



# CENTER FOR IMMIGRATION STUDIES

April 10, 2023

Avideh Moussavian, Chief  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
U.S. Department of Homeland Security  
5900 Capital Gateway Drive  
Camp Springs, MD 20746

**RE: USCIS Policy Manual Update; Volume 3: Humanitarian Protection and Parole, Part G, International Entrepreneur Parole (3 USCIS-PM G).**

Dear Chief Moussavian:

The Center for Immigration Studies (CIS) submits the following feedback to the U.S. Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) in response to the USCIS’s Policy Alert regarding the update to Volume 3: Humanitarian Protection and Parole, Part G, International Entrepreneur Parole (3 USCIS-PM G).<sup>1</sup>

CIS is an independent, non-partisan, non-profit, research organization. Founded in 1985, CIS has pursued a single mission – providing immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States. CIS is the nation’s only think tank devoted exclusively to the research of U.S. immigration policy to inform policymakers and the public about immigration’s far-reaching impact. CIS is animated by a unique **pro-immigrant, lower-immigration** vision which seeks fewer annual admissions but a warmer welcome for those admitted.

## **I. Background**

On January 17, 2017, DHS published a final rule to establish criteria for the use of parole with respect to entrepreneurs of start-up entities who can demonstrate sufficient potential for rapid growth and job creation that they would provide a significant public benefit to the United States.<sup>2</sup> Section 212(d)(5) of the Immigration and Nationality Act (INA), confers upon the Secretary of Homeland Security the limited, discretionary authority to parole individuals into the United States temporarily, on a case-by-case basis, for urgent humanitarian reasons or significant public benefit. DHS stated that it created the International Entrepreneur Parole program (IEPP) to “increase and enhance entrepreneurship, innovation, and job creation in the United States.”<sup>3</sup>

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<sup>1</sup> U.S. Citizenship and Immigration Services, Policy Alert, International Entrepreneur Parole (Mar. 10, 2023).

<sup>2</sup> See 82 Fed. Reg. 5238 (Jan. 17, 2017).

<sup>3</sup> *Id.*

On May 29, 2018, after determining that parole was not an appropriate legal mechanism to permit the entry of entrepreneurs into the United States on a categorical basis, DHS issued a proposed rule to rescind the final rule. DHS ultimately withdrew that proposed rule on May 11, 2021.<sup>4</sup>

On March 10, 2023, USCIS issued a Policy Manual update to address IEPP and supplement the final rule. While USCIS is accepting comments on the Policy Manual update, the guidance went into effect on March 10, 2023 and is controlling.<sup>5</sup>

While CIS strongly supports adjusting U.S. immigration policy to a merit-based immigration system, CIS believes the creation of a categorical parole program directly conflicts with statute and Congress' intent to limit DHS's use of parole to infrequent and exceptional circumstances.<sup>6</sup> Moreover, the program diverts agency resources from legitimate visa programs, many of which have experienced historic processing times and delays. Accordingly, CIS urges DHS to terminate IEPP and rescind the regulation and all corresponding policy guidance.

## **II. IEPP is *Ultra Vires***

Congress has not delegated DHS authority, through section 212(d)(5) of the INA or any other provision in law, to permit the admission of categories of aliens defined solely by DHS's interpretation of "significant public benefit." Accordingly, DHS should terminate IEPP and all other categorical parole programs, including the Central American Minors (CAM) program and the Biden administration's recently created parole programs for prospective migrants who are nationals of Cuba, Haiti, Nicaragua, and Venezuela. These programs are *ultra vires* and result in unauthorized diversions of USCIS's limited resources.

### **a. INA § 212(d)(5) does not authorize IEPP.**

DHS's use of categorical parole to admit additional classes of entrepreneurs into the United States directly conflicts with Congress's intent in enacting the parole statute. DHS may only temporarily parole aliens into the United States on a strictly "case-by-case" basis for "urgent humanitarian" or "significant public benefit" reasons.<sup>7</sup> In fact, the history of the parole statute is one of increasing tightening of its language in response to agency overreach.<sup>8</sup> Congress's actions have resulted in the restriction of agency discretion, and IEPP abuses the limits of such discretion.

