"Global Workers Require Global Justice"

January 29, 2015

Attn: Ms. Laura Dawkins
Chief of the Regulatory Coordination Division
USCIS Office of Policy and Strategy
20 Massachusetts Avenue NW
Washington D.C. 20529-2140

Re: Notice of Request for Information
79 Fed. Reg. 78,458 – 78,460 (Dec. 30, 2014)
Agency/Docket Number: DHS Docket No. USCIS-2014-0014
Document Number: 2014-30641

SUBMITTED ONLINE

Dear Ms. Dawkins:

Global Workers Justice Alliance (Global Workers) submits these comments to the Department of State and Department of Homeland Security in response to the request for information Docket No. USCIS-2014-0014. President Obama's effort to streamline the legal immigration system and modernize the IT infrastructure is an important opportunity to improve worker protections and transparency in several of the nonimmigrant programs.

Global Workers is a member of the International Labor Recruitment Working Group (ILRWG), which separately submitted comments on addressing the abuses in international labor recruitment across visa categories. These present comments address several of the nonimmigrant and humanitarian visa categories. As directed by the notice in the federal register, the comments herein are organized according to the particular question to which they are responsive.

BACKGROUND ON GLOBAL WORKERS

Global Workers combats worker exploitation by promoting portable justice for transnational migrants through a cross-border network of advocates and resources. Global Workers believes that portable justice, the right and ability of transnational migrants to access justice in the country of employment even after they have departed, is an under-addressed element to achieving justice for today's global migrants.

Global Workers' core work involves training and supporting a Defender Network, comprised of human rights advocates in migrants' countries of origin. The Network educates workers on their rights before they migrate, partners with advocates in the countries of employment on specific

cases of labor exploitation, and advocates for systemic change. Global Workers' U.S. legal staff trains U.S. advocates on representing migrants after they return to their homes abroad, and provides advice, referrals, and case facilitation support. Global Workers also engages in policy advocacy, both nationally and internationally, drawing from unique insight into how various temporary work programs operate, from the perspective of both the countries of employment and origin. We have projects in the United States, Canada, Mexico, and Central America.

Through promoting access to justice for transnational migrants who have suffered labor violations as well as human trafficking and other workplace crimes, we identified structural problems with the temporary visa system. Nonimmigrant visas allow work only temporarily and usually offer no pathway to citizenship. With most categories of nonimmigrant visas, work is only authorized for one specific employer, which means that if an employee suffers abuse on the job, the visa does not allow him or her to look for another job. Furthermore, because nonimmigrant workers by definition must leave the United States after their employment ends, there are significant barriers to those workers accessing the U.S. justice system when their labor rights are violated during their stay.

In May 2012, Global Workers published a report *Visas, Inc.: Corporate Control and Policy Incoherence in the Temporary Labor System.*[1] *Visas, Inc.* took a panoramic approach and revealed fragmentation among several government agencies and a wide divergence in worker protections. The system lacks transparency and government oversight. Rather than developing a coherent system, the U.S. has responded piecemeal to employer demands and created a patchwork of visa classifications subject to distinct rules. This has resulted in the abuse of both foreign and U.S. workers. The creation of humanitarian visas has been a tremendous step in the right direction. However, much remains to be done to improve the legal immigration system so that workers are fully protected and have access to justice.

COMMENTS

I. Streamlining the Legal Immigration System

Question 2: What are the most important policy and operational changes that would streamline and improve the processing of nonimmigrant visas at U.S. Embassies and Consulates, including visitor, student, temporary worker and other nonimmigrant visas?

- **DOS should improve transparency and communication in visa processing generally.** Many Department of State (DOS) consular posts do not communicate with attorneys in the U.S. in any substantive way. Very few Embassies/Consulates respond to inquiries sent to their IV/NIV email addresses and when they do, their responses are often unhelpful and do not contain any case-specific detail. It is also common that clients do not receive the requisite written reason for the visa denial or else receive a denial letter/form that is unintelligible. For attorneys working with indigent victims of crime and

[1] Ashwini Sukthankar, *Visas, Inc.: Corporate Control and Policy Incoherence in the U.S. Temporary Foreign Labor System*, Global Workers Justice Alliance, (2012), available at http://www.globalworkers.org/our-work/publications/visas-inc.

survivors of violence who have limited resources, this lack of transparency makes it difficult to resolve issues quickly. This lack of communication causes confusion and delay, and leads to additional hardship for survivors of crime. To assist with this communication, an attorney's G-28 should follow the case and be forwarded to the DOS. Clients are frequently contacted directly by the DOS/NVC about their cases and when problems arise, attorneys cannot intervene because the attorney is not recognized as the clients' representative.

- **There should be uniformity in Consular Processing U visa applications.** Often, the process for applying for a U visa at a U.S. Embassy/Consulate varies depending on whether the applicant is a U-1 principal or holds U-2, U-3, U-4 or U-5 derivative status. We recommend that DOS have a principal contact in the United States that attorneys can contact about these cases. This way, there would be DOS staff familiar with the humanitarian immigration benefits, easily contactable, with one same set of standards applicable to all applicants abroad.

- **Consulates should adjudicate Form I-193 to waive the passport requirement in U visa cases**. Many U derivatives, especially minor children, can't get passports because their governments insist on the father providing authorization before issuing a child a passport. Often times the father is abusive or the mother has long lost contact with the child's father and getting authorization from him is impossible. U.S. Consulates should adjudicate the Forms I-193 given the hardship that U visa applicants face, especially in cases where the perpetrator of the violence is also the parent of a child.

