be placed on all grants of parole, making previous practices, of paroling aliens until the agency chose to terminate parole in an exercise of discretion, no longer authorized.

Post-IIRIRA, the only reasonable construction of the phrase "case-by-case" is that it bars any categorical grant of parole. The prohibition against "regard[ing]" parole as an admission disfavors agency interpretations that might increase or liberalize use of the parole power or permit any change in an alien's status while the alien is present as a parolee.

Furthermore, the mere fact that a statute gives DHS discretion whether to grant relief after application does not by itself give DHS the discretion to define eligibility for such relief. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987) (distinguishing between the Attorney General's discretion to make the ultimate decision to grant relief and the non-discretionary process and criteria for eligibility for relief). The amendments made by IIRIRA to INA § 212(d)(5)(A) represent a direct statement by Congress "to the precise question at issue"—whether the exercise of this parole power by DHS is subject only to agency discretion.[4]

The restrictive intent of IIRIRA is fully consistent with all prior legislative amendments to the parole power since enactment of the INA. That "is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. at 843.

B. The radical redefinition of the "significant public benefit" parole category by the Obama administration conflicts with the comprehensive statutory scheme for employment-based temporary and permanent immigration.

Not only does the IER conflict with the plain language and legislative history of the parole statute, INA § 212(d)(5)(A), it ignores the controlling body of immigration statutes regulating the entry of aliens to perform work. As a matter of law, the INA § 212 parole provision cannot operate without reference to the comprehensive legislative scheme for employment-related immigration found, *inter alia*, in INA §§ 101(a)(15), 203(b), 204(b), 213A, and 214.

DHS lacks the authority it claimed to be exercising in the IER: to parole an alien into the United States in order to engage in entrepreneurial employment. By law, aliens may only engage in

[4] Moreover, DHS cannot argue that "the precise question at issue is not a pure question of law. As such it is not within the jurisdictional bar of 8 U.S.C. § 1252(a)(2)(B)." *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001).

entrepreneurial work after lawful admission, pursuant to an approved immigrant or nonimmigrant visa. Where Congress has intended to promote employment of alien entrepreneurs in a given provision of immigration law, it has expressly indicated that intent in the statutory language.

Multiple express provisions of immigration law provide detailed statutory guidance on the prerequisite conditions for an alien to enter the United States for employment or entrepreneurial purposes. *See, e.g.*, INA §§ 101(a)(E)(ii), and 101(a)(15)(H)(i)(b) (employment-based nonimmigrants); INA §§ 203(b)(2)(B)(i), 203(b)(3)(A)(i), and 203(b)(5) (employment-based immigrants). Entry under one of these visa categories are the options provided by Congress for the admission of aliens under a nonimmigrant or immigrant visa "to establish and grow" start-up entities in the United States, rather than abroad. *See* 82 Fed. Reg. 5266.

For specialty occupations in *nonimmigran*t visa categories—including the STEM fields which the IER identified as frequently associated with high-growth start-up entities, *see* 82 Fed. Reg. 5272—international entrepreneurs who are the sole owners of a corporation which also employs them may direct a start-up entity to petition for an H-1B visa on their behalf. Nothing prevents entrepreneurs admitted in H-1B status from holding up to a 50% interest in their corporate sponsor, and H-1B workers may routinely extend their authorized stay for six years. 8 C.F.R. § 214.2(h)(4)(ii); *see e.g.*, *Matter of Aphrodite*, 17 I&N Dec. 530 (Comm'r 1980). Aliens from more than eighty "treaty" nations may (along with accompanying spouses and children) also be admitted in E-2 status "to develop and direct the operations of an enterprise in which the alien has invested, or is actively in the process of investing, a substantial amount of capital" in a *bona fide* enterprise. 22 C.F.R. § 41.51.

U.S. *immigrant* visa categories are also available for international entrepreneurs. The EB-2 second preference immigrant sub-category is specifically designed for international entrepreneurs holding advanced degrees or whose exceptional ability in the sciences, arts or business "will substantially benefit prospectively the national economy . . . or welfare of the United States . . . ." INA § 203(b)(2)(A). This immigrant classification is especially favorable for talented entrepreneurs investing in U.S. start-up entities, who are eligible for a national interest waiver. INA § 203(b)(2)(B)(i). Similarly, the IER specifically states that extending immigration benefits to start-up entities with the potential to show a high level of growth or innovation will prospectively benefit the national economy because they are "vital to economic growth and job creation in the United States" with a record of having "generated a cohort of high-growth firms that have driven a highly disproportionate share of net new job creation." 82 Fed. Reg. 5274. As such, the IER is duplicative of the EB-2 program, creating a new program via rulemaking where Congress has already unambiguously legislated.

