

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

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February 18, 2021

The Honorable Richard 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: Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions; Delay of Effective Date*

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 “Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions; Delay of Effective Date” (RIN: 1615-AC61). We received the rule on February 8, 2021. It was published in the *Federal Register* as a final rule; delay of effective date; request for comments on February 8, 2021. 86 Fed. Reg. 8543. The final rule has an effective date of February 8, 2021.

According to DHS, the final rule delays the effective date of the recently issued rule, “Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions,” 86 Fed. Reg. 1676 (H-1B Selection Final Rule), until December 31, 2021. The previously issued rule amended regulations governing the process by which U.S. Citizenship and Immigration Services selects H-1B registrations for the filing of H-1B cap-subject petitions.

The Congressional Review Act (CRA) requires a 60-day in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the final 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). DHS determined it had good cause to waive the requirement because implementing the H-1B Selection Final Rule on March 9, 2021, would require DHS to make and test major H-1B registration system modifications, revise internal procedures, train staff, and offer training to the regulated public, before the March 2021 start of the fiscal year (FY) 2022 H-1B cap filing season. While DHS initially assessed that it would have sufficient time to undertake these changes and advised the regulated public accordingly in the H-1B Selection Final Rule, upon further review DHS has determined that it will not have

sufficient time to ensure an orderly and effective implementation of the changes to the H-1B registration system in time for the FY 2022 H-1B cap season.

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 Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive style with a large, stylized initial 'S'.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Samantha Deshommes
Chief, Regulatory Coordination Division
U.S. Citizenship and Immigration Services
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
“MODIFICATION OF REGISTRATION REQUIREMENT FOR
PETITIONERS SEEKING TO FILE CAP-SUBJECT H-1B PETITIONS;
DELAY OF EFFECTIVE DATE”
(RIN: 1615-AC61)

(i) Cost-benefit analysis

In its submission to us, the Department of Homeland Security (DHS) indicated that it did not prepare an analysis of the costs and benefits of the final rule.

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

DHS stated the Act does not apply because, according to DHS, the final rule is exempt from notice and comment procedures.

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

DHS determined the final rule did not impose a mandate above the statutory threshold.

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

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

DHS waived notice and comment procedures for good cause. DHS determined it had good cause because implementing the “Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions” rule, 86 Fed. Reg. 1676 (H-1B Selection Final Rule), on March 9, 2021, would require DHS to make and test major H-1B registration system modifications, revise internal procedures, train staff, and offer training to the regulated public, before the March 2021 start of the fiscal year (FY) 2022 H-1B cap filing season. While DHS initially assessed that it would have sufficient time to undertake these changes and advised the regulated public accordingly in the H-1B Selection Final Rule, upon further review DHS has determined that it will not have sufficient time to ensure an orderly and effective implementation of the changes to the H-1B registration system in time for the FY 2022 H-1B cap season.

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

DHS stated it is delaying the implementation of all changes to the H-1B Registration Tool (Office of Management and Budget (OMB) Control number 1615-0144) and Form I-129, Petition for a Nonimmigrant Worker (OMB Control number 1615-0009), associated with the H-1B Selection Final Rule until December 31, 2021.

Statutory authorization for the rule

In its submission to us, DHS did not discuss the statutory authorization for the final rule.

Executive Order No. 12866 (Regulatory Planning and Review)

DHS stated that OMB determined the final rule was economically significant.

Executive Order No. 13132 (Federalism)

DHS determined the final rule would 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.