



441 G St. N.W.
Washington, DC 20548

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May 13, 2015

The Honorable Chuck Grassley
Chairman
The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate

The Honorable Bob Goodlatte
Chairman
The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
House of Representatives

Subject: *Department of Homeland Security; Department of Labor, Employment and Training Administration, Wage and Hour Division: Temporary Non-Agricultural Employment of H-2B Aliens in the United States*

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); Department of Labor (DOL), Employment and Training Administration, Wage and Hour Division entitled "Temporary Non-Agricultural Employment of H-2B Aliens in the United States" (RINs: 1615-AC06; 1205-AB76). We received the rule on April 29, 2015. It was published in the *Federal Register* as an interim final rule; request for comments on April 29, 2015. 80 Fed. Reg. 24,042.

The interim final rule sets forth the regulations governing the certification of the employment of nonimmigrant workers in temporary or seasonal nonagricultural employment and the enforcement of the obligations applicable to employers of such nonimmigrant workers. The rule establishes the process by which employers obtain a temporary labor certification from DOL for use in petitioning DHS to employ a nonimmigrant worker in H-2B status. The rule also provides for increased worker protections for both United States and foreign workers.

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). This interim final rule has a stated effective date of April 29, 2015. The rule was published in the *Federal Register* on April 29, 2015, received by the Senate on April 29, 2015, and received by the House of Representatives on May 1, 2015. 80 Fed. Reg. 24,042; 161 Cong. Rec. S2650 (May 5, 2015); 161 Cong. Rec. H2820 (May 8, 2015). Therefore, the final rule does not have the required 60-day delay in its effective date. The 60-day delay in effective date can be waived, however, if the agencies find for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agencies

incorporate a statement of the findings and their reasons in the rule issued. 5 U.S.C. §§ 553(d)(3), 808(2). DHS and DOL concluded that it is impracticable and contrary to the public interest to impose a delay on the effective date of this interim final rule. DOL and those employers and employees who are involved in the H-2B program have already experienced one regulatory lapse and anticipate another, which the agencies determined provides a sound foundation for DHS's and DOL's good cause to proceed without a delay in the effective date. Moreover, DHS and DOL found that even in the absence of another regulatory lapse, confusion and disarray will persist in the H-2B program as a result of uncertainty about the rules governing the program, which includes ambiguity about DOL's ability to enforce protections afforded to U.S. and foreign workers, and this provides further good cause to proceed with this interim final rule without a delay in the effective date. Therefore, DHS and DOL found good cause to waive delay in effective date.

Enclosed is our assessment of the agencies' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that the agencies complied with the applicable requirements.

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 Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Portia Wu
Assistant Secretary
Employment and Training Administration
Department of Labor

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF HOMELAND SECURITY;
DEPARTMENT OF LABOR,
EMPLOYMENT AND TRAINING ADMINISTRATION,
WAGE AND HOUR DIVISION
ENTITLED
"TEMPORARY NON-AGRICULTURAL EMPLOYMENT OF
H-2B ALIENS IN THE UNITED STATES"
(RINs: 1615-AC06; 1205-AB76)

(i) Cost-benefit analysis

The Department of Labor (DOL) sought to quantify and monetize the benefits and costs of this interim final rule where feasible. Where DOL was unable to quantify benefits and costs—for example, due to data limitations—DOL described them qualitatively. Summing the present value of the costs for 2015 through 2024, DOL calculated the total discounted costs over 10 years to be \$9.24 million to \$10.58 million (with 7 percent and 3 percent discounting, respectively). The total transfers over 10 years range from \$669.18 million to \$942.80 million and from \$792.92 million to \$1,112.81 million with 7 percent and 3 percent discounting, respectively. The annual average cost is \$0.92 million with 7 percent discounting and \$1.06 million with 3 percent discounting. The annual average transfers range from \$66.92 million to \$94.28 million with 7 percent discounting and from \$79.29 to \$111.28 million with 3 percent discounting.

DOL was not able to monetize any benefits for this interim final rule due to the lack of adequate data. However, DOL did identify important benefits (and cost reductions) resulting from the following provisions of this interim final rule: the enhanced U.S. worker referral period, additional recruiting directed by the certifying officer, the electronic job registry, transportation to and from the place of employment, payment of visa and consular fees, the job posting requirement, and enhanced integrity and enforcement provisions. According to DOL, because the enhanced referral period extends the time during which jobs are available to U.S. workers, it increases the likelihood that U.S. workers are hired for those jobs. In addition, the electronic job registry will improve the visibility of H-2B jobs to U.S. workers and enhance their employment opportunities. Also, the establishment of an electronic job registry will provide greater transparency with respect to DOL's administration of the H-2B program to the public, Members of Congress, and other stakeholders. DOL determined that the changes and increased protections for workers will result in an improved ability on the part of workers and their families to meet their costs of living and spend money in their local communities. These protections may also decrease turnover among U.S. workers and thereby decrease the costs of recruitment and retention to employers. Reduced worker turnover is associated with lower costs to employers arising from recruiting and training replacement workers. Because seeking and training new workers is costly, reduced turnover leads to savings for employers. Research indicates that decreased turnover costs partially offset increased labor costs. In addition, greater worker protections may increase a worker's productivity by incentivizing the worker to work harder. Thus, DOL concluded, the additional costs may be partially offset by higher productivity. A strand of economic research, commonly referred to as "efficiency wages," indicates that employees may interpret the greater protections as a signal of the employer's good will and reciprocate by

working harder, or they put in more effort in order to reduce the risk of losing the job because it is now seen as more valuable.