The same rings true as the IER relates to the EB-5 program. The EB-5 fifth preference immigrant category offers conditional permanent residence to aliens and their spouses and children who will "engag[e] in a new commercial enterprise . . . in which the alien has invested . . . capital in the amount of [$1 million or in certain instances $500,000] . . . which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or [LPRs] . . . ." INA § 203(b)(5); INA § 216A.

Accordingly, the IER was clearly intended to nullify the caps and other detailed restrictions on the admission of aliens under these entrepreneurial and employment-related visa categories. For each of the above nonimmigrant and immigrant categories, Congress has enacted quotas on the number of annual admissions. The statutory conditions enacted for each visa category also differ from the related criteria proposed for international entrepreneur parole eligibility in the IER, typically by requiring some combination of a higher level of occupational or professional credentialing or experience, or higher amounts of at-risk investment capital. In the IER, DHS proposed to treat such statutory conditions as "barriers" to entry, *see, e.g.*, 82 Fed. Reg. 5283.

The agency's refusal to accept congressional mandates as to the scope of these statutory programs simply underlines the clarity and directness of the legislative scheme for employment-based immigration. Rescission is thus mandated because the IER cannot meet the first prong of the *Chevron* test for deference to an agency's statutory construction:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842–43 (1984). Whether DHS possesses discretion to grant significant public interest parole for aliens to engage in entrepreneurial employment notwithstanding the legislative scheme of employment and investment-related immigrant and nonimmigrant visas is a pure question of law.

C. The IER proposal to radically redefine the "significant public benefit" parole category by regulation is arbitrary and capricious and should be rescinded.

The IER states that the regulatory purpose of the rule was to establish general criteria for the use of parole with respect to 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 growth and job creation. 82 Fed. Reg. 5273.

1. The sudden change to the parole regulation was arbitrary and capricious.

The Homeland Security Act mandates that the authority of the Secretary to issue regulations "shall be governed by" the procedures and requirements of the Administrative Procedure Act, 5 U.S.C. 500, *et seq.* 6 U.S.C. § 1129(e) ("APA"). However, no existing or prior federal *regulation* supports or ever countenanced parole of international entrepreneurs for the purpose of employment by start-up entities in the United States.

Agency action that is "arbitrary or capricious," "otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" is to be "h[e]ld unlawful and set aside." 5 U.S.C. § 706(2). "It is central to the real meaning of the rule of law, and not particularly controversial that a federal agency does not have the power to act unless Congress, by statute, has empowered it to do so." *Succar v. Ashcroft*, 394 F.3d 8, 20 (1st Cir. 2005), *citing Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992).

The application of APA standards to agency action based on federal immigration law was unanimously affirmed by the U.S. Supreme Court. *Judulang v. Holder*, 565 U.S. 42 (2011). In *Judulang*, the Supreme Court unanimously invalidated a BIA rule for determining whether noncitizens in deportation proceedings qualified for a retroactive discretionary waiver under former INA § 212(c). For failing to "provide a reasoned explanation of its action" as required "when an administrative agency sets policy," the Court concluded that the policy adopted by the agency was unlawfully "arbitrary and capricious." 565 U.S. at 45. The majority opinion in *Judulang* by Justice Kagan also rebuked the government's alternative argument, that because DHS itself did not consider the regulation at issue to be an "abrupt departure from its prior practice," it somehow constituted a permissible agency interpretation of its governing statute under the APA. *Id.* at 61. "We think this is a slender reed on which to support a significant government policy" the Court explained, "[L]ongstanding capriciousness receives no special exemption from the APA." *Id.*

The IER is unlawfully arbitrary under APA standards. Coming twenty years after the last amendment to the INA parole statute in 1996, the IER represents a radical change in policy, with no explanation of why the change was suddenly occurring. Significantly, the IER made no changes to the § 212.5 regulation, making its official justification of "significant public benefit" in proposed new § 212.19, particularly arbitrary. The existing "specific" parole categories are found in 8 C.F.R. § 212.5. None of these parole categories is even remotely relevant to employment of aliens by or entrepreneurial investment in U.S. entities.

