



June 27, 2011

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**Re: *Public Commentary from the Economic Policy Institute*
22 CFR Part 62 RIN 1400-AC79 [Public Notice 7427]
Exchange Visitor Program—Summer Work Travel Program
Interim Final Rule**

I. INTRODUCTION

The Economic Policy Institute thanks the State Department for the opportunity to comment on the final interim rule for the Summer Work Travel (hereinafter, SWT) program at 76 Fed. Reg. 23177. Unfortunately, the SWT program has not lived up to the lofty goals of the Fulbright-Hays Act of 1961,¹ the legislation that originally granted the State Department the authority to create the SWT category within the Exchange Visitor Program. Although the Department's new final interim regulations may slightly improve the program's operation in a few limited ways, the program as a whole will remain incompatible with the interests of young unemployed U.S. workers who are suffering from severe joblessness across the country. And for the foreign visitors who participate in the SWT program, the system of management, oversight, and compliance that the final interim regulations establish will continue to be woefully inadequate in terms of its ability to ensure that SWT participants are protected from becoming victims of crime or from suffering serious violations of their basic employment and labor rights at the hands of unscrupulous employers. Furthermore, the regulations fail to ensure that those who commit these crimes and/or violations – namely, sponsors, their partners/cooperators, and employers – will be held accountable for their actions.

In this context, the following comments will discuss the fundamental flaws inherent in the SWT program.

¹ Mutual Educational and Cultural Exchange Act of 1961 (Pub.L. No. 87-256, 75 Stat. 527). Commonly referred to as the "Fulbright-Hays Act of 1961."



II. SWT EMPLOYERS ARE NOT REQUIRED TO ADVERTISE SWT JOBS TO U.S. WORKERS, AND NO LABOR MARKET TEST OR LABOR CERTIFICATION PROCESS IS REQUIRED OF SWT EMPLOYERS. THUS, U.S. WORKERS MAY NEVER HAVE AN OPPORTUNITY TO APPLY FOR SWT JOBS.

Jobs in the SWT program normally go to “foreign college and university students”² during their summer vacations. But before sponsors and employers seek SWT participants to fill the job openings they have available, employers are not required to conduct any labor market test to determine if there are willing, able, and available unemployed U.S. workers who could fill the labor needs of SWT employers, nor must they receive a labor certification from the Department of Labor, certifying that there are no able and available unemployed U.S. workers willing to take those jobs. In light of the current high unemployment rates for young Americans, this makes no sense.

The national unemployment rate in May of 2011 for workers aged 16-24 stands at 17.3%.³ The unemployment rate for workers aged 16-19 is 24.2%.⁴ In July 2010, during the part of the year when the majority of SWT participants are employed in the United States, the unemployment rate for workers aged 16-24 was 19.1%.⁵ These shockingly high unemployment rates for youth in the United States mean that millions of young workers are actively looking for work, including seeking temporary and seasonal positions like the ones filled by SWT participants. Many of these young workers may be desperate for these jobs, considering that few are eligible for unemployment benefits because they have not worked long enough to be eligible to receive them.

Because employers are not required to advertise open positions or to recruit U.S. workers before seeking exchange visitors, or to certify that no U.S. workers are available to fill the positions, it is likely that many U.S. workers are in fact being overlooked by employers and displaced by SWT participants. U.S. workers displaced by SWT exchange visitors are not afforded any process or procedure to complain or seek redress for displacement under the current or interim final SWT regulations, as they are in the H-2A and H-2B visa programs.

This blind spot in government employment policy is beginning to draw attention. One recent example of this is Horry County in North Carolina. Despite a county unemployment rate of 12.9%, a number of SWT participants were hired

² 76 Fed. Reg. 23177

³ Bureau of Labor Statistics, CPS data, Department of Labor (June 2011).

⁴ The Employment Situation, Bureau of Labor Statistics, Department of Labor website, available at <http://www.bls.gov/news.release/empsit.nr0.htm> (last visited June 25, 2011).

⁵ Nancy Lofholm, *Visa program encourages seasonal hiring of foreign students while U.S. youths go jobless*, The Denver Post, June 20, 2011, available at http://www.denverpost.com/news/ci_18308603 (last visited June 25, 2011).



to work in the hospitality sector.⁶ A representative of the local Hospitality Association and Workforce Investment Board defended the employment of so many J-1s in the county because “most locals who are unemployed are looking for permanent jobs, not seasonal ones.” This could be true, but without any requirements on employers to advertise these jobs or recruit U.S. workers before hiring SWT participants, the public and the government cannot know if unemployed U.S. workers are in fact being overlooked for these jobs. In June 2011, a Denver Post report also touched upon this point, underlining the connection between the extraordinarily high youth unemployment rate and the use of the J-1 visa by employers in Colorado and around the country.⁷

III. THE CURRENT AND FINAL INTERIM RULE’S PROVISIONS ON “PARTICIPANT COMPENSATION” ARE INSUFFICIENT TO PROTECT AGAINST ADVERSE AFFECTS ON THE WAGES OF U.S. WORKERS

As the Congressional Research Service has found, setting an appropriate minimum or prevailing wage that a foreign worker must be paid is an essential element in determining whether the hiring of a foreign worker could have an adverse affect on U.S. workers.⁸ If employers are allowed to pay workers less than the true market wage for their labor, it lowers the average wage in the occupation and puts downward pressure on the wages of all workers in the occupation.