Today, 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." Additionally, the INA provides

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<sup>4</sup> See 83 Fed. Reg. 24415 (May 29, 2018) (proposed rule); 86 Fed. Reg. 25809 (May 11, 2021).

<sup>5</sup> U.S. Citizenship and Immigration Services, Policy Alert, International Entrepreneur Parole (Mar. 10, 2023).

<sup>6</sup> See S. Rep. No. 104-249 at 2 (1996).

<sup>7</sup> See INA § 212(d)(5).

<sup>8</sup> Fishman, George, Center for Immigration Studies, *The Pernicious Perversion of Parole, A 70-year battle between Congress and the president* (Feb. 2022).

that “when the purposes of parole shall ... have been served the alien shall forthwith return or be returned.”<sup>9</sup>

According to the House Judiciary Committee, Congress tightened the parole authority because:

“[T]he parole authority was intended to be used on a case-by-case basis to meet specific needs, and not as a supplement to Congressionally-established immigration policy. In recent years, however, parole has been used increasingly to admit entire categories of aliens who do not qualify for admission under any other category in immigration law, with the intent that they will remain permanently in the United States. This contravenes the intent of section 212(d)(5), but also illustrates why further, specific limitations on the Attorney General’s discretion are necessary.”<sup>10</sup>

The Senate’s goals in enacting the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA) mirrored this sentiment. The Senate Judiciary Committee Report stated that its parole reform provision was intended to “reduce the abuse of parole” and “[t]ighten the Attorney General’s parole authority,”<sup>11</sup> and that “[t]he committee bill is needed to address ... the abuse of humanitarian provisions such as ... parole.”<sup>12</sup>

Since IIRIRA’s enactment, courts have also interpreted the statutory language narrowly, recognizing Congress’ goal in limiting the parole authority. As the Second Circuit explained, “Congress, in IIRIRA, specifically narrowed the executive’s discretion ... to grant ‘parole into the United States’. ... IIRIRA struck ... the phrase ‘for emergent reasons or for reasons deemed strictly in the public interest’ as grounds for granting parole into the United States and inserted ‘only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.’ . . . *The legislative history indicates that this change was animated by concern that parole . . . was being used by the executive to circumvent congressionally established immigration policy.*” [Emphasis added.]<sup>13</sup>

The Ninth Circuit likewise concluded that, “In enacting IIRIRA ... Congress expressed concern that the Attorney General had been using parole ‘to circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories.’ ... Congress responded in IIRIRA by narrowing the circumstances in which aliens could qualify for “parole into the United States”.”<sup>14</sup>

More recently, the Fifth Circuit explained in *Texas v. Biden* that, “Throughout the mid-twentieth century, the executive branch on multiple occasions purported to use the parole power to bring in large groups of immigrants. ... In response, Congress twice amended [the parole statute] to limit the scope of the parole power and prevent the executive branch from using it as a programmatic policy tool ... in the Refugee Act of 1980 [and in IIRIRA].”<sup>15</sup> Congress has limited this authority

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<sup>9</sup> INA § 212(d)(5)(A).

<sup>10</sup> H.R. 2202, § 523, 104th Cong; *See* H.R. Rep. No. 104-469, part 1, at 174-75.

<sup>11</sup> S. Rep. No. 104-249 at 2 (1996).

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

<sup>13</sup> *Cruz-Miguel v. Holder*, 650 F.3d 189, 199, 199 n.15 (2nd Cir. 2011).

<sup>14</sup> *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1119 (9th Cir. 2007).

<sup>15</sup> *Texas v. Biden*, 20 F.4th 928, 947 (5th Cir. 2021).

to prohibit DHS from paroling aliens into the United States to supplement existing visa programs, as IEPP is designed to do.

The courts' determinations accord with DHS's prior practice, which is articulated in the U.S. Citizenship and Immigration Services, U.S Immigration and Customs Enforcement, and U.S. Customs and Broder Protection's 2008 Memorandum of Understanding (MOU) regarding the exercise of parole with respect to aliens outside the United States. The MOU explained that, "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.] Under this standard, an alien entrepreneur seeking admission for the purpose of operating a business venture would be ineligible for parole regardless of the venture's potential for economic growth or innovation.

