

VC Group Pushes To End Delay Of Int'l Entrepreneur Rule

By **Nicole Narea**

Law360, New York (September 29, 2017, 9:02 PM EDT) -- A venture capital group asked a D.C. federal judge Friday to compel the government to implement an Obama-era rule that would allow foreign entrepreneurs to temporarily live in the U.S., saying it will likely succeed in claiming that the government shirked administrative procedure in delaying the rule's effective date.

The National Venture Capital Association pointed out that the government must post notice and seek comment before it issues a decision to delay the effective date of a rule under the Administrative Procedure Act, which it allegedly failed to do in the case of the long-awaited International Entrepreneur Rule. The group claimed preliminary injunctive relief was appropriate given that many of its member startups and venture capitalists are irreparably harmed by the rule's delay, unable to effectively grow their businesses.

"[The government's] excuses are insufficient to outweigh the APA's emphasis on public participation in agency decision-making," the group said in its motion. "[The government] cannot meaningfully contend that compelling operation of the rule will cause any harm."

The IER, published in the final days of President Barack Obama's tenure, would let some 2,940 entrepreneurs a year seek temporary permission to be in the country, known as parole, to oversee and grow their startup companies, the U.S. Department of Homeland Security had said in January.

Under the rule, entrepreneurs need to have at least a 10 percent ownership in the business and a central role in the company's operations, and must show that the company has received a "significant investment" from qualified U.S. investors — likely \$250,000 or more, according to the complaint — or significant grants from government entities. They also must show their business would provide a significant public benefit.

President Donald Trump's January executive order on interior immigration enforcement ordered DHS to "ensure that parole authority is exercised only on a case-by-case basis in accordance with the plain language of the statute." Although the International Entrepreneur Rule was set to take effect July 17, DHS announced July 10 that it would delay the rule until March 2018 in order to collect public comments on a proposal to rescind the rule entirely.

The NVCA, which filed suit Sept. 19, said Friday that the agency violated the APA because it failed to provide any notice of the delay and appears to have pre-determined that the rule will be repealed.

The group shot back at the government's defense that providing notice and comment prior to delaying the rule would be "contrary to the public interest," arguing that it cannot be considered "good cause" under a narrow exception in the administrative procedure statute that is reserved for "extraordinary circumstances." The group said it was, in fact, the government's own actions that resulted in the failure to provide notice and comment, making it ineligible for the "good cause" exception.

Moreover, in its notice in the Federal Register, the government gave "cursory, unsubstantiated assertions" as to why it was choosing to delay the rule, failing to abide by the requirement that it offer a "brief statement of reasons" for its decision, the NVCA argued.

"Immediate implementation of the International Entrepreneur Rule is necessary so that our clients — founders, startup companies and their investors — can continue their important work of growing new, innovative business in the United States," Paul Hughes, counsel for the NVCA, said in a statement Friday. "These enterprises hire American workers, grow the U.S. economy and ensure American technological leadership for decades to come."

The government does not comment on pending litigation.

NVCA and the other plaintiffs are represented by Andrew J. Pincus, Paul W. Hughes and John T. Lewis of Mayer Brown LLP, and Melissa Crow, Mary Kenney and Leslie K. Dellon of the American Immigration Council.

Counsel information for the government was not immediately available.

The case is National Venture Capital Association et al. v. Elaine Duke et al., case number 1:17-cv-01912, in the U.S. District Court for the District of Columbia.

--Additional reporting by Kelcee Griffis. Editing by Aaron Pelc.