

2012

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### Recommended Citation

Patricia Medige & Catherine G Bowman, *U.S. Trafficking Policy and the J-1 Visa Program : The State Department's Challenge from within*, 7 Intercultural Hum. Rts. L. Rev. 103 (2012).

Available at: <https://scholarship.stu.edu/ihrlr/vol7/iss1/9>

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# U.S. ANTI-TRAFFICKING POLICY AND THE J-1 VISA PROGRAM: THE STATE DEPARTMENT'S CHALLENGE FROM WITHIN

PATRICIA MEDIGE\* & CATHERINE GRIEBEL BOWMAN+

## *I. Introduction*

The J-1 non-immigrant visa program, also referred to as the Exchange Visitor Program,<sup>1</sup> has been the source of much controversy over the past year.<sup>2</sup> A widely publicized labor strike by international

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+ Ms. Bowman is a doctoral candidate in the Dep't. of Sociology at the University of Colorado-Boulder. She has several years of experience in the anti-trafficking field. Most recently, she was a human trafficking paralegal and outreach provider with Colorado Legal Services. As a case manager with Safe Horizon's Anti-Trafficking Program in New York City, she provided social services to trafficking survivors. Ms. Bowman was awarded a Fulbright Fellowship in 2003 to evaluate Latin American cooperation on anti-trafficking agreements. Ms. Bowman has also served as an instructor at Saint Mary's College, teaching a gender and development course in Honduras. Ms. Bowman has been a speaker at several conferences, including 2007 Freedom Network Conference and the 2007 Crime Victims Board of New York State Meeting.

<sup>1</sup> The Mutual Educational and Cultural Exchange Act of 1961 (MECEA), § 2451, Pub. L. No. 87-256, 75 Stat. 527, codified at 22 U.S.C. 33 (2010), created the Exchange visitor program. The J visa is defined at Immigration and Nationality Act (INA) § 101(a)(15)(J); 8 U.S.C. 1101(a)(15)(J).

<sup>2</sup> See Jennifer Gordon, *America's Sweatshop Diplomacy*, N.Y. TIMES, Aug. 25, 2011, at A27. See also Julia Preston, *Pleas Unheeded as Student's U.S. Jobs Sour*, N.Y. TIMES, Oct. 17, 2011, at A1; Al Baker, *Foreign Twist to Latest Case*

college students in Hershey, Pennsylvania, who claimed mistreatment on the job,<sup>3</sup> along with the federal indictment of members of the notorious Gambino and Bonnano crime families for alleged racketeering and visa fraud involving J-1s workers in New York strip clubs, have revived an old debate about how the program is managed and whose interests it serves.<sup>4</sup> What has been largely absent from the discussion, however, is a consideration of the threats the program poses to existing U.S. anti-human trafficking policy. Significant gaps in the J-1 visa program's legal framework—namely its management by the State Department, a federal agency lacking the resources, expertise and accountability to oversee arguably one of the nation's largest temporary worker visa programs—place the agency at odds with its own mandate to lead U.S. government anti-human trafficking activities and to evaluate other governments' efforts to combat the crime.<sup>5</sup> Although there has been evidence of some response within the State Department—including its announcement of significant reforms to the program and the elimination from the Program of the sponsor involved in the Hershey's case, the Council for Educational Travel-USA (CETUSA)—the department's continued responsibility for the program undermines its efforts to be a global leader on anti-labor exploitation and anti-human trafficking efforts.<sup>6</sup>

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*Involving Mob and Strippers*, N.Y.TIMES, Dec. 1, 2011 at A32; The Associated Press, *Controversial Visa Program Target of Federal Review*, DENVER POST, Dec. 6, 2011 at 6.

<sup>3</sup> See, e.g., Preston, *supra* note 2.

<sup>4</sup> See Preston, *supra* note 2. See also United States Attorney's Office, Southern District of New York, *Manhattan U.S. Attorney Charges Twenty Individuals for Participating in a Scheme to Recruit Illegal Immigrants to Work in Adult Entertainment Clubs Controlled by La Cosa Nostra*, available at <http://www.justice.gov/usao/nys/pressreleases/November11/trucchioalphonseetalarrestspr.pdf> (last visited Feb. 12, 2012).

<sup>5</sup> See Victims of Trafficking and Violence Protection Act of 2000. Pub L. No.106-386, 114 Stat. 1464 [hereinafter TVPA].

<sup>6</sup> Exchange Visitor Program – Summer Work and Travel, Interim final rule with request for comment, 77 Fed. Reg. 27593 (May 11, 2012), available at <https://www.federalregister.gov/articles/2012/05/11/2012-11253/exchange-visitor-program-summer-work-travelp-3#> (last visited July 10, 2012) [hereinafter Interim Rule]. The May 11, 2012 interim final rule, to be discussed more fully in III.A.,

This article will review two key J-1 categories of the Exchange Visitor Program—the Au Pair and Summer Work Travel (SWT) programs—and compare the legal protections afforded by them to those provided under the H-2A and H-2B visas, two temporary worker visa programs regulated by the U.S. Department of Labor (USDOL).<sup>7</sup> The article will then discuss the J-1 program within the context of the U.S. Trafficking Victims Protection Act (TVPA),<sup>8</sup> a federal law passed in 2000, which significantly altered the legal definitions and penalties associated with human trafficking and conferred additional responsibilities to the State Department to coordinate anti-trafficking efforts. The authors will argue that the State Department’s management of the J-1 visa program compromises its anti-human trafficking role, both at the federal level, as the agency responsible for coordinating U.S. anti-trafficking activities, and at the international level, in monitoring and critiquing other nations on their efforts to stem human trafficking. The article concludes with recommendations for reform to the J-1 program.

## *II. Deterioration of the SWT Program*

In 2011, the institutional and regulatory failings of the J-1 SWT program became more apparent than ever. While the J-1 program generally has been under scrutiny for years and the focus of

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implemented the following changes to the program: it adds to the list more occupations that are not appropriate or permissible for the SWT program, makes changes to enhance the cultural component of the program as originally intended, and tasks sponsors with improved employer vetting, monitoring of SWT participants while present in the U.S., and sponsor accountability for use of third party entities. It also calls for more transparency on the part of sponsors regarding the various fees (including fees of foreign partners) charged to SWT participants as well as estimated transportation and housing costs they will likely incur. The May 11, 2012 interim final rule also makes explicit reference to CETUSA’s voluntary withdrawal from the program and highlights the alleged worker exploitation which led to its decision to withdraw. *See also* Julia Preston, *Company Officially Banned in Effort to Protect Foreign Students from Exploitation*. N.Y. TIMES, Feb. 2, 2012 at A12.

<sup>7</sup> INA §§101(a)(15)(H)(ii)(a) & (b); 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) & (b).

<sup>8</sup> TVPA, *supra* note 5.

three separate government reports citing the misuse and lack of oversight of the diplomatic program,<sup>9</sup> a rash of new cases gaining media attention once again brought the program to the attention of the public, top State Department officials and Congress.<sup>10</sup> Among the most disturbing reports was that of the alleged scheme of organized crime syndicates, including members of the Gambino and Bonnano families.<sup>11</sup> A federal indictment filed on November 17, 2011 charged defendants on eight counts, including crimes related to visa fraud and transporting, harboring and inducing the illegal entry of women from Eastern Europe and Russia under the J-1 SWT program to work as exotic dancers in the New York City area.<sup>12</sup>

State Department regulations require that sponsor organizations designate their own employees to act as Responsible Officers and Alternate Responsible Officers, who bear ultimate responsibility for ensuring compliance with program rules.<sup>13</sup> In this case, clearly no sponsor was ensuring compliance, based on the fraudulent conduct alleged in the indictment.<sup>14</sup> As this case

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<sup>9</sup> Office of Inspector General (OIG), U.S. Dept. of State, *The Exchange Visitor Program Needs Improved Management and Oversight (Audit Report 00-CI-028)* (Washington D.C.: State Dept. OIG, Sept. 2000); U.S. General Accounting Office (GAO), *U.S. Information Agency: Inappropriate Uses of Educational and Cultural Exchange Visas (GAO/NSIAD-90-61)* (Washington, D.C.: GAO, February, 1990)[hereinafter GAO 1990 Report]; and U.S. GAO, *State Department: Stronger Action Needed to Improve Oversight and Assess Risks of the Summer Work Travel and Trainee Categories of the Exchange Visitor Program (GAO-06-106)* (Washington D.C., GAO, Oct. 2005) [hereinafter GAO 2005 Report].

<sup>10</sup> Preston, Gordon & Baker, *supra* note 2. See also, Holbrook Mohr, *U.S. Fails to Tackle Abuses of Student Visa Program*, THE ASSOCIATED PRESS, Dec. 6, 2010. This article, resulting from an in-depth study of the program, appeared in several major news outlets, including the N.Y. Times, Dec. 6, 2010, at A1. See also Center for Immigration Studies reports, <http://cis.org/taxonomy/term/432>. (last visited on March 9, 2011).

<sup>11</sup> United States v. Trucchio, et al., No 11-cr-00614-VM (S.D.N.Y. 2011) (copy of Indictment on file with authors).

<sup>12</sup> *Id.*

<sup>13</sup> The State Department's reliance on Responsible Officers and Alternate Officers affiliated with sponsor organizations to perform monitoring and compliance activities is outlined in 22 C.F.R § 62.11.

<sup>14</sup> United States v. Trucchio, *supra* note 11.

demonstrates, the State Department's J-1 visa program regulatory scheme—which relies on communication, visits and audits of program sponsors, not employers—allows for gross misuses of the program to go undetected since it does no actual monitoring of labor sites itself.<sup>15</sup> Additionally, its sole reliance on sponsors to regulate themselves and their employers while also advocating on behalf of program participants creates an inherent conflict of interest.<sup>16</sup> A program sponsor who suspected a scenario such as the one involving the Bonnano and Gambino defendants, would risk loss of profits, severe sanctions, and possibly its very removal from the program if it were to report such activities.<sup>17</sup> It is under this structure that the State Department has encountered significant challenges to the J-1 program's integrity.<sup>18</sup>

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<sup>15</sup> 22 C.F.R. § 62.15 outlines the primary monitoring function for the J-1 Visa Program, the Annual Report. There is no reference to systematic on-site visits of sponsor or labor activities in the regulations. In fact, the 2005 GAO report revealed that State Department does not have enough staff capacity to conduct routine site visits of sponsors. See GAO-06-106, *supra* note 9, at 10. Furthermore, the May 11, 2012 interim final rule confirms that the State Department has no direct jurisdiction over host employers. See Interim Rule, *supra* note 6.

<sup>16</sup> This conflict of interest is created by the sponsor annual reporting requirement contained in 22 C.F.R. § 62.15 and monthly documentation of mandatory sponsor communication with SWT participants contained in 22 C.F.R. §62.32(j)(1); such documentation should include any reported problems involving the host employer. These requirements place the onus on sponsors to report problems involving mistreatment of J-1 participants. Nonetheless, these problems have the potential of reflecting badly on the sponsors themselves and could invite unwanted sanctions or audits. Sponsor reporting of employers also potentially damages the business relationship between sponsors and employers, which typically last multiple seasons.