It was also incorrect for the agency to claim that an IER parolee would be entering to work "incident to status." The most prominent condition of the proposed entrepreneur parole program is that the alien work for a single designated entity. The IER would parole otherwise inadmissible aliens into the United States for the sole purpose of employment in a managerial and skilled technical capacity at certain small firms ("startup entities") in which the paroled alien controls a small but significant equity share. 82 Fed. Reg. 5241.

2. DHS failed to collect data required to establish a reasonable basis for the radical change in regulation of significant public interest parole.

The IER should also be rescinded as arbitrary agency action because, for 16 years, the agency has defied IIRIRA by refusing to comply with the direct mandate of Congress to collect and report the most directly relevant data for evaluating the policy change.[5] The agency relies instead on non-peer reviewed online articles, even while admitting that for key aspects of the IER, these highly selective sources only confirm that the potential effect of the rule is unknown. *See*, *e.g.*, 82 Fed. Reg. 5276.

The 1996 IIRIRA reforms to the INA § 212(d)(5) parole authority not only restricted its categorical and routine use, but mandated detailed reporting of agency use of parole, in particular by country of origin and "numbers and categories of aliens paroled, the duration of parole, the current status of aliens paroled, and the number and categories of aliens returned to the custody from which they were paroled . . . ." IIRIRA § 602(b).

Congress unambiguously stated the importance of this data for evaluating the agency's exercise of discretion, in particular the evaluation of agency-defined parole categories, and outcomes by category. *Id*. IIRIRA mandated that the Attorney General (now the Secretary of Homeland Security) provide this report "not later than 90 days after the end of each fiscal year to the Committee on the Judiciary of the House of Representatives and . . . the Senate. . . ." *Id*. Defying Congress and the public for reasons of bureaucratic self-interest and agency capture by its own "clients," the former INS issued just two "annual" reports. *See Report to Congress: Use of the Attorney General's Parole Authority Under the Immigration and Nationality Act Fiscal Years 1997–1998*.

The findings in the 1998 Report are diametrically in conflict with the statements regarding agency policy in the IER. An entire section of the 1998 Report "discusses the purposes of parole and

[5] *E.g.*, Mailman, *et al*., *Immigration Law & Policy*, § 62.01[3], n.52 (Rel. 139 2012): "The level of information in the [1998] report falls short of the detailed data Congress mandated."

introduces the six categories into which parolees are classified." *Id*. That section of the 1998 Report reads:

> In general, the parole authority in section 212(d)(5) allows the INS to respond in individual cases that present problems that are time-urgent or for which no remedies are available elsewhere in the Immigration and Nationality Act. The prototype case arises in an emergency situation. For example, the sudden evacuation of U.S. citizens from dangerous circumstances abroad often includes household members who are not citizens or permanent resident aliens, and these persons are usually paroled. When aliens are brought to the United States to be prosecuted or to assist in the prosecution of others, they are paroled. Parole is sometimes used to reunite divided families. . . .
>
> Since FY 1992, the INS has used six categories to classify paroles. A brief description of each follows:
>
> 1. Port-of-entry parole is the single category used most often. It applies to a wide variety of situations and is used at the discretion of the supervisory immigration inspector, usually to allow short periods of entry. Examples include allowing aliens who could not be issued the necessary documentation within the required time period, or who were otherwise inadmissible, to attend a funeral and permitting the entry of emergency workers, such as fire fighters, to assist with an emergency.
>
> 2. Advance parole may be issued to aliens residing legally in the United States in other than lawful permanent resident (LPR) status who have an unexpected need to travel abroad and return, and whose conditions of stay do not otherwise allow for readmission to the United States if they depart.
>
> 3. Deferred inspection parole may be conferred by an immigration inspector when aliens appear at a port-of-entry with documentation, but after preliminary examination, some question remains about their admissibility which can best be answered at their point of destination.
>
> 4. Humanitarian parole responds to the "urgent humanitarian reasons" specified in the law. It is used in cases of medical emergency and comparable situations.
>
> 5. Public interest parole *refers to the "significant public benefit" language in the law. It is generally used for aliens who enter to take part in legal proceedings* (emphasis added).
>
> 6. Overseas parole is the only category of parole that is designed to constitute long-term admission to the United States. In recent years, most of the aliens the INS has processed through overseas parole have arrived under special legislation or international migration agreements [].

