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RE: RIN 1400-AD14 [Public Notice 7875]. Interim Final Rule: Exchange Visitor Program – Summer Work Travel; 77 Fed. Reg. 27593 (May 11, 2012).

About EPI: Since 1986, the Economic Policy Institute has investigated and reported on labor market issues and the conditions of low- and middle-income workers. EPI examines the economic landscape and analyzes what is happening to working families – including vulnerable young workers who enter the country with J-1 visas to participate in the Summer Work Travel program (SWT), as well as the high percentage of young unemployed Americans who are actively seeking employment opportunities.

We salute the State Department’s desire to fortify “the Program’s prestige as a world class U.S. public diplomacy initiative.” To do so will require reforms that, at a minimum, do the following:

I. ENSURE THAT J-1 STUDENTS KNOW, BEFORE THEY PAY A SPONSOR OR A RECRUITMENT FEE, THAT THEY WILL EARN AT LEAST A MINIMUM AMOUNT DURING THEIR MONTHS IN THE UNITED STATES.

The SWT students must know in advance whether the cost to them of housing and food, combined with poor pay and insufficient hours, will leave them poorer after working for four months than when they started.

Thus, the students must know that their wage will never be less than the federal minimum wage, even if it is not technically applicable to their employment and when any applicable state or local minimum wage is less than the federal minimum. The SWT Program is a federal program, and the federal minimum wage must be the floor for wages. We know of a current case where the employment – cooking at a summer recreational camp – is exempt from the Fair Labor Standards Act (FLSA) and a J-1 student is being paid only \$2.00 an hour.

The solution is to make the sponsor responsible for assuring that students receive at least the federal minimum wage for each hour of work, regardless of any exemption or question of coverage. The IFR is insufficient because in situations where no minimum wage applies at all, it provides no protection to the J-1 employee.

Sponsors should be required to provide each J-1 a guarantee of minimum hours, along the lines of the $\frac{3}{4}$ guarantee in the H-2A visa program and the Department of Labor's new H-2B regulations. It would undermine State's goal of operating a world class, prestigious program if foreign students who pay thousands of dollars to travel to the U.S., with the expectation of earning enough to repay their expenses and have sufficient funds to travel within the U.S. after working, are impoverished instead. After all, the target group for this program is – as the IFR's background section states – “persons who were otherwise financially unable to visit the United States.”

In order to achieve this goal, the requirements on **participant compensation** at 22 C.F.R. § 62.32(i) need clarification. For example, if no minimum wage applies to a job because the employer is small, in an excluded industry, or because the occupation is exempt, there must still be a minimum wage imposed by this rule. The obvious choice is the federal minimum wage, which is currently \$7.25 an hour. No enforcement provision appears in the text, and it might be too much to expect State to kick a sponsor out of the program because an employer failed to pay the minimum wage to a J-1 student. But in such a case, the sponsor should be jointly responsible and should be required either to make the employee whole or lose its right to be a sponsor.

Likewise, with respect to the payment of wages and benefits commensurate with those provided to similarly situated U.S. employees, the sponsor should be held responsible for paying if the employer does not. The text requires the sponsor to require the employer to make up the difference if its piece rate leads to wages less than the highest applicable minimum wage or the locally prevailing or predominant wage paid to similarly situated employees. The text should require the sponsor to pay the SWT worker this make-whole payment if the employer does not.

If the Department does not find it feasible to ensure that SWT workers are paid at least the minimum wage as we have described, then alternatively, all jobs and occupations that are exempt from the federal minimum wage should be prohibited in the SWT program.

Furthermore, it is a weakness that the text does not tell an employer or sponsor how to determine what the predominant local wage is. The rule should require sponsors to consult the

Department of Labor's Occupational Employment Statistics to make that determination, or to get help from DOL. However, formal cooperation with DOL, for example, having DOL certify the prevailing wage that the employer has promised to pay, would be preferable and better protect SWT workers from exploitation. DOL could enforce the prevailing wage by randomly auditing a percentage of SWT host employers each year. A small percentage of the program fees collected by sponsors could be used to fund the staff hours required for the audits.

