January 26, 2024

Director, Karen Ward
Office of Private Sector Exchange Designation
Bureau of Educational and Cultural Affairs
U.S. Department of State
2200 C. Street NW
Washington, DC 20522

Submitted via www.regulations.gov
Docket No. DOS-2023-0025
RIN 1400-AF12

Re: Comments Largely in Support of U.S. Department of State's Notice of Proposed Rulemaking for Exchange Visitor Program – Au Pair category.

Dear Director Ward:

The undersigned organizations submit these comments largely in support of the U.S. Department of State's Notice of Proposed Rulemaking for Exchange Visitor Program – Au Pair category. Because the Proposed Rule seeks to clarify and modernize the au pair program by, among other important things, adding worker protections to the childcare components of the program and amending the program's compensation structure to reflect changes in state and local wage laws, we support the Proposed Rule with the additional proposed changes discussed below.

1. BACKGROUND

Legal Aid Chicago

Legal Aid Chicago is Cook County's largest provider of free civil legal services to people who are living in poverty or are otherwise vulnerable. Legal Aid Chicago's Immigrants and Workers' Rights Practice Group ("IWR PG") provides services in four distinct areas: employment, immigration, human trafficking, and migrant farmworker law. Many of its clients are domestic workers who have been exploited through wage and overtime theft. Additionally, many are survivors of human trafficking. As such, IWR PG is uniquely qualified to comment on the important issues addressed in these regulations.

Legal Action Chicago

Legal Action Chicago is a partner of Legal Aid Chicago. Through class action litigation and legislative advocacy, Legal Action Chicago improves policies and systems that affect large groups of low-income individuals or even entire communities, with a priority on addressing racial equity. Legal Action Chicago has a strong interest in ensuring that the proposed regulations provide adequate protections for au pairs, many of whom are economically marginalized or otherwise vulnerable.

Shriver Center on Poverty Law

The Shriver Center on Poverty Law fights for economic and racial justice. Over our 55-year history, we have secured hundreds of victories with and for people living in poverty both in Illinois and across the country. The Shriver Center on Poverty Law has worked to ensure that all workers are well-paid, provided with safe working conditions, do not work too many hours, and receive benefits like paid sick days and paid vacation. Shriver supports the Illinois Domestic Workers Coalition, which brings together worker centers and policy advocates to demand improvements in these types of laws and policies that impact domestic workers. Because we consider au pairs to be domestic workers, we have a strong interest in ensuring that they are not exploited due to the power imbalance between employers and employees who are not US citizens and only have temporary status to remain in the country. To avoid such exploitation, au pairs must be given the same on the job rights as other workers in the United States.

Arise Chicago

Arise Chicago builds partnerships between faith communities and workers to fight workplace injustice through education, organizing, and advocating for public policy changes. The Arise Chicago Worker Center is a membership-based community resource for workers, both immigrant and native-born, to learn about their rights and organize with fellow workers to improve workplace conditions. Arise Chicago organizes domestic workers (au pairs, nannies, babysitters, caregivers, and cleaning and housekeeping workers). Arise Chicago is a member of the Illinois Domestic Workers' Coalition. We support the proposed regulations as written with the proposed changes below.

2. INTRODUCTION

We appreciate the State Department proposing this rule, which would preserve the au pair program that is so valued as a cultural exchange and a key piece of our country's public diplomacy, while broadening important worker protections and other legal rights for au pairs. The rule strikes almost precisely the right balance between maintaining a program that has largely been successful for 37 years and recognizing that just as other domestic workers in the United States are often eligible for paid leave, paid sick days, minimum wage, required rest periods, and other protections, so too should au pairs – who perform the same work while also living with the family they are providing assistance for.

To that end, while we recommend several changes to the proposed rule, we are in strong support of its premise. In doing so we join the State Department's belief in putting this regulation forward, that if au pairs are to have positive experiences in their positions, they must be entitled to and receive similar wages, benefits, and other worker protections as other domestic workers.

