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Visa Pages:

U.S. TEMPORARY FOREIGN WORKER VISAS

J-1 VISA

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The J-1 nonimmigrant visa program allows employers to hire foreign workers under the auspices of an educational and cultural exchange visitor program without testing the U.S. labor market.

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I. J-1 VISA

A. OVERVIEW

The J-1 nonimmigrant visa allows individuals to come to the United States under the auspices of an educational and cultural exchange visitor program.[1] When the program was created, its purpose was to promote international understanding. The Department of State (DOS) – as the federal agency that maintains foreign relations – manages the program.

The exchange visitor program was not designed to import foreign labor. However, in practice, the J-1 visa is routinely used as a temporary work visa. Despite this reality, the U.S. Department of Labor (USDOL) does not evaluate the J-1 program's effect on the labor market. USDOL plays no role in regulating the J-1 program other than to enforce the standard federal wage and hour laws that apply to the general workforce.[2] The Department of Homeland Security (DHS) also plays a limited role through two components. DHS's Student Exchange Visitor Program is responsible for operating the Student and Exchange Visitor Information System (SEVIS) – the federal database which tracks all foreign students and exchange visitors.[3] DHS's Customs and Border Patrol oversees every person's admission, including J-1 exchange visitors, at land border crossings and all other ports of entry. DHS has not promulgated any regulations specific to the J-1 program.

DOS regulations outline fourteen distinct categories and subcategories within the J-1 program: au pair, camp counselor, college and university students, government visitors, international visitors, physicians, professors and research scholars, high school students, short term scholars, specialists, summer work travel, teachers, interns, and trainees.[4] At least six of these categories – summer work travel, camp counselors, trainees and interns, au pairs, and teachers – present situations where J-1 workers are vulnerable to exploitation. Indicators such as geographic isolation, employment in private homes or in low-wage, unskilled industries, and lax worker protections and oversight contribute to this. DOS data shows that these six categories make up just over half of all total J-1 visas issued.[5] In 2018, 342,639 individuals received J-1 visas.[6]

B. HISTORICAL CONTEXT

The J-1 exchange visitor program was created in 1961.[7] It was enacted during the same month as the Foreign Assistance Act and Peace Corps Act, thus joining the broader effort to improve and strengthen U.S. relations abroad. At its inception, the primary goal of the J-1 visa was to spread information to the rest of the world by providing opportunities for foreign nationals to experience the U.S. and then use that experience in their home countries. Initially, the U.S. Information Agency (USIA) ran the program. Responsibility for administration transferred from USIA to DOS in 1999. Over time the J-1 exchange visitor program expanded to include fourteen different categories that each have their own set of rules and requirements. While now covering a wide swath of the workforce,

Comparison of Select J-1 Exchange Visitor Program Categories

	Program Length	Extensions Available	Repeat Participation	Work Hour Restrictions	Wage Requirement	Mandatory Vacation Time	U.S. Worker Protections
Summer Work Travel	4 months	No	No restriction	May not work in positions where work hours fall between 10pm & 6am	The higher of federal, state or local minimum wage or pay and benefits commensurate with similarly situated U.S. workers	1 month after the three months work	Sponsors must confirm that host employers will not displace domestic U.S. workers at worksites where they will place program participants
Camp Counselors	4 months	No	Yes, but sponsors shall limit number of repeat participants – not more than 10% of total from immediately preceding year	None	Pay and benefits commensurate with American counterparts	None	None
Au Pair	12 months	Yes 6, 9 or 12 months but additional educational component requirements	Yes, after 2 year home residency	Maximum 30 or 45 hours per week depending on EduCare or regular au pair; 10 hours per day maximum	Stipend of $197 per week	1.5 days off per week; 1 complete weekend per month; 2 weeks paid vacation	None
Interns	12 months	No	Yes, after 2 year home residency	Minimum 32 hours per week	None	None	Sponsors must certify that they or any host organization does not displace full/part time temporary or permanent American workers
Trainees	18 months; 12 months for Hospitality/Tourism & Agriculture (Ag allowed up to 18 mo. if original TP/IPP includes 6 months of study)	No	Yes, after 2 year home residency	Minimum 32 hours per week	None	None	Sponsors must certify that they or any host organization does not displace full/part time temporary or permanent American workers
Teachers	3 years	No	No restriction	Must be full-time	None, but must be in compliance with collective bargaining agreement; compensation, if any, must be outlined in writing beforehand	None	None

Source: 22 C.F.R. Part 62

including both low wage concessionaires and high wage doctors, all exchange visitors have the same J-1 visa.

C. Hiring Process

Most J-1 categories contemplate the exchange visitor performing work in the United States as part of the program, but that is not always the case.[8] J-1 exchange visitors do not receive general employment authorizations to work wherever they want and are subject to termination from the program if they engage in unauthorized employment.[9] Rather, any employment is part and parcel to and defined by the specifics of the exchange program. DOS has an interactive website that walks participants, sponsors, host entities, and the public through the J-1 exchange visitor program.[10]

DOS's Bureau of Education and Cultural Affairs oversees this process and designates sponsor organizations to administer all aspects of a specific program. Essentially, sponsors act as recruiters and liaisons between the host entity (employer) and exchange visitor (worker).[11] Procedures vary according to the specific category in play. In any case, the sponsors will usually coordinate with foreign third parties to advertise their exchange program and recruit foreign participants. Then, sponsors make the connection between the exchange visitor and the host employer. DOS approves a majority of sponsors who apply.[12] As of October 2018, there were approximately 10,574 sponsors designated to administer J-1 programs in the fourteen categories and subcategories.[13]

1. Steps for Employers (aka "Hosts")

Employers who want to hire workers under the J-1 exchange visitor program contact a sponsor designated to administer the specific category of interest. Sometimes the employer pays the sponsor a fee. The sponsor recruits the foreign exchange visitor, completes the immigration paperwork with him or her, and with DOS, is responsible for monitoring and reporting throughout the exchange visitor's stay in the United States.

DIGGING DEEPER: NO APPROVAL FROM USDOL NECESSARY

Employers do not need to seek pre-approval from the Department of Labor or the Department of Homeland Security's U.S. Citizenship and Immigration Services before hiring a J-1 exchange visitor. Unlike other non-immigrant employment visas such as H-1B, H-2A or H-2B, the J-1 program has no prerequisite labor market test and no requirement that employers request permission to hire nonimmigrants. This is due to the fact that the J-1 program's main purpose is to foster cultural exchange. It was not conceived and is not designed to facilitate the temporary employment of foreign workers.

While several of the J-1 categories have rules about wages and working conditions, DOS does not regulate employers directly. Rather, the rules apply to sponsors because sponsors are the entities regulated by DOS. Even so, employers must follow all applicable federal and state labor laws when employing J-1 exchange visitors, just as they do with respect to their regular U.S. workforce.

a) Incentives for employers who hire J-1 exchange visitors

There are several reasons why employers may choose to hire individuals under the J-1 program. Perhaps the most significant benefit to employers is that they do not have to pay federal employment taxes on J-1 exchange visitors' wages, which can be a savings of up to 8%.[14]

2. Steps for Exchange Visitors (aka "the workers")

Before applying for a J-1 visa, a foreign national must be accepted by a sponsor for a specific category of exchange visitor. The individual usually applies to a designated sponsor through a separate agency or third-party foreign recruiter located in the visitor's country of origin. Applicants typically have to pay an application fee. Sponsors must establish and utilize a screening process to ensure that potential exchange visitors meet each category's specific criteria.[15] The following general requirements apply to every exchange program applicant:

- Have sufficient funds to cover expenses or has made other arrangements to provide for expenses[16]
- Pay for medical insurance at the required level[17]
- Speak English sufficiently to participate in the program[18]
- Have no intention of immigrating to the United States[19]
- Comply with the two-year home-country physical presence requirement if it applies[20]

Summary of reasons why an employer may choose to hire J-1 exchange visitors

3. Designated Sponsors (aka the "recruiters")

DOS designates sponsors to be in charge of administering all aspects of the J-1 exchange visitor program. Sponsors are central to the process and take on the role of an official recruiter or a staffing agency by locating, screening, and selecting the visitors and then matching them with a site of activity and host employer.[21] A sponsor's designation is for a specific subcategory and not all sponsors may administer every subcategory. For example, according to DOS provided information, for 2018, 16 sponsors could facilitate the au pair subcategory and 48 sponsors could facilitate summer work travel.[22]

Sponsors have many obligations and must follow general regulations and also rules that pertain to each exchange program category. The Department of State amended the sponsor regulations in January 2015.[23] They set out several new responsibilities for sponsors including providing disclosures to exchange visitors about terms of their exchange program, orientation, increased monitoring, etc. The new sponsor regulations also explicitly prohibit sponsors from retaliating or threatening exchange visitors who complain about their program.