<sup>17</sup> Due to the lax monitoring framework of the J-1 visa program which relies almost exclusively on the annual report versus regular on-site audits or visits, sponsors have a disincentive to report possible problems that the State Department would not otherwise have knowledge of.

<sup>18</sup> Another high profile case involving Eastern European students fraudulently recruited to work as J-1 SWT participants as restaurant servers but instead subjected to brutal violence and forced labor as strippers in Detroit, Mich. is *United States v. Maksimenko et al.* Press Release, DEPT. OF JUSTICE, Livonia Man Sentenced to 14 Years in Prison and \$1.5 Million in Restitution for Forcing Eastern European Women to Work at Detroit Area Strip Clubs (Jun. 25, 2007)(available at <http://legislationline.org/documents/action/popup/id/6765>) (last visited Jan. 27,

Another widely publicized incident involved nearly 400 J-1 student workers at a Hershey chocolate-packing factory in Palmyra, Pennsylvania, between the months of June and August 2011. The event was remarkable not least for the courageous nature in which approximately 200 of those international student workers from several countries staged a sit-in protest and street demonstration in the Hershey community.<sup>19</sup> Whereas many cases of labor exploitation involving international workers in the U.S. go unreported due to worker fears of reprisal, this group of international student participants resisted warnings from their sponsors and employers that they would be punished if they protested, and took to the streets about what they claimed were working and living conditions that fell far short of the ones they were originally offered.<sup>20</sup>

In a preliminary report conducted by a Human Rights Delegation that interviewed J-1 student workers in the wake of the incident, investigators cited possible violations including:

fraud and coercion in recruitment and contracting, failure to pay fair remuneration and unlawful pay deductions, including deductions for housing and charges for recruitment, visa, and travel costs that reduced the students' wages to significantly below minimum wage, failure to provide safe and decent working conditions, free from abusive, exploitative and discriminatory treatment, and interference with the right to freely choose one's place of work.<sup>21</sup>

As one student participant described his ordeal to the delegation, "We are supposed to be here for cultural exchange and education, but we are just cheap laborers."<sup>22</sup> Much like the Gambino and Bonnano case, the Hershey strikes underscore how easily J-1

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<sup>19</sup> See Colleen Breslin, et al., *Report of the August 2011 Human Rights Delegation to Hershey, Pennsylvania* (Sept. 11, 2011), available at <http://www.guestworkeralliance.org/wp-content/uploads/2011/09/Human-Rights-Delegation-Report-Hershey-Reissue-September-8.pdf> (last visited Feb. 12, 2012).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 18-22.

<sup>22</sup> *Id.* at 1.

labor abuses can arise, as well as the potential for generating bad will about the United States among impressionable international youth; albeit unintended, this outcome is nonetheless contrary to the program's stated goals.<sup>23</sup>

The Hershey case highlights another stark reality: the complicated web of sub-contractors that can form an integral part of the SWT program structure, yet with relatively little ability for the State Department to be aware of or to monitor these third-party employers. As the official State Department designated sponsor, CETUSA initially recruited and brought the participating students to the U.S.<sup>24</sup> The students' work ultimately benefited the Hershey Company, but according to a delegation of human rights lawyers who interviewed students about their SWT work experience, Hershey contracted Exel North American logistics to handle the day-to-day management of the packing facility and enlisted SHS Onsite solutions to staff factory workers.<sup>25</sup> SHS technically contracted with CETUSA for the J-1 student workers, and supplied them to Exel, yet student interviews uncover that the roles of various companies involved in their summer experience were "difficult to unravel" when faced with alleged unsafe and unfair working conditions.<sup>26</sup> Such a convoluted subcontractor structure raises essential questions about how accountability among program sponsors is meaningfully achieved by the State Department in a climate of increased subcontracting in the U.S. labor market. Above all, review of these two highly publicized cases and the State Department's response to alleged labor violations of J-1 visa participants suggests that, at the very least, there is a growing disconnect between the original intent of the program as conceived by the Mutual Educational and Cultural

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<sup>23</sup> MECEA, *supra* note 1, states that program goals include increasing mutual understanding between the people of the United States and other nations, promoting international cooperation for the cultural and educational achievement of the U.S. and other nations, and assisting "in the development of friendly, sympathetic and peaceful relations between the United States and other countries of the world."

<sup>24</sup> Preston, *supra* note 2.

<sup>25</sup> Breslin, *supra* note 19, at 4.

<sup>26</sup> *Id.* at 2.



Exchange Act and the current form it has taken as a de facto temporary foreign worker program.<sup>27</sup> Close examination of two unique categories of the J-1, the Au Pair and SWT program, reveal the significant legal challenges posed by the State Department's management of what effectively amount to employment programs. The scant labor protections afforded under each respective category of the J-1 visa, and their collective departure from the original legislative intent of fostering cultural exchange, expose the State Department to ongoing reports of participant abuse. The Au Pair and SWT programs are instructive because they offer a glimpse into both domestic and non-domestic labor sectors, including the service and factory sectors.<sup>28</sup> Furthermore, while the categories have distinct histories and guidelines regarding labor protections, they are nonetheless encumbered by the State Department's inability to adequately monitor either,<sup>29</sup> as such the Au Pair and SWT programs as they currently exist jeopardize the overall reputation of the J-1 Exchange Visitor Program in particular, and the State Department in general.

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<sup>27</sup> See Daniel Costa, *Guestworker Diplomacy: J visas receive minimal oversight despite significant implications for the U.S. labor market*, ECONOMIC POLICY INSTITUTE (July 14, 2011), at 3, available at [http://www.epi.org/publication/j\\_visas\\_minimal\\_oversight\\_despite\\_significant\\_implications\\_for\\_the\\_labor\\_ma/](http://www.epi.org/publication/j_visas_minimal_oversight_despite_significant_implications_for_the_labor_ma/) (last visited Feb. 12, 2012) [hereinafter EPI].

<sup>28</sup> Au pairs provide insight into the domestic labor sphere since au pairs are located in host families' homes and carry out child care while the summer work travel program participants provide insight into labor arrangements involving unskilled occupations. 22 C.F.R. § 62, Appendix E (listing examples of these occupations, the majority of which are in the service sector).

<sup>29</sup> See GAO 1990 and GAO 2005 Reports, *supra* note 9 (detailing the various failures to effectively monitor the summer work travel and au pair categories, among other categories).

*III. The SWT and Au Pair J-1 Programs: A Brief History and  
Overview of Labor Protections*

The Exchange Visitor Program originates from the Mutual Educational and Cultural Exchange Act (MECEA).<sup>30</sup> In the Cold War Era, top U.S. officials and legislators were keen to foster the United States' cultural knowledge and to win the hearts and minds of other nations, especially in developing regions of the world.<sup>31</sup> While there were U.S. legislative precursors to international educational and cultural exchange, the MECEA streamlined the previous versions and led to the form of international visitor exchange still in existence today.<sup>32</sup> The principled rhetoric of the landmark legislation is still prominent on the Bureau of Educational and Cultural Affairs (ECA) section of the State Department website with little mention of menial labor:

ECA accomplishes its mission through a range of programs based on the benefits of mutual understanding, international educational and cultural exchange, and leadership development. We engage youth, students, educators, artists, athletes and rising leaders in many fields in the United States and more than 160 countries through academic, cultural, sports, and professional exchanges.<sup>33</sup>

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<sup>30</sup> MECEA, *supra* note 1.

<sup>31</sup> *Id.* The MECEA was part of several U.S. government efforts carried out in the 1950s and 1960s to promote U.S. interests during the Cold War. For example, the United States Information Agency, which was responsible for the J-1 visa program from 1978 until 1999, was founded 1953 and responsible for *Voice of America*. This international broadcast was intended to promote a positive image of the United States abroad.

<sup>32</sup> For background on the legislative history of educational exchange see EPI *supra* note 27, at 3. See also *The Wonderful World of Disney Visas*, 63 FLA. L. REV. 915 (2011), available at <http://ssrn.com/abstract=1839544> (last visited Feb. 12, 2012).

<sup>33</sup> *About the Bureau*, U.S. Dept. of State, Bureau of Educational and Cultural Affairs, available at <http://exchanges.state.gov/about.html> (last visited Feb. 12, 2012).

It was under the auspices of this diplomatic tool that the Au Pair and SWT programs were created.<sup>34</sup> The non-immigrant visa category itself was established by the Immigration and Nationality Act (INA), and as such, the Department of Homeland Security (DHS) currently is responsible for facilitating participants' entry into the country.<sup>35</sup> But State Department regulations govern the program,<sup>36</sup> thus placing primary responsibility with the State Department for overseeing exchange visitors' activities while they are in the U.S.

### *A. The SWT Program*

The SWT program has existed since the inception of the MECEA in different forms without congressional authorization until 1998, when Congress gave the State Department explicit authority to administer summer travel and work programs without pre-placement requirements.<sup>37</sup> SWT annual admissions dramatically spiked from under 40,000 participants in 1998 to levels reaching 150,000 participants by 2008.<sup>38</sup> Also, around the same period the origin of SWT participants shifted from predominantly Western Europe countries to those of Eastern Europe.<sup>39</sup> While concrete employment placement data is sparse on the program, State Department

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<sup>34</sup> MECEA, *supra* note 1.

<sup>35</sup> Immigration-specific J-1 visa regulations are found at 8 C.F.R. §§ 212.7, 212.8, and 214.2. Nonetheless a Memo of Understanding (MOU) between the State Department and the Department of Homeland Security (DHS) regarding the J-1 visa program provides broad authority for the State Department to designate J-1 program categories, which results in virtually no DHS involvement in the J-1 visa's regulatory construction. For a detailed description of this MOU and its practical implications *see* EPI, *supra* note 27, at 5.

<sup>36</sup> 22 C.F.R. § 62.

<sup>37</sup> This authority to administer the SWT program without pre-placement requirements was granted in Section 846 of Public Law 105-244 (Oct. 7, 1998) and is codified at 22 U.S.C. § 1474. Pre-placement requirements refer to obligations of sponsors to secure employment placement of participants before their arrival to the United States.

<sup>38</sup> *See* EPI, *supra* note 27, at 10 (Figure C).

<sup>39</sup> *See* GAO 2005 Report, *supra* note 9.

designated sponsors advertise employment options in amusement/water parks, hotels, restaurants, grocery stores, tourist companies, and in security-related positions among others.<sup>40</sup>

Although colorful images of smiling SWT participants draped arm-in-arm on beaches, in front of popular U.S. monuments and adorned in crisp work uniforms are abundant on the State Department and designated sponsor websites, information regarding participant labor protections is not.<sup>41</sup> This is due in large part to the minimal labor protections actually afforded to this category of J-1 workers. The basic federal regulations pertaining to SWT participants principally focus on the obligations of State Department designated sponsors regarding the selection and monitoring of program participants, host employers and foreign entities operating outside of the U.S. that provide recruitment, consular and travel-coordination services.<sup>42</sup> SWT regulations outline very few enforceable worker protections. Nonetheless, since 2011 these protections have been expanded as a result of two State Department interim final rules.<sup>43</sup>

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<sup>40</sup> See, e.g., SPIRIT CULTURAL EXCHANGE, <http://www.spiritexchange.com/> (last visited Feb. 12, 2012); U.S.-UKRAINE FOUNDATION, <http://www.exchangeusa.org/> (last visited Feb. 12, 2012); UNITED STUDIES, INC., <http://www.unitedstudies.org/available.asp> (last visited Feb. 12, 2012).

