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Public Interest Comment¹ on
The Department of Homeland Security's Proposed Rule
Removal of International Entrepreneur Parole Program

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The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Department of Homeland Security's (DHS) proposed rule to eliminate its international entrepreneur program does not represent the views of any particular affected party or special interest, but is designed to evaluate the effect of DHS's proposal on overall societal welfare.

Introduction

The Department of Homeland Security's proposed rule would eliminate its international entrepreneur (IE) program, issued in 2017. DHS states that its proposal is consistent with the administration's policy priorities detailed in section 11 of Executive Order 13767 (EO 13767),

¹ This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

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“Border Security and Immigration Enforcement Improvements.”⁴ However, this order states that parole of individuals into the U.S. should be exercised on a case-by-case basis “only when an individual demonstrates...a significant public benefit derived from such parole.”⁵ The department’s IE program includes a strict set of criteria designed to achieve precisely this outcome. Additionally, the elimination of this program is not in line with the administration’s stated policy priority of moving towards a merit-based immigration system.⁶

In its final rule published on January 17, 2017, DHS noted that the IE program was “expected to generate important net benefits to the U.S. economy.” Among the benefits DHS cited were the creation of jobs for U.S. citizens, increased spending on research and development, and increases in total factor productivity and innovation including technological spillovers into other areas of the economy. In addition, DHS committed to fully recovering all costs associated with administering the program by charging fees to applicants; a biennial review process would ensure that DHS could adjust application fees to ensure they covered all administrative costs.⁷

In its 2017 IE rule, DHS argued that the program was not only consistent with its “general authority to extend employment authorization to noncitizens in the United States”⁸ but also directly advanced the agency’s statutory mandate to “ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.”⁹ DHS’s current justification for eliminating the IE program directly contradicts this statutory mandate.

In the event that DHS chooses to move forward with its elimination of the IE program, there are several regulatory requirements mandated by existing executive orders that are absent in the proposed rule. For example, DHS’s preferred alternative for transitioning out of the IE program—automatic termination of IE parole on the effective date of a final rule—is not consistent with the regulatory philosophy outlined in EO 12866 that agencies tailor their regulations to impose the least burden on society.¹⁰

DHS’s proposed rule would harm economic growth by raising barriers to foreign entrepreneurship; the agency previously cited and agreed with the wealth of economic literature asserting that “high growth firms” (which the IE program targets) are responsible for a disproportionately large share

⁴ Executive Order 13767, “Border Security and Immigration Enforcement Improvements,” January 25, 2017. 82 FR 8793. §11.

⁵ Ibid. §11(b).

⁶ <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backs-raise-act/>

⁷ 82 FR 10.

⁸ 8 U.S. C. §1324a(h)(3)(B).

⁹ 6 U.S.C. §111(b)(1)(F).

¹⁰ Executive Order 12866, “Regulatory Planning and Review,” §1(b)(11).

of economic gains related to growth in total factor productivity, job creation, innovation, and GDP.¹¹

This public comment proposes several changes that DHS could make to its proposed rule to minimize its cost burden on the U.S. public. These include:

- **Maintaining the international entrepreneur program.** The 2017 analysis conducted by DHS estimating that the IE program would produce substantial net benefits for the U.S. economy remains valid. It follows then that eliminating the program would result in a net loss to the U.S. economy. Additionally, elimination of the IE program is not consistent with the administration’s stated policy priorities and runs counter to DHS’s statutory mandate to “ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.”¹² Finally, the IE program is consistent with the administration’s efforts to shift towards skills-based immigration vs. other immigration schemes.
- **Considering flexible approaches for phasing out applicants.** DHS states that its preferred alternative is immediate termination of parole on the effective date of a final rule. Given that the investment capital in startup entities is primarily that of U.S. investors, DHS should allow sufficient time for these investors to adjust. The agency states that 13 applicants are currently in an advanced stage of the approval process. Completing the process and making a case-by-case decision on each of these applicants could also provide a valuable opportunity for DHS to collect data on the performance of these startups to better inform future rulemaking, consistent with the principles of retrospective review detailed in EO 13563.¹³
- **Finding offsets for the additional cost burden imposed by this rule.** This proposed rule is classified as a significant action under EO 12866. Consistent with the Office of Management and Budget (OMB) guidance on implementing EO 13771, DHS should identify two regulations it intends to remove to promulgate this significant regulatory action in addition to eliminating costs elsewhere to offset the additional burden created by this rule.