Each sponsor must comply with all laws and requirements, be staffed with adequate and competent employees, and have the financial capacity necessary to carry out their functions.[24] DOS may require non-governmental sponsors to provide evidence of solvency, financial statements, and even post bond if there is "reasonable doubt" about their ability to meet program obligations.[25]

a) Disclosures

Each sponsor must provide accurate program information in all public advertisements and materials geared toward prospective exchange visitors, host organizations and

employers.[26] Sponsors are required to provide detailed information to exchange visitors at the time of recruitment and before the prospective visitors pay any fees.[27] These disclosures must include the following information:

- Program activities
- Terms and conditions of employment including job duties, number of work hours, wages and compensations, typical deductions for housing and transportation
- Itemized list of all fees charged (any fees paid to sponsor or employer)
- Insurance costs
- Type, duration, nature and importance of cultural components of program

B) Pre-arrival information and orientation

Sponsors must provide clear information about the program to all exchange visitors before they arrive and must offer appropriate orientation.[28] Orientation should include, for example: information about life and customs in the United States; local community resources such as public transportation, medical centers, schools, libraries, recreation centers, and banks; any rules that the exchange visitors must follow under the sponsor's program; and contact information for the responsible officer at the sponsor's organization.[29] The sponsor must ensure that every exchange visitor has received the Wilberforce Pamphlet on the Rights and Protections for Temporary Workers.[30]

C) Monitoring

Sponsors are required to monitor the exchange visitors participating in their programs and are expressly prohibited from retaliating or discriminating against exchange visitors who complain about the program.[31] Sponsors must ensure that the exchange visitor is engaged in the activity for which he or she obtained the J-1 visa, track the activity site and the progress and welfare of the exchange visitor, require the exchange visitor to update the sponsor with his or her address and telephone number, and report any changes within the SEVIS system.[32]

DIGGING DEEPER: SPONSOR DESIGNATION

An organization applies for sponsor designation with Form DS-3036 and a non-refundable fee of $3,982.[33] Sponsors must have three years of experience facilitating international programs to be eligible for designation.[34] The sponsor must meet certain financial requirements and demonstrate that they will comply with the regulations specific to the J-1 category they seek to administer.[35] The sponsor must have detailed knowledge of laws pertaining to employment, including the Fair Labor Standards Act.[36]

DIGGING DEEPER: THE DS-2019

Sponsors provide the Certificate of Eligibility for Exchange Visitor Status -- Form DS-2019[37] – to the individuals who are selected to participate in the specific exchange program.[38] Form DS-2019 permits the prospective exchange visitor to schedule his or her interview at the U.S. consular processing post abroad.[39]

Department of State Maximum and Minimum Duration of Participation Rules

CATEGORY	Min. Duration of Participants	Min. Duration of Participation for Sponsors with Program Serial G-1, G-2, or G-3 (1)	Max. Duration of Participants	Extension Beyond Maximum Duration of Participation is Permitted (requires DoS approval)
Alien Physician	3 weeks	N/A	7 years	Yes
Au Pair	1 year	N/A	1 year	Yes
Camp Counselor	3 weeks	N/A	4 months	No
Government Visitor	3 weeks	N/A	18 months	Yes
Intern	3 weeks	N/A	1 year	Yes
International Visitor	N/A	N/A	1 year	Yes
Professor(2)	3 weeks	N/A	5 years	No
Research Scholar (2)	3 weeks	N/A	5 years	No
Short Term Scholar	N/A	N/A	6 months	No
Specialist	3 weeks	N/A	1 year	Yes
Students				
Associate Degree	3 weeks	N/A	N/A	N/A
Bachelor's Degree	3 weeks	N/A	N/A	N/A
Doctorate Degree	3 weeks	N/A	N/A	N/A
Master's Degree	3 weeks	N/A	N/A	N/A
Non-Degree	3 weeks	N/A	2 years	No
Student Intern	3 weeks	N/A	1 year	No
Secondary School	One academic semester (5 mo.)	One academic semester (5 mo.)	1 year	No
Summer Work Travel	3 weeks	N/A	4 months	No
Teacher	3 weeks	N/A	3 years	Yes
Trainee (3)	3 weeks	N/A	18 months	Yes

(1): Section 62. 8 General Program Requirements: (b) Minumum Duration of program. Sponsors other than the Federal Governemnt agencies (identified by the program serialG-1, G-2, or G-3) shall provide exchange visitor. except short-term scholars with a minumum period of participation in the United States of 3 weeks
(2): Extension Beyond Maximum Duration of Participation for professors and research scholars
(3) The maximum duration of participation for a trainee is 18 months for all occupational categories except in the occupational fields of "Agritcultural Forestry, and Fishing" and "Hospitality and Tourism". Training in the fields of Hospitality and Toursim are limited to a maximum of 12 months. Training in the fields of Agritcultural Forestry, and Fishing is limited to 12 months, unless 6 months contains an academic classroom component, which allows maximum of 18 months. The Department may limit the designation to a lesser amount of time, for example 6-or 12- month training program. An extension of a program beyond 18 months would be considered an extension beyond the maximum duration of participation and require DoS approval.

4. Exchange Visitors Apply for the J-1 Visa and Admission to the U.S.

After the sponsor issues the DS-2019, the foreign individual applies for a J-1 visa through the Department of State at the U.S. Consulate abroad. First, the applicant completes the online visa application – Form DS-160 – and pays the $160 processing fee.[40] In-person interviews at the consulate are usually required. At the interview, the J-1 visa applicant brings a printed-out confirmation of the Form DS-160, his or her passport, and any supporting documents required by the specific program.

When J-1 exchange visitors apply for their visas, the consular officers should provide an anti-trafficking brochure describing various work protections.[41] The Wilberforce Pamphlet on the Rights and Protections for Temporary Workers directs aggrieved workers to call 911 and/or a toll-free hotline for victims of human trafficking.[42] The Department of State must train its consular officers about the labor protections described in the brochure.

The time it takes to process a J-1 visa application depends on the country and specific consular processing post. Once the visa is in-hand, the individual may travel to the U.S. and present for admission at a U.S. border or port of entry. The U.S. Department of Homeland Security's Customs and Border Patrol will determine whether the individual is admissible and if so, will allow entry to the United States.

D. Duration of the J-1 Visa

The duration of a J-1 visa depends on the subcategory and particular exchange program's length.[43] For seasonal workers this may be as short as three weeks[44] and for professionals this may be as long as five years (not including extensions).[45] J-1 exchange visitors may be admitted for a "period up to 30 days before the report date or start of the approved program" but the visa's validity may not exceed the program period plus 30 days for the purposes of travel unless an extension or change has been granted.[46] After the visa expires, many exchange visitors are required to return home for two years before being eligible to return to the United States.[47]

E. J-2 Visa for Family Members

J-2 visas are available for dependent family members of J-1 exchange visitors, including children under the age of 21 and the J-1 visitor's spouse.[48] The Department of State presumes family members will not accompany participants in the summer work travel, camp counselor, and au pair subcategories.[49] The duration of a J-2 visa must not be longer than the principal J-1's authorized stay.[50] Individuals with a J-2 visa are eligible to apply for employment authorization (Form I-765) from DHS and work in the U.S. at any job they can find once that application is approved.[51]

F. Lack of Job Transferability

As with most other nonimmigrant visas that authorize work in the U.S., J-1 exchange visitors are vulnerable to the extent that their lawful immigration status is tied to a specific and oftentimes predetermined job placement (an exception to this is the J-1 Summer Work Travel participants coming from Visa Waiver Program countries, see the J-1 Summer Work Travel section below). An individual who has paid money to come to the United States to work has a strong incentive to stick with an exploitative situation.[52] Depending on the category of exchange program, most exchange visitors who want to change jobs may seek a placement change with their sponsor.[53] However, there is no guarantee that the sponsor will honor the request.

G. Displacement of U.S. Workers

The J-1 exchange visitor program regulations do not have a system in place to test the local labor market for jobs where J-1 workers are employed. In other words, there is no built-in mechanism to guard against the displacement of U.S. workers. For example, there is no requirement to advertise open jobs or recruit U.S. workers before hiring exchange visitors, as is the case with the various H visa programs. Some J-1 subcategories explicitly prohibit placing J-1 workers in positions instead of U.S. workers; however, there is no specific guidance for sponsors on how to manage or enforce this prohibition,[54] even as

many advocates claim that J-1 wages undercut local wage markets.[55] Furthermore, even representatives of the Department of State have acknowledged that there is no mechanism in place to monitor and enforce provisions that disallow sponsors displacing U.S. workers with J-1 visa holders.[56]

II. J-1 Workers – Data Transparency

A. Overview

Both the Departments of State and Homeland Security maintain data about J-1 workers. Close to 300,000 new J-1 visas are issued each year. Some J-1 programs span more than one year, while some have a much shorter duration of just several months. The number of individuals in "active J-1 status" at any one time fluctuates between approximately 160,000 and 220,000 depending on the time of year. The subcategory with the most participants is summer work travel, followed by high school and university students, and then scholars. J-1 workers come to the U.S. from all over the world, with most coming from European nations. China is the largest sending country for J-1 workers, followed by the United Kingdom, Germany, Brazil, and France. Even though the U.S. government possesses detailed information on individuals who work with J-1 visas, including their age, gender, country of origin, program category and place of employment, this information is not publicly available.

B. The Number of J-1 Exchange Visitors in the U.S.

1. U.S. Department of Labor

USDOL does not have any role in the administration of the J-1 visa program. As such, it neither collects nor maintains data regarding the number of J-1 workers present in the United States.