A single sentence states the present wage rule for SWT exchange visitors at 22 C.F.R. § 62.32(e):

Participant compensation. Sponsors shall advise program participants regarding Federal Minimum Wage requirements and shall ensure that participants receive pay and benefits commensurate with those offered to their American counterparts.

The first part of this rule simply requires that sponsors “advise” participants about the Federal Minimum wage. The second obliges sponsors to “ensure” that SWT participants are paid wages that are “commensurate” to those earned by American workers.

⁶ See e.g., Victoria Spechko, *Facebook question: Why are local jobs going to foreign exchange students?* Carolinalive.com/NewsChannel 15, April 14, 2011, available at <http://www.carolinalive.com/news/story.aspx?id=605601> (last visited June 25, 2011).

⁷ Nancy Lofholm, *Visa program encourages seasonal hiring of foreign students while U.S. youths go jobless*, The Denver Post, June 20, 2011, available at http://www.denverpost.com/news/ci_18308603 (last visited June 25, 2011).

⁸ See Ruth Ellen Wasem, *Immigration of Foreign Workers: Labor Market Tests and Protections*, Congressional Research Service (March 30, 2010).



The new rule relating to wages in the interim final rule (effective July 15, 2011) will be found at § 62.32(g), and states the following:

Participant compensation. Sponsors must inform program participants of Federal Minimum Wage requirements and ensure that at a minimum participants are compensated at the prevailing local wage, which must meet the higher of either the applicable state or the Federal minimum wage requirement, including payment for overtime in accordance with state specific employment laws.

The updated rule adds the requirement that sponsors must “ensure” that the higher of the state or Federal Minimum wage be paid to the participant and that they are entitled to overtime pay based on state law. It also changes the requirement that sponsors ensure that participants are paid a wage that is “commensurate” to that offered to similar U.S. workers, replacing it with a the requirement that they be “compensated at the prevailing local wage.”

The language of the updated rule is a weaker version of the original language because it no longer requires that SWT participants be paid a wage that is comparable to that of their similarly situated counterparts. It requires only that they be paid the higher of the state or Federal Minimum Wage; and although it mentions a “prevailing wage,” the language does not define or state what this means. In sum, how either rule should function in practice – i.e., what constitutes a “commensurate” wage or a “prevailing” wage in a particular occupation and in a particular geographical area – is not explained. Without an explicit methodology to determine the appropriate commensurate or prevailing wage in any particular case, without an additional requirement that the methodology be used, and with no enforcement mechanism, §§ 62.32(e) and (g) are effectively rendered moot. As a result, the SWT program is likely to have a negative impact on the wages of U.S. workers in similar occupations to those worked by SWT exchange visitors.

Additionally, by specifying only that sponsors must ensure compliance with minimum wage laws, whether state or federal, and state overtime laws, the proposed rule implies that federal overtime compensation laws do not apply.

IV. THE SWT PROGRAM OFFERS EMPLOYERS SIGNIFICANT INCENTIVES TO PREFER SWT EXCHANGE VISITORS OVER U.S. WORKERS AND WORKERS IN OTHER NONIMMIGRANT CATEGORIES THAT INCLUDE WORKER AND LABOR MARKET PROTECTIONS

In addition to the aforementioned lack of a labor market test, labor certification, or required prevailing wage (such as those found in the H-1B, H2-A,



and H-2B nonimmigrant visa categories), the lack of protections for foreign workers in the SWT program and the lower salary and administrative costs that employers can legally pay for their labor create strong incentives to hire SWT exchange visitor workers over U.S. workers or foreign workers in other nonimmigrant temporary worker categories with additional requirements and restrictions on employers. The J-1 visa provides an end-run around more protective employment visa requirements.

Significant Payroll Savings

One compelling reason why employers would prefer an exchange visitor worker or workforce over a U.S. worker or workforce is the significant cost savings they get in terms of wages, taxes, and health care costs. Employers are exempt from paying certain taxes for SWT workers, including Medicare, Social Security, and federal unemployment taxes. This represents payroll savings for employers of 8.45% on the portion of the wages paid that are taxable by the federal government, but the exact savings can depend on the applicable unemployment taxation laws in each state, because employers are also exempt from paying state unemployment taxes. The average amount employers must contribute to unemployment insurance per employee varies by state, ranging from \$114 in Louisiana to \$939 in Idaho.⁹

Websites such as Jobofer.org openly tout and advertise the cost savings of hiring J-1 foreign workers.¹⁰ Another website even includes a “Payroll Taxes Savings Calculator.” The calculator estimates that if an employer hires five SWT workers for four months, and if the employees work 40 hours per week while earning \$8.00 an hour, the employer will pay \$2,317 less in payroll taxes than if five U.S. workers had been hired.¹¹

These employer savings also impact the social safety net in the United States because they result in a significant amount of foregone revenue for the federal government. For example, in FY 2008, in the SWT category alone, if we assume that all of the SWT participants earned the federal minimum wage, and worked 40 hours per week for four months, the federal government would receive \$116 million less in Medicare, Social Security and Federal

⁹ Summary of State Contribution Levels, Significant Measures of State UI Tax Systems, Division of Fiscal and Actuarial Services, Office of Workforce Security, U.S. Department of Labor, October 2010, at 61, available at <http://workforcesecurity.doleta.gov/unemploy/pdf/sigmeasuitaxsys10.pdf> (last visited June 25, 2011).