Statutory Authority

The Immigration and Nationality Act (INA) grants the Secretary of Homeland Security “the discretionary authority to parole individuals into the United States, on a case-by-case basis, for

¹¹ See Clayton et al. “High-employment-growth firms: defining and counting them,” Office of Industry Employment Statistics, Bureau of Labor Statistics (BLS), Monthly Labor Review (June 2013), p.1-2. For the relationship between high-growth firms and the economy, see: Haltiwanger et al. “Who Creates Jobs? Small vs. Large vs. Young,” the National Bureau of Economic Research. NBER Working Paper No. 16300. August 2010.

¹² 6 U.S.C. §111(b)(1)(F).

¹³ Executive Order 13563, “Improving Regulation and Regulatory Review,” January 18, 2011. 76 FR 3821.

urgent humanitarian reasons or significant public benefit.”¹⁴ It also gives the Secretary the authority “to establish rules and regulations governing parole.”¹⁵ Additionally, the Secretary is granted “general authority to extend employment authorization to noncitizens in the United States.”¹⁶ Consequently, the Secretary has decided to exercise her authority under INA 212(d)(5) and proposes to eliminate the International Entrepreneur Parole Program. It is worth noting here that the Secretary may be within her legal authority to eliminate the IE program, but this does not appear to be the best way to advance the Department’s goals as spelled out in its own statutes or the various executive orders that govern executive branch rulemaking.

The International Entrepreneur Program

Implemented in 2017, the IE program created a robust set of criteria for DHS to use in the exercise of its statutory authority to parole individuals into the United States on a case-by-case basis for reasons of “significant public benefit.” When granted, parole allows foreign entrepreneurs to start a business in the U.S. by providing a temporary initial stay of 30 months to the applicant and their dependent family members which includes spouses and children. Applicants can also apply to extend their parole by an additional 30 months if their business meets certain thresholds for revenue growth and creation of U.S. jobs.

DHS designed the IE program consistent with its intention to limit the use of parole to applicants whose business “would provide a significant public benefit through the substantial and demonstrated potential for rapid business growth and job creation.” In particular, DHS targeted a subset of businesses known as “high-growth firms,” those responsible for a disproportionately large share of economic gains related to growth in total factor productivity, job creation, innovation, and GDP.¹⁷ Parole is limited to foreign entrepreneurs whose businesses receive a significant capital investment from qualified¹⁸ U.S. investors (\$250,000 or more).

Elimination of the IE Program is Unnecessary

Constraints on Shifting Personnel

DHS notes in this proposed rule that it recognizes the contribution of foreign entrepreneurship to U.S. economic growth but cites the need to prioritize resources in light of the administration’s priorities—particularly after review of this program in accordance with EO 13767, “Border

¹⁴ 8 U.S.C. 1182(d)(5)

¹⁵ 8 U.S.C. 1103(a)(1), (3)

¹⁶ 8 U.S.C. 1324a(h)(3)(B)

¹⁷ *Supra* at 11.

¹⁸ DHS defined a qualified investor in its final IE rule as a person who: 1) had invested no less than \$600,000 within the preceding 5 years and 2) whose investment resulted in either 5 qualified jobs or whose business generated at least \$500,000 in revenue with an annualized revenue growth of at least 20 percent.