2. U.S. Department of State

DOS publishes select J-1 data on its interactive J-1 visa website.[57] including the number of sponsors and workers per category and the destination states for each category.[58] Statistics for J-1 visas are also found on a multi-year spreadsheet for all nonimmigrant visas (NIV) issued by nationality, which is published on the general DOS website.[59] The numbers for 2018 (the most recent year for which data is available from both sources) listed in each of these sources, however, do not match up. The interactive website indicates that 330,536 J-1 visas were issued,[60] whereas the nonimmigrant visa (NIV) detail table shows a total of 342,639 J-1 visas.[61] The reason for this discrepancy is not apparent.

a) J-1 Category numbers

DOS publishes the number of participants who received a visa in each exchange visitor category on their j1.gov website. Of the fourteen categories, Summer Work Travel was the largest at 104,512 participants in 2018.[62] Students comprised the second largest type

J-1 Visas Issued by Subcategory

VISA TYPE, YEAR	2016	2017	2018
Alien physician/ physician	2,623	2,830	2,738
Au Pair	19,233	20,353	20,678
Camp Counselor	22,991	24,868	24,919
Government Visitor	5,299	4,743	4,997
Intern	25,202	26,075	26,112
International Visitor	5,273	6,256	6,360
Professional & Research Scholar*	37,445	36,363	35,627
Short term scholar	19,928	19,730	18,885
Specialist	1,327	1,354	1,350
College & University Students**	46,766	46,692	46,722
Secondary Student	23,904	22,953	23,527
Summer Work Travel	101,054	104,921	104,512
Teacher	2,662	2,867	3,252
Trainee	10,751	10,885	10,857
TOTAL	**324,458**	**330,890**	**330,536**

*Prior to 2018, Professor and Research Scholar did not include separate numbers for each visa type. In 2018, 1,074 visas were issues to professors and 34,553 issues to research scholars.
**The totals in 2016 and 2017 include foreign nationals that began a cultural exchange in pursuit of Associate, Bachelors, Masters, Doctorate, Non-Degree, and Student Intern programming. In 2018, the DOS began reporting the numbers by type of degree sought instead of the general "college and university program." For the email detailing this breakdown, please see the document titled Justice in Motion mail - J-1 Visa Facts and Figures inquiry (pdf)

Statistics from: https://j1visa.state.gov/basics/facts-and-figures/

of J-1 exchange visitors: high school and university students combined totaled 70,249 participants. Scholars were the third largest group when the professor, research and short-term scholar subcategories were combined, amounting to 54,512 visas issued. The intern and trainee subcategories together totaled 36,969 participants.

3. U.S. Department of Homeland Security

DHS annually publishes the number of admission events rather than the number of individuals who have been approved for a certain immigration status.[63] Each time a nonimmigrant enters the United States, DHS's Customs and Border Patrol counts the entry as an admission. One single individual may be counted many times over in this total count because each admission is counted. Because J-1 exchange visitors may return to

J-1 Numbers at a Glance

AGENCY	DATA COLLECTED	FY15	FY16	FY17	FY18
U.S. Department of Labor	No data collected	---	---	---	---
U.S. Department of State*	Number of J-1 visa applications approved and visas issued to foreign workers at U.S. Consulates abroad	339,712	343,811	342,639	353,279
U.S. Department of Homeland Security – U.S. Customs and Border Patrol**	Number of J-1 admissions and readmissions at the border with a I-94 entry document	502,372	513,905	523,864	537,705

*These number do not count Canadian J-1 workers because they are not required to apply for J-1 visas through the State Department; but they do get I-94s and are counted in the admissions number below. These numbers include workers who receive visas; receiving a visa does not mean that the worker in fact was admitted to the U.S. at the border or port of entry. Statistics on workers who are turned away at the border are not disaggregated by visa classification.

**Individuals may be counted more than once in the admissions numbers because some workers depart and re-enter the U.S. in the same year. First-time and repeat entries are not distinguished.All admissions are counted regardless if the J-1 worker was admitted on a new I-94 or a valid I-94 that was previously used.

Sources: See U.S. Department of State, Table XVI(B) Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards) Fiscal Years 2015-2019, available at https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2019AnnualReport/FY19AnnualReport-TableXVI-B.pdf(November 2015); U.S. Department of Homeland Security, Table 25 Nonimmigrant Admissions by Class of Admission: FYs 2009-2018, available at https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/yrbk_2018_ni_excel_final.zip (November 2019).

their home countries for holidays or vacations during the year, the number of J-1 admissions is much larger than the actual number of visitors.

A) U.S. Immigration and Customs Enforcement

U.S. Immigration and Customs Enforcement (ICE) is the DHS unit that oversees the Student and Exchange Visitor Program (SEVIS), the computer system that tracks the whereabouts and employment of all J-1 participants. ICE publishes SEVIS quarterly reports[64] showing the number of individuals in active J-1 status.[65] During the quarter ending in March 2018, there were 209,568 active J-1 exchange visitors in the United States. The numbers fluctuate throughout the year. For example, there are more J-1 exchange visitors present in the United States in the summer than in winter.

DIGGING DEEPER: SEVIS DATABASE

The Student and Exchange Visitor Information System (SEVIS) is the computer database that allows the U.S. government to track information about all foreign students and exchange visitors, including J-1 visa holders.[66] It was created in 1996 with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act.[67] The Student Exchange Visitor Program (under the umbrella of DHS, Immigration and Customs Enforcement) oversees SEVIS.

Through SEVIS, DHS collects information from sponsors relating to J-1 exchange visitors while they are present in the United States. SEVIS is a web-based tracking and monitoring system that

enables sponsors to electronically submit information throughout the participant's stay. Sponsors are required to update information on SEVIS about "status events" such as the J-1 exchange visitor's entry to and exit from the U.S., current address, program extensions, current employment, or other changes.[68]

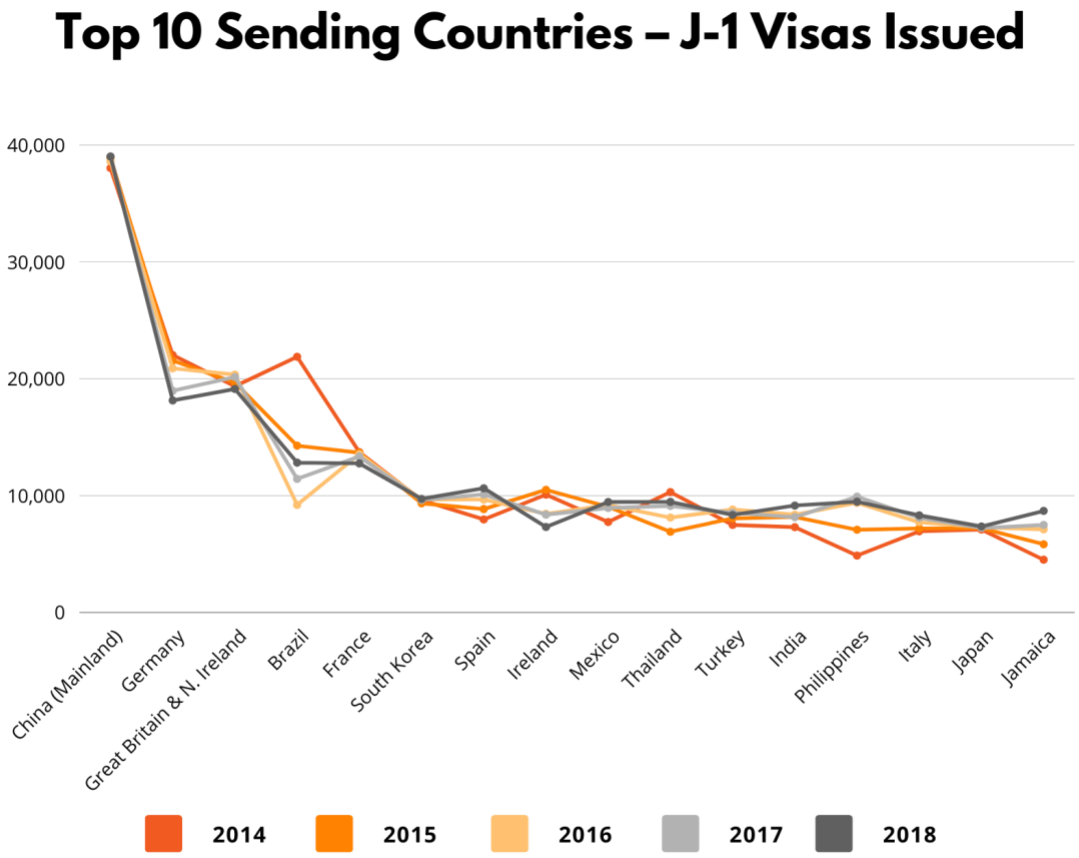
The general public does not have access to the information on SEVIS; however, DHS publishes select statistics from SEVIS on a quarterly basis. Quarterly reports include the number of J-1 exchange visitors in active status during a particular time frame but do not list the breakdown of the number per category. For example, during the quarter ending in March 2018, there were 209,568 individuals in the U.S. in active J-1 status but no indication of how many individuals were in each of the fourteen categories.[69] A more comprehensive picture of the J-1 workforce would emerge with regular publication of the wide-ranging SEVIS data that ICE collects and maintains.[70]

