

## 3 Suits Challenging Trump's Immigration Visa Tightening

By **Nicole Narea**

*Law360 (August 28, 2018, 9:40 PM EDT)* -- Recent regulatory changes affecting foreign students and entrepreneurs have inspired many business immigration practitioners to stand up for affected clients by taking the Trump administration to court. Here's what you need to know about the array of suits in the works.

### Rescinding Restrictions on STEM Students

Jonathan Wasden, an immigration attorney based in Reston, Virginia, filed suit on behalf of a business group in New Jersey federal court in May challenging a recent U.S. Citizenship and Immigration Services policy change restricting certain foreign students from working at third-party work sites.

In April, USCIS made unannounced updates to its website indicating that its interpretation of a 2016 rule establishing the so-called STEM optional practical training program for F-1 student visa holders had changed. The program has given science, technology, engineering and math students work authorization for up to 24 months after graduating if they jointly present a training plan with their employer and if the employer agrees to supervise them.

But the update imposed an additional, explicit restriction: The employee must be based at the employer's work site. At staffing agencies, consulting firms and the like, which regularly send employees to third-party work sites, this change presents significant obstacles.

Wasden said that the plaintiffs have sought a preliminary injunction barring the change. One of the issues at stake is whether the plaintiffs are likely to succeed on the merits of their arguments that the policy change was unlawful.

Instead of defending their rule changes published on the website, USCIS changed the website earlier this month, omitting almost everything Wasden had challenged. Hours later it filed a brief denying having the rules and requirements challenged in the case, citing the latest version of the website.

The case highlights that the agency is "throwing things against the wall and seeing what sticks," when it should be going through a deliberative vetting process before making rules and decisions based in law and defensible policy, Wasden said. As soon as the government's policymaking was challenged in this case, it backed down.

Wasden, who used to litigate on behalf of USCIS, says the agency is terrified of litigation.

"The last thing they want is a court looking behind the curtain," he said. "When I used to advise the agency that policies may be indefensible in court, the answer was, 'The business immigration bar never sues, so it doesn't matter. No one will overturn this.'"

### **Restoring Benefits for Foreign Startup Founders**

Representing the National Venture Capital Association and other startup stakeholders, Mayer Brown LLP and the American Immigration Council are working on litigation in D.C. federal court to restore an Obama-era rule authorizing foreign entrepreneurs to temporarily remain in the U.S.

Known as the International Entrepreneur Rule, the policy was promulgated just days before President Donald Trump took office and was set to take effect in July 2017, granting immigration parole to some 2,940 entrepreneurs annually. The Trump administration, however, tried to delay the implementation of the policy without providing notice or seeking the public comment required by the Administrative Procedure Act.

Paul Hughes, a partner at Mayer Brown and co-counsel on the case, said that, following conversations with the firm's partners at the American Immigration Council and clients, they decided to file suit challenging that delay as unlawful.

"I've worked with friends, colleagues and clients in the startup space for many years, so it's always been an ecosystem that is important to me," Hughes said. "When there was this direct challenge to immigration in this sphere, we were interested in engaging."

He said they courted the National Venture Capital Association as a plaintiff given that the organization had already worked diligently to lobby for the International Entrepreneur Rule. They also consulted startup incubators across the country to understand how the rule change affected companies the incubators had invested in.

The plaintiffs' efforts paid off in December, when U.S. District Judge James E. Boasberg granted them summary judgment, finding that the administration's attempt to roll back the rule was unlawful under the APA. Since then, he has also awarded the plaintiffs more than \$100,000 in attorneys' fees and allowed them to pursue discovery to determine whether the government was indeed processing parole applications under the rule.

Hughes said that discovery process is continuing.

### **Challenging Students' Unlawful Presence**

Hughes and H. Ronald Klasko, managing partner of Klasko Immigration Law Partners LLP, said they are exploring litigation challenging a USCIS policy issued this month changing how students become unlawfully present in the U.S.

Under the new policy, a student can be found to be unlawfully present as soon as they first violate their visa. A USCIS officer could, for example, evaluate an individual's history when they apply for an immigration benefit, such as an adjustment of status or visa renewal, and retroactively determine that they had violated their visa, accruing a period of unlawful presence. If the student were then to leave

the U.S., they would not be allowed to return for three to 10 years.

Before the memo, students were admitted to the U.S. not for a particular period of time with an end date but rather for the time it took to complete their studies. If they had fallen out of legal status during their student period or if they failed to report changes in the coursework, they were, in contrast to other visa holders, not regarded as unlawfully present until an official explicitly made that determination.

Klasko said he is in the process of recruiting plaintiffs for the suit, which would challenge the policy on the basis that it violates APA notice-and-comment requirements. He has also compiled examples of more than 50 student visa violations that are particularly technical or are due to an error in a database, indicating that a student could face serious consequences without clearly overstepping the terms of their visas under the policy.

"We think the interpretation of unlawful presence that the immigration service and the State Department have adopted ever since 1997 is correct under the law," he said.

So far, three universities have signed on — they would take on tremendous liability under the policy because a foreign student counselor could give a student wrong advice, leading the student to be barred from the U.S. for up to a decade and giving them grounds to sue, Klasko said.

A spokesperson for USCIS said the agency does not comment on pending litigation as a matter of policy.

--Editing by Brian Baresch and Alanna Weissman.