U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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October 22, 2020

The Honorable Lindsay Graham
Chairman
The Honorable Dianne Feinstein
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: Strengthening the H–1B Nonimmigrant Visa Classification Program*

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 "Strengthening the H-1B Nonimmigrant Visa Classification Program" (RIN: 1615-AC13). We received the rule on October 8, 2020. It was published in the *Federal Register* as an "interim final rule (IFR) with request for comments" on October 8, 2020. 85 Fed. Reg. 63918. The stated effective date of the IFR is December 7, 2020.

According to DHS the IFR is amending certain DHS regulations governing the H-1B nonimmigrant visa program. Specifically, DHS states that it is: revising the regulatory definition of and standards for a "specialty occupation" to better align with the statutory definition of the term; adding definitions for "worksite" and "third-party worksite"; revising the definition of "United States employer"; clarifying how U.S. Citizenship and Immigration Services (USCIS) will determine whether there is an "employer-employee relationship" between the petitioner and the beneficiary; requiring corroborating evidence of work in a specialty occupation; limiting the validity period for third-party placement petitions to a maximum of 1 year; providing a written explanation when the petition is approved with an earlier validity period end date than requested; amending the general itinerary provision to clarify it does not apply to H-1B petitions; and codifying USCIS's H-1B site visit authority, including the potential consequences of refusing a site visit.

According to DHS the primary purpose of these changes is to better ensure that each H-1B nonimmigrant worker (H-1B worker) will be working for a qualified employer in a job that meets the statutory definition of a "specialty occupation." DHS asserts that these changes are urgently necessary to strengthen the integrity of the H-1B program during the economic crisis caused by the COVID-19 public health emergency to more effectively ensure that the employment of H-1B

workers will not have an adverse impact on the wages and working conditions of similarly employed U.S. workers. DHS believes that, in addition, to strengthening the integrity of the H-1B program, these changes will aid the program in functioning more effectively and efficiently.

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 IFR was published in the *Federal Register* on October 8, 2020. The *Congressional Record* does not yet reflect receipt of the IFR, but according to USCIS, the IFR was delivered to Congress via United Parcel Service on October 9, 2020. E-mail from Management and Program Analyst, USCIS, to staff attorney, GAO, *Subject: RE: CRA Submission 85 FR 63918* (Oct. 21, 2020) (A copy of the delivery receipt shows that a parcel was delivered to the Speaker of the House and the Office of the Vice President). The rule has a stated effective date of December 7, 2020. Therefore, this IFR does not have the required 60-day delay in its 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 this IFR. 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 this IFR, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

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Enclosure

cc: Samantha Deshommes
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U.S. Citizenship and Immigration Services
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
ENTITLED
"STRENGTHENING THE H–1B NONIMMIGRANT
VISA CLASSIFICATION PROGRAM"
(RIN: 1615-AC13)

(i) Cost-benefit analysis

The Department of Homeland Security (DHS) provided a summary of cost and benefits for this interim final rule (IFR). According to DHS, this IFR will impose new annual costs of $24,949,861 for petitioners completing and filing H-1B petitions with an additional time burden of 30 minutes.[1] DHS asserts that this IFR will also result in more complete petitions and allow for more consistent and efficient adjudication decisions.

DHS stated that it estimates $17,963,871 in annual costs to petitioners to submit contractual documents, work orders, or similar evidence required by this IFR to establish an employer-employee relationship and qualifying employment.

DHS also stated that it estimates $1,042,702 for the total annual opportunity cost of time for worksite inspections of H-1B petitions. DHS noted that this IFR is codifying its existing authority to conduct site visits and other compliance reviews and clarifying consequences for failure to allow a site visit. DHS asserts that conducting on-site inspections and other compliance reviews is critical to detecting and deterring fraud and noncompliance.

DHS stated further that it estimates a cost savings of $4,490,968 annually in eliminating the general itinerary requirement for H-1B petitions. DHS stated that, relative to the current regulation, this provision reduces the cost for petitioners who file on behalf of beneficiaries performing services in more than one location and submit itineraries.

According to DHS, while the maximum validity period for a specialty occupation worker is 3 years, this IFR will limit the maximum validity period to 1 year for workers placed at third-party worksites. DHS stated that it estimates costs of $0 in fiscal year (FY) 2021, $376,747,030 in

[1] DHS stated that the baseline for its estimates are based on a new fee schedule published in a final rule. *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 85 Fed. Reg. 46788 (Aug. 3, 2020) (Fee Schedule Final Rule). According to DHS, the Fee Schedule Final Rule was scheduled to go into effect on October 2, 2020. DHS stated that on September 29, 2020, the U.S. District Court for the Northern District of California issued a nationwide injunction, which prevents DHS from implementing the Fee Schedule Final Rule. *Immigrant Legal Resource Center v. Wolf*, Docket No. 4:20-cv-5883 (N.D. Cal. Sept. 29, 2020). DHS stated further that it intends to vigorously defend this lawsuit and is not changing the baseline for this IFR as a result of the litigation. DHS notes that if it does not prevail in the Fee Schedule Final Rule litigation, this IFR may reflect overstated transfers, costs, and opportunity costs associated with the filing of the Form I-129.