The report provides further relevant analysis on parole for "significant public benefit".

> The *public interest parole* category *invokes the "significant public benefit" language in the law. It is primarily used with aliens entering in conjunction with a legal proceeding. These aliens may have been brought to the United States for prosecution under our laws, or they may be assisting U.S. officials in a prosecution* (emphasis added). The authority for public interest parole rests with the INS Headquarters Office of International Affairs.
>
> Public interest parole has been the least used type of parole in recent years, accounting for about 2 percent of all paroles in both FY 1997 and 1998. Canadian and Mexican nationals were again the most common in this category, as shown in Table 6. They accounted for 65 percent of all public interest paroles in 1997 and 72 percent in 1998. The increase in the absolute number from Mexico accounted for all of the increase in public interest parole between 1997 and 1998. *On average in FY 1997, public interest parole was given for 7 weeks* (emphasis added).

Table 6

Aliens Granted Public Interest Parole by Selected Country of Citizenship* FYs 1997 and 1998

Country	FY 1997	FY 1998
All countries	3,593	5,173
Mexico	1,299	3,193
Canada	1,050	555
Haiti	128	13
United Kingdom	87	100
China (PRC)	75	111
Percent of yearly total	73.4%	76.8%
*Countries were selected if they had at least 100 public interest parolees in either year.		

> Persons paroled in a law enforcement context present a special complication for data collection, since in addition to entry into the United States, the parole may represent entry into or out of detention, or transfer to the custody of another law enforcement agency, and the ultimate disposition of these cases is not tracked in the NIIS. If convicted of the crime for which they were being prosecuted, public interest parolees may remain for substantial periods of time while serving their sentences in U.S. prisons.

Id., *available at* https://www.ilw.com/immigrationdaily/news/2001,0329-Parole.shtm (last visited June 25, 2018).

In considering the reasonableness of the agency's evocation of the "significant public benefit" prong of INA § 212(d)(5)(A) as authority for the proposed new 8 C.F.R. § 212.19 regulation creating "international entrepreneur" parole, it is highly significant that the Clinton administration, which had the duty of preparing the original regulations to implement IIRIRA and issued the 1998 Report, did not recognize use of *any* parole category to enable the employment of alien entrepreneurs or investors.

Further confirmation that the radical change in DHS policy put in place under the IER is unlawfully arbitrary is found in a 2008 DHS internal agency Memorandum of Agreement, which formally reaffirmed the agency's original construction of IIRIRA § 602(a) as retaining the longstanding policy and practice of strictly limiting the applicability of significant public benefit parole for aliens located outside the United States or who present themselves at a U.S. port of entry upon initial approach to the United States:

> As [agency] practice has evolved, DHS bureaus have generally construed "humanitarian" paroles (HPs) as relating to urgent medical, family, and related needs and "*significant public benefit paroles" (SPBPs) as limited to persons of law enforcement interest such as witnesses to judicial proceedings*. Categorizing parole types helps prospective parole beneficiaries direct their applications to the appropriate bureau and facilitates DHS tracking.

See USCIS, ICE and CBP, *Memorandum of Agreement, 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*, at 2 (Sep. 29, 2008), available at https://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf (last viewed June 22, 2018) (emphasis added).

The MOA clarified that all three immigration bureaus of the DHS—ICE, USCIS and CBP—agreed in 2008 that the correct construction of the discretionary parole power under INA § 212(d)(5)(A) was, "as 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*." *Id*. (emphasis added).

The agency's position in 2008 was not only administratively consistent, but in constitutional terms was a restatement of Supreme Court construction of the parole power that is more than 100 years old:

> The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status, and to hold that petitioner's parole placed her legally

> "within the United States" is inconsistent with the congressional mandate, the administrative concept of parole, and the decisions of this Court.

Leng May Ma v. Barber, 357 U.S. 185, 190 (1958); *see, e.g.*, *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) ("The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction").

IRLI concludes that never in the history of U.S. immigration law has *any* statutory parole power been used to promote the entry and employment of alien entrepreneurs, who are simply inadmissible under the INA's comprehensive legislative scheme for employment-related permanent and temporary immigration. The proposed rescission of the IER is the only option available to DHS that would bring the agency back into APA compliance.

