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Foreign Startup Founder Rule Review Sparks Delay Worries

By **Allissa Wickham**

Law360, New York (June 14, 2017, 10:07 PM EDT) -- A new rule for foreign startup founders was slated to go into effect this July, but has instead been sent back to the Office of Management and Budget, sparking fears that it will be delayed or eventually revoked, especially in light of the Trump administration's skeptical view of parole.

Roughly two months before the **new rule** aimed at giving "parole" — or temporary permission to be in the U.S. — to startup founders was set to take effect on July 17, U.S. Citizenship and Immigration Services kicked the regulation back to the OMB for further review.

The notice posted with the OMB doesn't give a reason for the extra scrutiny, and the government has been tight-lipped on the matter, with USCIS declining to comment, and representatives for the OMB not responding to a comment request.

But the fact that the rule is back at the OMB, after having been finalized in January, is cause for concern among immigration attorneys, who said this could signal a delay in its implementation, if not a demise down the road.

"I would think, at the very least, this may mean a delay in the rollout from the July 17th beginning," said Dan Berger of Curran & Berger LLP. "But obviously, this is crystal ball kind of speculation."

It could also be a hint that the Trump administration is thinking about withdrawing the rule, according to Fuji Whittenburg of Sostrin Immigration Lawyers LLP, although that's a phase that may come later down the road.

"I think if it is going back to the OMB, they are probably looking to review it, amend it, postpone it, withdraw it — there are all sorts of possibilities here, and that's really disappointing, I would say," Whittenburg said.

The OMB notice, which says the rule was received on May 25, came about four months after President Donald Trump **signed an executive order** that called for more scrutiny of the use of parole. The order specifically requires "appropriate action" to be taken to ensure that parole authority is used on a "case-by-case" basis only.

Additionally, the president's nominee for USCIS director, Lee Francis Cissna, assured lawmakers at his May 24 confirmation hearing that he would take part in a review of the way parole is being used.

Overall, it adds up to an administration, and potential agency head, that's ready to scrutinize the use of parole, which could spell a bumpier path forward for the international entrepreneur rule.

"I think that there is definitely a group in the new administration that hates the whole idea of parole, in any form, that's used for any purpose," said Greg Siskind of Siskind Susser PC. "And it doesn't really matter whether you can make a great economic case for this category or not, or that there are big gaps in immigration law that make this category necessary. They still do not like the use of parole."

Interestingly, the Trump administration has argued in the travel ban litigation that the president has "broad authority" when it comes to immigration issues, which could undercut claims that the executive branch didn't have the power to roll out the entrepreneur rule.

"[T]he authority to impose the travel restrictions and the authority for the entrepreneur regulation fall under the same section of the statute," explained Lynden Melmed of Berry Appleman & Leiden LLP. "That may make it difficult for them to argue that they lack authority to parole entrepreneurs into the country."

Instead, Melmed said, it's a "safe bet" that the administration will "focus on whether American workers are hurt by the regulation" and if there's a policy reason for changing the rule. And notably, the rule was finalized in January, right before President Trump took office, so it may be among the most vulnerable of the immigration rules out there.

"This would be the most susceptible, I believe, over the H-1B program, because it's easier to get rid of something that never really started, than to pick apart something that's been a stand-by for a really long time," noted Whittenburg.

If the administration does opt to rescind the rule, the "cleaner" way to do it would be a delay, followed by a proposed recession, according to Stuart Shapiro, a professor at Rutgers, who specializes in the regulatory process and who previously worked in the OMB.

"If they were going to rescind it, the cleaner way to do it would be to delay the effective date [by six months, for example]," Shapiro said. "And in that six months' time, propose a recession, and then issue a final document with the recession — both of which would be reviewed by OMB, presumably."

If the rule does go away, it will leave startup founders in the U.S. where they are now: with limited visa options, no immigration avenue that's specifically tailored for entrepreneurs, and the prospect of bringing their company to a different country instead.

"If you go to Silicon Valley, they have billboards — the Canadian government — on U.S. 1, the highway there, that to attract immigrants ... to look at Canada," Siskind said. "Because they know that it's just next door."

--Editing by Pamela Wilkinson and Catherine Sum.