TO: **Office of Private Sector Exchange Designation, Bureau of Educational and Cultural Affairs, U.S. Department of State**

FROM: **National Domestic Workers Alliance and Towards Justice**

CONTACT: **Rocio Avila, State Policy Director & Senior Employment Counsel, National Domestic Workers Alliance, rocio@domesticworkers.org, or Nina DiSalvo, Policy Director, Towards Justice, nina@towardsjustice.org**

RE: **RIN 1400–AF12**

DATE: **January 26, 2024**

VIA: **JExchanges@state.gov**

Together, the National Domestic Workers Alliance (NDWA)[1] and Towards Justice[2] submit these comments on the proposed Exchange Visitor Program regulations governing the Au pair category (RIN 1400-AF12) published at 88 FR 74071-97.

NDWA is the nation's leading voice for dignity and fairness for the nearly 2.5 millions domestic workers in the United States.[3] Founded in 2007, NDWA members include childcare workers on J-1 au pair visas, nannies, direct or home care workers, and house cleaners in private homes, providing essential care and supportive services to children, aging parents, and family members with disabilities every day. NDWA reaches and engages over 400,000 domestic workers on a regular basis through our 68 affiliate organizations in 50 cities and 19 states, our state and local chapters in North Carolina, Georgia, Houston/Harris County (Texas), San Jose (California), Philadelphia (Pennsylvania), the DMV (Washington D.C., Virginia & Maryland), and New York, and through our digital platforms.

Towards Justice is a Colorado-based nonprofit legal organization that advocates for and collaborates with workers and workers' organizations to build worker power and advance economic justice. Towards Justice has served as counsel to au pairs in litigation around the country, including in *Beltran, et al v. Interexchange, Inc.,* Case 14-cv-03074-CMA (D. Colo.), *Morales Posada, et al v. Cultural Care, Inc.,* Case 1:20-cv-11862-IT (D. Mass.), and *Vera v. Au Pair International,* 23 CV 30345 (Colo. Dist. Ct.). Towards Justice also represented amicus curia in *Capron, et al v. Massachusetts Attorney General et al*, Case: 17-2140 (1st Cir.).

We appreciate the opportunity to comment on these proposed rules.

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[1] *See,* https://www.domesticworkers.org/.
[2] *See,* https://www.towardsjustice.org.
[3] Linda Burnham & Nik Theodore, *Home Economics: The Invisible and Unregulated World of Domestic Work*, National Domestic Workers Alliance, 2012, at 26-28, https://www.domesticworkers.org/reports-and-publications/home-economics-the-invisible-and-unregulated-world-of-domestic-work/.

Introduction

Congress created the J-1 visa to facilitate cultural exchange between nations pursuant to the Mutual Educational and Cultural Exchange Act of 1961 ("Fulbright-Hays Act").[4] Today, there are more than a dozen J-1 visa programs, admitting around 300,000 foreign visitors - ranging from teachers and camp counselors to physicians and professors - each year.[5] The federal government began operating the J-1 program for au pairs in 1986.[6] Since then, the program has grown to allow about 20,000 foreign young people (mostly women) to work as full-time, live-in nannies for American families each year.[7] The program is managed by sponsor organizations, "that act as labor recruiters for families looking to hire foreign au pairs, [and] to which the State Department ("DOS") has mostly outsourced [program] management and oversight[.]"[8]

Congress created the J-1 visa to facilitate cultural exchange, but the DOS has allowed the au pair program to morph into a work program that was never contemplated by Congress.[9] The current program - and the program as proposed in these rules - is focused on labor. One au pair explained, my host family was "expecting me to work as a maid. I worked with them more than fifty hours. Even when they were home I was still working. They wanted me to do a lot of home services; I ended up cleaning the house alone."[10] That is, "in reality, au pairs are a deeply vulnerable class of domestic workers who have little recourse for workplace abuse[.]"[11]

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[4] Mutual Educational and Cultural Exchange Act of 1961, 22 U.S.C. §2451, *et seq.*

[5] Bridge USA, J-1 Visa Basics, *Facts and Figures*, https://j1visa.state.gov/basics/facts-and-figures/; U.S. State Department, *Worldwide Nonimmigrant Visa Workload by Visa Category FY22*, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVWorkload/FY2022NIVWorkloadbyVisaCategory.pdf.

[6] Susan B. Epstein, *The Au Pair Program*, Cong. Research Serv., RL 95-256, Jan. 30, 1998, at 2–3.

[7] Daniel Costa, *Au pair lawsuit reveals collusion and large-scale wage theft from migrant women through State Department's J-1 visa program*, Economic Policy Institute, Jan. 15, 2019, https://www.epi.org/blog/au-pair-lawsuit-reveals-collusion-and-large-scale-wage-theft-from-migrant-women-through-state-departments-j-1-visa-program/#:~:text=There%E2%80%99s%20no%20question,foreign%20policy%20goals.

[8] *Id.*; *see also* 22 C.F.R. § 62.31 (au pair-specific regulations); 22 C.F.R. § 62.9 (J-1 visa sponsor obligations generally).

[9] Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 Harv. J.L. & Gender 269, 269 (2013), http://harvardjlg.com/wpcontent/uploads/2013/09/Chuang.pdf ("Close examination of the program reveals that, contrary to its "cultural exchange" rhetorical cornerstone, the program's primary emphasis is on the au pair's role as provider of affordable, flexible childcare for American families.").

[10] *Shortchanged: The Big Business Behind the Low Wage J-1 Au Pair Program*, International Labor Recruitment Working Group (ILRWG), Centro de los Derechos del Migrante (CDM), the International Human Rights Law Clinic at the American University Washington College of Law, and the National Domestic Workers Alliance (NDWA), at 9, https://cdmigrante.org/shortchanged/ (*hereinafter* "Shortchanged") *citing* Interview by Au Pair WCL Clinical Student Attorney Group with Au Pair (Interview #2556), New York City, N.Y. (April 8, 2017).

[11] Prachi Gupta, *Au Pairs, an International Class of Domestic Workers, Are Suing for Labor Protections*, Jezebel, Mar. 3, 2018, https://jezebel.com/au-pairs-an-international-class-of-domestic-workers-a-1823646266; *see also*, Victoria Bejarano Hurst Muirhead, "*I'd Never Let My Sister Do It": Exploitation Within the U.S. Au Pair Program,* Lewis & Clarke L. Rev. Vol. 26.1, 2022, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://law.lclark.edu/live/files/33141-261-muirhead ; Sondra Cuban, *"Any Sacrifice Is Worthwhile Doing": Latina Au Pairs Migrating to the United States for*

Abuses and underpayment of au pairs have led to substantial litigation in federal courts around the country over the past decade.[12] Nevertheless, the DOS proposes rules that would not only continue the au pair work program, but also deny these foreign workers basic state and local employment protections. This proposal falls outside the DOS's statutory authority: the agency cannot continue to operate an au pair work program nor may it preempt state and local employment protections without congressional authorization. Further, preemption of state and local employment protections as proposed, and the concomitant creation of a separate and distinct set of employment protections for au pairs, would result in problematic and confusing policy that undermines the rights of both au pairs and domestic childcare workers across our economy.

Despite these fundamental challenges, pieces of the proposed regulations would protect au pairs from abuse, including the rampant violation of state and local minimum wage laws, and improve au pair wages and working conditions from the status quo. Although we suggest that the DOS shelve the proposed rules and halt operation of the au pair program until Congress authorizes it, if the agency nevertheless moves forward, it should at least maintain these long-overdue improvements.

The Au Pair Program, as Currently Operated and as Proposed, is Outside the Department of State's Statutory Authority

No statutory authority authorizes the DOS to regulate, manage, or otherwise oversee the au pair work program as it currently exists. Instead, Congress provided authority to the DOS to administer cultural exchange programs,[13] and to grant J-1 visas to foreign nationals who come to the United States "for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills or receiving training."[14] By their

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Opportunities, 16 J. Immigr. & Refugee Stud. 235, 2018; Shayak Sarkar, *The New Legal World of Domestic Work*, 32 Yale J.L. & Feminism 1, 2020 (discussing the exclusion of au pairs from labor protections); Cameron Lynne MacDonald, *Shadow Mothers: Nannies, Au Pairs, and the Micropolitics of Mothering,* Univ. of Cal. Press, 2010.

[12] *See generally,* Noy Thrupkaew, *Are Au Pairs Cultural Ambassadors or Low-Wage Nannies? A Lawsuit Enters the Fray*, Wash. Post, Nov. 3, 2016, https://www.washingtonpost.com/lifestyle/magazine/are-au-pairs-cultural-ambassadors-or-low-wage-nannies-a-lawsuit-enters-the-fray/2016/11/01/09e8a1ee-8f2e-11e6-9c85-ac42097b8cc0_story.html; *see also Beltran v. InterExchange, Inc*., No. 14-cv-03074-CMA-KMT, 2019 WL 3496692 (D. Colo. Aug. 1, 2019), *Capron v. Off. of Att'y Gen. of Massachusetts*, 944 F.3d 9 (1st Cir. 2019), *Morales Posada v. Cultural Care, Inc*., 554 F. Supp. 3d 309 (D. Mass. 2021), *aff'd Posada v. Cultural Care, Inc.*, 66 F.4th 348 (1st Cir. 2023); *Padron v. GreatAuPair, LLC*, Case No. CGC-20-5847057, Slip. Op. p. 3-4 (Cal. Sup. Ct. Feb. 24, 2021); *Kudlacz v. Cultural Care, Inc*., Case No. CGC-20-584567, Slip. Op. p. 2 (Cal. Sup. Ct. Sept. 3, 2020); *Kudlacz v. Cultural Care, Inc*., Case No. CGC-20-584567, Slip. Op. p. 4 (Cal. Sup. Ct. Dec. 10, 2021); *Vera v. Au Pair International,* 23 CV 30345 (Colo. Dist. Ct.); Kate Taylor, *A Court Said Au Pairs Deserve Minimum Wage. Some Families Are Protesting*, N.Y. Times, Jan. 8, 2020, https://www.nytimes.com/2020/01/08/us/au-pair-massachusetts-ruling.html; Vanessa Romo, *Au Pair Sponsor Agencies Settle Wage Lawsuit, Offer $65.5 Million in Back Pay*, NPR, Jan. 9, 2019, https://www.npr.org/2019/01/09/683831264/au-pair-sponsoragencies-settle-wage-lawsuit-offer-65-5-million-in-back-pay.

