



United States Government Accountability Office  
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March 13, 2012

The Honorable Tom Harkin  
Chairman  
The Honorable Michael B. Enzi  
Ranking Member  
Committee on Health, Education, Labor, and Pensions  
United States Senate

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

Subject: *Department of Labor, Employment and Training Administration: 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 Labor, Employment and Training Administration, entitled "Temporary Non-Agricultural Employment of H-2B Aliens in the United States" (RIN: 1205-AB58). We received the rule on February 27, 2012. It was published in the *Federal Register* as a final rule on February 21, 2012. 77 Fed. Reg. 10,038.

The final rule amends regulations governing the certification of the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment and the enforcement of the obligations applicable to employers of such nonimmigrant workers. The final rule revises the process by which employers obtain a temporary labor certification from Labor for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H-2B status. The final rule also contains new regulations to provide for increased worker protections for both U.S. and foreign workers.

Enclosed is our assessment of Labor's 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 Labor 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: Jane Oates  
Assistant Secretary for  
Employment and Training  
Department of Labor

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE  
ISSUED BY THE  
DEPARTMENT OF LABOR,  
EMPLOYMENT AND TRAINING ADMINISTRATION  
ENTITLED  
"TEMPORARY NON-AGRICULTURAL EMPLOYMENT OF  
H-2B ALIENS IN THE UNITED STATES"  
(RIN: 1205-AB58)

(i) Cost-benefit analysis

Labor conducted a cost-benefit analysis in conjunction with the final rule. Labor states that it expects that the total undiscounted costs of the final rule in the first 10 years to total approximately \$15.2 million.

Labor stated that it was not able to monetize any benefits for the final rule due to the lack of adequate data, and therefore the monetized costs exceed the monetized benefits both at a 7 percent and a 3 percent discount rate. Labor did describe the benefits that it was unable to monetize. Labor stated that the final rule will provide several important benefits to society, including increased employment opportunities for U.S. workers and enhancement of worker protections for U.S. and H-2B workers. 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. In addition, the establishment of an electronic job registry will provide greater transparency with respect to the Department's administration of the H-2B program to the public, members of Congress, and other stakeholders. Labor also described benefits that it could not monetize in the form of cost savings. As more U.S. workers are hired as a result of the 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. Also, the final rule eliminates the requirement put in place in 2008 that state workforce agencies (SWAs) complete Form I-9 for nonagricultural job orders, and inspect and verify the employment eligibility documents furnished by the applicants, which will result in cost savings to SWAs. Labor 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.

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

Labor determined that the final rule was not likely to have a significant economic impact on a substantial number of small entities and therefore was not required to

prepare a final regulatory flexibility analysis. However, Labor did prepare an analysis and included it in the final rule.

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

Labor determined that the final rule did not contain any federal mandates.

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

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

On March 18, 2011, Labor published a notice of proposed rulemaking in the *Federal Register*. 76 Fed. Reg. 15,130. Labor received 869 comments on the proposed rule, from a range of commenters including small business employers, state workforce agencies (SWAs), agents, law firms, employer and industry advocacy groups, union organizations, members of Congress, and various interested members of the public. Labor discussed and responded to the comments in the final rule. 77 Fed. Reg. 10,038.

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

The information collections used in the final rule were first approved by the Office of Management and Budget (OMB) on November 21, 2008, under OMB control number 1205–0466. The final rule made some minor changes to the information collections; however, these changes do not impact the overall annual burden hours for the H–2B program information collection. The total costs associated with the form, as defined by the PRA, are zero dollars per employer for ETA Forms 9141, 9142, and 9155. Labor submitted the revised forms to OMB. The ETA Form 9141 has a public reporting burden estimated to average 1 hour per response or application filed. The ETA Form 9142 with Appendix B.1 has a public reporting burden estimated to average 1 hour per response or application filed. Additionally, the ETA Form 9155 has a public reporting burden estimated to average 1 hour per response or application filed.

Statutory authorization for the rule

The final rule is authorized by section 214 of the Immigration and Nationality Act, as codified at 8 U.S.C. § 1184.

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

Labor determined that the final rule was economically significant, and the final rule was reviewed by OMB under the Executive Order.

## Executive Order No. 13,132 (Federalism)

Labor determined that the 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 Executive Order. Therefore, Labor determined that the final rule will not have sufficient federalism implications to warrant the preparation of a summary impact statement.