Security and Immigration Enforcement Improvements.” However, it is unreasonable to assert that elimination of the IE program would allow agency resources—personnel working at U.S. Citizenship and Immigration Services (USCIS)—to be reallocated to the administration’s priorities as stated in the executive order:

The purpose of this order is to direct executive departments and agencies (agencies) to deploy all lawful means to secure the Nation’s southern border, to prevent further illegal immigration into the United States, and to repatriate illegal aliens swiftly, consistently, and humanely.¹⁹

Personnel working at USCIS likely have vastly different skillsets than those working in other parts of DHS (e.g. Customs and Border Protection or Immigration and Customs Enforcement).

DHS does not Lack Funding

Agency resources also include funds appropriated by Congress. However, DHS estimated in its IE program final rule that the collection of fees from applicants would be sufficient to adequately cover government costs related to administering the program. In addition, the agency proposed a biennial fee review to ensure that fees would be continually adjusted to ensure full recovery of any cost to DHS. It is worth noting that applicants pay up-front fees to USCIS when they apply for the IE program. Finally, DHS’s budget continues to grow in line with the administration’s priorities and shows no sign of stagnating as evidenced by the president’s FY 2019 Budget which requests a 4.8 percent increase in real resources and a 3.8 percent increase in staff in 2019.²⁰

Investment by Qualified U.S. Investors Indicates Merit and Skills of Entrepreneurs

A final point regarding the IE program concerns the administration’s stated priority of transitioning towards a more skills-based immigration system. The President has repeatedly praised merit-based systems, such as Canada’s, as a preferred alternative to the status quo:

Switching away from this current system of lower-skilled immigration, and instead adopting a merit-based system, we will have so many more benefits. It will save countless dollars, raise workers' wages, and help struggling families — including immigrant families

¹⁹ Executive Order 13767, “Border Security and Immigration Enforcement Improvements,” January 25, 2017. 82 FR 8793. §1.

²⁰ Susan Dudley & Melinda Warren, “Regulators’ Budget: More for Homeland Security, Less for Environmental Regulation: An Analysis of the U.S. Budget for Fiscal Years 1960 through 2019.” May 14, 2018. Available at: <https://regulatorystudies.columbian.gwu.edu/fy-2019-regulators-budget-more-homeland-security-less-environmental-regulation>

— enter the middle class. And they will do it quickly, and they will be very, very happy, indeed.²¹

The IE program would only approve applicants whose businesses received significant investment of capital from qualified U.S. investors “with established records of successful investments.” This essentially establishes a market-based criteria of confidence in future business success and current business acumen of entrepreneurs relative to other possibly less meaningful metrics (i.e. requiring applicants to have a university degree). The IE program’s criteria are more closely aligned with a merit-based system than other nonimmigrant visa schemes. For example, the EB-5 visa program also allows foreign entrepreneurs to work in the U.S., but it merely requires foreign entrepreneurs to invest a certain amount of capital to run a U.S. startup—a less reliable indicator of business performance.

Compliance with Regulatory Analysis Requirements

Executive Order 12866 (EO 12866) provides standards for rules issued by executive branch agencies:

Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need... Each agency shall assess both the costs and benefits of the intended regulation and...propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation of the intended regulation justify its costs...Each agency shall tailor its regulations to impose the least burden on society...²²

As we noted in a public comment on DHS’s proposed International Entrepreneur Rule, there is substantial evidence that reducing barriers to foreign entrepreneurship and investment in the U.S. increases economic growth; the IE program is a net benefit to the U.S. public.²³ In its 2017 final rule, DHS also estimated that the IE program would “generate important net benefits to the U.S. economy.”

In the proposed rescission of the rule, DHS justifies its decision not to quantify the costs of eliminating the IE program based on its assertion that there is uncertainty regarding “the extent to which entrepreneurs would avail themselves of other immigration programs.” However, the

²¹ Remarks by President Trump in Joint Address to Congress. Available at: <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-address-congress/>

²² Exec. Order No. 12866, Regulatory Planning and Review, §1(a), §1(b)(6), §1(b)(11).