¹⁰ Reasons Seasonal Employers Hire International Students for Summer and Seasonal J1 Jobs in the US, Jobofer.org website, available at <http://www.jobofer.org/benefits/> (last visited June 25, 2011).

¹¹ Tax Benefits for Employers Hiring Seasonal J1 Foreign Staff: How Much Can Employers Save? Seasonal Staffing Solutions website, available at <http://seasonalstaff.org/Tax-Benefits-For-Employers-Hiring-J1-Foreign-Staff.html> (last visited May 27, 2011).



Unemployment taxes than if those hours had been worked by a U.S. worker earning the federal minimum wage.

Indentured servitude

Another incentive for employers to hire exchange visitors is the desperate situation that many find themselves in upon arrival in the United States. In the SWT program in particular, the current rule (until July 14, 2011) requires that only 50% of a sponsor's participants must have a job secured before being granted a J-1 visa and entering the country. This means that after paying any applicable fees, and paying for health insurance and travel costs, the exchange visitor will have to search for and find a job after arriving in the country – but there is no guarantee that he or she will find one. As a result, they will be likely to accept any wages and working conditions that employers may offer, because if they are unable to find a job quickly, the exchange visitors might not have enough money to pay for food, shelter, or even for a return flight to their home country.

The new rule will require that all SWT participants from countries that are not part of the Visa Waiver Program¹² (VWP) secure employment before entering the United States, but the participants who do hail from VWP countries are exempt from the requirement and may arrive in the United States before they have a firm job offer. If implemented and properly enforced program-wide, such a requirement would be a positive step toward protecting against exchange visitors ending up stranded and without a job, and hopefully avoid the situation where they are forced to “walk up and down the Boardwalk and Coastal Highway looking for work,” as they do every summer in Ocean City, Maryland.¹³

Even if SWT exchange visitors enter the country with a job, or are lucky enough to find a job after arriving, they can still find themselves in a desperate situation if they are laid off or fired before the end of the duration of their program. This is exactly what happened to a number of SWT participants from Peru, Brazil, and Argentina who were working in Lancaster, Ohio. After being laid off, they were left without any income or means of transportation. Although the sponsor organization agreed to pay for their housing until they could depart on their flights home (which were previously purchased and scheduled to depart at the end of the 4 month program), in order to eat and survive until then, the exchange visitors were forced to rely on the charity of local residents, churches,

¹² At present, 36 countries participate in the Visa Waiver Program. For information and the list of participating countries, see Visa Waiver Program (VWP), State Department website, available at http://travel.state.gov/visa/temp/without/without_1990.html (last visited May 27, 2011).

¹³ Shawn Soper, *Summer Visa Changes To Have Major Impact*, The Dispatch, January 14, 2011, available at <http://www.mdcoastdispatch.com/articles/2011/01/14/Top-Stories/Summer-Visa-Changes-To-Have-Major-Impact> (last visited June 25, 2010).



and businesses. These young people paid their sponsor \$1,500 for the privilege to participate in this program. Such desperate circumstances put employers in an unfair and unbalanced position of power over a SWT participant; as a result, the SWT participant has a strong incentive to accept whatever the employer has to offer in terms of wages and working conditions, whereas a U.S. worker with friends, family or government resources to assist them could much more easily decline or leave a job with poor pay and working conditions. An article in the Spanish language press reported that Peruvian students sometimes invest \$3,000 just to participate in the SWT program (including travel and administrative fees).¹⁴ This constitutes a huge investment for a student from Peru – an amount he or she will be desperate to earn back in wages – especially when considering that the median disposable income for a family in Peru is only \$4,385 per year.¹⁵

Furthermore, the J-1 visa does not allow for easy portability among employers. This means that each visa and exchange visitor is tied to a particular sponsor and employer, and if he or she is fired, the SWT exchange visitor may no longer be authorized to work and remain in the U.S.¹⁶ If an exchange visitor is unsatisfied with the wage that is being offered by the employer, this factor also means that she cannot easily switch to another employer who may be offering a better wage. Thus, SWT workers are afraid to complain about low wages or poor working conditions because they can easily be fired for doing so, and getting fired means they can be deported before earning back the money they have invested to participate in the program. These factors cause SWT exchange visitors to become, in essence, indentured servants to their employer.