[13] 22 U.S.C. 2451, *et seq.*

[14] 8 U.S.C. § 1101(a)(15)(J).

plain language, these statutory provisions do not create an employment-based visa program for live-in nannies. These provisions also differ substantially from provisions creating temporary work programs.[15] Nevertheless, the au pair program as currently operated (and as proposed) operates (and would continue to operate) as an employment program.

Even during the early years of the au pair program, the work component of the au pair program raised concerns that its implementation could fall outside of the authority "to promote international cooperation for educational and cultural advancement" under the Fulbright-Hays Act of 1961.[16] Indeed, in a Congressionally mandated 1990 report, the General Accounting Office ("GAO") found that the pilot au pair exchange program was not consistent with the intent of the Fulbright-Hays Act.[17]

In response to this criticism, the United States Information Agency ("USIA"), which initially administered the au pair program, worked to strengthen the educational and cultural exchange components of the program. To do that, the USIA utilized new regulatory authority[18] to impose screening requirements for au pairs and host families, ensure au pair training and orientation, clarify au pair work hours and educational requirements, detail monthly reporting requirements, and defer to the Department of Labor on au pair wages issues.[19] These new requirements were explicitly designed to bring the au pair program back within the mandate to create a cultural exchange program, and USIA expressed that "[w]hile the [Agency] is pleased that the au pair program apparently provides considerable direct benefit to many American families on the important matter of affordable child care, the Agency cannot lose sight of the fact that it has legal authority to operate the au pair program only if it is primarily a cultural and educational exchange program which incidentally provides child care."[20]

The USIA's final au pair rules went into effect in February 1995, and ten months later Congress authorized USIA to "continue to administer an au pair program" for a two-year period and to provide an interim report detailing "the compliance of all au pair organizations with [the new] regulations[.]"[21] Two years later - in 1997 - Congress removed the two-year sunset from the

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[15] *See e.g.,* 12 U.S.C. § 1101(a)(15)(H) (allows individuals to temporarily work in the United States in certain specialty occupations or as fashion models, nurses, or agricultural workers).
[16] *See* Pub. L. No. 87-256 § 102, 75 Stat. 527 (1961) (codified at 22 U.S.C. § 2451, *et. seq.*); *see also* Fulbright-Hays Act. Exchange Visitor Program, 59 Fed. Reg. 64, 296 (Dec. 14, 1994) (supplementary information).
[17] U.S. Gov't Accountability Office, *U.S. Information Agency: Inappropriate Uses of Educational and Cultural Exchange Visas*, GAO-90-61, 19-20, 29 (1990).
[18] Congress authorized USIA to prescribe au pair program regulations in 1994. Pub. L. 103-415, §1, 108 Stat. 4299, 4302 (1994) *codified at* 22 U.S.C. §3926 (1995).
[19] 59 FR 64296-01, 1994 (interim); 60 FR 8547, 1995 (final).
[20] 60 FR 8547-02, 1995.
[21] Pub. L. No. 104-72, 109 Stat. 776 (1995).

reauthorization,[22] and in 1999, when the USIA closed, moved administration of the au pair program to the DOS.[23]

Since the 1995 reauthorization, the program has diverged from the statutory purpose of cultural exchange, and developed into a "stop-gap solution to a larger problem: the exorbitant costs of child care in America."[24] Currently, au pairs are still expected to work full-time, but inflation has dramatically eroded the value of the educational stipend ($500 for the Au Pair and Extraordinaire program; and up to $1,000 for Educare), such that it is inadequate to fund almost any meaningful educational experience.[25] The DOS has long been aware of the inadequacy of au pair educational engagement,[26] but has nevertheless allowed "[a]n entire industry of 'weekend classes' [to spring] up to provide au pairs with courses that cost exactly $500[.]"[27] The proposed regulations would increase the educational stipend by $700, but that fails to even keep up with inflation, which would require a $897.96 increase to offer au pairs the same purchasing power that they had when the program began 39 years ago.[28] But even an increase sufficient to match inflation would be insufficient to create a meaningful educational component given that "the cost to attend a private or public four-year university has more than doubled since 1995"[29] and work requirements leave au pairs without sufficient time to engage in a

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[22] An Act to Provide Permanent Authority for the Administration of Au Pair Programs, Pub. L. No. 105-48, § 1, 111 Stat. 1165 (1997).
[23] Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, §§ 1311-1314, 112 Stat. 2681, 2681-776 *codified at* 22 U.S.C. §§ 6531-6533 (dissolving the USIA and transferring implementation of the Fulbright-Hays Act to DOS).
[24] Gupta, *supra* n. 10; *see also,* Chuang, *supra* n. 9; *Child care costs in the United States*, Economic Policy Institute, https://www.epi.org/child-care-costs-in-the-united-states/; Costa, *supra* n. 7 ("But the answer to America's child care affordability crisis is not to have the State Department run a program that allows migrant women to be underpaid, abused, and exploited."); Juliana Chayutse Quecan Velásquez, *Experiencias de jóvenes Au Pair colombianas: inserción en las lógicas modernas de explotación del trabajo del cuidado,* Universidad Nacional de Colombia, Facultad de Ciencias Humanas, Escuela de Estudios de Género, 2017 ("este esquema representa una solución facilista e inmediata a los problemas sociodemográficos y de demanda de mano de obra barata que están viviendo en la actualidad."; "this scheme represents an easy and immediate solution to sociodemographic problems and the demand for cheap labor that we are currently experiencing.") (on file with authors; translation by authors).
[25] *See generally*, Nat'l Ctr. for Educ. Stat., U.S. Dep't of Educ., *Tuition Costs of Colleges and Universities,* 2021, https://nces.ed.gov/fastfacts/display.asp?id=76.
[26] U.S. Dep't of State, Bureau of Educ. & Cultural Affs., *2014 Au Pair Program Annual Reports Analysis*, 2014, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.politico.com/f/?id=0000015b-0cf1-d373-a17b-4ff399fb0001, *hereinafter* "DOS 2014 Analysis" (identifying "completing the education requirement due to high costs of education, limited availability of suitable classes, and lack of flexibility in the current regulations" as an issue/problem in 2014); U.S. Dep't State, *2015 Au Pair Program Annual Reports Analysis*, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.politico.com/f/?id=0000015b-0cf2-d4b9-abff-3ffe31fd0001 (noting that only "25% of host families [] rated [the] educational component as excellent, which is the second lowest program category following rematch process.").
[27] Muirhead, *supra* n. 10.
[28] Carbon Collective, *$500 in 1985 is worth $1,397.96 in 2024*, https://tools.carboncollective.co/inflation/us/1985/500/#:~:text=%24500%20in%201985%20has%20the,is%20a%20change%20of%20%24897.96.
[29] Muirhead, *supra* n. 10 ("tuition payment component has remained at $500 for 25 years, despite the fact that the cost to attend a private or public four-year university has more than doubled since 1995").

meaningful educational program. Therefore, the proposed educational stipend increase does nothing to alter the nature of the au pair program as simply a work program.

Meanwhile, over the years program sponsors have increasingly tailored program marketing depending on the audience, resulting in a disparity in expectations that has undermined the program's ability to function as a cultural exchange. Sponsors promise cheap childcare to potential host families, and cultural exchange to potential au pairs.[30] The result is a misalignment of expectations that threatens to be the program's undoing. For example, Joana Beltran, an au pair from Colombia, told the Washington Post in 2015, "[w]hen I was in Colombia, [my au pair sponsor organization] told me that being an au pair would be wonderful and that I would explore another life, language, family, culture and that if anything bad happened to me they would be there to help …. instead, my host family treated me like a maid."[31] Similarly, Juliana's sponsor agency "assured her she'd be treated with love and kindness," but instead "she worked illegally long hours and wasn't paid; she was denied food, screamed at and was generally treated like 'trash.'"[32] Other au pairs also expected a cultural exchange, but reported the experience "to be a lot more businesslike than [] imagined".[33]

In addition to different marketing strategies, program oversight has declined as the au pair program has grown. By 2012, the DOS's internal Office of Inspections expressed concern that "[i]n the midst of unfettered program growth, ECA [the Bureau of Educational and Cultural Affairs ("ECA") in the DOS oversees the J-1 visa programs, including the au pair program] lost sight of the original intent of some J visa programs."[34] Meanwhile, "[s]ignificant increases in annual exchange visitor visa issuance have left ECA struggling to oversee the more than 1,200 sponsor organizations responsible for ensuring positive cultural exchange experiences for participants, many of whom are youth."[35] By 2017, data suggested that DOS struggled to keep track of complaints, not to mention ensure that the program was meeting participant needs.[36] In

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[30] DOS 2014 Analysis, *supra* n. 26 ("most sponsors market the program differently to host families and to au pairs. For host families, the program is commonly marketed as an affordable, reliable and flexible way to obtain quality childcare. For au pairs, the program is often advertised as an easy way to live with an American family, learn about American culture, take classes, and earn some money."); *see also*, Sabine Hess & Annette Puckhaber, *'Big Sisters' Are Better Domestic Servants?! Comments on the Booming Au Pair Business*, 77 Feminist Rev. 65 (2004).

[31] Lydia DePillis, *Au Pairs Provide Cheap Childcare. Maybe Illegally Cheap*, Wash. Post, Mar. 20, 2015, https://www.washingtonpost.com/news/wonk/wp/2015/03/20/au-pairs-provide-cheap-childcare-maybe-illegally-cheap/.

[32] Zack Kopplin, *They Think We Are Slaves: The U.S. Au Pair Program is Riddled with Problems—and New Documents Show that the State Department Might Know More than it's Letting On*, Politico, March 27, 2017.