<sup>41</sup> See, e.g., *J-1 Exchange Visitor Program*, U.S. DEPT. OF STATE, available at <http://j1visa.state.gov/participants/how-to-apply/about-ds-2019/> (last visited Feb. 12, 2012), which provided no information about SWT participants' employment and housing rights or any complaint process. Instead, a participant would need to know to search 22 C.F.R. § 62. Information found via the "Program Sponsors" tab on the website are far more complete, containing a reference to 22 C.F.R. § 62 and related legislation (such as the Mutual Education and Cultural Exchange Act of 1961), rulemaking documents, U.S. State Department guidance documents, a copy of the William Wilberforce Act (containing the TVPA) and a pdf version of a J-1 SWT Brochure designed for potential participants, which contains guidance on wage and hour and related laws.

<sup>42</sup> 22 C.F.R. § 62.32.

<sup>43</sup> Exchange Visitor Program Interim final rule with request for comment, 76 Fed. Reg. 23177 (April 26, 2011) available at <http://www.gpo.gov/fdsys/pkg/FR-2011-04-26/pdf/2011-10079.pdf> (last visited July 25, 2012) and Exchange Visitor Program—Summer Work Travel, Interim final rule with request for comment, *supra* note 6.

In particular, the SWT regulations establish appropriate employments placement practices, including certain prohibitions.<sup>44</sup> Sponsors are responsible for vetting all employers, and the May, 2012 interim final rule (IFR) sets guidelines for this process, including the vetting of all initial, subsequent and additional prospective employers within 72 hours<sup>45</sup> and an overall annual employer review process in which sponsors must ensure that host employers are legitimate and reputable businesses.<sup>46</sup>

Federal regulations prohibit sponsors from placing SWT participants in any positions in the adult entertainment industry, in sales work that requires the purchase of inventory that must be sold to support themselves, domestic help positions in private homes, as pedicab and rolling chair drivers or operators, as commercial drivers, any position related to clinical care, or “in any position that could bring notoriety or disrepute to the Exchange Visitor Program.”<sup>47</sup> Additionally, the May 2012 IFR extends the prohibition list, to include positions declared by the Secretary of Labor as hazardous to youth or that require sustained physical contact with other people; those that are substantially commission-based; with traveling fairs; those that involve gaming or gambling; warehousing or online order distribution center jobs; chemical pest control jobs; and positions for which there is another specific J category or that require licensing.<sup>48</sup> Placements in certain goods-producing industries will also be banned as of November 2012; this list includes oil and gas extraction, quarrying, forestry, fishing, and all job in manufacturing.<sup>49</sup>

The State Department’s May 2012 IFR also improves the placement process of SWT participants by setting forth regulations limiting the use of staffing agencies.<sup>50</sup> It makes explicit that SWT jobs must be temporary or seasonal in nature<sup>51</sup> and likewise prohibits

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<sup>44</sup> See generally 22 C.F.R. § 62.32(g).

<sup>45</sup> 22 C.F.R. § 62.32(g)(2).

<sup>46</sup> 22 C.F.R. § 62.32(n)(2).

<sup>47</sup> 22 C.F.R. § 62.32(h)(1).

<sup>48</sup> 22 C.F.R. § 62.32(h)(9)-(15); § 62.32(g)(5).

<sup>49</sup> 22 C.F.R. § 62.32(h)(16).

<sup>50</sup> 22 C.F.R. (g)(6).

<sup>51</sup> 22 C.F.R. § 62.32(g)(4).

employment placements with overnight work hours.<sup>52</sup> The May, 2012 regulations mandate that sponsors use “extra caution” when placing SWT participants in occupations associated with human trafficking, such as modeling agencies, housekeeping and janitorial services.<sup>53</sup> If a SWT participant wishes to change jobs, the regulations expressly prohibit sponsors from posing obstacles to changes, and sponsors must offer reasonable assistance regardless of whether the jobs were secured by sponsors or by the participant.<sup>54</sup>

The SWT regulations likewise articulate specific worker protections regarding compensation.<sup>55</sup> Sponsors must ensure that participants are paid at the higher of applicable Federal, State or local wage rates, including in situations where a portion of the SWT participant’s wages are withheld for employer-provided housing or transportation, or a participant is paid a “piece rate.”<sup>56</sup> If piece rate wages fall below the predominant local wage, the SWT participant’s pay must be supplemented.<sup>57</sup> Regulations similarly state that SWT participants may not be paid less than similarly situated U.S. workers.<sup>58</sup>

Beyond these stated protections for SWT participants, the May 2012 IFR also includes protection for U.S. workers. For example, in the course of sponsors’ routine vetting of employers, sponsors must confirm that host employers will not displace domestic U.S. workers, and that host employers have not experienced layoffs in the past 120 days nor have workers on lockout or strike.<sup>59</sup> These newly added U.S. worker protections obviously have the potential to discourage the participation of exploitive employers and to improve conditions generally in the workplaces where SWT participants are employed.

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<sup>52</sup> 22 C.F.R. § 62.32(h)(8).

<sup>53</sup> 22 C.F.R. § 62.32(g)(8).

<sup>54</sup> 22 C.F.R. § 62.32(g)(3).

<sup>55</sup> 22 C.F.R. § 62.32(i).

<sup>56</sup> 22 C.F.R. § 62.32(i)(2)(ii).

<sup>57</sup> *Id.*

<sup>58</sup> 22 C.F.R. § 62.32(i)(1)(ii).

<sup>59</sup> 22 C.F.R. § 62.32(n)(3)(ii) and (iii).

Additionally, while not explicitly labor related, the May 2012 IFR places greater emphasis on the cultural component of the program by requiring participants to be placed in jobs alongside U.S. citizens doing work where one will be exposed to U.S. culture, and through additional cultural offering when participants are not working.<sup>60</sup>

Finally, the SWT regulations—as a result of the May 2012 IFR—place definitive obligations on sponsors to ensure that SWT participants have access to safe and affordable housing and transportation.<sup>61</sup> SWT participants must be informed if employer housing or transportation costs will reduce wages, and any reduction should be made in compliance with the Fair Labor Standards Act.<sup>62</sup>

In spite of these substantial improvements in the SWT regulations, they still are inadequate to protect workers. There are no provisions setting either minimum or maximum hours to be worked. The lack of such standards leaves SWT participants vulnerable either to being overworked, or to leaving the U.S. poorer than when they arrived or even in debt. For example, a Peruvian-based SWT recruiter matter-of-factly states on its website that participants whose employers are providing too few work hours are free to seek a second job and are entirely responsible for doing so.<sup>63</sup> This lack of minimum and maximum work hours places SWT workers at a distinct disadvantage when compared to other low-wage temporary workers, such as Au Pairs, H-2A and H-2B workers, whose regulations do articulate minimum and maximum work hour

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<sup>60</sup> 22 C.F.R. § 62.32(f).

<sup>61</sup> 22 C.F.R. §62.32(e)(7) ; 22 C.F.R §62.32(i)(2)(i).

<sup>62</sup> 22 C.F.R. §62.32(g)(9). *See also* Interim Rule, *supra* note 6 , background section for a discussion of changes to sponsors' obligations regarding housing and transportation, including reference to the Fair Labor Standards Act (FLSA) and its stipulations of making those deductions voluntary and not charging such fees at a profit to employer or any affiliated person.

<sup>63</sup> *See* INTEJ website (INTEJ is a Spanish-language acronym which stands for "Promoter of Youth Education and Cultural Immersion"), *available at* [http://www.intej.org/work\\_travel/index.php?option=com\\_content&id=10&task=view&Itemid=16](http://www.intej.org/work_travel/index.php?option=com_content&id=10&task=view&Itemid=16) (last visited July 12, 2012). In its FAQ section, the organization explains how SWT participants recoup their initial investment in the program by undertaking a second job.

standards.<sup>64</sup>

SWT program regulations also lack an enforceable employment contract between participants, their host employers and their sponsors. In the absence of such a contract, participants who have suffered wage, overtime or other workplace violations have less legal recourse than would be available with an enforceable contract.<sup>65</sup>

The May 2012 protections regarding housing and transportation—while an improvement over pre-2011 regulations—still fail to adequately protect participants from predatory practices on the part of the employer or housing provider. The regulations only narrowly protect SWT participants whose employers consider housing as part of a compensation package.<sup>66</sup> Participants whose employers do not categorize housing as part of a compensation package or use unofficial partners to provide housing are not protected. Likewise, regardless of how housing or transportation fees are charged, the regulations do not mandate an assessment of the average market rate for housing in the specific geographical location of employment, information that would empower SWT participants to determine for themselves if prices are reasonable and affordable. Thus, SWT participants are not protected from extortionary rents or “sweetheart” deals between employers and housing providers.

The SWT regulations are not only lacking in terms of clearly defined worker protections, but also with respect to the method by which SWT participants may report abuses and enforce their rights.

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<sup>64</sup> See 22 C.F.R. § 62.31(c)(2) for Au Pair regulations on maximum work hours; 20 C.F.R. § 655.122 for H-2A provisions stipulating minimum work hour guarantees; see also new 20 C.F.R. 655.20 (f) for similar minimum work hour guarantees for H-2B workers.

<sup>65</sup> See e.g., Daniel Costa and Ross Eisenbrey, Public Comments: *Public Notice 7875: 60--Day Notice of Interim Final Rule: Exchange Visitor Program—Summer Work Travel*; 77 Fed. Reg. 27593 (May 11, 2012), Economic Policy Institute, July 10, 2012 at 9, available at <http://www.regulations.gov/#!documentDetail;D=DOS-2012-0033-0010> (last visited July 24, 2012). EPI and other commenters on the May 11, 2012 final interim rule “have identified this [lack of contract] as a major weakness in the SWT Program framework.” *Id.*

<sup>66</sup> 22 C.F.R. § 62.32(i)(2)(i).



