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IRLI is a nonprofit public interest law firm working to end unlawful immigration and to set levels of legal immigration that are consistent with the national interest.

IRLI is a supporting organization of the Federation for American Immigration Reform.

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October 17, 2016
Ms. Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Ave N.W.
Washington, DC 20539

DHS Docket No. USCIS-2015-0006: Public Comment of the Immigration Reform Law Institute, Inc.

Dear Chief Deshommes:

The Immigration Reform Law Institute, Inc. ("IRLI") submits the following public comments to the U.S. Citizenship and Immigration Services ("USCIS") of the Department of Homeland Security ("DHS") in opposition to the agency's Notice of Proposed Rulemaking ("NPRM"), as published in the Federal Register on August 31, 2016. *See* ***International Entrepreneur Rule***, DHS Docket No. USCIS-2015-0006, 81 Fed. Reg. 60130-68.

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, and to monitor and hold accountable federal, state, or local government officials who undermine, fail to respect, or 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.

After careful review of the NPRM, IRLI regretfully concludes that the proposed rule would conflict with and violate controlling federal immigration and administrative law. This public comment focuses on those aspects of parole for aliens whom DHS intends to administratively classify as "international entrepreneurs" that would be unlawful. IRLI respectfully submits that DHS lacks the authority to parole unadmitted "entrepreneurs" and their spouses into the United States for employment by United States entities.

First, The NPRM would conflict with U.S. admission and inspection statutes.

Second, the legislative record is unambiguous that DHS parole authority has been progressively restricted by Congress.

Third, the agency's proposed radical construction of the "significant public benefit" parole category conflicts with the comprehensive statutory scheme for employment-based temporary and permanent immigration.

Fourth, no existing or prior federal regulations support or countenance parole of international entrepreneurs for the purpose of employment by start-up entities in the United States.

Fifth, the DHS proposal to radically redefine the "significant public benefit" parole category is arbitrary and capricious.

Sixth, the comprehensive legislative scheme for employment-based temporary and permanent immigration bars DHS from issuing work authorization documents to aliens paroled solely for the purpose of engaging in entrepreneurial employment.

Finally, the NPRM fails to provide a reasonable factual basis for the novel claim that parole for an uncapped number of inadmissible alien entrepreneurs would produce "substantial and positive contributions to innovation, economic growth, and job creation."

1. The NPRM entry rules would conflict with U.S. admission and inspection statutes.

The NPRM is unacceptably vague as to whether the agency intends to grant parole under proposed 8 C.F.R. § 219 to aliens already present in the United States. The NPRM states that aliens may apply for international entrepreneur parole or derivative status regardless of whether they are "within the United States or outside the United States." 81 Fed. Reg. 60142. However, proposed 8 C.F.R. § 219(d) would read, "Approval of such a request must be obtained before the alien may appear at a port of entry to be granted parole, in lieu of admission." *Id*. at 60166.

Regardless of its political desire to deem alien entrepreneurs already present in the United States as a novel class of significant public benefit parolees under proposed 8 C.F.R. § 219, DHS lacks authority to do so. Parole under Immigration and Nationality Act ("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 the his immigration status." *Ibragimov v. Gonzales*, 476 F.3d 125 (2d Cir. 2007). "Parole in place" is a controversial bureaucratic practice that has no statutory or regulatory status. An internal 2013 USCIS policy memorandum claims that the legal

authority for granting parole-in-place was formally recognized by then-Immigration and Nationality Service (INS) General Counsel Paul Virtue in a 1998 agency memorandum.[1] The 1998 memorandum contended that two Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") amendments had, by joint operation, authorized parole for unadmitted aliens. Mr. Virtue noted that IIRIRA § 302(a) had amended INA § 235 to classify aliens present in the United States without admission or parole as "applicants for admission,"[2] and also that IIRIRA § 301(c) made aliens who have not been admitted or paroled inadmissible.[3] His memorandum concluded that the amendment to the definition of "applicant for admission" had thus added unadmitted aliens in the United States, who were not "arriving aliens" as defined in INA § 235(a)(1), to the classes of aliens eligible for parole under § 212(d)(5)(A).[4]