D. The comprehensive legislative scheme for employment-based immigration bars DHS from issuing work authorization to aliens paroled for the *ultra vires* purpose of engaging in entrepreneurial employment.

A critical element of any DHS action to rescind the IER should be to clarify that the prior administration's claim of sweeping executive branch discretion to grant work authorization on a categorical basis had no basis in law, and is thus repudiated as policy by the Secretary of Homeland Security. Indeed, the IER repeats the novel and unfounded claim of the Obama administration that Congress has delegated the power to authorize *any* alien to engage in employment to DHS, except where Congress has explicitly prohibited it. The IER summary incorrectly claimed that the source of this alleged agency authority is two INA provisions: INA § 103(a) and § 274A(h)(3). *See* 82 Fed. Reg. 5239. The former defines the duties of the Secretary of Homeland Security and makes no mention of authority to grant employment. The latter is the definition of the term *unauthorized alien* (*i.e.*, those aliens employers may not hire), but is limited in scope by the text to § 274A.

1. <u>INA § 103(a) does not authorize unlimited discretionary grants of work authorization.</u>

Subsection 103(a) of the INA currently defines the powers and duties of the Secretary of Homeland Security. This provision was originally created in the INA, § 103, 66 Stat. 173–74. That provision (both as originally created and as it reads now) makes no mention of authorizing alien employment. *Id*. Congress could not have conferred unlimited authority on DHS to grant aliens employment when it created § 103(a) in 1952, as the Act then required all aliens entering the job market (with exceptions not relevant here) not to affect American workers adversely.

Moreover, both the House and Senate reports on the 1952 Act directly contradict the claim that the INA has ever included a grant of independent employment authority to the Executive. *See* S.

Rep. 82-1137 at 11 (Jan. 29, 1952) and H.R. Rep. 83-1361 at 51 (Feb. 14, 1952). Both reports state the INA excludes the admission of aliens to perform labor if the Secretary of Labor determines American workers are available or that such foreign workers will adversely affect American workers.[6] *Id*. Both reports also state the provision is applicable to "all aliens" except those determined to be needed in the United States and certain admissions for permanent residency. *Id.* This requirement that foreign labor may not be admitted if the Secretary of Labor determines it would have an adverse impact on American workers precludes the interpretation that enactment of § 103(a) conferred on the Secretary of Homeland Security unfettered authority to authorize employment to otherwise inadmissible alien entrepreneurs.

2. INA § 274A(h)(3) does not authorize unlimited discretionary grants of work authorization.

Subsection 274A(h)(3) is merely a definitional provision, limited to a single section of the INA.[7] It provides no authorization for anyone to do anything. INA § 274A was created by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3445 (IRCA). It imposes civil and criminal penalties on employers who employ *unauthorized alien*s—*i.e.*, those not authorized to work in the United States. Furthermore, subsection 274A(h)(3) defines the term *unauthorized alien* solely for the purposes of that section ("as used in this section").

The agency's position in the IER is untenable because its radical interpretation—that USCIS already has discretionary authority to authorize employment to any alien under INA §§ 103 and 274A(h)(3)—would make all discretionary authority for the Secretary of Homeland Security to grant work permits to aliens meaningless surplusage. Consequently, the IER's interpretation directly conflicts with Supreme Court doctrine holding that "no words are to be treated as surplusage or as repetition." *Platt v. Union P. R.*, 99 U.S. 48, 59 (1879). The agency's theory cannot explain why Congress included provisions in IRCA granting the Secretary of Homeland Security authority to provide certain aliens with work permits, nor explain subsequent similar grants of authority—all of which would become surplusage under 8 C.F.R. § 212.19(g), 8 C.F.R. 274a.12(b)(37), and 8 C.F.R. § 274a.12(c)(34).

Applied to the required elements of work authorization in § 274A, the definition of *unauthorized alien* in § 274A(h)(3) allows employers to hire three groups of aliens without penalty: (1) permanent residents; (2) those authorized to be employed by the INA (*e.g.*, H and L guestworkers); or (3) those authorized by the Attorney General (now the Secretary of Homeland

[6] The Immigration Act of 1965 changed this provision, making a certification by the Secretary of Labor a precondition for admitting foreign labor. Pub. L. No. 89-236, § 10, 79 Stat. 911, 917–18.