Question 3. What are the most important policy and operational changes that would streamline and improve U.S. Citizenship and Immigration Services (USCIS) processing of the following types of immigrant and nonimmigrant visa petitions?

(c) Nonimmigrant Petitions

- **Job portability for H-2 workers.** When an H-2 worker suffers labor abuse, there should be an easy process to change jobs to another employer with an approved I-129 and labor certification. Currently, the process for a worker to transfer to another H-2 employer requires that the worker find an H-2 employer and that the new H-2 employer submits a new I-129 form (even if it already has an approved I-129 petition) on behalf of the worker for the worker to change employment, and if necessary extend the terms of their visa.[2] Usually, the employer must pay another $325 fee and the H-2 worker must wait for the I-129 petition to be approved before beginning work. The process for changing employers within the H-2 program should be simplified. An H-2 worker with a valid visa should be able to immediately begin working for an employer with an approved I-129 petition, so long as the start date is on or before the date of need. In the alternative, if the new employer is still required to submit a new I-129 petition, the worker should be allowed to being work as soon as the petition is filed and the $325 fee should be waved.

[2] See 8 C.F.R. § 214.2(h)(2)(i)(D).

Reducing the cost and burden on the new employer will incentivize that employer to hire an H-2 worker who is already in the country.

(d) Humanitarian Petitions

- **Implement Parole Procedures for U visa conditional grantees abroad.** The lack of a procedure for granting parole to U conditional grantees abroad is a significant obstacle to achieving the protection and support for crime victims and their families that U visas are intended to provide. Parole to conditional grantees abroad--both principal U visa applicants and derivatives-- would alleviate the consequences of the delayed U grants. Family members abroad (often children) desperately need to reunite with the primary crime victim, and the crime victim needs family support to heal and build a new life. The U visa regulations at 8 CFR Section 214.14(d)(2) specifically authorize the use of parole for conditional U grantees.[3]

- **Advanced Parole for U visa conditional grantees who need to travel.** U.S. Citizenship and Immigration Services (USCIS) should create an advanced parole system for the U visa program, especially for conditional grantees with deferred action status who need to travel abroad. Although there is a current process in place for U visa holders who need to travel, there is no such procedure in place for conditional U grantees on the waitlist.[4] Conditional grantees may have emergencies back in their home countries that require them to travel, to participate in legal cases regarding their children or the death of an immediate family member. If conditional U visa grantees travel abroad, they will have to wait for a visa to become available in order to enter the US with U visa status, a process that could take upwards of 2 years.

- **Permit time in deferred action status to count towards accruing continuous presence for purposes of adjustment.** USCIS should count the time U visa conditional approvals spend in deferred action status as time towards adjustment. USCIS has applied a similar rule in the interim relief context and has, in the meantime, provided methods to help aged-out derivative extend or maintain their status.[5] USCIS should adopt a similar approach for the category of U derivatives who had no control over when USCIS would adjudicate their principals' claims and who may have become ineligible due to no fault of their own.

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[3] Specifically, ""USCIS will grant deferred action ***or parole*** to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list." 8 CFR Section 214.14(d)(2) [Emphasis added].

[4] The process for U visa holders to travel abroad is also cumbersome because of the requirement that those in U status obtain a visa to return to the United States. This policy requires unnecessary additional work for USCIS and the Department of State, with processing delays that put the U status holder at risk of remaining outside the U.S. in excess of 90 days, jeopardizing his or her eligibility for adjustment of status.

[5] U.S. Citizenship and Immigration Services, PM-602-0077: *Age-Out Protection for Derivative U Nonimmigrant Status Holders: Pending Petitions, Initial Approvals, and Extensions of Status* (Dec. 12, 2012) available at http://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback Opportunities/Interim Guidance for Comment/U-Visa-Age-Out-Interim-PM.pdf.

- **Ensure age-out protections of VAWA 2013 apply to all U visa derivatives.** VAWA 2013 contained important age out protections for U visa derivatives. Section 805 of VAWA 2013 provided that derivative U visa applicants who were under 21 at the time of the principal's filing shall continue to be classified as children even if they turn 21 while the principal U-1's application (or their own application) is pending. This provision applies retroactively for derivatives back to the creation of the U visa in 2000 and should, therefore, cover anyone harmed by USCIS' change in policy towards aged-out derivatives.

- **Improve adjudicator trainings on workplace U visas.** USCIS adjudicators require additional training and education on the context of U visa qualifying criminal activity that take place in the workplace. Several cases indicate general confusion and unfamiliarity with common fact patterns of qualifying crime that occur in the workplace; and that adjudicators have applied inconsistent and higher standards for showing of "substantial physical and mental abuse."[6] Adjudicators have also indicated confusion about ways that broader labor violations contribute to qualifying abuse, disregard aggravation of prior injury to applicants, and impose unreasonable and inconsistent standards of proof to show a nexus between the qualifying criminal activity and abuse suffered by victims. This concern is particularly important as the U.S. Department of Labor recently announced that it would certify Forms I-918B for victims of fraud in foreign labor contracting, extortion, and forced labor.[7] Proper education of USCIS adjudicators is crucial for the program to function properly and for workers who suffer from severe labor exploitation to be protected to the full extent of the law.