Class-based or categorical parole programs, such as IEPP, directly conflict with Congress's explicit intent to limit DHS's parole authority by contrarily allowing DHS to set its own immigration policy. While DHS claims that each determination for IEPP will be made on a case-by-case basis, DHS set out specific requirements applicants must meet in order to qualify for parole under the program. For example, an alien's entity must receive an investment amount of at least \$264,147 from one or more qualified investors or received at least \$105,659 through one or more qualified government awards or grants within 18 months immediately preceding the filing of an application for parole, or "other reliable and compelling evidence of the start-up entity's substantial potential for rapid growth and job creation" to be eligible for parole under IEPP.<sup>16</sup> DHS likewise set out similar eligibility criteria for approval of a request of additional periods of parole.<sup>17</sup> As USCIS's Policy Manual update demonstrates, IEPP requires complex adjudications based on highly structured eligibility criteria that have not been authorized by Congress.

It is irrational to conclude that, while Congress acted to subdue the agency's discretionary parole authority, Congress simultaneously sought to expand DHS's power to the vast extent necessary to authorize IEPP, or any other categorical parole program.<sup>18</sup> No such provision in law exists. Rather, Congress has created a detailed and comprehensive scheme for regulating the admission and employment of aliens, including entrepreneurs, refugees, and familial relatives, into the United States.<sup>19</sup>

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<sup>16</sup> 8 C.F.R. § 212.19(b)(2).

<sup>17</sup> See 8 C.F.R. § 212.19(c).

<sup>18</sup> See *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1119 (9th Cir. 2007) ("The scope of § 1182(d)(5)(A) is carefully circumscribed: Aliens may be paroled into the United States 'only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.'").

<sup>19</sup> See 8 U.S.C. § 1101 et seq.

**b. Entrepreneurs may only use existing legally established immigrant and nonimmigrant visa categories, or Congress can amend the INA to establish additional visas to enact IEPP.**

IEPP interferes with the statutory scheme Congress created to permit certain entrepreneurs to enter and work in the United States. The U.S. Constitution grants Congress, not the Executive Branch, plenary authority over immigration, and Congress has already created at least three other visa programs that are available for entrepreneurs to enter and work in the United States.

First, aliens may be admitted via the EB-5 immigrant investor program, which provides lawful permanent residency to investors and their close relatives, for those who invest \$1,050,000 in a new or existing business (or alternatively \$800,000 for an investment in a “targeted employment area”). Congress limited visa eligibility under this category for cases where the new enterprise creates (or preserves) at least ten jobs for U.S. citizens.<sup>20</sup>

Second, Congress created the E-2 Treaty Investor program, which is administered by the U.S. Department of State. This program provides nonimmigrant visas to aliens (and their immediate relatives) who open a business in the United States, without imposing a minimum investment amount.<sup>21</sup>

Moreover, Congress created the L-1 nonimmigrant classification to transfer an executive or manager from an affiliated foreign office to one of its United States locations and the H-1B visas to admit high-skilled aliens who wish to perform services in a specialty occupation.<sup>22</sup> While these visa options require certain educational or experience backgrounds, they nevertheless provide an additional, lawful avenue for aliens to enter the United States and contribute to innovation and job growth within the domestic economy.

Only Congress the legal authority to designate a new category of aliens as eligible to enter the United States for the purpose of starting businesses using venture capital or other U.S.-sourced funding, and has repeatedly considered and rejected legislation that would have established similar visas programs for entrepreneurs.<sup>23</sup> While the existing visa classifications may not encompass the entire population of entrepreneurs addressed in IEPP, DHS must recognize the limits established by Congress, which is uniquely qualified to balance the many competing and complex policy priorities in attracting and retaining foreign entrepreneurs.