[33] Alan Prendergast, *Long Hours, Low Wages and Lawsuits Plague the Federal Au Pair Program*, Westword, Aug. 28, 2018, https://www.westword.com/news/au-pair-program-plague-by-low-pay-long-hours-suit-claims-10712872.

[34] U.S. Department of State and Broadcasting Bd. of Governors Office of Inspector Gen., *Inspection of the Bureau of Educational and Cultural Affairs*, Report Number ISP-I-12-15, Feb. 2012, at 24, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.stateoig.gov/uploads/report/report_pdf_file/isp-i-12-15_1.pdf (*hereinafter* "OIG 2012 Report").

[35] *Id.*

[36] Kopplin, supra, n. 32 ("[a] State Department spokesman told Politico Magazine it received 62 complaints from au pairs and families in 2015. But according to a State Department internal analysis of

2020, the Huffington Post reported that the DOS only had about 100 staff to oversee all J-1 visa programs, with only about a dozen dedicated to compliance, and one compliance staffer focused on the au pair program.[37] This has meant that au pairs who reach out to DOS for assistance regularly report that their communications did not yield results.[38]

Capacity concerns are exacerbated by a concerning conflict of interest: Several DOS staff members believed that their jobs depended on the level of revenues generated by sponsor designation and redesignation fees, among other fees.[39] This may contribute to an overall lack of regulatory clarity and consistent enforcement of sponsor obligations."[40] Conflict concerns may also help explain why, in spite of the DOS's authority to sanction sponsors, between 2006 and 2020, in the face of various public program challenges, the agency only officially sanctioned one au pair company and declined to revoke any sponsor's authorization to continue recruiting and placing au pairs.[41] Instead, DOS records show "repeated failures to crack down on au pair companies that don't report regulatory violations and allegations of abuse."[42] These challenges have led some scholars to argue that DOS's inability to adequately enforce the workplace rights of J-1 visa program participants compromises the agency's anti-human trafficking role.[43]

Without appropriate oversight, the au pair program fails in its goal of improving intercultural relations and cultural diplomacy.[44] This is demonstrated by the increasing unhappiness of au pairs, who report misleading recruitment information, mistreatment by host families, lack of attention by sponsor organizations, wage suppression, wage theft, and confusing and excessive fees.[45] Such discontent does not sow the seeds of international cooperation, but rather, of dischord.[46]

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the program obtained by Politico Magazine, that's inaccurate: Au pair agencies received and reported to the government more than 3,500 incidents that year.").

[37] Zack Kopplin, *Au Pairs Come To The U.S. Seeking Cultural Exchange, But The State Department Often Fails To Protect Them*, Huffington Post, Jul. 31, 2020, https://www.huffpost.com/entry/au-pair-america-cultural-care_n_5f204d6ac5b69fd473126c61.

[38] *See e.g.,* Alejandro Padron, *Comment on the proposed Exchange Visitor Program regulations governing the Au pair category*, Jan. 26, 2024, attached as exhibit A; *Ana Maria Cuevas, Comment on the proposed Exchange Visitor Program regulations governing the Au pair category*, Jan. 26, 2024, attached as exhibit B.

[39] OIG 2012 Report, *supra* n. 34 at 26 ("Fees generated through the sponsor designation and biennial redesignation processes, participant payments for program adjustments, and participant SEVIS fees currently fund all designations and compliance positions. Several EC staff members believe that their jobs ultimately depend on the level of revenues generated by these processes.").

[40] *Id.* at 34 ("no one in ECA is managing the sponsors and programs on a day-to-day basis.").

[41] Kopplin, *supra* n. 37 (According to a Department of State spokesperson, an "unspecified lesser sanction" was issued to one au pair agency in 2019).

[42] *Id.*

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

[44] 22 U.S.C. §2451, *et seq*.

[45] *See generally,* Exhibits A through E.

[46] The DOS has been aware of this challenge for years - the OIG reissued it's 2012 recommendation that the agency seek higher level guidance about whether "certain J visa categories are not primarily cultural exchanges," should "have a different visa designation and" should "either be transferred to another Federal agency that has the requisite expertise or discontinued" for a second time in 2013. U.S. Dep't of State & Broadcasting Bd. of Governors Of. of Inspector Gen., *Compliance Follow Up Review of the*

Perhaps more fundamentally, the evolution of the au pair program since 1995 means that it simply does not offer participants the cultural exchange opportunity intended by Congress. Now that the program is primarily a work program, regardless of how valuable it may be, it cannot be legally maintained as a federal program within the DOS. Indeed, ongoing implementation of the au pair program in this form would be antithetical to Congressional intent. Absent authority to operate a work program for foreign live-in nannies, DOS must halt operation of the au pair program or dramatically restructure it. The proposed regulations do neither, and instead propose to continue operating a work program, while also preempting state and local labor protections. The DOS lacks authority to do either.

The Department of State Lacks Authority to Preempt State and Local Labor Protections

Given that Congress has not granted the Department of State the authority to operate this work program, the agency also lacks the authority to preempt state or local employment law as proposed. As the Supreme Court recently explained, "[A]n agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it."[47] As such, the only agency actions that can preempt state law "are agency actions taken pursuant to the [agency's] congressionally delegated authority."[48]

Even if the DOS were to dramatically rework the proposed rules to reinvent the au pair program as a bona fide cultural exchange, it still could not exclude au pairs from state and local employment protections as proposed here. Specifically, the DOS proposes to explicitly exclude au pairs from state and local employment protections in areas of au pair selection, placement, education, minimum time off, paid time off, vacation and sick leave, as well as state and local law related to hours and compensation except for minimum wage and overtime, and all state unemployment insurance and employment training taxes.[49] The rules also propose to preempt an undefined number of other protections, including "any state or local law that, in the Department of State's view, otherwise poses an obstacle to the realization of the objectives of the Au pair" program.[50]

Although we applaud the proposal to ensure that state and local minimum wage and overtime requirements protect au pairs,[51] the proposal to preempt other portions of state and local wage laws contradicts that assurance and renders the proposal incoherent. For example, the question of whether a meal or lodging deduction is allowed goes to the core of state and local minimum wage and overtime requirements. That is, an employer violates the minimum wage law if it pays

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Bureau of Educational and Cultural Affairs, September 2013, at 14, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.stateoig.gov/uploads/report/report_pdf_file/isp-c-13-51_1.pdf.

[47] *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. ---, 139 S. Ct. 1668, 1679 (2019) (quoting *New York v. FERC*, 535 U.S. 1, 18 (2002)).

[48] *Id. See also, Mozilla Corp. v. FCC*, 940 F.3d 1, 75 (D.C. Cir. 2019) ("[I]n any area where [an agency] lacks the authority to regulate, it equally lacks the power to preempt state law".)

[49] Exchange Visitor Program - Au Pairs, 88 FR 74071-97, Sec. 62.31(t)(1) (proposed Oct. 30, 2023) (to be codified at 22 CFR Part 62), *hereinafter* "NPRM".

[50] *Id.* at Sec. 62.31(t)(2).

[51] *Id.* at Sec. 62.31(n).

less than the minimum wage for all hours worked. If the employer pays less than the minimum wage because it took an unauthorized meal and lodging deduction, that is a minimum wage violation. Deduction issues are similarly intertwined with state and local overtime requirements. Determining overtime amounts due to a worker requires calculation of the workers' regular rate of pay. If the deductions taken by the employer are not authorized under state law, the regular rate of pay is illegal and overtime calculations impossible. All of this is to say that the interconnectedness of minimum wage, overtime, deductions, and credits in state and local wage laws, makes it impossible to preempt some, but not all of these laws.

Similarly, Congress has not granted DOS the authority to preempt other generally applicable state and local employment laws. An agency's authority to preempt state law is a question of Congressional intent.[52] "[T]he best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency."[53] Here, there is nothing in the limited power to enable cultural exchanges conferred upon the DOS that demonstrates an intent to preempt state employment law. Congress was aware that state employment law existed when it enacted the Fulbright-Hays Act, and generally applicable state and local workplace protections have long been held to apply to those in the country on temporary visas. "Congressional silence on the issue, coupled with its certain awareness" that state employment law existed, and that it generally applies to those in the country on temporary visas, "is powerful evidence" that it did not intend for the DOS to preempt state employment law.[54]

Meanwhile, although an agency may issue regulations with preemptive effect where they "represent[] a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute[,]"[55] no such conflict exists here. To the contrary, the proposed preemption would undermine the purpose of the au pair program, and conflict with Congressional intent. That is because denying foreign workers basic employment protections does nothing to develop "friendly, sympathetic, and peaceful relations between the United States and the other countries of the world."[56] The First Circuit Court of Appeals in *Capron* explained that "[i]t is hardly evident that a federal foreign affairs interest in creating a 'friendly' and 'cooperative' spirit with other nations is advanced by a program of cultural exchange that, by design, would authorize foreign nationals to be paid less than Americans performing similar work."[57] Although the proposed rules attempt to rectify the disparity in pay between au pairs and American domestic workers who labor as nannies, they nevertheless propose a program that would allow employers to provide fewer employment benefits and protections than American domestic workers performing similar work. Other nations could (and should!) find that unfriendly and uncooperative.

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[52] *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009).
[53] *City of New York v. F.C.C.,* 486 U.S. 57, 66 (1988).
[54] *Wyeth*, 555 U.S. at 575.
[55] *City of New York*, 486 U.S. at 64.
[56] 22 U.S. C. § 2451.
[57] *Capron v. Off. of Att'y Gen. of Massachusetts*, 944 F.3d 9, 26 (1st Cir. 2019).

The conflict between preempting state and local employment protections and congressional intent is further elucidated by Congressman Tom Lantos' remarks during the 1995 reauthorization debates. At that time, Congressman Lantos explained that "[t]his is not a program to provide free child-care for upper-middle class Americans. It is not a program to get around our nation's labor laws. Those laws have been written for specific purposes, and the au pair program must be consistent with our labor laws."[58] Despite this admonition, the DOS proposes to use the au pair program to get around state and local labor protections.

