U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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December 5, 2016

The Honorable Chuck Grassley
Chairman
The Honorable Patrick 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: Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled NonImmigrant Workers*

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 "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled NonImmigrant Workers" (RIN: 1615-AC05). We received the rule on November 18, 2016. It was published in the *Federal Register* as a final rule on November 18, 2016, with an effective date of January 17, 2017. 81 Fed. Reg. 82,398.

The final rule amends regulations related to certain employment-based immigrant and nonimmigrant visa programs. Specifically, according to DHS, the final rule provides various benefits to participants in those programs, including the following: improved processes and increased certainty for U.S. employers seeking to sponsor and retain immigrant and nonimmigrant workers, greater stability and job flexibility for those workers, and increased transparency and consistency in the application of DHS policy related to affected classifications. DHS states that many of these changes are primarily aimed at improving the ability of U.S. employers to hire and retain high-skilled workers who are beneficiaries of approved employment-based immigrant visa petitions and are waiting to become lawful permanent residents, while increasing the ability of those workers to seek promotions, accept lateral positions with current employers, change employers, or pursue other employment options.

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: Samantha Deshommes
Chief, Regulatory Coordination Division
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
"RETENTION OF EB-1, EB-2, AND EB-3 IMMIGRANT WORKERS
AND PROGRAM IMPROVEMENTS AFFECTING
HIGH-SKILLED NONIMMIGRANT WORKERS"
(RIN: 1615-AC05)

(i) Cost-benefit analysis

The Department of Homeland Security (DHS) performed a cost benefit analysis of the final rule. According to DHS, taken together, the amendments in the final rule are intended to reduce unnecessary disruption to businesses and workers caused by immigrant visa backlogs. DHS states that the benefits from these amendments add value to the U.S. economy by retaining high-skilled workers who make important contributions to the U.S. economy, including technological advances and research and development endeavors, which are highly correlated with overall economic growth and job creation. DHS has analyzed potential costs of these regulations and has determined that the changes have direct impacts to individual beneficiaries of employment-based nonimmigrant and immigrant visa petitions in the form of filing costs, consular processing costs, and potential for longer processing times for Employment Authorization Document (EAD) applications during filing surges, among other costs. Because some of these petitions are filed by sponsoring employers, this rule also has indirect effects on employers in the form of employee replacement costs.

According to DHS, the amendments clarify and amend policies and practices in various employment-based immigrant and nonimmigrant visa programs, with the primary aim of providing additional stability and flexibility to foreign workers and U.S. employers participating in those programs. These changes provide various benefits to U.S. employers and certain foreign workers, including the enhanced ability of such workers to accept promotions or change positions with their employers, as well as change employers or pursue other employment opportunities. DHS states that these changes also benefit the regulated community by providing instructive rules governing the: (1) extensions of stay for certain H-1B nonimmigrant workers facing long delays in the immigrant visa process; (2) ability of workers who have been sponsored by their employers for lawful permanent resident (LPR) status to change jobs or employers 180 days after they file applications for adjustment of status; (3) circumstances under which H-1B nonimmigrant workers may begin employment with a new employer; (4) method for counting time in status as an H-1B nonimmigrant worker toward maximum periods of stay; (5) entities that are properly considered related to or affiliated with institutions of higher education for purposes of the H-1B program; and (6) circumstances under which H-1B nonimmigrant workers can claim whistleblower protections.

DHS states that the increased clarity provided by these rules enhances the ability of certain high-skilled workers to take advantage of the job portability and related provisions in the American Competitiveness Act of the 21st Century (AC21) and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). DHS further states that the final rule also amends the current regulatory scheme governing certain immigrant and nonimmigrant visa programs to further enhance job portability for certain workers and improve the ability of U.S. businesses to retain highly valued individuals. According to DHS, the final rule also amends

current regulations governing the processing of applications for employment authorization to provide additional stability to certain employment-authorized individuals in the United States while addressing fraud, national security, and operational concerns. To prevent gaps in employment for such individuals and their employers, the final rule provides for the automatic extension of EADs (and, where necessary, employment authorization) upon the timely filing of a renewal application. To protect against fraud and other abuses, the final rule also eliminates current regulatory provisions that require adjudication of applications for employment authorization in 90 days and that authorize interim EADs when that timeframe is not met. DHS provided a table which summarized the provisions and impacts of the final rule.

