

## Immigration

### Foreign Entrepreneurs Get Pathway to U.S. Without Visas

**F**oreign entrepreneurs soon will be able to come to the U.S. temporarily to work on their startup businesses without having to get a visa.

The Department of Homeland Security Jan. 13 finalized regulations (RIN:1615-AC04) allowing entrepreneurs into the country if they meet the criteria for showing that their businesses will generate a “significant public benefit.” The regulations establish the framework for use of parole authority, which allows the administration to admit foreign nationals outside the regular channels for humanitarian reasons or if it would create a significant public benefit.

When the proposal was unveiled in August, the White House touted immigrants’ propensity to start businesses and create jobs. More than 40 percent of Fortune 500 companies were founded by immigrants or their children, and immigrants are more than twice as likely to start a company as their native-born counterparts. Tech giants such as eBay, Google, Instagram, Tesla, WhatsApp and SpaceX count immigrants among their founders.

**No Startup Visa.** But there’s currently no visa set aside for immigrant entrepreneurs. That’s caused immigrants in some cases to jump through hoops to meet the requirements for existing visa categories, such as O-1 extraordinary ability visas or H-1B visas for high-skilled workers.

The regulation will “fill a void for entrepreneurs that are just not covered by our existing nonimmigrant and permanent resident scheme,” Seattle immigration attorney Bonnie Stern Wasser told Bloomberg BNA Jan. 13. The H-1B is “useless for a lot of people” because demand far exceeds supply and because an entrepreneur must show that he or she also is an employee of the business who can be fired by a board of directors, she said.

Foreign entrepreneurs with an ownership interest in their businesses also can’t pass the labor market test required for an employment-based green card because they can’t show their positions are truly available to U.S. workers, Wasser said.

**Nearly 3,000 Eligible Annually.** “DHS believes that this final rule will encourage foreign entrepreneurs to create and develop start-up entities with high growth potential in the United States, which are expected to facilitate research and development in the country, create

jobs for U.S. workers, and otherwise benefit the U.S. economy through increased business activity, innovation, and dynamism,” the department said in the final rule. Close to 3,000 individuals are expected to be eligible to apply each year, the DHS said.

The regulation is a companion to a recent precedential administrative decision from U.S. Citizenship and Immigration Services changing the standard for the “national interest waiver.” The waiver allows an immigrant to obtain a green card without an employer sponsor and without having to test the labor market.

Both are part of President Barack Obama’s 2014 executive action on immigration.

How many people apply for entrepreneur parole will “boil down to” who wants the quasi-status it confers, Wasser said. Parole isn’t a real immigration status, and under the rule entrepreneurs can’t switch to a different immigration status while they’re in the U.S., she said. That level of uncertainty also may deter investors, who want to know that the entrepreneur they’re funding is going to stick around to develop the company, she said.

The inability to switch to another immigration status from within the U.S. is a “a major stumbling block to the utility of this particular provision,” Angelo Paparelli of Seyfarth Shaw in Los Angeles told Bloomberg BNA Jan. 13. “If they want to be flexible, they should be flexible,” he said.

“There are many ways that someone like this could conceivably be eligible to adjust, and we make it harder for no apparent reason,” Paparelli said.

**Criteria for Parole.** The rule sets out the criteria for what’s considered a significant public benefit, but the DHS stressed that all determinations of whether to grant parole will be made on a case-by-case basis.

To qualify, an applicant must: have created a startup business within the five years before filing the application; have at least a 10 percent ownership stake in the business and have an “active and central role in the operations and future growth” of the business; and have obtained at least \$250,000 in capital investments, \$100,000 in government grants or other present evidence showing the business’s significant benefit to the U.S.

Entrepreneurs will be allowed an initial parole period of up to 30 months, which can be extended for up to another 30 months, up to a maximum of five years total.

The rule “does provide real opportunities for foreign entrepreneurs, which is badly needed in our current system,” Anastasia Tonello, an attorney with Laura Devine Attorneys LLC in New York and Laura Devine Solicitors in London, told Bloomberg BNA Jan. 13.

“This is a welcome improvement over the proposed rule and a refreshing change of heart on the part of US-

CIS because it seems that they actually took into account commenters' concerns," Paparelli said. He mentioned how the agency lowered the qualifying investment amount—from \$345,000 to \$250,000—and lengthened the initial parole period to 30 months from two years.

**Better to Get E-2?** Tonello, who serves as first vice president of the American Immigration Lawyers Association, compared entrepreneur parole to the E-2 treaty investor visa, a temporary visa available to citizens of countries with which the U.S. has a treaty and who invest in businesses in the U.S. Unlike with entrepreneur parole, E-2 applicants don't have a minimum investment threshold, Tonello said. Instead, USCIS adjudicators "look at the whole business and its potential," she said.

"A lot of these startups don't need significant investments," Tonello said. "A lot of really strong businesses start out with a computer and a really smart guy."

The regulation also doesn't allow for funding other than investments or government grants, Paparelli said. That means an entrepreneur who's able to self-fund the startup, or fund it with the help of friends and family, won't be able to qualify, he said.

Entrepreneur parole does hold some advantages over the E-2 visa, Tonello said. For one, India and China don't have treaties that qualify their citizens for the visas, and so this provides an avenue for them to come to the U.S., she said.

And E-2 visas require investors to retain a majority ownership stake in the company, which can be a problem when trying to attract venture capital, Tonello said. Having to retain only a 10 percent ownership interest allows for more equity to be sold to venture capitalists to ensure their funding, as well as converting the business from a foreign-owned to a U.S.-owned entity, she said.

Ultimately, the introduction "gave far more hope than this final rule ultimately manifested," Paparelli said. "It will benefit a small population of applicants," he said. It's "not so much about the number of people, it's really about the impact of the parole decision and its effect on American citizens, the U.S. economy and U.S. innovation," he said.

But because the qualifications for parole are unduly restrictive, the U.S. loses the full benefit that foreign entrepreneurs could bring, he said.

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*Text of the final rule is available at <http://src.bna.com/lo4>.*

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