U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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December 28, 2022

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

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

Subject: *Department of Homeland Security; Department of Labor, Employment and Training Administration: Exercise of Time-Limited Authority to Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*

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) and the Department of Labor (DOL), Employment and Training Administration entitled "Exercise of Time-Limited Authority to Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers" (RINs: 1615-AC82 & 1205-AC14). We received the rule on December 15, 2022. It was published in the *Federal Register* as a temporary rule on December 15, 2022. 87 Fed. Reg. 76816. The effective date is December 15, 2022.

DHS and DOL state that the temporary rule increases the total number of noncitizens who may receive an H-2B nonimmigrant visa by up to, but no more than, a total of 64,716 for the entirety of fiscal year 2023. DHS and DOL further state that the rule distributes supplemental H-2B visas in several allocations, including two separate allocations for the second half of fiscal year 2023 and that, of the total 64,716 visas made available in the rule, 20,000 visas are reserved for nationals of Guatemala, El Salvador, Honduras, or Haiti. Additionally, DHS and DOL state that all 64,716 visas will be available only to those businesses that are suffering irreparable harm or will suffer impending irreparable harm, as attested by the employer on a new attestation form. Finally, DHS and DOL state that the rule provides temporary portability flexibility by allowing H-2B workers who are already in the United States to begin work immediately after an H-2B petition (supported by a valid temporary labor certification) is received by the United States Citizenship and Immigration Services, and before it is approved.

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. § 808(2). Here, DHS and DOL found good cause to waive CRA's 60-day delay. Specifically, DHS and DOL found that employers would face irreparable harm, due to the lack of a sufficient labor force, if they did not issue the rule before DHS's authority to do so expired on December 16, 2022.

Enclosed is our assessment of DHS's and DOL'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 Shari Brewster, Assistant General Counsel, at (202) 512-6398.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Samantha Deshommes
Chief, Regulatory Coordination Division
USCIS Office of Policy & Strategy
Department of Homeland Security

ENCLOSURE

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
ENTITLED
"EXERCISE OF TIME-LIMITED AUTHORITY TO INCREASE
THE NUMERICAL LIMITATION FOR FY 2023
FOR THE H-2B TEMPORARY NONAGRICULTURAL WORKER PROGRAM
AND PORTABILITY FLEXIBILITY FOR H-2B WORKERS
SEEKING TO CHANGE EMPLOYERS"
(RINS: 1615-AC82 & 1205-AC14)

(i) Cost-benefit analysis

The Department of Homeland Security (DHS) and the Department of Labor (DOL), Employment and Training Administration conducted a cost-benefit analysis of the rule. DHS and DOL estimate that the total cost of the rule ranges from $6,872,394 to $8,902,155. DHS and DOL further estimate that the rule will result in $9,126,020 in transfers from petitioners to the government. DHS and DOL state that the benefits of the rule are diverse and difficult to quantify, but include the following: (1) employers benefit significantly through increased access to H-2B workers; (2) customers and others benefit directly or indirectly from increased access; (3) H-2B workers benefit significantly through obtaining jobs and earning wages, potential ability to port and earn additional wages, and increased information on COVID-19 and vaccine distribution; (4) some American workers may benefit to the extent that they do not lose jobs through the reduced or closed business activity that might occur if fewer H-2B workers were available; (5) the existence of 20,000 visas set aside for workers from Guatemala, Honduras, El Salvador, and Haiti gives lawful pathways for nationals from these countries to travel to and work in the United States and, therefore, provides multiple benefits in terms of U.S. policy with respect to the Northern Central American countries and Haiti; and (6) the federal government benefits from increased evidence regarding attestations.

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

DHS and DOL state that the Act's requirements for final rules do not apply to the rule because it is a temporary rule. Accordingly, DHS and DOL state that they are not required to certify that the rule would not have a significant economic impact on a substantial number of small entities and that they are not required to conduct a regulatory flexibility analysis.

(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 state that the rule is exempt from the Act because they did not publish a notice of proposed rulemaking for the rule. Additionally, DHS and DOL state that the rule does not exceed the threshold of $100 million in 1995 expenditures in any one year (when adjusted for inflation), and that the rule does not contain a relevant federal mandate as defined under the Act. Therefore, DHS and DOL state that the requirements of Title II of the Act do not apply.

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

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

DHS and DOL state that the rule was issued without prior notice and opportunity to comment and with an immediate effective date pursuant to sections 553(b) and (d) of the Act. Specifically, DHS and DOL state that good cause existed to bypass advance notice and comment and to make the rule effective immediately because American business would suffer irreparable harm due to the lack of a sufficient labor force if DHS and DOL did not issue the rule before DHS's authority to issue it expired on December 16, 2022.

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

DHS and DOL determined that the rule contains information collection requirements (ICRs) under the Act. DOL further states that it has submitted the ICRs contained in this rule to the Office of Management and Budget (OMB) and obtained approval of a new form, Form ETA-9142B-CAA-7. DHS and DOL estimate that the new form will pose a total annual time burden of 43,853 hours and a total annual cost burden of $2,647,484.

Statutory authorization for the rule

DHS and DOL promulgated this rule pursuant to sections 202 and 236 of title 6; sections 1101, 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i), (ii) and (ii)(a), 1101(a)(15)(H)(i)(b) and (b)(1), 1101(a)(15)(H)(i)(c), 1101 note, 1102, 1103, 1103(a)(6), 1105a, 1182, 1182(m), (n), and (t), 1182 note, 1184, 1184(c), (g), and (j), 1184 note, 1186a, 1187, 1188, 1221, 1281, 1282, 1288(c) and (d), 1301–1305, 1324a, 1357, and 1372 of title 8; section 2461 note of title 28; section 49k of title 29, and sections 1806, 1901 note, and 1931 note of title 48, United States Code; as well as, Pub. L. No. 101-410, 104 Stat. 890, as amended by Pub. L. No. 114-74, 129 Stat. 599; section 323(c) of Pub. L. No. 103-206, 107 Stat. 2428; section 643 of Pub. L. No. 104-208, 110 Stat. 3009-708; Pub. L. No. 106-386, 114 Stat. 1477–80; Pub. L. No. 107-296, 116 Stat. 2135, as amended; Pub. L. No. 109-423, 120 Stat. 2900; and section 701 of Pub. L. No. 114-74.

Executive Order No. 12866 (Regulatory Planning and Review)

DHS and DOL state that the Office of Information and Regulatory Affairs determined that this rule is an economically significant regulatory action under the Order and that OMB has reviewed the rule accordingly.

Executive Order No. 13132 (Federalism)

DHS and DOL state that the rule 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 and DOL state that the rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.