Finally, this preemption proposal is particularly egregious given its attempt to preempt laws in a field that the states have traditionally occupied. "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."[59] Therefore, the Department of State lacks any authority to displace state or local employment law in these proposed rules.

The Proposed Preemption of State and Local Employment Protections Is Unreasonable.

Even if the Department had authority to preempt state and local employment protections, the proposed preemption is unreasonable for a variety of reasons. First, it arbitrarily applies some but not all state and local employment protections to au pairs. Second, it attempts to preempt only portions of interconnected state and local laws in ways that make no sense. Third, it would undermine the rights of domestic workers. Fourth, it would leave au pairs without the ability to meaningfully enforce their employment rights. And finally, the rules surrounding this proposed preemption fail to adequately inform the regulated public of the law.

These challenges underline the necessity of considering the experiences of au pairs and domestic workers during the rulemaking process. Without that lens, the Department has proposed new protections for au pairs without any enforcement capacity and ignored the substantial negative impact these rules would have on American domestic workers across the country. These failings must be addressed in the final rule.

1. The arbitrary selection of which state and local employment protections should be preempted undercuts any argument that uniformity is necessary.

In the proposed rule, the Department both explicitly preserves certain state and local employment laws, like minimum wage, while specifying that others, like state and local paid sick leave laws, must be preempted.[60] This is illogical. If the system can function with different, for example, minimum wage requirements across the fifty states, there is no basis to assert that differing paid sick leave requirements would be destructive to the program. Indeed, the proposal

[58] H.R. 2767, To Extend Au Pair Programs: Markup Before the Subcomm. On Int'l Operations and Human Rights of the Comm. On Int'l Relations H.R., 104 Cong. 5 (1995) (Statement of Congressman Tom Lantos).
[59] *Metro. Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 756 (1985) (*quoting Slaughter-House Cases*, 83 U.S. 36, 62 (1872)) (quoting *De Canas v. Bica*, 424 U.S. 351, 356 (1976)); *see also Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 21 (1987)("[P]re-emption should not be lightly inferred in [the area of employment law], since the establishment of labor standards falls within the traditional police power of the state.").
[60] NPRM, *supra* n. 49 at Sec. 62.31(t)(1).

that some laws must be uniform while others need not be, undermines the agency's suggestion that national uniformity is essential to the operation of the au pair program. Not only does this regulatory proposal implicitly accept that uniformity is unnecessary - and even inherently problematic - but our entire country operates under a federalist system, and other non-immigrant workers enjoy the employment protections available under that system, including other workers on J-1 visas. If this system works for everyone else, and Congress expressed nothing suggesting that this system would not work for au pairs, the DOS steps beyond its authority by attempting to create a distinct system for au pairs. DOS's attempt would exacerbate the already stratified domestic worker industry in the United States, which is subject to precarious working conditions, including low-wages, wage theft and a lack of labor enforcement.

2. The Department's misunderstanding of employment law led to incoherent preemption proposals.

The preemption scheme proposed in the rules is also arbitrary because of the interconnected nature of employment rights. Indeed, the Department's attempt to tease them apart is nonsensical. For example, the proposed rules do not attempt to preempt sexual harassment or retaliation protections. But which retaliation protections? Only those related to allegations of sexual harassment? Or also those that protect au pairs who complain about denial of sick leave, even though the rules propose to preempt state and local sick leave protections? Similarly, and as discussed above, the rules propose to apply portions of state minimum wage protections to au pairs, but not the portions related to meal or lodging requirements. That makes no sense. The proposal to tease apart inherently interconnected legal protections by preempting some, but not all state and local employment protections creates a confusing and contradictory set of possibly applicable rules that will lead to confusion for all program participants.

3. The proposed preemption creates a two-tiered labor market that arbitrarily undermines the rights of domestic workers.

The proposed rules would create a new set of employment laws that apply only to au pairs, while allowing au pairs to continue to compete for nanny jobs with American domestic workers who are subject to traditional employment protections. This separate but distinct system would undermine protections for non-au pair domestic workers, including nannies, home or direct care workers, housekeepers and childcare centers.[61] This is so because although au pair sponsor organizations advertise au pairs to potential host families as an inexpensive option relative to domestic childcare,[62] the au pair program - unlike other temporary work visa programs - does not require employers to attempt to hire American workers first, to certify that hiring a foreign nanny won't displace Americans, or to pay an adverse effect wage rate designed to prevent

[61] *See e.g.,* Cuevas*, supra* n. 38.
[62] *See e.g.,* Cultural Care, https://culturalcare.com/pricing/, accessed Jan. 3, 2024 ("Many families find the total costs [of the au pair program] to be competitive when compared to daycare or nannies on an annual basis.").

displacement of American workers.[63] Therefore, if au pairs have fewer employment rights, it will make it hard for domestic workers to compete.[64]

Domestic workers cannot enforce their own rights to decent pay, paid leave, or workday breaks while competing with workers who are not entitled to those same protections. For example, a nanny in Colorado is entitled to paid Family and Medical Leave Insurance (FAMLI) in accordance with state law. A rational Colorado family in need of childcare would avoid paying FAMLI premiums by hiring an au pair, who the rule would (seemingly) exclude from the FAMLI program. That rational choice means that Colorado nannies will struggle to enforce their right to family and medical leave, be forced to accept lower wages to offset the possibility that they exercise their right to family and medical leave, or otherwise suffer from the undermining of their rights by an au pair program that provides cheaper, foreign childcare. The same would be true for American nannies entitled to protections under state and local Domestic Worker Bills of

[63] U.S. Department of State & Broadcasting Bd. of Governors Office of Inspector Gen., *Compliance Follow Up Review of the Bureau of Educational and Cultural Affairs*, Sept. 2013, at 14, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.stateoig.gov/uploads/report/report_pdf_file/isp-c-13-51_1.pdf ("Unlike H1B/H2B nonimmigrant and employment-based immigrant visa programs, J visa programs do not require a Department of Labor analysis of American labor market conditions.")
[64] *See generally,* Asha Banerjee, Elise Gould, and Marokey Sawo, *Setting Higher Wages for Child Care and Home Health Care Workers is Long Overdue*, Economic Policy Institute, Nov. 18, 2021, https://www.epi.org/publication/higher-wages-for-child-care-and-home-health-care-workers/.

Rights if those same rights are not extended to au pairs.[65] In this way, the separate system for au pairs will erode the rights of all domestic workers who perform similar jobs.

4. The proposed rules would hurt au pairs not only by denying them basic employment protections, but also access to the enforcement capacity of state and local governments.

Distinct and unequal employment rights for au pairs as proposed in these rules would hurt au pairs first by denying them basic workplace protections offered by state and local employment laws, and second by denying them access to the state and local enforcement infrastructure necessary to ensure that they can access justice if their rights are violated. For example, these rules propose to "offer" au pairs a certain amount of paid sick leave.[66] But the rules simultaneously purport to deny au pairs the protection of the sick leave laws that apply to all other workers in the state or municipality where they work.[67] The separate sick leave proposal is clearly bad for au pairs in jurisdictions with more generous paid sick leave policies than those

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[65] NDWA has been involved in advocating for Domestic Workers Bills of Rights in eleven states and three cities, including New York Domestic Workers' Bill of Rights; *See* Assemb. B. 1470, 2009–2010 Leg., 232nd Reg. Sess., (N.Y. 2010), *available at:* http://assembly.state.ny.us/leg/?default_fld=&bn=A01470&term=2009&Text=Y; Hawaii Domestic Workers' Bill of Rights; *See* Senate B. 535, 2013 Leg.27th Reg. Sess., (HI 2013), *available at:* https://www.capitol.hawaii.gov/sessions/session2013/bills/GM1351_.PDF; California Domestic Workers' Bill of Rigts; *See* Assemb. B. 241, 2013-2014 Leg.,Reg. Sess., (CA 2013), *available at*: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201320140AB241; Massachusetts Domestic Workers' Bill of Rights; *See* Senate B. 882, 2013-2014 Leg., 188th Reg. Sess., (MASS 2014), *available at:* http://www.mass.gov/ago/docs/workplace/domestic-workers/dw-notice-of-rights.pdf; Connecticut Domestic Workers' Bill of Rights; *See* Senate B. 446, 2015 Leg.,Reg. Sess., (CT 2015), *available at:* https://www.cga.ct.gov/2015/ACT/pa/pdf/2015PA-00249-R00SB-00446-PA.pdf; Oregon Domestic Workers' Bill of Rights; *See* Senate B. 552, 2015 Leg.,78th Reg. Sess., (OR 2015), *available at:* https://olis.oregonlegislature.gov/liz/2015R1/Downloads/MeasureDocument/SB552/A-Engrossed; Illinois Domestic Workers' Bill of Rights; *See* Assemb. B. 1288, 2016 Leg. 99th Reg. Sess.,(IL 2016), *available at:* http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=099-0758; Nevada Domestic Workers' Bill of Rights; *See* Senate B. 232, 2017 Leg. 79th Reg. Sess., (NV 2017), *available at:* https://www.leg.state.nv.us/App/NELIS/REL/79th2017/Bill/5125/Te**xt**); City of Seattle, Washington, Domestic Workers' Bill of Rights; *See* Council B. 119286, 2018 Leg.,Reg. Sess., (Seattle, WA 2018), *available at:* http://seattle.legistar.com/View.ashx?M=F&ID=6451347&GUID=107050D2-BEFC-4B43-BC0D-B7AD73ADABF1; New Mexico Domestic Service Bill; See Senate B. 85, 2019 Leg.,Reg. Sess., (NM 2019), *available at:* https://www.nmlegis.gov/Sessions/19%20Regular/final/SB0085.pdf; City of Philadelphia, Pennsylvania; *See* Council B 19060701, 2019 Leg.,Reg. Sess., (Philidelphia, PA 2019), *available at:* https://phila.legistar.com/LegislationDetail.aspx?ID=3991789&GUID=C8CA6F0D-9748-4074-8E3E-CABD3C840701&Options=&Search=; Virginia Domestic Workers' Bill of Rights; *See* Senate B. 804, 2020 Leg.,Reg. Sess., (VA 2020), *available at:* https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP1147+pdf; District of Columbia Domestic Workers' Bill of Rights; *See* Council B. 24-712, 2022 Leg., Reg. Sess.,(D.C. 2022), *available at:* https://code.dccouncil.gov/us/dc/council/laws/24-305; New Jersey Domestic Workers' Bill of Rights; *See* Senate 723, 2022-2023 Leg., 220 Reg. Sess., (NJ 2023), *available at:* https://www.njleg.state.nj.us/bill-search/2022/S723/bill-text?f=S1000&n=723_E1.

