International Entrepreneurs Now Eligible for U.S. Entry and Work Authorization – Know the Details Compared to Other Immigration Options

Insights
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A new federal program that just went into effect late last year is smoothing the way for international entrepreneurs to gain eligibility to enter and work in the United States – but how does it compare to other immigration options available? The International Entrepreneur Rule (IER), in effect since October 1, 2021, provides a much-less complicated path for those seeking the advantage of doing work in the U.S. However, the program still requires compliance with strict application procedures, and there are times where other available options may be preferable. This Insight will discuss what the IER program is, who may apply, and the procedures to apply. It will also explore how the IER program compares with non-immigrant work authorization visas (NIVs) to provide any interested entrepreneur a summary of what options are available to best fit their situation.

Brief Background

Prior to President Obama's last year in office, the only option any international entrepreneur possessed to establish a U.S. company was to see if they could be properly pigeon-holed into a specific type of non-immigrant work-authorized visa (NIV) type such as an H-1B, L-1, F-1 OPT, O-1, E-1/2, or other similar classification. Unfortunately, many of these visa categories limit what an entrepreneur can do or present qualification hurdles barring entrepreneurs from meeting their requirements. This caused many entrepreneurs to forgo entering the U.S., resulting in lost talent, job creation, and income to the American economy.

To fill this void, the Obama administration attempted to implement a special work authorization parole program for international entrepreneurs known as the International Entrepreneur Rule (IER). The program regulations were published on January 17, 2017, with an aim of taking effect later that year. However, the Trump administration delayed the implementation for further regulatory review, and a series of lawsuits caused the program to be halted for his entire term in office. The Biden administration, however, reimplemented the IER program and republished the regulations in the Federal Register on September 13, 2021. The IER then took effect on October 1, 2021, and U.S. Citizenship and Immigration Services (USCIS) has been accepting IER parole applications for international entrepreneurs since then.

The Basics: What is the IER Program?

The IER program allows any foreign national entrepreneur (non-U.S. citizen or permanent resident) a special Parole status to physically remain in the U.S. and work for a 2.5-year period under that status. That entrepreneur is allowed to remain in the U.S. for the full duration of their authorized stay as long as they form a start-up business that will provide a significant public benefit to the U.S. The entrepreneur must also maintain active involvement and ownership of the start-up business, and demonstrate sufficient minimal investment of capital by "qualified investors" into the start-up business. Let us take each of these parts and break them down further.

Start-Up Business

A start-up business is one that was formed within five years of the date the entrepreneur files their application for the IER program. It must be established in the U.S. within that five-year period of time. Any business established outside the five-year period does not qualify.

Significant Public Benefit

The U.S. start-up business must provide significant public benefit. This can be evidenced by:

- documented media coverage of the startup;
- documented investments or grants from notable investors or government agencies;
- proof of substantial revenue or job creation;
- press release(s) of notable funding;
- issued patents for novel technologies; and/or
- letters from industry peers regarding the new business and/or its technologies or inventions being advanced.

Active Involvement

The entrepreneur's active involvement and ownership of the start-up are two different requirements. The active involvement element entails evidencing the entrepreneur has taken a central and active role in managing the operations, growth, and success of the business. Documentation evidencing such may include:

- a detailed description of the entrepreneur's role in the operations;
- press releases of the entrepreneur's role;
- the professional background of the entrepreneur such as degrees, LinkedIn profile, and resume establishing the entrepreneur possesses knowledge, skills, or experience to advance the company;
- letters from relevant government or investment stakeholders confirming the entrepreneur's qualifications;

- documentary evidence of any technologies, patents, or investments attributed to the entrepreneur and connected with the start-up business; or
- any other related evidence establishing the entrepreneur's central and active role.

Ownership

The ownership requirement mandates the entrepreneur must own at least 10% of the start-up business upon filing the IER program's application for Parole. After the Parole is approved, this 10% ownership can sway between 5 to 10% during the first 2.5 years of the approved Parole period. This Parole period can be extended for another 2.5 years for a total aggregate five-year period under the IER program.

However, for the second 2.5 years, the entrepreneur's ownership interest must be no lower than 5% upon filing for the Parole extension. Once the Parole extension approved, the entrepreneur's ownership interest in the start-up business can go below the 5% ownership interest. However, the entrepreneur can never lose all ownership interest during the second 2.5-year Parole extension period.

Sufficient Minimal Investment

As for the sufficient minimal investment of capital by "qualified investors" into the start-up business, there are several types of "qualified investors." They are U.S. investors that possessed an "established record of successful investments"; any U.S. local, state, or federal government funding; or a combination of both.

- The U.S. investor that possessed an "established record of successful investments" is one where the U.S. investor has invested at least $600,000 in the past in more than one start-up. At least two of these start-ups must have either created at least five full-time U.S. jobs or generated $500,000 in annual revenue while maintaining a 20% growth rate. In essence, the U.S. investor should be a well-established U.S. venture capital fund. Please note the U.S. investor cannot be an entrepreneur, family member, or companies/entities owned by either. If the U.S. investor is qualified, then that investor must invest at least $250,000 into the start-up.
- As for any U.S. local, state, or federal government agency, such must be either a grant or award from such agency used for economic development, research and development, or job creation and totals no less than $100,000.
- Finally, if the totals above are less than the required amounts but have a combination of both U.S. investment and government grant, then the entrepreneur may still be able to apply for the IER program Parole based on "compelling evidence" catchall.

