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Immigration Regulations To Watch Before Obama Exits Office

By **Allissa Wickham**

Law360, New York (August 12, 2016, 8:15 PM ET) -- The country may be entering the tail end of Barack Obama's presidency, but that doesn't mean the government agencies that handle immigration issues will be twiddling their thumbs. In fact, some rules that were meant to be created under the president's 2014 executive actions have yet to be released, meaning the agencies only have a few months to get them out the door.

Because it can be difficult to keep track of all the regulations simmering in the background, affecting foreign startup founders and highly skilled workers alike, here's a roundup of rules — and at least one piece of policy guidance — that immigration attorneys should keep an eye out for.

Flexibility for High-Skilled Workers

Surely, one of the most highly anticipated rules is the one aimed at updating homeland security regulations to mesh with agency policies created in response to the American Competitiveness in the Twenty-first Century Act of 2000, or AC21. Although this law was an important piece of legislation for skilled foreign workers — as it allowed for a longer H-1B status extension and included a key provision on changing jobs — the agency hadn't issued regulations implementing it until now, roughly 15 years after it was enacted.

The proposed rule, which was **released in late December**, also includes several extra benefits, like a "one-time grace period" of up to 60 days when a job ends for people holding H-1B, L-1 or certain other statuses.

And the rule would expand the ability of people with certain approved visa petitions to keep their priority dates for petitions filed later on. This is key, as priority dates are used to figure out where an immigrant stands in the line for visas.

"I think the biggest benefit in this rule will be increased clarity about when employees are able to keep their priority dates if they move between jobs," said William Stock of Klasko Immigration Law Partners, LLP, who also serves as the president of the American Immigration Lawyers Association.

"It's probably at least once or twice a month that I encounter an employee who's unwilling to take a job with one of my clients because of fears about keeping that priority date," he added.

Additionally, it would allow people with some approved immigrant visa petitions to apply for work authorization for one year if they can show "compelling circumstances."

The rule received nearly 28,000 comments, meaning that the U.S. Department of Homeland Security has plenty of responses to wade through before it can issue a final regulation. But Stock said that he's "certainly hopeful" he'll see the rule within the next "couple of months."

Regulatory Updates for PERM

New PERM regulations — which control the labor certification process for permanently employing

foreign workers — have been expected for well over a year. But it looks as if those changes may finally be coming. Attorney Marketa Lindt said **at the recent AILA conference** that the U.S. Department of Labor has come up with a proposed regulation that is "expected to be published shortly" with updates to PERM.

Modernizing the PERM process was part of the president's executive actions, as the program still requires outdated recruitment methods, like putting job advertisements in newspapers. Kevin Miner of Fragomen, Del Rey, Bernsen & Loewy LLP said he was "pretty confident" that the PERM rule will include an update regarding the way the labor market test is performed.

"I think it's pretty likely that you'll see more online advertising and probably less reliance on various print media, for instance," said Miner, who chairs AILA's liaison committee with the labor department.

He also predicted a provision that would allow for fixes to "harmless" errors, as the PERM process can be "very unforgiving" regarding typos on forms.

"[A]nd I get the impression from listening to them that we'll see some sort of a change that will allow some kind of a correction to to those kinds of nonsubstantive errors," Miner said.

Parole for Entrepreneurs Rule

After a lengthy wait, a proposed rule on parole for entrepreneurs landed at the Office of Management and Budget for review on Aug. 1, indicating that a new regulation for startup founders from abroad may soon be a reality.

Parole, in immigration law, means "permission to be in the United States," according to USCIS. Titled "Significant Public Benefit Parole for Entrepreneurs," **the proposed rule** was submitted by U.S. Citizenship and Immigration Services, about a year and a half after such a program was proposed as part of the president's executive actions.

The rule's text is not available, but clues about its contents can be gleaned from a summary published in a spring agenda on Reginfo.gov. According to the summary, DHS is seeking to create a program that would allow for possible parole of "inventors, researchers, and entrepreneurs" who aim to set up a startup and have been given investor funds, or "otherwise hold the promise of innovation and job creation."