[66] NPRM *supra* n. 49 at Sec. 62.31(k)(1)(iv).

[67] NPRM *supra* n. 49 at Sec. 62.31(t)(1).

proposed in the rules. But it is also bad for au pairs in jurisdictions where state or local law offers less generous protections because, regardless of the jurisdiction, the sick day protections in the proposed rules are not backed up by meaningful enforcement. Instead, au pairs denied sick leave under this proposal would only be able to complain to their sponsor agency or to the DOS, both of which lack interest and capacity to address au pair concerns.

As mentioned above, the DOS has limited enforcement capacity, a poor track record of tracking much less following-up on complaints, and a lackluster history of monitoring sponsor organizations. For example, Ana Maria had to be hospitalized with pulmonary concerns during her time as an au pair. After Ana was released from the hospital, she was fired. Ana said, "I called the Department of State to report my termination, but didn't get an answer. When I was in the hospital, my friend also called the Department of State to get my [sic] help, but nobody called us back."[68]

Even if the DOS had capacity to investigate and adjudicate workplace justice violations in the au pair program, the current structure - including heavy reliance on sponsor agencies to police the industry - would prevent most complaints from ever reaching the agency. Today, au pairs are encouraged to report concerns first to their sponsor agency. But sponsor financial incentives render them unable to provide unbiased enforcement of au pair employment rights, much less support comparable to the infrastructure developed over decades within state and local governments. Sponsor agencies earn the vast majority of their au pair program-related income from fees charged to host families.[69] Although sponsors also charge au pairs program fees, those fees are thousands of dollars less than the fees paid by host families (compare a $1,500 au pair fee with an $11,120 host family fee).[70] Meanwhile, host families are repeat customers of sponsor organizations. Au pairs not only pay less, but can only participate in the program for one or two years. This imbalance means that the sponsor agency business model ensures that the agencies will side with host families over au pairs.[71] One former au pair explained, "[y]ou have to keep in mind that even though you're paying the agency, the host families are also paying. And in a larger quantity, they are the principal client of the agencies. The families need au pairs every year, but an au pair can only stay for a determined time. Because of this, even when they should defend the rights of au pairs, they give you advice so as not to harm the families."[72]

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[68] Cuevas, *supra* n. 38.

[69] Cultural Care, the largest au pair sponsor representing about half the program, currently charges host families $11,120 in fees. *Pricing Overview*, CulturalCare.com, https://culturalcare.com/lp/pricing-overview/?utm_source=google&utm_medium=ppc&utm_campaign=Alpha_Au-Pair&utm_content=how-much--au-pair-cost&ls=Online+Marketing&lsd=Google+PPC&utm_term=how%20much%20does%20an%20au%20pair%20cost&gad_source=1&gclid=CjwKCAiAzJOtBhALEiwAtwj8tq6zFswJ3wN4c8gn8oFXhNkVKQJDQmC07IhIP-uWcyUEFooXOku3pBoCbosQAvD_BwE (last visited Jan. 15, 2024).

[70] Although Cultural Care no longer posts the exact au pair program fee on its website, it was approximately $1,500 in 2018. Shortchanged, *supra* n. 10 at 3, *citing Our Pricing*, CulturalCare.com, https:// culturalcare.com/pricing (last visited Mar. 26, 2018); *All Countries*, CulturalCare.com, https:// www.culturalcare.co.uk/countries (last visited Mar. 26, 2018) (with links to fees charged by country).

[71] Shortchanged, *supra* n. 10.

[72] *Id.* at 3 *citing* Anonymous, Au Pair in America Review, Contratados.org (Nov. 10, 2014) http:// contratados.org/es/content/au-pair-america (translated from Spanish).

Some au pairs allege that the money made off host families has caused sponsor agencies to overlook serious au pair abuses.[73] And many allege that sponsor agencies allow new au pairs to be placed with host families in spite of au pair complaints. For example, after suffering sexual assault at the hands of her host father, one au pair realized that au pairs previously placed with that host family had similar experiences. She sued her sponsor for allowing her to be placed with a family with a history of sexually harassing au pairs.[74] Similarly, a sponsor allowed a host mother to hire a new au pair just two weeks after pleading guilty to misdemeanor battery for having hit and pushed her previous au pair.[75] Another au pair learned after her termination that she was the third au pair assigned to this host family despite reports of domestic violence in the home.[76]

Put simply, sponsor economic incentives ought to disqualify them from posing as neutral arbiters of employment disputes between au pairs and their host family employers.[77] Sponsor bias not only undermines the rights of au pairs who complain, but also chills the complaints of countless others. Instead, au pairs, like all other domestic workers, should be entitled to defend their employment rights through public enforcement agencies. This would include Denver Labor, a local agency with approximately 25 people charged with educating the community and enforcing local minimum and prevailing wage laws, among others,[78] the California Labor Commissioner, which can address retaliatory threats of immigration consequences like those confronted by au pair Alejandro Padron,[79] non-profit co-enforcement partners that work with states like New Jersey to protect and advance workplace rights,[80] and the federal Department of Labor. The proposal to apply an entirely new set of employment protections to au pairs, deny them access to these traditional enforcement mechanisms, and wish them luck with biased sponsors and lax DOS oversight cannot stand.

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[73] Kopplin, *supra* n. 37; Ellen Wulfhorst, *Foreign Students Recruited as Au Pairs Face Abuse in U.S.: Report,* Reuters, Aug. 20, 2018, https://www.reuters.com/article/us-usa-trafficking-aupairs/foreign-students-recruited-as-au-pairs-face-abuse-in-us-report-idUSKCN1L60B8/; Chuang, *supra* n. 9; *see also* Polaris & Nat'l Domestic Workers Alliance, *Human Trafficking at Home: Labor Trafficking of Domestic Workers,* 45–46 (Caren Benjamin, ed., 2019, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://polarisproject.org/wp-content/uploads/2019/09/Human_Trafficking_at_Home_Labor_Trafficking_of_Domestic_Workers.pdf.

[74] Shae Healey, *In Unsafe Hands*, Willamette Week, Oct. 26, 2011, http://www.wweek.com/portland/article-18136-in_unsafe_hands.htm; Nick McCann, *Au Pair Sues Agency for $1 Million*, Courthouse News Service, Oct. 7, 2011, https://www.courthousenews.com/au-pair-sues-agency-for-1-million/.

[75] Kopplin, *supra* n. 37.

[76] Anonymous, *Comment on the Proposed Exchange Visitor Program Regulations Governing the Au Pair Category*, Jan. 26, 2024, attached as exhibit C.

[77] *See generally*, Reveal News, Nov. 5, 2016, https://revealnews.org/podcast/host-of-problems/.

[78] Terri Gerstein and LiJia Gong, *The Role of Local Government in Protecting Workers' Rights*, Economic Policy Institute, Jun. 13, 2022, https://www.epi.org/publication/the-role-of-local-government-in-protecting-workers-rights-a-comprehensive-overview-of-the-ways-that-cities-counties-and-other-localities-are-taking-action-on-behalf-of-working-people/.

[79] Padron, *supra* n. 38.

[80] *See e.g.*, New Jersey Domestic Workers' Bill of Rights Act, S723, 2024, https://www.njleg.state.nj.us/bill-search/2022/S723.

5. The agency should eliminate the provision regarding purposes and objectives preemption.

The DOS proposes to "preempt any state or local law that, in the Department of State's view, otherwise poses an obstacle to the realization of the objectives of the au pair category of the Exchange Visitor Program except as provided in paragraph (t)(3) of this section.[81] Such a provision is entirely improper and outside the Department's statutory authority. Obstacle preemption is a form of conflict preemption that applies where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[82] "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects[.]"[83]

While the Supreme Court has suggested that obstacle preemption can apply where a state law interferes with a regulatory objective,[84] it has never suggested that an agency can grant itself the power to unilaterally determine, with the force of law, that state law constitutes such an impermissible obstacle. Even if, via rulemaking, the State Department could preempt specific kinds of state laws as an obstacle to its purposes and objectives, it cannot give itself the power to do so in the future without further notice-and-comment rulemaking -- which is what section (t)(2) purports to do.

Not only is such an action outside the authority Congress conferred upon the Department, but it would create significant notice problems. That is, how are au pair program participants - au pairs, host families, and sponsors - to intuit which laws the DOS will preempt and which it will not? Therefore, how are program participants to know what laws apply to them? These rules cannot be finalized without clarifying what laws apply to program participants.

The Department of State Lacks Authority to Override Department of Labor Interpretation of the Fair Labor Standards Act

Even if the DOS had the power to manage a work program for foreign nannies or the authority to preempt state and local law, it lacks the authority to interpret or implement the Fair Labor Standards Act (FLSA) or the authority to override interpretations of the FLSA by the Department of Labor. Congress charged the Department of Labor - not the DOS - with implementing and interpreting the FLSA.[85] Nevertheless, the DOS attempts to do so in these proposed rules.

