



Office of the General Counsel

B-276475

March 28, 1997

The Honorable Orrin G. Hatch
Chairman
The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate

The Honorable Henry J. Hyde
Chairman
The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
House of Representatives

Subject: Department of Justice, Immigration and Naturalization Service and
Executive Office for Immigration Review: Inspection and Expedited
Removal of Aliens; Detention and Removal of Aliens; Conduct of
Removal Proceedings; Asylum Procedures

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 Justice, Immigration and Naturalization Service (INS) and Executive Office for Immigration Review (EOIR), entitled "Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures" (RIN: 1115-AE47). We received the rule on March 14, 1997. It was published in the Federal Register as an interim rule on March 6, 1997. 62 Fed. Reg. 10312.

The interim rule implements the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) governing expedited and regular removal proceedings, handling asylum claims and other activities involving the apprehension, detention, hearing of claims and ultimately the removal of inadmissible and deportable aliens.

The interim rule has an effective date of April 1, 1997, which is less than the 60-day delay in a major rule's effective date required by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). In establishing the effective date, INS and EOIR state in the preamble to the interim rule that they find good cause to make the rule effective April 1, 1997, in order to meet the statutory deadline imposed by the IIRIRA. The preamble states that the statutory deadline necessitated the 30-day comment period in the notice of proposed rulemaking because of the time needed to draft the rule, coordinate with interested agencies, and complete the required Office of Management and Budget review process.

Enclosed is our assessment of INS' and EOIR'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 indicates that INS and EOIR, with the exception of the delay in the effective date, complied with the applicable requirements.

If you have any questions about this report, please contact James Vickers, Assistant General Counsel, at (202) 512-8210. The official responsible for GAO evaluation work relating to the Department of Justice, Immigration and Naturalization Service and Executive Office for Immigration Review is Norman Rabkin, Director, Administration of Justice Issues. Mr. Rabkin can be reached at (202) 512-8777.

Robert P. Murphy
General Counsel

Enclosure

cc: The Honorable Doris Meissner
Commissioner
Immigration and Naturalization Service

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE
ISSUED BY
THE DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION
SERVICE AND EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
ENTITLED
"INSPECTION AND EXPEDITED REMOVAL OF ALIENS; DETENTION AND
REMOVAL OF ALIENS; CONDUCT OF REMOVAL PROCEEDINGS;
ASYLUM PROCEDURES"
(RIN: 1115-AE47)

(i) Cost-benefit analysis

Both the Immigration and Naturalization Service (INS) and the Executive Office for Immigration Review (EOIR) have prepared a cost analysis of the impact on their budgets of the interim rule.

INS estimates that the cost to enforce the requirement to detain all criminal aliens will be at least \$205 million, consisting of \$65,284,000 for personnel and non-personnel costs of \$139,732,000. The nonpersonnel figure includes \$82,782,000 for bed space and related alien custody requirements (3,600 beds at \$63.00 per day), \$36,000,000 increase for alien travel expenses (3,600 removals at \$1,000 each), and an additional \$20,950,000 for detention vehicle expenses. INS is currently attempting to estimate the increased budgetary impact of detaining all aliens with administratively final orders of deportation pending their removal.

Also, INS estimates training employees on the new provisions of the law will be \$2,977,500 and \$2,000,000 for additional forms and changes needed to current forms.

The EOIR states that the provisions of the interim rule will require additional immigration judges, Immigration Court presence at existing INS detention centers, and construction of new Immigration Courts at new detention facilities. While there are several unknown variables which could effect the total cost, EOIR estimates that the annual cost could be as high as \$25,000,000 including \$21,300,000 for hiring new immigration judges and legal support staff.

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

The Attorney General has certified that the interim rule will not have a significant economic impact on a substantial number of small entities because it only affects the federal government operations regarding examination, detention, and removal of aliens from the United States.

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

The interim rule does not impose any federal mandates under title II of the act on state, local or tribal governments or the private sector of \$100 million or more in any one year.