This arbitrary interpretation directly conflicts with the intent of Congress, which as a DHS Chief Counsel noted in 2007, would provide an expansion of immigration benefits contrary to the overall structure of IIRIRA, which was designed to reduce—not increase—the opportunities available to aliens present without inspection."[5] While parole is a form of relief from immigration detention, it is not a form of relief from removal proceedings. *Zheng Zheng v. Gonzales*, 422 F.3d 98, 117 (3d Cir. 2005). By default, any alien "not clearly and beyond a doubt entitled to be admitted … shall be detained for a [removal] proceeding under section 240." INA §235 (b)(2)(A). No parolee is ever "entitled to be admitted."

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 and (2) be inspected while in such custody. INA § 235(a)(3). Post-IIRIRA, an alien who is "present in the United States" but "has not been admitted" is correctly classified as an "applicant for admission" per INA § 235(a)(1). But that applicant for admission is still inadmissible if he or she

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[1] USCIS, Policy Memorandum PM-602-0091, *Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i),* (Nov.15, 2013).
[2] *See* INA § 235(a)(1), 8 U.S.C. § 1225(a)(1).
[3] *See* INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i).
[4] PM-602-0091, at 2, citing Virtue, *Authority to Parole Applicants for Admission Who Are Not Also Arriving Aliens*, HQCOU 120/17-P, Legal Opinion 98-01 (Aug. 21, 1998), *available* at 1998 WL 1806685.
[5] Gus P. Coldebella, Memorandum, *Clarification of the Relation Between Release Under Section 235 and Parole Under Section 212(d)(5) of the Immigration and Nationality Act*, at 4–5 (Sept. 28, 2007), *available as* AILA Infonet Doc. No. 09121790; *see also* discussion of the restrictive parole language in IIRIRA § 602(a).

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).

All applicants for admission, whether they are at the border or physically present inside the country without having been admitted, "shall be inspected by immigration officers" who will determine their admissibility. 8 U.S.C. § 1225(a)(3). 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.[6] INA § 291 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). INA § 212(d)(5)(A) parolees thus remain in the status they held at the time of parole, *i.e.*, an inadmissible applicant for admission.

2. The legislative record is unambiguous that DHS parole authority has been progressively restricted by Congress.

The novel actions featured in the NPRM rely heavily for authority on the claim of law that, "The Secretary's parole authority is expansive." 81 Fed. Reg. 60134. 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 two classes of applicants for admissions: (1) Aliens who are refugees (unless the Secretary determines that parole is required for a particular alien for compelling reasons in the public interest), *see* INA § 212(d)(5)(B), 8 U.S.C. § 1182(d)(5)(B); and (2) alien crewmen during certain labor disputes, *see* INA § 214(f)(2)(A).

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[6] "Whenever any person … makes application for admission, or otherwise attempts to enter the United States, the burden 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." 8 U.S.C. § 1361.

Id. The agency's view of the intent and actions of Congress as expressed in the NPRM is very inaccurate. The 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).

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.[7] *See* 81 Fed. Reg. § 60134; 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 practice of categorical parole. Congress added "parole" language to § 1255(a) in 1960 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 in 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), 8 U.S.C. § 1182(d)(5)(A)(1979). 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 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).[8] However, in practice the INS resisted Congressional intent to limit its 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 institutional 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

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

[8] 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.)

than be admitted as a refugee under section 207." INA § 212(d)(5)(B), 8 U.S.C. § 1182(d)(5)(B)(1980).[9]

