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November 3, 2015

VIA ELECTRONIC TRANSMISSION

The Honorable Jeh Johnson
Secretary
Department of Homeland Security
Washington, DC 20528

Dear Secretary Johnson:

We write to express our concerns about the manner in which the Administration has been abusing its immigration parole authority, and to obtain answers to questions about its specific parole policies.

In general, parole authority is exercised under section 212(d)(5)(A) of the Immigration and Nationality Act, as amended, and provides that the Secretary of Homeland Security “*may ... in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States[.]*”

The current restrictions on the use of parole – i.e. use *only* on a case-by-case basis for “urgent humanitarian reasons” or for a “significant public benefit” – were put in place by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)¹ in response to years of abuse by the Executive of the parole authority. In a 1989 speech on the floor of the House, the Chair of the House Immigration Subcommittee at the time described how the parole authority was being used, contrary to Congress’s original intent, to allow entry to the country of large classes of aliens on an indefinite basis:

The power to ‘parole’ aliens into the United States is granted . . . by section 212(d)(5) of the Immigration and Nationality Act. At the time of its enactment, Congress intended that the parole authority would be used for the temporary

¹ Division C of Pub.L. 104–208.

admission of individual aliens. . . . In the case of an alien . . . paroled into the United States not for any short term, time limited reason, but instead under circumstances that suggest, explicitly or implicitly, that the parole will remain in effect indefinitely, parole status is an *unacceptable alternative* to a more permanent and defined immigration status.²

Subsequently, the Attorney General's decision in September 1994 to parole into the U.S. thousands of Cuban nationals detained at Guantanamo Bay was the straw that broke the camel's back, triggering intense opposition from many in Congress, including Senator Alan Simpson, who said that:

In recent months we have seen the Attorney General's parole authority being used to admit groups of persons for permanent residence in the United States. This is an abuse of the spirit, if not the letter, of the law allowing the Attorney General to parole aliens into the United States in certain circumstances.³

The resulting Congressional outrage eventually led to the limitations imposed on the parole authority under IIRIRA in 1996. The House Report to H.R. 2202 (the House bill that, after conference with the Senate, became IIRIRA) clearly states the intent of Congress regarding the use of parole:

Parole should only be given on a case-by-case basis for specified urgent humanitarian reasons, such as life-threatening humanitarian medical emergencies, or for specified public interest reasons, such as assisting the government in a law-enforcement-related activity. *It should not be used to circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration categories.*⁴

In 2008, U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP) entered into a Memorandum of Agreement on the use of parole authority that echoed the points made by the House Report, stating that “[p]arole is 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.*”⁵

² 135 Cong. Rec. H3718-03, *H3721 (July 13, 1989) (emphasis added).

³ Sen. Alan Simpson (R-WY) discussing provisions of the Immigrant Control and Financial Responsibility Act (Senate bill eventually folded into IIRIRA), 141 Cong. Rec. S1442-04, *S1454 (Jan. 24, 1995).

⁴ Section 523, House Rept. 104-469 (March 4, 1996), at 140-41 (emphasis added) (available at <https://www.congress.gov/104/crpt/hrpt469/CRPT-104hrpt469-pt1.pdf>). *See also* Cruz-Miguel v. Holder, 650 F.3d 189, 198-200 (2nd Cir. 2011), footnote 15 (stating that Congress’ concern in enacting amendments to the parole authority was that “parole under § 1182(d)(5)(A) was being used by the executive to circumvent congressionally established immigration policy.”).

⁵ Memorandum of Agreement Between USCIS, ICE, and CBP for the Purpose of 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 (Sep. 2008), at 2 (emphasis added) (available at <http://www.ice.gov/doclib/foia/reports/parole-authority-moa-9-08.pdf>).