Many comments opposing the proposed rule have cited the burden on employers of providing jobs that pay fairly, offer benefits, and provide strong worker protections. These

commenters fear that many people who can now afford au pairs will now no longer be able to do so if this proposed rule becomes a law. We recognize that this may be true. However, as workers' rights advocates, we do not see this as a problem. The au pair program regulations must be designed to protect au pairs as domestic workers, not to protect the ability of their employers to exploit them.

If a household hired a domestic worker and did not pay them minimum wage or follow other applicable employment laws, we would expect to file a complaint or lawsuit against that employer and prevail. There is no reason why an au pair should accept any less. If we allowed that to occur, au pairs would not return home with good things to say about this country. We should want the exact opposite – au pairs returning home saying that they enjoyed their stays, were fairly paid, and had appropriate time off. In short, by ensuring that au pairs are treated well, the proposed rule will improve the image of the United States around the world.

3. COMMENTS AND SUGGESTIONS FOR PROPOSED RULE

Au Pair & Host Family Agreement:

We support the Proposed Rule's requirement for greater specificity in the current au pair and host family agreement by requiring, among other things, signature of the host family and au pair prior to the au pair's departure from their home country, an itemized list of fees (i.e., costs to host family and au pair); a weekly schedule; detail of compensation; time off for weekends and vacation; educational component; room/housing; in-kind benefits (e.g., cell phone, gym membership, car for personal use); and appropriate and inappropriate au pair duties. We are also pleased that the proposed rule will require host families to track hours worked, compensation, leave taken, and room and board deductions weekly and provide a copy to the au pair.

Providing greater specificity and transparency in the au pair and host family agreement is key to having a successful program. For example, a written agreement sets clear expectations for both the au pair and the host family. Providing clear expectations reduces the risk of conflict or disagreement on topics like compensation, schedule, and duties.

The Proposed Rule's requirements for greater specificity and transparency in the current au pair and host family agreement also ensures that au pairs have stability in their schedules and compensation. We also commend the Proposed Rule's acknowledgment that input from both the au pair and the host family is required to effectuate any modification or change to the au pair's schedule. This requirement prohibits host families and sponsor agencies from making unilateral changes to an au pair's schedule, which can interfere with an au pair's experience in other aspects of the program.

Materials on Employment & Labor Laws and Anti-Trafficking

To fully protect au pairs from sexual harassment, exploitation, or other forms of abuse, we urge the Department of State, as opposed to sponsor agencies, to provide information on employee rights, human trafficking, and other forms of exploitation.

Sponsors do not have the incentive to provide au pairs with information on employee rights and human trafficking. After all, the goal of reducing negative publicity and controversy is at the forefront of any for-profit business. However, current Department of State regulation contemplates that sponsors will provide au pairs with information on employee rights and the Wilberforce Pamphlet. *See* 22 C.F.R § 62.10(b)(9), (c)(8).

Under the Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, the Secretary of State, in consultation with the Secretary of Homeland Security, the Attorney General and the Secretary of Labor, is required to develop an "informational pamphlet … on legal rights and resources for aliens applying for employment- or education-based nonimmigrant visas." 8 U.S.C. § 1375b(a)(1). The Wilberforce Pamphlet is required to include information regarding, among other things, "the legal rights of employment or education-based nonimmigrant visa holders under Federal immigration, labor and employment laws" and "the legal rights of immigrant victims of trafficking in persons and worker exploitation …" 8 U.S.C. § 1375b(b)(2), (4).

Ensuring that au pairs receive this information from the U.S. government, rather than an interested party, is a small but substantial step toward eliminating human trafficking and other forms of exploitation. An au pair's unique working conditions, their age, and their unfamiliarity with U.S. laws makes them highly susceptible to human trafficking and other abuses[1]. It is, therefore, important for the health and wellbeing of au pair participants to receive this information from the U.S. government.