Finally, the language in § 62.32(i) fails to explicitly state that the SWT worker is not responsible for tools, uniforms, and other equipment necessary to perform the job they've been hired to do. A provision should be included that unambiguously states the host employer's responsibility to provide the SWT worker, without charge or deposit, all tools, supplies, and equipment required to perform the assigned duties. Although FLSA allows employers to charge employees for certain supplies in some cases as long as it does not cause the employee's wage to drop below the minimum wage, it is unfair to require SWT workers to cover these costs, considering they have paid thousands of dollars to participate in the program and to travel to the United States, and are often earning at or near (and sometimes below) the minimum wage.

II. PREVENT OVERWORK AND PRESERVE SUFFICIENT TIME FOR EACH STUDENT TO ENGAGE IN MEANINGFUL CULTURAL ACTIVITIES AWAY FROM WORK.

Some students reportedly work as much as 80-100 hours a week,¹ even though the standard workweek in the United States is 40 hours. This creates several serious problems: the students will have no time or energy for required cultural activities; the students are more likely to displace U.S. workers; and such long work hours are unhealthy and unsafe.

The solution is to set a maximum number of hours that students may work in any week. A reasonable limitation is 48 hours, which adds an entire extra work day to the student's schedule. This limitation should be enforced in two ways: the students must agree to work no more than 48 hours as one of their program requirements, and sponsors must be required to get a commitment from every employer to whom they refer students not to employ a student for more than 48 hours in a week. Sponsors of employees who work longer hours should be banned from the program.

¹ See, e.g., Jack Nicas, "North Dakota City Draws Foreign Workers," *The Wall Street Journal*, June 28, 2012, accessed July 6, 2012, <http://online.wsj.com/article/SB10001424052702304830704577495022206535072.html>; James Kirchick, "From Serbia to Cape Cod," *The Atlantic*, July 28, 2011, accessed July 6, 2012, <http://www.theatlantic.com/national/archive/2011/07/from-serbia-to-cape-cod/242582/>.

The section on **host employer cooperation** at 22 C.F.R. § 62.32(o) should be strengthened accordingly. Host employers should be required to agree to pay time and a half for overtime without respect to whether it is required by the FLSA or state law. Employers should be discouraged from scheduling students for more than 40 hours of work per week (which an overtime pay requirement helps accomplish) and should be forbidden from scheduling more than 48 hours of work in a week. In addition, because certain municipalities, such as Santa Fe and San Francisco, set local minimum wages higher than the federal or state standards, host employers should be required to pay them, where applicable.

III. ENSURE THAT THE PROGRAM IS NOT USED AS A WAY TO DISPLACE U.S. WORKERS DELIBERATELY OR DEPRESS WAGES, OR INADVERTENTLY DENY EMPLOYMENT OPPORTUNITIES TO YOUNG PEOPLE IN THE UNITED STATES.

The IFR does little to ensure that these goals are met, but there are several obvious changes that would help.

Employers have strong incentives to hire J-1 students, including substantial cost savings from not having to pay FICA and Medicare taxes, or FUTA taxes. These savings can exceed \$100 on each \$1000 of payroll. These savings are advertised on websites that include calculators to help employers understand how much they have to gain by hiring a J-1.

As a result, extraordinary steps must be taken to let U.S. workers know that positions are or will be open, before J-1s are recruited. No employer should be able to hire a J-1 if the employer has not first submitted a position announcement to the State Workforce Agency and attested that the employer will hire any qualified U.S. applicant who comes forward and who is willing to work for the advertised wage.

Employers should also be required to advertise the jobs locally in a newspaper for at least two days, specifying a wage at least as high as that ultimately paid to the J-1 before resorting to J-1 SWT employees. These requirements should be enforced against the sponsors, who should be forbidden from referring students to employers that cannot prove they have met them.

Alternatively, the State Department could also create a searchable, public online database of SWT jobs, and require that all job openings first be posted there. This would ensure that unemployed U.S. workers have an opportunity to apply for short-term seasonal jobs across the country. Employers could be required to advertise the job openings there for at least one month. As some immigration lawyers advertise, employers can get J-1 workers from abroad in

about six weeks.² Thus, it would not be onerous to require employers to advertise jobs to local U.S. workers for a single month before they are allowed to apply for SWT workers. In most cases, SWT jobs will be seasonal (and the vast majority are available during the summer months) so employers should know approximately when they will need these workers and how many positions will become available. If no minimally qualified U.S. workers are available after one month, the potential SWT employer can still get an SWT worker in a very short time. DOL could investigate compliance with this rule, both through examination of individual complaints and post-entry audits.