While SWT regulations require sponsors to maintain contact with program participants on a monthly basis to “promptly and appropriately address issues affecting the participants’ health, safety, and welfare identified through such contacts,”<sup>67</sup> the regulations provide few meaningful protections for the SWT participant should labor abuses occur. In reality, the SWT regulations do not contain anti-retaliation provisions that provide recourse to participants, should a sponsor or employer improperly pressure the participant not to report program problems or punish a participant who asserts her rights. As the Equal Justice Center recently stated in public comments: “frequently, in an effort to preserve the relationship with the host employer, a sponsor or employer will dismiss complaints from participants and threaten to terminate their programs if they seek guidance.”<sup>68</sup> Since the regulations provide only vague language requiring sponsors to “promptly and appropriately address” issues, without specific procedures or anti-retaliation provisions, SWT participants are often rendered powerless when such disputes occur.<sup>69</sup>

The Hershey Case plainly illustrates how the lack of such measures can easily intimidate young, temporary foreign workers who experience demonstrable labor exploitation.<sup>70</sup> Additionally, the SWT Program fails both participants and the U.S. work force by failing to disclose publicly key program statistics. Unlike regulations that govern the H-2A and H-2B programs, SWT regulations do not mandate the disclosure of host employers enrolled in the program, the sponsors they partner with, their geographical location, the number of SWT participants utilized by employer each year, or the

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<sup>67</sup> 22 C.F.R. § 62.32(j)(1).

<sup>68</sup> See EQUAL JUSTICE CENTER, Comment on DOS-2012-0033-0001 (July 10, 2012), available at <http://www.regulations.gov/#!documentDetail;D=DOS-2012-0033-0012> (last visited July 25, 2012).

<sup>69</sup> 22 C.F.R. § 62.32(j)(1).

<sup>70</sup> The Human Rights Delegation to Hershey, Pennsylvania documented in detail the misinformation and threats that SWT participants received from sponsors and local supervisors when they expressed health concerns or protested their working conditions. See Breslin, *supra* note 19, at 22.

occupational titles of all SWT participants.<sup>71</sup>

Overall, protection of SWT workers is vague, nominal, and indirectly framed as obligations on the part of the sponsor. The lack of explicit protections renders the J-1 SWT regulations virtually useless in the practical enforcement of labor rights. While it is positive that the regulations now require that sponsors use “extra caution” when placing SWT participants in occupations that are frequently associated with trafficking in persons,<sup>72</sup> these measures are hollow since the State Department claims no authority over employers and does not explicitly confer authority to agencies such as the U.S. Department of Labor to investigate abuses or enforce SWT regulations. Instead, workers more often must rely on implicit protections contained in such legislation as the Fair Labor Standards Act if their employers are bound by it,<sup>73</sup> state wage and hour laws,<sup>74</sup> and statutes related to fair housing,<sup>75</sup> in order to challenge wrongdoing on the part of SWT sponsors, employers (including employment related sub-contractors) and other parties responsible for recruitment, housing and other programmatic elements.

### *B. The Au Pair Program*

Unlike the SWT Program, the Au Pair category involved considerably more congressional involvement in its creation. The U.S. Information Agency (USIA), an organization established to manage U.S. public diplomacy efforts after World War II and the architects of the global broadcast, Voice of America, had direct oversight of the Exchange Visitor Program from 1978 until 1999.<sup>76</sup>

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<sup>71</sup> See 20 C.F.R. §655.174 for an example of the requirement of such statistics for the H-2A program.

<sup>72</sup> 22 C.F.R. § 62.32(g)(8).

<sup>73</sup> 29 U.S.C. § 201 *et seq.*

<sup>74</sup> See, e.g., Colorado Wage Claim Act, Colo. Rev. Stat. § 8-4-101 *et seq.*; N.Y. Labor Law § 650 *et seq.*

<sup>75</sup> See, e.g., Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. § 3601 *et seq.*

<sup>76</sup> Susan Epstein, *The Au Pair Program*, Congressional Research Service:

In 1986, one of the longest standing cultural exchange sponsors, the American Institute of Foreign Study, approached the USIA with the idea of piloting the first U.S. 'Au Pair' program, a French term literally meaning "on par with," to refer to being an extension of the family as a mother's helper.<sup>77</sup> Using its authority to authorize such pilot programs, the Au Pair program was launched on a two-year preliminary basis.<sup>78</sup> Almost immediately, government officials outside of USIA raised concerns that the program violated the spirit of the MECEA since it served mainly as a full-time childcare program and lacked a cultural and educational component.<sup>79</sup> An interagency review panel consisting of members of the USDOL, the legacy Immigration and Naturalization Service (INS) and USIA concluded that the forty-five hours of childcare provision contained in the pilot program regulations were not authorized under the MECEA and recommended that the program be discontinued.<sup>80</sup>

Despite USIA's initial decision to terminate the program in 1988, Congress intervened and enacted legislation requiring continuation of the Au Pair program for two more years, effectively overriding the USIA's finding.<sup>81</sup> The same congressional legislation also called for an investigation by the Government Accountability Office (GAO) into whether the activities outlined by Au Pair program were inappropriate pursuant to the 1961 Act.<sup>82</sup> The GAO determined that the childcare program, as a full-time employment endeavor, was not appropriate for the Exchange Visitor Program, and held that categories like the Au Pair would likely be better suited for a strictly employment-based immigration category, with requirements geared towards temporary foreign labor activities.<sup>83</sup>

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*Report 95-256*, Wikileaks Document Release (Jan. 30, 1998), available at <http://ftp.fortunaty.net/org/wikileaks/CRS/wikileaks-crs-reports/95-256.pdf> (last visited Feb. 12, 2012).

<sup>77</sup> Epstein, *supra* note 76, at 2.

<sup>78</sup> *Id.* at 2.

<sup>79</sup> GAO 1990 Report, *supra* note 9, at 19.

<sup>80</sup> *Id.* at 19.

<sup>81</sup> Public Law 100-461 (10/1998).

<sup>82</sup> *Id.*

<sup>83</sup> GAO 1990 Report, *supra* note 9, at 20.

Congress continued to reauthorize the program until 1997 when it extended the program indefinitely.<sup>84</sup> Not unlike the SWT Program, the Au Pair program currently operates with minimal congressional oversight.

In contrast to the SWT regulations, the Au Pair program regulations include more labor protections.<sup>85</sup> Whereas the SWT wage and hour requirements are less explicit, the Au Pair regulations state clearly that participants shall be paid “in conformance with the requirements of the Fair Labor Standards Act (FLSA) as interpreted and implemented by the USDOL.”<sup>86</sup> Participants may not work more than forty-five hours per week or ten hours per day,<sup>87</sup> while “Educare”<sup>88</sup> au pairs’ hours may not exceed thirty hours per week, or ten hours per day.<sup>89</sup> Additionally, the au pair must receive a day and half off per week, one complete weekend off per month, and two weeks of paid vacation.<sup>90</sup> Unlike the SWT regulations, au pair program sponsors must secure an employment placement and ensure telephone contact between the participant and host family prior to the participant’s arrival.<sup>91</sup>

Furthermore the sponsor shall provide the au pair “with a copy of all operating procedures, rules, and regulations, including a grievance process, which govern the au pair’s participation in the exchange program,” along with a detailed profile of the host family and relevant community resource information.<sup>92</sup> The regulations contain more stringent monitoring and reporting requirements as well, including mandatory monthly contact with the participant, the immediate reporting of incidents alleging crimes of moral turpitude

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<sup>84</sup> EPI, *supra* note 27, at 5.

<sup>85</sup> 22 C.F.R. § 62.31.

<sup>86</sup> 22 C.F.R § 62.31(j)(1).

<sup>87</sup> 22 C.F.R § 62.31(c)(2).

<sup>88</sup> Educare au pair refers to those participants working in the home where all children are school age, and thus, are providing care outside of normal school hours. 22 C.F.R. § 62.31.

<sup>89</sup> 22 C.F.R § 62.31(j).

<sup>90</sup> 22 C.F.R § 62.31(j)(3) & (4).

<sup>91</sup> 22 C.F.R § 62.31(e).

<sup>92</sup> 22 C.F.R. § 62.31(f)(1).

or violence, and an annual summary of all complaints made by participants and host families during the course of the program year.<sup>93</sup> Sponsor organizations must also submit an annual report to the State Department completed by a certified public accountant, ensuring compliance with all program requirements.<sup>94</sup> The Au Pair regulations also contain specific sanctions that allow the State Department to immediately revoke a sponsor's designation if certain requirements are not met.<sup>95</sup> In terms of a cultural and educational component, au pairs must be enrolled at a post-secondary institution while in the U.S. and the host family is required to offset a portion of tuition costs.<sup>96</sup>

The considerable protections of the Au Pair program compared with the SWT visa category are laudable and could serve as a template for the SWT program in terms of their explicit mention of the FLSA, participant pre-arrival safeguards, including information on wage and hour requirements and the formal grievance process, in addition to a labor contract which articulates key workplace obligations on the part of the employer and participant and is signed by both parties.<sup>97</sup> Nonetheless, au pairs are more vulnerable given that, as domestic workers, they work in isolation and have considerably fewer protections under most state and federal labor laws.<sup>98</sup> While a criminal background check is required for prospective au pairs, only employment and personal character references are required of host families.<sup>99</sup> There are no anti-retaliation provisions.<sup>100</sup> With increased public awareness about the added vulnerabilities of migrant domestic workers in U.S. homes,<sup>101</sup>

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<sup>93</sup> 22 C.F.R § 62.31(l).

<sup>94</sup> 22 C.F.R § 62.31(m)(4).

<sup>95</sup> 22 C.F.R. § 62.31(h).

<sup>96</sup> 22 C.F.R § 62.31(k)(1).

<sup>97</sup> 22 C.F.R. § 62.31(e)(5).

<sup>98</sup> See generally Adam J. Hiller & Leah E. Saxtein, *Note: Falling through the Cracks: The Plight of Domestic Workers and Their Continued Search for Legislative Protections*, 27 HOFSTRA LAB. & EMP. L.J. 233 (Fall 2009).

<sup>99</sup> 22 C.F.R. § 62.31(d)(6) & (h)(4).

<sup>100</sup> See generally 22 C.F.R § 62.31.

<sup>101</sup> See Corey Kilgannon, *Long Island Couple are Convicted of Enslaving 2*

the State Department is in a precarious position to meaningfully defend worker's rights, lacking both the enforcement capacity and investigative expertise that such controversial cases may require.

Beyond the substance of regulations pertaining to SWT and Au Pair participants is the process by which the State Department creates, modifies and enforces them. Because the State Department, as a foreign affairs agency, is exempt from §553 (rulemaking) and §554 (adjudications) of the Administrative Procedures Act (APA), a federal law detailing the obligations of transparency to the U.S. public on the part of federal government agencies, it has the authority to create any J-1 visa category it deems consistent with the MECEA's intent of fostering cultural and educational exchange.<sup>102</sup> The State Department does not have the legal obligation to seek input from other federal agencies or the public on regulations governing its J-1 employment-based programs.<sup>103</sup> As Daniel Costa, author of the Economic Policy Institute Report asserts, this "foreign affairs exception to the APA allows the State Department to promulgate, amend, and repeal J-1 regulations as they [sic] see fit, without needing to publicly demonstrate their [sic] rationale for doing so, and without being required to solicit and consider the opinions and suggestions of the public."<sup>104</sup> As the history of the SWT demonstrates, the aforementioned categories of the J-1 Visa have been created largely without the U.S. public's knowledge, and by extension, with little public scrutiny. This contrasts with regulations governing other temporary visa worker programs, such as the H-2A and H-2B; since USDOL is not exempt from the APA, it solicits feedback and publishes all proposed changes to relevant

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*Domestic Workers*. N.Y.TIMES Dec. 18, 2007, at B3; see also Human Rights Watch, *Migrant Domestic Workers Face Abuse in the U.S.*, <http://www.hrw.org/news/2001/06/13/migrant-domestic-workers-face-abuse-us> (last visited Feb. 12, 2012).