- **Grant AAO jurisdiction over denied I-192 applications in U visa cases**. While the Administrative Appeals Office (AAO) at USCIS has jurisdiction over denied I-918 U applications, it does not have jurisdiction over denied I-192 waivers of inadmissibility in U visa cases.[8] However, the AAO does have jurisdiction over other forms of discretionary applications. Allowing the AAO to review I-192 denials is essential in order to provide more guidance and uniformity of the adjudication of these cases.

Question 11. How can labor market-related requirements for temporary workers be best tailored to meaningfully protect both U.S. and temporary foreign workers while achieving operational efficiency for both employers and relevant Federal agencies?

- **Maintain current level of strong H-2A regulations to protect U.S. labor market.** The current worker protections in the U.S. Department of Labor's H-2A regulations[9] are important to safeguarding the rights and interests of both U.S. and H-2A workers and should not be weakened or eliminated. Those protections were designed to ensure that

[6] NELP, ASISTA et al. *Letter to DHS Deputy Secretary U Visas Based on Crimes in the Workplace: USCIS Substantial Abuse Interpretations* (May 6, 2014) available at: http://bit.ly/1CvsCES.
[7] See U.S. Department of Labor, Fact Sheet, *The Department of Labor's Wage and Hour Division Will Expand Its Support of Victims of Human Trafficking and Other Crimes Seeking Immigration Relief from DHS* (Nov. 20, 2014), available at: www.dol.gov/dol/fact-sheet/immigration/u-t-visa.htm.
[8] 8 C.F.R.§ 212.17(b)(3).
[9] 20 C.F.R. § 655.122.

the employment of foreign nonimmigrants not adversely affect the wages and working conditions of U.S. workers. All of the worker protections are critical. The wage rules are a good example of how worker protections serve to advance interest of the U.S. labor market. Employers must pay the higher of the state or federal minimum wage rate, the local prevailing wage, or the adverse effect wage rate (determined annually for each state by a USDA survey). This scheme is necessary to protect the labor market. Because H-2A workers are tied to their employers by their visas, they lack economic freedom to switch employers and are unable to bargain for higher wages. Without wage protections, U.S. workers would be competing against job applicants who may be willing to work for much lower wages than U.S. workers due to the lower earnings in foreign workers' countries of origin. Every single worker protection rule promulgated by DOL has the same effect and must be maintained.

- **DHS should join DOL in promulgating the 2012 H-2B worker protection rules.**[10] Currently, the H-2B visa program has extremely limited protections for U.S. and migrant workers.[11] The 2012 H-2B rule would help improve the H-2B visa program and protect both U.S. and migrant workers by increasing recruitment efforts of U.S. workers and by providing safeguards from labor exploitation for migrant workers.[12] The important provisions of the final H-2B rule were subject to an intense notice and comment period by the public. The provisions are critical to protect workers' rights. Yet, a lone district court judge in Florida has vacated and, in effect, permanently enjoined the regulations nationwide.[13] However, DHS could simply jointly promulgate the substance of the 2012 H-2B rule together with DOL. They are a critical measure to ensure that the H-2B program does not adversely affect the U.S. labor market.

***Question 14. What other policy and operational changes would most effectively combat waste, fraud, and abuse in the legal immigration system*?**

H-2 guestworker programs

- **DOS should increase worker education outreach at consulates abroad.** DOS should expand the information that is provided to prospective nonimmigrant workers about their legal rights under U.S. laws and should cooperate with sending country governments and agencies to thwart misleading propaganda about U.S. work visa programs. For H-2A nonimmigrants in particular, during the visa interview, the consular officer should

[10] 77 Fed. Reg. 10038 (Feb. 12, 2012) (2012 H-2B rule).
[11] See, e.g., Arthur N. Read, *Learning from the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform*, 16 TEMP. POL. & CIV. RTS. L. REV. 423, 430, 432. (2007); Mary Bauer, *Close to Slavery: Guestworker Programs in the United States*, Southern Poverty Law Center, p. 18 (February 2013) available at http://www.splcenter.org/sites/default/files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf.
[12] Id. The 2012 H-2B rules included provisions to prevent undercutting U.S. workers by ensuring adequate worker protections for H-2B nonimmigrants. Some of these important protections include, for example: longer and more-timely recruitment periods of U.S. workers; requiring written job disclosures to workers before leaving their countries of origin, in languages they understand; disclosure of employer agreements with any agent or recruiter; additional anti-retaliation protections; and a work guarantee for three quarters of the hours promised during the work contract period.
[13] See Bayou Lawn & Landscape Services v. Solis, 3:12-cv-00183-MCR-CJK (N.D. Fla. Dec. 18, 2014).

confirm that the work has a copy of the job order, ETA Form 790, and highlight or point out the wage rate listed on the job order that the worker will receive. Among other things, workers should be provided information on their obligations under the Affordable Care Act, their eligibility for affordable health insurance through the health insurance marketplaces and corresponding information about filing taxes.

- **DOS should ensure that consulates respond to inquiries about recruiters.** Consulates should provide information as to whether the employer is approved, the name of the principal recruiter, and a copy of the form I-797. Further, there should be an intake and referral process for workers who report trafficking and other abuses during the recruitment process while abroad. Finally, consulates should increase public awareness about fraudulent recruiters and recruitment fraud through communication campaigns including notices at consulates and on consular websites.

- **DOS should play a more prominent role in eliminating the payment of recruitment fees**. Despite the ban on recruitment fees in the H-2A and H-2B programs,[14] some employers and recruiters still charge them.[15] Because of fees and expenses charged by recruiters and employers, workers often arrive in the United States mired in debt. These loans, when combined with abuses on the job, can lead to forced labor and involuntary servitude. DOS and DHS should institute whistleblower protections for workers who report paying these recruitment fees.