FY 2022, $502,330,510 for each of FY 2023 through FY 2027, and $349,127,070 for each of FY 2028 through FY 2030, for the increasing number of Form I-129H1 petitions to request authorization to continue H-1B employment for workers placed at third-party worksites. DHS asserts that it will have greater oversight in such cases, which are most likely to involve noncompliance, fraud, or abuse, thereby strengthening the H-1B program.

DHS estimates a one-time total regulation familiarization cost of $11,941,471 in FY 2021. According to DHS, for the 10-year implementation period of the rule (FY 2021 through FY 2030), it estimates the annual net societal costs to be $51,406,937 (undiscounted) in FY 2021; $416,212,496 (undiscounted) in FY 2022; $541,795,976 (undiscounted) from FY 2023 through FY 2027, each year; $388,592,536 (undiscounted) from FY 2028 through FY 2030, each year. DHS estimates the annualized net societal costs of the IFR to be $430,797,915, annualized at 3 percent and $425,277,621, annualized at 7 percent discount rates.

(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 when a rule is exempt from notice and comment rulemaking. DHS asserts that this IFR is exempt from the notice and comment rulemaking under 5 U.S.C. § 553(b)(3)(B). Therefore, according to DHS, a regulatory flexibility analysis is not required for this IFR.

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

According to DHS, while this IFR may result in the expenditure of more than $100 million by the private sector annually, this rulemaking is not a “federal mandate” as defined for Unfunded Mandates Reform Act (UMRA) purposes. DHS asserts that the cost to prepare H-1B petitions (including required evidence) and the payment of H-1B nonimmigrant petition fees by petitioners or other private sector entities is, to the extent it could be termed an enforceable duty, one that arises from participation in a voluntary federal program, applying for immigration status in the United States. DHS stated that this IFR does not contain such a mandate. DHS stated further that the requirements UMRA do not apply; thus, no actions were deemed necessary, by DHS, under the provisions of UMRA.

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

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

DHS stated that this IFR is being issued without prior notice and an opportunity to comment pursuant to 5 U.S.C. § 553(b)(3)(B). DHS asserts that the pandemic emergency's economic impact is an obvious and compelling fact that justifies good cause to forgo regular notice and comment. Thus, DHS stated that it is bypassing notice and comment requirements to urgently respond to the COVID-19 resulting economic crises, including high unemployment. DHS explained that instead of amending its regulations through notice and comment rulemaking which is generally a lengthy process, it is taking post-promulgation comments and providing a 60-day delayed effective date to ensure that the regulated public has advance notice to adjust to these regulatory changes.

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

DHS determined that this IFR contains information collection requirements (ICR) under the Act. According to DHS the ICRs were submitted to the Office of Management and Budget (OMB) for review and approval. DHS stated that it invited comment on the impact of this IFR on the collection of information. According to DHS, USCIS form I-129 (OMB Control Number 1615-0009) is estimated to impose a total annual public burden of 1,268,331 hours and $70,681,290 in cost. DHS also estimated that the total number of respondents for the I-129 to be 294,751 and the estimated hour burden per response is 2.84 hours. In addition, according to DHS, the USCIS H-1B Registration Tool (OMB Control Number 1615-0144) is estimated to impose a total annual public burden of 160,325 hours and $0 in cost. Lastly, DHS estimated the total number of respondents and the amount of time to respond using the USCIS H-1B Registration Tool to be 275,000 and 0.583 hours respectively.

Statutory authorization for the rule

DHS promulgated this IFR pursuant to sections 202 and 236 of title 6; sections 1101–1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1301–1305, and 1372 of title 8; and sections 1806, 1901 note, and 1931 note of title 48, United States Code; section 643 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, title IV, 110 Stat. 3009-708 (Sept. 30, 1996); and sections 1477–1480 of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No.106-386, 114 Stat. 1464 (Oct. 28, 2000).

Executive Order No. 12866 (Regulatory Planning and Review)

According to DHS, OMB determined that this is an economically significant regulatory action. However, OMB waived review of this regulation under section 6(a)(3)(A) of the Order.

Executive Order No. 13132 (Federalism)

DHS determined that this IFR would not have substantial direct effects on the states, on the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, according to DHS, this IFR does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.