In 1996 Congress moved again to rein in agency abuse of discretion to parole aliens into the United States. IIRIRA extended the prohibition on blanket or categorical parole from refugees to all aliens. IIRIRA § 602 amended INA § 212(d)(5)(A) to restrict the agency's discretionary grant parole authority "only" where multiple conditions have been met. 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") "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. 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 § 1182(d)(5)(A). *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1119 (9th Cir. 2007). Pre-IIRIRA, "emergent reasons" had meant merely unexpected needs for entry. Its deletion by Congress eliminated the former discretion to grant parole based solely on agency 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 is clearly a new statute of construction, whereby agency interpretations that might increase or liberalize use of the parole

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[9] 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.

power or permit any change of status while present as a parolee, such as the Virtue memorandum, are disfavored.

This legislative history establishes that Congress enacted these statutory prohibition on pre-IIRIRA practices of the categorical exercise of agency discretion out of concern that parole under pre-IIRIRA § 1182(d)(5)(A) 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)).

The mere fact that a statute gives DHS discretion as to 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 discretion in the Attorney General as to the ultimate decision to grant relief and the underlying 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.[10]

The restrictive intent of IIRIRA is clear because it 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.

3. The DHS proposed radical construction of the "significant public benefit" parole category conflicts with the comprehensive statutory scheme for employment-based temporary and permanent immigration.

DHS lacks the authority it claims to be exercising in the NPRM—to parole an alien into the United States in order to engage in entrepreneurial employment. Where Congress has intended that promotion of employment of alien entrepreneurs be the purpose of a given provision of immigration law, it has expressly indicated that intent in the statutory language.

By law, aliens may only engage in entrepreneurial employment after lawful admission based on an approved immigrant or nonimmigrant visa. Multiple express provisions of immigration law provide clear and unambiguous statutory guidance as to the conditions when an alien may enter the United States for employment or entrepreneurial purposes. *See, e.g.*, INA § 101(a)(E)(ii), § 101(a)(15)(H)(i)(b) (employment-based nonimmigrants); INA § 203(b)(2)(B)(i),

[10] 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. at 688.

§ 203(b)(3)(A)(i), and § 203(b)(5) (employment-based immigrants). Under each of these statutes, Congress has expressly provided for the admission of certain aliens under a nonimmigrant or immigrant visa "to establish and grow" start-up entities in the United States, rather than abroad, in the expectation that such admissions would "promote entrepreneurship and investment; facilitate research and development and other forms of innovation; support the continued growth of the U.S. economy; and lead to job creation for U.S. workers" as proposed in the NPRM. 81 Fed. Reg. 60135.

For specialty occupations—including the STEM fields which the NPRM identifies as frequently associated with high-growth start-up entities, *see* 81 Fed. Reg. 60,158—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 with accompanying spouses and children may 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 relevant. While the NPRM asserts that international entrepreneur programs operated by foreign nations are "competing" with U.S. programs, notably it does not identify a single parole-type program implemented by these foreign states, for the sound reason that the defects of a parole-based approach are systemic and fundamental.

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 (NIW). INA § 203(b)(2)(B)(i). The proposed NPRM 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." 81 Fed. Reg. 60153–54.

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.

The NPRM is 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 NPRM, 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 NPRM, DHS proposes to now treat such statutory conditions as "barriers" to entry, *see, e.g.*, 81 Fed. Reg. 60135, which would either "significantly delay" a parolees' proposed entrepreneurial employment, *id*. at 60153, or cause the potential entrepreneur to choose a third country in which to work and invest that would allegedly offer lower requirements to enter or immigrate for purposes of entrepreneurial employment. *Id*.

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. As a matter of law, INA § 212 cannot operate without continuing 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. The proposed rule thus 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 non-immigrant visas is a pure question of law. Judicial review of the proposed regulation is thus not barred by 8 U.S.C. § 1252(a)(2)(B). *Zadvydas v. Davis, 533 U.S. 678, 688 (2001).*

4. **No existing or prior federal regulations support or countenance parole of international entrepreneurs for the purpose of employment by start-up entities in the United States**.