Despite this history, and the unambiguous expression of Congressional intent that parole should be used only in a very limited set of circumstances, it is disturbing that the Administration has expanded the use of parole and ignored the Congressional intent on the use of this authority. Indeed, with each parole program implemented by this Administration, further damage is caused to the Constitutional authority of the United States Congress to establish a *uniform* set of immigration laws.⁶ We note with particular concern the proliferation in recent years of new parole *programs* that effectively create entirely new visa categories and repeat all the abuses that triggered the IIRIRA reforms in the first place⁷:

- **Parole for Filipino Caregivers of Elderly Family Members.** In July 2015, the White House announced that the Department will create a parole program to allow certain family members of Filipino-American World War II veterans to request parole to come to the United States to provide support and care to their Filipino veteran family members who are U.S. citizens or Lawful Permanent Residents.⁸
- **Parole for Entrepreneurs.** In May 2015, the Department published its annual Unified Agenda of regulations.⁹ Included in the list of regulations the Department announced it would be working on this year is a regulation that would establish a parole program for so-called entrepreneurs:

The Department of Homeland Security is proposing to establish a program that would allow consideration for parole into the United States, on a case-by-case basis, of certain inventors, researchers, and entrepreneurs who will establish a U.S. start-up entity, and who have been awarded substantial U.S. investor financing or otherwise hold the promise of innovation and job creation through the development of new technologies or the pursuit of cutting edge research. Based on investment, job-creation, and other factors, the entrepreneur may be eligible for temporary parole.¹⁰

The White House elaborated on this proposed parole program in July 2015, saying the Department would implement, “consistent with ... existing parole authority, a parole program for entrepreneurs who would provide a ‘significant public benefit,’ for example, because they have been awarded substantial U.S. investor financing or otherwise hold the promise of innovation and job creation through the development of new technologies.”¹¹

⁶ U.S. CONST. art I, § 8, cl. 4 (providing that “The Congress shall have Power To . . . establish an uniform Rule of Naturalization.”).

⁷ The very concept of a *program* to grant parole, which is a purely discretionary act that cannot be “applied” for and which is supposed to be granted only on a case-by-case basis, is itself problematic.

⁸ The White House, *Modernizing and Streamlining Our Legal Immigration System for the 21st Century* (July 2015), at p. 38 (available at https://www.whitehouse.gov/sites/default/files/docs/final_visa_modernization_report1.pdf).

⁹ See Agency Rule List – Spring 2015 (available at http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=1600&Image58.x=31&Image58.y=17).

¹⁰ DHS Unified Agenda, Significant Public Benefit Parole for Entrepreneurs (RIN: 1615-AC04) (available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1615-AC04>).

¹¹ *Supra*, note 6, at p.19.

- **Parole for Central American Minors.** In November 2014, the Administration announced a parole program for minors in Central America found to be ineligible for refugee status and with parents “lawfully resident” (a term that includes DACA or other deferred action recipients) in the United States.¹² Recent press reports indicate that of the applications fully adjudicated for this program to date, a shocking 84% of all applicants were approved to be paroled into the United States.¹³
- **Haitian Family Reunification Parole Program.** The Administration announced on October 17, 2014, that it would implement a “Haitian Family Reunification Parole Program” (HFRP) that would allow certain family members of U.S. citizens and lawful permanent residents in Haiti to be paroled into the United States years *before* their immigrant visas are available.”¹⁴ USCIS anticipates conducting approximately 5,000 HFRP program interviews annually.¹⁵

On March 27, 2013, 73 members of the House of Representatives sent Secretary of Homeland Security Napolitano a letter requesting that a similar mass-parole program be created for Syrians with approved immigrant petitions.¹⁶

- **Advance Parole for DACA Recipients:** The administration offers “advance parole” to recipients of executive amnesty under the Deferred Action for Childhood Arrivals (DACA) program.¹⁷ When the DACA recipients return, they are paroled into the country and are thereby rendered eligible to adjust to lawful permanent resident status if they otherwise qualify for one of the existing immigrant visa categories. After 5 years as a permanent resident, a person may apply for U.S. citizenship.
- **Parole for Russian and Chinese Tourists to the CNMI.** In October 2009, the Department announced that all Russian and Chinese visitors for business or pleasure would be paroled – on a “case-by-case” basis – into the Commonwealth of the Northern Mariana Islands (CNMI).¹⁸ On November 15, 2011, then-Secretary Napolitano approved