J-1 cultural exchange program

The J-1 cultural exchange program is one of the largest categories of nonimmigrant visas. Each year well over 300,000 exchange visitors come to the U.S. in 14 different program areas, or subclasses.[16] In recent years, advocates have documented examples of employers and sponsors failing to follow the J-1 regulations in various subclasses to the detriment of the J-1 participants.[17] Trainees and interns in Florida have spent their entire internships making beds and cleaning toilets instead of receiving the advanced training in hotel management detailed on their Training and Internship Placement Plans.[18] Other trainees filed a lawsuit against the Wyndham

[14] 20 C.F.R. §§ 655.135(j)(k), 655.22(j), (g)(2).
[15] See, e.g., Jurado Jimenez v. GLK Foods, Civil Action No. 12 cv 209, *Second Amended Complaint* (E.D. Wisc, filed Dec. 11, 2013); International Labor Recruitment Working Group, *The American Dream Up for Sale, A Blueprint for Ending International Labor Recruitment Abuse,* (2013), available at fairlaborrecruitment.files.wordpress.com/2013/01/the-american-dream-up-for-sale-a-blueprint-for-ending-international-labor-recruitment-abuse1.pdf
[16] Department of State, Fiscal Years 1997-2013 NIV Detail Table, available at http://travel.state.gov/visa/statistics/nivstats/nivstats_4582.html.
[17] See Meredith Stewart, *Culture Shock: The Exploitation of J-1 Cultural Exchange Visitors*, Southern Poverty Law Center, 23-27 (2014), available at sp.lc/culture-shock-report [hereinafter *Culture Shock*]; International Labor Recruitment Working Group, *The American Dream Up for Sale, A Blueprint for Ending International Labor Recruitment Abuse,* (2013), available at fairlaborrecruitment.files.wordpress.com/2013/01/the-american-dream-up-for-sale-a-blueprint-for-ending-international-labor-recruitment-abuse1.pdf; and Daniel Costa, *Guestworker Diplomacy,* Economic Policy Institute, 19 (2011), available at www.epi.org/files/2011/BriefingPaper317.pd.
[18] *Culture Shock*, at 25-27 (describing the case of resort workers in South Carolina who received a bi-weekly stipend of $200 for at least 40 hours of work per week).

hotel chain in part to recoup exorbitant housing costs that were deducted from their wages.[19] In 2011, hundreds of students worked at the Hershey chocolate plant in Pennsylvania, earning $1 to $3.50 per hour after deductions for rent and other fees.[2021] In another case, a student testified before Congress that her recruiter in the Ukraine had promised she would be waitressing and taking English classes in Virginia, but instead she was forced to work in a strip club in Detroit.[22]

The Department of Homeland Security (DHS) and the Department of State (DOS) should make policy and operational changes throughout the J-1 cultural exchange visitor program to ensure that all steps are being taken to prevent labor exploitation and provide enforcement mechanisms so that J-1 exchange visitors have access to justice and that the program's cultural exchange mission is fulfilled. Some of the suggestions are program-wide, and some pertain only to specific subclasses of exchange visitors.

- **Pre-arrival employment contract for all J-1 subclasses.** Sponsors are now required to provide detailed pre-arrival disclosures to exchange visitors at the time of recruitment and prior to the exchange visitors paying any fees.[23] Participants should be able to rely on the terms as binding. The regulations should require that exchange visitors only be employed pursuant to a contract. Either the host employer should sign the disclosure or the sponsor should sign and include a guarantee that the host employer will provide the terms and conditions of the job disclosed. The disclosure should certify that the terms be enforceable in court as an employment contract and that any employment undertaken as part of the J-1 program will comply with all applicable federal and state laws, including but not limited to the Fair Labor Standards Act, as amended (29 U.S.C. §§ 201, et seq.). If housing is provided to the participant in connection with the training or internship, this section should also include a statement that any housing provided complies with all applicable health and safety standards.

- **Ensure cultural exchange opportunities provided.** Currently, sponsors must disclose to participants the "type, duration, nature and importance of the cultural components of the program."[24] Sponsors should be required to document the cultural exchange opportunities provided to the exchange visitors on and off of the job.

- **Require pre-placement.** DOS should require pre-placement with a host employer for all employment-based J-1 subclasses before issuing the DS-2019 form.[25] Having a

[19] Jatupornchaisri v. Wyndham, Case No. 6:12-cv-00059, *Complaint* (M.D. Fla, filed Jan. 17, 2012).
[20] Jennifer Gordon, *America's Sweatshop Diplomacy*, New York Times, (August 24, 2011); Pete Blanchard, *An Exchange Program: How a Local Corporation Uses Foreign Students as a Workforce*, Buzzsaw Magazine, (Dec. 8, 2010); Colleen P. Breslin, Stephanie Luce, Beth Lyon & Sarah Paoletti, *Report of the August 2011 Human Rights Delegation to Hershey*, Pennsylvania (2011).
[21] Id.
[22] Holbrook Mohr, Mike Baker and Mitch Weiss, *U.S. Fails to Tackle Student Visa Abuses*, Associated Press, (Dec. 6, 2010).
[23] 22 C.F.R. §§ 62.9(d)(3) and 62.10(b).
[24] 22 C.F.R. § 62.9(d)(3)
[25] 22 C.F.R. § 62.12.

secure job placement prior to arrival in the U.S. is integral to the well being of J-1 exchange visitors.