²³ Daniel R. Pérez, “Public Interest Comment on the Department of Homeland Security’s Proposed International Entrepreneur Rule.” October 17, 2016. Available at: <https://regulatorystudies.columbian.gwu.edu/public-comment-department-homeland-security%E2%80%99s-proposed-international-entrepreneur-rule>

agency also admits that the IE program is an inferior alternative in many ways for entrepreneurs seeking to run startups in the U.S. because it does not currently provide for a durable immigration status or a path to citizenship.

DHS suggests that IE applicants could apply under other programs such as the EB-5 visa which offers visa-holders and their dependents permanent resident status allowing them to work or attend school in the U.S. and includes a path to citizenship. For this option to be a viable alternative, however, foreign entrepreneurs would have to be able to invest at least \$500,000 in a targeted employment area (TEA) or \$1 million in a business located outside a TEA to qualify. Similarly, the E-2 visa program, noted as a possible alternative for IE applicants, requires entrepreneurs to commit a substantial amount of capital and only applies to countries that have signed an E-2 treaty with the U.S. which excludes countries such as China, Brazil, and India. Therefore, it is reasonable to conclude that entrepreneurs who apply for the IE program did so because they would not have qualified under the existing criteria of other immigration schemes that offer more generous immigration statuses.²⁴

Given reasonable assumptions about the relative inability for entrepreneurs to qualify outside of the IE program, even a “back of the envelope” calculation would allow DHS to estimate the net cost of eliminating the program.²⁵ In its 2017 rule, DHS expected 2,940 entrepreneurs to be approved to manage 2,105 new firms annually that would receive investment capital from qualified U.S. investors. Given DHS’s requirements for granting extended parole, the agency expected a substantial number of these businesses would generate “at least \$500,000 in annual revenue with an average of annualized revenue growth of at least 20 percent.”

DHS Proposals for Transitioning Out of the IE Program

The agency is considering several options for phasing out applicants in the event that it proceeds to eliminate the IE program:

1. **Automatic termination of IE parole on the effective date of the final rule.** Parole granted to entrepreneurs, their spouses, and dependent children would expire on the effective date of a final rule. Unless these individuals found other means of legally staying in the U.S., they would be required to leave the country and immediately “begin to accrue unlawful presence when IE parole is terminated.” In the proposed rule, DHS states that this is its preferred approach.
2. **Termination of parole on notice.** In this case, DHS would set a date of termination for the IE parole program. During this timeframe, parolees and applicants could submit

²⁴ See: https://www.investorvisausa.com/how_much.html. See also: https://www.brookings.edu/wp-content/uploads/2016/06/EB5_Report.pdf

²⁵ Chris Carrigan and Stuart Shapiro, “What’s wrong with the back of the envelope? A call for simple (and timely) benefit-cost analysis.” May 02, 2016, Regulation and Governance, Vol. 10(1).

evidence to DHS that they meet the requirement for parole outside of the IE framework—either due to “urgent humanitarian needs” or because their stay would “provide significant public benefit.” Those not granted parole would either have to find other means of staying in the U.S. legally or leave the country before the effective date of a final rule. This option allows entrepreneurs an opportunity to apply for continued parole and additional time to make other arrangements relative to DHS’s preferred option.

3. **Reopening of IE parole determination.** DHS is also considering a proposal to automatically re-evaluate the adjudication of all IE parolees. Without additional fees to entrepreneurs, DHS would then determine if the individual could otherwise be paroled into the U.S. outside of the IER framework similar to the agency’s second transition option.
4. **Expiration of initial period of parole.** DHS would allow parole already granted to entrepreneurs under the IE program to expire naturally. Initial parole granted under the IE program allows entrepreneurs and their qualified family members to stay in the U.S. for 30 months. This is the most generous transition proposal put forth by the agency.

DHS states that its preferred option is automatic termination of IE parole on the effective date of the final rule, which it assumes to be 30 days after publication in the Federal Register.