¹² U.S. Department of State, In-Country Refugee/Parole Program for Minors in El Salvador, Guatemala, and Honduras With Parents Lawfully Present in the United States (Nov. 14, 2014) (available at <http://www.state.gov/j/prm/releases/factsheets/2014/234067.htm>); U.S. Citizenship and Immigration Services, In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM) (available at <http://www.uscis.gov/humanitarian/refugees-asylum/refugees/country-refugeeparole-processing-minors-honduras-el-salvador-and-guatemala-central-american-minors-cam>).

¹³ *Id.*

¹⁴ U.S. Citizenship and Immigration Services, DHS to Implement Haitian Family Reunification Parole Program (October 17, 2014) (available at <http://www.uscis.gov/news/dhs-implement-haitian-family-reunification-parole-program>); U.S. Citizenship and Immigration Services, Notice: Implementation of Haitian Family Reunification Parole Program, 79 Fed. Reg. 75581 (Dec. 18, 2014).

¹⁵ U.S. Citizenship and Immigration Services, The Haitian Family Reunification Parole (HFRP) Program, <http://www.uscis.gov/HFRP>.

¹⁶ See <http://www.scribd.com/doc/170880979/Letter-to-DHS-Humanitarian-Parole-for-Syrians>.

¹⁷ U.S. Citizenship and Immigration Services, Frequently Asked Questions, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> (last visited Apr. 16, 2014).

¹⁸ U.S. Customs and Border Protection, Russian Citizens Now Eligible to Travel to Guam Visa-Free (Jan. 26, 2012)

a policy change that allows CBP to exercise parole authority “on a case-by-case basis” to permit Russian (but not Chinese) nationals to travel to Guam visa-free.¹⁹

Each of these parole programs clearly violates the prohibition on using parole “to circumvent Congressionally-established immigration policy” or “to admit aliens who do not qualify for admission under established legal immigration categories.”²⁰ Specifically:

- In the case of proposed parole programs, such as the one for Filipino caregivers, that allow persons who are the beneficiaries of immigrant petitions, but may be years away from receiving an immigrant visa, to enter the country and work, those persons are not only effectively skipping to the head of the immigrant visa line, but skipping the line entirely.
- The parole programs, such as the program for entrepreneurs, specifically designed to bring foreign workers into the country, circumvent the visa programs that Congress has established as the exclusive means to bring foreign workers into the country.²¹
- The Russian and Chinese tourist parole programs in Guam and the CNMI circumvent the regime Congress established expressly for visa-free travel to Guam and the CNMI, the Guam-CNMI Visa Waiver Program (VWP).²²
- The parole program for Central American Minors unquestionably circumvents the refugee program established by Congress by granting parole – the extensions of which will surely never be limited – to any alien in the target class who is unsuccessful in obtaining refugee status. It also permits a potentially unlimited number of aliens into the country who do not qualify for admission under any of the established legal immigration categories.

(available at <http://www.cbp.gov/newsroom/national-media-release/2012-01-26-050000/russian-citizens-now-eligible-travel-guam-visa>). See also <http://www.doi.gov/oia/igia/2012/upload/15-Highlight-on-DHS-Parole-Initiatives-2012.pdf>.

¹⁹ Id.

²⁰ There are several other abuses of the parole authority of concern to us, including the “Parole in Place” for Military Spouses Program (See Memorandum for Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, from Jeh Charles Johnson, Secretary, U.S. Department of Homeland Security, Nov. 20, 2014, available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_parole_in_place.pdf), which I do not address in detail here in the interest of space.

²¹ A critical element of the Administration’s proposals is its legally questionable interpretation of section 274A(h)(3)(B) of the Immigration and Nationality Act, under which it claims *de facto* plenary authority to grant employment authorization to any alien at all, including parolees.