C. J-1 Exchange Visitor Demographics

DOS issues the most J-1 visas to workers from Europe and Asia. In 2018, European nations accounted for 152,255 J-1 visas and Asian countries 106,983.[71] The entire rest of the world received just 83,401 J-1 visas.[72] China is the single largest sending country for J-1 workers, with 39,010 visas issued. The next largest sending countries are the United Kingdom, Germany, Brazil, and France. DHS also publishes the nationality of persons admitted, along with their visa classification. However, because DHS counts admission events rather than individuals, those numbers obscure the picture of which countries send the most J-1 exchange visitors to the United States. To illustrate this point, Canadians had 31,002 admissions for J-1 workers in 2017.[73] This number of admissions may simply reflect that Canadian J-1 workers leave and re-enter the U.S. many times during one year. Indeed, if the individual lives near the border, it is possible that he or she is entering almost daily. So, while the flow of J-1 exchange visitors from Canada is high, that doesn't necessarily mean that the most exchange visitors are from Canada. Nevertheless, nonimmigrant admission numbers track the same source-countries DOS counts as sending the most exchange visitors: China, the United Kingdom, Germany, Canada, France, and Mexico. Neither DOS nor DHS breaks down nationalities for the nonimmigrant visa issuances and admissions for J-1 exchange visitors by program category.

DIGGING DEEPER: DEPARTMENT OF STATE DATA ON NATIONALITY NOT BROKEN DOWN BY J-1 SUBCATEGORY

DOS data on nationality is not broken down by J-1 program category. In other words, it is hard to know which nationalities are represented in each particular type of J-1 subcategory. However, looking at the issuance of J-2 visas alongside J-1 visas may illuminate the demographics in certain subcategories. There is a presumption that J-1 workers participating in the summer work travel, au pair, and camp counselor subcategories will not have dependents following to join them with J-2 visas. There are several top ten sending countries, such as the United Kingdom, Northern Ireland and Thailand, which have a J-2/J-1 ratio of less than 2%.[74] This may indicate that those countries have a high likelihood of being the countries of origin in those subcategories.



Source: U.S. Department of State, FY 1997-2018 NIV Detail Table, available at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html (October 2019).

1. Age and gender of J-1 exchange visitors per subcategory is not public

The federal government knows the number of J-1 exchange visitors that are present in the U.S. at any given time, their program category, nationality, gender, age and other information. All of this is listed on Form DS- 2019 and contained in the SEVIS computer database. Furthermore, sponsors have a continuing requirement to report their exchange visitors' program category, biographical information, and program sites or places of employment.[75] Because DHS maintains this information in SEVIS, the age of interns and where they are employed, for example, is known to the government, as is the gender and nationality of students participating in the Summer Work Travel subcategory. However, DHS does not publish this information.

DHS's annual Yearbook of Immigration Statistics, however, offers supplemental data tables that reveal the gender and age range of selected visas.[76] Even so, because the visa data is grouped together – J-1 with the J-2s, as well as with the F and M nonimmigrant visas, it is impossible to determine the age or gender breakdown of J-1 exchange visitors at all, much less by program category.[77]

D. J-1 Host Employer Demographics

As mentioned above, through SEVIS, both DOS and DHS collect the names of employers who hire J-1 exchange visitors: sponsors must report the "site of activity" both on the DS-2019 and in SEVIS.[78] All locations where the individual will spend any part of the exchange programs must be listed and updated. However, this information is not public. DOS lists data on its website showing states where exchange visitors are destined but offers no information about the actual "sites of activity" or places of employment.

III. The Rights of J-1 Workers

A. Overview

J-1 exchange visitors' employment rights may be enforced by any of the federal and state agencies in charge of enforcing employment and civil rights laws, or through private counsel in their own lawsuits. USDOL has jurisdiction when any covered employee – including a J-1 exchange visitor -- claims there has been a violation of federal wage and hour laws. Likewise, if there is any sort of discrimination and Title VII is implicated, then the Equal Employment Opportunity Commission has jurisdiction. State agencies customarily have the authority to enforce any applicable state laws.

To the extent that there is an employment contract or a violation of a federal or state statute allowing a private lawsuit, J-1 workers may bring their own cases to enforce rights in federal or state court, just like any other U.S. worker. The J-1 program regulations themselves do not give DOS authority to sanction employers who violate employment laws and do not provide a private right of action for workers to enforce their own rights through a civil lawsuit.

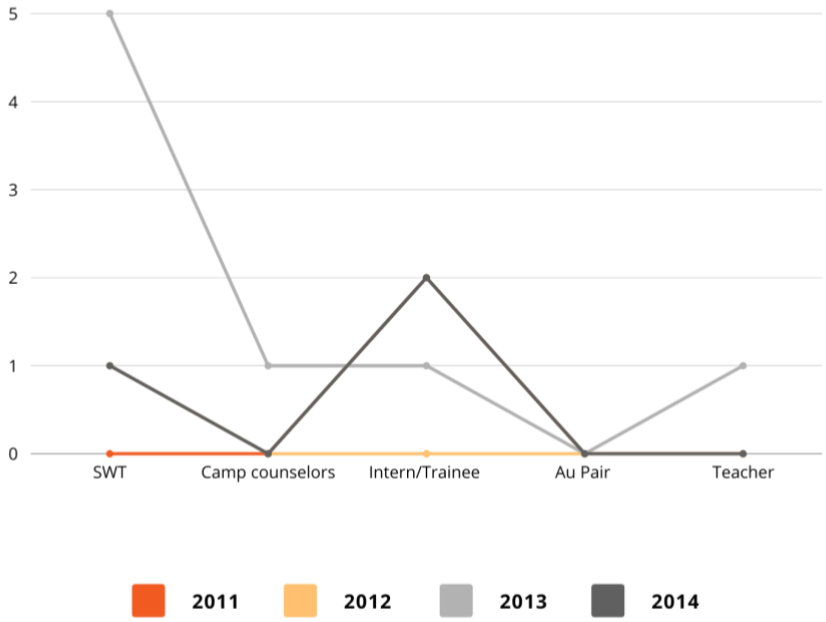
B. U.S. Department of State

Employers or third-party recruiters who violate the law do not fall within the jurisdiction of DOS and thus do not face any possible sanction from the agency.[79] DOS does have the authority, however, to sanction or decertify sponsors who are found to have violated program rules. Even so, DOS's system for monitoring J-1 sponsors relies almost entirely on sponsor self-enforcement combined with complaint-driven investigations. The J-1 regulations across these categories do not themselves refer to DOS needing to take affirmative efforts to monitor or investigate sponsors and employers.

In 2005, the Government Accountability Office (GAO) found that DOS lacked the staff to routinely conduct site visits.[80] Since then, DOS has created a compliance office and launched a complaint database.[81] In February 2015 DOS's J-1 Visa Exchange Visitor Program's Office of Private Sector Exchange Administration announced that it would begin performing site visits to many J-1 employers.[82] Additionally, the Office of Private Sector Exchange Administration has created multimedia material on participant safety and security, and about how program sponsors, exchange visitors, and others can identify and report incidents and complaints.[83]

DOS may sanction any J-1 sponsor that violates or fails to comply with the regulations, commits an act of omission that could "have the effect of endangering the health, safety, or welfare of an exchange visitor" or otherwise undermines the foreign policy objectives or national security interests of the U.S., or brings the "Exchange Visitor Program into notoriety or disrepute."[84] DOS may issue a written reprimand and/or corrective action plan, place the sponsor on probation, reduce the sponsor's authorized number of exchange visitors by up to 15% or more, suspend a license, and revoke or deny a sponsor's application for re-designation.[85]

J-1 Department of State Sanction Chart



Source: U.S. Department of State, Sanctioned Sponsors, available at http://j1visa.state.gov/wp-content/uploads/2014/09/Closed-Sanction-cases-2006-to-Date-Master_Final-2.pdf (March 2015).