<sup>102</sup> 5 U.S.C. § 500 *et seq.*; see 76 Fed. Reg. 23181 (Apr. 26, 2011) (providing a description by the State Department of its own legal reasoning regarding its exception to rulemaking and adjudications of the Administrative Procedures Act).

<sup>103</sup> *Id.*

<sup>104</sup> EPI, *supra* note 27, at 5.

labor programs.<sup>105</sup> As discussed, in the wake of alleged scandals surrounding the SWT Program, the State Department has recently invited public comments regarding various aspects of the SWT Program.<sup>106</sup> Regardless of this promising gesture of transparency, it falls short of the fundamental reform needed to protect workers under the program.

Moreover, whereas the USDOL's Wage and Hour Division operates from dozens of offices across the county, enforcing FLSA and other labor-related laws, the State Department's Office of Exchange Coordination and Compliance (ECC), a unit within the Bureau of Educational and Cultural Affairs' Private Sector Exchange's Office, staffs relatively few individuals to monitor the activities of approximately 300,000 participants.<sup>107</sup>

According to a 2005 GAO Report on the SWT Program, these compliance officers have typically relied on "telephone, email, fax or letter" correspondence to investigate sponsor reports of abuses or problems.<sup>108</sup> Due to these significant resource restraints, GAO reported that in a four-year period prior to 2005, the State Department had made site visits to only 8 of 206 program sponsors.<sup>109</sup> In September of 2011, however, the State Department announced it would visit fourteen SWT program sponsors to more fully evaluate recent allegations of SWT program abuses.<sup>110</sup> Although this suggests that the State Department takes concerns about the welfare of J-1 participants seriously, the overall

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<sup>105</sup> 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) & (b); 5 U.S.C. § 551(a)(1).

<sup>106</sup> See 76 Fed. Reg. 72995 (Nov. 28, 2011) (containing public notice 7695). The State Department invited public comment on Form DS-2007, the Summer Work Travel Employment Placement Form.

<sup>107</sup> EPI, *supra* note 27, at 3 (providing an estimate of the proportion of J-1 visitors authorized to work in the U.S.). According to media reports, the Acting Deputy Assistant Secretary of State has indicated that the State Department will add fifteen additional employees to its J-1 visa compliance unit as part of its efforts to bolster J-1 Visa program monitoring efforts. Preston, *supra* note 2.

<sup>108</sup> GAO 2005 Report, *supra* note 9, at 10.

<sup>109</sup> *Id.*

<sup>110</sup> Bureau of Educational and Cultural Affairs; Exchange Visitor Program; Summer Work Travel Program Sponsor On-Site Reviews, 76 Fed.Reg. 24551 (Sept. 23, 2011).

weaknesses in program enforcement cannot be understated. The most serious sanctions at the State Department's disposal are the suspension or revocation of a sponsor's program designation.<sup>111</sup> Unlike the USDOL, ECC compliance officers are not empowered to redress violations of participants' basic rights.<sup>112</sup> A closer examination of the labor protections afforded under the H-2A and H-2B and the USDOL's management of the temporary worker visa programs further illustrates the weaknesses of the Au Pair and SWT program structure.

#### *IV. Comparison to the H-2A and H-2B Temporary Worker Programs*

Since in reality the SWT and Au Pair programs serve as temporary worker programs more than the cultural exchange programs they are touted to be, a comparison to other temporary worker programs is warranted. Most relevant to this article are the H-2A and H-2B visas,<sup>113</sup> because they involve a similar labor force as the SWT and Au Pair programs: lower-skilled workers for labor-intensive industries.

##### *A. The H-2A Visa Program*

The H-2A visa is for workers coming to the U.S. temporarily to perform agricultural labor or services.<sup>114</sup> Employers seeking to bring H-2A workers into the U.S. must obtain a certification from the U.S. Secretary of Labor that there are not sufficient workers who are available and qualified to perform the designated work and that the employment of H-2A workers will not adversely affect the wages and working conditions of workers already in the U.S. performing

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<sup>111</sup> 22 C.F.R. §§ 62.50, 62.32(h).

<sup>112</sup> See generally 22 C.F.R. § 62.50.

<sup>113</sup> The H-2A and H-2B visas are so named because of their location in the Immigration and Nationality Act (INA). INA § 101(a)(15)(H)(ii)(a) and (b). See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and (b); 5 U.S.C. § 551(a)(1).

<sup>114</sup> INA § 101(a)(15)(H)(ii)(a); 8 U.S.C. § 1101(a)(15)(H)(ii)(a).



similar work (U.S. workers).<sup>115</sup> Thus the USDOL is directly involved in determining whether a need for these workers exists and in ensuring that U.S. workers will not be harmed by their employment.

In 2010, the USDOL substantially revised the regulations implementing the H-2A visa program.<sup>116</sup> The regulations address in detail the protections that exist for both H-2A and U.S. workers and the remedies to address employer misuse of the system. For example, employers planning to utilize H-2A workers must offer to U.S. workers no less than the same benefits, wages, and working conditions offered to H-2A workers.<sup>117</sup> Employers may not impose on U.S. workers any restrictions or obligations that will not be imposed on H-2A workers.<sup>118</sup> During the recruitment phase that may lead up to the hiring of H-2As, the employer must contact U.S. workers who worked during the previous year and solicit them to return, unless the worker had been dismissed for cause or abandoned the workplace.<sup>119</sup> Under a requirement known as the “fifty percent rule,” qualified U.S. job applicants may not be denied work if they apply during the first half of the contract period.<sup>120</sup>

To protect all workers, the USDOL establishes on an annual basis the minimum hourly wage that employers must pay H-2A workers in order to ensure that the wages of similarly employed U.S. workers are not adversely affected.<sup>121</sup> These “adverse effect wage rates” are calculated annually for each occupation and location using the U.S. Department of Agriculture’s annual wage rate data and published in the Federal Register.<sup>122</sup> In 2012, the adverse effect

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<sup>115</sup> INA § 218(a); 8 U.S.C. § 1188(a).

<sup>116</sup> Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884 (Feb. 12, 2010) (amending 20 C.F.R. pt. 655, 29 C.F.R. pt. 501).

<sup>117</sup> 20 C.F.R. § 655.122.

<sup>118</sup> *Id.*

<sup>119</sup> 20 C.F.R. § 655.153.

<sup>120</sup> 20 C.F.R. § 655.135.

<sup>121</sup> 20 C.F.R. § 655.120.

<sup>122</sup> *Id.* For 2012 adverse effect wage rates, see Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2012 Adverse Effect Wage Rates, 76 Fed. Reg. 79711 (Dec. 22, 2011).

wage rate in Florida is \$9.52 per hour.<sup>123</sup> Since U.S. workers must receive the same wages and benefits as H-2A workers, they must receive this wage as well.<sup>124</sup> If a higher wage exists under state or federal minimum wage laws, piece rate, as part of a collective bargaining agreement or pursuant to the local prevailing wage, the workers must receive the highest rate.<sup>125</sup>

Some of the key additional requirements for both H-2A workers and U.S. workers employed at an H-2A site include the following: the employer must provide housing at no cost to the H-2A workers and those U.S. workers in corresponding employment who are not reasonably able to return to their residence within the same day.<sup>126</sup> The employer must provide workers compensation insurance, accurate and complete wage records, cover certain transportation expenses and provide all tools, supplies and equipment to the workers at no charge.<sup>127</sup> Employers also must provide a three-fourths guarantee, which ensures the worker's total number of hours will be equal to at least three-fourths of the workdays of the total contract period.<sup>128</sup> The employer must assure that there is no strike or lockout due to a labor dispute at the worksite,<sup>129</sup> and that the employer is not seeking or requiring the employee to pay the employer's attorneys' fees, application fees, or recruitment costs.<sup>130</sup>

Significantly, USDOL regulations expressly state that the terms of conditions of employment submitted in the application process, specifically in the employer "job orders," serve as a contract between the employer and the worker.<sup>131</sup> The employer and employee may have a separate written contract regarding wages, hours, working conditions and other benefits, but in the absence of

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<sup>123</sup> Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2012 Adverse Effect Wage Rates, *supra* note 122.

<sup>124</sup> 20 C.F.R. § 655.122(a).

<sup>125</sup> 20 C.F.R. § 655.120.

<sup>126</sup> 20 C.F.R. § 655.122.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> 20 C.F.R. § 655.135(b).

<sup>130</sup> 20 C.F.R. § 655.135(j).

<sup>131</sup> 29 C.F.R. § 501.3(a) ("job order").

that, the job order and other documents submitted under the H-2A laws constitute an enforceable contract.<sup>132</sup> In contrast, the SWT regulations do not explicitly establish a contract between the student worker and either the sponsor or the ultimate employer.<sup>133</sup> As stated by the Economic Policy Institute in recent public comments:

An enforceable employment contract is indispensable to encourage employer compliance and protect the SWT participant/worker in court—and fair access to the legal system for participant/workers will enhance the reputation of the State Department abroad, by sending the strong message that everyone present in the United States is equally protected under rule of law.<sup>134</sup>

Unlike the SWT and Au Pair programs, the H-2A provisions explicitly prohibit retaliation or blacklisting of a worker who asserts her rights under the statute and regulations. Specifically, the H-2A provisions prohibit retaliation against those who have

[f]iled a complaint. . . [i]nstituted or caused to be instituted any proceedings. . . [t]estified or is about to testify in any proceeding. . . [c]onsulted with an employee of a legal assistance program or an attorney. . . or [e]xercised or asserted on behalf of himself or others any right or protection afforded by the INA statute or related regulations.<sup>135</sup>

This anti-retaliation language is broad, establishing a range of protected conduct and prohibiting retaliatory conduct by “any person,” not just the employer.<sup>136</sup> Workers generally may not waive their rights arising under these laws.<sup>137</sup>

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<sup>132</sup> 29 C.F.R. § 501.3(a) (“work contract”).

<sup>133</sup> See generally 22 C.F.R. § 62.32.

<sup>134</sup> Daniel Costa & Ross Eisenberry, ECONOMIC POLICY INSTITUTE, *Comment on DOS-2011-0134-0001* (Jan. 31, 2012), available at <http://www.regulations.gov/#!documentDetail;D=DOS-2011-0134-0013> (last visited Feb. 12, 2012).

<sup>135</sup> 29 C.F.R. § 501.4.

<sup>136</sup> *Id.*

<sup>137</sup> 29 C.F.R. § 501.5.