In fact, the State Department already provides some temporary workers coming to the U.S. to work or study with an anti-trafficking pamphlet that includes the phone number for the National Human Trafficking Hotline and information about a person's rights as a nonimmigrant visa holder in certain employment and education-based categories.[2] For those employment and education-based categories, the visa recipient receives the Wilberforce Pamphlet during his or her visa interview. A consular officer then verifies with the visa recipient that he or she received, read, and understood the contents of the pamphlet before receiving a visa.[3]

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[1] *See*, Zack Kopplin, *Actually, Owning an Immigrant Is Bad,* Slate (February 15, 2018) https://slate.com/news-and-politics/2018/02/the-au-pair-system-is-broken-we-dont-need-to-expand-it.html ("... many au pairs face regular abuse including sexual and physical assault, food deprivation, extra work, withheld wages, and even robbery by their sponsors, along with threats of arrest or deportation as retaliation for complaining about poor conditions.")

[2] Rights and Protections for Temporary Workers (state.gov) ("Before your visa interview at the U.S. Embassy or Consulate abroad, it is important that you take the time to read this pamphlet carefully. You will be asked at your visa interview to confirm that you have done so.").

[3] Wilberforce Pamphlet, Know Your Rights English Version (state.gov)

We, therefore, urge that the Department of State ensures that the Wilberforce Pamphlet is distributed to the au pair during his or her visa interview. The Department has a vested interest in fighting human trafficking and other forms of exploitation in its visa programs.

Sponsor Agencies' Local Coordinators

We support the Proposed Rule's requirement that (1) a local coordinator not have a family or work connection with any of the host families in which they have monitoring responsibilities; (2) a local coordinator employed part-time (fewer than 32 hours per week) not be responsible for placement and monitoring of more than 15 au pairs; and (3) a local coordinator employed full-time not be responsible for placement and monitoring of more than 30 au pairs. This will allow local coordinators to spend more quality time monitoring the au pairs' working conditions and to foster meaningful trust and communication with au pairs.

The Department of State has an interest in ensuring the health, safety, and welfare of visitors on exchange programs in the United States. A local coordinator is in the best position to address any issues related to the au pair's health and safety as they are expected to help the au pair acclimate to their community and monitor working conditions. The Proposed Rule's requirement also allows for greater oversight by a local coordinator to ensure compliance with the Department of State's rules and regulations.

Wage & Hour

We support the Proposed Rule's requirement that an au pair be compensated based on the tier of the highest applicable federal, state, or local minimum wage in the city/state of the host family residence. As discussed in the Proposed Rule, there are states and localities where the minimum wage exceeds the federal minimum wage. In those states and localities, the federal minimum wage does not provide sufficient compensation to cover the minimum standards of living necessary for the health, safety, and welfare of au pairs. For example, Chicago's minimum wage of $15.80 per hour eclipses the federal minimum wage currently set at $7.25 per hour.

The federal au pair program is, fundamentally, a work program. While the goal of the program is to allow young foreign nationals the experience of living in the United States with an American family, au pairs are nonetheless full-time childcare workers. Au pairs spend the majority of their hours working. As such, we commend the Proposed Rule's goal of compensating au pairs appropriately for their labor.

Even more, the Proposed Rule's goal of adequately compensating au pairs based on the highest applicable federal, state, or local minimum wage will have a positive effect on the private labor market. As it is currently structured, the compensation paid to au pairs depresses working conditions of similarly situated domestic workers in the private labor market. The practice of paying au pairs substantially less than the state and local minimum wage impacts the private labor

market[4]. In effect, American families are free to discriminate against private in-home childcare workers by making them a second choice only if an in-home childcare worker on a J-1 visa is unavailable.

Sponsor agencies and interest groups argue that the Proposed Rule's compensation structure is inconsistent with the au pair program's cultural exchange objectives. However, in no way are these two incompatible. Rather, ensuring that foreign nationals are not paid less than Americans performing similar work creates a positive and cooperative spirit among nations and advances the program's appeal for citizens of other countries.

Sponsor agencies and interest groups also argue that the Proposed Rule's compensation structure will price out families from participating in the au pair program. The Department of State should not be discouraged from ensuring adequate compensation for au pairs. Sponsor agencies and interest groups advocate for the continuation of a program that, by design, exploits young foreign nationals, mostly women, for their cheap labor. There is no question that childcare is too expensive in the U.S. All families who need childcare deserve it. But the answer to this problem requires large scale intervention from federal, state, and local governments; it is no solution to continue a program that relies on the underpaid and exploited labor of migrant women.

