USCIS Proposes a New Rule for International Entrepreneurs, October Visa Bulletin, and More...

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IMMIGRATION LAW UPDATE

USCIS Proposes a New Rule for International Entrepreneurs

On August 26, 2016, the United States Citizenship and Immigration Services (USCIS) announced a proposed new rule for international entrepreneurs. Under the rule, entrepreneurs will be considered for parole (temporary permission to be in the US) to start up businesses and work in the US. The purpose of the proposed rule is to enhance entrepreneurship, innovation, and job creation in the US. Because of the requirements of this rule, this appears to benefit persons already in the US who already have received US investors.

This is only a proposed rule, and cannot be utilized until it is formally a regulation. That is expected before President Obama leaves office. Under this proposed rule, the Department of Homeland Security (DHS), using its existing discretionary statutory parole authority, may parole, on a case-by-case basis, eligible entrepreneurs of start-up enterprises. An individual seeking to operate or grow his or her start-up business in the US would generally need to demonstrate the following to be considered for discretionary parole under this rule:

- *Formation of a new start-up entity:* The applicant must have formed a new entity in the US that has lawfully done business since its creation, within the last three years.
    - The start-up entity must meet the definition of a US business entity and includes any corporation, limited liability company, partnership, or other entity that is organized under Federal law or the laws of any state.
- *Applicant must be an entrepreneur:* The applicant must be well-positioned to advance the entity's business. An applicant may generally meet this standard by providing evidence that he or she: (1) possesses a significant (at least 15 percent) ownership interest in the entity at the time of adjudication of the initial grant of parole; and (2) has an active and central role in the operations and future growth of the entity, such that his or her knowledge, skills, or experience would substantially assist the entity in conducting and growing its business in the US. The applicant cannot be a mere investor.
- *Significant US capital investment or government funding:* The applicant must show that the entity has received significant investment of capital. The applicant can prove this standard by demonstrating:
    - Receipt of significant investment of capital (at least $345,000) from US investors with established records of successful investments;
    - Receipt of significant awards or grants (at least $100,000) from certain federal, state, or local government entities; **or**
    - Partial satisfaction of one or both of the above criteria in addition to other reliable and compelling evidence of the start-up entity's substantial potential for rapid growth and job creation. Such documentation may include, but is not limited to, evidence of capital investments other than those mentioned above; letters from relevant government entities, qualified investors, or established business associations with knowledge of the entity's research, products, or services and/or the applicant's knowledge, skills, or experience that would advance the entity's business; newspaper articles or similar evidence that the applicant has received significant attention or recognition; evidence of significant revenue; evidence pertaining to the applicant's role, knowledge, and skills; patents or awards; or any other relevant and credible evidence indicating the entity's potential for growth or the applicant's ability to advance the entity.

DHS proposes that an applicant who meets the above criteria may be considered for a discretionary grant of parole lasting up to two years. A subsequent request for re-parole (for up to three additional years) would be considered only if the entrepreneur and the start-up entity continue to provide a significant public benefit as evidenced by substantial increases in capital investment, revenue, or job creation.

USCIS adjudicators will be required to consider the totality of the evidence, including evidence obtained by USCIS through background checks and other means, to determine whether the applicant has satisfied the above criteria, whether the specific applicant's parole would provide a significant public benefit, and whether negative factors exist that warrant denial of parole as a matter of discretion.

DHS retains the right to revoke any such grant of parole at any time as a matter of discretion or if they determine that parole no longer provides a significant public benefit, such as when the entity has ceased operations in the US or DHS believes that the application involves fraud or misrepresentation.

If an applicant meets the above criteria, his or her spouse and minor, unmarried children, if any, can also be granted parole into the US. The entrepreneur's spouse and children would not be authorized for employment incident to the grant of parole.

First-Time Third Country H-1B Applicants May Apply in Vancouver

The US Consulate in Vancouver, Canada has confirmed that it will accept applications for third country nationals applying for their first H-1B visa, even if the case is based on a university degree issued outside the US or Canada. Previously, third country nationals were discouraged from applying at the Vancouver post. Applicants should plan in advance as appointments for third party applicants will be limited as the posted visa appointment processing times online only apply to Canadian residents and not third party country nationals. To learn more about H-1Bs, visit the Clark Hill website.

Canada to Lift Mexican Visa Requirement

In 2009, Canada instituted a visa requirement for Mexican citizens traveling to Canada. Effective December 1, 2016, Mexicans will no longer need a visa to enter Canada for temporary purposes. Like virtually all other non-visa nationals traveling to Canada, Mexicans will require an Electronic Travel Authorization (eTA). US citizens and permanent residents are exempt from this eTA requirement. For more information about eTA and information on travel to Canada, see the Government of Canada's website.

DHS Adjusts Certain Civil Penalties Assessed by CBP and ICE

On November 2, 2015, President Obama signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 to improve the effectiveness of civil monetary penalties and maintain their desired effect of deterring certain behaviors. As part of the 2015 Act, the DHS will apply new penalty amounts to all penalties assessed after August 1, 2016. DHS undertook a review of the civil penalties, as a result, penalties assessed by Immigration and Customs Enforcement (ICE) against employers will be increased. Civil penalties for knowingly hiring, recruiting, referring, or retaining unauthorized aliens will increase to $539-$4,313 per unauthorized alien; second offenses will increase to $4,313-$10,781 per unauthorized alien; and third offenses will increase to $6,469-$21,563 per unauthorized alien. Civil penalties for I-9 paperwork violations will increase to $216-$2,156 per violation. For more regarding I-9 compliance see the Clark Hill website.

Updates to US Passport Rule Due to International Megan's Law and FAST Act

The US Department of State (DOS) made updates to the US passport rules as a result of the passage of two laws: the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders (IML), and the Fixing America's Surface Transportation Act (FAST Act). The final passport rules incorporate statutory passport denial and revocations for certain individuals, including certain sex offenders under IML, persons with over tax obligations under the FAST Act, and persons who submit a passport application with incorrect or invalid social security numbers.

Social Media Added to Visa Waiver Program Vetting Source List

DHS has proposed an update to the DHS system of records. The system of records allows DHS and US Customs and Border Protection (CBP) to collect and maintain records on nonimmigrant aliens seeking to travel to the US under the Visa Waiver Program. DHS has proposed to add the following language to the system of records, "Please enter information associated with your online presence-Provider/Platform-Social media identifier." This will be an optional field. The purpose of this additional language is to enhance the investigation process and provide an additional tool set to investigators to better screen and analyze applicants. Comments to this proposed rule will be accepted until October 3, 2016. For more information regarding the visa waiver program, visit the Clark Hill website.

October Visa Bulletin

The October Visa Bulletin has been released. For the first time, USCIS will allow applicants in the employment-based green card process to use the "Filing Date" for the priority date and not the "Final Action Date" to file their adjustment of status application.

For China, both the second and third preference filing dates will advance forward. The filing date for employment-based second category (EB-2) China will advance to March 1, 2013 and EB-3 China will advance to May 1, 2014.

For India, both the second and third preference filing dates will advance forward. The filing date for employment-based second category (EB-2) India will advance to April 22, 2009 and EB-3 India will advance to July 1, 2005.

The filing date for employment-based second category (EB-2) cases included in the "worldwide" limit will be current. The filing date for employment-based third category (EB-3) cases included in the "worldwide" limit will be current.

It is not likely that the "Filing Date" will be used for the rest of the year; instead, the "Final Action Dates" will likely be used. For more information about priority dates and employment based green cards see the Clark Hill website.