

EPI BRIEFING PAPER

ECONOMIC POLICY INSTITUTE • JULY 14, 2011 • BRIEFING PAPER #317

GUESTWORKER DIPLOMACY **J visas receive minimal oversight despite significant implications for the U.S. labor market**

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Executive summary

What originally began as a State Department program to facilitate exchanges of scientific and cultural knowledge has deviated far from its original intent. While some aspects of the J-1 Exchange Visitor Program are unquestionably valuable—for example, allowing exceptionally talented non-U.S. citizens to study, research, and teach in the United States as Fulbright Scholars—most exchanges under the program are primarily employment-related. In fact, the J-1 Exchange Visitor Program is now the largest U.S. guestworker program in terms of annual admissions. Of the 350,000 exchange visitors and their spouses and dependents who entered the country in 2010, nearly 300,000 were employed in full- or part-time jobs during their stay. Exchange visitors from China, Russia, Brazil, and other countries all over the world are working in the United States as au pairs, ride operators at amusement parks, hotel maids, laborers on dairy farms, and other semi- or unskilled workers as well as in professional occupations such as teachers and physicians.

This report is the product of an extensive six-month review of the J-1 Exchange Visitor Program. The analyses, described in the body of the report, led to a number of key findings, which are summarized below:

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- The program displaces U.S. workers by providing significant direct and indirect financial incentives for individuals, companies and organizations that recruit exchange visitors as workers, “sponsor” exchange visitors, and hire them as lower-cost labor alternatives to U.S. workers or foreign guestworkers in other nonimmigrant visa classifications that provide greater protections for U.S. workers.
- Employers can legally discriminate against U.S. workers in favor of J-1 exchange visitors because they are not required to advertise their available jobs or seek available U.S. workers. This is true even in areas with persistently high unemployment, where many able and available U.S. workers may be willing to take even temporary jobs. Lax oversight and inadequate regulations allow employers to simply coordinate with sponsors to obtain foreign workers or sponsor those workers themselves, entirely bypassing the U.S. workforce.
- U.S. workers that are displaced by J-1 workers have no protections or enforcement tools under the State Department regulations. For example, employers are not required to pay exchange visitor workers a prevailing wage, the lack of which exerts downward pressure on the wages of U.S. workers.
- The State Department has outsourced the monitoring of compliance with program rules and oversight of program performance to the program sponsors and employers, who have a vested interest in optimizing their returns from the program. Sponsors and employers cannot be expected to report violations, which would jeopardize their financial gains. This amounts to an obvious conflict of interest.
- Because participants incur significant debt to participate in the Exchange Visitor Program and to travel to the United States, and because they are unable to easily switch between employers, they arrive virtually indentured to their employer.
- Outsourcing oversight of the program to sponsors and employers leaves the J-1 worker without adequate protection—and some have suffered exploitation as a

result. Some program participants have been found living in overcrowded conditions, others begging, and in the most extreme cases forced to work in the sex trade.

- Housing what is essentially a labor program (and advertised as such on recruitment websites) in an agency concerned with foreign affairs doesn’t make sense. In addition to a lack of expertise in policing the labor market, the State Department currently has only 13 compliance officers overseeing a program with more than 350,000 participants; thus their ability and resources to investigate complaints or violations by employers and sponsors are extremely limited.
- Over the past 21 years, government auditors, including the State Department’s own Inspector General, have published three reports with scathing criticisms of the lack of oversight, the lack of data to make meaningful labor market assessments, and many other failings in the program. Nevertheless, while the size of the program has increased by 96% in those 21 years, no significant steps have been taken to address the concerns outlined in the reports.
- The four major flaws in the program that are most critical to address include: the lack of protection for U.S. workers; the State Department’s overbroad authority to create new guestworker programs; the significant and inappropriate financial incentives for J visa sponsors and their partners; and the program’s flawed system of management, data collection, oversight, compliance, and enforcement.

The State Department’s J visa Exchange Visitor Program has ballooned into a massive guestworker program and is in desperate need of reform. Congress must investigate the rampant abuse of the program and the negative impacts it is having on the U.S. labor market and unemployed U.S. workers, and terminate or suspend the Exchange Visitor Program until these problems can be adequately addressed.

Introduction

Every year, hundreds of thousands of foreign visitors enter the United States temporarily with a J-1 visa to work at

amusement parks, restaurants, summer camps, universities and grade schools, hospitals, and engineering and law firms, or to watch over young children. Others come to attend high school or university, or to participate in a government-sponsored exchange program with a federal agency. Many of these visitors have positive, life-enriching experiences in academia or on the job—but some do not.

The government program that issues J-1 visas is known as the Exchange Visitor Program, the primary purpose of which is to:

*...enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations, and the contributions being made toward a peaceful and more fruitful life for people throughout the world; to promote international cooperation for educational and cultural advancement; and thus to assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world.*¹

This noble language comes from the Fulbright-Hays Act of 1961, the legislation that authorized and created the modern-day Exchange Visitor Program.

Before the enactment of the statute in 1961, Congress had enacted different versions of legislation that allowed for international cultural, educational and/or scientific exchanges.² On the heels of signing two international declarations with Latin American countries in Buenos Aires, Argentina in 1936³ and in Lima, Peru in 1938,⁴ the first scientific international exchange program⁵ was enacted by Congress in 1938 and 1939⁶ at the behest of President Franklin D. Roosevelt, who sought scientific exchanges and enhanced cooperation with other governments in the Americas.⁷

The next incarnation of what would become the Exchange Visitor Program came with the passage of the U.S. Information and Educational Exchange Act of 1948,⁸

commonly referred to as the “Smith-Mundt Act,” which allowed for certain educational, cultural, and technical exchanges, and expanded exchange programs beyond the Americas. And in 1952, after the passage of the Immigration and Nationality Act, exchange visitors were able to enter the United States under the “business visitor” or “student” classifications.⁹

After 1961, the Exchange Visitor Program became a formal tool of diplomacy for the State Department. As evident in the quote above, the program’s goals are to “increase mutual understanding” and “strengthen the ties which unite us with other nations” not only by hosting exchange visitors from abroad, but also by supporting exchanges that would allow Americans to experience what other cultures and countries have to offer. The State Department recently referred to the largest category of the Exchange Visitor Program as “a cornerstone of U.S. public diplomacy efforts for nearly 50 years.”¹⁰

But one aspect of the program that is not clearly addressed in the Fulbright-Hays Act has evolved to become central to its existence: exchanges for the purpose of employment.

In fact, the vast majority of Exchange Visitor Program participants are engaged in either full- or part-time employment during some portion of their stay. With approximately 300,000 participants employed in the U.S. labor market every year, the program annually authorizes more foreign temporary guestworkers than any other guestworker program under U.S. law. It is managed almost entirely by the State Department, whereas other large U.S. guestworker programs involve the U.S. Citizenship and Immigration Services (USCIS) and/or the Department of Labor (DOL), two federal agencies with authority to implement aspects of immigration policy in other employment-based nonimmigrant visa categories. Surprisingly, the guestworker component of the program has rarely been addressed by academics, the media, or immigration and labor policy advocates.

This report does not argue that foreign visitors and Americans alike do not benefit from the cultural, scientific, and educational exchange between nationalities, cultures and ethnicities that can occur as a direct result of the Exchange Visitor Program—they undoubtedly do. Instead, the report addresses the gap in understanding of the

guestworker component of the Exchange Visitor Program by examining its possible impacts on the U.S. labor market.

The J visa Exchange Visitor Program: The basic elements

Although the legal authority for the modern day Exchange Visitor Program originally comes from the Fulbright-Hays Act, the overarching legal and normative framework for the program is outlined primarily by State Department regulations at 22 C.F.R. Part 62. Some additional elements are found in Department of Homeland Security (DHS) regulations, at 8 C.F.R. §§ 212.7, 212.8, and 214.2. The Foreign Affairs Manual¹¹ offers key interpretive guidance, as do the numerous policy statements, advisory opinions, and case law which exist.¹² Within this framework, as this section will detail, the State Department has broad authority to make sweeping changes regarding the operation of the Exchange Visitor Program.

Categories

Visitors under the J-1 Exchange Visitor Program enter the United States under any one of 16 categories.¹³ Although some are grouped together below, in the regulations each has its own applicable rules and procedures.¹⁴ The categories are:

- Professors and research scholars;¹⁵
- Short-term scholars;¹⁶
- Trainees and interns;¹⁷
- College and university students;¹⁸
- Teachers;¹⁹
- Secondary school students;²⁰
- Specialists;²¹
- Physicians;²²
- International visitors;²³
- Government visitors;²⁴
- Camp counselors;²⁵
- Au pairs;²⁶

- Summer work/travel for postsecondary students;²⁷ and
- Same sex domestic partners of U.S. employees in the Foreign Service while on domestic assignments.²⁸

Also, the Fulbright-Hays Act authorizes the Secretary of State to create additional programs on an ad hoc basis by entering into agreements with “foreign governments and international organizations.”²⁹ One example of such a program is the Student Work and Travel Pilot Program for students and recent graduates from Australia and New Zealand.³⁰

The J-2 visa³¹ is designated for the spouses and minor children³² of the principal J-1 beneficiary.

Occupations and time limits

While some of the exchange visitor categories are narrow and self-explanatory (e.g., teachers, physicians, au pairs), the remaining categories are broad enough to encompass almost any professional or unskilled occupation. For example, Summer Work Travel (SWT) participants are most likely to work as unskilled cashiers, waiters, and ride operators at amusement parks, but may work in highly skilled positions, while participants in the Trainee category, who must either have a college degree or five years of work experience, have been reported to work as laborers on dairy farms.

Time limits for exchange visitors vary by category and occupation. Within those limits the exact duration of status may be determined by their sponsor, depending upon the nature of the individual program. Primary and secondary school teachers may work in the United States for up to three years, postsecondary students may stay for up to two years, trainees and interns may remain for up to 12 or 18 months depending on the type of program, and those in the Summer Work Travel category may stay and work for four months. All exchange visitors are entitled to an additional 30-day grace period to travel and return to their country of origin.³³

A spouse or child who has been granted a J-2 visa is allowed to remain in the U.S. for the same amount of time as the principal J-1, but not longer.³⁴ In addition, J-2 beneficiaries may engage in any lawful employment without any occupational limitations or restrictions for up

to four years, or for the authorized duration of the principal J-1 beneficiary's visa, whichever is shorter.³⁵ The only requirement is that the J-2 beneficiary first apply for and be granted employment authorization from USCIS.³⁶

State Department authority to create and modify program categories

The legal and regulatory authority used over the years by the State Department to create, modify, or continue individual Exchange Visitor categories has varied at times and has an interesting history. Although State technically has the authority to manage the categories as it sees fit, it has sometimes done so in ways that are procedurally puzzling or less than ideal.

The Immigration and Nationality Act (INA) created the nonimmigrant visa categories that correlate to the Exchange Visitor Program: the J-1 and J-2 visa (originally dubbed the "EX" visa by consular officials),³⁷ which allow the participants and their spouses and dependents to enter the country.³⁸ Under the Homeland Security Act of 2002³⁹ the DHS is the lead agency that issues guidance to the State Department's consular officers who implement policy relating to almost all nonimmigrant visa categories. But in the case of the J visa, the State Department has agreed to a memorandum of understanding (MOU) with DHS outlining each agency's role in the J visa process.

Under the terms of the MOU, the State Department has the sole authority to "designate qualifying exchange programs."⁴⁰ In theory, the State Department is allowed to create Exchange Visitor Program categories that are consistent with the Fulbright-Hays Act because they "increase mutual understanding" and "promote international cooperation" through educational and cultural exchanges. In practice, the State Department has been able to create Exchange Visitor Program categories without coordinating with other federal agencies or attending to their concerns. In addition, although the terms of the MOU are unclear on the matter, in practice the State Department is allowed to publish its own internal guidance relating to Exchange Visitor Program categories and regulations but not allowed to publicly issue this guidance without DHS authorization.

The State Department has created most categories by simply promulgating the regulations that will govern the category, and has done so without the formal notice and

comment period usually required by the Administrative Procedure Act (APA).⁴¹ The State Department asserts that the "Exchange Visitor Program is a foreign affairs function of the U.S. Government and that rules implementing this function are exempt from § 553 (Rulemaking) and § 554 (Adjudications) of the Administrative Procedure Act."⁴² This "foreign affairs exception"⁴³ to the APA allows the State Department to promulgate, amend and repeal J-1 regulations as they see fit, without needing to publicly demonstrate their rationale for doing so, and without being required to solicit and consider the opinions and suggestions of the American public.

In addition to the creation of J-1 categories by the State Department's regulatory fiat, Congress has also explicitly authorized two specific Exchange Visitor categories. First, in 1986, the U.S. Information Agency (USIA) created two pilot programs that established the first manifestation of the Au Pair category. In 1989, six more au pair programs were designated by the USIA based on the pilot programs, and then Congress enacted legislation temporarily continuing the programs. After an internal USIA review and an examination by the GAO, it was determined that the category was not consistent with statutory requirements, but the organizations that sponsored au pair exchange visitors were able to lobby Congress directly and receive explicit authorization to continue the program under USIA's management.⁴⁴ The program was then reauthorized every few years by Congress until 1997,⁴⁵ and in that year, despite media reports of scandals involving au pairs,⁴⁶ Congress extended the program indefinitely.⁴⁷

In the case of the Summer Work Travel (SWT) category, the State Department operated a temporary worker program for nearly 50 years without any specific congressional authorization, despite the fact that, arguably, it involves no educational or cultural component. In 1998, Congress included one sentence in an omnibus appropriations bill that authorizes the State Department to "administer summer travel and work programs without regard to preplacement requirements."⁴⁸ The State Department describes this as the "Summer Work Travel Statutory Authority" on the Regulations and Compliance Administration page of the J-1 visa section of its website.⁴⁹ However, this appropriations provision was preceded by Section 846 of Public Law 105-244 (October 7, 1998),

“Authority to Administer Summer Travel and Work Programs,”⁵⁰ and both of these provisions were codified into Title 22 of the United States Code, in a note found at section 1474.⁵¹

The newest Exchange Visitor category was created by the State Department in early 2011, but without congressional approval or any enacted or proposed regulations. This new category authorizes same sex domestic partners of U.S. State Department employees in the Foreign Service to enter the United States as exchange visitors with J-1 visas to accompany their partners while they are in the U.S. on domestic assignments. The J-1 is issued for an initial period of 18 months, but can be renewed for up to the length of the domestic assignment of the Foreign Service employee. The J-1 domestic partners are allowed to work in the United States with no restrictions and are eligible to apply for a J-2 visa for their dependents.

The creation of the category managed to generate some news coverage⁵² because this type of J-1 can circumvent some of the restrictions on same sex couples in the Defense of Marriage Act,⁵³ a law that the Obama administration said it will not defend in court because its key provisions are unconstitutional.⁵⁴

Although many view these events as positive steps toward eliminating official discrimination in the United States,⁵⁵ the procedure used by the State Department to create the category is troublesome. The category was created with the transmission of an unclassified but apparently not publicly available State Department cable in February 2011. Secretary of State Hillary Clinton announced in 2009 that the State Department intended to do what it could within its authority to provide equal benefits to its employees in same sex relationships,⁵⁶ but there was no official publicity around the February 2011 cable. (Although the author has seen the full text of the cable, he was unable to find a copy of it anywhere on the Internet.)

For all intents and purposes, the release of the cable and the subsequent creation of a new Exchange Visitor category were accomplished in secret. Aside from the fact that the process violated basic principles of transparency and open government, the cable created an entirely new guestworker category that authorizes a foreign worker to be employed in the U.S. labor market for at least 18 months, without any labor certification, labor market test,

or prevailing wage requirements, and without oversight or authorization by the Department of Labor. The actual number of J-1 visas issued in this category is likely to be quite small, but the way in which the category was created sets a bad precedent.

Even more puzzling is the State Department’s creation of an Exchange Visitor category/program through a bilateral agreement, such as the aforementioned Australia and New Zealand Student Work and Travel Program Pilot Program⁵⁷ (other similar MOU based programs⁵⁸ have been created with Ireland⁵⁹ and South Korea).⁶⁰ The program was created in 2007 through memorandums of understanding between the U.S. government and the governments of Australia and New Zealand. The MOUs themselves are not publicly available, and no regulations have ever been promulgated to govern the program.

Instead, an FAQ about the program notes that the SWT regulations govern the program, but the program differs in two important ways from the SWT program.⁶¹ First, the program lasts 12 months instead of four, and second, “tertiary students in vocational studies are eligible to participate in the Program (but not in the four-month SWT program).” The only official guidance for this program is in the form of four sentences in the Foreign Affairs Manual.⁶² The State Department’s announcement about the program states that both the Australia and New Zealand pilot programs will “conclude two years after becoming effective.”⁶³ This means that each program should have ended in either September or October of 2009. The author spoke directly to one of the authorized sponsors involved with the pilot programs, and confirmed that the pilot programs have been reauthorized and continuously operational since their creation. The existence of a program allowing foreign guestworkers in the United States for an entire year—without any apparent governing regulatory authority—is baffling.

Sponsors

Program sponsors play a fundamental role in the Exchange Visitor Program by administering and implementing the various programs within the United States. First, they identify potential exchange visitors overseas, and often partner with foreign entities and agents to do so. Once the exchange visitor has arrived in the United States, sponsors

are principally in charge of ensuring that the activities and welfare of their participants are adequately monitored⁶⁴ and that their own programs and the activities of the participants' employers, comply with all applicable rules and regulations for the programs they are using.⁶⁵ Sponsor organizations, which may or may not be direct employers, must designate their own employees to act as Responsible Officers (ROs) and Alternate Responsible Officers (AROs), who bear ultimately responsibility for ensuring compliance with program rules.⁶⁶

Also, the sponsor must submit an annual summary report to the State Department detailing the program's activities and evaluating its effectiveness,⁶⁷ and must keep records of the programs and exchange visitors for at least three years.⁶⁸ If sponsors fail, they may be subject to appropriate sanctions,⁶⁹ termination,⁷⁰ or revocation⁷¹ of the right to participate as an exchange visitor sponsor.