Less restrictive, easier and cheaper to obtain than other temporary work visas

Employers may also prefer to hire SWT exchange visitors because it saves them the time and money required to petition for foreign workers through other employment-based visa programs, especially the H-2B category for unskilled workers. In order to obtain an H-2B visa for a foreign worker, employers must take certain procedural steps, such as going through the process of acquiring a prevailing wage determination, recruiting U.S. workers and filing an application for labor certification. These procedures require the payment of hundreds or thousands of dollars in filing and administrative fees, and may require an

¹⁴ Terra noticias, *Estudiantes peruanos que trabajan en EEUU ganan en promedio US\$ 6 mil en tres meses*, January 3, 2011, available at http://economia.terra.com.pe/noticias/noticia.aspx?idNoticia=201101032113_TRP_79459858 (last visited June 25, 2011).

¹⁵ Median Equivalised Income, Peru 2004. Luxembourg Income Study (LIS) website, available at <http://www.lisproject.org/key-figures/kf-workbook.xls> (last visited June 25, 2011).

¹⁶ See e.g., 9 FAM 41.62, Exhibit V: Sample handout for Summer Work Travel participants, available at <http://www.state.gov/documents/organization/106108.pdf> (last visited June 25, 2011).



immigration attorney to complete. Acquiring a SWT participant on a J-1 visa on the other hand, is much cheaper, faster and easier, and there is no yearly limit on how many SWT participants may come to the United States every year (while the H-2B is capped annually at 66,000).

These advantages are the main selling points that immigration lawyers and sponsors use to market the J-1 visa to employers. The following is just one example – a video posted by an immigration lawyer on YouTube.com advertising the benefits of using J-1 visas to hire workers in the hospitality industry, relative to other classes of guestworker visas:

The nice thing about the J-1, it's quick to get, and it's easy for the employers to obtain those visas, because they are all handled through the State Department and a typical employee can get to the U.S. in six weeks.¹⁷

Many employers are also quite honest about their preference for J-1 workers instead of those in other visa categories. Copper River Seafoods, a company in Alaska, hires approximately 150 seasonal employees every year. The top of the page on the “Employment Opportunities” section of its website plainly states that it only accepts applications from “U.S. Citizens” and “J-1 Visa Qualifying Students,” while explicitly excluding and “not accepting H-2B Qualifying Applications.”¹⁸ Another employer that recruits J-1 workers is Morey’s Piers, an amusement and waterpark in Wildwood, New Jersey on the Jersey Shore. Its recruitment brochure advertises that Morey’s Piers hires “approximately 1500 seasonal associates” and that “700 – 800 of those employees are international students on visa programs.”¹⁹ The “visa programs” that the brochure mentions refer only to the J-1 visa, because the “International Students” page on the “summer jobs” section of its website specifies that “Morey's Piers only employs international university students who possess J-1 Work and Travel Visas.”²⁰ In the past, this wasn’t always the case; in fact, Morey’s Piers was a regular user of H-2B workers until 2008,²¹ and Denise

¹⁷ The Law Offices of Jacob J. Sapochnick, *Work Visas for the Hospitality Industry: J-1, H-3, H2B, L-1, E2, TN and H-1B*, video posted on YouTube.com, available at <http://www.youtube.com/watch?v=J7UCjlTnwGA> (last visited May 27, 2011).

¹⁸ Employment Opportunities, Copper River Seafoods website, available at <http://www.copperriverseafood.com/Content.aspx?page=EmploymentOpportunities> (last visited May 27, 2010).

¹⁹ Summer Employment Guide, available at http://www.moreyspiers.com/downloads/Recruiting%20Brochure%204_15_09.pdf (last visited May 27, 2011).

²⁰ Summer Jobs for International Students, Morey’s Piers and Beachfront Waterparks, available at http://www.moreyspiers.com/jobs_summer/82/index.php (last visited May 27, 2011).

²¹ Foreign Labor Certification Data Center website, available at <http://www.flcdatacenter.com> (last visited May 27, 2011).



Beckson, Morey's director of operations, suggested in a *Press of Atlantic City* news article that Morey's used H-2B foreign workers in the past because paying higher wages to attract U.S. workers was problematic:

...the cost of doing business has gotten so expensive...Overhead is astronomical. We've seen a 35 percent increase for our health insurance costs alone. So in terms of wages, any increases we were to pay would be passed on to the consumer.²²

But as of 2010, Morey's Piers admitted to the *Philadelphia Inquirer* that it now prefers to use only SWT participants with J-1 visas instead of H-2Bs:

Denise Beckson, director of operations at Morey's Piers in Wildwood, told me her company imported hundreds of foreign college students from Eastern Europe and Asia for its 1,600-member seasonal workforce, and preferred to use the J-1 student exchange visa instead of H-2B.²³

The actual number of exchange visitors hired by Morey's Piers remains a mystery. In one news article, Beckson claims that about 38% of seasonal workers hired are J-1 guestworkers, while the recruitment materials state the total to be approximately half. But a much older news article from *Newsweek* magazine reported in 1999 that "about 90 percent of the summer workers are foreigners," citing an additional reason why summer employers prefer foreign guestworkers over U.S. workers that are enrolled in school: "[u]nlike Americans, many won't return to school till September or October--a big plus for employers like Morey's, whose high season stretches into fall."²⁴

If an employer hires a few SWT workers year after year (as many do), the cost savings will multiply over time. In fact, we can look to a real world example to illustrate this on a large scale. One author estimates that the Walt Disney Company, one of the largest corporations in the country, saves about \$15 million per year on wages alone by hiring J-1 students and workers instead of U.S. workers.²⁵

²² Erik Ortiz, *Foreign workers, not laid-off locals, filling seasonal jobs at New Jersey shore*, *Press of Atlantic City*, April 5, 2010 available at http://www.pressofatlanticcity.com/news/press/cape_may/article_fc82f8a6-40ba-11df-9697-001cc4c002e0.html (last visited May 27, 2011).