We also support updating the hourly pay rates in the four-tiered au pair compensation chart no less than every three years in response to changing economic situations. While inflation has decreased greatly in the last year, price increases have eroded purchasing power. The proactive step of updating the four-tiered au pair compensation chart in response to changing economic situations ensures that an au pair's rate of pay remains at pace with inflation and costs of living.

Conflict Resolution and Mediation

Reforms to conflict resolution and mediation in J-1 au pair program are sorely necessary. Historically, in the "vacuum of 'cultural exchange' any conflict [has] been deemed personal[,] an unsuccessful 'match' lacking in personal chemistry[.]"[5] Further, "[d]espite their official role as a mediator between families and au pairs, sponsor agencies derive more profit from families, resulting in a bias towards families when conflict arises."[6] "This bias towards families is in direct conflict with sponsor agencies' State Department-assigned role as a dispute arbiter. Au pairs who reach out to their local counselors often see their complaints go unaddressed."[7]

The Department's proposed updates to au pair program requirements—including the nominal change to section 62.31(c)—are well-founded. In particular, we commend the Department

[4] *See* Daniela Costa, *Guestworker Diplomacy: J Visas Receive Minimal Oversight Despite Significant Implications for the U.S. Labor Market*, Econ. Pol'y Inst. Briefing Paper No. 317 (July 14, 2011), BriefingPaper317.pdf (epi.org)
[5] Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J. OF L. & GENDER 269, 306 (2013).
[6] Int'l Labor Recruitment Working Group, *Shortchanged: The Big Business Behind the Low Wage J-1 Au Pair Program*, at 15 (2018), available at https://fairlaborrecruitment.files.wordpress.com/2018/08/shortchanged.pdf.
[7] *Id.* at 18; *see* 22 C.F.R. § 62.31(l).

for recognizing the distinct risks au pairs face "after sponsors determine that irreconcilable differences exist between a host family and the au pair who has been placed in their home."[8] Because the "Department of State relies on sponsor organizations to … reach a resolution,"[9] it is vital that there be clear rules in place for how sponsor organizations handle complaints and conflict resolution.

Our view is that the proposed section 62.31(c)(1) (viii) is a step in the right direction. By requiring each agency to establish a specific process for responding to "issues, concerns, or emergencies" that arise during au pair's program term, there will be more clarity for all involved parties when a problem arises that requires the intervention of a sponsor. In addition, the new requirements proposed in sections 62.31(c)(1)(vi) and (vii) will indirectly aid conflict resolution. By requiring sponsors to establish a "[p]rocess for rematching qualified au pairs to new placements" as well as identify "circumstances and behaviors that indicate the au pair is not qualified to remain on program [,]" all parties will be able to approach any conflict with a clearer understanding of their rights and obligations.

Rest and Paid Sick Days

The Department's proposed changes regarding au pairs' rights to sick leave and rest are largely commendable and represent a positive step. It is true, but unfortunate, that federal law does not guarantee "paid sick days," and sick leave, fixed working hours, and rest time requirements are broadly not mandatory in the United States.[10] Where the federal government has failed to act, states have attempted to fill in the gaps, with numerous states moving to adopt a "Bill of Rights" for domestic workers over the past decade.[11] However, even in states with such domestic worker protections, au pair sponsor agencies have attempted to "carve out au pairs" from the protections.[12] The status quo is that few au pairs are entitled to those protections.