The DHS NPRM states that the purpose of the proposed rule is 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.

81 Fed. Reg. 60131.

The NPRM asserts that "DHS and the former … [INS] have long extended parole … exercised … through policy guidance or regulations identifying classes of individuals to be considered for parole through individualized case-by-case adjudications." 81 Fed. Reg. 60134. In support of this claim the agency misleadingly argues that "[8 C.F.R. 212.5] regulations provide that parole from immigration custody generally would be "justified" on a case-by-case basis if an individual falls within one of several specific categories…." *Id.* at 60135. However, none of the existing "specific" parole categories found in 8 C.F.R. § 212.5 are even remotely relevant to employment of aliens or entrepreneurial investment with U.S. entities. The NPRM proposes no changes to the § 212.5 regulation, making the official justification in proposed new § 212.19 even more arbitrary. In fact, IRLI believes 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 inadmissible under the INA's comprehensive legislative scheme for employment-related permanent and temporary immigration.

The only actual example in the NPRM of what DHS claims to have been an employment-related prior significant public benefit parole action is the agency's misleading citation to a "policy on the use of parole into the CNMI [Commonwealth of the North Marianas Islands] for certain foreign workers, as well as visitors from [Russia and China]… justified on the economic benefit such workers and visitors would provide to the U.S. territory." 81 F.R. 60135. That regulation, 8 C.F.R. § 214.2(w)(1)(v), is irrelevant to INA § 212(d)(5)(A) parole. It was issued pursuant to the Consolidated Natural Resources Act of 2008 (CNRA), in particular certain transitional territorial immigration provisions codified under 48 U.S.C. § 1806(e). CNRA transitional rule parole has no relation whatsoever to significant public benefit parole under INA § 212(d)(5)(A).

This cavalier misstatement of relevant law in the NPRM raises concerns as to the capability and willingness of the agency to exercise discretion impartially, consistent with all the conditions imposed by INA § 212(d)(5)(A), were it to actually perform the proposed international entrepreneur adjudications.

5. The DHS proposal to radically redefine the "significant public benefit" parole category is 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).

The Administrative Procedure Act (APA) will "hold unlawful and set aside" not only agency action that is "arbitrary or capricious," but also agency action that is "otherwise not in accordance with law" or is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A, C). "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).

An agency acts arbitrarily and capriciously if, *inter alia*, it "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency…." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, (1983); *see also FEC v. Rose*, 806 F.2d 1081, 1088 (D. C. Cir. 1986); *Nazareth Hosp. v. Sec'y of HHS*, 747 F.3d 172, 179 (3d Cir. 2014) ("Agency action is arbitrary and capricious if the agency offers insufficient reasons for treating similar situations differently.").

An agency's action will be set aside as "arbitrary and capricious" if the agency does not provide a "reasoned explanation" for a change in course. *Massachusetts v. EPA*, 549 U.S. 497, 534–35 (2007). "Unexplained inconsistency" in agency practice is a reason for holding a policy reversal "arbitrary and capricious" under the APA, unless "the agency adequately explains the reasons for a reversal of policy." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *see also State Farm*, 463 U.S. at 42–43; *CBS Corp. v. FCC.*, 663 F.3d 122, 145 (3d Cir. 2011). When making a shift in policy, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962)).

That reasoned analysis must be shown on the record. *Comité de Apoyo a los Trabajadores Agricolas v.Perez*, 774 F.3d 173, 187 (3d Cir. 2014) (citing 5 U.S.C. § 706(2)(D)). Without such analysis in the record, a reviewing court may conclude that an agency has taken action without complying with procedures required by law. *Id.*

The application of APA standards to agency action based on federal immigration law was unanimously affirmed by the 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 NPRM would, if implemented, be arbitrary under APA standards. Twenty years after the relevant amendment to the INA parole statute, it proposes a radical change in policy, without explanation of why the radical change is suddenly being made. It is also arbitrary because for 16 years the agency has defied IIRIRA by refusing to collect and report the most directly relevant data for evaluating the policy change, and which it was directly mandated by Congress to report.[11] The agency relies instead on non-peer reviewed online articles, even while admitting that for key aspects of the NPRM, these highly selective sources only confirm that potential effect of the rule is "unknown." *See, e.g.*, 81 Fed. Reg. 60136.