This attempt not only treads on Department of Labor authority, it also conflicts with the Department of Labor's longstanding interpretation of the FLSA. In particular, the Department of Labor does not allow employers to take a lodging credit toward an employee's wages if either the employee is required by law to stay in employer housing,[86] or if furnishing lodging is

[81] 88 Fed. Reg. at 74097.
[82] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 2294, 147 L. Ed. 2d 352 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).
[83] *Id.*
[84] *See, Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881–83 (2000).
[85] 29 U.S. Code § 204.
[86] 29 C.F.R. § 531.30.

primarily for the benefit or convenience of the employer.[87] The au pair program requires that au pairs live with American host families.[88] And the au pair's presence in the home facilitates provision of long and flexible hours of childcare to host families, and therefore benefits the employer. Nevertheless, the DOS proposes a rule that would explicitly allow host families to take a lodging credit toward an au pair's wages. The DOS lacks authority to make such a rule, which also confuses the public about which agency interpretation applies.

Portions of the Proposed Rule Improve Protections for Au Pairs

Although DOS lacks legal authority and enforcement capacity to create and implement an entirely new scheme for protecting the rights of domestic workers on J-1 au pair visas, we recognize that the proposed rules improve protections for vulnerable au pairs from the status quo. That is, the proposed rules are better for au pairs than those currently in place.

Although we encourage the DOS to halt the au pair program entirely until Congress authorizes the operation of this work program, if the agency nevertheless moves forward in promulgating these rules, it should retain the following proposals in the final rules:

1. Creating a part-time program (24-31 hours of childcare per week) and a full-time program (32-40 hours per week) instead of exclusively offering a 45 hour per week work commitment.[89]

Working full-time is antithetical to true cultural exchange. But working *more* than full-time is even worse. Although the proposed reduction in au pair work hours does not succeed in converting this work program into a cultural exchange, it is a necessary step to protect au pairs from overwork.

2. Requiring sponsors to develop standard operating procedures and internal controls, including procedures that clarify rights and obligations during the rematch process.[90]

Sponsor standard operating procedures are long overdue, particularly when it comes to the often fraught rematch process. The DOS has known about the challenges and dissatisfaction with the rematch process for years.[91] And the mere exercise of explaining how it currently works raises red flags. Today, when a conflict arises between an au pair and her host family - regardless of fault - the au pair has two weeks to find a new host or to leave the country under circumstances that may or may not compromise her ability to return to the United States in the

[87] 29 C.F.R. § 531.32(c); *see also Beltran*, 2016 U.S. Dist. LEXIS 21065, at *3536 (holding that the FLSA bars the practice of deducting room and board from wages where, as in the case of au pairs, live-in employment is a program requirement for the benefit of the employer).
[88] 22 CFR 62.31(a).
[89] NPRM, *supra* n. 49, Sec. 62.31(a).
[90] *Id.* Sec. 62.31(l), 62.31(c).
[91] DOS 2014 Analysis, *supra* n. 26 (reporting that the "[r]ematch process was the lowest-rated category among both au pairs and host families, at only 20% of au pairs and 21% of host families rating it as excellent.").

future.[92] During the two week rematch period, it is unclear where the au pair will live or who will cover the costs. For example, Alejandro, a Venezuelan au pair in San Francisco, was kicked out of his home and left to wander the streets or stay at a shelter for unhoused individuals with substance abuse problems.[93] Such a draconian rematch process chills au pairs from reporting workplace abuse. The very least the program should provide is clarity about how this process works, where an au pair will live during the rematch process, and who will cover the costs.

3. Reducing the caseload of local coordinators and preventing family or work connections between local coordinators and the host families whom they monitor. Sec. 62-31(c)(2)(i)-(iv).

The proposed requirements for the sponsor employees known as local coordinators or LLC's would improve protections from the status quo. Preventing connections between local coordinators and host families is a first step towards ensuring that local coordinators can effectively support au pairs during the program. However, the proposal does not prevent sponsors from continuing to tie LLC compensation to the number of host families recruited or retained. Currently, many LLC's earn a commission for recruiting new host families or retaining existing ones, "creat[ing] an inherent bias towards host families when disputes arise."[94] This bias layers on top of the sponsor agency's institutional bias towards host families; a double-whammy that impacts LCC responsiveness to au pair concerns. One au pair explained "[t]he local coordinators support the family at all times. The au pair is alone. She doesn't have anyone's support. It's a scam."[95] Another au pair shared that "LCCs were an intermediary between the au pair and the family, but as an au pair there was no use complaining to the LCC. She only cared about the client, [which is] the family. She did not care about the au pairs. She would only encourage us to do better. She only wanted the family to be happy and to have more families."[96] When Juliana complained to her LCC that her host family didn't provide her with enough food, she was told to be "flexible."[97] Therefore, although reducing workload and disentangling local coordinators from host families may be helpful, it is insufficient to ensure that LLC's adequately support au pairs during the program.

4. Raising the standards for vetting and orienting au pairs and host families and ensuring that all adult host family members participate in orientation and are subject to criminal background checks.[98]

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[92] Chuang, *supra* n. 9 ("Upon an au pair's completion of the program, the au pair agency has discretion to designate— via data entry into the Department of Homeland Security's Student Exchange Visitor Information System electronic database —the au pair's immigration status as either 'inactive' or terminated.' 'Inactive' status indicates successful completion of the program, whereas 'terminated' signals an au pair's failure to comply with the federal regulations, which according to ECA officials, 'may prevent a participant from receiving a future U.S. visa.'").
[93] Padron, *supra* n. 38.
[94] Chuang, *supra* n. 9 at 303; *see also* Shortchanged, *supra* n. 10 at 18.
[95] Shortchanged, *supra* n. 10 at 7 *citing* Anonymous, Cultural Care Au Pair Review, Contratados.org (July 29, 2015) http:// contratados.org/es/content/cultural-care-au-pair (translated from Spanish).
[96] *Id.* at 16 *citing* Interview by Au Pair WCL Clinical Student Attorney Group with Au Pair (Interview #2561), New York City, N.Y. (April 7, 2017).
[97] Kopplin, *supra* n. 32.
[98] NPRM, *supra* n. 49 at Sec 62.31(e)-(k).

The proposed rules regarding vetting and orientation of both au pairs and host families would improve practices from the status quo. That said, this modest and essential improvement to information sharing and expectation-setting does not prevent ongoing implementation of the sponsors' two track program marketing strategy; marketing cultural exchange to potential au pairs and cheap child care to potential host families. Given this ongoing challenge, the rules should do more to ensure that sponsors share additional information about employment rights with potential au pairs and require further host family education about their role as an employer.

5. Regulating sponsor relationships with third parties acting on their behalf.[99]

The DOS has recognized scams and other problems with foreign agents that assist in recruiting au pairs since at least 2014.[100] Requiring sponsors to be held accountable for the actions of their foreign agents is an important step toward preventing such abuse. That said, we encourage DOS also to require additional disclosures regarding authorized foreign agents to prospective au pairs.

6. Adding reporting requirements to ensure host families are paying au pairs correctly and not regularly demanding overtime work. This includes requiring host families to provide au pairs with copies of weekly pay tracking documents and requiring sponsors to collect, review, and retain timesheets each month.[101] It also includes requirements that families report to sponsors if and when they require an au pair to work beyond her program authorized number of hours.[102]

These requirements will help clarify host family obligations and prevent the commonly reported problem of au pair overwork.[103] Although we appreciate proposals that improve working conditions for au pairs over the status quo, we note that our employment laws generally require employers to track hours and provide paycheck stubs, rendering portions of these new requirements duplicative of existing law. Such duplication can lead not only to confusion, but to the need for enforcement through the DOS. As discussed above, the DOS has neither the capacity nor the expertise to enforce such requirements, much less to develop a new set of procedures and precedent that would guide decision-making outside of traditional administrative and civil procedures.

7. Formalizing and expanding the Host Family Agreement between au pairs and host families.[104]

Requiring the drafting, signature and review of an agreement that details program participant obligations and expectations, as well as provision of that agreement to both parties before

[99] *Id.* at Sec 62.31(c)(3)-(5), 62.31(r).
[100] DOS 2014 Analysis, *supra* n. 26.
[101] NPRM, *supra* n. 49 at Sec. 62.31(m)-(n).
[102] *Id.* at Sec. 62.31(i)(2)(iii) & (j)(8).
[103] *See e.g.,* Karen Lizeth Velásquez Cuero, *Comment on the proposed Exchange Visitor Program regulations governing the Au pair category*, Jan. 26, 2024, attached as exhibit E.
[104] NPRM, *supra* n. 49 at Sec. 62.31(f), (i), (j)

beginning the program, is the least these rules should do to level-set au pair and host family expectations. If the DOS proceeds with promulgation of these rules however, the agency should also include in the agreement information about how to address violations thereof, particularly if a sponsor response is unsatisfactory.

8. Increasing protections for au pairs by requiring host families to provide a home environment free from sexual harassment, exploitation, or other abuse; to not use a nanny cam; and to clarify au pair duties, time off, sick time and paid time off rules.[105]

These duties, time off, sick time, and paid time off requirements in these rules should set a floor for au pairs, and we recognize that this proposed floor is higher than that which exists in the current au pair program. While we appreciate the improvement, we encourage DOS to allow state and local paid time off, sick leave, family and medical leave, or other time off rules to improve au pair protections above the floor set here. As discussed above, applying the same employment protections to au pairs that apply to other workers would benefit both au pairs and our domestic workforce. Meanwhile, the proposed rules indicate that "[s]ponsors may terminate host families from the program if they fail to comply with" the time off requirements in Sec. 62.31(k)(1), but further enforcement of these new requirements will be required to make them meaningful on the ground.

9. Ensuring that host families pay au pairs at least the applicable state or local minimum wage in the jurisdiction where they work.[106]

The wage formulas in the proposed rule – which reflect state and local minimum wage laws – are a step toward ensuring appropriate au pair compensation. However, the rules should clarify that the rates are minimums and that host families are authorized to pay more than the minimum and to continue to compete for the best au pairs based on pay. Also, paying at least the applicable state or local minimum wage requires that an employer not take a deduction from au pair wages that is illegal under state or local minimum wage law. Nevertheless, the rules propose adopting state and local minimum wages, but preempting sections of those laws that would define authorized meal and lodging deductions. As discussed above, such a proposal leads to nonsensical results. Finally, enforcement of minimum wage requirements is essential to effective program function. Under the proposed rules, perhaps an au pair could enforce her right to minimum wage through a state or local enforcement agency or the federal Department of Labor, but the lack of clarity around enforcement best practices remains a blind spot throughout the proposed rules.