Students should also be encouraged to find out from their sponsors what the prevailing wage is for any job they intend to take. Sponsors can learn this easily on the Department of Labor's Occupational Employment Statistics website, or they can call DOL themselves.

IV. ENSURE THAT THE PROGRAM IS, AS IT WAS INTENDED BY CONGRESS TO BE, FIRST AND FOREMOST A CULTURAL EXCHANGE.

"Culture" construed broadly enough can mean almost any aspect of society, but it was clearly not intended to be work. The history of the Program is that work experience was added in 1961 as a way to enable less wealthy students to take part in the program by allowing them to earn money while here. The central cultural exchange focus has been lost over the years as sponsors developed relationships with employers who have come to depend on a steady stream of J-1s. It is now the case that no minimum amount of cultural activity has to take place and many students think of the J-1 SWT as simply a work program with a month of travel at the back end.

The Regulatory Impact Analysis for this rule reveals just how little State intends to demand of the sponsors in this regard: "The Department estimates that the new cultural component requirement will cost, on average, \$20 per participant." This is the cost of two hotdogs and a soda at a major league baseball game. This admission is an appalling indictment of this "world class U.S. public diplomacy initiative" and shows how little attention has been paid to "the core cultural component necessary for the Summer Work Travel Program to be consistent with the intent of the Fulbright-Hays Act."

The actual regulatory requirement is so vague as to be almost meaningless, though it admittedly would forbid a sponsor from allowing a student no opportunity to do anything but

² See, e.g., "Work Visas for the Hospitality Industry: J-1, H-3, H2B, L-1, E2, TN and H-1B," Law Offices of Jacob J. Sapochnick, Youtube.com video, accessed July 6, 2012, <https://www.youtube.com/watch?v=J7UCjITnwGA>.

work. No minimum number of events, no minimum time, and no direction regarding cultural diversity or the range of activities to which students should be exposed (music, theatre, dance, art, sports, poetry, crafts, etc.) is specified. All that is required is that “participants have opportunities to engage in cultural activities,” and that sponsors plan, initialize and carry out at least two events or activities “that provide participants’ exposure to U.S. culture.” Arguably, two sessions watching *Lost* or the *The Simpsons* on TV would satisfy this requirement.

V. CREATE A “BLACKLIST” OF HOST EMPLOYERS THAT ARE BANNED FROM THE PROGRAM FOR COMMITTING LABOR, EMPLOYMENT, AND WORKPLACE SAFETY LAWS AND REGULATIONS.

We were surprised by the State Department’s unambiguous statement that it has no jurisdiction over employers participating in the program. However, the State Department has broad authority to exercise jurisdiction over employers by virtue of establishing who may or may not participate in the program. The Department has instead put its faith in nongovernmental companies – the sponsors – in the hopes that sponsors will be able to convince employers to act in good faith and comply with the rules, despite the fact that a troublesome conflict of interest arises by virtue of employers and sponsors being de facto business partners.

It is understandable that the State Department does not wish to directly monitor employers considering its staff lacks expertise in labor and employment law. However, the Department should make sponsors jointly responsible for compliance with labor standards. It should also prohibit sponsors from placing students with employers that have violated the law.

At present, if a sponsor takes action against an employer who is failing to comply with program rules by banning the employer, the non-compliant employer is not prohibited from entering into a partnership with another sponsor. State should create a centralized list of prohibited, bad actor employers that sponsors must review before entering into a partnership with an employer. Sponsor “shopping” by non-compliant employers puts SWT workers at risk; thus, affirmative action must be taken to prevent it.

VI. PROHIBIT SWT WORKERS FROM BEING EMPLOYED IN THE OCCUPATIONS OF HOUSEKEEPING, MODELING, AND JANITORIAL SERVICES.

The **participant placement** section of the IFR at 22 C.F.R. § 62.32(g) requires sponsors to “use extra caution when placing students in positions at employers in lines of business that are frequently associated with trafficking persons (e.g., modeling agencies, housekeeping, janitorial services).” Because the Department acknowledges that the three occupations listed as examples are “frequently associated” with human trafficking, from the perspective of protection for program participants, it would be indefensible for the Department to continue to allow those occupations to make up part of the SWT program. There is no good reason to risk a stain on the reputation of this program of cultural diplomacy.