The 1996 IIRIRA reforms to the INA § 212 (d)(5) parole authority not only restricted its categorical and routine use, but it 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*.

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[11] *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."

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. DHS has issued none at all.

The findings in the 1998 Report are diametrically in conflict with the statements regarding agency policy in the NPRM. An entire section of the 1998 Report "discusses the purposes of parole and introduces the six categories into which parolees are classified." *Id*. That section of the 1998 Report stated:

> 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...

5. Public Interest Parole

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 FYs 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 October 6, 2016).

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. Equally indicative that the parole category which the NPRM proposes to create is an entirely arbitrary bureaucratic creation is the fact that for the fiscal years from 1999 to the present, the Secretary has completely failed, without any publically available explanation, to file the required annual Reports. There is thus—as a matter of law—no primary documentation in the record of the need for the proposed new parole category.

Further confirmation that the radical change in DHS policy as set forth in the NPRM 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 [emphasis added]. 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 (viewed Oct. 13, 2016).

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 [emphasis added].

Id. 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).

6. The comprehensive legislative scheme for employment-based temporary and permanent immigrant bars DHS from issuing work authorization documents to aliens paroled solely for the purpose of engaging in entrepreneurial employment.

The NPRM asserts, at 81 Fed. Reg. 60134: "Under current regulations, once paroled into the United States, a parolee is eligible to request employment authorization form USCIS by filing …

Form I-765. *See* 8 C.F.R. § 274a.12(c)(11)." Under the proposed rule "An entrepreneur … under this rule would be authorized for employment incident to his or her parole with the new start-up entity. (*See* proposed new 8 C.F.R. § 212.19(g)) [emphasis added]." 81 Fed. Reg. 60144. DHS "further proposes that … employment authorization … be "automatic"… so that the entrepreneur can pursue … parole related activities with the start-up entity without delay…. Delay resulting from the need to apply for and receive EADs (up to 90 days or more) could be detrimental to the success of the start-up entity." *Id*.

DHS proposes to use an amendment to the introductory provision of 8 C.F.R. § 274a.12(b), which lists the classes of foreign nationals authorized for employment incident to status with specific employers, by adding a reference to parolees under this rule. 81 Fed. Reg. at 60144. The regulation currently refers only to employment-authorized "nonimmigrants." *See* revised 8 C.F.R. § 274a.12(b) … and 8 C.F.R. § 274a.12(b)(37)).[12]

It is incorrect for the agency to claim that the parolee is entering to work "incident to status." In fact, the most prominent condition of the proposed entrepreneur parole program is that the alien work for a single designated entity. The proposed rule would parole otherwise inadmissible aliens into the United States for the sole purpose of employment in a managerial and skilled technical capacity for certain small firms ("startup entities") in which the paroled alien controls a small but significant equity share. *See, e.g.*, 81 Fed. Reg. 60165 (proposed 8 C.F.R. § 212.19(b)(2)).

The NPRM repeats the agency's novel claim that Congress has delegated the power to authorize *any alien* to engage in employment to DHS, except where Congress has explicitly prohibited it. The source of this alleged agency authority is INA § 103(a), 8 U.S.C. § 1103(a), or § 274A(h)(3), 8 U.S.C. § 1324a(h)(3). 81 Fed. Reg. 60131. The former defines the duties of the Secretary of Homeland Security and makes no mention of authority to grant employment. The

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[12] The NPRM is further proposing to extend eligibility for employment authorization to the accompanying spouses (but not the children) of entrepreneur parolees…. 81 Fed. Reg. 60145. *See* proposed 8 C.F.R. § 274a.12(c)(34). Spouses would apply for an EAD pursuant to § 274a.12 (c)(34), "consistent with current parole policy that allows parolees to apply for employment authorization… [and] may … ensure that they satisfy the proposed condition on their parole that they maintain household income that is greater than 400 percent… and may further incentivize a foreign entrepreneur to bring a start-up entity to the United States rather than create it in another country." *Id*.