Also unlike the SWT and Au Pair programs, the authority to investigate complaints arising under the H-2A statute and regulations is expressly vested in USDOL.<sup>138</sup> The H-2A regulations provide a high level of transparency, for example, requiring that USDOL maintain publicly available electronic files on employers applying for H-2A workers, including the number of workers requested, the date the application was filed and decided and the final outcome.<sup>139</sup>

USDOL has established detailed procedures for both the application process and for misconduct by H-2A employers. Penalties exist for those who knowingly and willfully falsify or conceal facts, who make false or fraudulent statements or who knowingly use false documents in the H-2A process.<sup>140</sup> Procedures exist for the revocation of H-2A certifications in the event of certain employer misconduct<sup>141</sup> and for debarment of employers, agents or attorneys upon a finding that they have committed “substantial” violations in the H-2A process.<sup>142</sup>

### *B. The H-2B Visa Program*

The H-2B visa allows workers to come temporarily to the U.S. to perform other (non-agricultural) temporary service or labor if U.S. workers cannot be found.<sup>143</sup> The INA does not set forth the requirements of the H-2B program to the degree that INA § 218<sup>144</sup> governs the H-2A program. Although the H-2B program historically has been far less regulated than the H-2A, INA § 214<sup>145</sup> sets forth certain provisions regarding H-2Bs.

In February 2012,<sup>146</sup> USDOL issued extensive regulations for

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<sup>138</sup> 29 C.F.R. § 501.6.

<sup>139</sup> 20 C.F.R. § 655.174.

<sup>140</sup> 29 C.F.R. § 501.8.

<sup>141</sup> 20 C.F.R. § 655.181.

<sup>142</sup> 20 C.F.R. § 655.182.

<sup>143</sup> INA § 101(a)(15)(H)(ii)(b), 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

<sup>144</sup> INA § 218.

<sup>145</sup> 8 U.S.C. § 1184.

<sup>146</sup> Temporary Non-agricultural Employment of H-2B Aliens in the United

the H-2B program, many of which emulate the H-2A program, to be effective April 23, 2012.<sup>147</sup> USDOL characterized the 2012 changes as a new rulemaking effort arising from and reflecting the “expansion of opportunities for U.S. workers, evidence of violations of program requirements, some rising to a criminal level, need for better worker protections, and a lack of understanding of program obligations.”<sup>148</sup> The program had been in need of reform for years, but most urgently after an Aug. 30, 2010, decision of the U.S. District Court for the Eastern District of Pennsylvania in *Comité de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis*,<sup>149</sup> which invalidated various provisions of regulations promulgated in 2008.<sup>150</sup>

On April 26, 2012, however, a federal district judge for the Northern District of Florida entered a preliminary injunction of the 2012 H-2B regulations, and thus they were never implemented.<sup>151</sup> The judge enjoined the USDOL from enforcing these regulations pending the outcome of the litigation, which is still pending.<sup>152</sup> As the USDOL states, the preliminary injunction:

necessarily calls into doubt the underlying authority  
of the Department of Labor to fulfill its

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States, Fed. Reg. publication date pending (Feb. 21, 2012), (amending 20 C.F.R. pt. 655 and adding 29 C.F.R. pt. 503), *available at* <http://s.dol.gov/MZ> (last visited Feb. 12, 2012).

<sup>147</sup> U.S. Dept. Labor, Wage and Hour Division, *Final Rule: Temporary Non-agricultural Employment of H-2B Aliens in the United States*, <http://www.dol.gov/whd/immigration/H2BFinalRule/index.htm> (last visited July 25, 2012).

<sup>148</sup> Temporary Non-agricultural Employment of H-2B Aliens in the United States, *supra* note 146, at 5.

<sup>149</sup> Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010).

<sup>150</sup> Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 29942 (May 22, 2008) (amending 20 C.F.R. pt. 655). The impact of the *CATA* case was reviewed by USDOL at Temporary Non-agricultural Employment of H-2B Aliens in the United States, *supra* note 146, at 4.

<sup>151</sup> Bayou Lawn & Landscape Services et al. v. Hilda Solis et al., No. 12-cv-183-MCR/CJK (N.D. Fla. Apr. 26, 2012) (copy of Order granting preliminary injunction on file with authors).

<sup>152</sup> *Id.*

responsibilities under the Immigration and Nationality Act and Department of Homeland Security regulations to issue the labor certifications that are a necessary predicate for the admission of H-2B workers.<sup>153</sup>

This preliminary injunction demonstrates that many impediments face the government and advocates attempting to establish basic worker protections. This and perhaps other legal challenges will proceed, and thus the status of the regulations will remain fluid for some time. This section will focus on the rules as published as an example of what can be improved in the context of the J SWT program. It does not attempt to review in depth either the detailed history of the regulatory changes or the current legal challenge. Further, a review of the very extensive, but currently enjoined, amendment and additions are beyond the scope of this article. However, the following are key provisions of the enjoined 2012 modifications to the H-2B regulations that serve as useful examples. Due to the current uncertain status of the regulations, they are referred to as “new” CFR provisions, to distinguish them from those currently in effect due to the injunction.

The USDOL, Employment and Training Administration (ETA) has jurisdiction to review H-2B certification requests, and has delegated this authority to the Office of Foreign Labor Certification.<sup>154</sup> The USDOL Wage and Hour Division (WHD) has the authority to investigate terms and conditions of employment in the H-2B program.<sup>155</sup> Under the enjoined 2012 regulations, the employer, and its attorney or agent, as applicable, would have to provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H-2B workers,<sup>156</sup> and would have to provide the identities of those working

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<sup>153</sup> Final Rule: Temporary Non-agricultural Employment of H-2B Aliens in the United States, *supra note* 154.

<sup>154</sup> New 20 C.F.R. § 655.2(a).

<sup>155</sup> New 20 C.F.R. § 655.2(b).

<sup>156</sup> New 20 C.F.R. § 655.9(a).

for the recruiter.<sup>157</sup> The USDOL would maintain a publicly available list of agents and recruiters who are party to the agreements.<sup>158</sup>

Although H-2B workers would not be not entitled to the Adverse Effect Wage Rate available to H-2A workers, employers would have to offer at least the prevailing wage established by the federal government, or the state or federal minimum wage, whichever is greater.<sup>159</sup> U.S. workers would have to be offered no less than the same benefits, wages, and working conditions than those available to H-2B workers, U.S. workers would not be subject to any restrictions or obligations not imposed on H-2B workers and the H-2B workers would have to receive the minimum benefits, wages, and working conditions that are offered to U.S. workers.<sup>160</sup> The employer's certification documents would have to provide thorough information about the position, including the employer's name and contact information; the total number of job openings; that the job opportunity is a temporary, full-time position; details about required job duties and qualifications; the work hours and days; the anticipated start and end dates; the geographic area of intended employment so as to apprise applicants of any travel requirements and where applicants will likely have to reside; the wage the employer is offering, ensuring that the wage offer equals or exceeds the highest of the prevailing wage or the federal, state, or local minimum wage; specify the availability of overtime and specify the frequency with which the worker will be paid, which must be at least every two weeks or according to the prevailing practice in the area of intended employment.<sup>161</sup> If the employer provided the worker with the option of board, lodging, or other facilities, including fringe benefits, or intended to assist workers to secure such lodging, the employer would have to disclose the cost of the board, lodging, or other facilities, including fringe benefits or assistance to be provided.<sup>162</sup> Thus, unlike H-2A employers, H-2B employers would

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<sup>157</sup> New 20 C.F.R. § 655.9(b).

<sup>158</sup> New 20 C.F.R. § 655.9(c).

<sup>159</sup> New 20 C.F.R. § 655.10.

<sup>160</sup> New 20 C.F.R. § 655.18(a)(1).

<sup>161</sup> New 20 C.F.R. § 655.18(b)(1)-(9).

<sup>162</sup> New 20 C.F.R. § 655.18(b)(10).

not be required to provide housing at the employer's expense.

The employer would have to make all required deductions and specify any other deductions the employer intended to make from the worker's paycheck which were not required by law, including, deductions for the reasonable cost of board, lodging, or other facilities.<sup>163</sup> The employer would have to reimburse the H-2B worker in the first workweek for all visas, visa processing, border crossing, and other related fees, including those mandated by the government, incurred by the H-2B worker (but need not include passport expenses or other charges primarily for the benefits of the worker).<sup>164</sup> The employer would have to provide or reimburse the worker for certain transportation expenses.<sup>165</sup> The employer would provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.<sup>166</sup>

The employer would be subject to the three-fourths guarantee, similar to that required in the H-2A context. The employer would guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays in each twelve week period (each six week period if the period of employment covered by the job order is less than 120 days), with some exceptions.<sup>167</sup> The employer would have to maintain and provide to each worker detailed wage statements.<sup>168</sup>

Like the H-2A regulations, the H-2B regulations would prohibit retaliation for a broad range of protected activities, including filing a complaint or other proceeding or consulting with workers' center or attorney.<sup>169</sup> Like the H-2A regulations, the H-2B regulations also would require the employer to provide assurance that there no is strike or lockout at any of the employer's

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<sup>163</sup> New 20 C.F.R. § 655.20(c).

<sup>164</sup> New 20 C.F.R. § 655.20(j).

<sup>165</sup> New 20 C.F.R. § 655.18(b)(12)-(14).

<sup>166</sup> New 20 C.F.R. § 655.18(b)(16).

<sup>167</sup> New 20 C.F.R. § 655.20(f).

<sup>168</sup> New 20 C.F.R. § 655.20(i).

<sup>169</sup> New 20 C.F.R. § 655.20(n).



worksites.<sup>170</sup> Employers also would be required to recruit U.S. workers whom they employed during the previous year, except those who were dismissed for cause or who abandoned the worksite.<sup>171</sup>

### *C. Comparison to J-1 SWT and Au Pair Program*

In sum, USDOL has attempted to require that H-2A and H-2B employers provide an extensive amount of information to prospective workers about the terms and conditions of employment. The wages for each category of worker are determined under federal law, and are set at amounts that are intended to avoid undercutting wages for U.S. workers. Regulations attempt to ensure that any U.S. workers employed at an H-2A or H-2B site must receive the same rate of pay and working conditions as the visa worker. They seek to protect all workers from retaliation and USDOL holds enforcement authority over both the certification process and in enforcing the terms and conditions of employment. The programs are required to provide more transparency through the public dissemination of information about visa applications, approvals, and recruiters. More information about the identity of recruiters is important in all contexts because workers often are defrauded, abused, or even trafficked by recruiters before even entering the U.S.<sup>172</sup> The J-1 SWT visa program provides none of these protections, either for the visa workers or for U.S. workers. The Au Pair program provides more oversight than the SWT program in terms of screening and monitoring the work site, but still lacks the full protections available under the H-2A and H-2B programs.

This is not to say that H-2A and H-2B programs have not

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<sup>170</sup> New 20 C.F.R. § 655.20(u).

<sup>171</sup> New 20 C.F.R. § 655.20(w).