10. Leaving state and local sexual harassment protections in place.[107]

Despite its eagerness to preemptively preempt a panoply of state and local laws, DOS explicitly promised not to preempt state or local sexual harassment and retaliation laws by deeming them

[105] *Id.* at Sec. 62.31(k) & (j).
[106] *Id.* at Sec. 62.31(j)(6), Sec. 62.31(n).
[107] *Id.* at Sec. 62.31(t)(2).

not "an obstacle to the realization of the objectives of the Au pair category."[108] We support leaving these state and local protections in place, but admit that the proposal raises more questions than it answers. In particular, state anti-retaliation protections exist in many forms. Some protect a victim of sexual harassment who complains. But others protect individuals who exercise their rights under a variety of state or local laws, including things ranging from fair scheduling protections to family and medical leave to workplace health and safety. The DOS's vague statement here could be read to ensure application of all of these anti-retaliation protections to au pairs, even while attempting to preempt the substantive right created in state or local law. This is terrifically confusing, and another indication of the nonsensical nature of the overarching proposal that some, but not all state and local employment protections should apply to au pairs.

In summary, we support these improvements to existing regulations, but reiterate that promulgation of the rules themselves goes beyond DOS's statutory authority. Further, some of these protections are duplicative of protections available under state or local law, like the requirement that employers provide paycheck stubs and maintain employment records. It is therefore confusing and unnecessary to create separate and distinct requirements. Also, even if the agency moves forward, protections on paper are meaningless without robust enforcement, which the DOS lacks the capacity to provide and cannot continue to outsource to sponsors given the financial incentives that impact their operations.

Conclusion

At its base, the au pair program is a work program and ought to be treated as such - both for the benefit of au pairs and for our domestic workers who cannot compete if au pairs are excluded from basic employment protections. Managing such a program, like all other non-immigrant work programs, would be more appropriate for the Department of Labor than the DOS. The Department of Labor has the expertise necessary to regulate a work program, and experience and authority to interpret and implement federal labor standards. That said, even regulation by the Department of Labor would not solve the fundamental problem here, that Congress has not authorized the creation of a work program for foreign nannies. And an au pair program as conceived in the Fulbright-Hays Act does not currently exist in the United States. Therefore, continuing to implement this program in its current form must await congressional authorization. Until then, the DOS should halt the "import of cheap foreign labor in the guise of an educational and cultural exchange program."[109]

[108] *Id.* at Sec. 62.32(t)(2).
[109] Exchange Visitor Program, 60 FR 8547-02, 60 Fed. Reg. 8547-53 (Feb. 15, 1995).

EXHIBIT A

TO: **Office of Private Sector Exchange Designation, Bureau of Educational and Cultural Affairs, U.S. Department of State**

FROM: **Alejandro Padron**

CONTACT: **Rocio Avila, State Policy Director & Senior Employment Counsel, National Domestic Workers Alliance (NDWA), rocio@domesticworkers.org**

RE: **RIN 1400–AF12**

DATE: **January 26, 2024**

VIA: **JExchanges@state.gov**

My name is Alejandro Padron. I was recruited in my home country of Venezuela to come to the United States to work as a domestic worker and to provide child care to American families. The sponsor agency that recruited me told me that I would need to apply for a J-1 visa, which would allow me to work and take educational classes. I was told that I would be referred to as “au pair” and that my employer, who paid my wages, would be referred to as my “host family.”

The sponsor agency charged me fees for their services, which was very expensive for me. They matched me with a host family in San Francisco, California. I worked for them from October 2019 to March 2021. I was responsible for caring for a 4.5 year old child. I was paid $205 per week. I worked 40 to 45 hours per week when I started to work. There were many weeks that I worked more hours, though. I worked through the pandemic. I was expected to work long hours during the day because the child was home all day and his mother worked from home. I felt like I had no choice, but to do what my host family employer told me to do.

When I got to my assignment, my host family had a room and a bed available for me. I was told that I could eat whatever I wanted from the refrigerator. However, my meals were limited because food was limited in the household. The host family employer didn’t buy enough food for everyone in the household. I didn’t have enough money to buy my own food. As a result,I lost a lot of weight and didn’t feel like myself health wise. I lacked a balanced nutritional diet.

Soon after I arrived, I realized that the wages I was paid were not enough to pay for my personal expenses, such as shampoo, soap, toothpaste, clothes, and transportation. I often found myself having to forgo some of my needs because I could not afford them. That combined with my limited food intake began to feel like my host family was getting so much more out of me living and working for them than I was getting from the cultural experience the sponsor agency said I would have in the J-1 Au Pair Program. I started to talk to other au pairs about their experiences and it became clear that my experience wasn’t unique. All of us were being subjected to similar working conditions. I then decided that the next time my host family employer asked me to work on my day off, I was going to say no, so that I could take care of myself.

However, my host family employer didn't like it, when I started to set work hour boundaries. They became increasingly upset when they saw me leave the house on my day off. They expected me to still take care of the child when I was at home in my room on my day off. As a result, I opted to go out even if it was to sit on a park bench by myself, so I could avoid the tension I was experiencing at home. When my employer realized that was going out, they started to bribe me into working more hours by offering to use their car in exchange for longer work days without more wages.

Consequently, my physical and mental health suffered. I felt pressured into working without pay. In doing so, I became more isolated from others since I could not go out or socialize with other au pairs or make new friends. At one point, I felt like I was going crazy because I wasn't able to communicate with anyone except for the child I cared for and the host employer. Because I had no money, I would leave the house and take walks in nearby parks and sit on the bench. I became depressed and didn't know what to do to make my life better. I was scared.

My relationship with my host family employer began to deteriorate and eventually got unbearable and unsafe for me. Even after I told my host family employer that she could not force me to work more hours during the week, she still demanded that I work during the weekends. I reported the threats to the sponsor agency, but they could not stop the host employer from imposing her demands on my work duties and hours. In fact, it got so bad that my host family employer threatened to fire me if I didn't do as she said. The agency didn't do anything to stop the threats. My host family employer executed her threats and evicted me from the home. I then called the Department of State to report what had happened to me. They called me back and said they would call the sponsor agency to get further information. In the meantime, I had nowhere to go and found myself walking for hours in San Francisco until a friend called and offered his home.

When I was evicted, my host employer owed me two weeks of wages. I called her to get my pay and to arrange a time to pick up my mail. She refused to pay me nor did she give me my personal mail. Instead, she called the police and said that I was in the country illegally. I was afraid for my safety. I learned that I had rights in the US. I called the California Labor Commissioner Office. They told me that what my host employer did was retaliation and that I could file a complaint against her. They also told me that I had the right to file a wage complaint to recover my unpaid wages based on the San Francisco minimum wage rate, which was $16.07. The Labor Commissioner contacted my host employer and told her to stop threatening me and that what she did was immigration related retaliation and it was against law. The sponsor agency failed to protect me. After I was evicted and in the streets, they offered to house me in a hotel for unhoused people. I declined the offer because those hotels tend to house people with substance abuse problems.

My au pair experience was not what I expected nor what the sponsor agency promised me in terms of pay and work hours. I also filed an application for a trafficking victim visa (T-visa) based on indentured servitude with the federal Department of Labor. I was granted a T-visa.

EXHIBIT B

TO: **Office of Private Sector Exchange Designation, Bureau of Educational and Cultural Affairs, U.S. Department of State**

FROM: **Ana Maria Cuevas**

CONTACT: **Rocio Avila, State Policy Director & Senior Employment Counsel, National Domestic Workers Alliance (NDWA), rocio@domesticworkers.org**

RE: **RIN 1400–AF12**

DATE: **January 26, 2024**

VIA: **JExchanges@state.gov**

I am Ana Maria Cuevas. On Jan 26 2023, I came to California to work as an au pair. My sponsor agency was Au Pair Care, Inc. I cared for 2 children. One child was 18 months and the other was 4 years old.

From the beginning of my au pair assignment, I realized that the experience was not going to be like it had been described to me by the sponsor agency. The first issue was that my host family employer required duties that were not part of the agreement. For example, I was required to work more than 60 hours per week and was only paid $225 per week. I worked 13 to 14 hours per day because I was required to do all the domestic work in the house. I did house cleaning, cared for the children, prepared meals for the entire family, and was responsible for the caregiving needs of the father of one of my host family employers, who was 87 years old. My host family employers had guests and dinner parties almost every weekend. This required that I often work on Saturdays. I was required to help with cooking and cleaning duties, among other things.

My host employers also had a live-out housekeeper that came to clean the house a couple of times during the month. After talking with her, I learned that I was not being paid what I was supposed to be paid based on California law. Housekeeper was paid $23 per hour. While I was paid approximately $3.25 per hour, when I divide my weekly schedule with the wages I was paid. I've also learned that meals and lodging deductions were not permitted because my contract with the family required that I live-in the house. According to my calculations, the housekeeper was making $20 more than I made per hour. This is why I support the proposed changes that will require employers to comply with minimum wage and overtime laws. However, I feel strongly that employers should not be able to deduct for meals and lodging when au pairs are required to live and work in the employer's home.

In addition, host employers should be required to engage in a background check that assesses if they have committed any crimes, including civil complaints against them. My host family was constantly paying me late. I often had to beg my host mother to pay my wages. She claimed that they were having financial problems. I reported the situation to my LLC, but she didn't do

anything to help me get my wages. My employers didn't like that I reported the issues to the LIC, so they yelled at me, and told me that I should be grateful to be in the United States.