- **Implement and enforce ban on unskilled labor in J-1 intern and trainee subclass.** DOS should promulgate regulations to better implement the ban on placing trainees and interns in unskilled positions.[26] Notwithstanding the clear prohibition on work in entry-level, casual jobs, exchange visitors are still often employed "in fast food service restaurants, convenience stores, and in other similar counter service positions."[27] Many intern and trainee jobs in the hospitality and tourism field amount to unskilled labor.[28] But even when the training and internship placement plan (T/IPP) contemplates rotations through different aspects of the hotel industry, some employers ignore the plan.[29] DOS must create a mechanism to ensure compliance with this prohibition, other than to simply trust that host employers will not use interns and trainees as unskilled labor. Sponsors should be required to visit the training and internship sites to ensure that the host employers are following the T/IPP. The T/IPP should add an enforceable attestation that the program will comply with the regulatory prohibition of unskilled labor.

- **Written agreements between sponsor and all third party entities.** Every sponsor should have written agreements to outline the full relationship between the entity and the sponsor on all matters involving the administration of the exchange visitor's program.[30] The agreements should include strong anti-fraud language, pre-arrival disclosure requirements, and an attestation that the foreign entity will comply with all applicable federal, state and local law. Sponsors should be required to provide copies of these written agreements to DOS.

- **A Foreign Entity Report for every J-1 subclass.** DOS acknowledged the importance of recruitment transparency when it required that all Summer Work Travel sponsors provide lists of their foreign partners to DOS in a Foreign Entity Report.[31] This requirement should apply across subclasses, especially with regard to

[26] 22 C.F.R. § 62.22(b)(1)(ii) ("Exchange Visitor Program training and internship programs must not be used as substitutes for ordinary employment or work purposes; nor may they be used under any circumstances to displace American workers. The requirements in these regulations for trainees are designed to distinguish between bona fide training, which is permitted, and merely gaining additional work experience, which is not permitted. The requirements in these regulations for interns are designed to distinguish between a period of work-based learning in the intern's academic field, which is permitted (and which requires a substantial academic framework in the participant's field), and unskilled labor, which is not.")

[27] U.S. Department of State, Guidance Directive 2010-08, "Trainee and Intern Subclass: New Regulations and Work in Counter Service Positions," Aug. 12, 2010.

[28] Id.

[29] See Jatupornchaisri v. Wyndham, Case No. 6:12-cv-59, *Complaint* (M.D. Fla., May 7, 2012); *Culture Shock*, at 27.

[30] 22 C.F.R. § 62.2 Definitions.

[31] 22 C.F.R. § 62.32(p)(2) (Sponsors must "Maintain listings of all active foreign agents or partners on the Foreign Entity Report by promptly informing the Department of any additions, deletions, or changes to foreign entity information by submitting new versions of their reports that reflect all current information. Reports must include the names, addresses, and contact information, including physical and mailing addresses, telephone numbers, and email

foreign partners. Given that apparently the DOS is requiring all sponsors to maintain the list,[32] it places no additional burden on sponsors to provide those lists to DOS as a matter of course when filing for designation and re-designation. Moreover, sponsors should also be required to provide their written agreements with third parties to DOS when seeking re-designation. DOS should fully promote sponsor accountability and facilitate a pro-active monitoring system.

- **Enable job portability.** DOS should ensure that sponsors allow J-1 workers to switch job placement locations when labor disputes and other problems arise. As with most other nonimmigrant visas that authorize work in the U.S., J-1 workers are vulnerable to the extent that their immigration status is tied to their employer. If an individual has invested money in coming to the United States to work, there is a strong incentive to stick with even an exploitative situation.[33] While J-1 participants may seek a placement change with their sponsor, the regulations do not contain safeguards ensuring that the needed assistance is provided.

- **Require regular communication between sponsors and participants.** Under current DOS regulations, all J-1 sponsors regardless of subclass must "monitor the progress and welfare of the exchange visitor" and "ensure that the activity in which the exchange visitor is engaged is consistent with that subclass and activity listed on the DS-2019."[34] However, only the Summer Work Travel subclass requires sponsors to personally communicate with each participant every month.[35] Sponsors in every subclass should have this clear requirement to regularly ensure the program is running smoothly for workers.

- **Protections against retaliation should be improved**: Sponsors may not retaliate against exchange visitors.[36] While this important rule lists a number of protected activities providing security for exchange visitors' rights, it can be strengthened. To make this rule stronger, DOS should include language prohibiting the sponsor and Host Employer from taking any "adverse employment action" against exchange visitors who engage in protected activities. The provision should also include clear-cut sanctions for retaliation so that workers are not afraid to complain.

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addresses of all foreign entities that assist the sponsors in fulfilling the provision of core programmatic services. Sponsors must utilize only vetted foreign entities identified in the Foreign Entity Report to assist in fulfilling the sponsors' core programmatic functions outside the United States, and they must inform the Department promptly when and why they have cancelled contractual arrangements with foreign entities.").

[32] The Department states this requirement in the rulemaking preamble material to the recent Final Rule Part 62 General Provisions, but it does not appear in the Final Rule's code provisions. (Sponsors must "provide the Department with a list of foreign and domestic third parties with whom they have written agreements.") The Department should add this requirement to the code provisions for clarity. 79 Fed. Reg. 60,298.