²³ Joseph DiStefano, *A bid to boost wages for hard labor*, *Philadelphia Enquirer*, *Philly.com*, October 6, 2010.

²⁴ *Newsweek*, *A Summer Place*, August 30, 1999, available at <http://www.newsweek.com/1999/08/29/a-summer-place.html> (last viewed May 27, 2011).

²⁵ Disney does not use SWT J-1 visas exclusively, it also hires exchange visitors in the "College and University Student" category, and in the Australia and New Zealand Pilot Programs, which are similar to the SWT program, except participants in that program are able to work for an entire year, instead



Employers can use exchange visitors to fill their regular yearly staffing needs

Websites for major sponsors of exchange visitors barely attempt to represent their program as one that facilitates a cultural or educational exchange (if at all), and instead are very explicit about their role and primary purpose of providing labor to employers, especially in regards to the SWT program. For example, the website for the Council on International Educational Exchange (CIEE), a designated sponsor organization in Portland, Maine, has a section subtitled “Hiring Solutions,” which provides information to employers on how they can hire workers in the SWT, Trainee and Intern categories.²⁶ Another sponsor organization advertises the tax exemptions that potential employees will benefit from if they hire J-1 workers via the SWT program²⁷ along with letting employers know that they can help “Meet your Seasonal Staffing Needs,”²⁸ and the Council for Educational Travel, USA announces that the SWT program “is a great opportunity to...fill your short-term and seasonal staffing needs.”²⁹

These examples are representative of how the Exchange Visitor Program is marketed to employers. As a result, when taking into account all of the aforementioned advantages of hiring SWT workers over U.S. workers, it’s not surprising that employers often choose to hire large numbers of exchange visitors every year. The testimonials of employers on the CIEE website provide us with more detail regarding just how long some employers have been using exchange visitors to fill their yearly staffing needs.

CIEE describes the Pool Management Group (PMG) as a company that “manages over 750 outdoor swimming pools in 16 US cities” and has “been in the business of providing quality swimming pool management services for 25 years.”³⁰ In its testimonial, PMG describes its experience with the program:

of four months. Kit Johnson, *The Wonderful World of Disney Visas*. 63 Florida Law Review 915, at 956 (April 1, 2011). Available at <http://ssrn.com/abstract=1839544> (last visited May 27, 2011).

²⁶ Hiring Solutions, CIEE website, available at <http://ciee.org/hire/index.aspx> (last visited May 27, 2011).

²⁷ Summer Work Travel Program, International Culture & Career Exchange website, available at <http://www.icceusa.com/HostOrganizations/Summerbenefits.aspx#> (last visited May 27, 2011).

²⁸ International Culture & Career Exchange website, available at <http://www.icceusa.com/HostOrganizations/Summer.aspx> (last visited May 27, 2011).

²⁹ Council for Educational Travel, USA website, available at <http://www.cetusa.org/public/offers/work-and-travel-program/for/employers> (last visited May 27, 2011).

³⁰ CIEE website, available at <http://dynamichire.ciee.org/AgentEvent.aspx?roadShow=959&agent=152&event=17189909&employer=81724> (last visited May 27, 2010)



We started recruiting back in 2003, and since then we've had over 700 students. A lot of them come year after year, as long as they can. They just provide a great labor force, especially when the American students have to go back to school; to have them stay around until the end of summer has been really beneficial.³¹

Another company featured in the testimonials is Xanterra Park & Resorts, which manages accommodations and facilities at Yellowstone National Park. Xanterra praises the SWT program and states that it has benefitted from it for 12 years. A statement from Morey's Piers is also included in the testimonials:

The Work & Travel program has worked exceedingly well for our company. We've been involved with it or over 20 years... It's not just about their wage and their paycheck. Five years from now they're not going to remember how much they made, they're going to remember about their experience.

These examples demonstrate that employers are using the SWT program as a regular staffing solution to meet their labor needs every year, and that the sponsor organizations are acting as de facto labor recruiters – and indeed represent themselves as such.