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.

Subsection 103(a) 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*. and § 1103(a) (2014). 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) to not adversely affect American workers.

Both the House and Senate reports on the 1952 Act directly contradict the claim there was such a grant of independent employment authority to the Executive anywhere within the INA. *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. *Id*.[13] 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 § 1103(a) conferred on the Executive unfettered authority to authorize employment to otherwise inadmissible alien entrepreneurs.

Subsection 274A(h)(3) is merely a definitional provision that contains 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 aliens*—*i.e.*, those not authorized to work in the United States. Subsection 274A(h)(3) defines the term *unauthorized alien* solely for the purposes of that section.

By its clear terms, § 274A(h)(3) is merely a definitional provision limited to a single section of the INA.[14] It does not confer authority on anyone to do anything. The NPRM's proposed interpretation directly conflicts with Supreme Court doctrine holding that "no words are to be

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[13] 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.
[14] 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").

treated as surplusage or as repetition." *Platt v. Union P. R.*, 99 U.S. 48, 59 (1879). The agency's position in the NPRM is untenable because its radical interpretation, that USCIS already has discretionary authority to authorize employment to any alien under INA §§ 103 and 274A, would make all discretionary authority for the Executive to grant work permits to aliens meaningless surplusage. 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 proposed 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 without penalty three groups of aliens: (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 Security). The first two categories provide no difficulty in interpretation, and in any case are not evoked by the NPRM 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 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 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 § 1324a(h)(3), aliens could possess work permits provided for by IRCA but remain unemployable, as their employers would still have been subject to the civil and criminal penalties contained in § 1324a.

The Immigration Act of 1990 ("IMMACT90") moved the restriction that foreign labor is inadmissible unless the Secretary of Labor certified 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 extends to the proposed alien entrepreneurs, who as parolees are seeking "to enter" despite their inadmissibility under other INA § 212 provisions, noted above.

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*. 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.

The claim in the NPRM of unlimited DHS discretion to authorize employment to aliens is unsupported by law. There is no statute explicitly granting such authority and no judicial consensus as to where 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)."

If, in fact, Congress 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 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 create one administratively through an extra-statutory initiative like the NPRM.

7. The NPRM fails to provide a reasonable factual basis for the novel claim that parole for an uncapped number of inadmissible alien entrepreneurs would produce "substantial and positive contributions to innovation, economic growth, and job creation."

As noted, DHS has defied the law and refused to provide the data and analysis that Congress established as essential to assessing the scope and function of the IIRIRA changes to the agency's INA § 212(d)(5) parole power. Instead, in the NPRM DHS has proffered references to a handful of special interest communications, none of which provide peer-reviewed data establishing the agency's policy justification for the NPRM: "Allowing certain qualified entrepreneurs to come to the United States as parolees would produce a significant public benefit through substantial and positive contributions to innovation, economic growth, and job creation.[emphasis added]" 81 Fed. Reg. 60136.