[33] 9 FAM 41.62, Ex. V at 2 ("If you change employment without the permission of your sponsoring agency, your status in the program may be terminated.").

[34] 22 C.F.R. § 62.10(d).

[35] 22 C.F.R. § 62.32(j)(1).

[36] 22 C.F.R. § 62.10(d).

- **Sponsor should be required to report severe labor exploitation to DOS.** Sponsors are required to report any "serious problem or controversy" involving a J-1 exchange visitor on or before the next business day.[37] DOS should clearly articulate that a "serious problem or controversy" extends beyond death, serious injury and sexual abuse to include in the definition of "serious problem or controversy" violations of the Trafficking Victims Protection Reauthorization Act, recruitment fraud, passport withholding, threats of deportation, wage theft, discrimination, and labor and housing disputes.

- **Access to federally funded legal services.** Finding a lawyer may be difficult for J-1 workers due to language barriers, cultural differences, geographic isolation, and for some subclasses, the duration of their time in the United States. At present, federally funded legal services organizations may represent only certain classes of aliens.[38] In most cases, individuals with J-1 visas are not eligible.[39] DOS and DHS should recommend that J-1 nonimmigrant visa holders be added to the classes of aliens eligible for legal services by Legal Services Corporation grantees.

- **Deferred action to pursue legitimate employment complaints.** Most nonimmigrant visa programs do not set up a way for workers to enforce their rights or denounce abuses after the work period ends. Migrant workers who are owed money or injured on the job are forced to make a decision: go home and lose the practical ability to exercise their rights, or stay in the U.S. in unlawful status.[40] Deferred action is an act of prosecutorial discretion and serves as an important tool postponing removal and enabling an individual to remain in the United States for a certain time.[41] In June 2011, the DHS reminded ICE officers, special agents, and attorneys to "exercise all appropriate discretion on a case-by-case basis when making detention and enforcement decisions in the cases of victims of crime, witnesses to crime, and individuals pursuing legitimate civil rights complaints" and to pay particular attention to individuals involved in non-frivolous disputes with employers.[42] However, the A-3 and G-5 visas for domestic workers of diplomats and international organization employees, are the only nonimmigrant visas with this explicit deferred action

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[37] 22 C.F.R. § 62.13(d).
[38] 45 C.F.R. § 1626.5.
[39] There is an exception if the J-1 worker is a victim of domestic violence, human trafficking or another crime. See Legal Services Corporation Program Letter 05-2 (Oct. 6, 2005), available at http://globalworkers.org/sites/default/files/visafiles/LSC%20letter%2005-2.pdf
[40] Returning home in compliance with visa program rules gives rise to two issues. First, plaintiffs in lawsuits regarding problems with their jobs will need to return to the U.S. to give testimony at trial. The same is true for workers who are injured on the job and require continuing medical treatment in the United States.
[41] See, e.g., U.S. Dep't of Homeland Security, Guidelines for Deferred Action for Childhood Arrivals, available at https://www.dhs.gov/deferred-action-childhood-arrivals (last visited March 2014); for history of deferred action relief up until DACA, see Wadhia, Shoba S., *The Role of Prosecutorial Discretion in Immigration Law*, Scholarly Works Paper 17 (2010), available at http://elibrary.law.psu.edu/fac_works/17 (last visited March 2014).
[42] John Morton, Director, U.S. Immigration and Customs Enforcement, *Memorandum: Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs* (June 17, 2011), available at http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

procedure for immigration relief after employment ends.[43] DHS should adopt a specific policy to provide deferred action to J-1 nonimmigrant visa holders who must remain in the U.S. after their employment program ends. This would be an important step ensuring access to justice for cultural exchange visitors who suffer employment abuse while in the United States.

Question 17. From the perspective of petitioners and applicants, which elements of the current legal immigration system (both immigrant and nonimmigrant systems) are most in need of modernized information technology (IT) solutions, and what changes would result in the most significant improvements to the user experience?

- **Form I-129 data should be maintained electronically.** Unfortunately, with respect to the I-129 and supplemental forms, USCIS maintains only a narrow set of data categories on file. Data including, but not limited to the location where nonimmigrant workers will be employed (Part 5, Question 3), wages per week or per year (Part 5, Question 8), and gender (Part 3, Question 1f) are apparently not maintained by USCIS in an electronic database,[44] but instead remain on paper forms. This has presented problems when agencies are responding to Freedom of Information Act requests. Responses take longer and are more costly. IT solutions should be designed to make the agencies more efficient at responding to reasonable requests for information. That such key information about the immigration system—with important implications for the U.S. labor market—is not maintained and recorded and published electronically is a shame, and not consistent with the bookkeeping norms and standards of the developed world.

- **Improve timeliness of job postings and migrant housing information on ICert portal.** Worker rights advocates often have difficulty in assisting workers because the job orders are delayed in being posted to the ICert Portal. Past job orders are frequently removed from the Portal. Job orders should be posted more quickly to the ETA ICert Portal and the orders should be accessible on the website for a permanent duration. Worker rights advocates will be better able to assist workers when the information is available. Job orders, past and present, posted to the ICert Portal should state not only the county and city, but the address(es) where the workers will be working and staying, if housing is provided. The addresses will allow worker rights advocates to reach workers who may have limited access to information, transportation and phones.

