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B-336222

April 23, 2024

The Honorable Richard J. Durbin
Chairman
The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
United States Senate

The Honorable Jim Jordan
Chairman
The Honorable Jerrold Nadler
Ranking Member
Committee on the Judiciary
House of Representatives

Subject: *Department of Homeland Security: Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Employment Authorization Document Renewal Applicants*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Homeland Security (DHS) entitled “Temporary Increase of the Automatic Extension Period of Employment Authorization and Documentation for Certain Employment Authorization Document Renewal Applicants” (RIN: 1615-AC78). We received the rule on April 8, 2024. It was published in the *Federal Register* as a temporary final rule (TFR) with request for comments on April 8, 2024. 89 Fed. Reg. 24628. The stated effective date of this TFR is April 8, 2024, through September 20, 2027, except for the amendments to 8 C.F.R. § 274a.13(d)(5), which are effective from April 8, 2024, through October 15, 2025.

According to DHS, the TFR temporarily amends existing DHS regulations to provide that the automatic extension period applicable to expiring Employment Authorization Documents (Forms I-766 or EADs) for certain renewal applicants who have filed Form I-765, Application for Employment Authorization (EAD application), will be increased from up to 180 days to up to 540 days from the expiration date stated on their EADs. DHS stated that it is taking these steps to help prevent renewal applicants from experiencing a lapse in their employment authorization and documentation.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The 60-day delay in effective date can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. 5 U.S.C. §§ 551(b)(3)(B), 808(2). Here, DHS asserted that good cause exists to forego notice-and-comment and delayed effective date requirements under the

Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.*, because delaying the TFR's effective date would impede due execution of DHS, U.S. Citizenship and Immigration Services' (USCIS's), mission and result in real and serious harm to the public. Specifically, DHS stated that unless it implements the TFR immediately, USCIS's lengthy processing times for renewal EAD applications will result in hundreds of thousands of renewal EAD applicants experiencing gaps in employment authorization and/or EAD validity, leading to adverse impacts on the applicants, their families, their employers, and their communities. For these same reasons, DHS stated that the TFR meets CRA's criteria for waiving the 60-day delay in effective date.

Enclosed is our assessment of DHS's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Charlie McKiver, Assistant General Counsel, at (202) 512-5992.

A handwritten signature in cursive script that reads "Shirley A. Jones". The signature is written in black ink and is positioned above the typed name and title.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Samantha Deshommes
Chief Regulatory Officer
Department of Homeland Security

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF HOMELAND SECURITY
ENTITLED
“TEMPORARY INCREASE OF THE AUTOMATIC EXTENSION PERIOD
OF EMPLOYMENT AUTHORIZATION AND DOCUMENTATION
FOR CERTAIN EMPLOYMENT AUTHORIZATION DOCUMENT RENEWAL APPLICANTS”
(RIN: 1615-AC78)

(i) Cost-benefit analysis

The Department of Homeland Security (DHS) conducted a cost-benefit analysis with respect to the temporary final rule (TFR). According to DHS, the TFR results in stabilization of earnings worth \$29.1 billion to employment-authorized immigrants, cost savings of \$5.2 billion to U.S. employers from avoided labor turnover, and is expected to yield \$3.1 billion in employment tax transfer payments over a 5-year period of analysis using a 2 percent discounting rate. DHS stated that while the Employment Authorization Documents (EADs) end dates are known to DHS and can be used to accurately project lapses, there is uncertainty around the TFR’s monetized, economic impacts due to the timing of EAD renewal filing behavior and the resulting duration of lapses experienced by workers of varying wages in the absence of the TFR.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

DHS stated that a regulatory flexibility analysis is not required for the TFR because it did not issue a notice of proposed rulemaking for the TFR.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

DHS stated that the TFR is exempt from the written statement requirement under the Act because DHS did not publish a notice of proposed rulemaking for the TFR. DHS further stated that the TFR does not contain a federal mandate as that term is defined in the Act, so the requirements of title II of the Act therefore do not apply and DHS has not prepared a statement under the Act.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act’s exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act’s requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the

OMB Director as required by section 263(a) or (b) of the Act” in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

In its submission to us, DHS stated that it determined that the TFR is exempt from the Act because it does not increase direct spending beyond the applicable thresholds. DHS further stated that OMB reviewed DHS’s determination.

(v) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

DHS did not publish a proposed rule. In the TFR, DHS requested public comments by June 7, 2024.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

DHS stated the TFR does not propose new, or revisions to existing, collections of information, as that term is defined under PRA.

Statutory authorization for the rule

DHS promulgated the TFR pursuant to sections 1101, 1103, 1105a, and 1324a of title 8, as well as section 1806 of title 48, United States Code, in addition to Public Law 101-410, as amended by Public Law 114-74, Public Law 110-229, and Public Law 115-218.

Executive Order No. 12866 (Regulatory Planning and Review)

DHS stated that OMB designated the TFR as a significant regulatory action as defined under the Order and that OMB therefore reviewed the TFR.

Executive Order No. 13132 (Federalism)

DHS stated that the TFR does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, DHS stated that the TFR does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement under the Order.