In order to become a sponsor, eligible entities must apply for designation with the Office of Designation in the State Department's Bureau of Educational and Cultural Affairs (ECA) (specifically within ECA's Private Sector Exchange office). Eligible entities include:

- United States local, state and federal government agencies;⁷²
- International agencies or organizations of which the United States is a member and which have an office in the United States; or⁷³
- Reputable organizations which are "citizens of the United States," as that term is defined in [22 C.F.R.] § 62.2.⁷⁴

"Citizens of the United States" includes non-profit and for-profit corporations and other legal entities.⁷⁵ Thus, almost any governmental, non- or for-profit entity can become a sponsor if it pays the non-refundable fee of \$2,700⁷⁶ and its application is approved.⁷⁷ It is unclear exactly how many sponsors exist: U.S. Immigration and Customs Enforcement (ICE) reports that there are 1,456 "active" exchange visitor programs,⁷⁸ and the data provided on the State Department's J-1 Visa website lists 3,416 "total sponsors."⁷⁹

Initial sponsor designation is valid for two years, after which it is subject to a redesignation review, which must then occur every two years; each redesignation requires an additional payment of \$2,700.⁸⁰ The designation and redesignation fees go toward funding the State Department's administration of the Exchange Visitor Program.

If an organization or business wishes to host exchange visitors, but does not want to be designated as a program sponsor, the entity may go through an already existing program sponsor (known as an "umbrella" sponsor for the Intern and Trainee categories).⁸¹ Usually the host pays the umbrella sponsor a fee, and the umbrella sponsor reviews and approves or rejects the application on behalf of the third-party employer or organization.

Student and Exchange Visitor Information System (SEVIS)

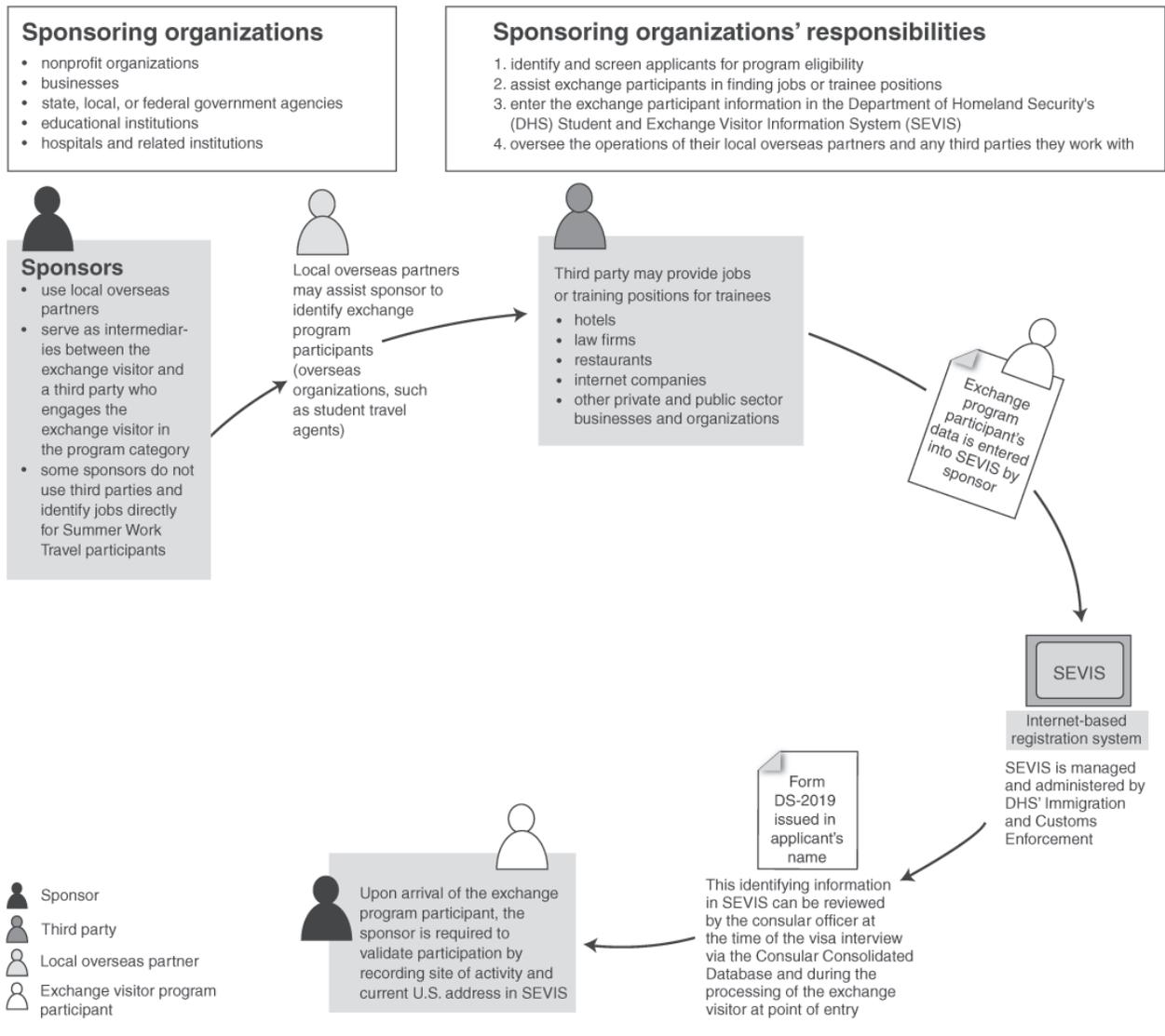
Sponsors must also participate in the Student and Exchange Visitor Information System (SEVIS), an online electronic status tracking and monitoring database activated by the Department of Homeland Security in 2003. The system, which is managed by U.S. Immigration and Customs Enforcement through its Student and Exchange Visitor Program (SEVP),⁸² collects information on non-immigrant students in the country on F-1 and M-1 visas, (for those pursuing academic or vocational studies in the United States) and exchange visitors on J-1 visas, as well as their spouses and dependents holding F-2, M-2 and J-2 visas. As of March 31, 2011, SEVIS contained records for 1,124,271 active nonimmigrant students, exchange visitors, and their dependents, and, in total, records for approximately 8.3 million active and inactive F-1, M-1 and J-1 holders.⁸³

Figure A diagrams the role of the sponsor and the interactions between sponsors, foreign recruiters that help find potential exchange visitors, and the exchange visitors themselves, and how the SEVIS system fits in to the process.

As the figure shows, sponsors are required to enter information on each participant into SEVIS. All F-1, M-1 and J-1 applicants pay a SEVIS registration fee to ICE based on the type of visa and/or exchange visitor category. For students with F-1 and M-1 visas, the fee is \$200;⁸⁴ J-1 exchange visitors under the Camp Counselor, Au Pair

FIGURE A

Roles and responsibilities of sponsoring organizations in the Exchange Visitor Program



SOURCE: U.S. Government Accountability Office.

and Summer Work Travel programs pay \$35, and all other exchange visitor programs pay \$180;⁸⁵ spouses and dependents are exempt from the fee.⁸⁶

The SEVIS fees collected represent a significant source of revenue for ICE. Although fees collected from the current active F-1 and M-1 students in the SEVIS database as of March 31, 2011 amounted to \$164 million, the actual total may be much higher because of visa applica-

tions that have been denied. For example, in FY 2008, the 163,936 F-1 and 3,353 M-1 visa applications denied totaled \$33.5 million in collected fees.

Accurate totals of SEVIS fees collected from exchange visitors are more difficult to calculate because of data gaps, but available data suggests that the State Department may have collected roughly \$37 million from J-1 visa fees in FY 2008, not including the 58,321 J-1 visa applications that

were denied.⁸⁷ If these estimates are extrapolated to account for the 7.8 million F-1, M-1 and J-1 visa grantees, as well as the many visa applicants who are denied but nevertheless have paid the fee (which are not reported in SEVIS), we can begin to imagine how much SEVIS is worth to ICE. According to the ICE website, the SEVIS fees are “used to administer and maintain the Student and Exchange Visitor Information System (SEVIS) as well as develop and deploy the next generation of SEVIS, support compliance activities, and establish SEVIS Liaison Officers to provide information and assistance to students and schools.”⁸⁸

Compliance and oversight within the State Department

Responsibility for administering and monitoring the Exchange Visitor Program has fallen within and outside of the State Department over the years but now currently resides with the State Department’s Bureau of Educational and Cultural Affairs (ECA), specifically with ECA’s Private Sector Exchange office (PSE), which is directed by the Deputy Assistant Secretary for Private Sector Exchange.

PSE divides its oversight authorities among the Office of Designation and the Office of Exchange Coordination and Compliance. The Office of Designation provides oversight of program administration by initially designating organizations as sponsors, redesignating sponsors every two years,⁸⁹ and providing guidance and assistance to sponsors in the administration of their designated exchange programs.

The Office of Exchange Coordination and Compliance (ECC), which had 13 permanent staffers as of January 2009,⁹⁰ is the only office with authority to issue the sanctions against sponsor organizations that violate regulations. The most severe sanction at ECC’s disposal is the revocation of sponsor designation. Other than that, sanctions may include the temporary suspension of program designation, a letter of reprimand warning of possible suspension or revocation of sponsor designation, a declaration of probation against the sponsor, or up to a 15% reduction in the number of authorized exchange visitors in the sponsor’s program or in the geographic area of its recruitment or activity, with further reductions in 10% increments for continued violations.⁹¹

Any sanctions imposed may be subject to an internal review by a panel of Review Officers⁹² and may be further reviewed and overturned in federal court on procedural grounds if the State Department’s internal review is not consistent with the Administrative Procedure Act.⁹³

Exchange Visitor Program participation: Yearly admissions, categories, and source countries

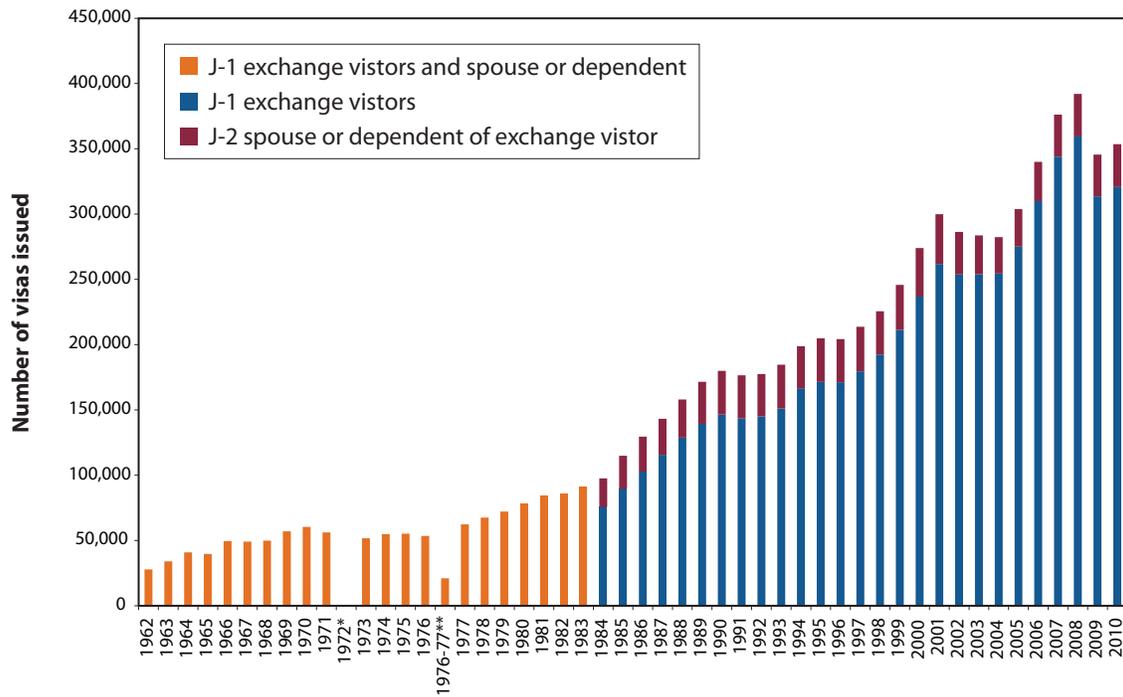
Data from a variety of sources allow us to piece together a picture of the J visa Exchange Visitor Program’s growth over time, including in individual categories. Unfortunately, large gaps remain in terms of current and past data that would provide the public with a clearer picture of where exchange visitors in each category come from and what education levels they have attained. Furthermore, no data exists regarding how many, if any, exchange visitors transfer from J-1 into other nonimmigrant visa categories or eventually become permanent residents.

Program participation has skyrocketed

The total number of J visas that may be granted by the State Department is not limited by law or regulation. Every year, the State Department publishes statistics detailing the total number of J-1 and J-2 nonimmigrant visas granted, but the data posted online only go back to 1987. Earlier data must be obtained by direct request of the State Department. In fiscal year 1962, the first year of the program, 27,910 visas were granted to exchange visitors and their spouses and dependents. **Figure B** illustrates the dramatic growth in J visas issued since then. By FY 2008 (the peak year for total J visas issued), the number of visas issued had increased by 1,300%, to 392,089. In FY 2009, 345,541 visas were issued (31,944 of which were J-2 visas for spouses and children of J-1s), and in FY 2010, 353,602 visas were issued (including 32,642 J-2 beneficiaries).⁹⁴ These data signify that the J visa Exchange Visitor Program, in terms of annual flow, is the largest category of nonimmigrant visas allowing both long- and short-term, full- and part-time employment under U.S. immigration law. (Other visa categories, in particular the H-1B, are likely to account for a larger “stock”⁹⁵ of nonimmigrants working in the U.S.).⁹⁶

FIGURE B

J visas issued annually for exchange visitors and spouse/dependent(s), 1962–2010



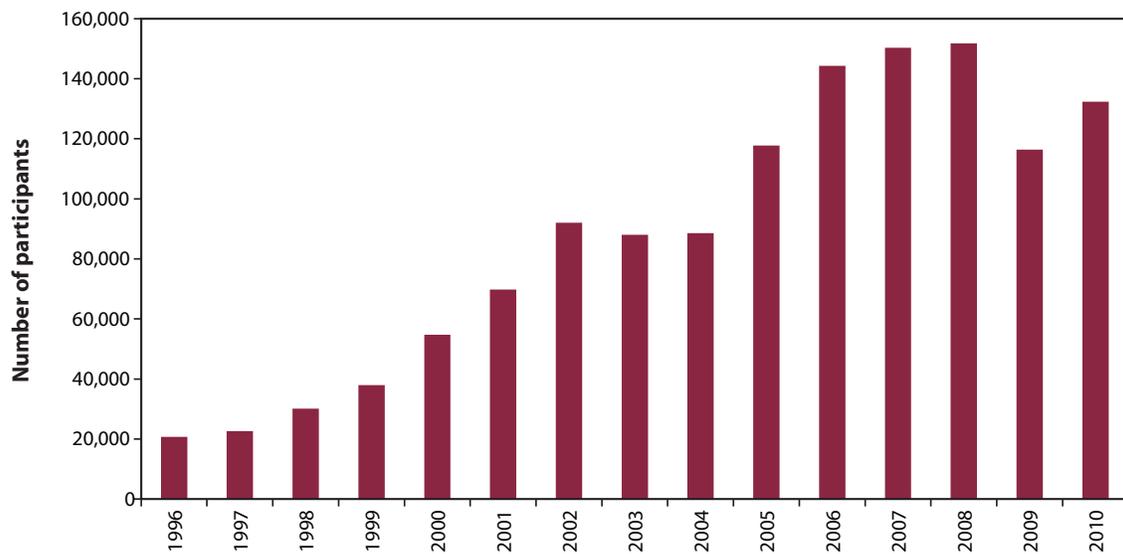
* No data available. **Transitional quarter—quarter between fiscal year 1976 and fiscal year 1977.

NOTE: State Department data from 1962-1983 does not distinguish between the total number of exchange visitors and their spouse and dependent(s).

SOURCE: State Department.

FIGURE C

Total Summer Work Travel program participants, 1996–2010



SOURCE: U.S. State Department and Interagency Working Group on U.S. Government-Sponsored International Exchanges and Training; State Department (J-1 Visa website) (see endnotes 97-99).

TABLE 1

Exchange Visitor Program participants, by category, 2002–2010*

Exchange visitor category	2002	2003	2004	2005	2006	2007	2008	2009	2010
<i>Alien physician</i>	9,257	8,000	7,295	1,533	1,480	1,779	1,853	2,038	1,997
<i>Au pair</i>	11,855	11,901	16,093	12,659	14,054	17,149	17,503	14,160	13,297
<i>Camp counselor</i>	24,377	23,490	20,602	20,895	20,296	22,205	21,485	18,354	17,190
<i>College and university student/intern</i>	29,812	14,158	32,780	19,268	22,925	29,097	34,504	39,023	40,492
<i>Intern (created in 2007)</i>						634	15,934	15,047	16,054
<i>Trainee</i>	35,745	30,500	27,214	23,219	24,619	29,998	12,553	8,495	8,727
<i>Professor**</i>			2,980	2,279	2,304	1,903	1,557	1,398	1,313
<i>Research scholar**</i>			49,472	23,480	26,663	27,884	27,900	26,658	27,612
<i>Short-term scholar**</i>	56,250	22,233	7,513	9,550	11,976	16,802	19,475	18,225	18,396
<i>Secondary student</i>	26,142	28,000	24,084	24,608	26,711	29,512	28,627	26,601	26,509
<i>Specialist</i>	6,432	1,132	1,151	945	1,150	1,537	2,289	2,406	2,216
<i>Summer work travel</i>	71,218	88,851	77,323	88,557	106,725	147,645	152,726	116,387	132,342
<i>Teacher</i>	8,300	2,366	5,292	2,447	2,534	3,052	2,456	1,509	1,224
TOTALS (fiscal year)	279,388	230,631	271,799	229,440	261,437	329,197	338,862	290,301	307,369

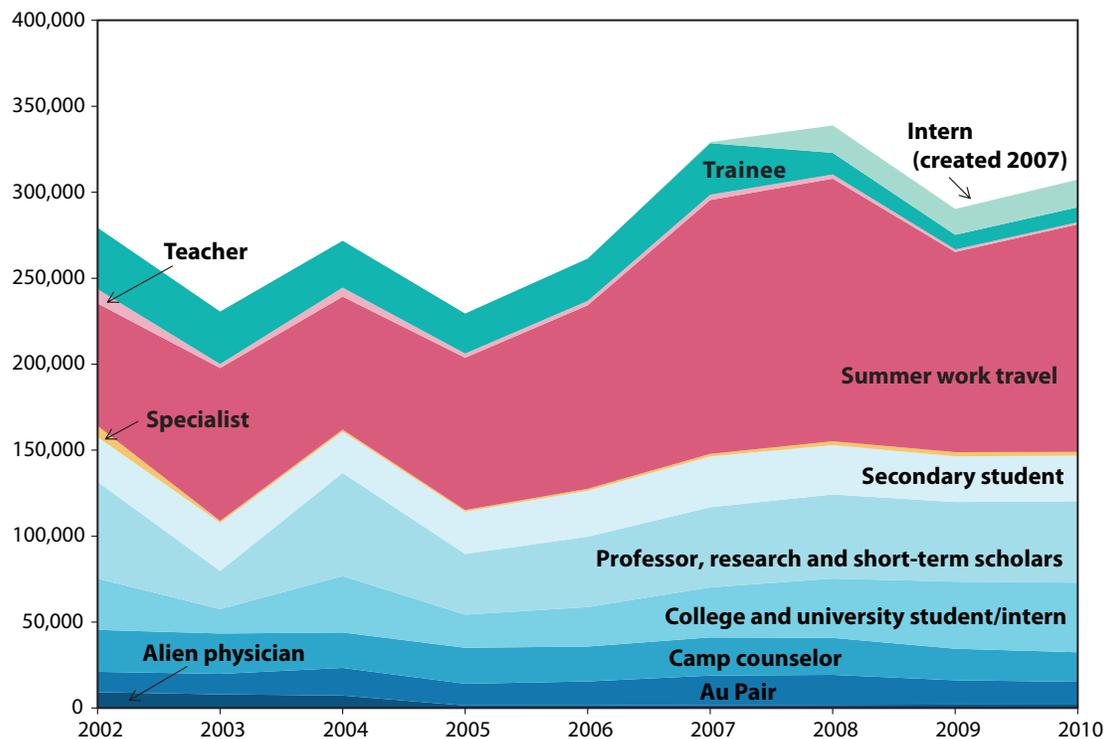
* These figures represent new participants in the program (i.e. new J-1 visas issued) each year, not the total number of J-1 visa holders in the country during the entire year. The totals do not include government visitors, international visitors, and government-sponsored exchange visitors in other categories.