### **III. The Program Diverts Agency Resources from Legitimate Visa Programs**

As an unauthorized and unappropriated program, all costs stemming from implementation of this program divert attention and resources from lawful immigration programs, which only increase costs and delays – even when USCIS charges fees to recover adjudication costs. CIS strongly

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<sup>20</sup> See U.S. Citizenship and Immigration Services, *About the EB-5 Classification, Capital Investment Requirements* (Jul. 28, 2022).

<sup>21</sup> See U.S. Citizenship and Immigration Services, *E-2 Treaty Investors* (May 4, 2022).

<sup>22</sup> See U.S. Citizenship and Immigration Services, *L-1A Intracompany Transferee Executive or Manager*; U.S. Citizenship and Immigration Services, *L-1B Intracompany Transferee Specialized Knowledge*; U.S. Citizenship and Immigration Services, *H-1B Specialty occupations and Fashion Models*.

<sup>23</sup> See, e.g., *Startup Visa Act of 2011*, S. 565, 112th Cong.

recommends USCIS focus its resources instead in operations that have been authorized by Congress, consistent with the limits Congress has enacted in statute.

As DHS itself has explained, implementation of IEPP requires time-consuming and complicated analysis to consider whether an applicant meets the program’s eligibility criteria. The assessments required for a parole determination under this program—including, among others, “to resolve ‘substantial ownership interest’ questions, whether the entity has a ‘substantial potential for rapid growth and job creation,’ whether the applicant is ‘well-positioned . . . to substantially assist’ with the growth and success of the business, whether the start-up entity has received ‘lawfully derived capital,’ whether the entity has received either the requisite investment threshold or qualifying ‘significant awards or grants for economic development’ or both, and whether an investor is ‘qualified’ under the rule and has an established record of successful investments”<sup>24</sup>—would be highly challenging and extremely labor intensive.<sup>25</sup>

Even with the inclusion of an application fee, DHS determined in 2018 that implementation of the program will require “significant resources to hire and train additional adjudicators with specific technical expertise, modify intake and case management information technology systems, revise application and fee intake contracts, develop guidance for the adjudicators, and communicate with the public about these changes.”<sup>26</sup> DHS acknowledged that, even with a collection of a fee, implementation of the program will impose “opportunity costs associated with diverting limited agency resources.” Given the substantial fee increases and workforce enhancements USCIS has proposed for fiscal years 2023-2024, CIS believes these resources would be better focused on implementing programs Congress has authorized or mandated and carrying out initiatives to better deter and detect fraud and abuse.

#### **IV. Conclusion**

USCIS must rescind the Policy Manual update and terminate the underlying IEPP program. While CIS strongly supports adjusting the U.S. immigration system to one that reflects merit-based principles, only Congress has the authority to determine which classes of aliens may enter and work in the United States, consistent with the will of the American people. Congress has not authorized DHS through INA § 212(d)(5), or any other provision of law, the power to designate classes of foreign nationals as authorized to circumvent the existing limitations on admission imposed by Congress.

CIS also strongly agrees with DHS’s 2018 position that the complex and highly structured IEPP program is best left to the legislative process rather than “an unorthodox use of the Secretary’s authority to ‘temporary’ parole, in a categorical way, otherwise inadmissible aliens into the United States for ‘significant public benefit.’”<sup>27</sup> The admission of foreign nationals seeking to remain in the United States and start businesses using venture capital invokes many complicated and competing policy considerations, which only Congress – not DHS – is equipped to address.

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<sup>24</sup> See 82 Fed. Reg. 5286-89 (Jan. 17, 2017).

<sup>25</sup> See 83 Fed. Reg. 24415, 24418 (May 29, 2018).

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

<sup>27</sup> *Id.* at 24416.

Finally, CIS believes that termination of IEPP is necessary to ensure that USCIS's limited resources are used in an efficient manner to implement the statutory scheme. USCIS should terminate IEPP and rescind all corresponding policy guidance to limit the diversion of resources away from immigrant and nonimmigrant programs Congress has authorized.

Thank you,

A handwritten signature in black ink that reads "Elizabeth Jacobs". The signature is written in a cursive, flowing style.

Elizabeth Jacobs

Director of Regulatory Affairs and Policy