The health insurance for au pairs must be improved because the coverage available to us now is inadequate and poses an adverse to our well being. Plus, au pairs should be paid for sick days like other workers. During my au pair assignment, I got sick two times. The first time I was required to work even though I had vertigo. When I told them that I could not work, they said it was fine, but that I would not be paid. They told me that I would only be paid if I worked. I had no right to paid sick days. The second time I got sick was much more serious. I almost lost my life. I caught a virus that debilitated my immune system due to lack of rest and sleep. I was constantly tired because I had no breaks during the work day. I felt like I was an indentured servant. I told my host mom that I needed to rest because I didn't feel well. That night while in my room, I could not breathe. I asked my host employers to take me to the hospital and they said for me to catch an Uber ride. I called my LLC and told her about my condition. She said for me to call the ambulance because it would be too expensive. I called my friend who drove me to the emergency room. Doctors put me in the ICU because my lungs were compromised. I was scared and don't recall much after that because I lost consciousness. Hospital staff called the sponsor agency to inform them of my condition. They provided insurance information, which didn't provide much coverage. I incurred a hospital bill that I'm still paying.

When I was released from the hospital, I expected to return to work, but instead I received a call from my host employer mom. She told me that my contract was terminated and to come over to the house to pick up my personal belongings for 2 hours on Oct. 13, 2023. The sponsor agency did nothing. They assigned a new au pair to the host family and within 15 days she left.

After I was fired, I called the Department of State to report my termination, but didn't get an answer. When I was in the hospital, my friend also called the Department of State to get my help, but nobody called us back.

Needless to say, my au pair experience was traumatizing. I would not recommend the au pair program to anyone. In addition to things I mentioned above, I also experienced:

1. Food and meal restrictions
2. Exchange and education components were not adhered to by my host employers. I asked on several occasions to be able to enroll in classes and was denied the opportunity. Host mom said that classes would be during the week and that they were going to interfere with my work hours.
3. Wages: besides not getting paid what I was legally entitled, I was also told that I would not be paid for hours when the baby was asleep
4. The lack of comprehensive health insurance almost costed me my life
5. The unfair termination and retaliation due to my complaints let me to lost my housing and end up in the streets
6. Unpaid wages and the fact that other workers who also did domestic work got paid more than me is something that needs to stop.

EXHIBIT C

TO: **Office of Private Sector Exchange Designation, Bureau of Educational and Cultural Affairs, U.S. Department of State**

FROM: **Au Pair # C**

CONTACT: **Rocio Avila, State Policy Director & Senior Employment Counsel, National Domestic Workers Alliance (NDWA), rocio@domesticworkers.org**

RE: **RIN 1400–AF12**

DATE: **January 26, 2024**

VIA: **JExchanges@state.gov**

I am a former au pair # C from Mexico. I was an au pair in both Maryland and Washington, D.C from June 19, 2022 to November 17, 2023. As a result of the worker exploitation and abuse I was subject to by both my host family employers and sponsor agency, I don't feel comfortable revealing my name. I want to ensure my safety and protect my identity.

My sponsor agency was Cultural HomeStay International. They failed to protect or help me when I most needed their support. My first assignment was for a family in Maryland. I cared for 3 children ranging from 3 to 7 years old. They were a military family. I worked with them for a total of 4 months before requesting a rematch.

On the 3rd month of my assignment, I was sexually assaulted on my day off. It happened after I left the mall. I was by myself. After the incident, I made it back to my host family's employer's house. I was severely beaten by my aggressors. I went to my room to take care of my wounds. The next day, I told my host family mom what happened to me. She told me to call my LLC and to report the incident to the police. The LLC told me that it was up to me to report the attack. The only help I got from my LLC was that she gave me the contact information of another au pair who was also a victim of a sexual assault. LLC suggested for me to call her. Nobody from my sponsor agency provided me with any other help. I navigated the awful incident that has changed my life all on my own. The LLC told me that if I chose to report the incident to the police, I had to do that during my time off because my host family needed me to work. My host mom required me to work despite knowing that I was not well both physically and mentally. I could hardly get out of bed due to the panic attacks that I experienced.

I reported the incident to the police. They told me to go to the hospital, which I did. The hospital staff gave me referrals to resources for mental and legal services. I became very ill and I told my LLC what was happening with me. However, she told me that I had to work or my host family might fire me, so I continued to work. My work duties were demanding. I worked from 5:30 AM to sometimes 8 PM in the evening. I followed up with my appointments by phone whenever I had a short break, but it was virtually impossible to have time for myself. I told my LLC that I needed a rematch due to the pressure I experienced with the family and constant work.

I was rematched with another family in Washington, D.C. I didn't tell them what happened to me. Soon after, I realized that my second assignment was not going to be any better than the previous one. There was abuse in the household. The host employers used drugs and physically and emotionally abused the child that I cared for. I reported the situation to my LLC but she didn't do anything about it. After I started to complain about the unbearable situation at home, the LLC called me to tell me that she thought I was too unstable to work and that my contract was terminated. The sponsor agency made me feel like I was damaged and useless to them. I later found out that I was the 3rd au pair assigned to my second family and that the sponsor agency knew about the domestic violence in the household. Yet, instead of ending the contract with the host employers, they terminated the contract with me and the other au pairs. I didn't know my rights, but now I know that the sponsor agency and my host family retaliated against me for complaining about the abuse. I asked the sponsor agency to find me a healthy host family where I could continue to work as an au pair and try to heal from my attack, but that didn't happen. I'm under the care of psychologist after I tried to commit suicide a few months ago.

I want the State Department to check-up on au pairs. I want it to have oversight of the sponsor agencies and make them understand that they cannot fire au pairs after they complain for bad matches and that if an au pair, like me, is a victim of crime, they need to give her sick days and let her rest and pay her. I received no sick days even though I knew that I was entitled to them because the social worker in charge of my case told me.

EXHIBIT D

TO: **Office of Private Sector Exchange Designation, Bureau of Educational and Cultural Affairs, U.S. Department of State**

FROM: **Maria Bonilla Renteria**

CONTACT: **Rocio Avila, State Policy Director & Senior Employment Counsel, National Domestic Workers Alliance (NDWA), rocio@domesticworkers.org**

RE: **RIN 1400–AF12**

DATE: **January 26, 2024**

VIA: **JExchanges@state.gov**

My name is Maria Bonilla Renteria. I am from Columbia. I was an au pair from Jan. 18, 2022 to Dec. 9, 2023.

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I had a total of two host family employers. The first family I was assigned to was in Whiteplains, New York. I cared for a four month baby. After one year with them, I requested a rematch because the host family was making me work long hours as a housekeeper and a nanny. They assigned me duties that were outside of my contract. The second family I worked for was in Brooklyn, New York. I worked for them for one year before they terminated and evicted me from their home.

Things became unbearable with the second family because they also made me work ten to twelve hour days without any breaks. They were also very controlling. They expected me to tell them everything about me including whom I socialized with on my days off. I believe this to be an invasion of privacy. I told them and they didn't like it, so they complained to my LLC. After my host family spoke with the sponsor agency, my host mom told me that she wanted me out of the house and said that I was fired for failure to comply with the house rules, which required me to be at home at the time they specified. They didn't give me any time to pick up my personal belongings. I called the sponsor agency and told them that I needed a place to stay and they told me that they weren't required to help me with that. So, I went to stay with a friend. I didn't receive the last week of my wages. When I did research about my rights, I found out that I could file a complaint for the unpaid wages, including for sick days, which I didn't receive.

I am submitting my story because I want the Department of State to tell host employers and sponsor agencies that need to comply with state and local laws. I should have not been denied my wages or paid sick days. Sponsor agency never explained to me my rights. Also, host families need to be told that au pairs have privacy rights. They should not force us to tell them everything about our lives. Yet, we don't know anything about their families. Not fair for us to be assigned to families who have not done background checks.

EXHIBIT E

TO: **Office of Private Sector Exchange Designation, Bureau of Educational and Cultural Affairs, U.S. Department of State**

FROM: **Karen Lizeth Velásquez Cuero**

CONTACT: **Rocio Avila, State Policy Director & Senior Employment Counsel, National Domestic Workers Alliance (NDWA), rocio@domesticworkers.org**

RE: **RIN 1400–AF12**

DATE: **January 26, 2024**

VIA: **JExchanges@state.gov**

I am Karen Lizeth Velásquez Cuero and I was an au pair for the Cultural Care agency between 2018 and 2020.

I had a year of preparation and training before starting the program. I was excited to visit the United States and often dreamt about my experience. Unfortunately, the fantasy world that I created in my head faded away when I came to live with my host family. Upon arriving in Seattle, WA, I was “officially” required to care for 4 month old twins for 45 hours a week for a salary of $195.75. In theory, I shouldn't have exceeded 45 hours a week, but after the second month, I started working much more. First it was 30 extra unpaid minutes until I reached a total of 55 hours a week. My former host justified my overtime as a gesture of solidarity on their part since they would pay me 10 dollars more. I didn't know that this was illegal and I accepted because I needed the money. The father was very temperamental and yelled at everyone all the time, including to his wife, his children, and, of course, to me. I honestly lived in a lot of fear throughout the entire program. I lived with a lot of anxiety and worry about doing something that would make him angry and yell at me. The children feared him. I got sick twice and couldn't work for two days. I had to make up those two days of absence by working during the weekend without pay.

When COVID hit, I worked for a year without a day off. They promised they would pay me for my two weeks of vacation, but they never did. I went to my LCC looking for help but he told me not to insist on claiming and not to waste my effort and time asking them for the money. Which is why I never reported it.

I believe that the au pair program needs a lot of reforms if it is to continue existing. Host employers need to pay workers for all hours worked at the Seattle and Washington wages. They cannot deduct for meal and lodging because our contracts require us to live where we work. It is not an option for us. They should pay for sick days and also know that they cannot abuse us. Just because I’m an immigrant does not mean that I’m not human. The sponsor agencies are scared for losing the host families business so they don’t say anything to them, including stopping the abuse. They should not be able to continue to operate their businesses if they are not going to enforce the contracts against the families and require them to pay all work hours.

Health insurance also needs to be provided but one that actually helps au pairs. I heard that Seattle has a Bill of Rights for domestic workers and I was not told about it when I was assigned to work in Seattle. Why?? Are they keeping important information from us? Why are we treated differently even though we are nannies and take care of children? The Department of Labor should be involved to stop all the abuse.