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New immigration law allows U.S. start-ups to employ foreign-born founders, key staff

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The Department of Homeland Security (DHS) recently revived a short-lived Obama-era regulation providing foreign entrepreneurs with the ability to work for U.S. start-up companies that have received significant funding from qualified U.S. investors.

DHS is facilitating this new type of U.S. work permit based on a provision of the immigration laws known as "parole."

The parole statute permits the agency, in its discretion on a case-by-case basis, to grant entry and employment authorization to foreign nationals for urgent humanitarian reasons or significant public benefit.

The new program fills a hole in the current U.S. immigration system, which provides limited or no feasible work permit options for talented entrepreneurs seeking to found, build and/or shape the course of new U.S. businesses.

Recognizing the significant public benefit realized through entrepreneurship, innovation, and job creation in the United States, the regulation establishes general criteria DHS may use in evaluating applications for parole filed by foreign nationals who will play key roles for U.S. start-ups.

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The H-1B visa, for example, is severely limited by an annual quota, imposes competitive compensation requirements, and is often out of reach for start-ups with little or no employees or revenue.

The E-2 investor visa is available only to citizens of countries with which the U.S. has a specific treaty, requires that the U.S. business be majority foreign owned, and, like the EB-5 immigrant investor visa, typically involves a substantial capital investment from the foreign national seeking the visa.

To qualify for International Entrepreneur Parole (IEP), the entrepreneur must play a central and active role in the operations of the start-up and demonstrate that his or her academic background and/or experience will substantially assist the entity with the growth and success of its business.

The definition of "entrepreneur" is not limited to those individuals who manage the overall operations of the start-up entity but may also include technical founders and other key players who are fundamental to the success of the enterprise.

At the time of the initial application, the entrepreneur must own at least 10% of the entity, but this ownership may steadily decease over the course of five years as equity is transferred to other investors.

He or she must, however, have at least some ownership interest in the start-up during the entire period of employment authorization.

The U.S. start-up entity must have been created within the five years immediately preceding the IEP application or within five years of the start-up's receipt of the qualified grants, awards, or investments described below.

The IEP application must also demonstrate the U.S. start-up has lawfully done business during any period of operation since its date of formation.

While this requirement may seem challenging — since it may require showing business activity before the entrepreneur is in the United States on a full-time basis — the preamble to the regulation clarifies the agency's desire for a flexible approach to this requirement and provides that examples of such business activity may include business permits, equipment purchased or rented, contracts for products or services, invoices, licensing agreements, federal tax returns, sales tax filings, and evidence of marketing efforts.

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In order for the entrepreneur to qualify for IEP, the U.S. start-up must have received at least $250,000 in funding from qualified U.S. investors, or at least $100,000 in qualified government awards or grants, within eighteen months of the IEP request.

Private investors may be individuals or investment firms such as venture capital firms, angel investors, or start-up accelerators, that are majority owned and controlled by U.S. citizens or permanent residents and who in the past five years have invested at least $600,000 in new U.S. businesses, at least two of which have created five or more American jobs or generated $500,000 in revenue with an average annual revenue growth of at least 20%.

It is unclear from the rule-making process how DHS will interpret the requirement that qualified investors be "owned and controlled" by U.S. citizens or permanent residents.

In the case of some investment firms, it may be difficult or impractical to trace the ownership of a large number of limited partnerships whose funds are invested but have no control over the management of the investment firm or the manner in which its capital is invested.

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If the IEP application can document that a U.S.-based investment firm's funds are controlled by U.S. citizens/residents who in turn may have an ownership interest in the firm, DHS should accept this as meeting the intended purpose of the rule.

Support for such an interpretation is found in the L-1 visa category, where "ownership and control" among legal entities within a multinational group may be evidenced through agreements that vest control in a common parent company or set of individual directors even where there is minority ownership.

Also, in the preamble to the IEP rule, DHS responded to a public comment about foreign funding/investment by affirming that a qualifying investment firm must be "owned or controlled" by U.S. citizens or lawful permanent residents.