** Prior to 2004, the data for the Professor, Research Scholar, and Short-term Scholar categories was combined into one category.

SOURCE: Interagency Working Group on U.S. Government-Sponsored International Exchanges and Training and State Department (J-1 Visa website) (see endnotes 98-99).

FIGURE D

Exchange Visitor Program participants, by category, 2002–10*



SOURCE: U.S. State Department and Interagency Working Group on U.S. Government-Sponsored International Exchanges and Training; State Department (J-1 Visa website) (see endnotes 98-99).

Summer Work Travel is the largest category of J-1 visas

Although the State Department's new J-1 Visa website lists how many exchange visitors are currently in the country, by category and state, the department does not list the total number of J-1 visas granted in each Exchange Visitor category each year. But information from other sources, including GAO reports, a presentation on the State Department's website,⁹⁷ and the yearly Inventory of Programs report of the Interagency Working Group on U.S. Government-Sponsored International Exchanges and Training (IAWG)⁹⁸ reveal that the Summer Work Travel (SWT) category is the largest. **Figure C** lists the total number of J-1 SWT participants from 1996–2010.

Table 1 and **Figure D**, which show the numbers of exchange visitors by category from year to year, show how large the SWT category is compared with other categories for which data is available. For example, as shown in Table 1, 132,342 individuals with J-1 visas came to the United States for summer work/travel in 2010, compared with just 1,224 teachers, 1,313 professors, and 16,054 interns. Figure D shows how the combined categories for professors and research and short-term scholars have remained relatively stable since 2002 while the SWT category has expanded significantly.

It should be noted that without an official release of data from the State Department detailing the exact numbers of exchange visitors in each category each year, the Inventory of Programs reports provide the only publicly available information on J-1 visas issued per category for 2002–2010. The data in Table 1 and Figure D represent all non-government sponsored J-1 exchange visitors. The U.S. government sponsored International Visitor and Government Visitor categories are not included.

Most J-1s come from Europe and Asia

Most J-1s come overwhelmingly from Europe and Asia (**Figure E**). As shown in **Figure F**, some of the principal source countries for J-1 beneficiaries are China, Russia, Germany, the U.K., France, and Brazil. In terms of the SWT and Trainee categories, the only data available lists the top 10 sending countries for both programs in 2004. That year, SWT participants came overwhelmingly from

Eastern Europe (**Figure G**), while most Trainees hailed from Western Europe (**Figure H**).

Lack of occupational and wage data for exchange visitors

On June 1, 2011, the State Department published a new "J-1 Visa Exchange Visitor Program" website at <http://j1visa.state.gov>. Considerably more user friendly than the former website, the new website contains useful information about the program; links to relevant legislation, regulations, and policy directives; and lists key contact information. Perhaps the most useful and relevant feature is the new "Facts and Figures" page,⁹⁹ which includes an interactive map and downloadable data on exchange visitors in each of the 50 states, by category. As of June 5, 2011, the Facts and Figures page reveals that there are currently 174,982 exchange visitors in the country.

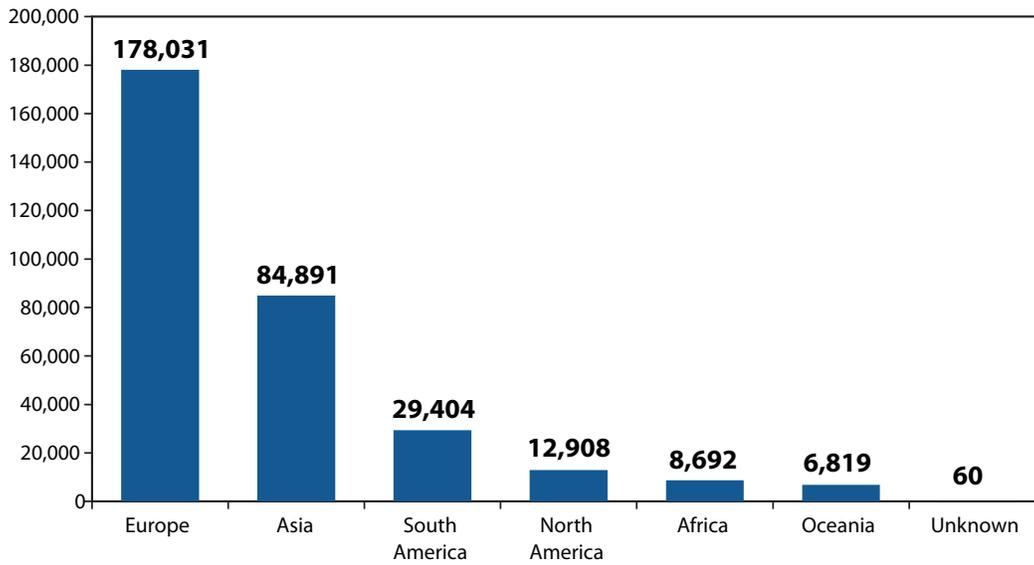
In March 31, 2011, ICE reported 171,978 "active" J-1 exchange visitors currently being tracked in SEVIS, along with 50,702 J-2 dependents of J-1 visa holders.¹⁰⁰ The total number of active J-1 holders reported by SEVIS at the end of any quarter other than the one ending June 30 is always much lower than the total number of J-1 visas granted for the entire year because a large percentage of J-1s are participating in the SWT program during the summer months.¹⁰¹

Beyond the basic data on the State Department's new J-1 visa website and in the SEVIS quarterly reports, much is missing that would allow the public to know more about who exchange visitors are and what they are doing while in the United States. For example, occupational data that would allow the public and labor market researchers to know exactly which jobs are being filled by J visa beneficiaries, or which city or county those jobs are located in, or wage data that would allow us to know how much they earn, is unavailable. Thus it is impossible to reliably assess this sizeable visa program's impacts on the U.S. labor market.

In 2009, the American Federation of Teachers (AFT) complained about the lack of access to data on J-1 teachers, noting also that "the data that has been made public has not been shared in a way that allows it to be disaggregated," making it difficult to assess "where overseas-trained teachers are working within the United States; which countries

FIGURE E

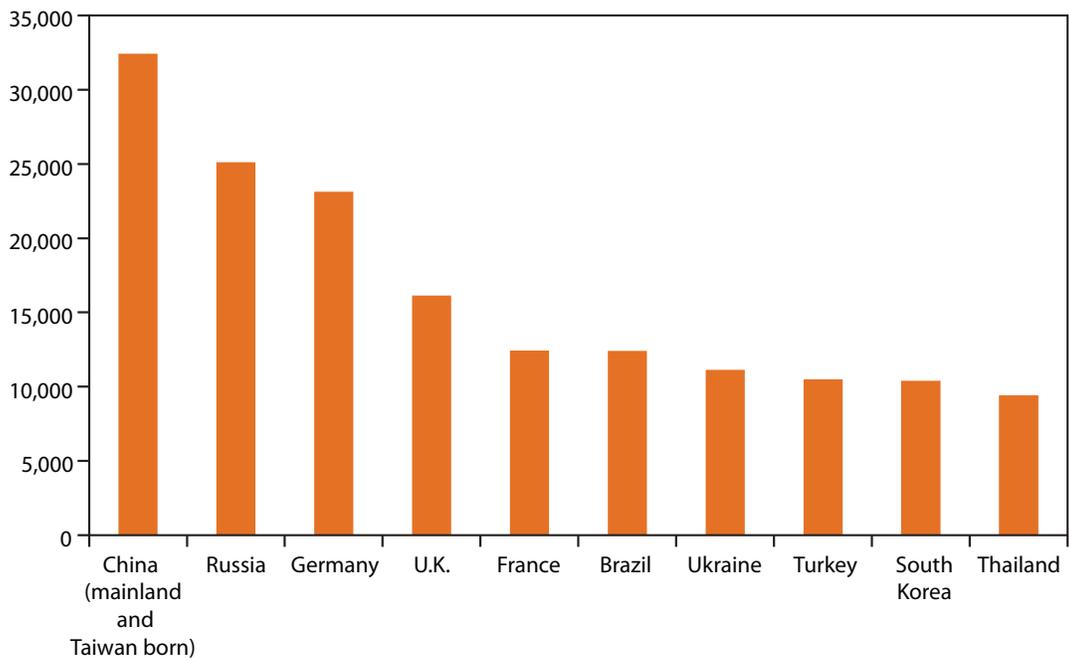
Exchange Visitor Program participants, by source region, 2010



SOURCE: U.S. State Department "Nonimmigrant Visa Statistics" website.

FIGURE F

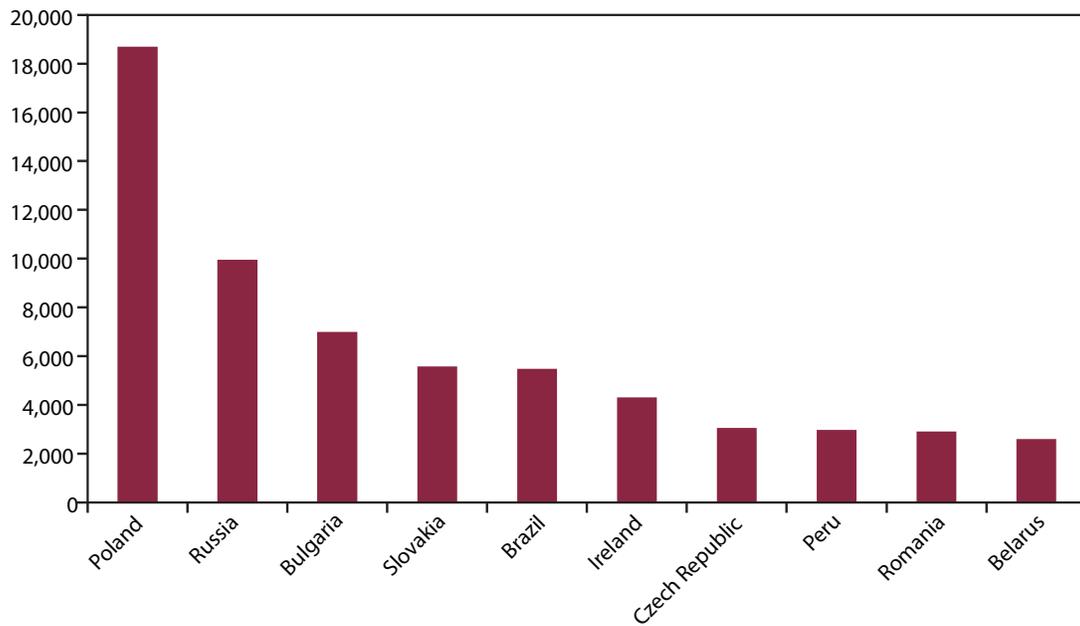
Exchange Visitor Program participants, top 10 source countries, 2010



SOURCE: U.S. State Department "Nonimmigrant Visa Statistics" website.

FIGURE G

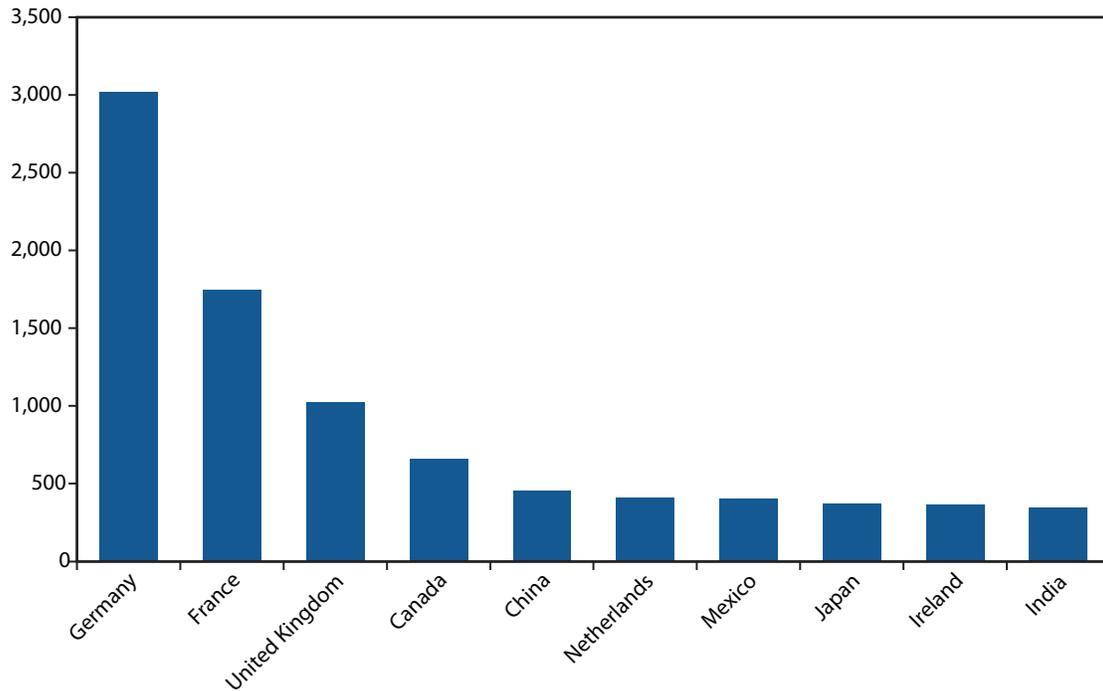
Summer Work Travel program participants, top 10 sending countries, 2004



SOURCE: Government Accountability Office 2005 (see endnote 109).

FIGURE H

Trainee program participants, top 10 sending countries, 2004



SOURCE: Government Accountability Office 2005 (see endnote 109).

overseas-trained teachers are coming from; what types of teachers are coming to the United States (age, gender, education level, content specialization, etc.); and how long overseas-trained teachers stay in the United States after receiving an initial visa and what percentage acquire permanent residency status.¹⁰² The same concerns apply to all other categories, occupations and regions where exchange visitors are employed.

It is somewhat odd that SEVIS reports contain such minimal data about the J-1, considering that the quarterly reports on the other two visa categories that SEVIS tracks (the F-1 and M-1 student visas) provide detailed data about where F-1 and M-1 beneficiaries reside (by state), how much education they have, their principal topics of study, the number of schools that have F-1 and M-1 authorized attendees, and the top five schools with the highest number of F-1, M-1, and combined F-1/M-1 students attending.

Some of this same information for the J-1 is now viewable through the State Department website's new interactive map feature, a marked improvement over the large data gap on J-1 in the quarterly SEVIS reports. Nevertheless, it's not unreasonable to assume that the SEVIS database may contain much more information regarding J-1 beneficiaries—their educational levels and who the top sponsors are around the country—than appears in the quarterly reports. In fact, some of this additional data might already be collected on the exchange visitor's DS-2019 form, the SEVIS-produced form that all applicants must complete; other information not currently required (e.g., wages to be paid), could perhaps be added to the form.

One identifiable problem with the data that is collected in SEVIS is that the name and location of the employer hosting the exchange visitor is not always listed on the DS-2019 form. Instead, only the name and address of the sponsor is listed. Since the sponsor is not regularly required to provide this information on any other form or communication with the State Department, in many cases the State Department does not know where exchange visitors are employed, making it impossible for the public to access this information even through a Freedom of Information Act (FOIA) request, because it is only held by private organizations.

An interim final rule recently published by the State Department requires that SWT sponsors enter into SEVIS the information regarding the name of the “participants’ host employers, sites of activities and job titles... prior to issuing their Forms DS-2019.”¹⁰³ This is an improvement on the status quo, but only applies to the SWT category, and there are no provisions in the interim final rule that require the data be made publicly available. The preamble to the new SWT rules also mentions a requirement that sponsors inform participants of the “hourly wage” they are to receive, as well as “how many hours per week they will work,”¹⁰⁴ but sponsors are not required to report this data to SEVIS or the State Department, which effectively keeps it out of the public domain, even with the use of a FOIA request.

In addition, federal regulations require that J-1 sponsors annually report, by category, how many exchange visitors they hosted.¹⁰⁵ Thus, it's certain that the State Department possesses but chooses not to disclose a more detailed and complete categorical disaggregation of J-1 data extending back far beyond what is provided on the new website and in the Inventory of Programs reports (which only go back as far as 2002).

Program abuses and failures documented by reports

Over the past 20 years, various U.S. government agencies have published a handful of reports looking into various issues related to the Exchange Visitor Program. In light of the scarce publicly available data on the program and the exchange visitors themselves, these reports are the only official assessments of how the program is functioning. This section will focus on what the three government reports issued between 1990 and 2005 found, and conclude with a discussion of a recent investigative report by the Associated Press which sheds light on how the program is operating today.