The government has emphasized that parole does not amount to "formal admission" to the U.S. and gives only temporary status. However, the U.S. still lacks a visa option tailored to the needs of startup founders, so news of this rule has been met with welcoming arms by some immigration attorneys.

"[W]e'd love to see an entrepreneur visa to give people time to work on [an idea], but I think anything would be helpful," said Dan Berger of Curran & Berger LLP. "And if even if it's just limited to people who've had investment, I think that's that's something that we don't have right now."

As for what attorneys hope the rule contains, Susan Cohen of Mintz Levin Cohn Ferris Glovsky and Popeo PC said it should include a multi-entry feature — so people are able to come in and out of the U.S. — and should be flexible in when it comes the qualifying criteria.

'Extreme Hardship' Policy Guidance

Policy guidance on "extreme hardship" is also currently at the OMB, landing at the agency about eight months after USCIS issued a draft outlining which waivers to current immigration laws require a showing of "extreme hardship" and clarifying how it would make the hardship determinations once the guidance is finalized.

To be eligible for a provisional unlawful presence waiver, immigrants must be able to show that not being able to come back to the U.S. will cause "extreme hardship" to a U.S. citizen parent or spouse. Waivers are therefore crucial because people without them who rack up unlawful presence time in the U.S. — and subsequently leave the country — can be hit with a three- or 10-year

inadmissibility bar.

According to **the draft memo**, an applicant must demonstrate that it's reasonably foreseeable that the relative would either relocate or remain in the U.S. and that it is more likely than not that the relocation or separation would result in extreme hardship.

With the extreme hardship guidance recently resurfacing at the OMB, a final version of the memo may be on the horizon. Dree Collopy of Benach Collopy LLP said the guidance is "a welcome interim step," although she believes that rulemaking would have been the better choice.

Still, the guidance clarifies two established principles, according to Collopy: that factors of extreme hardship should be weighed "in the aggregate," and that extreme hardship to a nonqualifying relative can be taken into consideration if the hardship affects a qualifying relative.

Possible EB-5 Changes, a Final Fee Rule & DOJ Updates

After reform to the EB-5 immigrant investor program faltered last year, USCIS **said in April** that it's mulling possible "regulatory and policy changes" regarding the program, and asked stakeholders to weigh in on minimum investment amounts and the process by which regional centers are designated.

The EB-5 program allows foreign nationals who invest at least $500,000 in the U.S. — and create or maintain a minimum of 10 U.S. jobs — to obtain green cards. And while efforts to reform the program have been a frequent topic of discussion recently, changes fizzled last year when Congress opted simply to extend its regional center component until Sept. 30.

"I think it's conceivable that that regulation could come out in proposed form prior to Sept. 30, as a way of showing Congress that the agency is committed to … that [package] of integrity measures," Stock said. "But I'm sure that the agency is in discussions with the oversight committees in the Senate and the House about the timing on that."

And finally, attorneys should keep an eye out for the final version of a rule **that would increase fees** for a slew of immigration requests. For instance, the government is proposing to increase the fee for a Form I-140, known as an Immigrant Petition for Alien Worker, from $580 to $700. The proposed rule also suggests a fee hike of 145 percent for Form I-526 — which is one of the first documents filed in the lengthy EB-5 process — raising it from $1,500 to $3,675.

"Clients are are cost-sensitive ... so it's just something that they need to prepare for," noted Nancy Morowitz of Fragomen. "And it may deter some from maybe filing as many petitions as they ordinarily would have, like during the H-1B lottery process."

And not to be outdone, the U.S. Department of Justice on Friday unveiled a proposed rule that would update regulations that implemented a part of immigration law regarding so-called "unfair, immigration-related employment practices." The notice of proposed rulemaking, which was scheduled to be officially published on Monday, contains a slew of updates concerning unfair immigration-related employment practices, such as defining terms like "hiring."

--Editing by Patricia K. Cole and Jill Coffey.

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