By proposing that host families be required to give au pairs an "uninterrupted eight-hour period of rest per every 24 hours to ensure adequate sleep and time away from duty,"[13] in section 62.31(k)(ii), as well as 1.5 consecutive days off each week and 2 consecutive days off once per month in section 62.31(k)(1), the Department has correctly recognized how critical such protections are. The same goes for the Department's proposals to provide at least 80 hours of paid time off "at the au pair's request" in section 62.31(k)(iv). They are critical to au pairs who cannot be expected to perform their job functions if they are sleep-deprived, overworked, and have not

[8] Notice of Rulemaking at 74,074.
[9] *Id.*
[10] Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J. OF L. & GENDER 269, 277, 308 (2013).
[11] *See, e.g.*, Int'l Labor Recruitment Working Group, *Shortchanged: The Big Business Behind the Low Wage J-1 Au Pair Program*, at 17-18 (2018), https://fairlaborrecruitment.files.wordpress.com/2018/08/shortchanged.pdf.
[12] *Id.* at 18.
[13] Notice of Proposed Rulemaking at 74,075.

had enough time to recharge[14]. They are also critical to the underlying purpose of the au pair program—both rest and time off are necessary components of actual, meaningful cultural exchange taking place.[15]

In addition, the Department's proposal to require Host Family Agreements to, via Section 62.31(k)(iv), "give au pairs 56 hours of paid sick leave for a 12-month program and a pro-rated number of sick leave hours for program extensions shorter than 12 months" will help ensure that au pairs are not forced to choose between their health and ejection by their host family. In particular, we support the proposed rule not inherently requiring au pairs to request sick leave when an illness "is not foreseeable." As a matter of common sense, no one plans to get sick—it is critical that au pairs not be required to schedule an illness in advance.[16]

Reporting to Enforcement Agencies

Limits on au pairs' ability to report harmful or exploitative conduct to regulators or law enforcement create dangerous risks for a vulnerable population. "[F]ew au pairs are able to pursue legal remedies when exploitation occurs. An au pair agency wields ultimate control over whether an au pair gains access to redress. While au pairs can opt to leave abusive families, an au pair agency may exercise its sole discretion to simply send an au pair home rather than facilitate a rematch with a new host family. Indeed, anecdotal information suggests that in cases of severe exploitation, agencies prefer to repatriate an au pair in order to avoid bad publicity and possible legal culpability."[17]

The proposed rules tackle this problem head-on and we fully support these vital changes, including the preemption carve-out in section 62.31(t)(2) that allows state and local "[s]exual harassment and retaliation laws" to apply to au pairs in full force. This is consistent with the premise that state and local regulators may have a better sense of the degree of protections needed to ensure that au pairs feel comfortable reporting program violations and other misconduct, as well

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[14] *See*, Isabela Dias, *When You Live With Your Boss: The Horrors and Indignities of Working as an Au Pair*, MOTHER JONES (September 14, 2021) https://www.motherjones.com/politics/2021/09/when-you-live-with-your-boss-the-horrors-and-indignities-of-working-as-an-au-pair/

[15] https://www.aupair.com/en/p-about-aupair-com.php (the purpose of the Au Pair program is to reduce prejudices through intercultural contacts, supporting the work-life balance of families, strengthening the self-confidence of young women and host mothers in particular, bring different cultures together through mutual understanding, international friendships, prevention of nationalism and wars, and better connection to the host country.)

[16] *See, e.g.*, Zack Kopplin, *Au Pairs Come to the U.S. Seeking Cultural Exchange, but the State Department Often Fails to Protect Them*, HUFFINGTON POST (July 31, 2020), https://www.huffpost.com/entry/au-pair-america-cultural-care_n_5f204d6ac5b69fd473126c61 (describing experience of an AuPairCare au pair who was "kicked out of her host's house on a freezing winter night because she was sick and had refused to work extra."); Int'l Labor Recruitment Working Group, *Shortchanged: The Big Business Behind the Low Wage J-1 Au Pair Program*, at 12 (2018), https://fairlaborrecruitment.files.wordpress.com/2018/08/shortchanged.pdf (describing experience of au pair who was reprimanded for getting a bladder infection following "excessive, unpaid overtime").

[17] Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J. OF L. & GENDER 269, 307 (2013).

as—along with all other domestic workers—an equal opportunity to report sexual harassment and other abuse. Indeed, the Department appears to fully recognize how important it is to empower au pairs to report abuse, and how threatening abusive host families are to the success of the au pair program. We fully support proposed program requirements in section 62.31(k)(7) that "[h]ost families must provide au pairs a safe … environment free from sexual harassment, exploitation, or any other form of abuse[.]"