In 1989, through appropriations legislation, Congress directed the General Accounting Office (now the Government Accountability Office) to review and report on the Exchange Visitor Program,¹⁰⁶ because of questions about “whether aliens in the United States on J visas were performing activities consistent with legislative intent.”¹⁰⁷ The report was published in 1990. In 2000, the State

Department's Office of Inspector General reviewed and evaluated "whether the Exchange Visitor Program is effectively administered and monitored,"¹⁰⁸ and in 2005, the GAO published a study that examined the State Department's management of the Summer Work Travel and Trainee programs, and how it "identifies potential risks of the programs and the data available to State to assess these risks."¹⁰⁹

The three reports pointed out serious causes for concern within the Exchange Visitor Program, and some of the themes commonly emerge throughout all the investigative analyses. The following six subsections summarize and synthesize some of the key findings.

Regulations are inadequate

All of the reports on the Exchange Visitor Program criticized the inadequacy and ineffectiveness of the agency regulations that govern the program. According to the 1990 GAO report, "regulations governing J visa programs are too vague and not comprehensive enough to ensure that participants and their activities are consistent with the intent and purpose of the 1961 act," they "are not adequate to ensure integrity of the program"¹¹⁰ and "provide little guidance as to what constitutes legitimate educational and cultural exchanges;" and for three of the categories, "the regulations do not require participants' status and their activities to be the same or similar to the categories described in the act."¹¹¹ Those criticisms applied to the existing regulations at the time—when no applicable regulations had yet been enacted for many of the Exchange Visitor categories, which meant that "at least half of all participants in 1987 were in programs not directly addressed in the regulations."¹¹²

Exchange Visitor program regulations and categories have significantly changed since then, leading to the 16 categories that now exist. Nevertheless, the two most recent reports (from 2000 and 2005) found that "the regulations are too broad, allowing almost any type of work situation to be interpreted as training," and as a result, recommended that State Department's Bureau of Educational and Cultural Affairs (ECA), "clarify" and "better define" the Trainee program regulations,¹¹³ and that the Secretary of State "update and amend the regulations where necessary" in order "to enhance the over-

all management and monitoring of the Summer Work Travel and the Trainee programs."¹¹⁴ Both sponsors and State Department officials voiced their concerns about the regulations—the sponsors complaining that "varying interpretations of the regulations make it difficult to implement the program," and the State Department saying that "the sanctions provided in the regulations are not adequate to control the activities of sponsors who incorrectly implemented the program."¹¹⁵ Thus, the two most recent governmental analyses continue the criticism from the 1990 report, regarding inadequate regulations, especially in the SWT and Trainee programs.

State Department management and oversight is deficient

A primary focus of the three government reports over the past 20 years has been the management and oversight of the Exchange Visitor Program. The relevant findings of the 1990 GAO report are particularly enlightening:

*USIA [the agency responsible for the Exchange Visitor Program at the time] lacks adequate information on participant activities, does not enforce requirements that program sponsors provide periodic information on participant activities, has no systemic process to monitor sponsors' and participants' activities, and does not adequately coordinate the program internally or with other agencies having visa responsibilities.*¹¹⁶

Ultimately, the report concluded that the agency "cannot adequately manage the J-visa program."¹¹⁷

Ten years later, responsibility for administering the Exchange Visitor Program had shifted to the Office of Exchange Visitor Program Services (EVP) within ECA, but not much had changed after a decade. The State Department's own Office of the Inspector General (OIG) echoed many of the same criticisms of EVP's management and oversight duties. For example, the agency "cannot effectively monitor and oversee the Exchange Visitor Program," and "lax monitoring" of the Exchange Visitor Program by EVP "has created an atmosphere in which program regulations can easily be ignored and/or abused."¹¹⁸

The annual reports submitted by the sponsors are not independently audited, thus staff "has to rely heavily on

the full and truthful disclosure of events by sponsors.”¹¹⁹ This creates an obvious conflict of interest: Can sponsors be relied upon to disclose any program violations or unauthorized activities involving exchange visitors if such disclosures could lead to suspension of their program?

Compounding the oversight problem, the responsible office at ECA historically has lacked adequate staff and resources to operate effectively. The OIG reported that EVP staff admitted “that they are unable to read all 1,460 annual reports received each year.” Each officer is responsible for overseeing more than “a hundred sponsors, which makes it difficult to read and analyze every annual report.”¹²⁰

In addition to report reviews, there are also weaknesses in the other oversight mechanism, the sponsor redesignation process. Every two years (before 2002, every five years¹²¹ except for the Au Pair program), each sponsor must apply for a renewal of sponsor designation and the appropriate office at ECA must review the sponsor’s annual reports and any accompanying documents and then come to a decision. As noted above, the annual reports have not been independently audited or verified, and in many cases, overburdened staffers do not have the time to review the reports in-depth, if at all. Thus, the OIG’s report exposed the Trainee sponsor redesignation process to be a sham. OIG’s proposed solution was that the Office of Exchange Visitor Program Services in ECA “conduct on-site program review at all sponsors prior to redesignating them,” but explained that this could “only be realized if there is sufficient staff and a substantial travel budget.”

The OIG also made it clear that the government was not the only party failing to conduct sufficient oversight; sponsors were often negligent in conducting their own monitoring and oversight, especially of third parties and the day-to-day activities of their exchange visitors. After noting that large sponsors provide trainees to hundreds of “third parties” (i.e., employers of trainees) all across the country, the OIG revealed that “in many instances, sponsors do not ever visit the third party to speak with the actual trainer and to see the premises where the trainee will work and train,” in fact, the “vast majority of third parties are never visited by sponsors.” The impact of this negligence was alarming, because the “minimal monitoring currently in place can lead to inappropriate or even unsafe placement of trainees.”¹²²

The Exchange Visitor Program violations uncovered by the OIG were so bad in fact, that “the Department has no assurance that sponsors are adhering to program regulations,” and believes that without more oversight, violations such as these will “continue and possibly get worse.”¹²³ Despite these serious violations, OIG also found that many of the complaints of violations are never investigated, or investigated inadequately, because complaints made to the Office of Exchange Visitor Program Services (EVP) are only investigated “through telephone calls, e-mails, and faxes” since officials lack “staff, travel money, and time” for on-site visits. This state of affairs leaves exchange visitors relying on their employers and sponsors to look out for their general welfare and employment rights—again, creating another conflict of interest because employers and sponsors have vested interests in the trainee, due to the fees paid to the sponsor and the labor provided to the employer.

In part because “potentially serious problems are not investigated by EVP,”¹²⁴ and because the annual report reviews and sponsor redesignation process (the two main monitoring and oversight mechanisms in place for the Trainee category) are insufficient, the OIG recommended that ECA create a compliance unit. It was not until five years later, in April 2005, that a compliance unit was created.

The GAO report released in 2005 did not present evidence of any improvement in management and oversight of the Exchange Visitor Program, then housed in EVP’s successor office, the Office of Exchange Coordination and Designation, or ECD. In the report, GAO reiterated the OIG’s criticism that monitoring compliance through the designation and redesignation of sponsors was insufficient because State Department officials “rarely visit the sponsors, host employers or third-party organizations of the exchange participants”¹²⁵ which would allow them to “observe program activities and verify the information that they provide.”¹²⁶

The report provided a statistic to substantiate this claim: “In the past 4 years, State officials made visits to only 8 of its 206 Summer Work Travel and/or Trainee sponsors.”¹²⁷ That means that each year, on average, only 1% of sponsors received a visit—an average of only two visits conducted per year. For a nonimmigrant visa program that approved 442,627 J-1 visas in the SWT and

Trainee categories during fiscal years 2002 to 2005,¹²⁸ the miniscule number of on-site visits is shocking. But the results are unsurprising: Because the Department has virtually no evidence about how sponsors are administering the programs in practice, “the vast majority of sponsors who apply for redesignation are approved.”¹²⁹

As the GAO report detailed, this problem persists due to a lack of adequate staff and funding at the State Department. Officials complained to the GAO that “their staffing levels and lack of travel funds do not allow for intensive monitoring of the Exchange Visitor Program sponsors.”¹³⁰ This also impacts the department’s ability to conduct other compliance efforts. For example, the same GAO report revealed that in 2005, alarmingly, the State Department failed to even “systematically document program abuse.”¹³¹ And when responding to specific reports of problems or complaints from sponsors, the department’s “monitoring efforts largely consist of reviewing written information provided by sponsors,”¹³² because normally, officials only respond via “telephone, e-mail, fax or letter”¹³³ (exactly as the OIG had reported five years earlier).

Another statistic in the report revealed that the State Department’s failure to conduct adequate compliance is the direct result of its failure to commit staff to the task: “The Office of Exchange Coordination and Designation has five Program Designation officers who serve as the point of contact and are responsible for the day-to-day administration and management of the 13 exchange programs.”¹³⁴

That’s only five officers in charge of management, administration and compliance of the entire Exchange Visitor Program, which admitted an average of 259,343 J-1 nonimmigrants per year between fiscal years 2002–2005, which means that each officer was responsible for the welfare of 51,869 exchange visitors per year, not counting those that remain in the country for longer than one year. It’s no surprise that these officers were unable to keep pace with the workload. In response the report recommended that the State Department “fully implement a compliance unit,” and noted that funding for establishing such an office was repeatedly requested—including funding for five more positions to staff a new compliance unit—but the State Department rejected including the request as part of its overall budget request to the Office of Management and Budget (OMB).¹³⁵

The 2005 report also discussed the failure of sponsors to monitor and oversee their own programs to ensure compliance with governing regulations. An examination of sponsors by overseas consular officers resulted in one sponsor admitting to only “spot-checking the viability of third party organizations and training plans,” and disturbingly, the revelation that a potential exchange visitor was applying to work at a “topless bar” on a J-1 visa through the SWT program.¹³⁶ The GAO laid some of the blame on the State Department for the lack of sponsor oversight and monitoring, because it “does not offer any guidance on how the sponsors should carry out their monitoring and oversight responsibilities,”¹³⁷ and GAO noted that the sponsors themselves complained that State “does not consistently disseminate its interpretations or guidance on the regulations to the sponsors.”¹³⁸

As previously noted, officials at the State Department do not believe that the Exchange Visitor Program regulations offer adequately enforceable standards. The sanctions available to the department “range in severity from a letter of reprimand to an action to revoke a sponsor’s designation,” and denying certification to a sponsor “until the compliance issue has been resolved.”¹³⁹

But in some cases, the department’s efforts to execute these sanctions may be thwarted. The example provided by GAO describes the State Department receiving complaints from two trainees, then investigating the sponsor and concluding that the sponsor was “operating a work program, in violation of the regulations.”

The State Department’s revocation board supported revoking the sponsor’s license to operate an Exchange Visitor Program, but the revocation was challenged in federal court. The district court found that the punishment of revocation was inappropriate because “the investigation had been too limited” and remanded the matter back to the revocation board, and “[a]fter a second hearing, the board overturned the revocation, thereby enabling the sponsor to resume its program.”¹⁴⁰

As this situation illustrates, even when the State Department believes a sponsor’s actions to be inconsistent with applicable regulations, the lack of manpower to investigate and oversee the programs renders the department vulnerable to procedural legal challenges that may cancel out its limited efforts to enforce regulations.

Some of the program categories constitute employment programs that displace U.S. workers

The government reports documented how the Exchange Visitor Program is used as an employment program, instead of one that facilitates educational and cultural exchanges, and how the J-1 visa category undermines the use of other visa categories that contain at least some ostensible protections for U.S. workers.

The GAO report from 1990 noted that the trainee category was abused in some cases, where “[t]raining appeared to consist primarily of manual labor in commercial enterprises with no cultural or educational emphasis placed on the participants’ program activities.”¹⁴¹ The report quoted a 1987 Financial Integrity Act report criticizing the trainee regulations for their inability “to prevent work programs, under the guise of training, from being conducted.”¹⁴²

The examples provided consisted of exchange visitors working in the horticultural field, at an automobile body repair shop, and in hotels and restaurants—but these visitors already had similar and substantial work experience in their home countries in these occupations, thus they weren’t receiving on-the-job training or learning about these occupations via the Trainee program.

In the Au Pair category, GAO quoted a Department of Labor official who characterized the au pair exchange visitors as “temporary foreign workers” working full time who would normally need labor certification to ensure that U.S. workers were not adversely affected.¹⁴³ GAO concluded that the Au Pair program is “essentially a child care work program.”¹⁴⁴

The 1990 GAO report also pointed out that employers prefer to use the J-1 visa instead of the more appropriate H, L, and M employment-based nonimmigrant visas because J-1 “regulations are not as stringent,” i.e., labor attestations or certifications are not required. According to GAO, the Labor Department attributed the large increase in J-1 visa admissions to this employer preference, which, GAO said, “dilutes the integrity of the J visa” and “obscures the distinction between the J visa and other visas.”¹⁴⁵

The 2000 OIG report investigated the Trainee category, in part because of complaints of U.S. citizens about “possible or actual displacement” by foreign workers

with J-1 visas.¹⁴⁶ Two of the five complaints investigated were found to have merit, because “trainees were filling positions that would normally be filled by full-time or part-time employees.” The report noted that, “it is difficult to distinguish work programs from training programs,” and that trainees “are in fact being used to compensate for labor shortages.”

One of the cases clearly illustrated why some employers use J-1 trainees: A tour company had used J-1 trainees for 10 years primarily because of the “economic benefits gained from not having to pay the higher salaries charged by local U.S. employees.”¹⁴⁷

The 2005 GAO report also found that the Trainee category was used as an employment program that undermined and circumvented other guestworker categories. GAO found that one organization was placing trainees with employers that use H-2B guestworkers,¹⁴⁸ because the H-2B visa cap had been reached and it needed “an alternative way to receive foreign workers.”¹⁴⁹ J-1 trainees were also found working on dairy farms (an occupation that requires guestworkers to obtain H-2B visas), although they were not properly qualified to work as trainees and were not receiving “training,” but instead were being exploited for “cheap labor.”¹⁵⁰ The director of the State Department’s Office of Exchange Coordination and Designation described the J-1 agricultural programs as “problematic because of the potential for fraud,” and noted “the abuses are not hidden and that there is not even an attempt to represent jobs as training, and...employers refer to the participants as employees rather than trainees.”¹⁵¹

In another case, 650 electrical engineers were recruited as trainees from Eastern Europe, but were contracted to work on construction projects as electricians. The State Department only became aware of this after complaints from the electricians union and the trainees themselves. Bringing electrical engineers into the country would normally require an employer to obtain an H-1B visa,¹⁵² which is subject to an annual cap and requires that the employer pay a prevailing wage and file a labor attestation with the DOL. The 2005 GAO report noted that the State Department and overseas posts (embassies and consulates abroad) possessed information about these types of abuses, but “did not have information on the extent of the problem.”¹⁵³

Financial incentives motivate many sponsor organizations

The State Department OIG's report from 2000 found that third party and/or exchange visitors are often paying "a significant sum of money to participate in the program."¹⁵⁴ The average fee ranged from \$400 to \$2000, and the average fee for trainees was \$1000. Their investigation found that many for-profit and nonprofit program sponsors are mainly motivated by financial gains and exist principally "to make money." In fact, some sponsors bring in thousands of exchange visitors each year, allowing them to benefit from "considerable financial gain." The report quoted a cable sent in February of 2000 from a U.S. consulate summarizing how the Exchange Visitor Program framework had become a profit-generating system:

The Nonimmigrant visa section observed in 1999 a radical restructuring of how organizations connect J-1 interns with opportunities in the U.S. Today's interns are recruited by local "cooperators" which purchase DS-2019s from U.S. non-profits, prepare their recruits' visa applications, and then turn these participants over to U.S. job based agencies. The U.S. "cooperators" then place the interns in a variety of U.S. businesses. Prominent among these is the hospitality industry: the typical host country national applicant for a J-1 internship is now seeking to change linens or wash dishes in a Las Vegas hotel for twelve to eighteen months.

Representatives of host country and U.S. cooperators, in meetings with consular officers were frank. "It's a business," said one repeatedly. The U.S. based staffing services, the local host country recruiters, and the DS-2019 issuers are all paid fees for their services. Ironically, well-known sponsors, which derive authority to issue DS-2019s as P-3 not for profit enterprises, are often the only non-profit enterprises in the chain between host country applicant and U.S. work opportunity. Host country cooperators say that sponsors monitor their programs, but admit that they rarely, if ever, have direct contact with the applicants.¹⁵⁵

Because of the profitmaking incentives created in the context of the program, State Department officials told the OIG that the Trainee category had gotten "out of control." As a result of their findings, the OIG recommended "an overall reassessment of the use of the J visa for trainees," but that before new regulations were issued, the Department of Labor, the Immigration and Naturalization Service (now the U.S. Citizenship and Immigration Services in the Department of Homeland Security) and appropriate bureaus within the State Department should consult with one another and discuss "whether sponsors solely in business to provide trainees to third parties are appropriate for the J visa."¹⁵⁶

The program is inconsistent with legislative intent

As described in Section II, the primary intention of the Mutual Educational and Cultural Exchange Act of 1961 is to promote reciprocal educational and cultural exchanges between Americans and people from other nations. In 1990, the GAO asserted that many of the activities and programs authorized with J visas were clearly work programs that were not consistent with, or authorized by the act. The programs listed as inconsistent with the act were the International Visitor, Trainee, Camp Counselor, and Au Pair categories, as well as the largest of all the categories, the SWT category.

GAO did not identify any educational or cultural purpose for authorizing "waiters, cooks, child care providers, amusement and leisure park workers, and summer camp counselors" to work with J visas.¹⁵⁷

In 2000, the OIG determined that reciprocity of cultural and educational exchanges was only being accomplished "to a small degree,"¹⁵⁸ meaning that Americans were not benefitting from going abroad and engaging in exchanges at levels comparable with those of foreign exchange visitors coming to the United States—such reciprocity is one of the principal goals envisioned by the act.

Reliable data on the program are lacking

In 1990, the GAO found that the U.S. Information Agency (the agency responsible for the Exchange Visitor

Program at the time) did not have “reliable data on the nature and extent of J-visa activities because its management system is not up-to-date, is unreliable, and contains erroneous information.”¹⁵⁹

Since 1990, much has changed, including the introduction of the SEVIS online tracking system. Nevertheless, in 2005, the GAO once again highlighted some of the dangers of the Exchange Visitor Program, namely that it could be used as an employment program, and that participants in the program could remain in the country for longer than the time authorized by their J-1 visa. Although the GAO and OIG investigations revealed actual instances where the Exchange Visitor Program was being used as a work program, and DHS and overseas posts reported evidence suggesting that exchange visitors overstay their visas,¹⁶⁰ unfortunately, “State has little data to measure whether such risks to the program are significant,” and thus it “cannot determine if additional management actions are needed to mitigate the risks,”¹⁶¹ the 2005 GAO report said.