1. DOS SANCTIONS AGAINST SPONSORS

From 2006 through February 2014, looking across six subcategories of J-1 visas, DOS sanctioned a sponsor 32 times. DOS has not sanctioned a sponsor of the au pair program since 2006. Only one camp counselor sponsor was sanctioned for keeping poor SEVIS records. Nine trainee and intern sponsors were sanctioned; all received a letter of reprimand for poor record keeping, the lightest possible sanction, according to the most recent list. A previous accounting included a sponsor that was terminated in 2011 for unknown reasons. The vast majority of sponsors who are sanctioned and then apply for re-designation are approved.[86] DOS responded to 2019 requests for updated sanction information by stating that they don't currently share this information but that they plan to sometime in the future.[87]

2. SPONSOR SELF-ENFORCEMENT

Under DOS regulations, all J-1 sponsors regardless of category must monitor the exchange visitor's participation in the program.[88] Among other things, the sponsor must monitor the progress and welfare of exchange visitors and ensure that the activity in which the exchange visitor is engaged is consistent with the information on the DS-2019.[89] The sponsors are explicitly prohibited from retaliating against exchange visitors who make adverse comments about the program or who file complaints about any work related matter.[90]

> No sponsor or employee of a sponsor may threaten program termination, remove from the program, ban from the program, adversely annotate an exchange visitor's SEVIS record, or otherwise retaliate against an exchange visitor solely because he/she has filed a complaint; instituted or caused to be instituted any proceeding; testified or is about to testify; consulted with an advocacy organization, community organization, legal assistance program or attorney about a grievance or other work-related legal matter; or exercised or asserted on behalf of himself/herself any right or protection.[91]

Even so, only a few categories' regulations mention how to make sure the program is running smoothly for workers. For example, the summer work travel program category requires sponsors to personally communicate with each participant every month.[92] If sponsors become aware of serious problems or controversies involving exchange visitors, including potential litigation related to the program, they are required to inform DOS "on or before the next business day by telephone."[93] Additionally, in all categories, sponsors are required to submit an annual report to DOS through SEVIS on Form DS-3097.[94] The annual report must include a program report and evaluation including, among other things, a summary of any program difficulties and a description of the cross-cultural opportunities provided.[95]

While many advocates reasonably expect that these rules place "the onus on sponsors to report problems involving mistreatment of J-1 participants, in reality"[96] sponsors may have a disincentive to report employer noncompliance. A sponsor could invite an audit and damage "the business relationship between sponsors and employers," which usually endures throughout the stay of various cycles of exchange visitors.[97]

3. Critiques Of Department Of State Oversight

Weaknesses with DOS's J-1 oversight responsibility have been documented over decades, including lack of staff, poor management and lack of funds for enforcement. A study from 1990 found that the government "does not adequately coordinate the program."[98] Ten years later, the Inspector General warned that "lax monitoring" created an atmosphere in which companies "can easily" ignore or abuse the regulations, and it found "widespread violations" of the regulations. Moreover, the DOS unit in charge of the program could not "effectively administer and monitor the Exchange Visitor Program."[99] That was still a problem in 2005, when another GAO report criticized DOS for its minimal monitoring and inadequate sanctions.[100] This long-standing criticism has led some advocates to conclude that the "State Department is in a precarious position to meaningfully defend worker's rights, lacking both the enforcement capacity and investigative expertise that such controversial cases may require."[101] In 2019, labor rights advocates argued that the Summer Work Travel program in particular is a work program, and should be regulated as one.[102] Indeed, others have called for Congress to authorize the Department of Labor to take over enforcement of the J-1 visa regulations.[103]

Some scholars argue that the weak labor protections of the J-1 visa program are particularly troubling given the State Department's anti-trafficking mandate:[104]

> Not only does the Department of State risk being viewed as compromised for its simultaneous management of a labor program with a history of labor abuses, but it also jeopardizes strategic partnerships between U.S. and foreign partners in the fight against trafficking. The Department of State's conflicting role as anti-trafficking leader and J-1 visa program administrator could well harm cooperation with key J-1 visa participant source country governments, particularly in delicate situations involving the sharing of intelligence with foreign law enforcement or when attempting to facilitate the extradition of traffickers or safe repatriation of trafficking victims. Its conflicting role also challenges the State Department's relationships with key anti-trafficking allies in the U.S. While the Department of State Trafficking in Persons Office and U.S. anti-trafficking advocates have worked collaboratively on many projects, including an international visitors program facilitated by the Department of State to mutually share best practices, advocates may find themselves at odds with the Department of State when confronted with clients who suffered abuse as J-1 participants and have little recourse as a result of Department of State's minimal regulations, apparent inability to provide oversight and limited data tracking and collection system.[105]

DIGGING DEEPER: DOS ADMINISTRATIVE PROCEDURES ACT EXEMPTION

"The process by which the State Department creates, modifies and enforces" the J-1 program lacks transparency.[106] As a foreign affairs agency, DOS is exempt from the rulemaking portions of the Administrative Procedures Act (APA), which is the federal law outlining the obligations of federal government agencies to inform the public of their actions.[107] DOS contends it is authorized to create any J-1 visa category consistent with fostering cultural and educational exchange and does not have the legal obligation to seek input from other federal agencies or the public prior to rules taking effect.[108]

C. U.S. DEPARTMENT OF LABOR

USDOL is in charge of enforcing at least two federal laws that may provide employment rights to J-1 workers: The Fair Labor Standards Act (FLSA) and the Occupational Safety and Health Act. While USDOL has not played a significant role in enforcing the FLSA rights of J-1 workers, the agency has, on occasion, stepped up to investigate and fine employers. For example, in February 2014 USDOL found that a McDonald's restaurant owner violated the FLSA and required him to pay $205,977 in back wages to 291 employees, 178 of whom were J-1 foreign student workers.[109] In another case in March of 2015, the USDOL found that an event planning business in Hawaii paid Japanese J-1 trainees as little as $4 per hour. The employer paid $35,000 in back wages

and damages to the affected workers.[110] The problem with sole reliance on USDOL for enforcement of labor rights is that the agency is limited to enforcing particular labor laws such as the FLSA and specific J-1 workers may be exempt from FLSA because of the nature of the employer or the type of work.

D. Private Lawsuits

J-1 workers may enforce their employment and civil rights by filing litigation in federal or state court as allowed by law. As is the case with all temporary foreign workers, it may be a challenge to find a lawyer willing and able to represent clients who are bound to return home once their work visas expire.

1. Labor Rights

If J-1 workers are owed minimum or overtime wages under the Fair Labor Standards Act (FLSA), any applicable state wage laws, or under an employment contract, they may file a lawsuit and depending on the case, on behalf of all similarly situated workers.[111] In a FLSA case from 2012, J-1 workers claimed minimum wage violations based on the failure to reimburse pre-employment expenses that were for the benefit of the employer.[112] The employer argued that the J-1 regulations limit the remedies available to workers and that only the sponsors are responsible because the regulations do not extend to the companies where the workers are placed.[113] The district court did not agree with the employer and found that the regulations did not preclude J-1 workers from seeking damages under the FLSA through their own federal lawsuit.[114]

a) Joint employment

A J-1 sponsor's duties with respect to the creation and monitoring of the employment relationship between the worker and the employer in some cases may render the sponsor a joint employer with the actual employer. However, one district court that dealt with the issue in the J-1 context decided that there was no joint employment relationship under the FLSA because the sponsor did not exercise enough management control over the workers.[115]

b) Retaliation prohibited

The FLSA contains an important anti-retaliation provision, which applies to "any person."[116] To wit, it is "unlawful for any person ... to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under [the FLSA] . . . ."[117] A person is defined as any "individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons."[118] Therefore, when J-1 workers complain about violations of their FLSA rights both the employer and the sponsor would be prohibited from retaliating against them.[119]

2. Access to justice

Finding a lawyer may be difficult for J-1 workers due to language barriers, cultural differences, geographic isolation, and for some subcategories, the duration of their time in the United States. Moreover, because many J-1 workers are placed in low-wage jobs and the duration of their job is relatively short, the amount of money owed may be small

in comparison to the cost and complication of transnational litigation. If there are a large number of workers with the same claims, it may be possible for an attorney to pursue a collective or class action lawsuit, making the effort more fruitful.

