



"Global Workers Require Global Justice"

December 4, 2014

Robin Lerner
Deputy Assistant Secretary for Private Sector Exchange
Bureau of Educational and Cultural Affairs
U.S. Department of State

Re: Final rule with request for comment, Exchange Visitor Program – General Provisions
79 Fed. Reg. 60,293 (Oct. 6, 2014)
Agency/Docket Number: Public Notice: 8893
RIN: 1400-AC36
Document Number: 2014-23510

Dear Ms. Lerner:

Global Workers Justice Alliance (Global Workers) submits these comments to the Department of State in support of the 2014 Final Rule for the Exchange Visitor Program – General Provisions (Final Rule), and more generally in support of the Department's efforts "to monitor sponsors and protect the health, safety and welfare of foreign nationals who come to the United States as exchange visitors."¹ As described herein, the Final Rule takes important incremental steps toward curbing abuses in the J-1 program. However, several provisions of the Final Rule must be strengthened to better protect exchange visitors and effectuate the program's cultural and diplomatic goals.

I. 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

¹ 79 Fed. Reg. 60,294.

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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.

II. Comments

A. Definition of “Third Party”

The Department’s revised definition of “Third Party” is a welcome change to the existing regulations. The revised definition captures foreign recruiters – entities and individuals – and requires that sponsors enter into written agreements with any third parties as defined under the rule.

Global Workers commends the Department for specifying that it considers “recruiting” to be “conduct of the sponsor’s exchange visitor program,” therefore requiring that sponsors maintain written agreements with their foreign recruiters. However, the Department should specify required terms for such written agreements between sponsors and foreign third parties. The current requirement is too vague to be meaningful: written agreements must only “outline the full relationship between the entity and the sponsor on all matters involving the administration of the exchange visitor’s program” (§ 62.2). The written agreement should include strong anti-fraud language, pre-arrival disclosure requirements that mirror those of the Final Rule (§ 62.10(b)), a ban on fees charged to participants by foreign entities, and an attestation that the foreign entity will comply with all applicable federal, state and local law.

Because a Host Organization is defined as a “Third Party” in the existing regulations (§ 62.2), the Final Rule’s definition of “Third Party” requires sponsors to enter into written agreements with Host Employers. The Department should specify certain terms of those agreements to better protect exchange visitors from improper or abusive placements. For example, such agreements should at a minimum outline the cultural exchange opportunities the Host Employer will provide to the exchange visitors on and off of the job and should include a guarantee that the Host Employer will provide the terms and conditions of the job that were disclosed to the exchange visitor pursuant to section 62.10(b) of the Final Rule.

Under the current regulations, sponsors are responsible for monitoring their third parties’ compliance with the regulations and other laws. This oversight structure has resulted in recruitment abuse, unsuitable job placements, and workplace abuse.² The Final Rule with the recommended changes will help abate these problems by providing the sponsor with more tools to monitor third party compliance with the regulations.

² See Meredith Stewart, *Culture Shock: The Exploitation of J-1 Cultural Exchange Visitors*, Southern Poverty Law Center, 23-27 (2014), available at <http://www.splcenter.org/get-informed/publications/Culture-Shock>; International Labor Recruitment Working Group, *The American Dream Up for Sale, A Blueprint for Ending International Labor Recruitment Abuse*, (2013), available at <http://fairlaborrecruitment.files.wordpress.com/2013/01/the-american-dream-up-for-sale-a-blueprint-for-ending-international-labor-recruitment-abuse1.pdf>; Daniel Costa, *Guestworker Diplomacy*, Economic Policy Institute, 19 (2011), available at www.epi.org/files/2011/BriefingPaper317.pdf; and U.S. Dep’t of State Office of the Inspector Gen., *Inspection of the Bureau of Educational & Cultural Affairs* (Feb. 2012), available at <http://oig.state.gov/documents/organization/186048.pdf>.

B. Sponsor Designation and Re-designation

The Final Rule provides more rigorous requirements for sponsor designation and re-designations that will encourage sponsor accountability. Given that the Department outsources the monitoring of all practical aspects of the program to designated sponsors, measures to ensure sponsor accountability and competence are crucial. Global Workers applauds these revisions, but offers the following to strengthen the rule further.

- ***Sponsor Eligibility***: The Final Rule requires sponsors to have three years of experience to be eligible for designation (§ 62.3) The Final Rule also requires sponsors to file for re-designation every one or two years per the Department’s discretion (§ 62.6). The Department should strengthen these provisions by reinserting the requirement that any entity applying for designation undergo a site visit as part of the process. As the Department noted, a pre-designation site visit is an important tool in measuring sponsor competence and resources and will help the Department exclude unsuitable entities before they begin operating.³
- ***Background Checks***: The Final Rule requires Responsible Officers and Alternative Responsible Officers to obtain criminal background checks (§ 62.9). The Department should also require that the results of the Responsible Officer’s criminal background check be submitted to the Department with each application for designation and re-designation. Absent this requirement, the Department undermines its own effort to vet the sponsors and also misses an important opportunity to collect vital information on those directly responsible for the well-being of exchange visitors.
- ***Disclosures of Third Parties***: The Department should also reinsert the requirement from the proposed rule that a sponsor seeking re-designation (and designation) “provide the Department with a list of foreign and domestic third parties with whom they have written agreements.”⁴ The Department acknowledged the importance of recruitment transparency when it required that all Summer Work Travel sponsors provide lists of their foreign partners to the Department in a Foreign Entity Report.⁵ This requirement should apply across categories, especially with regard to foreign partners. Given that the Department is requiring all sponsors to maintain the list,⁶ it places no additional burden on sponsors to provide those lists to the Department as a

³ See 79 Fed. Reg. 60,297.