The fact that these occupations have been identified as high-risk should be enough to justify their exclusion from the SWT program. But furthermore, because the term “extra caution” is vague and undefined, in practice this rule will place no affirmative requirement on sponsors that would help protect the vulnerable participants who work in these occupations.

Sponsors and the State Department should encourage employers seeking SWT workers in these three occupations to instead use the H-1B program for modeling, and the H-2B program for housekeeping and janitorial occupations. Both the H-1B and H-2B programs, while far from ideal, nevertheless offer improved protections for foreign workers in those occupations and oversight by the Departments of Labor and Homeland Security.

VII. INSTITUTE A LOWER NUMERICAL LIMIT TO THE SWT PROGRAM THAT IS INVERSELY TIED TO THE YOUTH UNEMPLOYMENT RATE.

The State Department has taken another positive step by capping the number of annual participants in the SWT program at 109,000. For years, the program grew rapidly despite scathing criticisms of mismanagement from government auditors and inspectors. Halting the program’s growth is the smart thing to do considering its inherent weaknesses. But in light of the high unemployment rate among young people in the United States we recommend the number of participants be reduced further.

The latest statistics on youth unemployment are stunning: Workers under 25 who are not currently enrolled in school and have only a high school diploma averaged an unemployment rate of 21 percent over the past year; for those with a college degree, the average was 8.3

percent.³ In order to ensure that the millions of young unemployed American job-seekers have a fair opportunity to land jobs that are being filled by SWT workers, the Department should set a maximum annual limit (or “cap”) on the program, which would vary according to the national youth unemployment rate.

We recommend that at the beginning of the fiscal year, if the national youth unemployment rate averaged above five percent during the preceding year, the SWT program should be capped at 30,000 (approximately the 1998 level). But if the national youth unemployment rate has averaged under five percent during the preceding fiscal year, the upper limit of the SWT program could be set at 50,000.

Reducing the program to this size would benefit participants by unburdening sponsors and the State Department from overseeing a program that has become too large to manage and oversee effectively. The GAO and State’s own Office of Inspector General have harshly criticized the Department’s oversight efforts – reducing the program’s size will go a long way to alleviating many of their concerns, since program officers and sponsors will have increased staff time to monitor participants and employers.

Finally, this recommended reduction would not significantly impact the State Department’s public diplomacy efforts through the J-1 Exchange Visitor Program, because the Department will continue to admit over 200,000 exchange visitors in 15 other categories in addition to SWT.

VIII. PUBLISH DETAILED GEOGRAPHICAL, OCCUPATIONAL, AND WAGE DATA ON SWT PARTICIPANTS AND HOST EMPLOYERS.

The State Department should make the identities and locations of all employers in the program, the number of SWT workers employed at each host employer, the wage the host employer has promised to pay, and the occupational titles of all SWT participants available online to the public. This would make the program consistent with the other main nonimmigrant visa categories that involve employment, i.e., the H-1B, H-2A and H-2B visa programs.

It is difficult to determine the impact of the program on the labor market without these basic data. Except for the wage data, much of this information is likely to be stored already within the SEVIS database, so it would simply be a matter of the State Department or Immigration and

³ Heidi Shierholz, “The labor market is trading water,” Economic Policy Institute, July 6, 2012, accessed July 6, 2012, <http://www.epi.org/publication/labor-market-trading-water/>.

Customs Enforcement (ICE) releasing it to the public. Collecting and releasing these data would also be technologically feasible and inexpensive. State or ICE already collects and reports limited real-time data sets from SEVIS in the SEVP Quarterly Review reports⁴ and on the J-1 Visa Website's interactive map, under the "Facts and Figures" section.⁵ For a model of how to collect and release these data, the State Department need look no further than the Labor Department's Foreign Labor Certification Data Center and Employment and Training Administration websites.⁶

The State Department has not explained or provided any justification for keeping SWT employer, occupational, and wage data secret from the public. The Labor Department's publication of labor certification data in the H visa categories offers the public a minimum level of transparency about the use of temporary foreign workers in the United States that the State Department – which continues to manage one of the largest guest worker programs in the world – should aspire to, and replicate.

Additionally, the Department should be more transparent about the locations where SWT workers reside, by publishing the location of all employer or sponsor-provided housing. This will help protect against SWT workers being hidden away in substandard conditions, because civil society organizations, and investigative staff from the State Department and DOL will be easily able to locate and check in on them when complaints arise.