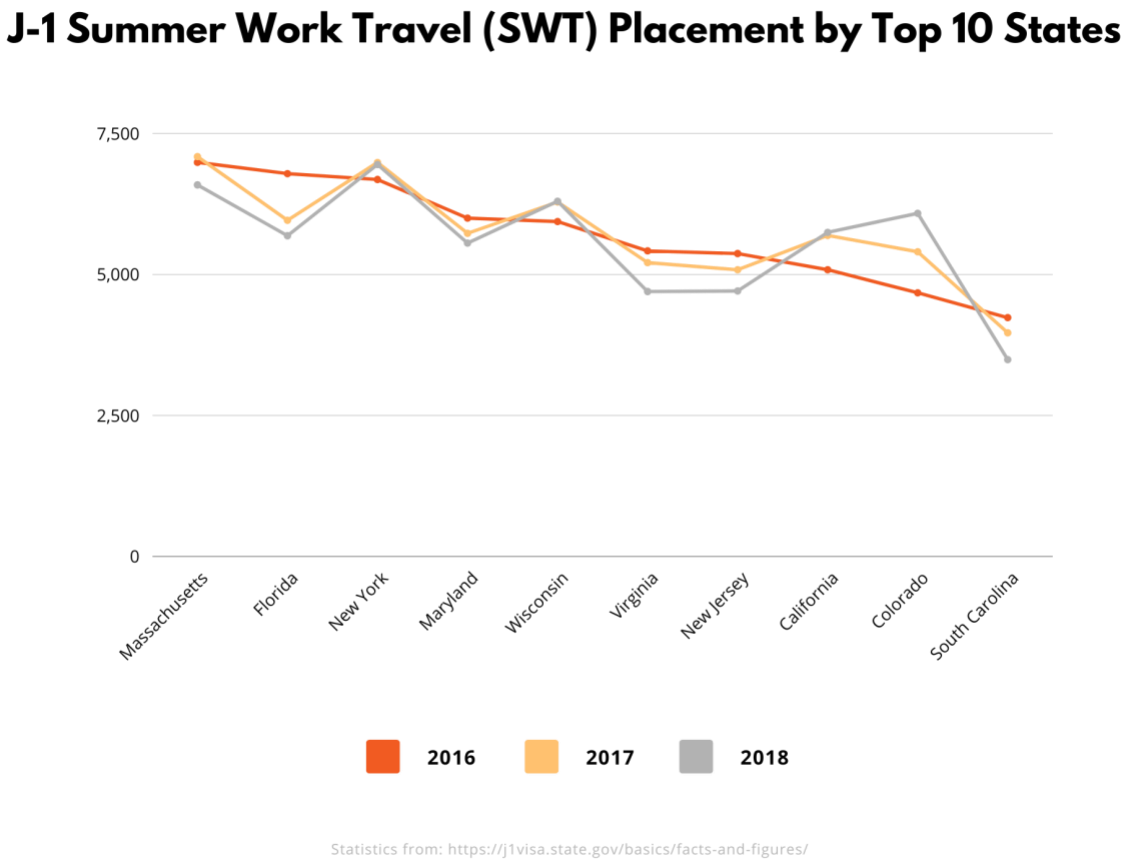
A) FEDERALLY FUNDED LEGAL SERVICES

Federally funded legal services organizations offer free representation to clients but may only help certain classes of foreign individuals with certain types of disputes.[120] In most cases, J-1 exchange visitors will not be eligible. There are exceptions to this if the individual is a victim of domestic violence, human trafficking or another crime.[121] Some of the categories, such as SWT and camp counselors, have such short program durations that the money damages suffered may pale in comparison to the cost of pursuing litigation for workers who will not be able to stay in the United States. Seeking legal redress for labor and other violations can prove difficult however, as access to legal counsel can be scarce partly because J-1 workers are ineligible to receive federally funded legal services to help them address legal questions.[122] The problem of seeking portable justice looms large.

IV. SUMMER WORK TRAVEL

A. OVERVIEW

Summer Work Travel (SWT) is a J-1 subcategory for foreign college and university students which provides the opportunity to experience U.S. culture.[123] As its name implies, this experience includes both work and travel. Though one of the program's stated goals is providing a cultural experience to its participants, the principle activity of J-1 visa holders in the SWT program is providing low wage services.[124] The regulations specify that the work component should be in a job that requires minimal training and is "seasonal or temporary" in order to earn funds to help defray a portion of the exchange visitor's expense.[125] The Summer Work Travel category has an annual cap of 109,000 J-1 visas per year.[126] In 2018, there were 104,512 participants in the J-1 SWT category.[127]



B. EXCHANGE VISITOR REQUIREMENTS

To qualify for the program, students must be proficient in English; enrolled full-time at an accredited post-secondary, classroom-based, academic institution physically located outside the United States; and must have successfully completed at least one semester.[128]

Under SWT, students may work in the U.S. for up to four months during their vacation break between academic years.[129] As with the other J-1 categories, an applicant's first step is to find a sponsor. Students submit their visa applications directly to a U.S. consulate or embassy post abroad. In 2010, DOS initiated a complaint intake system. Sponsors must provide J-1 workers under the SWT category with phone numbers to complain to their sponsors as well as the Wilberforce Pamphlet on the Rights and Protections for Temporary Workers.

C. Sponsor Obligations

As with all the J-1 categories, sponsors administer nearly every aspect of the program. Sponsors must recruit, screen and select the foreign students to participate; provide participants with orientation prior to leaving their home countries; place participants in jobs; regularly monitor the students' participation; [130] promptly inform DHS via SEVIS when there are changes in the students' whereabouts; and confirm that host employers are meeting their program obligations too. In 2018, there were 48 designated SWT program sponsors.[131]

1. Third parties

SWT program sponsors depend on third parties – both in the U.S. and abroad – to assist in fulfilling core programmatic functions. However, much is unknown. With regard to the sponsors' overseas agents and partners who screen foreign participants outside of the U.S., we only know that in 2011, they numbered approximately 960.[132] DOS does not provide updates on the number of any of these necessary third parties in any systematic way.[133]

Domestic organizations may assist with promoting mutual understanding (i.e., providing opportunities for participants to engage in cultural activities), while host employers offer job placement for the students and must pay them according to work agreement terms and applicable employment laws.[134]

Even though third-party entities are necessary to the functioning of the J-1 SWT program, the regulations do not apply directly to them. Instead, as fully described below in this section, the sponsors are responsible for conducting due diligence in vetting all third parties, sometimes obtaining written and executed agreements, and establishing internal controls to be certain that obligations are met.[135]

a) Foreign recruiters

Sponsors have a number of responsibilities with respect to foreign entities that may help with screening workers and providing orientation. Sponsors must annually review business licenses; check for pending legal actions, bankruptcies or complaints; and obtain criminal background checks on all owners and officers, written references from three current business associates, a notarized copy of recent financial statements, and any advertising materials used to recruit workers. Sponsors also need to summarize each foreign partner's experience facilitating aspects of the J-1 program.[136]

1) Recruitment materials

Sponsors must keep copies of all foreign recruitment materials in their original language together with a copy translated into English.[137] DOS explained the rationale for this rule in the background notes accompanying the 2012 final interim rule:

> The foreign entities' initial outreach to potential program participants sets the stage for participants' expectations about the Summer Work Travel Program. Sponsors must be aware of what the foreign entities are posting on web sites, communicating through social media, and distributing in printed materials to ensure the information conforms to the purpose and intent of the program and meets regulatory requirements. It is important, for example, that the cultural exchange aspects of the program are accentuated, and that students' expectations about how much money they can earn are realistic.[138]

2) Sponsor contracts with foreign recruiters

Additionally, sponsors must obtain written and executed agreements with any foreign entity that is working with the sponsor. These agreements must:

- Outline the obligations of and the full relationship between the parties;
- Delineate responsibilities;
- Include price lists for the program marketed by the sponsor and itemize all costs charged to participants;
- Affirm that the foreign entity "will not engage in, permit the use of, or otherwise cooperate or contract with other third parties . . . for the purpose of outsourcing any core programmatic functions of screening and orientation covered by the agreement;" and
- Confirm that the foreign entity will neither pay nor provide incentives to employers in the U.S. to accept program participants for job placements.[139]

The requirement for sponsors to itemize the costs that participants must pay to participate in the SWT program went into effect in 2012.[140] DOS was concerned about the exorbitant costs that some program participants had allegedly been paying to work in minimum wage jobs.[141] Indeed, the purpose of the rule is to "protect participants, sponsors, and the integrity of the program."[142] However, while recruiters are now required to reveal the amount of recruitment fees, the DOS's regulatory framework does not limit the fee amounts.

DIGGING DEEPER: THE FOREIGN ENTITY REPORT

Sponsors must electronically report to DOS certain information pertaining to all active foreign agents or partners on the Foreign Entity Report. This report is maintained by DOS as a SharePoint site which lists the designated U.S. sponsors and their affiliated local, third-party agents/recruiters in each country where they are located.[143] Sponsors are required to reveal names, contact information, physical and mailing addresses, telephone numbers, and email addresses, and then update the report with any changes in information.[144] The regulations further mandate that: *Sponsors must utilize only vetted foreign entities identified in the Foreign Entity Report… and must inform the Department promptly when and why they have canceled contractual arrangements with foreign entities.*[145]

Sponsors must annually update the records and credentials of the foreign entities.[146] U.S. diplomats and foreign service officers abroad are instructed to "share information about misconduct by local [foreign] third-party entities with the Office of Fraud Prevention Programs (FPP), the Post Liaison Division (CA/VO/F/P), and the ECA Office of Coordination and Compliance so that ECA can review and take appropriate action."[147] Indeed, the "designated U.S. sponsor could lose its authorization to be an exchange visitor sponsor if inappropriate or illegal practices are discovered."[148]

B) DOMESTIC THIRD-PARTY RECRUITERS

Sponsors must take care to choose only reputable individuals or organizations that have liability insurance to assist with cultural understanding opportunities.[149] If the entity is a registered business, the sponsor must make direct contact to verify the business owner and contact information for the manager, confirm that it is a viable business entity utilizing publicly available information, and obtain copies of the business license.[150] Written agreements between sponsors and any U.S. partners must outline the obligations and full responsibilities of the parties and delineate the parties' respective responsibilities.[151]

C) HOST EMPLOYERS

Sponsors have to vet all host employers to confirm they are legitimate and reputable businesses.[152] The regulations require sponsors to directly contact employers to verify contact information, obtain and verify an employer's tax identification number, obtain copies of their business license and workers' compensation policy, and utilize publicly available information to confirm that jobs will be at reputable business entities.[153]

Furthermore, sponsors must check the number of job placements available, be certain that employers have not experienced layoffs in the past 120, days do not have workers on lockout or strike, and determine that the placement of SWT participants will not displace U.S. workers.[154]

2. JOB PLACEMENT

Sponsors must screen all job placements for SWT participants by verifying the terms and conditions of employment and vetting the employers.[155] Sponsors are responsible for confirming both initial jobs that are directly placed by the sponsor prior to the participant's arrival as well as additional or replacement jobs that participants may obtain once they are in the United States. Sponsors must vet all new host employers within 72 hours after the participant arrives in the United States and identifies a job.[156]