²² The Guam-CNMI Visa Waiver Program is established under section 212(l) of the Immigration and Nationality Act. See Guam-CNMI Visa Waiver Program, U.S. Customs and Border Protection, available at https://help.cbp.gov/app/answers/detail/a_id/1165/~guam---cnmi-visa-waiver-program.

In light of the foregoing, we ask that you respond to our concerns and the questions attached to this letter by November 16, 2015. We would like your assurances that the Administration will refrain from implementing or discontinuing, as appropriate, these parole programs – instead of continuing to encroach upon a Constitutional power expressly reserved for the United States Congress.

Sincerely,



Charles E. Grassley
Chairman, Committee on the Judiciary



Jeff Sessions
Chairman, Subcommittee on
Immigration and the National Interest



Michael S. Lee
U.S. Senator

Questions

1. Please explain – in specific detail – how, for each of the Administration’s parole programs described in this letter, the program does not violate the congressional proscription on using parole “to circumvent Congressionally-established immigration policy or to admit aliens who do not qualify for admission under established legal immigration policies.”²³
2. Please explain how the proposed parole program for entrepreneurs, which effectively creates a new visa program for entrepreneurs who are unwilling or unable to enter the United States using the visa programs created by Congress for that purpose, i.e. the E-2 treaty investor category and EB-5 immigrant investor categories, is not inconsistent with the opinion of the court in the seminal *Bricklayers* case that agency policy “permit[ting] aliens to circumvent the restrictions enacted by Congress” in those sections of the law authorizing employment-based visa programs “is inconsistent with both the language and the legislative intent of the Act.” *Int’l Union of Bricklayers & Allied Craftsmen v. Meese*, 616 F. Supp. 1387, 1401 (N.D. Ca. 1985).
3. USCIS, in its responses to questions for the record relating to the Senate Immigration and the National Interest Subcommittee hearing on the Central American Minors program on April 23rd stated:

At the request of more than 70 members of Congress in 2013, USCIS considered whether to establish a parole program for Syrians in Syria but decided that establishing such a program was not warranted. However, as the situation continues to evolve and USCIS continues to engage with stakeholders, USCIS may reconsider the use of parole for certain Syrian nationals.²⁴

Why would establishing such a parole program for Syrian nationals be necessary at all in light of the existence of the United States Refugee Admissions Program, and the Administration’s plans to admit at least 10,000 Syrian refugees in this fiscal year?

4. Regarding the Filipino caregiver parole program, is a pending or approved Form I-130 going to be required in all cases?
5. The professed policy reason for undertaking the Haitian Family Reunification Parole Program (HFRP) was expressed by DHS Deputy Secretary Mayorkas in October 2014:

²³ Section 523, House Rept. 104-469 on HR 2202 (March 4, 1996), <https://www.congress.gov/104/crpt/hrpt469/CRPT-104hrpt469-pt1.pdf>.

²⁴ Responses of Joseph Langlois, Associate Director for Refugee, Asylum and International Operations, U.S. Citizenship and Immigration Services, Questions for the Record, *Eroding the Law and Diverting Taxpayer Resources: An Examination of the Administration's Central American Minors Refugee/Parole Program* (Question #14) (April 23, 2015).

The rebuilding and development of a safe and economically strong Haiti is a priority for the United States. The Haitian Family Reunification Parole program ... supports broader U.S. goals for Haiti's reconstruction and development by providing the opportunity for certain eligible Haitians to safely and legally immigrate sooner to the United States.²⁵

On what rational basis would USCIS deny a request from Syria, Liberia, Bangladesh, or any other country on earth with severe reconstruction and/or economic development needs to implement a parole-based "family reunification" program for such a country?