IX. TAKE STEPS TO ESTABLISH A CLEAR AND ENFORCEABLE EMPLOYMENT CONTRACT BETWEEN THE SPONSOR, HOST EMPLOYER AND SWT WORKER.

As we have argued before in the context of the proposed DS-7007 form,⁷ the SWT program lacks an unambiguous, enforceable employment contract, which leaves SWT workers vulnerable to employer exploitation and abuse. Attorneys who represent the interests of SWT workers around the country – who are in most cases suing for minimum wage and overtime violations – have identified this as a major weakness in the SWT program framework. Many important questions remain unanswered in this regard: Is the DS-2019 form an employment

⁴ See, e.g., "Student and Exchange Visitor Information System, General Summary Quarterly Review For the quarter ending March 31, 2012," SEVP Quarterly Review, January - March 2012, Data retrieved April 2, 2012, accessed July 6, 2012, http://www.ice.gov/doclib/sevis/pdf/quarterly_rpt.pdf.

⁵ J-1 Visa Website, State Department, accessed July 6, 2012, <http://j1visa.state.gov/basics/facts-and-figures/>.

⁶ Foreign Labor Certification Data Center website, accessed July 6, 2012, <http://flcdatcenter.com/>; "Office of Foreign Labor Certification Case Disclosure Data," Employment and Training Administration website, U.S. Department of Labor, accessed July 6, 2012, <http://www.foreignlaborcert.doleta.gov/quarterlydata.cfm>.

⁷ Daniel Costa and Ross Eisenbrey, "Public comments: *Public Notice 7695: 60--Day Notice of Proposed Information Collection: Form DS-7007, Summer Work Travel Job Placement Verification Form.* 76 Fed. Reg. 72,996 (Nov. 28, 2011)," Economic Policy Institute, January 27, 2012.

contract? Is the employer or sponsor's own online data collection form an employment contract? At what point has a contract been formed?

The lack of a clear answer to these questions has made it extremely difficult for attorneys and SWT workers to win judgments against employers who act illegally. Thus, a legally enforceable tri-partite (sponsor, employer, and SWT worker) employment contract must become a basic component of the SWT program. The contract must explicitly establish that sponsors and host employers are jointly and severally liable for all wage violations, because State takes the position that program regulations are not binding on employers, just on sponsors, who are only empowered to advise and encourage employers to act legally and consistently with program rules.

X. INSERT A NEW REGULATORY PROVISION EXPLICITLY PROHIBITING HOST EMPLOYER AND SPONSOR RETALIATION AGAINST SWT WORKERS WHO ENGAGE IN PROTECTED ORGANIZING ACTIVITY OR ASSERT THEIR RIGHTS UNDER ANY LOCAL, STATE, OR FEDERAL LAW.

A new regulatory provision is required that protects SWT workers from unfair treatment and retaliation against them by host employers and sponsors for engaging in protected labor organizing activities. These protections are essential to the labor and employment rights of SWT workers, because without them, workers will be too frightened to complain about abusive working conditions suffered at the hands of host employers. The sponsors who work with host employers have also retaliated against SWT workers by blocking enforcement of workplace rights and otherwise contributing to the exploitation of SWT workers, in order to protect the interests of the host employer (i.e., the sponsor's de facto business partner). In some cases, sponsors have threatened SWT workers with program termination and deportation, and falsely told them that they will not be allowed to reenter the United States if they fail to keep quiet about conditions in the workplace.

Without these protections, SWT workers will rightly be afraid of retaliation at the hands of their employer or sponsor, and reasonably fear losing their job and being removed from the country. Not having the chance to earn enough to survive day-to-day or to pay back the debts incurred in order to partake in the SWT program can have a disastrous impact on the lives of SWT participants.

This new SWT rule should protect against unfair discharges, blacklisting, coercion and other threats made by employers and sponsors. And it should use strong language protecting

communications and consultations with workers' centers, community organizations, labor unions, legal assistance programs, and attorneys. The strong and broad language protecting communications is especially necessary because private attorneys are likely to be unaffordable for SWT workers, and because Legal Services Corporation (LSC) rules do not allow LSC attorneys to represent most SWT workers. As a result, oftentimes the first person with whom an SWT worker will discuss problems in the workplace is a staff member or representative of a union, workers' center or another public interest advocacy organization or non-profit organization.