[43] 8 U.S.C. § 1375c(c)(1), (2) (former A-3/G-5 workers may be eligible for deferred action for the amount of time necessary "to fully and effectively participate in all legal proceedings related to such action."). This relief for was created by the 2008 reauthorization of the Trafficking Victims Protection Act. See Martina Vandenberg and Alexandra Levy, *Human Trafficking and Diplomatic Immunity: Impunity No More*, 7 INTERCULTURAL HUM. RTS. L. REV. 77, 96-97 (2012). The right does not just apply when trafficking is alleged but also applies in any civil case the worker brings against his or her employer alleging violations of employment terms. See 8 U.S.C. § 1375c(c)(1), (2) (applies to A-3/G-5 workers with regard to civil actions alleging "a violation of any of the terms contained in the contract or violation of any other Federal, State, or local law in the United States governing the terms and conditions of employment").

[44] Part and question refers to 10/31/2013 version of the Form I-129.

- **DHS should collect information on all recruiters in the recruitment chain.** Question 7 of section 2 of the H Classification Supplement to Form I-129 asks for the name of the petitioner's staffing, recruiting or placement agent. While the question notes where the petitioner should answer the question if there is more than one service or agent, it does not clearly require that petitioner's fill out recruiters down the chain who are subcontracted by the primary recruiter. This would be easily remedied by changing the I-129 form instructions to explicitly require that all recruiters down the chain to the individual who makes the offer of employment are listed on the form.

Question 18. Which existing government- collected data and metrics would be most valuable to make available to the public, consistent with privacy protections and national security, in order to improve oversight and understanding of the legal immigration system?

There is much government-collected data that would greatly improve oversight and understanding of the legal immigration system if publically available. Transparency is needed not only for policymakers to evaluate impact of temporary foreign workforce on the U.S. labor market but also to prevent severe exploitation and human trafficking. The federal government should annually publish electronically all data and metrics, with the exception of personal identifiers, supplied by petitioners for nonimmigrant visa programs that contemplate any type of employment activity in the United States,[45]. All information collected during the application process can help improve understanding of how employers use these visa programs and the impact it has on workers, graduates, and the U.S. labor market. Privacy for employers is not a concern because similar information is already published and posted online for the H visa classifications. Publishing the information will not reveal personal or confidential information. It is feasible to publish non-personal identifying information collected during the application process for temporary nonimmigrant visa programs. The Department of Labor annually (and sometimes quarterly) publicly releases and publishes labor certification data from the H-2A and H-2B visa programs, and Labor Condition Application data from the H-1B visa program.[46] The steps listed below will go a long way towards improving oversight and understanding of the immigration system.

- **Detailed annual reporting on nonimmigrant visas that authorize employment.** DHS and DOS should also annually publish online in the form of a summary report (with underlying raw data) divided by visa classification and subclass, information gathered or collected during the labor certification, nonimmigrant petition or visa application processes, including the nationality, gender, age, employer, occupation, place of employment, wage, recruiter (if any) of individuals who are present in the United States with any visa status defined in subparagraphs of 8 U.S.C. §1101(a)(15) that permit employment in the United States under any circumstances, including cultural exchange,

[45] This should include the A-3, B-1, G-5, H-1B, H-2A, H-2B, L, O, P, J visas, and the F-1/OPT programs.
[46] For H-2A, see http://www.foreignlaborcert.doleta.gov/docs/h_2a/H-2A_FY2012.xlsx; for H-2B, see http://www.foreignlaborcert.doleta.gov/docs/py2013/H2B_FY13_Q4.xls; and for H-1B see http://www.foreignlaborcert.doleta.gov/docs/py2012_q4/LCA_FY2012_Q4.xlsx; from DOL's *OFLC Performance Data* page at http://www.foreignlaborcert.doleta.gov/performancedata.cfm.

training, or business activities which result in receiving any form of compensation, including a stipend, from any source.[47]

- **Create a recruiter database.** DOS and DHS should coordinate to create a publicly searchable database/list of recruiters and employers based on information included in the I-129s and I-797s, the countries where they are recruiting and the numbers of workers authorized. Workers often do not know if recruiters have a legitimate job for them in the United States. Some recruiters set up shop, extract thousands of dollars in fees from workers, and then disappear with little trace.[48] In order to bring transparency to the recruitment process, DOS and DHS should coordinate to create a publicly searchable database that has a list of employers and recruiters in all of the nonimmigrant visa categories. The recruiter and employer information is already captured in the I-129s and I-797s, DOS and DHS should aggregate the information and make it available to the public. The recruiter and employer information will help prospective workers know whether a recruiter and offer of a job are legitimate.

- **Make public existing government-collected data and metrics on the J-1 program.** The U.S. government currently collects an abundant amount of information about the J-1 cultural exchange program. DOS and DHS maintain data and metrics about the J-1 participants who are present in the United States. Between the information listed on Form DS- 2019 and provided to DOS at visa application interviews, and what is contained in the SEVIS computer database managed by DHS, every individual J-1 exchange visitor's program subclass, nationality, age and gender, employer and location of worksite is known to the U.S. government.[49] Neither DOS nor DHS make the full range of this information public.[50] Shedding light on the scope of employment within the

[47] This should include nonimmigrant visas issued, or nonimmigrant status granted, under any subparagraph category of section 101(a)(15), and the data should be disaggregated by each subclass specified in regulations or Federal agency guidance or directives, including with respect to section 101(a)(15)(J), the specific program provisions enumerated in Subpart B of part 62 of title 22, Code of Federal Regulations, with respect to section 101(a)(15)(B), the specific categories of business visitor activity enumerated in notes 9-11 of section 41.31 of volume 9, U.S. Department of State Foreign Affairs Manual, and with respect to section 101(a)(15)(F), all persons granted employment authorization pursuant to the provisions enumerated in section 214.2(f)(10) of title 8, Code of Federal Regulations.

