U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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April 6, 2016

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

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

Subject: *Department of Homeland Security: Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students*

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 "Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students" (RIN: 1653-AA72). We received the rule on March 10, 2016. It was published in the *Federal Register* as a final rule on March 11, 2016. 81 Fed. Reg. 13,040.

The final rule amends the DHS F-1 nonimmigrant student visa regulations on optional practical training (OPT) for certain students with degrees in science, technology, engineering, or mathematics (STEM) from U.S. institutions of higher education. Specifically, the final rule allows such F-1 STEM students who have elected to pursue 12 months of OPT in the United States to extend the OPT period by 24 months (STEM OPT extension). This 24-month extension effectively replaces the 17-month STEM OPT extension previously available to certain STEM students. According to DHS, the rule also improves and increases oversight over STEM OPT extensions by, among other things, requiring the implementation of formal training plans by employers, adding wage and other protections for STEM OPT students and U.S. workers, and allowing extensions only to students with degrees from accredited schools. As with the prior 17-month STEM OPT extension, the rule authorizes STEM OPT extensions only for students employed by employers who participate in E-Verify. The rule also includes the "Cap-Gap" relief first introduced in a 2008 DHS regulation for any F-1 student with a timely filed H-1B petition and request for change of status.

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. Our review of the procedural steps taken indicates that DHS 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: Margaret Broaddus Stubbs
Supervisory Regulations Specialist
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
"IMPROVING AND EXPANDING TRAINING OPPORTUNITIES
FOR F-1 NONIMMIGRANT STUDENTS WITH STEM DEGREES
AND CAP-GAP RELIEF FOR ALL ELIGIBLE F-1 STUDENTS"
(RIN: 1653-AA72)

(i) Cost-benefit analysis

The Department of Homeland Security (DHS) prepared a cost benefit analysis of the final rule. DHS estimated that the costs imposed by the implementation of this rule will be approximately $737.6 million over the 10-year analysis time period, discounted at 3 percent, or $588.5 million, discounted at 7 percent. This amounts to $86.5 million per year when annualized at a 3 percent discount rate, or $83.8 million per year when annualized at a 7 percent discount rate. DHS included a summary table in the final rule that presented the cost estimates in more detail. With respect to benefits, DHS states that making the science, technology, engineering, or mathematics optional practical training (STEM OPT) extension available to additional students and lengthening the 17-month extension to 24 months will enhance certain students' abilities to achieve the objectives of their courses of study by allowing them to gain valuable knowledge and skills through on-the-job training that may be unavailable in their home countries. According to DHS, the changes will also benefit the U.S. educational system, U.S. employers, and the broader U.S. economy. DHS states, the rule will benefit the U.S. educational system by helping to ensure that the nation's colleges and universities remain globally competitive in attracting international students in STEM fields. U.S. employers will benefit from the increased ability to rely on skilled U.S.-educated STEM OPT students, as well as their knowledge of markets in their home countries. And, according to DHS, the nation also will benefit from the increased retention of such students in the United States, including through increased research, innovation, and other forms of productivity that enhance the nation's economic, scientific, and technological competitiveness. Furthermore, DHS states that strengthening the STEM OPT extension by implementing requirements for training, tracking objectives, reporting on program compliance, and accreditation of participating schools will further prevent abuse of the limited on-the-job training opportunities provided by OPT in STEM fields. Lastly, DHS states these and other elements of the rule will also improve program oversight, strengthen the requirements for program participation, and better ensure that U.S. workers are protected.

DHS states that students will incur costs for completing application forms and paying application fees; reporting to designated school officials (DSOs); preparing (with their employers) the Training Plan for STEM OPT Students required by this rule; and periodically submitting updates to employers and DSOs. DSOs will incur costs for reviewing information and forms submitted by students, inputting required information into the Student and Exchange Visitor Information System (SEVIS), and complying with other oversight requirements related to prospective and participating STEM OPT students. Employers of STEM OPT students will incur burdens for preparing the Training Plan with students, confirming students' evaluations, enrolling in (if not previously enrolled) and using E-Verify to verify employment eligibility for all new hires, and complying with additional requirements related to E-Verify.

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

The RFA requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small business, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. DHS states that it conducted a statistically valid sample analysis to estimate the number of STEM OPT employers and schools that would be considered small entities. To identify the entities that would be considered ''small,'' DHS used the Small Business Administration guidelines on small business size standards applied by the North American Industry Classification System (NAICS) code. This analysis indicated that 48 percent of schools are small entities. Based on 1,109 approved and accredited schools participating in STEM OPT extensions, about 532 could

reasonably be expected to be small entities impacted by the rule. DHS analysis of a sample of 26,260 entities that employed students who had obtained STEM OPT extensions revealed that about 69 percent were small. Hence, according to DHS, about 18,000 employers that are small entities could be affected by the rule.

DHS provided an RFA analysis that: (1) discussed a statement of the need for, and objectives of, the rule; (2) a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis; a statement of the assessment of the agency of such issues, and a statement of any changes made in the 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 SBA in response to the proposed rule, and a detailed statement of any changes made to the proposed rule in the final rule as a result of the comments; (4) a description of and an estimate of the number of small entities to which the 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 rule, including an estimate of the classes of small entities that will be subject to the requirements 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 applicable statutes, including a statement of the 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 (UMRA), 2 U.S.C. §§ 1532-1535

UMRA requires federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a state, local, or tribal government in the aggregate, or by the private sector, of $100,000,000 or more in any year (adjusted for inflation). DHS concluded that this rule would not result in such expenditure.