There is no evidence that the State Department implemented the GAO’s 2005 recommendation to “develop strategies to obtain data, such as information on overstays and labor market abuses, to assess the risks associated with the exchange program categories,” in order to “use the results of its assessment to focus its management and monitoring efforts.”¹⁶²

AP investigation reveals exploitation of young people and State Department’s negligence

The GAO and OIG reports aren’t the only documents assessing how the government is managing and operating the Exchange Visitor Program. Various articles in the news media have also analyzed aspects of the program. An investigative news story conducted and published by the Associated Press (AP) in December 2010, “*US Fails to Tackle Student Visa Abuses*,” exposed some of the traumatic experiences that foreign visitors had as a result of their participation in the Exchange Visitor Program’s Summer Work Travel (SWT) program.¹⁶³

The AP investigation included interviews with “students, advocates, local authorities and social service agencies” and the review of “thousands of pages of confidential records,

police reports and court cases,” as well as a Freedom of Information Act (FOIA) request. Listed below are some of the key findings as quoted in the report:

- *Many foreign students pay recruiters to help find employment, then don’t get work or wind up making little or no money at menial jobs. Labor recruiters charge students exorbitant rent for packing them into filthy, sparsely furnished apartments so crowded that some endure “hotbunking,” where they sleep in shifts.*
- *Hotels, restaurants and other businesses often hire third-party labor recruiters to supply the J-1 workers. Many of those brokers are people from the students’ native countries... These middlemen commonly dock students’ pay so heavily for lodging, transportation and other necessities that the wages work out to \$1 an hour or less.*
- *The program generates millions of dollars for the sponsor companies and third-party labor recruiters.*
- *Students routinely get threatened with deportation or eviction if they quit, or even if they just complain too loudly. Some resort to stealing essentials like food, toothpaste and underwear, according to police.*
- *The State Department failed to even keep up with the number of student complaints until this year, and has consistently shifted responsibility for policing the program to the 50 or so companies that sponsor students for fees that can run up to several thousand dollars. That has left businesses to monitor their own treatment of participants.*
- *Strip clubs and adult entertainment companies openly solicit J-1 workers, even though government regulations ban students from taking jobs “that might bring the Department of State into notoriety or disrepute.”*

These alarming findings are illustrated on a human level by the harrowing stories of the exchange visitors in the report. One girl participated in the program in order to save money for dental school but ended up without a job and “begging for work on the Myrtle Beach boardwalk and sharing a three-bedroom house with 30 other exchange students.”

A 19-year-old Russian woman who couldn’t earn enough to survive working at a souvenir shop had to work

as a cocktail waitress at a strip club in order to make ends meet. A Mongolian student and four other exchange visitors were fired from their fast food jobs after complaining about having to pay \$350 a month each to live in a converted garage. And three Ukrainian women worked 14-hour days without being paid overtime and had to eat on the floor.

In the most extreme cases, exchange visitors were either forced into sexual slavery or left with no choice but to become strippers or enter the sex trade. Two Ukrainian women were promised waitressing jobs in Virginia, but instead had their passports confiscated and were forced to work as strippers in Detroit, while being regularly beaten and threatened with a gun, and one of them was forced to have sex against her will. Unfortunately, this does not appear to be an isolated incident, because an Immigration and Customs Enforcement agency official told AP of “at least two federal investigations” ongoing regarding the use of J-1 visas to facilitate human trafficking (while declining to elaborate).

The AP also reported that in some communities, exchange visitors turned to charity in order to survive. In summer 2010, a church in Ocean City, Maryland, “served more than 1,700 different J-1 participants from 46 countries who sought free meals... sometimes upward of 500 in one night,” and in Virginia Beach, Virginia, a homeless shelter was feeding twice as many people as usual because so many exchange visitors were showing up. Although the report does not mention this, some of the areas identified with large J-1 populations by AP were already suffering from high levels of unemployment. An influx of thousands of desperate temporary workers can magnify problems in local labor markets already lacking sufficient jobs and stretch the resources of charitable organizations beyond their limits.

For example, Ocean City is in Worcester County, a county whose average monthly unemployment rate was 8.4% from May to September 2010. During the rest of the year, the county’s unemployment rate averaged 13.4%, which is more than 4% higher than the current national unemployment rate.¹⁶⁴ Although the unemployment rate drops sharply over the summer months due to seasonal job openings, 8.4% should still be considered an extremely high unemployment rate.

The addition of thousands of temporary workers to labor markets with scarce employment opportunities raises the possibility that unemployed U.S. workers could be displaced by J-1 workers. Unfortunately, neither the departments of State or Labor have considered whether or not it makes sense to import thousands of guestworkers into high unemployment areas such as these under the Exchange Visitor Program—or whether local communities are equipped to cope with such an influx.

The AP’s findings also exposed the exceptional negligence of the State Department’s efforts to protect exchange visitors and to monitor the program. A sheriff’s department investigator in the Florida Panhandle told AP that the abuse and exploitation of exchange visitors by the same companies every year is an “epidemic,” despite his reports to the State Department about them.

The AP also described how Belarus warned its residents in 2006 “to avoid going to the U.S. on a J-1, warning of a ‘high level of danger’ after one of its citizens in the program was murdered, another died in what investigators in the U.S. said was a suicide, and a third was robbed.”

The most mind-boggling example of negligence occurred when the AP asked the State Department (via a FOIA request) for a complete list of complaints made about the Exchange Visitor Program. In its response one year later, the State Department admitted that it did not compile or keep any database of complaints, but had just created one in November 2010, after the AP made its request. The department also “did not provide a copy of the [newly created] complaint database to the AP or indicate how many complaints it included,” and officials even refused to “discuss on the record the problems that have plagued J-1 visas.” This incidence exposed the State Department’s failure to even track problems in the SWT program, as well as its aversion to transparency about the program.

Exchange visitors and the labor market

As with Exchange Visitor Program participation, data from a variety of sources also allow us to describe the skill levels of exchange visitor workers relative to U.S. workers and their place in the U.S. labor market. Because the regulations and oversight of the program fails to offer adequate

protections for Exchange Visitor and similarly situated U.S. workers, employers have clear incentives to hire exchange visitor workers over U.S. workers. This preference can negatively impact the labor market and opportunities for unemployed workers already in the United States.

How many exchange visitors are “workers” and what are their skill levels?

Despite the gaps in available data, estimates regarding how many exchange visitors can be considered “workers” (i.e., employed full- or part-time in the United States) and their skill composition can help us better understand their potential impact on the U.S. labor market. Using the data that does exist, we can roughly estimate the number and duration of exchange visitors participating in the U.S. labor market. While the lack of occupational data makes it impossible to determine their exact skill levels, we can at least speculate about the skill levels found in each of the exchange visitor categories by examining the regulatory requirements of each and by reviewing the GAO’s descriptions of certain categories.

Full-time workers in the Summer Work Travel, Trainee, and Intern categories—all considered as the most problematic by State’s OIG and the GAO—made up 49% of all new J-1 exchange visitors in 2010, or approximately 157,123 workers (see Table 1). SWT participants made up 84% of this subset, interns (who were split from the Trainee category in 2007) constituted 10% and trainees accounted for the remaining 6%.

Most SWT participants are very likely to be working in unskilled or lower-skilled occupations, according to a review of the industries that typically seek and hire them, descriptions on SWT sponsor websites, and sample job openings posted by some sponsors.¹⁶⁵

Trainees on the other hand are required to have either a post-secondary degree or professional certificate from abroad and at least one year of related work experience in their field, or, if they don’t have a degree, they must have at least five years of experience in their occupational field outside of the United States. Accordingly, trainees are likely to be working in high- or middle-skilled occupations, but in some cases may also be lower-skilled.

Regulations require that Intern participants either be enrolled in a post-secondary degree program or have graduated from such a program no more than 12 months prior to beginning their exchange visitor employment. This makes it difficult to assess the skill level of interns, since interns could range from being low- to medium-skilled college students to highly skilled recent grads in science, engineering, and technology fields. Although they are prohibited from engaging in unskilled employment in specific listed occupations,¹⁶⁶ Interns can still work in other unlisted, unskilled occupations. Although interns may possess a mix of skill levels, all are likely to be employed full-time.

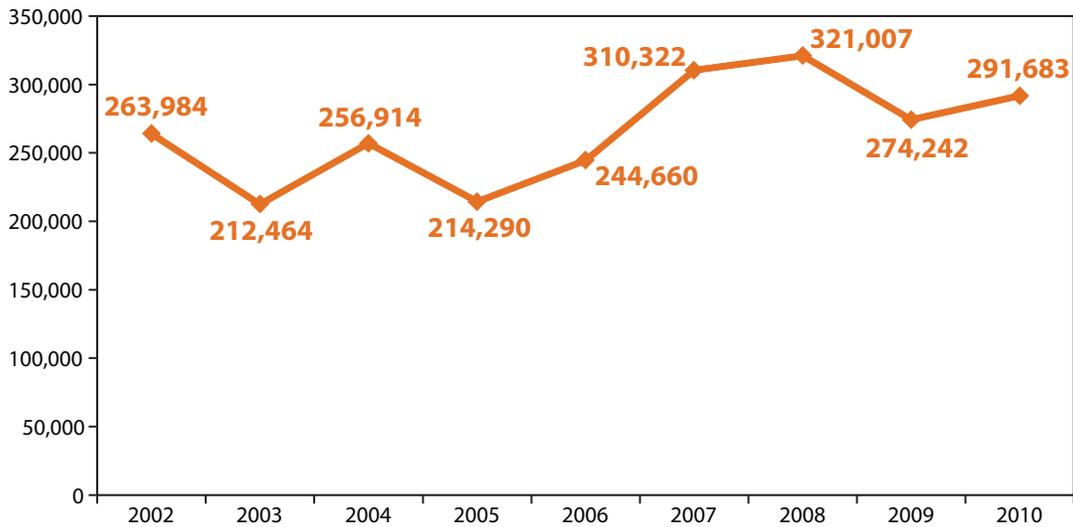
Most of the other Exchange Visitor categories, other than International/Government visitors and high school foreign exchange students (the latter of whom are not allowed to work), should be classified as part-time or full-time U.S. workers. The relative skill levels of the participants in the remaining categories can more confidently be assessed. Workers in the Teacher (K-12); Specialist; Alien Physician; and university Professors, Scholars, and Researchers categories are all likely to be middle- to high-skilled workers. Under the regulations, university students can work 20 hours a week during the school year and full time during vacation periods, but considering the aforementioned lack of oversight in the program many conceivably work full time, and could be of any skill level. Camp counselors and au pairs are also full-time workers, but in unskilled occupations.

Finally, J-2 spouses and dependents are allowed to work as long as they apply for employment authorization from DHS. As a result, all J-2s are potential workers, but it’s impossible to speculate about their skill levels or estimate how many are actually employed full or part time, or even know how many have applied for an Employment Authorization Document (this information is not released by DHS and it is unclear whether it is even collected and sorted by visa category).

In total, approximately 291,683 of the exchange visitors who came to the United States in 2010 with J-1 or J-2 visas were working at some point during the year. **Figure I** charts the author’s estimates of J visa entrants employed in

FIGURE I

Estimated number of exchange visitors working in the U.S., 2002–2010*



* Figures represent new Exchange Visitor Program participants who worked part- or full-time at some point during the year they were issued their J-visa (not the total stock of J-visa holders working in the country the entire year). Totals include one-third of all J-2 beneficiaries, and exclude secondary students, government visitors, international visitors, and government-sponsored exchange visitors in other categories.

SOURCE: Author's estimate based on report of the Interagency Working Group on U.S. Government-Sponsored International Exchanges and Training, and the State Department's J-1 Visa website (see endnotes 98-99).

TABLE 2

Worker skill level, maximum duration of status, and weekly work hours, by category

Exchange visitor category	Skill level				Maximum duration of status	Estimated hours worked per week	Admissions (FY 2010)
	Low	Middle	High	Mixed			
<i>Alien physician</i>			X		7 years	40 (no restriction)	1,997
<i>Au pair</i>	X				1–2 years	up to 45	13,297
<i>Camp counselor</i>	X				4 months	40 (no restriction)	17,190
<i>College and university student/intern</i>				X	18 months–3 years	20–40*	40,492
<i>Intern</i>				X	1 year	40 (no restriction)	16,054
<i>Trainee</i>				X	18 months	40 (no restriction)	8,727
<i>Professor</i>			X		5 years	40 (no restriction)	1,313
<i>Research scholar</i>			X		5 years	40 (no restriction)	27,612
<i>Short-term scholar</i>			X		6 months	40 (no restriction)	18,396
<i>Specialist</i>				X	1 year	40 (no restriction)	2,216
<i>Summer work travel</i>	X				4 months or 1 year**	40 (no restriction)	132,342
<i>Teacher</i>		X			3 years	40 (no restriction)	1,224
<i>J-2 spouses/dependents</i>				X	Same as principal J-1	40 (no restriction)	32,797

* Full-time students are restricted to 20 hours per week, but no hourly restrictions apply during school breaks and vacations. Students in academic training programs are unrestricted in terms of work hours.

** Australia and New Zealand Pilot Program.

SOURCE: Author's analysis of 22 C.F.R. §62 and GAO 1990, 2005 and OIG 2000 (see endnotes 107-109); Interagency Working Group on U.S. Government-Sponsored International Exchanges and Training and State Department (J-1 Visa website) (see endnotes 98-99).

either full- or part-time positions for any period of time during the fiscal years of 2002–2010, and **Table 2** lists the likely worker skill level, maximum duration of status, and hourly work hours permitted under the J visa categories that permit employment in the United States.

The author is only aware of one other published estimate regarding the number of J-1 exchange visitors working in the U.S. labor market. The Migration Policy Institute (MPI) estimated in 2008 that one-third of all J-1 visa beneficiaries were using their visas for employment purposes¹⁶⁸ (i.e., should be classified as “workers”), and rightly states that exchange visitors include “a wide diversity of nonimmigrants.”¹⁶⁹ But the data cited in this paper show that MPI’s estimate for 2008 was far too low. In 2008, the confirmed number of total workers in the SWT category alone was higher than MPI’s estimate of the entire pool of J-1 workers for that year.¹⁷⁰ Adding the other J-1 categories (not including secondary students and government and international visitors) increases the number of J-1 workers in 2008 to more than 300,000—not including more than 32,000 J-2 spouses and dependents, who are also eligible for employment in the United States.

Do the Exchange Visitor Program rules offer any protections for J-1 and U.S. workers?

With approximately 300,000 workers entering the labor market through the Exchange Visitor Program the last few years, a valid question to explore is whether U.S. citizens and legal permanent resident workers in the country are protected from displacement and adverse effects on their wages and working conditions. In 2005, the GAO reported that Department of Labor officials in the Bush administration doubted any significant effect:

*Despite...misuses, Labor officials stated that it is not likely that the exchange programs will have any effect on the U.S. labor market because of the small number of J-1 exchange visitors (about 283,000 in fiscal year 2004) relative to the U.S. workforce. However, the U.S. government does not collect data to assess any potential effect of exchange programs on the U.S. labor market.*¹⁷¹

It is true that 300,000 workers make up only a small percentage of the entire civilian U.S. workforce of 153.7 million workers.¹⁷² But that does not necessarily mean that these workers will not “have any effect on the labor market” and should thus be ignored. Nearly 300,000 guestworkers, especially if concentrated in particular occupations and/or industries, could indeed impact the wages and working conditions of other workers in those sectors.

If concentrated in particular regions or metropolitan statistical areas, or in high unemployment areas, J visa workers could impact the wages and working conditions of U.S. workers in that area. For example, employers are allowed to bring up to 66,000 H-2B guestworkers into the U.S. every year; a much smaller number than the total authorized workers entering the country every year with a J-1 visa. Nevertheless, EPI research has demonstrated that increasing unemployment and stagnant or declining wages for workers are together correlated with the main occupational sectors that hire a large percentage of the H-2B guestworkers admitted into the United States (except for those hired in occupations related to “extraction,” due to a boom in the mining industry).¹⁷³ As a result, the impact of 300,000 guestworkers on the U.S. labor market should not be ignored. But without any meaningful data to assess, analysts are left with no alternative but to examine whether any legal or regulatory protections are in place to protect against possible adverse effects on U.S. workers.

The regulatory language found at 22 C.F.R. § 62 offers some ostensible protections for both U.S. and foreign workers in a few of the Exchange Visitor Program categories, but their ultimate impact must be assessed in the context of how the entire program operates. The following section will briefly summarize the relevant regulations and the subsequent section will discuss their utility and possible impact on workers and the U.S. labor market.

Interns and Trainees (22 C.F.R. § 62.22). Regulations governing interns and trainees explicitly prohibit the displacement of “full- or part-time or temporary or permanent American workers,”¹⁷⁴ and the use of trainees and interns to fill labor shortages. Trainees and interns are prohibited from occupying unskilled or casual labor positions (a list of “unskilled occupations” is appended in the regulations),

and from working in positions involving child or elder care or patient contact, and jobs that require more than 20% clerical work. Sponsors may not use staffing and employment agencies, and sponsors for traineeships and internships in the agricultural field must “certify” that the programs comply with the Fair Labor Standards Act¹⁷⁵ and the Migrant and Seasonal Agricultural Worker Protection Act.¹⁷⁶

Because the regulations do not list any rules or procedures requiring the recruitment of unemployed U.S. workers in order to test the labor market before an intern or trainee may be hired, or for determining and identifying which trainee and internship positions could potentially displace U.S. workers, or mention any possible remedies for U.S. workers who have been displaced, there is no way to enforce the prohibition on displacement.

Also, there is no minimum wage requirement (other than the state and federal minimum wage) or prevailing wage methodology that employers must use to determine the appropriate compensation for an intern or trainee. However, depending on the terms of the individual internship or training program developed by the sponsor, many interns and trainees, whose labor is not considered work, do not receive any compensation from their employer.¹⁷⁷

College and University Students (22 C.F.R. § 62.23). Exchange Visitor Program students enrolled in a full course of study may be employed for up to 20 hours per week, and full time during breaks and vacations. Despite these hourly restrictions, a recent report¹⁷⁸ revealed that the regulations governing this category have allowed at least one company to create its own “academic training” program for students,¹⁷⁹ which allows J-1 college and university students to work “conservatively, 1,500 to 2,000 hours”¹⁸⁰ per year, for training that can last 18 or 36 months,¹⁸¹ while only including a minimal academic or training component. The vague regulations governing this category, combined with the fact that no statutory or regulatory definition exists for “academic training”¹⁸² allows employers to use students as full-time or nearly full-time workers.¹⁸³

For the entire category, no labor market test, wage standards, or other restrictions or requirements apply to employers or sponsors, although there is one additional

provision that applies to student interns: Sponsors are required to ensure that student interns do not “displace full- or part-time or temporary or permanent American workers or serve to fill a labor need”¹⁸⁴ and must certify that “programs in the field of agriculture meet all the requirements of the Fair Labor Standards Act...and the Migrant and Seasonal Agricultural Worker Protection Act.”¹⁸⁵ But no enforceable definition of “displace” or “ensure” is provided, nor are there any remedies for displaced U.S. workers. These requirements are, therefore, meaningless in practice.