A good model for the new rule we propose can be found in the 2012 final (but currently not in force) H-2B rule, at 20 C.F.R. §655.20(n), titled "No unfair treatment."

In addition, the new rule should be clear about the process to protect SWT workers when a sponsor engages in such actions. Most importantly in this context, State should not rely on the sponsor for investigative assistance, should not continue to allow the sponsor to determine the worker's compliance with program rules, and should not permit the sponsor to make determinations relating to whether an SWT worker remains in lawful immigration status.

ADDITIONAL COMMENTS ON NEW PROVISIONS IN 2012 IFR

The State Department solicits comments on the updated and new sections contained within the 2012 IFR, which are listed on page 27595. The following are our comments and suggestions to selected provisions and regulations of interest. We have kept the original numbering that corresponds to the summarized list on page 27595.

2. Individuals enrolled full time in on-line universities are not eligible for the program;

We support the requirement that under 22 C.F.R. § 62.32(d)(4), SWT participants be enrolled in, or have recently graduated from, "classroom-based" academic institutions, and not on-line universities. Requiring sponsors to verify the existence of foreign online-based universities is likely to be difficult for sponsors because of a lack of access to information that would allow the sponsor to verify that the university offers a genuine and traditional academic experience, or to determine even basic information, including for how long the online university has been in existence.

A foreseeable result of not having this restriction would be that websites which are fraudulently posing as foreign online universities could be used to facilitate the unlawful entry of ineligible non-student participants and workers.

3. Sponsors and foreign entities cannot provide host employers cash or gift incentives (though they may host job fairs):

The two sections that prohibit the provision of cash or gift incentives from sponsors or foreign entities to employers are found at 22 C.F.R. §§ 63.32(g)(1) and (l)(v). Both are important provisions which we support, because they aim to prevent sponsor bribery of host employers.

According to the State Department, sponsors earn millions of dollars in annual revenues. For example, out of a total of 49 SWT sponsors, the 13 largest have combined annual revenues of at least \$112 million.⁸ Sponsors will naturally hope to continue to earn revenues at current levels or to increase them, but there exists the possibility that job placements across the United States may be difficult to find for SWT workers when millions of unemployed American job-seekers are desperate for work. Thus, the State Department should unambiguously prohibit bribes or other incentives offered by sponsors to host employers to gain job placements for their own SWT workers.

However, the IFR fails to prevent possible bribery from going in the other direction. We propose additional regulatory language to prohibit sponsors from receiving cash, gifts, or other incentives offered by employers as compensation or a bribe, seeking to convince sponsors to provide the employer with SWT workers. We propose the following language be added to 22 C.F.R. § 63.32(g):

Sponsors and third parties acting on their behalf may not receive any cash or gift incentives from an employer for providing the employer with SWT workers.

Some employers are eager to receive SWT referrals because compared to a U.S. worker, an SWT worker is usually less expensive (because of the savings on payroll taxes and the lack of an effective prevailing wage requirement) and less likely to complain about wages or working conditions (because the SWT workers have so much to lose from being fired and losing their visa status).⁹ Our proposed additional language clearly expresses the principle that a sponsor may not send an SWT worker to the highest bidding employer – instead, a sponsor should

⁸ 77 Fed. Reg. 27606

⁹ See generally, Daniel Costa, “Guestworker Diplomacy: J visas receive minimal oversight despite significant implications for the U.S. labor market,” (Washington D.C.: Economic Policy Institute, July 14, 2011), accessed July 6, 2012, http://www.epi.org/publication/j_visas_minimal_oversight_despite_significant_implications_for_the_labor_ma/.

assign the SWT worker to the employer that the sponsor believes will best facilitate an educational and cultural exchange experience.

4. Sponsors must provide itemized annual cost schedules for all fees participants pay for program participation (including fees charged by foreign entities);

We support the new requirement at 22 C.F.R. § 63.32(p)(1) that sponsors provide the State Department with itemized cost schedules for fees paid by participants for the program. This will help provide additional transparency to the program and help the State Department track the types of fees charged to participants and the amounts that are paid for each. We believe this information should be tracked closely, with the ultimate goal of eliminating all recruiter fees and unnecessary and excessive program fees.