V. SIGNIFICANT FINANCIAL INCENTIVES EXIST FOR SWT SPONSORS

In addition to the employers' incentives to hire SWT workers over U.S. workers, the SWT sponsors are also profiting handsomely from the system. Official estimates of the profit earned by these entities are almost impossible to find, but the interim final rule provides the public with a snapshot of how much revenue sponsors in the SWT program are generating:

Of the 53 entities sponsoring SWT placements, 34 have annual revenues of less than 7 million dollars. These 34 entities account for approximately 15,000 of the 120,000 annual SWT exchange participants.³²

According to this information, 34 of the SWT program sponsors, which sponsor 12.5% of SWT participants, earn less than 7 million dollars per year. That means that the other 19 sponsors that engage the large majority of SWT participants – the remaining 87.5% – earn more than 7 million dollars per year. It must also be noted that these data do not even include the profits earned by the foreign cooperators and partners of the sponsors, who are likely to be earning a

³¹ Testimonials, CIEE website, available at <http://ciee.org/hire/work/testimonials.aspx> (last visited May 27, 2011).

³² 76 Fed. Reg. 23182



substantial share of the profits. In other words, these are not small organizations earning nominal amounts of revenue in order to facilitate cultural and educational exchanges. Instead, they are labor contracting businesses earning large profits for their services

VI. THE FINAL INTERIM RULE DOES NOT DO ENOUGH TO REMEDY THE INSUFFICIENT REGULATION AND OVERSIGHT INHERENT IN THE SWT PROGRAM

Much of the new (and current) regulatory language governing the SWT program is overly general and vague. This is key because the ultimate effectiveness of the rules and regulations, in terms of protecting U.S. and foreign workers, hinges upon how they are enforced, and vague rules are difficult to enforce. Under the regulations program sponsors are chiefly responsible for ensuring that their exchange visitor programs comply with all applicable regulations, including those that purport to protect U.S. and SWT workers. The State Department's role should be one of oversight, but as the Government Accountability Office³³ and Associated Press³⁴ have reported, State lacks adequate funding, time and staff to investigate complaints in person, or even to read the annual reports submitted by sponsors, and does a poor job of tracking complaints. What results is a system where sponsors are allowed to police themselves. This is problematic because even if a sponsor believes itself to be in violation of one or multiple program regulations, or believes an employer has violated the regulations or other labor laws, the sponsor has no incentive to report the violation/s to the State Department because this could jeopardize the sponsor organization's very existence, including the significant profits it earns, and its relationship with the employers who eventually hire the SWT participants – because the only serious sanction at State's disposal is the temporary suspension or revocation of the sponsor's designation.

Under the current system the sponsor organizations are expected to protect the interests and employment rights of SWT program participants, as well as the interests and employment rights of U.S. workers, despite the fact that those interests may be in direct conflict with those of the sponsors and the employers that contract with them to hire exchange visitors. The State Department has also revealed that sponsors often “outsource the core programmatic functions inherent in the administration of their programs” to

³³ See *Stronger Action Needed to Improve Oversight and Assess Risks of the Summer Work Travel and Trainee Categories of the Exchange Visitor Program*, United States Government Accountability Office, GAO-06-106 (October 2005).

³⁴ Holbrook Mohr and Mitch Weiss, *U.S. Fails to Tackle Student Visa Abuses*, Associated Press, December 6, 2010, available at <http://abcnews.go.com/Business/wireStory?id=12320099> (last visited June 25, 2011).



third parties, which include U.S. host employees and foreign partners or cooperators. When this occurs, the State Department “has no assurance that the third parties who perform these tasks are qualified to take on the required roles of the sponsors.” As the Department also stated, in the worst cases this means that sponsors become “mere purveyors of J-visas.”³⁵ Thus the sponsor, who has gone through the designation process, is often not even in charge of managing and overseeing the program and monitoring regulatory compliance – instead, the responsibility is delegated to employers or foreign labor contractors, about whom the State Department knows nothing. The new interim final rule of April 26, 2011 includes additional review and documentation requirements for sponsors contracting with foreign third parties and U.S. host employers that will perform the sponsors’ functions for them, but the sponsors remain in charge of reviewing their own practices and for “vetting” the third parties. A new report published by the AP in June 2011 predicted the new SWT rules will do little to change this.³⁶

What information we have about the SWT program, and more specifically, about how complaints and enforcement are handled by sponsors and the State Department, make it impossible to conclude that the current regulations adequately protect U.S. workers from adverse effects and displacement in the labor market. Program sponsors and the employers and other third parties they outsource their duties to cannot be expected to simultaneously fairly balance their own financial interests with those of U.S. and SWT workers, with such minimal oversight from the State Department.

In addition to this conflict of interest and lack of oversight, the State Department, SWT program sponsors and third parties have no expertise in issues related to employment law and enforcement, or regarding the protection of U.S. workers in the labor market, yet they are tasked with managing one of the largest temporary foreign worker programs in the United States.³⁷ In another temporary worker program, the H-2B visa program, the Department of Labor plays an integral role in the authorization of foreign workers through the labor certification processes, and the use of a required prevailing wage methodology. Although the rules in the H-2B category are deeply flawed in some respects, they at least represent some form of oversight and involvement by the Department of Labor (DOL), which has a duty to protect the wages and working conditions of U.S. workers. The SWT Program regulations, on the other hand, do not outline any role whatsoever for the Department of Labor in the J-1 visa granting process,

³⁵ 76 Fed. Reg. 23178

³⁶ Holbrook Mohr and Mitch Weiss, *Student Visa Program: New Rules, Same Problems*, Associated Press, June 20, 2011, available at <http://www.huffingtonpost.com/2011/06/20/student-visa-program-new- n 880202.html> (last visited June 25, 2011).