Teachers (C.F.R. § 62.24). Primary and secondary school teachers from abroad are permitted to work in the United States for up to three years in the Exchange Visitor Program. None of the regulations governing this category mention specific wage requirements or labor certifications or labor market tests to prevent the displacement of U.S. teachers. The only wage-related requirement is on sponsors to provide the exchange visitor teacher with “[a] written statement which clearly states the compensation, if any, to be paid to the teacher and any other financial arrangements in regards to the exchange visitor program.”¹⁸⁶

If a collective bargaining agreement (CBA) is in place between the workers and the educational institution where the exchange visitor teacher will work, then the position must be in compliance with the agreement.¹⁸⁷ Thus, an existing CBA can offer some protection for wages and working conditions of both the foreign and U.S. teachers, but in schools without a CBA, there are no other meaningful regulatory protections for foreign teachers or the U.S. teachers they might displace.

Specialists (C.F.R. § 62.26). In light of the limited available data about the Exchange Visitor Program (discussed above), it is difficult to know much about the Specialist category—including even the basic occupations of specialists—other than the prohibition on specialists being research scholars and professors, short-term scholars, or physicians in graduate medical education or training. The program regulations also mention that the program “is intended for exchanges with experts in such areas, for example, as mass media communication, environmental science, youth leadership, international educational

exchange, museum exhibitions, labor law, public administration, and library science,¹⁸⁸ but this list of examples is not exhaustive.

The regulations contain very little mention of worker protections for either the exchange visitor or for a U.S. worker displaced or adversely affected by a specialist exchange visitor. The regulation requires that the specialist “not fill a permanent or long-term position of employment while in the United States,” but again, the language does not spell out what this means in practice (what does permanent or long-term employment mean?) or how it can be enforced. And the only wage-related regulation in this category requires that the sponsor provide the specialist with “[a] written statement which clearly states the stipend, if any, to be paid...”¹⁸⁹

Camp Counselors (22 C.F.R. § 62.30). Exchange visitors may enter the United States and work as summer camp counselors for up to four months. The camp counselor/exchange visitor’s permitted employment activities are partially restricted: They may not “serve as administrative personnel, cooks, or menial laborers, such as dishwashers or janitors.”¹⁹⁰ Presumably, the regulatory language here protects U.S. workers in these occupations.

In terms of wages, sponsors are required to provide the foreign camp counselor with “detailed information regarding...[f]inancial compensation for their service as a camp counselor,”¹⁹¹ and they must “ensure that international participants receive pay and benefits commensurate with those offered to their American counterparts.”¹⁹²

This latter rule, if implemented correctly, could protect the wages of U.S. camp counselors from downward pressure, and foreign camp counselors from being paid less than the true market value for their labor. Unfortunately, the regulations do not contain a wage methodology for determining what constitutes the “commensurate” wage that should be paid: It is up to the sponsors to figure this out and to enforce it. As a result, it’s impossible to know what establishes a “commensurate” wage, and if foreign camp counselors are actually earning wages commensurate to those paid to U.S. workers.

The regulations also lack any enforcement provisions, remedies, or a private right of action for either J-1 camp

counselors or similarly employed U.S. workers if J-1 camp counselors are found to earn less than the appropriate (or “commensurate”) amount.

Au Pairs (22 C.F.R. § 62.31). The Au Pair category allows participants to live with a host family in the United States while attending post-secondary school, and to work for the host family by providing child care. Rules for the program are more extensive than for many of the other categories. The regulations specify that sponsors must require that au pair wages be paid in conformance with the Fair Labor Standards Act, and that EduCare¹⁹³ participants be compensated at “75% of the weekly rate paid to non-EduCare participants.”¹⁹⁴ Sponsors must also ensure that au pairs not perform more than 45 hours of child care work in one week or 10 hours in one day, or 30 hours per week for EduCare participants, and that exchange visitors receive a “minimum of one and one half days off per week in addition to one complete weekend off each month”¹⁹⁵ and “two weeks of paid vacation.”¹⁹⁶

The rules in this category are bolstered by a reporting requirement not found in the other exchange visitor categories: Sponsors must submit to the State Department a report by a certified public accountant that attests to their compliance with the regulations of the program. The State Department is also empowered to revoke a sponsor’s Exchange Visitor Program designation if the Au Pair category requirements have not been met, including if a sponsor fails to enforce and monitor the host family’s compliance with the wage and hour rules.

Although these rules provide more protection for exchange visitors in the Au Pair category relative to others, meaningful protections for U.S. workers are nonexistent because no labor market test or labor certification is required to determine if there are any able and available unemployed U.S. workers interested in open au pair positions.

In 1990 the GAO determined that the “au pair programs are essentially child care work programs that do not correlate with the qualifying categories mentioned in the J-visa statute.”¹⁹⁷ GAO illustrates the basic reasoning behind this finding by quoting a Labor Department official who notes that working “a 40 hour week constitutes full-time employment, and as such, makes au pairs

temporary foreign workers. These workers would normally have to receive certification from the Department of Labor that enough qualified U.S. workers were not available and that the wages and working conditions attached to job offers would not adversely affect similarly employed U.S. workers.”¹⁹⁸ Despite this finding, little has changed in the program 21 years later, except for an extension of authority granted by Congress to continue the program indefinitely as is.¹⁹⁹

Summer Work Travel (22 C.F.R. § 62.32). This exchange visitor category allows “foreign post-secondary students the opportunity to work and travel in the United States for a four-month period during their summer vacations”²⁰⁰ (except for the Australian and New Zealand Pilot Programs, which allow participants from these countries to work for one year), and allows them to stay in the country an additional 30 days to travel and prepare to depart the United States. SWT participants may work in almost any skilled or unskilled occupation except as a domestic employee or in a door-to-door sales position that requires the participant to “invest his or her own monies to provide themselves with inventory for the purpose of door-to-door sales.”²⁰¹

A newly published interim final rule from the State Department that will take effect on July 15, 2011²⁰² removes the prohibition on door-to-door sales jobs, and adds to the list of prohibited jobs: “any position in the adult entertainment industry”; “pedicab or rolling chair drivers or operators”; “operators of vehicles or vessels that carry passengers for hire and/or for which commercial drivers licenses are required”; and “any position related to clinical care that involves patient contact.”²⁰³

There is no labor-market test or certification required to determine if there are willing, able, and available U.S. workers that may be displaced by SWT participants. If a U.S. worker is in fact displaced by a SWT exchange visitor, he or she is not afforded any process or procedure to complain or seek redress for displacement under the current or interim final SWT regulations.

In terms of wages, a single sentence states the pre-July 15, 2011 rule for “participant compensation” at 22 C.F.R. § 62.32(e): “Sponsors shall advise program participants

regarding Federal Minimum Wage requirements and shall ensure that participants receive pay and benefits commensurate with those offered to their American counterparts.”

The new rule relating to “participant compensation” in the interim final rule (effective July 15, 2011) will be found at § 62.32(g), and states, “Sponsors must inform program participants of Federal Minimum Wage requirements and ensure that at a minimum participants are compensated at the prevailing local wage, which must meet the higher of either the applicable state or the Federal minimum wage requirement, including payment for overtime in accordance with state specific employment laws.”

The updated rule adds the requirement that sponsors must “ensure” that the participant be paid the higher of the state or federal minimum wage and earn overtime pay based on state law. It also replaces the requirement that participants be paid a wage that is “commensurate” with that offered to similar U.S. workers with the requirement that they be “compensated at the prevailing local wage.”

The language of the updated rule is a weaker version of the original language because it no longer requires that SWT participants be paid a wage that is comparable to that of their similarly situated counterparts. It requires only that they be paid the higher of the state or federal minimum wage; and although it mentions a “prevailing wage” the language does not define or state what this means. In sum, how either rule should function in practice—i.e., what constitutes a “commensurate” or a “prevailing” wage in a particular occupation and geographical area—is not explained.

Without an explicit methodology to determine the appropriate commensurate or prevailing wage in any particular case, and without an additional requirement that the methodology be used, and with no enforcement mechanism, sections § 62.32(e) and (g) are effectively rendered moot. Additionally, by specifying only that sponsors must ensure compliance with minimum wage laws, whether state or federal, and state overtime laws, interim final rule § 62.32(g) implies that federal overtime compensation laws do not apply.

Do these protections function in practice?

Much of the aforementioned regulatory language is general and vague, and as the GAO reported, the State

Department does not always publish adequate interpretive guidance to help sponsors understand their responsibilities under the rules or how to implement them. This is key because the ultimate effectiveness of rules and regulations aimed at protecting U.S. and foreign workers hinges on how well they are enforced. The program sponsors are chiefly responsible for ensuring that their exchange visitor programs comply with all applicable regulations, including those that purport to protect U.S. and J-1 foreign workers.

The State Department's role should be one of oversight, but as the GAO, OIG, and AP reports revealed, State lacks adequate funding, time, and staff to investigate complaints in person, or even to read the annual reports submitted by sponsors, and does a poor job of tracking complaints. The result is a system where sponsors are allowed to police themselves. This is problematic. Because there is only one serious sanction at State's disposal—the temporary suspension or revocation of the sponsor's designation—and if that sanction gets used, the program could disappear. So even if a sponsor believes itself or an employer has violated regulations or other labor laws, it has no incentive to report violations to the State Department because this could jeopardize its profits, its relationship(s) with the J-1 visa-holder employers, and its very existence.

Under the current system the sponsor organizations are expected to protect the interests and labor and employment rights of program participants (who are in most cases, temporary foreign workers) and U.S. workers. These interests may directly conflict with the sponsors' own interests as well as those of the employers they supply with exchange visitors.

The State Department has also revealed that sponsors often “outsource the core programmatic functions inherent in the administration of their programs” to third parties, which include U.S. host employees and foreign partners or cooperators. When this occurs, the State Department “has no assurance that the third parties who perform these tasks are qualified to take on the required roles of the sponsors.” As the department also stated, in the worst cases this means that sponsors become “mere purveyors of J-visas.”²⁰⁴ Thus the sponsor, who has gone through the designation process, is often not even in charge of managing and overseeing the program and monitoring regula-

tory compliance. Instead, the responsibility is delegated to employers or foreign labor contractors, about whom the State Department knows nothing.

The new interim final rule of April 26, 2011, includes additional review and documentation requirements for SWT program sponsors contracting with foreign third parties and employers that may ultimately end up performing the sponsors' oversight and compliance functions for the sponsors. But the sponsors remain in charge of reviewing their own practices and for “vetting” the third parties. A new report published by the AP in June of 2011 highlighted how the new SWT rules will do little to change the status quo.²⁰⁵

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

In addition to this conflict of interest and lack of oversight, the State Department, sponsors, and third parties have no expertise in issues related to labor and employment law and enforcement, or regarding the protection of U.S. workers in the labor market. Yet they are tasked with managing the largest temporary foreign worker program in the United States.²⁰⁶ In another temporary worker program, the H-visa program, the Department of Labor is charged with authorizing foreign workers through the labor certification and attestation processes, and with overseeing the use of a prevailing wage methodology or an adverse effect wage rate.

Although the rules in the different H-visa categories are deeply flawed in many respects, they at least represent some form of oversight and involvement by the Department of Labor, which has a duty to protect the wages and working conditions of U.S. workers. The Exchange Visitor Program regulations, however, do not outline any role for the Department of Labor in granting J-1 visas or enforcing labor violations committed by em-

ployers or impacting U.S. and/or foreign workers in the program. DOL is the appropriate agency to perform these functions, and possesses the required staff expertise. The State Department, on the other hand, is primarily tasked with conducting the foreign affairs²⁰⁷ of the United States—not advancing “opportunities for profitable employment” or assuring “work-related benefits and rights” for U.S. workers.²⁰⁸

In the absence of both adequate self-regulation by sponsors and third parties or any involvement by the DOL, U.S. workers who feel that their wages and working conditions have been adversely affected by foreign-worker participants in the Exchange Visitor Program, or who believe they have been displaced or replaced by a J-1 worker, are left only with the option of filing a complaint with the Office of Exchange Coordination and Compliance (ECC) at the State Department.

The only tools the ECC has at its disposal are the suspension or revocation of program-sponsor designation, letters of reprimand, or a reduction in the total number of participants authorized to a sponsor. But as the Associated Press revealed in its 2011 report, “no Summer Work Travel sponsor has ever been removed from the program for its treatment of students, despite years of complaints of exploitation and deplorable living and working conditions... [a]nd only a few sponsors have ever been reprimanded.”²⁰⁹ In addition, the State Department’s website shows that only one SWT sponsor has had its designation terminated since 2006²¹⁰ (the reason for the termination is not revealed)—which means that the only significant sanction available to the department is scarcely used, making it useless as a deterrent.

Also, the State Department has no additional authority to provide relief to U.S. workers or exchange visitors. If an employer commits acts that violate labor or employment laws, an exchange visitor seeking remedies must pursue those claims through another appropriate government agency or the courts (presumably with the help of an attorney, and at their own expense). The sponsors are under no legal obligation to assist or support the exchange visitor in pursuing claims stemming from potential workplace violations; sponsors are only obligated to inform participants of their rights.

Are there incentives for employers to hire exchange visitors over U.S. workers and other nonimmigrants?

The lack of protections for foreign workers in the Exchange Visitor Program, and the lower salaries and administrative costs that employers can legally pay for their labor creates strong incentives to hire J-1 exchange visitor workers over U.S. workers and foreign workers in other nonimmigrant temporary worker categories that impose additional requirements and restrictions on employers.

Payroll savings. The most compelling reason why employers would prefer exchange visitor workers is the significant cost savings in terms of wages, taxes, and health care costs paid per employee. Without any prevailing wage requirement or methodology, such as those found in the H-1B, H-2A, and H-2B nonimmigrant visa categories, employers are able to legally pay exchange visitor workers less than either a statutorily defined “prevailing” wage or a true “market” wage for their labor; i.e., they can pay wages below the average wage earned by U.S. workers in the same occupation in the same geographical region. As the Congressional Research Service has found, setting an appropriate minimum or prevailing wage for a foreign worker is an essential element in determining whether hiring a foreign worker could adversely affect U.S. workers.²¹¹

If employers are allowed to pay workers less than the true market wage, the average wage in the occupation falls, which puts downward pressure on the wages of all workers in the occupation. To illustrate the scale of wage savings that may benefit employers, one author estimates that the Walt Disney Company, one of the largest corporations in the country, saves about \$15 million per year on wages alone by hiring J-1 students and workers instead of U.S. workers.²¹²

In addition, employers are exempt from paying certain taxes for workers in the Exchange Visitor Program. In most cases,²¹³ both J-1 exchange visitors and their employers are exempt from paying Medicare,²¹⁴ Social Security,²¹⁵ and federal unemployment taxes.²¹⁶ For employers, this represents payroll savings of 8.45% on the portion of the wages paid that would be taxable by the federal government if the worker were a U.S. worker. But the exact payroll savings

will depend on the applicable unemployment taxation laws in each state, because employers are also exempt from paying state unemployment taxes, which varies by state, ranging from an average of \$114 per employee in Louisiana to \$939 on average in Idaho.²¹⁷ J-2 spouses and dependents on the other hand, are not exempt from regular Medicare and Social Security payments.

Many websites such as Jobofer.org openly tout and advertise the cost savings of hiring J-1 foreign workers.²¹⁸ Another website even includes a “Payroll Taxes Savings Calculator.” The calculator estimates that if an employer hires five J-1 workers for four months (the duration of the SWT program), and they work 40 hours per week while earning \$8.00 an hour, the employer will pay \$2,317 less in payroll taxes than if five U.S. workers had been hired.²¹⁹ If an employer hires a few J-1 workers year after year (as many do), these cost savings will multiply significantly over time.

Employers are also exempt from paying for any health care costs for exchange visitors. Exchange Visitor Program regulations at 22 C.F.R. § 62.14 require exchange visitors to have their own health insurance coverage for the duration of their stay in the United States. Although these particular savings are more difficult to quantify, the economy-wide average that private sector employers pay to provide health insurance for their employees is \$2.08 per hour.²²⁰ As a result, a company that hires Summer Work Travel workers instead of U.S. workers can save almost \$1,500 on health care costs per worker.

These employer savings also impact the social safety net in the United States because they deprive the federal government of significant revenue. For example, in fiscal year 2008, in the SWT category alone, if we assume that all of the SWT participants earned the federal minimum wage at the time, and worked 40 hours per week for four months, the federal government would receive \$116 million less in Medicare, Social Security and Federal Unemployment taxes than if those hours had been worked by a U.S. worker earning the federal minimum wage.

No labor market test. Employers are able to act on their preference for exchange visitors because there is no labor market test, i.e., they are not required to show that there are no able and available U.S. workers who are willing to

take the jobs that they fill with exchange visitors. Employers and sponsors are not required to advertise open positions or recruit unemployed U.S. workers for those positions, nor do they have to attest or certify that they have done so. This means that employers can legally hire exchange visitors to do unskilled work, even in areas with high unemployment.

One recent example of exchange visitors working in unskilled jobs occurred in Horry County, South Carolina, where—despite a county unemployment rate of 12.9%—a number of SWT participants were hired to work in the hospitality sector.²²¹ A representative of the local Hospitality Association and Workforce Investment Board suggested there were so many J-1s working in the county because “most locals who are unemployed are looking for permanent jobs, not seasonal ones.” This could be true, but without any requirements on employers to advertise these jobs and recruit U.S. workers before hiring exchange visitors, the public and the government cannot know whether unemployed U.S. workers are or are not being overlooked for these jobs. A June 2011 *Denver Post* article touched upon this point, underlining the connection between the extraordinarily high youth unemployment rate and the use of the J-1 visa by employers in Colorado and around the country.²²²

Previous regulatory language purported to address the hiring of SWT participants in areas with high unemployment by requiring that participants “be fully briefed on the employment situation in the United States and advised not to seek employment in areas where a high unemployment situation exists” and that sponsors “check in advance with the Department of Labor to obtain information regarding areas or cities which have a high unemployment rate” and further requiring that “[s]tudents should be advised to avoid such areas in seeking employment.”²²³ But neither the current regulations nor the new ones that will supersede them on July 15, 2011, contain this language, even though it was toothless and unenforceable as a limit on the program because it required only that SWT participants be “briefed” and “advised” about avoiding high unemployment areas—not that they actually avoid those areas or that the sponsors take action if they don’t.