<sup>172</sup> For a full discussion of the exploitation regularly committed by recruiters and recommendations for improving protections *see*, Cathleen Caron, *Why Transparency in the Recruiter Supply Chain is Important in the Effort to Reduce Exploitation of H-2 Workers: A Global Workers Justice Alliance Position Paper* (Sept. 2011), available at [http://globalworkers.org/PDF/recruiter\\_supply\\_chain\\_disclosure\\_gwja\\_sept\\_2011.pdf](http://globalworkers.org/PDF/recruiter_supply_chain_disclosure_gwja_sept_2011.pdf) (last visited Feb. 12, 2012).

resulted in exploitation and abuse of workers. Several large human trafficking prosecutions in recent years have involved H-2A and H-2B workers.<sup>173</sup> It would be naïve to suggest that the mere existence of regulations fully prevents worker exploitation, particularly when employers have the means to level constant legal challenges. With fewer regulatory protections and less oversight, however, SWT and Au Pair participants are even more vulnerable to exploitation than similarly situated international workers on temporary employment visas such as the H-2A and H-2B. With so little capacity to provide oversight, the State Department is not likely to uncover exploitation when it does happen. Any J-1 specific anti-retaliation provisions do not protect workers who take a stand against abuses, such as the Hershey workers.

Consequently, the lack of protections for Au Pair and SWT participants afforded under federal law when compared to similarly situated temporary H-2A and H-2B workers, coupled with the State Department's largely ineffectual regulatory framework for program monitoring and enforcement relative to agencies like USDOL, raise serious questions about the State Department's role as administrator of perhaps the largest temporary worker visa program in the U.S.<sup>174</sup> Not only does the State Department's responsibility for the Au Pair, SWT and other employment-focused exchange visitor categories disempower workers and constrain an agency not well equipped to manage labor programs, but it places the State Department at odds with its primary foreign affairs and diplomatic objectives, as demonstrated by the State Department's obligation to coordinate

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<sup>173</sup> For example, in *United States v. Askarkhodjaev*, No. 09-00143-01-CR-W-ODS (W.D. Mo. May 6, 2009) a federal grand jury indicted 12 defendants on human trafficking and related charges arising from alleged violations in 14 states. According to the indictment, a labor leasing company exploited hundreds of male and female laborers, many of them on H-2B visas, in the hotel/resort, casino, and construction industries. The government alleged that the defendants underpaid the immigrant workers, threatened them with deportation, imposed various arbitrary fees on the workers, charged unconscionable rents for crowded and unsanitary housing and threatened to charge their families exorbitant fees if they escaped. In May 2011, the alleged ringleader was sentenced to 144 months in prison after pleading guilty to various counts. (Indictment and Judgment on file with authors).

<sup>174</sup> EPI, *supra* note 27, at 9.

U.S. anti-trafficking activities and to critique other nations on their efforts to prevent labor exploitation and human trafficking pursuant to the TVPA,<sup>175</sup> as the next section discusses.

*V. The Trafficking Victim Protection Act:  
The State Department's Role*

At precisely the time when the J-1 exchange visitor admissions levels were increasing rapidly, U.S. lawmakers were engaged in intense debates about what would later become the nation's most comprehensive anti-trafficking legislation. Two cases in particular—the *El Monte Sweatshop*<sup>176</sup> and the *Deaf Mexican Case*<sup>177</sup>—shocked U.S. officials, human rights advocates and community members alike.<sup>178</sup> Traffickers not only subjected migrants to unthinkable living and working conditions, but did so in densely populated neighborhoods, seemingly under the noses of Los Angeles and New York City residents.<sup>179</sup> In the U.S.'s efforts to hold individuals responsible for these modern manifestations of forced labor, prosecutors realized the legal complexities of prosecuting such cases without tangible evidence of physical violence.<sup>180</sup> The criminals involved in these newly surfaced cases were savvy and

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<sup>175</sup> TVPA, *supra* note 5.

<sup>176</sup> *United States v. Paoletti-Lemus et al.*, No. 97-cr-00768-NG (E.D.N.Y.).

<sup>177</sup> *United States v. Manasurangkun et al.*, No. 95 Cr. 714(A) (C.D. Cal. 1995).

<sup>178</sup> Luis CdeBaca, *El Monte, 15 Years Later: Reflections on a Labor Trafficking Case in California*, DIPNOTE, (Aug. 3, 2010), available at [http://blogs.state.gov/index.php/site/entry/labor\\_trafficking\\_california](http://blogs.state.gov/index.php/site/entry/labor_trafficking_california) (last visited Feb. 8, 2012); see also, Dan Barry, *Pair Arrested in Chicago In Smuggling-Ring Inquiry*, N.Y. TIMES, July 27, 1997.

<sup>179</sup> *U.S. v. Manasurangkun*, *supra* note 177. Victims involved were held in a densely populated neighborhood of Los Angeles. *U.S. v. Paoletti-Lemus*, *supra* note 150. Victims were forced to sell trinkets in New York subways plainly in view of residents; the traffickers had links to similar operations in Chicago.

<sup>180</sup> In *U.S. v. Kozminski*, 487 U.S. 931 (1988), the U.S. Supreme Court ruled that involuntary servitude should be interpreted narrowly, such as where the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury or by the use or threat of coercion through law or the legal process.

preyed on victims' immigration, socio-economic, gender, ethnic, and disability status.<sup>181</sup> They often only had to employ verbal threats to keep migrants captive.<sup>182</sup> Traffickers created the perception of mounting debt owed for passage to the U.S.<sup>183</sup> They also made plausible threats to report victims to law enforcement as illegal or to cause harm to family members if the victims tried to leave their situation.<sup>184</sup> Such subtle forms of psychological manipulation were difficult for federal prosecutors to prove, a difficulty the TVPA specifically addressed.<sup>185</sup>

In response to growing concern about this surreptitious crime, President Clinton issued a Presidential Directive in 1998, which provided a template for the U.S.'s approach to anti-trafficking efforts.<sup>186</sup> It included the framework of what then were "3-Ps": "prevention" of human trafficking, "protection" and rehabilitation for victims affected, and "prosecution" of traffickers;<sup>187</sup> more recently advocates and government officials have added a fourth P, referring to "partnerships" among different levels and divisions of law

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<sup>181</sup> See *U.S. v. Paoletti-Lemus et al.*, *supra* note 176 (providing descriptions of coercive tactics used to recruit victims of both cases). In the case of the deaf Mexican victims, their traffickers targeted them specifically because they were deaf, and thus less able to seek help once in the United States.

<sup>182</sup> See *U.S. v. Manasurangkun et al.*, *supra* note 77 (providing descriptions of coercive tactics used to compel victims of both cases to continue working for defendants that did not involve physical violence, but rather non-violent threats based on a lack of legal immigration status).

<sup>183</sup> See *e.g.*, *United States v. Zavala et al.*, 04-mj-00857 (E.D.N.Y). The U.S. government charged the defendants with smuggling nearly eighty Peruvian nationals into New York State between 2003 and 2004. *Id.* Living and working in various establishments on Long Island, victims feared leaving their situation based on perceptions from traffickers of mounting debt for passage, room and board, and other fees.

<sup>184</sup> See *U.S. v. Paoletti-Lemus, et al.*, *supra* note 176; *see also* *U.S. v. Manasurangkun, et al.*, *supra*, note 177 (providing descriptions of coercive tactics used to compel victims of both cases to continue working for defendants).

<sup>185</sup> See 22 U.S.C. § 7101(b)(13).

<sup>186</sup> Memorandum on Steps To Combat Violence Against Women and Trafficking in Women and Girls, Pub. Papers 358 (Mar. 11, 1998).

<sup>187</sup> See Janie Chuang, *United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 449 (2006).

enforcement, and between law enforcement and social service sectors.<sup>188</sup> The aim of President Clinton's directive was to address human trafficking with proposed domestic legislation, and for the U.S. to play a leading role in the crafting of the United Nations (U.N.) Protocol to Prevent, Suppress and Punish Trafficking in Persons, contained in the U.N. Convention Against Transnational Crime.<sup>189</sup>

President Clinton's directive, along with growing international consensus on strategies to combat human trafficking, galvanized the U.S. Congress to take action on the issue. As the result of hard fought compromise amidst various proposed anti-trafficking bills, the Victims of Trafficking and Violence Protection Act was passed by U.S. lawmakers in 2000.<sup>190</sup>

The legal framework created by the TVPA has been heralded by many as a legal model internationally.<sup>191</sup> First, the act recognized that traffickers could control victims without the use of physical force.<sup>192</sup> The definitions of forced labor and sex trafficking encompass situations where the victim is exploited through the use of force, fraud, or coercion.<sup>193</sup> Coercion is defined broadly.<sup>194</sup>

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<sup>188</sup> Reference to the fourth 'P', partnerships, is described on the State Department's website: <http://www.state.gov/j/tip/> (last visited on March 11, 2012).

<sup>189</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. GAOR, 55th Sess., U.N. Doc. A/55/383 (Nov. 15, 2000). See Chuang, *supra* note 161, at 449 (providing a discussion of the U.S.'s leadership objectives during U.N. protocol drafting process). Chuang credits the United States government with spearheading the drafting of the U.N. Protocol.

<sup>190</sup> TVPA, *supra* note 5. The TVPA was subsequently modified by the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875; the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); and the Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457 Stat 5044.

<sup>191</sup> See generally Chuang, *supra* note 187.

<sup>192</sup> 18 U.S.C. § 1589 (forced labor) and 18 U.S.C. § 1591 (sex trafficking) outline the forms of coercion, in addition to the use of physical force, to control and force victims to perform or to continue to perform labor or services to avoid incurring harm.

<sup>193</sup> 18 U.S.C. § 1589 defines forced labor. 18 U.S.C. § 1591 defines sex

Secondly, taking into account the devastating emotional and financial impact of human trafficking on its victims and the increased vulnerability of victims to reprisals by traffickers outside of the U.S., the TVPA extended protections such as eligibility for immigration relief, public assistance, and specialized case management and legal services to victims and their qualified family members. It also gave victims a civil cause of action to sue their traffickers.<sup>195</sup> Finally, the U.S. extended its efforts globally by undertaking the monitoring and reporting of foreign governments' efforts to prevent and combat human trafficking.<sup>196</sup>

Thus, hypothetically, if the SWT participants in the New York club case<sup>197</sup> were being coerced with deportation, threatened with physical harm or harm to their family members or otherwise forced into participating in the work, they were victims of human trafficking in the course of participating in a State Department program.<sup>198</sup>

Pursuant to the TVPA, Congress designated the Secretary of State as the chair of an interagency taskforce to monitor and combat human trafficking. The taskforce also includes the Administrator of

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trafficking of children or by force fraud or coercion. When children under 18 years of age are brought into the commercial sex industry, no force, fraud or coercion needs to be shown, since minors may not consent to this conduct. 18 U.S.C. § 1591(a)(2).

<sup>194</sup> 18 U.S.C. § 1589 (forced labor) and 18 U.S.C. § 1591 (sex trafficking) specify that the manner of control can include force, threats of force, physical restraint or threats of physical restraint to the victim or to another person; by means of serious harm or threats of serious harm to the victim or to another; by means of the abuse or threatened abuse of law or legal process, such as threats of deportation; or by means of any scheme intended to cause the victim to believe that if the person did not perform such labor or services, that person or another would suffer serious harm or physical restraint. Serious harm can include psychological, financial or reputational harm that is sufficiently serious, under the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

<sup>195</sup> 18 U.S.C. § 1595 provides a civil cause of action.