Even if these documents are presumed, *arguendo*, to be entirely correct, they do not establish the extraordinary chain of causation which the NPRM asserts will propel the proposed parole program. Glaeser *et al*. (2013) only claim that "increasing the proportion of startup employment within a region increases the overall growth rate of employment and wages." 81 Fed. Reg. 60135 n.12.Haltiwanger *et al*. (2010) only claim that domestic "business startups and young businesses" play an "important role" in U.S. job creation. The words immigrant or immigration never appear in this study. *Id*. Kane (2010) only "show[s] the importance of startups for net job growth…." Even the CEA 2015 report, by an entity whose *raison d'etre* is to prepare supportive policy analysis for the White House, only argues that "high-skilled immigration has positive effects on innovation (as measured by patenting) and on total factor productivity." *Id*. As with the Haltiwanger study for the U.S. Census Bureau, the SBA study by Plehn-Dujowich (2013) on product innovation by start-up firms is entirely domestic in orientation, and the word immigrant or immigration never even appears. *Id*. n.12.

The NPRM then carefully omits the disturbing conclusions of its cited expert Robert Litan (2015), whose article in Foreign Affairs magazine actually states that "although individual entrepreneurs deserve applause, they do not benefit the economy the way larger firms do…." 81 Fed. Reg. 60135, n.13 and n.14. In particular,

> Even if the United States successfully boosts the formation of new companies, it will have to contend with the dark side of innovation: the wealth inequalities that sometimes accompany technological change…. Some economists believe that the revolution in information technology may end up benefitting only those workers whose salaries place

> them in the top ten to 20 percent of the income spectrum, thus widening the already substantial income gap between the wealthy and the poor.
>
> It is not yet clear what the impact an influx of startups would have on this problem—but there is reason to suspect it could make things worse. In recent years, hugely profitable start-ups have created relatively few new jobs and done little to spread the wealth…. If the majority of companies resemble these successful technology firms, then any start-up renaissance will only magnify inequality.

Id. (emphases added).

Fairlee (2012) claims that "immigrants were twice as likely to start new businesses in 2011," but the NPRM conveniently omits his conclusion that home ownership is the most important factor in immigrant entrepreneurship in the United States, a criterion which has little to no alignment with the profile that the NPRM speculates will be typical of parolee entrepreneurs. 81 Fed. Reg. 60135, n.13. As for the DHS claim at 81 Fed. Reg. 61035 that "the need to create conditions that reduce barriers to entry and attract has become a policy goal for a number of … nations," Litan identifies just one such nation, Chile, and describes a Chilean program that resembles the U.S. EB-2 legal permanent immigrant program, not parole. *Id*. n.14. Similarly the NPRM cites an "expert" report from the Migration Institute—a highly partisan lobby group for increased migration of all kinds—that is merely an informal overview of investment-based immigrant visa programs among certain OECD nations, none of which operate under the assumptions or parameters of the proposed parole program. *See* Sumption (2012), *Id*. at n.14.

The NPRM's reliance on tracts by employer advocates Stuart Anderson (2006, 2010, 2013) and Vivek Wahda (2012), *etc*., for the proposition that "foreign-born entrepreneurs are critical forces in the U.S. economy" is flawed because these advocates improperly substitute the "foreign-born" as statistical surrogates for immigrants, to artificially boost the productivity and participation rates of the later. This distortion is particularly chronic as it is proposed by the NPRM as a surrogate for any data actually showing the predicted superior performance of entrepreneurial parolees. 81 Fed. Reg. 60136, footnotes 17-22.

While this "slender reed" of a record, if read in the most favorable and uncritical light, may suggest that permanent legal residents who engage in self-employment have less negative impact on the native work-force than other immigrants, it does not document that fact. In particular, nothing in the research cited by DHS even establishes that temporary parole of younger and less affluent aliens and their families as "entrepreneurs" would have the same effects as the permanent immigration of skilled entrepreneurs under the statutory scheme.

8. Conclusion

Given the unlawful effect and unsubstantiated factual record in the NPRM, IRLI respectfully calls on USCIS to withdraw the proposed notice, recognize that the use of parole to meet the employment and investment needs of U.S. start-ups would be unlawful, and find a permissible alternative statutory mechanism, supported by reasonable peer-reviewed data, should the agency persist in its view that employment-based immigration by entrepreneurial aliens is in the national interest.

Respectfully submitted,

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