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

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

The interim rule was issued under the notice and comment procedures of 5 U.S.C. § 553. INS published the proposed rule on January 3, 1997, in the Federal Register. 62 Fed. Reg. 444. The proposed rule only allowed 30 days for comment in view of the statutory deadline of April 1, 1997, for implementing the changes required by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

The proposed rule's request for comments resulted in 124 comments being received, which the preamble to the interim rule discusses, along with the actions taken by INS and the EOIR as a result of the comments. In addition, the interim rule contains a request for additional comments to be submitted in a 120-day comment period.

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

The information collection requirements of the interim rule have been previously reviewed and approved by the Office of Management and Budget under the Paperwork Reduction Act and OMB control numbers have been issued.

We have been advised by an official at INS that the Application for Asylum and Withholding of Removal Form (INS Form I-589; OMB Control No. 1115-0086) was resubmitted to OMB for approval because of minor revisions necessary to comply with the provisions of the interim rule. However, the revisions did not impact the burden hours previously approved by OMB.

Statutory authorization for the rule

The interim rule is promulgated under the authority of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub. L. 104-208, Sept. 30, 1996).

Executive Order No. 12866

The interim rule is considered a "significant regulatory action" under Executive Order No. 12866 and was reviewed by the Office of Management and Budget (OMB). The Office of Information and Regulatory Affairs of OMB approved the interim rule as complying with the requirements of the order based on the information supplied by INS, including a planned regulatory action document describing the reason for the rule and an assessment of the costs and budgetary impact of the interim rule.

Executive Order No. 12612

The interim rule has been reviewed under Executive Order No. 12612 (Federalism), and it has been determined that there are insufficient federalism implications to warrant to the preparation of a Federalism Assessment.

Executive Order No. 12988

The interim rule was reviewed by INS and EOIR under Executive Order No. 12988 (Civil Justice Reform), sections 3(a) and 3(b)(2) and found to meet the standards for drafting and clarity set forth in the order.



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-276475.2

May 19, 1997

The Honorable David McIntosh
Chairman, Subcommittee on National
Economic Growth, Natural Resources, and
Regulatory Affairs
Committee on Government Reform and Oversight
House of Representatives

Dear Mr. Chairman:

This is in reply to your inquiry regarding our Office's March 28, 1997, Congressional Review Act report on a major rule concerning the inspection and expedited removal of aliens issued by the Immigration and Naturalization Service (INS) and the Executive Office for Immigration Review of the Department of Justice (GAO/OGC-97-32).

Your inquiry seeks clarification of INS' compliance with the 60-day delay in the effective date of a major rule from the latter of the date of publication or receipt in Congress required by section 801(a)(3) of title 5 of the United States Code.

As was pointed out in our March 28, 1997, report, while the rule was published in the Federal Register on March 6, 1997, and was received in our Office and Congress on March 14, 1997, the rule stated that it was effective on April 1, 1997. However, because none of the statutory exceptions apply to toll the 60-day delay in the effectiveness of the INS rule, 5 U.S.C. § 801(a)(3) required that it take effect no earlier than May 13, 1997.

The INS stated that it found "good cause" to make the rule effective on April 1, 1997, because of the statutory deadline imposed by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. But the good cause exception to the 60-day delay provision found at 5 U.S.C. § 808(2) only applies if the agency finds with good cause "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Thus it is not available when notice and comment procedures have been used. (Our report on the Health Care Financing Administration Medicare Program Major Rule, B-275549, B-275552, December 9, 1996, discusses the good cause exception at length.) Here, INS published a notice of proposed rulemaking on January 3, 1997, and received comments for 30 days, and therefore the good cause exception was not properly

invoked. Moreover, as discussed in our Medicare Program Major Rule Report referred to above, the mere existence of the April 1 statutory deadline established by the IIRIRA, which was enacted September 30, 1996, did not provide a basis for failing to comply with the 60-day delay provision.

We trust this answers your inquiry.

Sincerely yours,

Robert P. Murphy
General Counsel

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