<sup>196</sup> 22 U.S.C. § 7107(b)(1).

<sup>197</sup> U.S. v. Trucchio, et al., *supra* note 11.

<sup>198</sup> 18 U.S.C. § 1589.

the United States Agency for International Development, the Attorney General, the Secretary of Labor, the Secretary of Health and Human Services, the Director of National Intelligence, the Secretary of Defense, the Secretary of Homeland Security, and the Secretary of Education.<sup>199</sup> The TVPA likewise established an Office to Monitor and Combat Human Trafficking, designating the Department of State to lead it.<sup>200</sup> With these steps, the State Department emerged as the coordinating agency of U.S. anti-trafficking efforts.<sup>201</sup>

Additionally, the TVPA created both incentives, in the form of grants to support anti-trafficking activities abroad<sup>202</sup> and penalties, which include the threat of unilateral sanctions on governments failing to meet minimum standards, in the U.S. government's efforts to eliminate human trafficking.<sup>203</sup> Since 2001, the State Department—pursuant to the TVPA—has published a Trafficking in Persons (TIP) Report, which ranks countries annually based on a tier system.<sup>204</sup> Among the stated criteria in determining a country's ranking are: whether a government “vigorously investigates and prosecutes acts of severe forms of trafficking,” “protects victims” and “encourages their assistance in the investigation and prosecution of their trafficker,” and whether the government

monitors immigration and emigration patterns for evidence of severe forms of trafficking in persons and whether law enforcement agencies of the country respond to any such evidence in a manner that is consistent with the vigorous investigation and prosecution of acts of such trafficking, as well as with the protection of human rights of victims and the internationally recognized human right to leave any country, including one's own, and to return to one's

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<sup>199</sup> 22 U.S.C. §7103.

<sup>200</sup> 22 U.S.C. §7103(e).

<sup>201</sup> 22 U.S.C. §7103.

<sup>202</sup> 22 U.S.C. §7104.

<sup>203</sup> 22 U.S.C. §7107.

<sup>204</sup> For a detailed description of the different tiers *see* 22 U.S.C. §7107(b)(1).

own country.<sup>205</sup>

With such an ambitious and far-reaching agenda, the State Department's TIP Report has been met with criticism over the years. Opponents have argued that the U.S. monitoring and sanction scheme is heavy-handed, forcing U.S. values on sovereign nations and claiming that it weakens the authority of binding international agreements, such as the U.N. Trafficking Protocol.<sup>206</sup> Nonetheless, as legal scholar Janie Chuang points out in her article on the State Department's sanction scheme, "the TIP Report country assessments have tremendous potential to shape the international trafficking response."<sup>207</sup> In fact, she asserts that governments "worldwide have passed anti-trafficking legislation and developed domestic infrastructure to the meet the minimum U.S. standards."<sup>208</sup> The State Department, for its part, has likewise responded to criticism that it scrutinizes other's efforts without evaluating its own by including an U.S. country narrative beginning in 2010.<sup>209</sup> Viewed in light of the State Department's anti-trafficking mandate, the weak labor protections and lax oversight of the J-1 visa program are particularly troubling. Not only does the State Department risk being viewed as compromised for its simultaneous management of a labor program with a history of labor abuses, but it also jeopardizes strategic partnerships between U.S. and foreign partners in the fight against trafficking. The State Department's conflicting role as anti-trafficking leader and J-1 visa program administrator could well harm cooperation with key J-1 visa participant source country governments, particularly in delicate situations involving the sharing of intelligence with foreign law enforcement or when attempting to facilitate the extradition of traffickers or safe repatriation of trafficking victims. Its conflicting role also challenges the State Department's relationships with key anti-trafficking allies in the U.S. While the State Department Trafficking in Persons Office and U.S.

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<sup>205</sup> 22 U.S.C. §§7106(b)(1), (2), (6).

<sup>206</sup> Chuang, *supra* note 187, at 456-459.

<sup>207</sup> *Id.* at 474.

<sup>208</sup> *Id.* at 465.

<sup>209</sup> DEP'T OF STATE, *2010 Trafficking in Persons Report*, <http://www.state.gov/j/tip/rls/tiprpt/2010/> (last visited Mar. 11, 2012).



anti-trafficking advocates have worked collaboratively on many projects, including an international visitors program facilitated by the State Department to mutually share best practices, advocates may find themselves at odds with the State Department when confronted with clients who suffered abuse as J-1 participants and have little recourse as a result of State Department's minimal regulations, apparent inability to provide oversight and limited data tracking and collection system.

### *VI. Recommendations*

The State Department has indicated publicly in various ways that it intends to bring changes to the J Exchange Visitor Program. In its notice of September 2011, for example, the State Department announced the review of major sponsors.<sup>210</sup> In January 2012, it reportedly barred CETUSA, the "sponsor" of the Hershey SWT participants,<sup>211</sup> and there have been calls for an intensive and thorough review of the SWT travel program.<sup>212</sup> The May, 2012 IFR takes significant steps to improve protections for participants and restore the cultural exchange component of the SWT program.<sup>213</sup> Further, that rule indicates that other modifications to the SWT program will be proposed later in 2012 through a Notice of Proposed Rulemaking.<sup>214</sup>

Due to the depth of the problems, including the lack of protections for participants, inability to respond to complaints due to lack of personnel, and heavy involvement by overseas recruiters and

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<sup>210</sup> Bureau of Educational and Cultural Affairs; Exchange Visitor Program; Summer Work Travel Program Sponsor On-Site Reviews, *supra* note 87.

<sup>211</sup> Preston, *supra* note 2.

<sup>212</sup> Holbrook Mohr, *Clinton orders review of visa program*, THE ASSOCIATED PRESS, Dec. 5, 2011, available at <http://www.nevadaappeal.com/article/20111205/APA/1112051185> (last visited Feb. 12, 2012). The article attributed the statement to an unnamed State Department spokesperson; the authors have located no public statement from Secretary Clinton directly.

<sup>213</sup> Interim Rule, *supra* note 6.

<sup>214</sup> *Id.* at 27595.

third party “sponsors,” any review of the project must be thorough and comprehensive. Superficial changes will not suffice. Guidance can be found in the H-2A and H-2B regulations previously reviewed. The government also should draw from written comments specific to the SWT program submitted in January and July 2012 by numerous advocates and labor organizations with expertise in the topic. For example, the Global Workers Justice Alliance’s (GWJA) recommendations included the following: that consular officials be required to collect copies of Job Placement Verification Forms (the DS-7007) during interviews to improve accountability; that the data from these verification forms should be publicly available through searchable databases to improve transparency and accountability; that participants be fully informed of the fees and costs they will incur before they enter the program; and that the verification forms disclose the identities of all recruiters and agents involved, from the principal recruiter through to the subcontractors who directly interact with the students, to improve accountability.<sup>215</sup> The GWJA further recommended that federally funded legal services be made available to SWT participants to prevent human trafficking situations and to defend their basic rights as workers.<sup>216</sup>

The National Guestworker Alliance, a membership organization representing temporary visa workers across the country, recommends that the State Department prohibit recruiters in the home countries and the U.S. from charging excessive visa, travel and recruitment fees; prohibit the deduction of fees that bring student participants’ wages below the lawful wage levels; and provide immigration relief for students during a labor dispute so as to eliminate the student’s dependence on the recruiter (“sponsor”) and employer.<sup>217</sup> The alliance also suggested requiring attestations from

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<sup>215</sup> Cathleen Caron, Global Workers Justice Alliance, *Comment on DOS-2011-0134-0001* (Jan. 31, 2012), available at <http://www.regulations.gov/#!docketDetail;dct=PS;rpp=10;po=0;D=DOS-2011-0134> (copy on file with authors). The Economic Policy Institute also made similar recommendations regarding disclosure of data online and the identification of recruiters and other agents. Costa & Eisenberry, *supra* note 111.

<sup>216</sup> Caron, *supra* note 215.

<sup>217</sup> Jennifer J. Rosenbaum, National Guestworker Alliance, *Comment on DOS-*

the “sponsor” organizations, similar to H-2A and H-2B assurances, that the sponsor will not retaliate against the student participants for asserting their labor rights or for any labor organizing or related activities; that sponsors will cooperate in sharing information with government agencies and that they will not employ SWT participants if they already employ H-2A or H-2B workers.<sup>218</sup>

Finally, the Economic Policy Institute also recommended that the verification form require information about the duties to be carried out by subcontractors and/or additional employers; that, in the alternative, sponsors should work directly with employers and be prohibited from using subcontractors; and that the verification form should prohibit employer charges or deductions for uniforms, safety equipment, supplies and other expenses.<sup>219</sup>

Several organizations recommended that the verification forms be categorized as an enforceable contract, as are H-2A job orders, that USDOL have jurisdiction to enforce the terms and conditions of employment, and that the sponsors be required to provide to participants and to the federal government the residential addresses where participants will be housed.<sup>220</sup> The authors concur that lack of public information about current participation, lack of enforcement authority by USDOL and lack of accountability among recruiters, other agents and subcontractors are major factors contributing to the current abuses.

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2011-0134-0001 (Jan. 31, 2012), available at <http://www.regulations.gov/#!documentDetail;D=DOS-2011-0134-0015> (last visited Feb. 12, 2012) (copy on file with authors). The Economic Policy Institute also made similar recommendations regarding employer and sponsor attestations/certifications. Costa & Eisenberry, *supra* note 65.

<sup>218</sup> Rosenbaum, *supra* note 217. The Economic Policy Institute also made similar recommendations regarding employer and sponsor attestations/certifications. Costa & Eisenberry, *supra* note 65.

<sup>219</sup> Costa & Eisenberry, *supra* note 65.

<sup>220</sup> See *id.*; Caron, *supra* note 215; Rosenbaum, *supra* note 217.

### *VII. Conclusion*

The J-1 visa program must be more transparent, with data available to the public regarding recruiters, sponsors, employers and current placements. Participants must be protected from extortionary recruitment and housing schemes as well as from retaliation. All visa, recruitment, equipment and housing costs should be regulated and disclosed to participants. Agreements between employers, sponsors and participants must be enforceable contracts. Wage protections similar to those available to U.S. and temporary workers under the H-2A program must be established. Minimum and maximum work hour requirements akin to those under the H-2A, H-2B and Au Pair program should also be implemented. Positions in occupations frequently associated with human trafficking, such as modeling, housekeeping, and janitorial services should be expressly prohibited. Oversight for the program should be delegated to the USDOL. These and other concrete suggestions for reform have been offered in the course of public debate, and the State Department should proceed with substantial reforms. By making these fundamental and urgently needed changes, the State Department will be better able to prevent more Hershey and alleged organized crime crises from occurring, and will be less conflicted in its legal obligations to promote anti-trafficking and anti-labor exploitation practices at home and abroad.