Indentured servitude. Another incentive for employers to hire exchange visitors is the leverage that employers

have given the desperation that many visitors experience upon arriving in the United States. In the SWT program in particular, the current rule (in force until July 14, 2011) requires that only 50% of a sponsor's participants have a job secured before being granted a J-1 visa and entering the country. This means that after paying any applicable fees, and paying for health insurance and travel costs, the remaining exchange visitors will have to seek jobs after arriving in the country with no guarantee of finding one. As a result, they will be likely to accept any wages and working conditions that employers offer because they may lack enough money to pay for food, shelter, or even a return flight home in the event that they are unable to quickly find a job.

The State Department created a new "pilot program" for 2011 which requires that all SWT participants from six countries identified as the most problematic in the program (Belarus, Bulgaria, Moldova, Romania, Russia, and Ukraine) have a job offer before they are granted a J-1 visa. The program has not been codified into U.S. law or regulation; it exists only in the form of a two page letter posted on the State Department's website.²²⁴ The State Department's Office of the Spokesperson implied²²⁵ that the pilot program is intended to continue even after the new SWT interim final rule enters into force on July 15, 2011²²⁶ (although the pilot program will become somewhat redundant in light of the new regulations). The new SWT interim final rule will modify the requirement that each sponsor be required to ensure that 50% or more of its certified SWT participants have a job offer before coming to the United States.

In the preamble to the interim final rule, the State Department admitted that it had no idea whether sponsors were complying with the 50% rule, because consular officers only assess participant eligibility on a "case-by-case" basis, without reviewing the total percentage of participants that have been sponsored with or without a job by each individual sponsor. The new rule will require that all SWT participants from countries that are not part of the Visa Waiver Program²²⁷ (VWP) secure employment before entering the United States, but exempts participants from VWP countries from the requirement. Countries that are part of the VWP are generally wealthier, advanced economies,²²⁸ and are mainly located in Europe. The State

Department estimates that this differential treatment for participants from rich countries versus developing and underdeveloped countries will "result in approximately 87% of all Summer Work Travel participants entering the United States with prearranged and vetted jobs."²²⁹

If implemented and properly enforced program-wide, such a requirement would be a positive step toward protecting exchange visitors from ending up stranded and without a job, and hopefully avoid the situation where they are forced to "walk up and down the Boardwalk and Coastal Highway looking for work," like they do every summer in Ocean City, Maryland.²³⁰ Because the pilot program began so recently and the final interim rule does not take effect until mid-July of 2011, not much can be known about how the pilot program or new rules will function in practice. However, the press has reported that the pilot program "could put a serious dent in the foreign student workforce" in New Jersey and Maryland.²³¹ As the representative of a lodging and restaurant trade association noted, "It's going to be harder for the businesses... if they want to round out their staffs with these foreign student workers."²³²

Even exchange visitors who enter the country with a job, or are lucky enough to find a job after arriving, can still find themselves in desperate situations if they are laid off or fired before the end of their program. This is exactly what happened to a number of SWT participants from Peru, Brazil, and Argentina who were working in Lancaster, Ohio.²³³ After being laid off, they were left without any income or mode of transportation. Although the sponsor organization agreed to pay for their housing until their departure (on flights previously purchased and scheduled for the end of the four month program) the exchange visitors were forced to rely on the charity of local residents, churches, and businesses for food and other living expenses prior to departure. These young people paid their sponsor \$1,500 for the privilege to participate in this program. The new SWT regulations do not anticipate or address this scenario in any way.

Desperation, or the threat of it, gives employers an unfair power over SWT participants, and as a result, participants have strong incentives to accept whatever wages and working conditions their employer offers. In comparison, a U.S. worker could much more easily

decline or leave a job with poor pay and working conditions because the U.S. worker would not be stranded in a foreign land without any friends, family, or government resources for assistance. For instance, as reported in the Spanish language press, Peruvian students sometimes invest \$3,000 just to participate in the SWT program (including travel and administrative fees).²³⁴ This constitutes a huge investment for a student from Peru, where the median disposable family income is only \$4,385 per year.²³⁵ He or she will be desperate to earn the expenditure back in wages.

Furthermore, the J-1 visa does not allow for easy portability among employers. This means that each visa and exchange visitor is tied to a particular sponsor and employer, and if he or she is fired, the exchange visitor may no longer be authorized to work and remain in the U.S.²³⁶ Thus exchange visitors who are unsatisfied with their wages cannot easily switch employers, making them afraid to risk firing and deportation by complaining about low wages or poor working conditions. These factors cause exchange visitors to become, in essence, indentured servants to their employer.

Lower costs and less restrictions than other nonimmigrant options. Employers may also prefer to hire exchange visitors with J-1 visas because it saves them the time and money required to petition for foreign workers through other employment-based visa programs. In order to obtain guestworker visas for foreign workers in the principal H visa categories, employers must complete certain procedural steps, such as acquiring a prevailing wage determination or filing a labor condition application. Some of these steps cost hundreds or thousands of dollars in filing and administrative fees, and may require an immigration attorney to complete.

The H visa categories also require some form of interaction, application, and/or approval from three separate federal agencies: the Department of Labor, the State Department, and the Department of Homeland Security. Acquiring a J-1 visa does not require any of these steps. And, because the sponsoring organizations act as de facto immigration authorities, employers are required to pay only minor fees (if any), often don't need to hire attorneys, and need only interact with a single federal

agency (if at all), the State Department. As a result, the processing time required to get a J-1 visa is much shorter than for other visa classes.

Immigration lawyers and sponsors market these J-1 visa advantages to employers. For example, a video by an immigration lawyer posted on YouTube.com touted the benefits of using J-1 visas to hire workers in the hospitality industry, relative to other classes of guestworker visas:

*The nice thing about the J-1, it's quick to get, and it's easy for the employers to obtain those visas, because they are all handled through the State Department and a typical employee can get to the U.S. in six weeks.*²³⁷

Other websites also openly advertise using the J-1 visa program to get around the limitations of the yearly numerical limits imposed on H-1B²³⁸ and H-2B²³⁹ visa. The "J Visa Guidebook," (an aid for immigration attorneys) describes why the J-1 is preferable to the H-3 "trainee" visa:

*One advantage to using the J-1 trainee option over the H-3 option is that the training requirements are generally easier to meet than H-3 requirements. Furthermore, J-1 trainees can apply for a visa without initial approval by USCIS. This means that the costs may be less than the H-3 and the timing may be much faster. Finally, J-2 spouses are permitted to obtain employment authorization, while H-4 spouses are not.*²⁴⁰

Employers are honest about their preference for J-1 workers over those in other visa categories. Alaska-based Copper River Seafoods, which hires approximately 150 seasonal employees every year, states at the top of its "Employment Opportunities" website page that it only accepts applications from "U.S. Citizens" and "J-1 Visa Qualifying Students," while explicitly excluding and "not accepting H-2B Qualifying Applications."²⁴¹

The recruitment brochure for Morey's Piers, an amusement and waterpark in Wildwood, New Jersey on the Jersey Shore, advertises that Morey's Piers hires "approximately 1,500 seasonal associates" and that "700-800 of those employees are international students on visa programs."²⁴²

The “visa programs” that the brochure mentions refer only to the J-1 visa, because the “International Students” page on the “summer jobs” section of the company website specifies that “Morey’s Piers only employs international university students who possess J-1 Work and Travel Visas.”²⁴³ In the past, this wasn’t always the case; in fact, Morey’s Piers was a regular user of H-2B workers until 2008,²⁴⁴ and Denise Beckson, Morey’s director of operations, interviewed by *The Press of Atlantic City*, said that they used H-2B foreign workers in the past because paying higher wages to attract U.S. workers was problematic:

*...the cost of doing business has gotten so expensive... Overhead is astronomical. We’ve seen a 35 percent increase for our health insurance costs alone. So in terms of wages, any increases we were to pay would be passed on to the consumer.*²⁴⁵

But as of 2010, Morey’s Piers told a *Philadelphia Inquirer* columnist that the company now prefers to use only J-1 visas instead of H-2Bs:

*Denise Beckson, director of operations at Morey’s Piers in Wildwood, told me her company imported hundreds of foreign college students from Eastern Europe and Asia for its 1,600-member seasonal workforce, and preferred to use the J-1 student exchange visa instead of H-2B.*²⁴⁶

The actual number of exchange visitors hired by Morey’s Piers remains a mystery. Although Beckson’s statements to the press²⁴⁷ and Morey’s recruitment materials state the total to be approximately half of all seasonal workers hired, a much older 1999 *Newsweek* article reported that “about 90 percent of the summer workers are foreigners,” citing an additional reason why summer employers prefer foreign guestworkers over U.S. workers that are enrolled in school: “[u]nlike Americans, many won’t return to school till September or October—a big plus for employers like Morey’s, whose high season stretches into fall.”²⁴⁸ The backdrop to all of this is that, as the *New York Times* reported, there have been thousands of unemployed and over-qualified U.S. workers seeking summer jobs along the Jersey Shore since the recession began.²⁴⁹

The J-1 visa may also be a preferable option for college and university students, rather than the traditional student visas, the F-1 and the M-1, and for employers who offer an academic or training component to the jobs they offer. This is because the State Department’s regulations are much less restrictive in terms of employment than the Department of Homeland Security regulations that govern the F-1 and M-1 visa programs. The preference for the use of less restrictive J-1 visas is evident for example in the Walt Disney Company’s “academic training” and employment program. For Disney, the F-1 and M-1 visas:

*...are less appealing...than the J visa because they restrict student employment. Students participating in the M visa program are unable to accept employment apart from limited practical training after completion of their studies. 8 C.F.R. § 214.2(m) (13), (14) (2010). Those in the United States under an F visa are limited in the number of hours per week that they can work and they also face significant restrictions on off-campus employment. 8 C.F.R. § 214.2(f)(9) (2010).*²⁵⁰

The J-1 offers students and their employers an easy option to get around the stricter DHS regulations.

In sum, because the Exchange Visitor Program’s J-1 visas are so cheap, easy, and quick to get relative to other guestworker visas and student visas that allow employment, and because they are uncapped by law, they effectively diminish the integrity of the other guestworker programs and student visas that require management and oversight by the Department of Labor and U.S. Citizenship and Immigration Services within DHS. As early as 1990, the GAO reported this problem, noting that H, L, and M visas “may be more appropriate” for the activities of exchange visitors, and importantly, these three visa categories “have certain safeguards to protect U.S. interests... and the requirements relating to them are more stringent than those governing the J visa.” The DOL at the time also conjectured that the sharp rise in J visa usage was likely a result of the desire to avoid labor certifications and employer sanctions.²⁵¹

Since the publication of the GAO’s report in 1990, it has been a matter of public record that employers are

using the Exchange Visitor Program to avoid the rules and protections for U.S. workers that the DOL and DHS are responsible for enforcing. Nevertheless, while the size of the program has increased by 96% in the 21 years that have passed, no significant steps have been taken to address these concerns.

Use of exchange visitors to fill employers' regular yearly staffing needs. Websites for major sponsors of exchange visitors make little or no referene to the program as one that facilitates a cultural or educational exchange, and instead explicitly state that the role and primary purpose of exchange visitors is to provide labor to employers, especially with regard to the SWT program. For example, the website for the Council on International Educational Exchange (CIEE), a designated sponsor organization in Portland, Maine, has a section subtitled "Hiring Solutions," which provides information to employers on how they can hire workers in the SWT, Trainee, and Intern categories.²⁵² Another sponsor organization advertises the tax exemptions benefiting employers that hire J-1 workers via the SWT program²⁵³ and proclaims that it can help employers "Meet your Seasonal Staffing Needs."²⁵⁴ And the Council for Educational Travel, USA announces that the SWT program "is a great opportunity to...fill your short-term and seasonal staffing needs."²⁵⁵

Given the aforementioned marketed advantages of hiring J-1 workers over U.S. workers, it's not surprising that employers often choose to hire large numbers of exchange visitors every year. The testimonials of employers on the CIEE website illustrate how long some employers have been using exchange visitors to fill their yearly staffing needs.

CIEE describes the Pool Management Group (PMG) as a company that "manages over 750 outdoor swimming pools in 16 US cities" and has "been in the business of providing quality swimming pool management services for 25 years."²⁵⁶ PMG describes its experience with the program in its testimonial²⁵⁷:

We started recruiting back in 2003, and since then we've had over 700 students. A lot of them come year after year, as long as they can. They just

provide a great labor force, especially when the American students have to go back to school; to have them stay around until the end of summer has been really beneficial.

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

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

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

There are two main problems with this use of the program for regular staffing and this relationship between program sponsors and employers. First, nothing in the Fulbright-Hays Act of 1961 even remotely suggests that the Exchange Visitor Program was intended to function as a seasonal guestworker program to meet the staffing needs of U.S. employers. But this exactly what some categories in the program have become. Even though two of the Exchange Visitor Program categories have received explicit, additional congressional authorization, it is highly unlikely that either the SWT or Au Pair programs are consistent with the goals and purpose of the original Fulbright-Hays statute. Nevertheless, this authorization permits the State Department to manage the largest category of the largest guestworker program in the United States without consulting or cooperating with the other two federal agencies that normally play a major role in the execution of U.S. immigration policy, and without obtaining even a basic assessment of the conditions or needs of the U.S. labor market.

Second, the Exchange Visitor Program's legal, regulatory and institutional framework does not provide U.S. workers with any protections from displacement by exchange visitors or from discrimination by employers who prefer to hire exchange visitors instead of U.S. workers. Employers who fill their staffing needs with J-1 workers every year are not even required to advertise their open positions to unemployed U.S. workers. Instead, they are free to staff their offices and worksites completely with J-1 guestworkers—even if the worksite is located in a high unemployment area with hundreds or even thousands of unemployed U.S. workers.

Discussion: Four critical problems with the Exchange Visitor Program

As discussed above, many of the problems associated with the Exchange Visitor Program have been well documented, while others are difficult to assess due to a lack of available and potentially useful data on the wages and occupations of participants. However, an analysis of the available data and information reveals four major flaws in the program to be the most critical to address.

Problem #1: The Exchange Visitor Program lacks protections for U.S. workers

There are no mechanisms in place to prevent the displacement of U.S. workers by exchange visitors with J-1 visas, or to protect the wages and working conditions of U.S. workers in occupations that employ J-1 visa holders. U.S. workers are not preferred for, and likely never even get a chance to apply for open positions that go to exchange visitors, because employers are not required to advertise their job openings. Rather, foreign workers recruited by sponsors, employers, and third country cooperators serve as a steady supply of workers who have little incentive to complain about poor wages and working conditions and who may legally be paid less than what a similarly situated U.S. worker would earn, and for whom employers pay no federal and state payroll taxes and health care costs.

Employers are able to exploit these loopholes because the State Department's regulations do not create any enforceable rights for U.S. workers to assert in a court of law. As a result, the State Department is facilitating discrimination against U.S. workers by U.S. employers, and

creating downward pressure on the wages and working conditions of U.S. workers.

Problem #2: The State Department's authority to create new guestworker programs is unrestricted and overbroad

The State Department is tasked with conducting foreign affairs and diplomacy on behalf of the president of the United States, and has the expertise to exercise that authority. However, the department has no expertise to operate the largest foreign guestworker program in the United States. State is the agency least concerned with domestic issues, the most important of which is perhaps the proper functioning of the U.S. labor market.

Despite its poor record and patent lack of expertise in labor regulation, the State Department has assumed the authority to create new guestworker categories—which bestow the right to work in the United States—without consulting other agencies or Congress. The State Department has created new Exchange Visitor Program categories simply by declaring the existence of a new category via either transmitting a cable, signing an MOU, or promulgating a regulation without a notice and comment period (by claiming a foreign affairs exception to the Administrative Procedure Act). Most of the other major guestworker categories, such as the H-1B, H-2A, and H-2B, have been created by Congress and include some protections for U.S. workers.

Under the U.S. Constitution, Congress has plenary power over immigration, the ultimate authority to create classifications and procedures in immigration law. But whether Congress has appropriately delegated the authority to create guestworker programs and categories to the State Department under the Fulbright-Hays Act and subsequent legislation is an open question; State may be usurping congressional authority when it grants J-1 visas allowing foreign visitors to be employed in the U.S. labor market.

Problem #3: Significant financial incentives for J visa sponsors and their partners are inappropriate and an obstacle to reform

The financial incentives for employers, sponsors, and third country cooperators and recruiters have allowed them to turn the Exchange Visitor Program into a moneymaking

enterprise. As discussed earlier, there are significant financial incentives for employers to hire exchange visitors with J-1 visas rather than U.S. residents, but there are also financial incentives for the other stakeholders involved in operating the program—especially the sponsors and their overseas cooperators/partners that recruit exchange visitors in their home countries.

Although new procedures for the SWT program in the interim final rule of April 26, 2011²⁵⁸ attempt to create safeguards by increasing transparency and the accountability of sponsors and their partners, they do not apply to any other Exchange Visitor Program categories. More importantly, they do not eliminate the financial incentives that drive program use. As described in the 2000 report by the Office of the Inspector General of the State Department, many of these organizations are primarily motivated by profit. As a result the OIG recommended that the State Department consult with other agencies about whether to allow these entities to exist for the sole purpose of enriching themselves.

Official estimates of the profit earned by these entities are almost impossible to find, but the interim final rule provides a snapshot of how much revenue sponsors in the SWT program are generating:

Of the 53 entities sponsoring SWT placements, 34 have annual revenues of less than 7 million dollars. These 34 entities account for approximately 15,000 of the 120,000 annual SWT exchange participants.²⁵⁹

According to this information, 34 of the SWT program sponsors, which sponsor 12.5% of SWT participants, earn less than 7 million dollars per year. That means that the other 19 sponsors, which represent the large majority of SWT participants—the remaining 87.5%—earn more than \$7 million per year. It must also be noted that these data do not even include the profits earned by the foreign cooperators and partners of the sponsors, which (according to the OIG report) are likely to be earning a substantial share of the profits. In other words, these are not small organizations earning nominal amounts of revenue in order to facilitate cultural and educational exchanges. Instead, they are labor contracting businesses

earning large profits for their services. As the history of the Au Pair category demonstrates, like any other business with substantial amounts of capital at its disposal and benefiting from the political and legal status quo, these organizations are able to promote their interests through the political system.