2.5-Year Period

Once the Parole status is granted, it is given for 2.5 years. Should the start-up continue to be successful and the need to apply for an extension is required, the entrepreneur may apply for one more 2.5-year extension. The ownership interest that must be established for that 2.5 year extension has already been discussed above. However, the business itself must show either (1) it has received $500,000 of additional funding from "qualified investors; any U.S. local, state, or federal government funding; or a combination of both; (2) earned revenue of more than $500,000 annually with at least 20% growth rate from year-to-year; or (3) a combination of both under the "compelling evidence" catchall.

Miscellaneous

The entrepreneur's spouse and minor children are also eligible for Parole status and will be given the same period of time given to the entrepreneur. Further, the entrepreneur's spouse is eligible to apply for work authorization once given and entered into the U.S. under the Parole status.

This entrepreneur status is not a process for U.S. permanent residency (i.e. green card) nor is it a bridge to any other U.S. immigrant or non-immigrant status. It is discretionary and subject to extensive USCIS vetting and potential denial if the agency does not view all the requirements are met to fulfill the entrepreneur role. Finally, USCIS does require any Parolee must maintain a household income in excess of 400% of the posted U.S. poverty level. This requires proof that the entrepreneur has separate funds to allow them to maintain their living while managing the start-up business.

In summary, the IER program gives foreign entrepreneurs an option to live and work in the U.S. to grow and establish a successful start-up. However, the details required to evidence such are extensive. With this view, we can compare the IER program to the other nonimmigrant visa options to provide entrepreneurs with guidance on what option works best.

Other Non-Immigrant Visa Options for Business Owners

There are of course other employment-based visa options available that existed prior to the recent Entrepreneur Parole process. However, many of these alternatives have different requirements that may or may not be appropriate for a foreign national entrepreneur to be sponsored for work authorization or limits the ability for further venture capital investments.

E Visas are Most Common Options

The most obvious options are the Treaty Trader (E-1) and Treaty Investor (E-2) visas. In a nutshell, the E visa encourages substantial trade and/or investment in the United States by foreign nationals or company(s) that have at least a 50% or more majority ownership interest in a U.S. company. In order to qualify, these owner(s) must be from countries that have signed specific investor or trader treaties with the U.S. Not all countries possess such treaties. Nations such as the People's Republic of China, India, Russia, Brazil, and Peru are not eligible for the E visa category.

For those countries that are eligible, business owners from those countries may apply for and obtain the appropriate E visa. This visa entry allows for stays of up to two-year increments with no limitations on extensions. The E visa can be applied for by the majority-owner of the US company who is from the E-visa treaty country. Employees that are executives, supervisors, or essential skilled employees can also be eligible for the E-1 visa so long as they have the same nationality of the majority-owner.

The downside to self-petitioning under the E visa is the 50% or more majority ownership of the U.S. company must always be maintained. This can be a difficult when the U.S. company begins obtaining venture capital funding that compromises the 50% E-visa minimum ownership. Once that majority E visa ownership is less than 50%, then all E visa holders will have their valid visa status and work authorization terminate. The current Entrepreneur Parole has no such restriction.

Other Options

Besides the E visa, there are other options for foreign national entrepreneurs to establish an manage a U.S. company. They include:

- the O-1 "extraordinary ability" worker visa, available to those who have demonstrated extraordinary achievement in the arts, sciences, or business world;
- the L-1 manager or specialized knowledge professional intra-company transfer visa, which allows any foreign worker employed at a foreign affiliate of a U.S. company for at least one year to be transferred to the U.S. company; or
- the H-1B/H-3/H-1B1 specialty occupation visas (H-3 are for Australians and H-1B1s are for Chilean and Singaporeans). A "Specialty occupation" requires is any position that requires at least bachelor's or higher degree in the specific specialty related to the offered position.

The difficulty in applying for the L-1 visa is the U.S. company must be affiliated with a foreign company under a parent/subsidiary relationship and the people sponsored including the owner of the company to be sponsored under the L-1 must have been employed with the foreign company for at least one year. These requirements can be difficult to meet for entrepreneur start-up companies.

The O-1, H-1B, H-1B1, and E-3 are strictly employee sponsorship visas. If the majority owner of the company is to be sponsored for any of these visas, USCIS may question if there is truly an employer/employee relationship – which could result in a denial.

Conclusion

Based on the facts above, any entrepreneur looking to start-up and manage a U.S. company should view all options and see which one works best from them. We'll monitor this situation and provide updates as warranted, so make sure you are subscribed to Fisher Phillips' Insight system to get the

most up-to-date information. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our Immigration Practice Group.

Related People

Jang Hyuk Im
Partner
415.490.9051
Email

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