

VC Group Gets Win In Foreign Entrepreneur Rule Row

By Kelly Knaub

Law360, New York (December 1, 2017, 9:49 PM EST) -- A D.C. federal judge on Friday granted a venture capital group's bid to vacate a Trump administration rule that delayed an Obama-era regulation for international entrepreneurs, finding it unlawful because the government failed to give time for public notice or comment.

U.S. District Judge James E. Boasberg sided with the National Venture Capital Association, Omni Labs Inc. and others who had argued that the U.S. Department of Homeland Security didn't have good cause to forgo notice and comment on the rule that pushed back the effective date of the International Entrepreneur Rule until March, and vacated the rule. The rule would have permitted nearly 3,000 foreign entrepreneurs to stay in the U.S. for a limited time to oversee their startup ventures.

Specifically, the judge rejected the government's argument that its delay rule was justified by the expense of implementing the entrepreneur rule, saying its argument "doesn't pass muster," and also shot down its contention that implementing the entrepreneur rule would cause confusion and waste resources.

"Defendants fail to show any real 'confusion' that required bypassing notice and comment," the judge said.

Judge Boasberg also refused to issue a stay of the International Entrepreneur Rule, saying it wasn't justified and would "simply remedy the agency's delay with more delay."

The International Entrepreneur Rule was promulgated just days before President Donald Trump took office. The rule was set to take effect in July, but the Trump administration published another rule that month delaying it.

In September, the National Venture Capital Association, Omni Labs, Peak Laboratories LLC and two U.K. siblings who founded LotusPay launched their suit. They asked the court for judgment last month, saying it should throw out the delay rule to allow the entrepreneur rule to take effect.

NVCA and the other plaintiffs said the government postponed the entrepreneur rule six days before it was to go into effect, and did so without giving the public a heads-up on a chance to comment. Instead, they contended, the government argued that the imminent effective date of the regulation provided "good cause" to not employ notice and comment under the Administrative Procedure Act.

But Judge Boasberg on Friday sided with the plaintiffs, who had raised their eyebrows at the DHS' "good cause" argument, saying "the agency's proffered reasons for bypassing notice and comment easily fall short of good cause."

The International Entrepreneur Rule 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 DHS said in January.

Under the rule, entrepreneurs need to have at least a 10 percent ownership in the business and a central role in its 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.

Trump's January executive order on interior immigration enforcement ordered the 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, the DHS announced July 11 that it would delay the rule until March 2018 in order to collect public comments on a proposal to rescind the rule entirely, according to the plaintiffs' summary judgment motion.

"The court's order confirms that, while administrations may change, basic legal requirements ensure agency transparency, guarantee public participation, and prevent reactionary, ill-considered policy changes," Paul Hughes, lead counsel for the plaintiffs, said in a statement Friday.

A DHS representative said the agency couldn't comment on the pending litigation as a matter of policy.

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.

The government is represented by Glenn M. Girdharry of the U.S. Department of Justice.

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 Allissa Wickham, Nicole Narea and Kelcee Griffis. Editing by Bruce Goldman.