⁴ 79 Fed. Reg. 60,298.

⁵ 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 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.”).

⁶ The Department states this requirement in the rulemaking, but it does not appear in the Final Rule’s code provisions. The Department should add this requirement to the code provisions for clarity. 79 Fed. Reg. 60,298.

matter of course when filing for designation and re-designation. Moreover, sponsors should also be required to provide their written agreements with these entities to the Department upon seeking re-designation. By not requiring sponsors to regularly provide such lists and agreements, the Department fails to fully promote sponsor accountability or to facilitate a pro-active versus reactive monitoring system.

- ***Disclosure of Labor Disputes:*** The Department should require sponsors to disclose any labor disputes at Host Employers in their applications for re-designation.

C. General Program Administration and Sponsor Obligations

The Department made a number of helpful changes to general program administration and sponsor obligations and duties. Overall, these encourage sponsor accountability and will better protect exchange visitors. Global Workers supports the following provisions in the Final Rule.

- ***Pre-Arrival Disclosures:*** Sponsors are required to provide detailed pre-arrival disclosures to exchange visitors at the time of recruitment and prior to the exchange visitors paying any fees (§§ 62.9(d)(3) and 62.10(b)). These disclosures will reduce fraud in recruitment and ensure exchange visitors receive, in writing, the precise terms and conditions of their program.
- ***Protections Against Retaliation:*** Sponsors may not retaliate against exchange visitors (§ 62.10(d)). This section lists a number of protected activities providing broad protection for exchange visitors' rights. The anti-retaliation language is a much-needed addition to the regulations and helpfully now applies across categories. To strengthen this provision the Department 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.
- ***Officer Competence:*** The Responsible Officers and Alternative Responsible Officers of a sponsor must have detailed knowledge of laws pertaining to employment, including the Fair Labor Standards Act (§ 62.11(a)). This requirement will ensure sponsors can adequately respond to exchange visitors' questions and complaints about workplace violations. This requirement should also facilitate the sponsor's monitoring duties vis-à-vis the Host Employers.
- ***Bond Payment:*** The Department's decision to maintain its discretion to require a sponsor post a payment bond is an important measure to ensure sponsors are able to meet their financial obligations and protect exchange visitors (§ 62.9(e)(3)). However, because sponsors are the sole entity responsible for an exchange visitor's welfare, the Department should require all new sponsors, and/or those that have been sanctioned for inadequate monitoring and/or accounting practices to secure a payment bond.

- **Management Review Process:** The Department’s decision in § 62.15(b) to require all private sector program sponsors to submit to a program-specific management review as is currently required for the Au Pair sponsors is a positive step.⁷ The Department should carefully evaluate and assess such management reviews across all relevant J-1 categories to ensure sponsors operate according to their IRS status; for example, all 501(c)(3) organizations should be operating with a discernible charitable mandate.

However, the following provisions related to general program administration and sponsor obligations should be substantially improved to better protect exchange visitors from recruitment and labor abuse:

- **Section 62.8(d) Cross Cultural Activities:** The Final Rule’s cultural exchange requirement remains too vague. The Department should define “cross-cultural activity” with more detail and should require a minimum level of cultural activity that the sponsor is required to provide to exchange visitors outside of the workplace.
- **Section 62.12 Control of Forms DS-2019:** The Department should require pre-placement for all employment-based J-1 categories before issuing the DS-2019 form. Having a secure placement is integral to the well-being of J-1 Exchange Visitors and contributes to a positive, non-exploitative experience. To restore the J-1’s program’s original 1961 legislative intent of cultural and educational exchange, pre-placement should be a requirement of all employment-based programs.
- **Section 62.13(d) Notification Requirements:** Global Workers supports the requirement that sponsors report any “serious problem or controversy” involving a J-1 exchange visitor on or before the next business day. However, the Department should clearly articulate that a “serious problem or controversy” extends beyond death, serious injury and sexual abuse. The Department should explicitly 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.
- **Section 62.16(a) Employment:** The Department should state that when an exchange visitor receives compensation it should comply with the regulations and all federal, state, and local laws. Compliance with wage laws should apply across categories.
- **Public Disclosures:** The Final Rule does not address the Department’s failure to make critical program information public to stakeholders and the community. The Department should require sponsors of employment-based J-1 categories to capture

⁷ 79 Fed. Reg. 60,304, *see also* 22 C.F.R. § 62.31(m)(4) (designated sponsors in the au pair program are required to submit to management review including “A report by a certified public accountant, conducted pursuant to a format designated by the Department of State, attesting to the sponsor's compliance with the procedures and reporting requirements set forth in this subpart.”).

detailed employment information and this data should be made publically available and easily accessible on an annual basis.⁸

III. Conclusion

The Final Rule and the public comment process present an important opportunity for constructive reforms to the J-1 program. Global Workers commends the Department for recognizing problems and creating solutions to ensure that exchange visitors are safe from recruitment and workplace abuse. Please consider the recommended changes above to assure that the regulations provide the strongest possible safeguards for exchange visitors and continue to advance the program's cultural exchange mission.

Thank you for your time and the attention to these comments.

Sincerely,

Nan Schivone
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Global Workers Justice Alliance

⁸ The Form DS-7007, proposed by the Department in 2011 for the SWT program but never implemented, represents a good model of collecting employment information from sponsors. 76 Fed. Reg. 72996-01 (Nov. 28, 2011). The Department should require that sponsors fill out a similar form for all exchange visitors regardless of category and the Department should in turn make that information publically available.