³⁷ In terms of the number of guestworkers entering the country every year – not in terms of the total “stock” of temporary foreign workers in the United States at any given time.



nor in prosecuting labor violations committed by employers or suffered by U.S. and/or SWT workers in the context of the program. DOL is the appropriate agency to perform these functions, and possesses the staff expertise required. The State Department, on the other hand, is primarily tasked with conducting the foreign affairs³⁸ of the United States – not the advancement of “opportunities for profitable employment” or the assurance of “work-related benefits and rights” for U.S. workers.³⁹

In the absence of both adequate self-regulation by sponsors and third parties or any involvement by the DOL, U.S. workers who feel that their wages and working conditions have been adversely affected by foreign worker participants in the SWT Program, or who believe they have been displaced or replaced by a SWT worker, are left only with the option of filing a complaint with the ECC at the State Department. The only tools the ECC has at its disposal are the suspension or revocation of program sponsor designation, letters of reprimand or a reduction in the total number of participants authorized to a sponsor. As the AP revealed in its 2011 report, no SWT sponsor has ever had its designation revoked for allowing the abuse of foreign students, and the State Department’s website shows that only one SWT sponsor has had its designation terminated since 2006⁴⁰ – which means that the few sanctions available to the Department are scarcely used, making them useless as a deterrent. The State Department has no additional authority to provide relief to U.S. workers or exchange visitors. If an employer commits acts that violate labor or employment laws, an exchange visitor seeking remedies must pursue those claims through another appropriate government agency or the courts (presumably with the help of an attorney, and at their own expense). The sponsors are under no legal obligation to assist or support the exchange visitor in pursuing claims stemming from potential workplace violations; sponsors are only obligated to inform participants of their rights.

VII. THE SWT PROGRAM IS INCONSISTENT WITH THE FULBRIGHT-HAYS ACT

Nothing in the Fulbright–Hays Act of 1961 even remotely suggests that the Exchange Visitor Program was intended to function as a seasonal guestworker program to meet the staffing needs of U.S. employers – but this is exactly what

³⁸ State Department Mission Statement, *available at* <http://www.state.gov/documents/organization/150505.pdf> (last visited May 27, 2011).

³⁹ Department of Labor Mission Statement, *available at* <http://www.dol.gov/opa/aboutdol/mission.htm> (last visited May 27, 2011).

⁴⁰ *Closed Sanction Cases Covering the Period 2006 to date*, State Department website, *available at* <http://exchanges.state.gov/media/office-of-private-sector-exchanges/pdfs/closed-sanction-cases-2006-to-date-feb-11.pdf> (last visited June 25, 2011).



the SWT program has become. Even though the SWT program has received explicit, additional congressional authorization, it is highly unlikely that the program is consistent with the goals and purpose of the original Fulbright-Hays statute. Nevertheless, this legal authority permits the State Department to manage one of the largest guestworker programs in the United States without meaningful consultation or cooperation with the other two federal agencies that normally play a major role in the execution of U.S. immigration policy, and without requiring even a basic assessment of the conditions or needs of the U.S. labor market. Exchanges for employment purposes that are not educational, scientific or cultural in nature, especially in the case of low-skilled guestworkers who participate in the SWT program, are not in the spirit of the original legislation that created the Exchange Visitor Program.

VIII. THE MISTREATMENT OF YOUNG SWT EXCHANGE VISITORS AND ITS IMPACT ON FOREIGN AFFAIRS

The failure to adequately protect the well-being of foreign visitors who participate in the program, as evidenced by the two recent news reports from the Associated Press, has diminished any ostensible diplomatic value the Department might argue that the program holds.

Some of the AP's alarming findings in December 2010 were illustrated by the harrowing individual stories of the SWT participants in the report. One girl participated in the program in order to save money for dental school but ended up without a job and "begging for work on the Myrtle Beach boardwalk and sharing a three-bedroom house with 30 other exchange students." A Russian 19 year-old girl who couldn't earn enough to survive working at a souvenir shop had to work as a cocktail waitress at a strip club in order to make ends meet. A Mongolian student and four other exchange visitors were fired from their fast food jobs after complaining about each having to pay \$350 a month to live in a converted garage. And three Ukrainian women worked 14-hour days without being paid overtime and had to eat on the floor.

In the most extreme cases, SWT participants were either forced into sexual slavery or left with no other choice but to become strippers or enter the sex trade. Two Ukrainian women were promised waitressing jobs in Virginia, but instead had their passports taken from them and were forced to work as strippers in Detroit, while being regularly beaten and threatened with a gun, and one of them was forced to have sex against her will. Unfortunately, this does not appear to be an isolated incident, because an Immigration and Customs Enforcement agency official admitted to the AP that there are "at least two federal investigations" ongoing regarding the use of J-1 visas to facilitate human trafficking – but the official would not elaborate or provide additional details.