[48] In 2013, a recruitment agency Chamba México defrauded over 3,000 persons from almost twenty different states in Mexico. Prospective workers with temporary visas could not verify whether the company was legitimate, and many paid recruitment fees only to see their investment disappear. See Jornaleros Safe, *Press Release* (in Spanish) (April 24, 2013), available at http://www.globalworkers.org/sites/default/files/NOTA_ChambaMX_Jornaleros-SAFE_0.pdf

[49] See Department of Homeland Security, User Manual for Exchange Visitor Program Sponsor Users (RO/ARO) of SEVIS Version 6.1:Volume II Form DS-2019, p. 35 (Dec. 7, 2012) (field 13, "Exchange Visitor Subclass" presents drop down menu offering fifteen J visa participant subclass options, detailed in Appendix 3). Sponsors must report each J-1 visa holder's "site of activity" both the DS-2019 and SEVIS; the primary and any secondary locations where the J-1 workers will spend the duration of their exchange programs must be listed in full, and updated throughout their stay. See Id. at 39-43.

[50] In its Yearbook of Immigration Statistics, published annually, DHS offers supplemental data tables that offer the gender and age range of selected subclasses. However, the subclasses are not specific to certain visas. For example, J-1 exchange visitors are grouped with F-1 students. The information is not useful to determine the age of gender breakdown of any of the J-1 visa subclasses. See, U.S. Department of Homeland Security, Nonimmigrant

J-1 cultural exchange program, particularly within the J-1 intern, trainee, Summer Work Travel, teacher, camp counselor and au pair subclasses would bring workers out of the shadows, prevent labor exploitation, and improve their access to justice. Rural geographic isolation, no telephones in the camp, lack of knowledge about employment rights, and the relatively short time on the job all contribute to these workers' acute vulnerability to human trafficking. With improved public data, human trafficking can be reduced or prevented by assisting governments and advocates to develop more targeted prevention efforts and campaigns.

- **Require J-1 sponsors to collect and report additional employment data.** DOS should require sponsors of employment-based J-1 subclasses to capture detailed employment information and this data should be made publically available and easily accessible on an annual basis. If the wage that J-1 employers have promised to pay is currently not collected by ICE or DOS, then DOS should publish a regulation requiring that sponsor and employers submit this information so that it can be published. There is no question that DOS has the legal authority to do this. DOS claims it is exempt from the Administrative Procedures Act under the foreign affairs exception, and therefore creates Exchange Visitor Program rules subject to little scrutiny; DOS may set the rules for sponsor and employer participation in the program. Requiring that sponsors and employers reveal what they pay their workers does not unduly burden those who use the program, but it will provide important information to the public that can help bring credibility to a program that has suffered greatly in terms of its legitimacy after numerous public scandals showcasing DOS's inability to adequately manage the program or protect young, vulnerable participants from abroad. The Form DS-7007, proposed by DOS in 2011 for the SWT program but never implemented, represents a good model of collecting employment information from sponsors[51] and should be expanded where necessary. DOS should require that sponsors fill out a similar form for all exchange visitors regardless of subclass and make that information publically available so that stakeholders can analyze impacts of the J-1 program on the labor market.

- **Publish Foreign Entity Report currently required in J-1 Summer Work Travel.** Sponsors with designation for the Summer Work Travel subclass must electronically report to DOS certain information pertaining to all active foreign agents or partners on the Foreign Entity Report. The Foreign Entity Report is maintained by DOS and lists sponsors and their affiliated local, third party agents/ recruiters in each country where they are located.[52] Sponsors are required to reveal names, contact information, physical and mailing addresses, telephone numbers, and email addresses, and then update the report as any of this changes.[53] Sponsors are only allowed to use these vetted foreign entities identified in the Foreign Entity Report and must inform DOS when they cancel

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Admissions (I-94 Only) by Selected Subclass of Admission, Age and Gender: Fiscal Year 2011, available at http://www.dhs.gov/yearbook-immigration-statistics-2011-2.

[51] 76 Fed. Reg. 72996-01 (Nov. 28, 2011).

[52] 9 FAM 41.62 N4.12-3 d.

[53] 22 C.F.R. § 62.32(p)(2).

contractual arrangements with foreign entities and provide the reason.[54] If the public has access to information about which foreign recruiters have been vetted by sponsors, then workers will be in a better position to make informed decisions when evaluating whether to participate in the J-1 program. Greater transparency will lead to less fraud and exploitation.

CONCLUSION

President Obama's call to streamline the lawful immigration system presents an important opportunity for constructive reforms to nonimmigrant and humanitarian visa programs. These steps above, which involve more robust disclosures for workers, enforcement of wage violations, and transparency, will combat waste, fraud and abuse in the entire system and further effectuate the purposes of each visa classification, whether employment or humanitarian. Please consider the recommended changes above to assure that the Departments of State and Homeland Security provide the strongest possible safeguards for nonimmigrant workers and the U.S. labor market.

Thank you for your time and the attention to these comments. For further information please contact me via email at nan@globalworkers.org or you may call 646-351-1160.

Sincerely,

Nan Schivone
Staff Attorney & Legal Manager
Global Workers Justice Alliance

[54] Id.