When DOS updated the J-1 SWT rules in 2012, the agency reaffirmed that sponsors' core function is matching participants with job opportunities. Sponsors may not delegate job placement to a third-party recruiter. While another recruiter may provide "leads for potential jobs," only the sponsor may determine the suitability of a placement.[157] Given the ancillary role that recruiters may play in job placement, however, the regulations prohibit both sponsors and recruiters from giving incentives to host employers for accepting the exchange visitors they sponsor.[158] Despite this prohibition, critics report that sponsors "pay employers with large job orders to travel abroad for SWT recruitment fairs", a practice that is essentially "an employer kickback".[159]

A) Types of jobs

SWT participants may only work in jobs that are seasonal and temporary in nature and that provide opportunities for regular interaction with U.S. citizens to allow for experiencing U.S. culture.[160] Employment is seasonal if the "required service is tied to a certain time of the year by an event or pattern" and additional workers are needed beyond usual levels.[161] Employment is temporary if an "employer's need for the duties to be performed is a one-time occurrence, a peak load need, or an intermittent need. It is the nature of the employers' needs, not the nature of the duties that is controlling."[162] However, sponsors may not place participants with employers seeking to fill non-seasonal and non-temporary jobs with exchange visitors who have "staggered vacation schedules."[163]

Sponsors need to make certain that participants have opportunities to "work alongside U.S. citizens and interact regularly with U.S. citizens to experience U.S. culture during the workday."[164] Indeed, "sponsors must consider the cultural component in all placement decisions."[165] Sponsors are required to use caution to not match SWT students in jobs "frequently associated with trafficking in persons."[166] Sponsors may place participants with staffing agencies only when that agency is the employer and pays the participant, provides on-site job supervision, and effectively controls the work site.[167]

1) Prohibited jobs

Some specific jobs are specifically banned by the SWT regulations. The list of off-limits positions include: positions in private homes; jobs related to clinical patient care, any position in the adult entertainment industry; jobs that require work hours at night; jobs declared hazardous to youth, jobs that are substantially commission-based; any position involved in gaming or gambling, pest control, distribution centers, traveling fairs; any position where there is another specific J category, such as camp counselors; and any position in agriculture, forestry, fishing and hunting, mining, quarrying, and oil and gas extraction, construction and manufacturing.[168]

DIGGING DEEPER: ALASKA FISHERIES

J-1 Summer Work Travel participants are no longer allowed to work in Alaska's seafood processing industry. For many years, fisheries had been hiring foreign workers through SWT, despite high youth unemployment rates in the U.S.[169] Among other problems, many sponsors and employers

had been taking advantage of the work component of the Summer Work Travel program to the complete exclusion of any cultural activities. For example, a recruiter for Leader Creek Fishing, a fish processing company in Nakenak, Alaska, bluntly told prospective student workers that they must be able to work "up to 16 hours a day" and that "there's really nothing to do in Nakenak, other than work."[170]

The timing of the regulations banning SWT in fisheries was controversial. When DOS announced that the change would take place during the summer of 2012, the seafood industry and the entire Alaskan legislative delegation lobbied against the prohibition. These efforts emphasized the central importance of J-1 students in filling labor shortages. [171] According to Alaska Senator Lisa Murkowski, the industry did not "believe it could recruit U.S. workers in numbers to fill the void left by the loss of J-1 participants."[172] DOS recognized the hardship of the last minute rule and delayed its implementation until the summer of 2013.

B) Timing of Job Placement and Confirmation

Most participants will have a job in place prior to their travel to the United States. Whether a sponsor must prearrange a job depends on whether the participant's country of origin is counted among the countries in the Visa Waiver Program (VWP). The vast majority of SWT participants are nationals of non-VWP countries who must be placed in jobs in advance of their travel to the United States.[173]

Nevertheless, sponsors oftentimes match SWT workers from VWP countries with jobs prior to their departure. If a sponsor does not directly place a worker with a job prior to her departure, she may look for a job on her own once she arrives in the United States.[174] However, the sponsor must guarantee that VWP workers receive "information that explains how to seek employment and secure lodging" in the U.S. and clearly identifies the types of jobs allowed under the SWT program rules.[175] Workers notify the sponsors immediately after they find a job, and they cannot actually start work until the sponsor vets the host employer, which happens within 72 hours.[176] Furthermore, the sponsor must check that workers bring enough money with them to support themselves during their job search. If the worker does not find a job within a week, the sponsor will assist with the job search.

DIGGING DEEPER: VISA WAIVER PROGRAM

The Visa Waiver Program (VWP) allows nationals of certain countries to travel to the United States for tourism or business for a stay of up to 90 days without obtaining a visa.[177] The Department of State maintains a list of countries eligible for VWP.[178] For purposes of the J-1 SWT program, the VWP is only significant in that workers from listed countries need not be placed in jobs prior to their arrival in the United States: participants from VWP countries may find their own jobs.[179] This is the only difference between VWP and non-VWP SWT workers. Sponsors must still confirm and vet their jobs, however, to make sure host employers and students are following J-1 program rules.

C) Changing Jobs

In promulgating the 2012 rules, the Department of State explained that while "sponsors are required to make reasonable efforts to find replacement jobs for participants, under certain circumstances, it would be appropriate for sponsors to end (not terminate) programs of participants for whom subsequent suitable jobs cannot reasonably be arranged."[180] The distinction between ending and terminating a participant's program is

significant because participants who end the work portion of their programs early may travel in the U.S. before they return home, while those with terminated programs may not.[181]

3. Wages

SWT exchange visitors must be compensated at the applicable federal, state or local minimum wage, whichever is highest, including overtime pay if required, or the wages and benefits equal to what is paid to similarly situated U.S. employees.[182] If the wage rate is based on a piece rate measure, the hourly wages still must equal at least the highest required wage. If the exchange visitors do not earn that required wage while working on a piece rate basis, the employer must supplement earnings accordingly.[183]

When host employers provide housing or daily transportation, details of those arrangements must be made clear to the workers ahead of time. If the housing and transportation are considered part of the compensation package, the market value of the benefits must be clear. All deductions from wages must be detailed ahead of time and in compliance with the Fair Labor Standards Act (FLSA).[184] The FLSA requires that any deductions be voluntary and not include a profit to the host employer or "any affiliated person."[185] Sponsors should inform the workers of these rights and give appropriate assistance when issues arise.[186]

4. Host employer cooperation

Sponsors may place workers only with host employers that agree to do the following:

- Make a good faith effort to provide the number of hours of paid employment per week as identified on their job offers;
- Pay overtime when required under state and federal law;
- If housing and transportation are provided, provide "suitable and acceptable accommodations" and "reliable, affordable and convenient transportation;"
- Notify sponsors promptly when participants arrive and begin work, when there are any changes in the job placement, when participants are not meeting the job requirements, and when participants leave their placements early; and
- Contact sponsors immediately if there is an emergency involving a participant or any issue with health, safety or welfare.[187]

While the SWT program's integrity rests on host employers' paying their employees, labor law enforcement does not rest with DOS.[188] Sponsors must ensure that host employers fairly compensate SWT participants for their work.[189] The only federal government agency with express authority to regulate employers' compliance with federal labor law is the U.S. Department of Labor.

a) Sponsor oversight of host employer cooperation

Sponsors are required to, at minimum, have monthly personal contact with participants.[190] In order to confirm that participants are working sufficient hours, sponsors should inquire about their job satisfaction and financial state.[191] "If they are not earning enough money

to cover their basic expenses, it is incumbent upon the sponsors to assist in finding new or additional jobs."[192]

Sponsors should establish internal controls to ensure employers comply with the law and refer issues to other government agencies as necessary.[193] If a sponsor "has reason to suspect that a participant is not being compensated in accordance with Federal, State or local law, the sponsor must contact the appropriate authorities, including, but not limited to the U.S. Department of Labor's Wage and Hour Division."[194]

B) TERMS AND CONDITIONS OF EMPLOYMENT

SWT workers are employees at will unless they have an employment contract.[195] Sponsors are required to inform participants about the terms and conditions of the host employer's job offer to "ensure that the participants' expectations are in line with the jobs and conditions that they will encounter."[196]

5. CULTURAL EXCHANGE ACTIVITIES

Participants in SWT must be provided with the opportunity to "engage in cultural events outside of work."[197] Some examples of cultural exchange opportunities include attendance at community events and excursions to national parks, historical sites, major cities and scenic areas.[198] DOS has acknowledged that some sponsors, participants, and host employers lose "sight of the center cultural exchange focus" and that "solely work-based cultural exposure is insufficient."[199] Sponsors are responsible for planning activities that provide exposure to U.S. culture and may only delegate this core program function to domestic third-party entities that the sponsors have vetted.[200]

6. SPONSOR REPORTING REQUIREMENTS

Twice a year, sponsors submit to DOS a report of all job placements, including the workers' names, SEVIS identification numbers, nationalities, and all their host employers.[201] Sponsors annually report to DOS an itemized list of the costs that workers must pay to both foreign agents and sponsors to participate in SWT.[202]

Sponsors must update their list of foreign partners on the Foreign Entity Report whenever there is new information.[203] When a sponsor cancels contractual arrangements with an entity listed in the Report, it must disclose the reason.[204]

D. HISTORY OF WORKER EXPLOITATION IN SWT CATEGORY

In 2010, following media reports of J-1 students suffering employment abuse while on the job, there was a push for a thorough review of SWT from high-level government officials.[205] In 2011, the Department of State promulgated new SWT regulations to address concerns about worker exploitation – but many argued those regulatory changes did not go far enough.[206] The agency again revised the SWT rules and they took effect incrementally in May and November 2012.[207]

While worker advocates agree that the 2012 SWT rules improved protections for workers, some economists argue they were still inadequate.[208] As a 2014 Southern

Poverty Law Center publication[209] points out, the 2013 Department of State Trafficking in Persons report noted that the many weaknesses in the J-1 SWT program – including fraudulent job offers, inappropriate positions, and housing and transportation issues – "potentially facilitate human trafficking."[210]

In March 2015, the Government Accountability Office (GAO) also released a report on the SWT program.[211] The GAO found that while DOS had taken steps to protect SWT participants from abuse and the program from misuse in the 2012 SWT rules, more improvements were necessary to eliminate exorbitant participant program costs, improve transparency, and better empower DOS to enforce cultural exchange requirements.