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

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

On April 8, 2008, DHS published an interim final rule (2008 IFR) in the *Federal Register* (73 Fed. Reg. 18,944). DHS received over 900 comments in response to the 2008 IFR. Public comments received on the 2008 IFR and other records may be reviewed at the docket for that rulemaking, No. ICEB–2008–0002. DHS states that on August 12, 2015, the U.S. District Court for the District of Columbia issued an order in the case of Washington Alliance of Tech. Workers v. U.S. Dep't of Homeland Security, — F. Supp. 3d —, 2015 WL 9810109, (D.D.C. Aug. 12, 2015) (slip op.). DHS states that the court held that DHS violated the notice and comment provisions of the Administrative Procedure Act (APA), 5 U.S.C. 553, by promulgating the 2008 IFR without advance notice and opportunity for public comment. DHS states that in its order, the court invalidated the 2008 IFR as procedurally deficient and remanded the issue to DHS. DHS states that although the court vacated the 2008 IFR, the court stayed the vacatur until February 12, 2016. According to DHS, on January 23, 2016, the Court further stayed its vacatur by 90 days until May 10, 2016. Washington Alliance of Tech. Workers v. U.S. Dep't of Homeland Security, No. 1:14-cv-00529, (D.D.C. Jan. 23, 2016) (slip op.). According to DHS, litigation in this matter is ongoing, as the plaintiff has appealed a portion of the court's August 12, 2015, decision. Thus, according to DHS, the final disposition of the case remains to be determined. On October 19, 2015, DHS published a Notice of Proposed Rulemaking (NPRM in the *Federal Register*, 80 Fed. Reg. 63,376). During the public comment period, approximately 50,500 comments were submitted on the NPRM and related forms. Comments were submitted by a range of entities and individuals, including U.S. and international students, U.S. workers, schools and universities, professional associations, labor organizations, advocacy groups, businesses, two Members of Congress, and other interested persons.

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

DHS has submitted an information collection request (ICR) to the Office of Management Budget (OMB) for review and approval in accordance with the review procedures of the PRA. The final rule maintains

the 2008 IFR revisions to previously approved information collections. The 2008 IFR impacted information collections for Form I–765, Application for Employment Authorization (OMB Control No. 1615–0040); SEVIS and Form I–20, Certificate of Eligibility for Nonimmigrant Student Status (both OMB Control No. 1653–0038); and E-Verify (OMB Control No. 1615–0092). These four approved information collections corresponding to the 2008 IFR include the number of respondents, responses and burden hours resulting from the 2008 IFR requirements, which remain in this final rule. Therefore, DHS states that it is not revising the burden estimates for these four information collections. According to DHS, additional responses tied to new changes to STEM OPT eligibility will minimally increase the number of responses and burden for Form I–765 and E-Verify information collections, as the two collections cover a significantly broader population of respondents and responses than those impacted by the rule and already account for growth in the number of responses in their respective published information collection notices burden estimates. DHS stated that it has created a new information collection instrument for the Training Plan for STEM OPT Students, which is available at https://studyinthestates.dhs.gov/. According to DHS, the attestations therein will ensure proper training opportunities for students and safeguard interests of U.S. workers in related fields. Additionally, DHS stated that it made minor non-substantive changes to the instructions to Form I–765 to reflect changes to the F–1 regulations that lengthen the STEM OPT extension and allow applicants to file Form I–765 with the U.S. Citizenship and Immigration Services (USCIS) within 60 days (rather than 30 days) from the date the DSO endorses the STEM OPT extension. Accordingly, USCIS submitted form OMB 83–C, Correction Worksheet, to OMB, which reviewed and approved the minor edits to the Form I–765 instructions.

DHS provided an overview of the new information collection and an abstract explaining the ICR. It is the Training Plan for STEM OPT Students which affects Immigration and Customs Enforcement Form I–983. The new ICR affects students with F–1 nonimmigrant status, state governments, local governments, educational institutions, businesses, and other for-profit and not-for-profit organizations. DHS estimated that the affected parties will be 42,092 STEM OPT student respondents; 1,109 accredited schools endorsing STEM OPT students; and 16,891 employers of STEM OPT students. DHS estimated that the 42,092 average responses annually will take 7.5 hours per initial Training Plan response. DHS estimated there will be 70,153 average responses annually at 3.66 hours per 12-month evaluation response by STEM OPT students, DSOs, and employers. The estimate of the total public burden (in hours) associated with the collection is 566,698 hours. The recordkeeping requirements set forth by this rule are new requirements that require a new OMB Control Number. DHS states that during the NPRM, DHS sought comment on these proposed requirements. DHS received a number of comments on the burden potentially imposed by the proposed rule. The comments, and DHS's responses to those comments, can be found in the discussion of public comments regarding Form I–983 in the final rule. The final form and instructions are available in the docket for this rulemaking.

Statutory authorization for the rule

According to DHS, the final rule was promulgated under the authority of 6 U.S.C. 202, 6 U.S.C. 111(b)(1)(F); the Immigration and Nationality Act of 1952, as amended (INA), Sec. 103, 8 U.S.C. 1103; INA Sec. 101(a)(15)(F)(i), 8 U.S.C. 1101(a)(15)(F)(i); INA Sec. 214(a)(1), 8 U.S.C. 1184(a)(1); INA Sec. 274A(h)(3), 8 U.S.C. 1324a(h)(3); section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, 110 Stat. 3009–546, 3009–704 (Sep. 30, 1996) (codified as amended at 8 U.S.C. 1372), and section 502 of the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107–173, 116 Stat. 543, 563 (May 14, 2002).

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

DHS stated that the final rule has been designated a significant regulatory action that is economically significant, under section 3(f)(1) of Executive Order 12,866. Accordingly, OMB has reviewed the regulation.

Executive Order No. 13,132 (Federalism)

DHS concluded that the final rule does not have implications for federalism.