U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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January 25, 2021

Chair
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: Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions*

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 or the Department) entitled "Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions" (RIN: 1615-AC61). We received the rule on January 8, 2021. It was published in the *Federal Register* as a final rule on January 8, 2021. 86 Fed. Reg. 1676. The stated effective date of this rule is March 9, 2021.

According to DHS it is amending its regulations governing the process by which U.S. Citizenship and Immigration Services (USCIS) selects H-1B registrations for the filing of H-1B cap-subject petitions (or H-1B petitions for any year in which the registration requirement is suspended), by generally first selecting registrations based on the highest Occupational Employment Statistics (OES) prevailing wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification (SOC) code and area(s) of intended employment. DHS stated that these changes align with the Trump Administration's goals of improving policies such that the H-1B classification more likely will be awarded to the highest paid or highest skilled beneficiaries.

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 *Congressional Record* does not reflect the date of receipt by either House of Congress; however, DHS confirmed that the House received this final rule on January 15, 2021, and the Senate received this final rule on January 11, 2021. E-mail from Management and Program Analyst, DHS, to Staff Attorney, GAO, *RE: Congressional Review Act Submission (GAO) RIN 1615-AC61*, (January 15, 2021) (attachments). The rule has a stated effective date of March 9, 2021. Therefore, the final rule does not have the required 60-day delay in its effective date.

Enclosed is our assessment of the Department'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.

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Enclosure

cc: Samantha Deshommes
Chief, Regulatory Coordination Division
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
"MODIFICATION OF REGISTRATION REQUIREMENT FOR
PETITIONERS SEEKING TO FILE CAP-SUBJECT H-1B PETITIONS"
(RIN: 1615-AC61)

(i) Cost-benefit analysis

The Department of Homeland Security (DHS or Department) provided an estimate of the net costs that will result from this final rule compared to the baseline of the H-1B visa program. DHS stated, for the 10-year implementation period of the rule, it estimated the annualized costs to the public would be $15,968,792 at the 3 percent discount rate, and $16,089,770 at the 7 percent discount rate. According to DHS, this final rule will benefit petitioners agreeing to pay H-1B workers a proffered wage corresponding to Occupational Employment Statistics (OES) wage level III or IV, by increasing their chance of selection in the H-1B cap selection process. DHS stated that these changes align with the Trump Administration's goals of improving policies such that the H-1B classification more likely will be awarded to the highest paid or highest skilled beneficiaries. DHS stated that these changes will also better align the administration of the
H-1B program with the dominant congressional intent. DHS also stated that this final rule may provide increased opportunities for similarly skilled U.S. workers in the labor market to compete for work as there will be fewer H-1B workers paid at the lower wage levels to compete with U.S. workers. DHS state further, assuming demand outpaces the 85,000 visas currently available for annual allocation, it believes that the potential reallocation of visas to favor those petitioners able to offer the highest wages to recruit the most highly skilled workers will result in increased marginal productivity of all H-1B workers. DHS asserted, this final rule may provide increased wages for positions offered to H-1B cap-subject beneficiaries.

According to DHS this final rule is expected to reduce the number of petitions for lower wage H-1B workers. DHS stated that this may result in increased recruitment or training costs for petitioners that seek new pools of talent. DHS also stated, petitioners' labor costs or training costs for substitute workers may increase. DHS stated further that some petitioners might be impacted in terms of the employment, productivity loss, search, and hire cost per employer of $4,398, and profits resulting from labor turnover. DHS noted, in cases where companies cannot find reasonable substitutions for the labor the H-1B beneficiary would have provided, affected petitioners will also lose profits from the lost productivity. DHS explained that in such cases, employers will incur opportunity costs by having to choose the next best alternative to immediately filling the job the prospective H-1B worker would have filled. In addition, according to DHS, there may be additional opportunity costs to employers such as search costs and training. Lastly, DHS stated that petitioners that would have hired relatively lower-paid H-1B workers, but were unable to do so because of non-selection (and ineligibility to file a petition), may incur reduced labor productivity and revenue.

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

DHS determined that the changes in this final rule will not have a significant economic impact on a substantial number of small entities. DHS prepared a Final Regulatory Flexibility Analysis. The analysis included (1) a statement of need for and objectives of this final rule; (2) a statement of significant issues raised by the public comments and a statement of assessment of any changes made in the proposed rule as a result of such comments; (3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration, and any change made as a result of the comments; (4) a description of and an estimate of the number of small entities to which this final rule will apply or an explanation of why no such estimate is available; (5) a description of the projected reporting, recordkeeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record; and (6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of the applicable statutes, including a statement of factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected

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

DHS determined that this rule will not have an effect that may result in $100 million or more in expenditures (adjusted annually for inflation—$168 million in 2019 dollars) for any one year by state, local, and tribal governments or the private sector.

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

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

DHS published a notice of proposed rulemaking in the *Federal Register* on November 2, 2020. 85 Fed. Reg. 69236. According to DHS, it received 1103 comments and 388 comments on the rule's information collection requirements. DHS stated that commenters consisted primarily of individuals, including anonymous submissions. DHS also stated that it received the remaining submissions from professional associations, trade or business associations, employers/companies, law firms, advocacy groups, schools/universities, attorneys/lawyers, joint submissions, research institutes/organizations, and a union.

DHS stated that it reviewed all of the public comments received in response to the proposed rule and addressed substantive comments relevant to the proposed rule (for example, comments that are pertinent to the proposed rule and DHS's role in administering the registration requirement for petitioners seeking to file H-1B petitions on behalf of cap-subject beneficiaries) in the preamble of this final rule.

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

DHS determined that this final rule contains information collection requirements (ICR) under the Act. DHS stated that it revised currently approved ICRs associated with this final rule. DHS stated that annual burden for the ICR entitled “H-1B Registration Tool” is estimated to be

229,075 hours and the annual cost is estimated to be $0. DHS stated further that the annual burden for the ICR entitled “Petition for a Nonimmigrant Worker” (form I-129) is estimated to be 1,293,873 hours and the annual cost is estimated to be $70,681,290.

Statutory authorization for the rule

DHS promulgated this final rule pursuant to sections 202 and 236 of title 6; sections 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372 of title 8, sections 1806, 1901 note, and 1931 note of title 48, United States Code; section 643, Public Law 104-208; Public Law 106-386; and Public Law 115-218.

Executive Order No. 12866 (Regulatory Planning and Review)

According to DHS the Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget, has determined that this final rule is an economically significant regulatory action. However, DHS stated OIRA has waived review of this regulation under section 6(a)(3)(A) of the Order.

Executive Order No. 13132 (Federalism)

DHS has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.