DOL also found that several unquantifiable benefits result in the form of cost savings. As more U.S. workers are hired as a result of this interim final rule, employers will avoid visa and consular fees for positions that might have otherwise been filled with H-2B workers; it is also likely that transportation costs will be lower. Under the prior rule, state workforce agencies (SWAs) were required to complete Form I-9 for nonagricultural job orders, and inspect and verify the employment eligibility documents furnished by the applicants. Under this interim final rule, SWAs will not be required to complete this process, resulting in cost savings to SWAs. DOL was not able to quantify these cost savings due to a lack of data regarding the number of I-9 verifications SWAs have been performing for H-2B referrals. After considering both the quantitative and qualitative impacts of this interim final rule, DOL has concluded that the societal benefits of the rule justify the societal costs.

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

Agencies are required to perform initial and final regulatory analyses when required to publish a general notice of proposed rulemaking for any proposed rule. 5 U.S.C. §§ 603(a), 604(a). As DOL and the Department of Homeland Security (DHS) made a good cause finding that a general notice of proposed rulemaking was impractical and contrary to the public interest, the agencies determined the requirements of the Act do not apply to this interim final rule. However, for informational purposes, DOL and DHS referred to the initial and final regulatory flexibility analyses that DOL completed in the rulemaking process during 2012. See 76 Fed. Reg. 15,166; 77 Fed. Reg. 10,132.

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

DHS and DOL determined that this interim final rule has no federal mandate as a decision by a private entity to obtain an H-2B worker is purely voluntary.

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

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

DHS and DOL found good cause to waive notice-and-comment procedures for this interim final rule. The agencies concluded that it was impracticable and contrary to the public interest to issue this rule under the Act's standard notice and comment procedures. DOL and those employers and employees who are involved in the H-2B program have already experienced one regulatory lapse and anticipate another, which DHS and DOL determined provided a sound foundation for their good cause to proceed without notice and comment. Moreover, DHS and DOL determined that even in the absence of another regulatory lapse, confusion and disarray will persist in the H-2B program as a result of uncertainty about the rules governing the program, which includes ambiguity about DOL's ability to enforce protections afforded to U.S. and foreign workers, and this provides further good cause to proceed with this interim final rule without notice and public comment. For the same reasons, DHS and DOL also found good cause to make the interim final rule effective immediately instead of imposing the 30-day delay under the Act.

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

DHS and DOL determined that this interim final rule contains information collection requirements under the Act. The requirements, entitled “H–2B Application for Temporary Employment Certification,” “H–2B Registration,” and “Seafood Industry Attestation” have been submitted to the Office of Management and Budget (OMB) for review under OMB Control Number 1205-0509. DHS and DOL estimate that the 7,355 total respondents will submit 184,442 responses for a total estimated burden of 47,992 hours and a total burden cost of \$351,800 in operating and maintaining costs.

Statutory authorization for the rule

DHS and DOL promulgated this final rule under the authority of sections 1101(a)(15)(E)(iii); 1101(a)(15)(H) and (b)(1); 1103(a)(6); 1182(m), (n) and (t); 1184(c), (g), and (j); 1188; and 1288(c) and (d) of title 8; and section 49k of title 29, United States Code; section 3(c)(1) of Public Law 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); section 221(a) of Public Law 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); section 303(a)(8) of Public Law 102–232, 105 Stat. 733, 1748 (8 U.S.C. 1101 note); section 323(c) of Public Law 103–206, 107 Stat. 2428; section 412(e) of Public Law 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); section 2(d) of Public Law 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Public Law 107–296, 116 Stat. 2135, as amended; and Public Law 109–423, 120 Stat. 2900. DHS and DOL also cited as authority sections 214.2(h) of title 8, Code of Federal Regulations.

Executive Order No. 12,866 (Regulatory Planning and Review)

DHS and DOL determined that this interim final rule is an economically significant regulatory action under the Order because it will have an annual effect on the economy of \$100 million or more. OMB reviewed the rule.

Executive Order No. 13,132 (Federalism)

DHS and DOL determined that this interim final rule does not have substantial direct effects on states, on the relationship between the states, or on the distribution of power and responsibilities among the various levels of government as described by the Order. Therefore, DHS and DOL determined that this interim final rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.