[7] Other definitions using similar language in regard to employment include, 8 U.S.C. § 1182(n)(5)(E) ("or by the Attorney General") and 8 U.S.C. § 1182(t)(4)(D) ("or by the Secretary of Homeland Security").

Security). The first two categories provide no difficulty in interpretation, and in any case were not evoked by the IER as employment authorization for international alien entrepreneur parolees.

Identifying the legislative intent behind the inclusion of the phrase "or by the Attorney General" in the definition requires additional analysis. The Immigration Act of 1965 amended the alien employment provisions to require an affirmative certification by the Secretary of Labor that American workers were not available and that the alien labor would not adversely affect American workers prior to the admission of foreign labor, and changed the "shall only apply" restriction to "shall apply." Pub. L. No. 89-236, § 9, 79 Stat. 911, 917–18. The courts subsequently applied this restriction to nonimmigrant categories. *See, e.g., International Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 800 (D.C. Cir. 1985).

IRCA contained seven specific grants of authority to the Attorney General to authorize classes of aliens without visas to engage in employment. *See* § 201, 100 Stat. 3397, 3399 [two], § 301, 100 Stat. 3418, 3421 [two], 3428. The Senate report on IRCA stated that such aliens shall "be considered to be authorized by the Attorney General to be so employed during the period of time indicated on such documentation." S. Rep. 99-132 at 43 (Aug. 28, 1985). Had Congress omitted the phrase "or by the Attorney General" from § 274A(h)(3), aliens could have possessed work permits provided for by IRCA but still remained unemployable, as their employers would still have been subject to the civil and criminal penalties contained therein.

The Immigration Act of 1990 ("IMMACT90") moved the restriction that foreign labor is inadmissible unless the Secretary of Labor certified that no Americans are available and that the foreign labor would not adversely affect American workers, from INA § 212(a)(14) to § 212(a)(5). Pub. L. No. 101-649, § 601, 104 Stat. 5072. Another provision, § 162, limited this worker protection to EB-2 and EB-3 green card petitions. 104 Stat 5011. However, the next year Congress enacted the Miscellaneous and Technical Immigration and Nationalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733. This Act repealed IMMACT90's restriction of labor certification to EB-2 and EB-3 green cards, and returned the applicability of the provision from "any alien who seeks admission or status as an immigrant under paragraph (2) or (3) of section 203(b)" back to "any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor." § 302, 105 Stat. 1746. The current labor certification language in INA § 212(a)(5)(i) thus clearly applies to the IER alien entrepreneurs, who as parolees are seeking "to enter" despite their inadmissibility under other INA § 212 provisions.

Subsequent enactments confirm that the phrase "or by the Attorney General" refers only to specific circumstances where the Executive Branch has been granted authority to authorize employment. For example, in 1996, IIRIRA granted discretion to the agency to extend employment

authorization to asylum applicants through regulation. Pub. L. No. 104-208, § 604, 110 Stat. 3009, 3009-693. In 2006, the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA) granted DHS discretion to provide employment authorization to VAWA petitioners. Pub. L. No. 109-162, § 814, 119 Stat. 2960, 3059 (2006). The same section also provided that DHS "may authorize" battered spouses "to engage in employment." *Id*. And, the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, § 908, 112 Stat. 2681-538 (HRIFA), a statutory overseas parole program distinct from INA § 212(d)(5)(A) parole, provided that the Attorney General, "may authorize" employment to certain Haitian nationals.

Therefore, the claim in the IER that DHS has unlimited discretion to authorize employment to aliens is unsupported by law. No statute explicitly grants such authority. Moreover, there is no judicial authority as to how Congress may have *implicitly* granted such power. For example, in its Supreme Court brief in *U.S. v. Texas*, the government argued that "Section 1324a(h)(3) did not create the Secretary's authority to authorize work; that authority already existed in Section 1103(a)" (referring to INA § 274A(h)(3) and INA § 103(a), respectively). If Congress had conferred such *sweeping authority* on the Executive, it is striking that there is no agreement where Congress actually did it. *See King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[H]ad Congress wished to assign ['a question of deep economic and political significance'] to an agency, it surely would have done so expressly."). "Congress [] does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). One would therefore expect a grant to DHS of dual authority with Congress to define classes of aliens who may work in the United States to have a clear statement somewhere; something like: *The Secretary may through regulation extend employment to aliens who* _____. Yet, no such provision exists. DHS may not administratively create a missing statutory authorization of work authorization discretion through an extra-statutory initiative like the IER. Because DHS cannot identify an alternative statutory means to parole international entrepreneurs in the United States, the IER must be rescinded.

