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B-336908

December 17, 2024

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, U.S. Citizenship and Immigration Services; Department of Labor, Employment and Training Administration: Exercise of Time-Limited Authority to Increase the Numerical Limitation for FY 2025 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, U.S. Citizenship and Immigration Services (DHS) and the Department of Labor, Employment and Training Administration (DOL) (collectively, the Departments) entitled “Exercise of Time-Limited Authority to Increase the Numerical Limitation for FY 2025 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers” (RINs: 1615-AC95 & 1205-AC20). We received the rule on December 2, 2024. It was published in the *Federal Register* on December 2, 2024. 89 Fed. Reg. 95626. The amendments at instructions 1, 3, and 5 are effective December 2, 2024; instructions 2 and 4 amending 8 C.F.R. §§ 214.2 and 274a.12, respectively, are effective from December 2, 2024, through December 2, 2027; instruction 6, adding 20 C.F.R. § 655.64, is effective from December 2, 2024, through September 30, 2025; and instruction 7, adding 20 C.F.R. § 655.68, is effective from December 2, 2024, through September 30, 2028.

According to the Departments, this rule increases the total number of noncitizens who may receive an H-2B nonimmigrant visa by up to 64,716 for the entirety of fiscal year (FY) 2025. The Departments stated that these supplemental visas will be distributed in four allocations throughout the fiscal year and reserves 20,000 of these visas for nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica. The Departments further stated that all visas will be available only to businesses that are suffering or will suffer impending irreparable harm, as attested by the employer. Finally, the Departments stated that the rule provides 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 does not apply, however, if the agency finds for good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, and the agency incorporates the finding and a brief statement of its reasons in the rule. 5 U.S.C. §§ 553(b)(B), 808(2). The Departments invoked the good cause exception with respect to this rule. 89 Fed. Reg. 95626, 95661–62, 95679. The Departments stated that with respect to the supplemental visa allocations provisions, the Departments are acting pursuant to supplemental cap authority in the Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. G, title I, § 105, 138 Stat. 460, 856 (Mar. 23, 2024), extended by the Continuing Appropriations and Extensions Act, 2025, Pub. L. No. 118-83, div A, §§ 101(6), 106, 138 Stat. 1524, 1525–26 (Sept. 26, 2024), and the deadline for exercising that authority is December 20, 2024. *Id.* at 95661. The Departments stated that they bypassed advance notice and comment to urgently address increased labor demand and to prevent economic harm resulting from American businesses suffering irreparable harm due to a lack of a sufficient labor force. *Id.* The Departments further stated that undertaking notice and comment would delay final action by months and would greatly complicate and potentially preclude the Departments from successfully exercising the supplemental cap authority. *Id.* With respect to the temporary portability and change of employer provisions, the Departments stated that these are also supported by labor market demands. *Id.* at 95661–62. Finally, the Departments stated that taking public comments may have limited utility given that the Departments took post-promulgation public comments in response to a nearly identical temporary rule in FY 2023 and discussed those comments in detail in the preamble of their FY 2024 temporary rule. *Id.* at 95662.

Enclosed is our assessment of the Departments' 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 Charlie McKiver, Assistant General Counsel, at (202) 512-5992.



Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Samantha Deshommes
Chief Regulatory Officer
U.S. Citizenship and Immigration Services

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF HOMELAND SECURITY,
U.S. CITIZENSHIP AND IMMIGRATION SERVICES;
DEPARTMENT OF LABOR,
EMPLOYMENT AND TRAINING ADMINISTRATION
ENTITLED
“EXERCISE OF TIME-LIMITED AUTHORITY TO INCREASE THE NUMERICAL LIMITATION
FOR FY 2025 FOR THE H-2B TEMPORARY NONAGRICULTURAL WORKER PROGRAM
AND PORTABILITY FLEXIBILITY FOR H-2B WORKERS
SEEKING TO CHANGE EMPLOYERS”
(RINS: 1615-AC95 & 1205-AC20)

(i) Cost-benefit analysis

The Department of Homeland Security, U.S. Citizenship and Immigration Services (DHS) and the Department of Labor, Employment and Training Administration (DOL) (collectively, the Departments) prepared an analysis of the costs and benefits for this rule. See 89 Fed. Reg. 95626, 95662–78 (Dec. 2, 2024). The Departments estimated that the rule will result in costs to petitioners of \$8,798,321 to \$11,964,750, costs to the government of \$270,960, and transfers of \$12,088,515 from filing fees made by petitioners to the government. See *id.* at 95662. The Departments also described the benefits of the rule, some of which the Departments stated are difficult to quantify. See *id.* at 95662–63.

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

The Departments stated that the requirements of the RFA do not apply to this rule because the rule is exempt from the APA’s notice-and-comment requirements. 89 Fed. Reg. 95626, 95678.

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

The Departments stated that the Act’s requirements do not apply to this rule because the Departments did not publish a notice of proposed rulemaking for the rule. 89 Fed. Reg. 95626, 95678. The Departments also determined that the rule will not have an effect on state, local, or tribal governments, in the aggregate, or on the private sector, of \$100 million in 1995 dollars, updated annually for inflation, in any one year. *Id.*

(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.

In its submission to us, the Departments indicated the Act is not applicable to this rule.

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

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

The Departments invoked the good cause exception from the Act's notice-and-comment requirements and stated that they bypassed advance notice and comment to urgently address increased labor demand and to prevent economic harm resulting from American businesses suffering irreparable harm due to a lack of a sufficient labor force. 89 Fed. Reg. 95626, 95661. The Departments further stated that undertaking notice and comment would delay final action by months and would greatly complicate and potentially preclude the Departments from successfully exercising the supplemental cap authority. *Id.* With respect to the temporary portability and change of employer provisions, the Departments stated that these are also supported by labor market demands. *Id.* at 95661–62. The Departments also stated that taking public comments may have limited utility given that the Departments took post-promulgation public comments in response to a nearly identical temporary rule in FY 2023 and discussed those comments in detail in the preamble of their FY 2024 temporary rule. *Id.* at 95662. Citing the reasons described above regarding the need for immediate action, the Departments also concluded that they had good cause to dispense with the Act's requirement that a rule's effective date be no earlier than 30 days after publication. *Id.*

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

The Departments determined that this rule contains information collection requirements under the Act. 89 Fed. Reg. 95626, 95679.

Statutory authorization for the rule

The Departments promulgated this rule pursuant to section 202(4) of title 6 and sections 1101(a)(15)(H)(ii)(b), 1101(a)(3), 1184(a)(1), (c)(1), (c)(14), 1324a, 1357(a)(1) of title 8, United States Code, as well as the Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. G, title I, § 105, 138 Stat. 460, 856 (Mar. 23, 2024), and the Continuing Appropriations and Extensions Act, 2025, Pub. L. No. 118-83, div A, §§ 101(6), 106, 138 Stat. 1524, 1525–26 (Sept. 26, 2024).

Executive Order No. 12866 (Regulatory Planning and Review)

The Departments stated that this rule is significant under the Order and was submitted to OMB for review. 89 Fed. Reg. 95626, 95662.

Executive Order No. 13132 (Federalism)

The Departments determined that this rule does not have federalism implications. 89 Fed. Reg. 95626, 95678.