Problem #4: The system of management, data collection, oversight, compliance, and enforcement in the Exchange Visitor Program is fundamentally flawed

As government auditors and news sources have found, and as this report has discussed, the State Department regulations for the Exchange Visitor Program are inadequate to protect either program participants from abuse or U.S. workers from displacement. But even more important is how fundamentally flawed the system for monitoring and reporting violations is, and how ineffective are the sanctions and procedures used to punish sponsors.

First, the State Department fails to collect some of the most basic data about exchange visitors. In many cases, the department does not even know where exchange visitors are employed and the name of their employers, because sponsors are only required to enter their own name—not the name and address of the employer and the occupational title—on the DS-2019 form. (The newly announced regulations will require that this information be entered for SWT participants.) Thus, in many cases the State Department and the Student and Exchange Visitor Information System (SEVIS) online database do not possess employer and occupational information about exchange visitors; only the sponsors have this information. State's failure to collect data also means it is unavailable to the public, because State cannot report it or even reveal it in response to a FOIA request.

In addition, in all cases sponsors are not required to report the wages earned by the exchange visitors, and the State Department does not conduct post-entry audits of employers to determine if they are complying with applicable labor and employment laws or Exchange Visitor Program regulations. Because this data is not collected, the public and even internal government auditors are unable to assess the impact of exchange visitors on the labor market.

The GAO has also criticized the State Department for not collecting enough data to see whether exchange visitors are filing fraudulent immigration claims and overstaying the length of their visa terms.²⁶⁰ Considering that approximately 40-50% of all unauthorized migrants in the United States initially entered the country with a valid visa and overstayed beyond the permitted time limit,²⁶¹ the possibility that some percentage of the 300,000 temporary workers entering the country every year may be overstaying their J-1 and J-2 visas should not be overlooked.

Second, and most importantly, the State Department by and large outsources its management and oversight responsibilities to the sponsor organizations. The sponsors then outsource their own responsibilities to third parties, either the U.S. employers that hire exchange visitors or the individuals (here and abroad) and foreign agencies that recruit exchange visitors and place them with employers. This system creates a conflict of interest for sponsors, their recruiting partners in the U.S. and abroad, and employers, who are supposed to protect exchange visitors but have incentives not to. It makes no sense to allow the State Department to rely on sponsors and employers to file complaints of violations that they themselves commit against their own participants or employees. Sponsors and employers cannot be expected to act against their own institutional and financial self-interests by reporting their violations of regulations and abuse of employees to the State Department, whose remedy is to eliminate the program, and therefore the financial revenues and savings it generates for the sponsors and employers.

Furthermore, in the unlikely event that exchange visitors gather the courage to report violations directly to the State Department despite knowing that they could be fired if their employers discover the complaint, then the exchange visitor will encounter an agency ill-equipped to respond. Until late 2010, the department did not even keep a record of complaints received. And as the GAO reported, it only conducts investigations via telephone, email, and fax because it is underfunded and understaffed. Finally, State cannot provide participants with any other relief than suspending or terminating the sponsor's program.

Very little data exists on the sanctions the State Department has issued in order to ensure compliance. The department's website contains a list, "Closed Sanction

Cases Covering the Period 2006 to date,"²⁶² which lists the sponsor organizations that have been sanctioned since 2006 and gives a very brief, general description of the reason for each sanction. By far, most of the sanctions have been incurred by sponsors in the Secondary Student category (whose participants are generally not employed). The list does not provide the exact details behind the violations that justified the sanctions, and omits information on some sanctions altogether. For example, no description is listed detailing the reason behind the only termination of designation of a SWT sponsor since 2006 (only an "N/A" is listed).

How many organizations were sanctioned before 2006, and what sanctions were issued? What were the reasons? How many exchange visitors did each of these organizations sponsor and how much revenue were they earning? Are these sponsors back in business, or did they reopen under a different company name? No public data exists to fully answer these questions, although in June of 2011 the Associated Press reviewed documents suggesting that for the largest Exchange Visitor Program category, "only a few sponsors have ever been reprimanded."

Furthermore, it is unclear whether the State Department keeps detailed records of sanctions. In addition, one sponsor's representative complained that when unfortunate incidents occur, smaller sponsors are often sanctioned as a public example, while larger and wealthier sponsors are not sanctioned because of their political and financial clout. Unfortunately, without more data, the public and policymakers cannot examine or determine how the State Department has performed its oversight responsibilities. Reports by independent government auditors and the media suggest it has largely failed.

Conclusion

The totality of the evidence—in the GAO and OIG reports, the admissions by the State Department in the SWT interim final rule of 2011, and news reports throughout the years—reveals the State Department's opaque or inept administrative practices regarding the Exchange Visitor Program. The evidence points to an agency operating a program that does not function in the interest of either the young people to whom it issues J-1 visas or the U.S. workers whose employment and labor rights it ignores.

The Fulbright-Hays Act does not authorize the use of the Exchange Visitor Program as a temporary guest-worker program. Exchanges for employment purposes that are not educational, scientific, or cultural in nature—especially in the case of low-skilled guestworkers who participate in the SWT program—violate the spirit of the original legislation that created the Exchange Visitor Program. Nevertheless, Congress has stepped in at least twice to authorize temporary worker programs not anticipated or authorized by the original statute.

Congress should examine how the Exchange Visitor Program has grown into the largest guestworker program in the United States while under minimal oversight by an understaffed and under-resourced compliance division in an inappropriate agency. Why has the program been allowed to continue to operate, in the face of at least 21 years of compelling and legitimate public criticisms by representatives of other federal agencies, government auditors, the media, and the public? Why does the State Department, whose primary objective is to conduct foreign relations, want to operate and continually expand a large guestworker program within the United States?

One explanation may be that the State Department views the Exchange Visitor Program as a tool of diplomacy instead of a resource for increasing mutual understanding through reciprocal educational and cultural exchanges (as the Fulbright-Hays Act anticipates). State apparently sees the J-1 visa as a tangible good that it can give to other countries as an expression of goodwill that garners their goodwill in return—what some scholars have called “visa diplomacy.”²⁶³

If J-1 visas only allowed tourist visits or short-term visits for cultural, educational, scientific or training purposes, such “visa diplomacy” would be a legitimate use of the State Department’s delegated authority to conduct foreign relations on behalf of the executive branch. But because J-1 visas allow full-time employment in the United States, and authorize more guestworkers annually than any other visa program, it extends far beyond visa diplomacy. The Exchange Visitor Program has become a form of “guestworker diplomacy,” a version of diplomacy that can broadly impact the domestic labor market, despite the fact that State’s mandate and expertise are

fundamentally outward looking (i.e., beyond the borders of the national labor market). Thus, the department’s lack of expertise in labor market dynamics, combined with its primary concern to conduct diplomacy and foreign affairs, likely mean that the department does not realize the impact of an additional 300,000 workers per year in the labor market on U.S. workers, or does not care, because it is concerned only with conducting *foreign* affairs.

Furthermore, the failure to adequately protect the well-being of foreign visitors who participate in the program has diminished the value of State’s guestworker diplomacy both at home and abroad. U.S. credibility suffers when mistreatment or unfortunate incidents lead embassies in Eastern Europe to warn their residents to “avoid going to the U.S. on a J-1” because of a “high level of danger.”

And when the State Department says that the Exchange Visitor Program has played a role in facilitating “money laundering, money mule schemes and Medicare fraud” and that exchange visitors themselves have been “either knowingly engaging in or becoming hapless victims of and accessories to criminal activities,”²⁶⁴ it calls into question the benefit of this type of diplomacy.

Finally, scant oversight of the program facilitates employer abuses of J-1 workers, permits preferential hiring of J-1 workers to reduce payroll costs, and creates a more submissive foreign workforce ill-equipped to complain about subpar wages and working conditions.

Tolerating abuse of foreign workers at the hands of some unscrupulous employers, sponsors, and foreign recruiters is not only adverse to the interests of U.S. workers. The department asserts that when these “problems occur, the U.S. Government is often held accountable by foreign governments for the treatment of their nationals, regardless of who is responsible for the problems” because “the failure to protect the health, safety and welfare of these program participants will have direct and substantial adverse effects on the foreign affairs of the United States.”²⁶⁵ But given its widespread problems, the J visa Exchange Visitor Program is having substantial direct and adverse effects on the foreign affairs of the United States. The State Department should suspend the program until its numerous problems have been exposed and corrected, or terminate the program and start over from scratch.

It is not clear that this guestworker diplomacy benefits anyone other than certain U.S. employers and sponsor organizations. If the Exchange Visitor Program is to continue, the State Department should provide evidence demonstrating how the country benefits culturally and educationally from having 300,000 workers enter the country each year to take jobs that young Americans desperately need. Such action cannot be justified without any showing that U.S. workers are unavailable, and without the basic protection of a prevailing wage to prevent against adverse affects on the wages of U.S. workers. Allowing the State Department to continue to operate its large guestworker program in the United States ignores the agency's limitations and its mandate, and the interests of U.S. workers.

Endnotes

1. Mutual Educational and Cultural Exchange Act of 1961, § 2451, Pub. L. No. 87-256, 75 Stat. 527 (codified at 22 U.S.C. Chapter 33 (2010)), commonly referred to as the “Fulbright-Hays Act.”
2. For a more detailed history regarding the J visa and the Exchange Visitor Program, see Kit Johnson, “The Wonderful World of Disney Visas,” *Florida Law Review* no. 63 (2011): 937- 941, accessed May 27, 2011, <http://ssrn.com/abstract=1839544>.
3. “Declaration of Principles of Inter-American Solidarity And Cooperation, Buenos Aires, December 21, 1936” (Buenos Aires Conference), Mount Holyoke College, accessed May 27, 2011, <http://www.mtholyoke.edu/acad/intrel/interwar/interamerican.htm>.
4. “‘Declaration of Lima’ by the Eighth International Conference of American States, December 24, 1938,” Mount Holyoke College, accessed May 27, 2011, <http://www.mtholyoke.edu/acad/intrel/interwar/lima.htm>.
5. Clark A. Miller, “The Origins of Scientific Internationalism in Postwar U.S. Foreign Policy, 1938-1950,” accessed May 27, 2011, <http://www.georgetown.edu/faculty/khb3/osiris/papers/Miller.pdf>.
6. Pub. L. No. 75-535 (1938); amended by Pub. L. No. 76-63 (1939), and Pub. L. No. 76-355 (1939).
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8. U.S. Information and Educational Exchange Act of 1948, Pub. L. No. 80-402, 62 Stat. 6 (1948) (codified at 22 U.S.C. Chapter 18, §§ 1431-1480 (2010)), commonly referred to as the Smith-Mundt Act.
9. Gregory Siskind, William Stock and Stephen Yale-Loehr, *J Visa Guidebook: The Complete Resource for Exchange Visitor Programs and Participants* (New Jersey and California: Matthew Bender, 2010), § 1.1.
10. Exchange Visitor Program—Summer Work Travel, Interim final rule with request for comment, 76 Fed. Reg. 23177 (April 26, 2011) (to be codified at 22 C.F.R. 62.32), accessed May 27, 2011, <http://www.gpo.gov/fdsys/pkg/FR-2011-04-26/pdf/2011-10079.pdf>.
11. U.S. Department of State, *Foreign Affairs Manual* (Washington D.C.: State Department), accessed May 27, 2011, <http://www.state.gov/m/a/dir/regs/fam/>.
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13. Some of the 16 categories are grouped together here – other sources may consider these to be 13 or 14 categories.
14. In addition, a formerly existing Trainee category for the purposes of “flight training” was recently dissolved (as of June 1, 2010). See Exchange Visitor Program – Termination of Flight Training Programs, 73 Fed. Reg. 40008 (July 11, 2008).
15. 22 C.F.R. § 62.20
16. 22 C.F.R. § 62.21
17. 22 C.F.R. § 62.22
18. 22 C.F.R. § 62.23
19. 22 C.F.R. § 62.24
20. 22 C.F.R. § 62.25
21. 22 C.F.R. § 62.26
22. 22 C.F.R. § 62.27
23. 22 C.F.R. § 62.28
24. 22 C.F.R. § 62.29
25. 22 C.F.R. § 62.30
26. 22 C.F.R. § 62.31
27. 22 C.F.R. § 62.32
28. Unclassified State Department Cable 012058, *SUBJECT: CORRECTED COPY STATE 011470: Designation of the Department of State’s Bureau of Human Resources (DGHR) as an Exchange Visitor Program Sponsor (J-1) to facilitate entry to the United States of Non-U.S.-Citizen Same-Sex Domestic Partners of Members of the Foreign Service*.
29. Fulbright-Hays Act § 2453(a), 22 U.S.C. § 2453(a) (2006).
30. See “New Zealand and Australia Twelve-Month Student Work and Travel Programs,” United States Diplomatic Mission to New Zealand, accessed May 27, 2011, http://newzealand.usembassy.gov/swt_fa.html; see also “Student Work and Travel Pilot Program, Frequently Asked Questions,” Embassy of the United States, Canberra, Australia, accessed May 27, 2011, http://canberra.usembassy.gov/student_work_travel_pilot_prog.html.
31. Immigration and Nationality Act (INA) § 101(a)(15)(J).
32. “Dependents” are defined as unmarried children under the age of 21. See “About the J-2 Visa,” U.S. State Department, accessed May 27, 2011, <http://j1visa.state.gov/basics/j2-visa/>.
33. 8 C.F.R. § 214.2(j)(1)(ii). See also “Common Questions for Participants,” U.S. State Department, accessed June 5, 2011, <http://j1visa.state.gov/participants/common-questions/>.
34. 8 C.F.R. § 214.2(j)(1)(ii)
35. 8 C.F.R. § 214.2(j)(1)(v)(B)
36. Via “Form I-765, Application for Employment Authorization,” USCIS, accessed May 27, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=73ddd59cb7a5d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD>.
37. See Naomi Schorr and Stephen Yale-Loehr, “The Odyssey of the J-2: Forty-Two Years of Trying Not to Go Home Again,” *Bender’s Immigration Bulletin* no. 63 (December 1, 2003): 1810, 1816-1817, footnote 31-32; citing H.R. Rep. No. 87-721 (1961), at 76, 85, accessed May 27, 2011, <http://www.kramerlevin.com/files/Publication/1affe6b9-3d3c-4fb6-86e0-256b7bbd54f2/Presentation/PublicationAttachment/a9be3174-650d-4484-838b-07a47b694361/J-2article-final.pdf>.
38. INA § 101(a)(15)(J)
39. Homeland Security Act of 2002 § 428, Pub. L. No. 107-296 (Nov. 25, 2002), 116 Stat. 2188, 6 U.S.C. § 236.

40. Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning the Implementation of Section 428 of the Homeland Security Act of 2002, accessed May 27, 2011, http://www.nafsa.org/uploadedFiles/dos_dhs_mou_on_respective.pdf?n=7916.
41. Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (June 11, 1946).
42. See “Regulatory Analysis,” 76 Fed. Reg. 23181.
43. APA § 553(a)(1)
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45. An Act to Extend Au Pair Programs, Pub. L. No. 104-72, 109 Stat. 776 (December 23, 1995), accessed May 27, 2011, <http://www.gpo.gov/fdsys/pkg/PLAW-104publ72/html/PLAW-104publ72.htm>; Pub. L. No. 105-48, 111 Stat. 1165 (October 1, 1997), accessed April 27, 2011, <http://exchanges.state.gov/media/office-of-private-sector-exchanges/pdfs/au-pair-statutory-authority.pdf>; see also “Policy Statement on Au Pair Program,” 22 C.F.R. Part 514 (March 4, 1996), United States Information Agency, accessed May 27, 2011, http://dosfan.lib.uic.edu/usia/GC/GC_Docs/WhatsNew/ht3.txt.
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69. 22 C.F.R. § 62.50
70. 22 C.F.R. § 62.60
71. 22 C.F.R. § 62.61
72. 22 C.F.R. § 62.3(a)(1)
73. 22 C.F.R. § 62.3(a)(2)
74. 22 C.F.R. § 62.3(a)(3)
75. 22 C.F.R. § 62.2
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111. *Ibid.*, 4. Note: the regulations discussed in this report refer to the USIA's regulations, because responsibility for managing the Exchange Visitor program was not transferred to the State Department until 1999.
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116. The United States Information Agency was eliminated as an independent federal agency and merged back into to the State Department in 1999. GAO, "U.S. Information Agency: Inappropriate Uses of Educational and Cultural Exchange Visas (GAO/NSIAD-90-61)," 3.
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130. *Ibid.*
131. *Ibid.*, 3.
132. *Ibid.*, 9.
133. *Ibid.*, 10.
134. *Ibid.*
135. *Ibid.*, 16.
136. *Ibid.*, 11.
137. *Ibid.*
138. *Ibid.*, 12.
139. *Ibid.*, 13.
140. *Ibid.*, 14.
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142. *Ibid.*, 17.
143. *Ibid.*, 19.
144. *Ibid.*, 20.
145. *Ibid.*, 20, 22.
146. State OIG, "The Exchange Visitor Program Needs Improved Management and Oversight (Audit Report 00-CI-028)," 8.
147. *Ibid.*, 27-28.
148. Under U.S. law and regulation, H-2B workers are used to fill a labor shortage only if an unemployed person capable of performing such work cannot be found in the United States, and the number of H-2B workers is capped at 66,000 per year.
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166. Appendix E, 22 C.F.R. § 62--Unskilled Occupations
167. For this estimate and Figure I, the author has estimated that one-third of J-2 workers are employed.
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170. 151,756 vs. 118,617; as reported by the Inter Agency Working Group (*see* Table 1).
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178. Kit Johnson, "The Wonderful World of Disney Visas."
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181. 18 months "[f]or undergraduate and pre-doctoral training," 22 C.F.R. §62.23(f)(4)(ii); or 36 months "[f]or post-doctoral training," 22 C.F.R. § 62.23(f)(4)(iii).
182. Kit Johnson, "The Wonderful World of Disney Visas," 973.
183. "At Disney, AEE students undertake 'academic training' by working in the Disney World theme parks some thirty to thirty-five hours a week." Kit Johnson, "The Wonderful World of Disney Visas," 944.
184. 22 C.F.R. § 62.23(i)(3)(ii)(B)
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186. 22 C.F.R. § 62.24(f)(3)
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