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Washington, DC 20548

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December 4, 2023

The Honorable Richard J. Durbin  
Chairman  
The Honorable Lindsey Graham  
Ranking Member  
Committee on the Judiciary  
United States Senate

The Honorable Jim Jordan  
Chairman  
The Honorable Jerrold Nadler  
Ranking Member  
Committee on the Judiciary  
House of Representatives

Subject: *Department of Homeland Security; Department of Labor, Employment and Training Administration: Exercise of Time-Limited Authority to Increase the Numerical Limitation for FY 2024 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers*

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) and the Department of Labor, Employment and Training Administration (DOL) (collectively Departments) titled “Exercise of Time-Limited Authority to Increase the Numerical Limitation for FY 2024 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers” (RINs: 1615-AC89 & 1205-AC18). We received the rule on November 17, 2023. It was published in the *Federal Register* as a temporary rule on November 17, 2023. 88 Fed. Reg. 80394. The effective date is November 17, 2023.

According to DHS, it, in consultation with DOL, is exercising time-limited fiscal year (FY) 2024 authority and increasing the total number of noncitizens who may receive an H-2B nonimmigrant visa by up to 64,716 for the entirety of FY 2024. DHS stated that these supplemental visas will be distributed in several allocations. DHS also stated that 20,000 visas made available by this temporary rule will be reserved for nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica. DHS stated further that all visas will be available only to businesses that are suffering or will suffer impending irreparable harm, as attested by the employer. Lastly, DHS stated that it is again providing temporary portability flexibility.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the 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. §§ 553(b)(3)(B), 808(2). According to the Departments, they have good cause to waive notice comment procedures—therefore, they also have good cause to forgo CRA’s 60-day delay in effective date requirement, under 5 U.S.C. § 808(2). The Departments stated that they are bypassing notice and comment to prevent serious economic harm to the H-2B community, including U.S. employers, associated U.S. workers, and related professional associations, that could result from the failure to provide supplemental visas as authorized by Congress. The Departments also stated that taking public comments on this temporary rule before implementation may have limited utility given that the Departments took post-promulgation public comments during a 60-day comment period on last year’s (FY 2023) nearly identical temporary final rule.

Enclosed is our assessment of DHS’s and DOL’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, flowing style.

Shirley A. Jones  
Managing Associate General Counsel

Enclosure

cc: Samantha Deshommes  
Chief, Regulatory Coordination Division  
USCIS Office of Policy & Strategy  
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;  
DEPARTMENT OF LABOR,  
EMPLOYMENT AND TRAINING ADMINISTRATION  
TITLED  
“EXERCISE OF TIME-LIMITED AUTHORITY TO INCREASE  
THE NUMERICAL LIMITATION FOR FY 2024 FOR THE H-2B TEMPORARY  
NONAGRICULTURAL WORKER PROGRAM AND PORTABILITY FLEXIBILITY  
FOR H-2B WORKERS SEEKING TO CHANGE EMPLOYERS”  
(RINS: 1615-AC89 & 1205-AC18)

(i) Cost-benefit analysis

The Department of Homeland Security (DHS) estimates the total costs to petitioners to range from \$7,530,484 to \$10,043,625. DHS also estimates the total cost to the federal government is \$350,028. Therefore, DHS stated, it estimates the total cost of this temporary rule ranges from \$7,880,512 to \$10,393,653 and the total transfers from filing fees made by petitioners to the government is \$9,214,500. DHS also stated that the benefits of this rule are diverse, and some are difficult to quantify. Some of these benefits include increased access for employers to H-2B workers; American workers may benefit to the extent that they do not lose jobs through the reduced or closed business activity that might occur if fewer H-2B workers were available and they may benefit from the additional recruitment activities that the rule requires certain petitioners to complete; and the federal government benefits from increased evidence regarding attestations.

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

DHS stated that this temporary rule is exempt from notice and comment requirements; therefore, the requirements of RFA do not apply to this temporary rule. Accordingly, DHS stated that it is not required to either certify that the temporary rule would not have a significant economic impact on a substantial number of small entities nor conduct a regulatory flexibility analysis.

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

DHS stated that this temporary rule is exempt from the requirements of the Unfunded Mandates Reform Act (UMRA) because DHS did not publish a notice of proposed rulemaking for the temporary rule. DHS also stated that this rule does not exceed the threshold of \$100 million in any one year when adjusted for inflation (\$192 million in 2022 dollars based on the Consumer Price Index for All Urban Consumers (CPI-U)), and that the temporary rule does not contain a federal mandate as the term is defined under UMRA.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO's major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: "the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act's exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act's requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act" in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

DHS did not discuss the Administrative Pay-As-You-Go Act of 2023 in this temporary rule.

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

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

DHS stated that it had good cause to waive notice and comment procedures. According to DHS, it bypassed notice and comment to prevent serious economic harm to the H-2B community, including U.S. employers, associated U.S. workers, and related professional associations, that could result from the failure to provide supplemental visas as authorized by Congress. DHS and the Department of Labor (DOL) (collectively Departments) also stated that taking public comments on this temporary rule before implementation may have limited utility given that the Departments took post-promulgation public comments during a 60-day comment period on last year's nearly identical temporary final rule.

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

DHS stated that it has submitted the information collection request (ICR) contained in this temporary rule to OMB and obtained approval of a new form, Form ETA-9142B-CAA-8 (OMB Control Number 1205-NEW), using emergency clearance procedures. The Departments note that while DOL submitted the ICR, both DHS and DOL will use the information provided by employers in response to this information collection. According to DHS, the total estimated annual time burden imposed by this ICR is 32,469 hours and the total estimated costs burden is \$2,195,689. DHS also stated that Form I-907, Request for Premium Processing Service (OMB Control Number 1615-0048), was approved by OMB. DHS stated further that it has not made changes to Form I-907 in connection with this temporary rule. DHS estimates that this temporary rule may result in approximately 4,325 additional filings of Form I-907 in fiscal year 2024.

#### Statutory authorization for the rule

DHS promulgated this temporary rule pursuant to sections 202 and 236 of title 6; sections 1101, 1101 note, 1102, 1103, 1105a, 1182, 1182 note; 1184, 1184 note, 1186a, 1187, 1188, 1221, 1255, 1255 note, 1281, 1282, 1288, 1288 note, 1301–1305, 1324a, 1357, and 1372 of title 8; section 2461 note of title 28; section 49k of title 29; and sections 1806, 1901 note, and 1931 note of title 48, United States Code, and Public Law 107-296.

#### Executive Order No. 12866 (Regulatory Planning and Review)

DHS stated that OMB has designated this temporary rule as a significant regulatory action under section 3(f)(1) of Executive Order 12866, as amended by Executive Order 14094, because its annual effects on the economy exceed \$200 million in any year of the analysis. DHS also stated that OMB has reviewed the rule.

#### Executive Order No. 13132 (Federalism)

DHS stated that this temporary 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.