

The International Entrepreneur Rule Update

Written by Kevin J. Fitzgerald

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The International Entrepreneur Rule (“IE Rule”) has been in a constant state of fits in starts since its publication on January 17, 2017. During the 30 day comment period, the public has submitted 1,866 comments on the proposed rule change.

Legal proceedings in connection with IE Rule are still ongoing. On May 9, 2018, NVCA and its co-plaintiffs filed a motion for discovery to find out whether DHS fully complied with the court order. It is unclear if or when this proposed rule will actually take effect and how these proceedings may affect the outcome of this rule. It is important to note, even though the IE rule has been effect since December 2017, not one application has been adjudicated.

What Can International Entrepreneurs Do in the Meantime?

Foreign nationals who want to start a company in the U.S. have to navigate using existing visas, like the H-1B, E-2 treaty investor, or EB-5 Investor Program options, which are complicated, inflexible and often do not apply to specific early stage start-up company circumstances. For example, the H-1B visa requires individuals to work under the control of an employer, making it difficult to launch your own company and be a founder or a co-founder of the company. However, there may be a work around that require legal gymnastics to achieve, but possible.

The E-2 Treaty investor (if you are from a country that has an investor treaty with the U.S.) and EB-5 Investor program are options that require substantial at risk capital by the foreign national, which often is not how a start-up entity is launched. However, if you have “at risk” valued capital, you may want to explore these options. Again, there may be creative ways to value your at risk capital against the valuation of your start-up company.

Typically, a foreign national student starts a company based on intellectual capital in the form of an idea that is then funded by venture money, not typically with their own funds. At present, there are no U.S. visa options that fit this model which makes it increasingly hard for venture investment firms to invest in companies launched by foreign national students. However, the O-1 visa for an individual or even possibly for students who possesses extraordinary ability or achievement in the sciences, arts, education business, or athletics may qualify for this visa option. Again, given the limited options, it is worth exploring this.

Options may be limited and complicated, but creative approaches are available for foreign nationals wanting to start a company in the U.S. Contact our office for a review of possibilities.

Background Timeline on the IE Rule

As described in our previous alert, the IE Rule, which had been scheduled to go into effect on July 17, 2017, would allow qualifying foreign entrepreneurs to come to the U.S. to establish, oversee, and grow their new U.S. businesses. Six days before the IE Rule was set to take effect last July, the Trump administration published its own rule delaying its implementation until March 14, 2018, and indicated that it was likely going to rescind the IE Rule.

Then, National Venture Capital Association (“NVCA”), Omni Labs, Peak Laboratories LLC, and two foreign entrepreneurs from the UK filed suit in federal court to enjoin the Trump administration’s delay of the IE Rule on grounds that the delay was implemented without giving the public the required notice and chance to comment. The U.S. District Court for the District of Columbia agreed. In December 2017, the District Court issued an order enjoining the delay and ordering the implementation of the IE Rule. Although DHS then

announced that it was taking steps to implement the IE Rule to comply with the court order, the agency was also simultaneously in the final stages of drafting a notice of proposed rulemaking to repeal the IE Rule.

On May 29, 2018, Department of Homeland Security (“DHS”), published a Notice of Rule Making entitled, *Removal of the International Entrepreneur Rule*, to repeal the IE Rule. The proposed rule, approved by the White House Office of Information and Regulatory Affairs, would completely rescind the IE Rule. In the Federal Register announcement, DHS states “that [the IE rule] represents an overly broad interpretation of parole authority, lacks sufficient protections for U.S. workers and investors, and is not the appropriate vehicle for attracting and retaining international entrepreneurs.”

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