E. INA § 212(d)(5)(A) does not authorize parole for otherwise inadmissible aliens to engage in the entrepreneurial activity envisioned by the IER.

The novel actions featured in the IER improperly relied for authority on the Obama administrations' claim that, "The Secretary's parole authority is expansive." 82 Fed. Reg. 5242. According to DHS:

> Congress did not define the phrase "urgent humanitarian benefit or significant public benefit," entrusting interpretation and application of those standards to the Secretary. Aside from requiring case-by-case determinations, Congress limited the parole authority by

> prohibiting its use with respect to [just] two classes of applicants for admissions: (1) Aliens who are refugees (unless the Secretary determines that ‘‘compelling reasons in the public interest with respect to that particular alien require that the alien be paroled . . . rather than be admitted as a refugee’’ under INA section 207, 8 U.S.C. 1157), see INA section 212(d)(5)(B), 8 U.S.C. 1182(d)(5)(B); and (2) certain alien crewmen during a labor dispute in specified circumstances (unless the Secretary ‘‘determines that the parole of such alien is necessary to protect the national security of the United States’’), INA section 214(f)(2)(A), 8 U.S.C. 1184(f)(2)(A).

Id. at 5242-5243.

Parole under INA § 212(d)(5)(A) is "an administrative practice whereby the government allows an arriving alien who has come to a port-of-entry without a valid entry document to be temporarily released from detention and to remain in the United States pending review of his immigration status." *Ibragimov v. Gonzales*, 476 F.3d 125 (2d Cir. 2007). The sole method provided under the INA by which an unadmitted alien may meet the statutory requirement to "arrive" in a lawful manner is (1) to enter (or be taken) into DHS custody at a port of entry and (2) while in such custody be inspected regarding admissibility. INA § 235(a)(3). An alien who is "present in the United States" but "has not been admitted" is correctly classified as an "applicant for admission." INA § 235(a)(1). That applicant for admission is inadmissible if he or she has arrived in an unlawful manner, *i.e.*, "at any time or place other than as designated by the Attorney General." INA § 212(a)(6)(A)(i).

The plain language of the parole statute makes it clear that no parolee can ever be "entitled to be admitted." All applicants for admission, whether they are at a port of entry or physically present inside the country without having been admitted, "shall be inspected by immigration officers" who will determine their admissibility. INA § 235(a)(3). By contrast, aliens paroled into the United States per INA § 212(d)(5)(A)—including the proposed international entrepreneurs—are by definition *not* inspected and admitted. No provision of law entitles any alien to be "admitted" based merely on the agency's discretionary decision that a humanitarian emergency exists, or a significant public benefit would accrue. A parolee thus can never demonstrate that he or she is "clearly and beyond a doubt entitled to be admitted," which is the statutory standard for admission. *See* INA § 235(b)(2)(A). By statute, the burden of proof to show such entitlement is always on the applicant for admission, and may not be assumed by the government. *See* INA § 291.[8] INA § 291

[8] "Whenever any person makes application . . . for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he . . . is not inadmissible under any provision of this act, and, if an alien, [] is entitled to the [immigration] . . . status claimed, as the case may be . . . . nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not inadmissible under any provision of this Act . . . . If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law."

expressly prohibits such burden-shifting. Parole can only return the alien to the exact immigration status he or she held at the time advance parole was granted. *In re Arrabally*, 25 I&N Dec. 771, 778 (B.I.A. 2012). By law, INA § 212(d)(5)(A) parolees thus remain locked in the status they held at the time of parole, *i.e.*, an inadmissible applicant for admission.

F. Conclusion.

Given the unlawful effect and unsubstantiated record in the IER, IRLI respectfully urges USCIS to proceed with its immediate removal. In particular, the justification for rescission should recognize that the use of parole to meet the employment and investment needs of U.S. start-ups would be outside the scope of Congressional authorization, as would the categorical grant of work authorization to IER parolees and family members.

Respectfully submitted,
Immigration Reform Law Institute