

## 3 Immigration Rules To Watch In Trump's Spring Agenda

By **Nicole Narea**

*Law360 (May 10, 2018, 8:21 PM EDT)* -- The Trump administration published its spring regulatory agenda on Wednesday, highlighting proposed policies that would implement key structural changes at the office that oversees immigration courts, increase investment requirements for EB-5 visas and revoke a visa program for entrepreneurs.

The agenda, published twice a year by the Office of Management and Budget, is meant to inform the public of regulations under consideration or that the administration plans to enact. While the plans laid out in the agenda are not absolute, it is considered to be a kind of roadmap for the administration's goals.

Here, immigration attorneys examine key provisions to watch in the coming months:

### **Structural Changes to the Executive Office for Immigration Review**

The U.S. Department of Justice advised that it will issue a final determination on a rule that would change Executive Office for Immigration Review regulations relating to its "internal structure and organization, clarify the responsibilities of its components, and synchronize EOIR's organizational regulations with the Department of Justice's broader organizational regulations."

The agency noted in the spring agenda that the alterations were required because of a new "Office of Policy" within the EOIR, which is not currently accounted for in the EOIR's policies and regulations.

EOIR Director James McHenry told the Center for Immigration Studies earlier this month that that the office will be a "kind of central quarterbacking entity" that will ensure the agency has "coordinated policies across all adjudicatory bodies." The EOIR has not released further information about the new office.

Immigration Judge A. Ashley Tabaddor, speaking in her capacity as president of the National Association of Immigration Judges, expressed misgivings about the policy, suggesting it may signify the agency's intent to link law enforcement policies with the immigration courts.

"Law enforcement policy should not be the driving force of a court," she said. "We have concerns about this proposed structural change to the extent that it reflects the department's intent to insert its law enforcement policies into the court's mission. It is yet another example of why [an] immigration judge's

independent decision-making authority must be protected, and the immigration courts must be removed from a law enforcement agency to create an independent Article 1 court."

She also pointed out that the Department of Justice has not denied that it engages in "regular ex-parte communications with [DHS] and coordinates those policies with the court."

### **EB-5 Immigrant Investor Program Modernization**

U.S. Citizenship and Immigration Services indicated it will take final action on the proposed EB-5 Immigrant Investor Program Modernization rule in August.

The Department of Homeland Security had issued a proposal in January 2017 to alter its regulations relating to the EB-5 program, which encourages immigrant investment in new commercial enterprises and struggling businesses in the U.S., providing 10,000 visas annually. Individuals who hold an EB-5 visa may become eligible for a green card if they invest a certain amount or support 10 permanent full-time jobs for U.S. workers.

The agency had asked the public to weigh in on a number of changes, including raising the minimum investment amount, allowing certain EB-5 applicants to maintain their original priority date used to determine how long they would have to wait for a visa, alternating the classification of so-called targeted employment areas, and other changes to the filing and interview processes.

Carolyn Lee, a partner at Miller Mayer LLP and chair of the American Immigration Lawyers Association's EB-5 committee, said that the EB-5 industry has been unified in its opposition to one key aspect of the proposed rule: investment level increases. The rule proposed raising the required investment in targeted employment areas, certain designated rural areas or areas with high unemployment rates, from \$500,000 to \$1.35 million.

"The unanimous feeling of the entire EB-5 industry is that it would kill demand for EB-5 investors at that level," she said.

Investors in targeted employment areas make up about 80 to 90 percent of the EB-5 market, Lee said. Moreover, the EB-5 program as a whole faces significant backlogs, with a decade-long wait time for Chinese nationals, a newly announced backlog for Vietnamese and an imminent backlog for Indians in the next year.

DHS has argued that the price increase is reasonable, noting immigrant investor programs in other countries are far more expensive than the U.S. and that it adjusted the amounts based on the consumer price index in 1990, when the program was implemented.

But Lee argued the DHS failed to take into account that the U.S., unlike other countries, subjects its residents to worldwide taxation, meaning that EB-5 investors, by definition high-net-worth individuals, would pay much more over the course of their residency and naturalization in taxes.

Additionally, she said the DHS should not adjust the investment amounts based on the consumer price index from 1990, when the EB-5 program was underutilized, but rather when demand was roughly equivalent to the supply of visas.

Lee said that numerous stakeholders objected to the investment increases last April, when the agency

invited public comment on the proposed rule. If the agency were not to take into consideration their comments when it issues a final rule, she said it would likely face litigation on Administrative Procedure Act claims.

### **Rescission of the International Entrepreneur Rule**

USCIS provided notice that it would file a proposed rule to rescind the International Entrepreneur Rule, soliciting public comments.

The IER, published in the final days of former President Barack Obama's tenure, would grant parole to some 2,940 entrepreneurs annually, according to U.S. Department of Homeland Security estimates. It requires that an applicant qualifies as an entrepreneur, owns a recently formed startup entity, and demonstrates substantial potential for rapid growth and job creation by having U.S. investors or government grants.

It was originally scheduled to go into effect in July 2017, but DHS issued a notice in the Federal Register delaying its effective date until March 2018 to allow for more time for review. Paul Virtue, a partner in Mayer Brown LLP's global mobility practice and former Immigration and Naturalization Service general counsel, said that his firm worked with the American Immigration Council among other plaintiffs to successfully challenge that notice on the basis of the Administrative Procedure Act.

The program was thereafter reinstated by order of a D.C. federal judge in December 2017. In practice, however, USCIS has not processed any visa applications under the program. Virtue said that its failure to do so may be the subject of another motion in that case.

"This is on the regulatory agenda again presumably for USCIS to comply with the APA, which they didn't do the first time around," he said.

Startup founders, investors, economic development organizations and civic leaders have all opposed the rescission of the rule and will likely continue to do so during the public comment period.

--Editing by Philip Shea.

Correction: This story previously misstated the agency responsible for the rule relating to EOIR's organization. The error has been corrected.