In some communities, SWT participants turned to charity in order to survive. In the summer of 2010, a church in Ocean City, Maryland “served more than 1,700 different J-1 participants from 46 countries who sought free meals...sometimes upward of 500 in one night,” and in Virginia Beach, Virginia, a homeless shelter was feeding twice as many people as usual because so many exchange visitors were showing up. Although the report does not mention this, some of the areas identified by the AP with large SWT populations were already suffering from high levels of unemployment – and an influx of thousands of desperate temporary workers can exacerbate the challenges of a local labor market lacking enough jobs to satisfy the needs of its residents, in addition to putting pressure on charitable organizations whose resources may already be stretched to the limit.

The AP’s findings also exposed how the State Department’s efforts to protect the SWT exchange visitors and to monitor the program have been exceptionally negligent – at best. The AP quoted a Sheriff’s Department investigator in the Florida Panhandle describing how the abuse and exploitation of exchange visitors is an “epidemic” and occurs every year by the same companies, despite the fact that he always notifies the State Department about it. The AP also described how the country of Belarus notified its residents in 2006 “to avoid going to the U.S. on a J-1, warning of a “high level of danger” after one of its citizens in the program was murdered, another died in what investigators in the U.S. said was a suicide, and a third was robbed.” And the following is the most mind-boggling example: when the AP asked the State Department (via a FOIA request) for a complete list of complaints made about the Exchange Visitor Program – it received a response from the Department one year later admitting that State did not compile or keep any database of complaints, but had just created one in November 2010, after the AP’s request was made. The State Department also “did not provide a copy of the [newly created] complaint database to the AP or indicate how many complaints it included,” and State’s officials even refused to “discuss on the record the problems that have plagued J-1 visas.” The AP exposed the State Department’s failure even to keep track of the problems in its SWT program, as well as its aversion to transparency about it.

When mistreatment or unfortunate incidents lead embassies in Eastern Europe to warn their residents to “avoid going to the U.S. on a J-1” because of a “high level of danger,” the U.S. has lost its credibility to run a safe, successful and worthwhile exchange program that benefits foreign visitors. When federal agencies are investigating the possibility that foreign students are becoming the victims of human trafficking through the SWT program, and when the State Department admits that the program has also played a role in facilitating “money laundering, money mule schemes and Medicare fraud” and that SWT participants themselves have been “either knowingly engaging in or becoming



hapless victims of and accessories to criminal activities,”⁴¹ it’s clear that the unfortunate domestic consequences of this program for foreign visitors and U.S. workers outweigh the diplomatic benefits of the SWT program. Young people who suffer as victims of these crimes will not return to their home countries with a positive impression of the United States – this in turn will lead to negative impressions of the United States in the countries that send SWT participants – because these sending countries will view the United States as a country with a reckless disregard for the safety and well-being of young and vulnerable foreign visitors, that allows them to be victimized by criminals and exploited by employers for financial gain.

IX. CONCLUSION

For the reasons listed above in these public comments, it is clear that the SWT program should be terminated as an Exchange Visitor Program category by the Department. In fact, Congress should examine how the SWT program has grown to be one of the largest guestworker programs in the United States while being managed with minimal oversight by an understaffed and under-resourced compliance division in an inappropriate agency. The Department’s lack of knowledge of how the labor market works, combined with its primary concern to conduct diplomacy and foreign affairs, means that the Department either does not realize the impact on U.S. workers that an additional 130,000 workers per year in the labor market may have or does not care, because it’s principally concerned with conducting *foreign* affairs. Ultimately, it is not clear that anyone benefits from the SWT program other than participating U.S. employers and sponsor organizations. If the SWT is to continue, the State Department should provide evidence demonstrating how the country benefits culturally and educationally from having 130,000 workers enter the country each year to take employment that young Americans – particularly minority youth -- desperately need, without any showing that U.S. workers are unavailable, and without the basic protection of a prevailing wage to prevent against adverse affects on the wages of U.S. workers.

If the program is not eliminated, then in the alternative, the domestic operation of the program should be turned over to the Department of Homeland Security and the Department of Labor. A statutory cap on the annual admission of SWT participants should be created, one that does not allow more than 15,000 participants each year. An enforceable prevailing wage rule and methodology would also have to be created, and most importantly, employers wishing to hire SWT workers would be required to recruit U.S. workers across the country before being allowed to hire SWT workers from abroad. In addition, U.S.

⁴¹ 76 Fed. Reg. 23177 (April 26, 2011).



Immigration and Customs Enforcement should play a leading role in enforcing the program's regulations within this new framework. Allowing the State Department to continue to operate the domestic aspects of its large guestworker program ignores the agency's limitations and its mandate, and diminishes its credibility to focus on what it does best, which is to conduct the foreign affairs of the United States on foreign soil.

Sincerely,

A handwritten signature in dark ink that reads "Ross Eisenbrey". The signature is written in a cursive style with a clear, legible font.

Ross Eisenbrey
Vice President
Economic Policy Institute

A handwritten signature in dark ink that reads "Daniel Costa". The signature is written in a cursive style with a clear, legible font.

Daniel Costa
Immigration Policy Analyst
Economic Policy Institute