Similarly, the Department's proposed section 62.31(k)(vi)—which we support—appears to be directly responsive to the unique risks that au pairs face. Namely, the risk that a host family will take steps to limit the au pair's ability to freely move and communicate with the Department in response to an actual or threatened complaint about the family's conduct. Proposed provisions prohibiting host families from "depriv[ing] an au pair from access to" their "identification papers [], cellphone, flight tickets" and other materials will help to keep au pairs safe, ensure that their complaints are promptly heard, and in worst-case scenarios, allow them to leave the host family abruptly on their own accord to protect their safety and well-being.

Credits for Room / Board and Meals

The proposed rule at Section 62.31(n)(2) states the Department's position that that the Fair Labor Standards Act (FLSA) governs the deductions that can be taken from an au pair's stipend for lodging and meals and specifically lays out the amount of the applicable deductions by applying FLSA's provisions. We do not agree that applying FLSA leads to the same conclusion that the Department reaches.

A Colorado court has found that while a credit toward the federal minimum wage is permissible for meals, lodging, and other facilities under the FLSA (29 U.S.C. 203(m)), an employer may not credit the cost of room and board toward an employee's wages if the employer is required by law to provide the same. *Beltran v. InterExchange, Inc.,* 176 F.Supp.3d 1066, 1083-84 (D. Colo. March 31, 2016) (finding that 29 C.F.R. section 531.30 prohibits such deductions under the FLSA). Since the ability to provide lodging and meals is a requirement of the au pair program, this would disallow the deductions as applied to au pairs. The proposed rule should reflect this position.

The United States Department of Labor, whose interpretation and implementation of the FLSA controls, has expressed that an employer wishing to claim the section 3(m) credit for lodging must ensure that the following five requirements are all met: (1) the lodging is regularly provided by the employer or similar employers; (2) the employee voluntarily accepts the lodging; (3) the lodging is furnished in compliance with applicable federal, state, or local law; (4) the lodging is provided for the benefit of the employee rather than the employer; and (5) the employer maintains accurate records of the costs incurred in furnishing the lodging.

With respect to requirement number 4, the United Stated Department of Labor has conveyed that "expenses imposed on the employer by law are for the primary benefit of the

employer." Wage & Hour Field Assistance Bulletin 2015-1: Credit toward Wages under Section 3(m) of the FLSA for Lodging Provided to Employees (citing Wage & Hour Opinion Letter, 1997 WL 998029 (Aug. 19, 1997) (explaining that "an employer may not take credit for facilities which the employer is required by law or regulation to provide").

Because sponsor agencies and host families are required by law to provide housing for au pairs, neither can credit room and board under section 3(m) of the FLSA. *See* 22 C.F.R. § 62.31(e)(6) (current au pair regulation providing that "[s]ponsors shall secure, prior to the au pair's departure from the home country, a host family placement for each participant."). The proposed rule's amendment to this section also requires sponsor agencies and host families to provide housing for au pairs by demonstrating that "they have secured a host family placement prior to the au pair's departure from the home country or before being placed with a new host family (i.e., rematch) by obtaining the signatures of the host family and au pair on a dated Host Family Agreement." *See* proposed changes to 22 C.F.R. § 62.31(e).

In the event that lodging and meal deductions are part of the final rule, even for au pairs who are all live-ins, we recommend that the Department choose not to invoke federal preemption of state laws that provide a greater benefit to employees. For example, in our state of Illinois, regulations promulgated under the Domestic Workers Bill of Rights state that "An employer shall not take lodging or meal credits from the wages of a domestic worker if the employer requires that a domestic worker reside on the employer's premises..." 56 Illinois Administrative Code 210.125(e)(2). Without federal preemption, Illinois could apply its existing rules and increase the compensation received by au pairs.

4. CONCLUSION

For the reasons stated above, the above-signed organizations support the Proposed Rule, with the suggested modifications.

Respectfully submitted for consideration,

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