In its proposal, DHS notes that it has received 13 IE applications to date. Immediately terminating this rule would likely impose significant costs not only to these applicants but also to U.S. investors at various stages of planning for management of these startups. Consistent with the regulatory philosophy of EO 12866, DHS could better tailor its proposed rule to reduce the burden it imposes by opting for a generous transition out of the IE program. At minimum, allowing offered paroles and work authorizations to naturally expire would give investors and entrepreneurs 30 months to plan for alternative arrangements for managing their startups. This alternative would balance DHS’s desire to end the IE program with retaining the economic benefits to the U.S. economy of these startups.

Retrospective Review

Opting for a more generous transition also provides a valuable opportunity to better estimate the benefits and costs of the IE program—providing more informed estimates for future rulemaking. The department could allow the 13 applicants to advance through the program and collect data on their performance to inform future rulemaking; this is consistent with the principles set forth in EO 13563:

consider how best to promote retrospective analysis of rules... each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.²⁶

²⁶ Executive Order 13563, “Improving Regulation and Regulatory Review” January 18, 2011. 76 FR 3821.

Although 13 entrepreneurs are a small percentage of the 2,940 annual applicants DHS expected to approve, the outcomes of their startups would nonetheless provide valuable evidence towards reducing the uncertainty surrounding the costs and benefits of regulations intended to increase foreign entrepreneurship.

Eliminating the International Entrepreneur Program Imposes Additional Costs

Executive Order 13771 establishes an incremental regulatory budget which requires agencies to remove or modify existing regulations to offset new proposals that impose additional costs on the public.²⁷ Given the overwhelming evidence of the positive economic effects of reducing barriers to entrepreneurship, DHS’s own finding that the IE program would “generate important net benefits to the U.S. economy,” and other substantive points made within this public comment, the Department’s current regulation proposing to eliminate its IE program should be designated as a regulatory action pursuant to EO 13771. According to the Office of Management and Budget’s (OMB) records, this rule is currently classified as “other.”

Consistent with OMB guidance²⁸ to agencies on implementing the requirements of EO 13771, DHS should: 1) estimate the costs of its proposal and 2) identify actions to take to offset these costs. Additionally, DHS should identify for the Office of Information and Regulatory Affairs (OIRA) which two rules it intends to eliminate to promulgate this one. OMB guidance states that the only categories of regulations expressly exempt from EO 13771’s offset requirements are those “issued with respect to a military, national security... or foreign affairs function...”²⁹ DHS makes no claim in its proposed rule that removal of its IE program serves any of these ends.

Recommendations

DHS’s proposed rule to eliminate its international entrepreneur program would harm economic growth by raising barriers to foreign entrepreneurship. The agency previously cited a wealth of economic literature in its 2017 final rule to make the case that the IE program would contribute net benefits to the U.S. economy via growth in total factor productivity, job creation, innovation, and GDP. Although the Secretary may be within her legal authority to eliminate the IE program, this does not appear to be the best way to advance the Department’s goals as spelled out in its own statutes or the various executive orders that govern executive branch rulemaking.

In the event that DHS chooses to move forward with its elimination of the IE program, there are several regulatory requirements mandated by existing executive orders that are absent in the

²⁷ Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” January 30, 2017. 82 FR 9339

²⁸ Office of Management and Budget, “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs.’” April 5, 2017. Available at: <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>

²⁹ Ibid. Q33.

proposed rule. Additionally, DHS should opt against its preferred alternative for transitioning out of the IE program to reduce the burden this action would impose on society.

Finally, this significant regulatory action imposes additional burdens on the U.S. public. Consistent with OMB guidance to agencies on implementing the requirements of EO 13771, DHS should: 1) estimate the costs of its proposal and 2) identify for the Office of Information and Regulatory Affairs (OIRA) which actions the agency intends to take to offset these costs and which two rules it intends to eliminate to promulgate this one.