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

According to DHS, the changes made have direct effects on individual beneficiaries of employment-based nonimmigrant and immigrant visa petitions. As individual beneficiaries of employment-based immigrant visa petitions are not defined as small entities, costs to these individuals are not considered as RFA costs. DHS states that this rule does not impose direct costs on small entities; however, because the petitions are filed by sponsoring employers, this rule has indirect effects on employers. The original sponsoring employer that files the petition on behalf of an employee will incur employee turnover related costs in cases in which that employee ports to a same or a similar occupation with another employer. Therefore, DHS states that it examined the indirect impact of this rule on small entities as well and provided this analysis in the final rule.

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

DHS states that this rule exceeds the $100 million expenditure threshold in the first year of implementation (adjusted for inflation) and therefore DHS provided an UMRA analysis which addressed: (1) an identification of the provision of federal law under which the rule is being promulgated; (2) a qualitative and quantitative assessment of the anticipated costs and benefits of the federal mandate, including the costs and benefits to state, local, and tribal governments or the private sector, as well as the effect of the federal mandate on health, safety, and the natural environment; (3) estimates by the agency, if and to the extent that the agency determines that accurate estimates are reasonably feasible of future compliance costs of the federal mandate and any disproportionate budgetary effects of the federal mandate upon any particular regions of the nation or particular state, local, or tribal governments, urban or rural or other types of communities, or particular segments of the private sector; (4) estimates by the agency of the effect on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services, if and to the extent that the agency in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material; and (5) a description of the extent of the agency's prior consultation with elected representatives (under section 204) of the affected state, local, and tribal governments.

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

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

On December 31, 2015, DHS published a Notice of Proposed Rulemaking (NPRM), in the *Federal Register* at 80 Fed. Reg. 81,899. DHS states that during the 60-day public comment

period it received 27,979 comments offering a wide variety of opinions and recommendations on the NPRM and related forms. A range of entities and individuals submitted comments, including nonimmigrants seeking to become LPRs, U.S. workers, schools and universities, employers, labor organizations, professional organizations, advocacy groups, law firms and attorneys, and nonprofit organizations. DHS responded to relevant and timely comments in the final rule.

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

This final rule makes revisions to the following information collections to Office of Management and Budget (OMB) control numbers 1615-0040, 1615-0015, 1615-0009, 1615-0023, and Forms I-765; Form I-765 Work Sheet, Form I-765WS, I-140, I-129, I-485, and is creating a new Supplement J to Form I-485. DHS has considered the public comments received in response to the NPRM. DHS's responses to these comments appear in this final rule and in an appendix to the supporting statements that accompany this rule which can be found in the docket. DHS has submitted the supporting statements to the OMB as part of its request for the approval of the revised information collection instruments.

Statutory authorization for the rule

DHS promulgated this rule under the Immigration and Nationality Act (INA) 8 U.S.C. 1101 et seq., specifically section 103(a) of INA, 8 U.S.C. 1103(a), and the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 101 et seq., specifically section 102 of HSA, 6 U.S.C. 112. DHS states that further authority for the regulatory amendments in the final rule is found in the following sections: section 205 of INA, 8 U.S.C. 1155, section 204 of INA, 8 U.S.C. 1154; section 214 of INA, 8 U.S.C. 1184, including section 214(a)(1), 8 U.S.C. 1184(a)(1); section 274A(h)(3)(B) of INA, 8 U.S.C. 1324a(h)(3)(B); section 413(a) of ACWIA, which amended section 212(n)(2)(C) of INA, 8 U.S.C. 1182(n)(2)(C); section 414 of ACWIA, which added section 214(c)(9) of INA, 8 U.S.C. 1184(c)(9); section 103 of AC21, which amended section 214(g) of INA, 8 U.S.C. 1184(g); section 104(c) of AC21; section 105 of AC21, which added what is now section 214(n) of INA, 8 U.S.C. 1184(n); sections 106(a) and (b) of AC21, as amended; section 106(c) of AC21, which added section 204(j) of INA; and section 101(b)(1)(F) of HSA, 6 U.S.C. 111(b)(1)(F).

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

According to DHS, this rule has been designated a significant regulatory action that is economically significant, under section 3(f)(1) of Executive Order 12,866. The rule has been reviewed by OMB.

Executive Order No. 13,132 (Federalism)

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