Because the State Department asserts that the SWT category “of the Exchange Visitor Program was implemented to open the program to those persons who were otherwise financially unable to visit the United States,”¹⁰ the program’s costs should be minimized so that participants with limited financial means are not forced to work excessive hours and multiple jobs, or to accept large amounts of debt just to participate in the program. This can be accomplished by prohibiting sponsors from working with foreign and domestic recruiters who charge anything more than a nominal recruitment fee, and by setting a cap on the amount of program fees that are charged by sponsors in the United States. Many sponsor organizations are multimillion-dollar entities that have profited by charging significant fees to SWT workers who typically earn wages near the minimum wage.

7. Sponsors must annually vet host employers and third parties (foreign and domestic) and each season must reconfirm the number of jobs available with each host employer;

The vetting requirements listed at 22 C.F.R. § 63.32(n) do not go far enough to ensure that SWT workers are placed with host employers that offer a safe workplace. Although section 63.32(n) requires sponsors to conduct desk research and contact the employer, there is no requirement that the sponsor visit and inspect the premises where the SWT worker will be employed. This section should require the sponsor’s Responsible Officer (RO) or another representative to complete two additional tasks as part of the vetting process.

¹⁰ 77 Fed. Reg. 27596

First, they should use something like the Eat, Shop, Sleep mobile phone application¹¹ or contact the Department of Labor’s Wage and Hour Division, to inquire whether the host employer has recently been fined or found guilty of labor and employment law violations. Although the Background section of the IFR requires sponsors to check OSHA’s public list of recently sanctioned companies,¹² this requirement should be explicitly codified in the regulation. Next, the sponsor should be required to visit and inspect the host employer’s worksite in person, and then certify whether they consider the workplace to be a safe environment for the SWT worker.

The new regulatory provision that aims to prevent displacement of U.S. workers is welcome and encouraging, but ultimately insufficient. Section 63.32(n)(3)(ii) requires the sponsor to confirm “[t]hat host employers will not displace domestic U.S. workers at worksites where they will place program participants...” This overly vague provision fails to describe or offer guidance to the sponsor on the meaning of “displace.” For example: What criteria should the sponsor use to determine whether the displacement of U.S. workers has occurred? What questions should the sponsor ask the employer about past hiring and firing decisions? Which employer records and data could help the sponsor verify whether displacement has occurred?

The State Department should elaborate, because it is unlikely that program sponsors presently have the ability, expertise, and access to employer information to determine if U.S. workers might be displaced by the hiring of SWT workers. And perhaps more importantly, under the IFR’s regulatory framework, U.S. workers who have in fact been displaced continue to lack any remedies available to them via the sponsor or the State Department.

As part of the vetting process required under § 63.32(n), sponsors should be required to verify if potential host employers currently employ other temporary foreign workers in the “H” visa categories, or whether they have employed any H-visa workers in the preceding 5 years. This is because employers are likely to prefer to hire workers with J-1 visas instead of H visas – especially the H-2B visa – because employers do not have to pay the prevailing wage determined by DOL and are not required to recruit unemployed local workers.¹³ As the GAO has noted, J-1 visas are also “easier to administer.”¹⁴

¹¹ Eat Shop Sleep, mobile application by R. Moore, iTunes preview website, accessed July 6, 2012, <http://itunes.apple.com/us/app/eat-shop-sleep/id465262611?mt=8>.

¹² 77 Fed. Reg. 27604

¹³ See generally, *Guestworker Diplomacy*, *supra* note 9.

¹⁴ United States General Accounting Office, “U.S. Information Agency: Inappropriate Uses of Educational and Cultural Exchange Visas (GAO/NSIAD-90-61)” (Washington D.C.: GAO, 1990), at 22, accessed July 6, 2012, <http://archive.gao.gov/t2pbat12/140621.pdf>.

In order to confirm if an employer has hired workers with H visas during the previous five years, sponsors can easily access and search the publicly available labor certification databases maintained by the Department of Labor at the Foreign Labor Certification Data Center and the Employment and Training Administration websites.¹⁵ After cross-checking the databases, the sponsor can then inquire directly with the employer about their use of H-visa temporary foreign workers. If the employer currently employs any worker with an H visa at the proposed worksite, or if an H-visa authorized worker has been employed there anytime during the past five calendar years, the sponsor should be prohibited from providing the SWT worker to that employer.