6. Sections 201(c)(1)(A) and (c)(4) provide that the family-based immigrant visa cap is decreased each year by the number of certain long-term parolees.
 - What is the number calculated under INA 201(c)(4) for each of the previous 5 fiscal years?
 - Will the total number of family-based immigrant visas be decreased by the number of parolees under the HFRP, Central American Migrants, and Filipino Caregiver parole programs who stay longer than 2 years without departing the United States, per INA 201(c)(1)(A) and (c)(4)?
7. It appears that no fee – aside from Employment Authorization Document (EAD) application fee or biometrics fees – is or will ever be collected from parole applicants under any of the programs described in this letter.²⁶
 - What funds are being or will be used to pay for the costs of adjudicating the parole requests for each of the programs described in this letter? To suggest that EAD and biometrics fees pay for the cost of adjudicating satisfaction of parole eligibility criteria is not credible, as answers provided by DHS to questions for the record of the April 28, 2015 DHS oversight hearing demonstrate that 100% of EAD and biometrics processing costs are covered by those fees.
 - Is any money from the USCIS cash reserve being used, or planned to be used, to implement any part of any of the parole programs discussed in this letter?
8. For each of the parole programs discussed in this letter, will USCIS adjudicators be authorized to deny parole to anyone who meets all of the eligibility criteria? Please answer "Yes" or "No."

²⁵ DHS to Implement Haitian Family Reunification Parole Program (Oct. 17, 2014), <http://www.uscis.gov/news/dhs-implement-haitian-family-reunification-parole-program>.

²⁶ See, e.g., In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors – CAM), <http://www.uscis.gov/humanitarian/refugees-asylum/refugees/country-refugeeparole-processing-minors-honduras-el-salvador-and-guatemala-central-american-minors-cam> ("There is no fee to participate in this refugee/parole program and it is prohibited for anyone to charge a fee for completion of the form.").

9. In its responses to question for the record #44 relating to the March 3, 2015 Subcommittee on Immigration and the National Interest hearing (“Oversight of U.S. Citizenship and Immigration Services: Ensuring Agency Priorities Comply with the Law”), USCIS supplied a chart of Employment Authorization Documents (EADs) issued each year since FY2008. Under category “C11” (“paroled in the public interest”), the following numbers of parolees were issued EADs:

34,492 in FY14;
34,688 in FY13;
28,412 in FY12;
27,067 in FY11;
23,955 in FY10;
24,925 in FY09; and
82,492 in FY08.

- Please explain, in precise detail, the reason for the parole of each alien for each of the listed fiscal years. If not available for each individual alien, please provide as much information as possible as to the reason for the grant of parole to tens of thousands of aliens during each fiscal year.
- Do these numbers include grants of advance parole? If so, how many each year were advance parole grants? If not, what is the breakdown of reasons for which parole was granted in these cases?
- Why was the number of EADs granted in FY08 so much larger than in other years?

10. The Department’s argument for years has been that, notwithstanding the existence of class-wide eligibility criteria for parole programs like those discussed in this letter, the fact that the eligibility for parole of each alien “requesting” parole is adjudicated on an individual basis makes it a “case-by-case” determination. This is nonsense. By that argument, the case-by-case requirement in the statute is rendered meaningless because *every* parole determination is necessarily made on an individual basis.²⁷ Further, by the Administration’s reasoning, even the declarations of parole for an entire class of Cuban nationals made by Attorney General Reno that led to the establishment of the “case-by-case” requirement in the first place would be permissible, since even in that case each Cuban seeking parole still had to demonstrate on an individual basis his or her eligibility. Please respond to this criticism.

²⁷ We note that in an article dated November 25, 2014, Prof. David Martin, the former DHS Principal Deputy General Counsel under Secretary Napolitano, criticized the assertion that the proposed new Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program would involve “case-by-case review.” Prof. Martin writes that with respect to the averral of “case-by-case review” in DACA cases: “in actual operation ... the new deferred action programs will function so that anyone who meets the class-based criteria will be virtually guaranteed a grant.” David Martin, Concerns about a Troubling Presidential Precedent and OLC’s Review of Its Validity (Nov. 25, 2014), available at <http://balkin.blogspot.com/2014/11/concerns-about-troubling-presidential.html>.