IEP provides the entrepreneur with an initial 30 months of U.S. employment authorization with the start-up.

This can be extended — via re-parole — by an additional 30 months, for a total of five years, with evidence that the entrepreneur's role with the start-up will continue to provide significant public benefit to the United States.

This generally must include evidence that the start-up received at least $500,000 in qualifying investments or government grants/awards, created at least five U.S. jobs, or reached at least $500,000 in annual revenue with average annual revenue growth of at least 20%.

Where the start-up entity has received substantial funding from qualified investors, but does not meet all of the requirements described above for initial or re-parole, DHS may in its discretion approve an IEP application if supported by compelling evidence of the start-up's potential for rapid growth and job creation.

This might include evidence such as the entity's number of users or customers; revenue; additional investments/fundraising, including from crowdfunding platforms; social impact; national scope; and/or positive effects on the locality or region where it operates.

The entrepreneur's spouse and children may file their own applications for parole, and after arrival in the United States the spouse may apply for employment authorization.

Presumably because the statute provides DHS with discretion to grant parole only where there is significant public benefit (or for urgent humanitarian reasons), the IEP rule conspicuously provides that applications by spouses and children must include evidence the dependent "otherwise merits a grant of parole in the exercise of discretion."

While the rule is silent on the type of evidence family members must provide to obtain a favorable exercise of discretion, the regulation's preamble suggests that dependents may offer a significant public benefit "by maintaining family unity and thereby further encouraging the entrepreneur to operate and grow his or her business in the United States — and to provide the benefits of such growth to the United States."

The regulation provides DHS with broad discretion to terminate parole at any time for any reason if the agency determines the IEP no longer provides the United States with significant public benefit.

The start-up is not obligated to pay the entrepreneur a minimum salary or other guaranteed compensation. However, DHS may only grant IEP if the entrepreneur's U.S. household income will be at least 400% of the federal poverty line.

For example, the current federal poverty line for a household of four in the forty-eight contiguous states is $26,500. An entrepreneur seeking IEP for him/herself, a spouse, and two children would therefore need to demonstrate a prospective annual household income of at least $106,000.

This may be income paid by the start-up or may come from a combination of sources such as investment income or income earned by a spouse.

The entrepreneur has a continuous obligation to notify DHS immediately of material changes throughout the period of parole. Material changes include, among other things, "significant" changes in the ownership and control of the start-up entity.

DHS remarks in the rule's preamble that a significant change may occur when a transfer of equity results in an owner or owners not previously identified in the IEP application acquiring a controlling interest in the entity.

It is entirely possible, therefore, that the additional funding (and new controlling owners) the start-up secures during the initial 30 months of IEP will serve as the qualifying investment that renders the entrepreneur eligible for re-parole, and yet also immediately require him or her to report the equity transfer — including the entrepreneur's diluted interest in the start-up — to DHS as a material change.

The agency expressly recognized this apparent dichotomy in promulgating the final rule, explaining that it does not anticipate such changes in ownership, in and of themselves, will result in a termination of parole, but that vetting the impact of new ownership is important to the integrity of the IEP program.

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By analogy with its execution of termination provisions in other work permit categories, and as explicitly permitted by the IEP rule, DHS may also notify the entrepreneur of any concerns or questions it has about continued IEP eligibility and provide the entrepreneur an opportunity to respond.

Among other things, the agency may raise concerns if it believes information in the IEP application was not true or accurate, the entrepreneur failed to timely report a material change, or the entrepreneur is no longer employed in a central and active role or ceases to possess a qualifying ownership interest in the start-up entity.

The IEP program, at least in its current form, permits U.S. employment authorization for up to five years. Entrepreneurs whose talents are needed in the United States longer term should therefore explore options for U.S. residency well in advance of the expiration of their authorized parole.

The relaunch of the IEP program is a welcome sign that the current administration understands the critical role that start-up businesses founded by foreign entrepreneurs have played, and will continue to play, in creating jobs and stimulating the U.S. economy.

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