This is important because the GAO also pointed out that when exchange visitors are allowed to “engage in activities” that do not fulfill the purpose of educational and cultural exchange, and which would be more appropriate under other work or training visas, this “dilutes the integrity of the J visa” and “obscures the distinction between the J visa and other visas.”¹⁶ As EPI and media reports have documented, some employers are using H-2B and J-1 visas in the same workplace, or are switching from H-2B to J-1 visas in order to reap financial and administrative benefits.¹⁷

ADDITIONAL COMMENTS SOLICITED ON IFR’S UPDATED LIST OF PROHIBITED OCCUPATIONS

We strongly support the updated list of prohibited occupations in the SWT program. The following are brief comments with respect to two specific provisions.

22 C.F.R. § 63.32(g)(5)(iii) prohibits sponsors from placing SWT participants in jobs “[f]or which there is another specific J visa category (e.g., Camp Counselor, Trainee, Intern).” We support this provision but suggest the rule be expanded to prohibit major occupations for which other categories of temporary foreign worker visas are commonly used. For example, the major occupations filled by temporary workers with H-2B visas (and which are not already excluded by other sections of the IFR) include landscaping and groundskeeping laborers, janitorial services, and housekeeping at hotels and resorts. These occupations should also be excluded

¹⁵ Id., *supra* note 6.

¹⁶ GAO, *supra* note 14.

¹⁷ See, e.g., John Lantigua, “Cultural exchange or cheap labor? Palm Beach County country clubs hire foreigners on student visas,” *Palm Beach Post*, March 28, 2012, accessed July 6, 2012, <http://www.palmbeachpost.com/news/business/cultural-exchange-or-cheap-labor-palm-beach-coun-1/nLhzP/>.

because employers are using both visas to fill these same occupations¹⁸ – which allows them to circumvent the worker protections built into the H-2B program that are intended to protect both foreign and U.S. workers and prevent the degradation of wages and working conditions in these occupations.

Although it is beyond the scope of this commentary and IFR, it is relevant to mention that other J-1 categories are also duplicating non-exchange visitor visa categories that are more appropriate for their intended purposes, and that are relatively better regulated. The most glaring examples are the J-1 intern and trainee categories. The two categories are unnecessary and redundant because the H-1B, H-2A, H-2B, and H-3 “trainee” visa categories – which are administered by the Departments of Labor and Homeland Security – are available for traditional employment or career training for nonimmigrants in the occupations that J-1 interns and trainees are commonly placed in.

22 C.F.R. § 63.32(h)(16) prohibits SWT occupations “in the North American Industry Classification System’s (NAICS) Goods-Producing Industries occupational categories industry sectors 11, 21, 23, 31–33” after November 1, 2012. We strongly agree with the prohibition of these occupations, and commend the Department for acting to institute this ban on the hazardous jobs found in, for example, fish processing and mining occupations. Participants working in a cultural exchange program should not work in dangerous jobs they are not adequately trained and prepared for. Construction occupations are also banned – and considering that more workers die in construction each year than any other industry, and construction workers in the United States continue to suffer a prolonged period of double-digit unemployment¹⁹ – this makes perfect sense.

The ban on these occupations does not take effect until November 1, 2012. This grants employers who have become dependent on SWT workers in these industries ample time to modify their workforce by recruiting local workers or petitioning for temporary foreign workers in the H-2A or H-2B programs. Because the vast majority of SWT workers are employed in the United States during the summer months, most employers with SWT workers in the prohibited industries will not be affected this calendar year, and have an entire year to plan for next season.

¹⁸ See, e.g., John Lantigua, “Critics say lax visa rules for foreign workers allow abuse by employers,” *Palm Beach Post*, June 10, 2012, accessed July 6, 2012, <http://www.palmbeachpost.com/news/business/employment/critics-say-lax-visa-rules-for-foreign-workers-all/nPQbW/>.

¹⁹ “Industries at a glance; Construction: NAICS 23,” Bureau of Labor Statistics website, accessed July 6, 2012, <http://www.bls.gov/iag/tgs/iag23.htm>.

CONCLUSION

EPI would like to express its gratitude to the State Department for the opportunity to be heard in the process of this rulemaking. We appreciate the Department's efforts to improve the SWT program, and hope that additional protections for J-1 and U.S. workers will result from the Department's consideration of these comments.

Sincerely,



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