DIGGING DEEPER: J-1 SWT LABOR EXPLOITATION

In the summer of 2011, nearly 400 J-1 workers arrived at a Hershey's chocolate plant in Pennsylvania from countries as diverse as China, Ghana, Ukraine, and Turkey.[212] Despite the cultural exchange purpose of the J-1 SWT program, the students at Hershey labored under isolated conditions, lifting boxes weighing 60 pounds every few seconds, often through the night. They were housed in overcrowded apartments and earned approximately $1 to $3.50 per hour due to deductions for rent and other exorbitant fees.[213] The Hershey case echoed the abuses uncovered the previous year by an Associated Press investigation.[214] In that investigation, nearly 70 SWT participants in ten different states were interviewed. Most expressed frustration. The reporters uncovered cases of students forced to turn to homeless shelters or churches for free meals.[215] These events were not an anomaly. Indeed, many cases failed to attract public attention because of threats of termination and deportation by sponsors and employers. For example, six Russian students were fired from their lifeguard jobs at condominium swimming pools after they complained about illegal wage deductions, including excessive housing fees.[216] Another student from Ukraine testified before Congress in 2007 that instead of waitressing and taking English classes in Virginia as she had been promised, she was forced to work in a strip club in Detroit.[217]

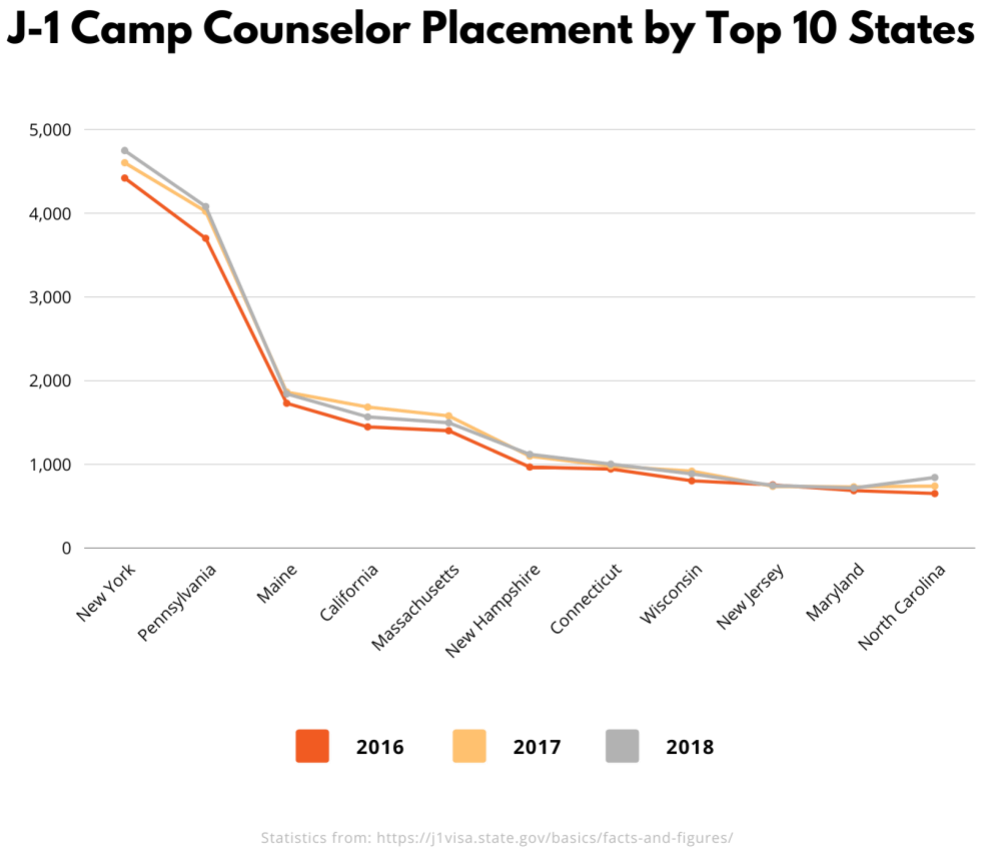
The 2014 report by the Southern Poverty Law Center cited numerous cases in which students contracted through the J-1 SWT program were forced to work brutally long schedules engaged in manual labor for minimal pay and made clear that the program's lack of oversight virtually eliminated wage protections for these workers. For example, one student from Peru received weekly wages under $200 to clean motel rooms 67 hours a week after exorbitant housing deductions.[218] In 2013, a group of J-1 students staged a strike outside the Harrisburg, Pennsylvania McDonalds franchise where they were employed. One of the organizers, a student from Argentina, explained that after going into debt to pay the $3,000 in fees to get the J-1 visa, he and seven other students were crammed into a tiny basement, charged $300 a month for those cramped living quarters, only given 25 hours of the 40 hours of work they were promised, and threatened with deportation if they complained.[219]

A 2019 critique of the J-1 SWT program by the International Labor Recruitment Working Group (ILRWG) highlighted cases of abuse and exploitation.[220] The report looked at a data set for all SWT participants in 2015. In addition to underscoring the above mentioned cases, the report stressed abuse in Minnesota (farm owner in Minnesota, who employed both H-2A and J-1 workers, was ordered to pay back unemployment taxes,[221] stolen wages,[222] and was sent to prison[223]), Florida (business owner was 30 years in federal prison after recruiting two J-1 SWT participants to work in a yoga studio then forcing them into prostitution[224]), and Oklahoma (SWT workers filed suit alleging illegal pay, unfair pay deductions, and threats of physical and financial harm[225]). These cases illustrate the precarity of J-1 SWT workers' rights in an enforcement and accountability system that DOS has conceded to sponsor organizations.

V. CAMP COUNSELORS

A. OVERVIEW

The J-1 exchange visitor program has a subcategory designated for camp counselors.[226] Participants must be at least 18 years old and be a college student, youth worker, teacher or possess special skills. The maximum duration of employment is four months. The Department of State publishes only rudimentary information about the camp counselor program. In 2018, 24,919 camp counselors were granted J-1 visas. The states with the most J-1 camp counselors were New York, Pennsylvania, Maine, California and Massachusetts. With the exception of California and Wisconsin, the top ten states for camp counselors were all in the eastern portion of United States.[227]



Statistics from: https://j1visa.state.gov/basics/facts-and-figures/

B. SPONSOR OBLIGATIONS

The Department of State has designated 469 sponsors to place camp counselors in jobs throughout the United States.[228] Prior to their arrival, all counselors must be interviewed and placed at summer camps that are accredited, affiliated with a nationally recognized

nonprofit organization, a member of the American Camping Association, or inspected and approved by the sponsor.[229] No labor market test is required before hiring foreign camp counselors. Sponsors should provide orientation to the counselors before they arrive. This should include an explanation of duties and responsibilities as a camp counselor, any contractual obligations, and the amount of compensation.[230]

C. Employment Terms

With respect to wages and working conditions, J-1 exchange visitor counselors must receive "pay and benefits commensurate" with U.S. workers at the camp.[231] They should not be employed as administrative personnel, cooks, dishwashers, or janitors.[232] The regulations do not require that camp counselors have an employment contract. While state and federal worker protection laws generally apply to J-1 exchange visitors, most camp employers are exempt from the basic wage and hour requirements established in the Fair Labor Standards Act (FLSA).

DIGGING DEEPER: CAMP COUNSELORS AND THE FAIR LABOR STANDARDS ACT

Under the FLSA, an employer does not need to pay minimum or overtime wages to any workers employed by a camp organization if it does not operate for more than seven months in any calendar year, or if during the preceding calendar year, its average receipts for any six months of such year were not more than 33% of its average receipts for the other six months of such year.[233] This exemption is often referred to as the "seasonal recreation and amusement exemption." The analyses are fact-specific, especially if the employer operates camps at multiple locations.[234]

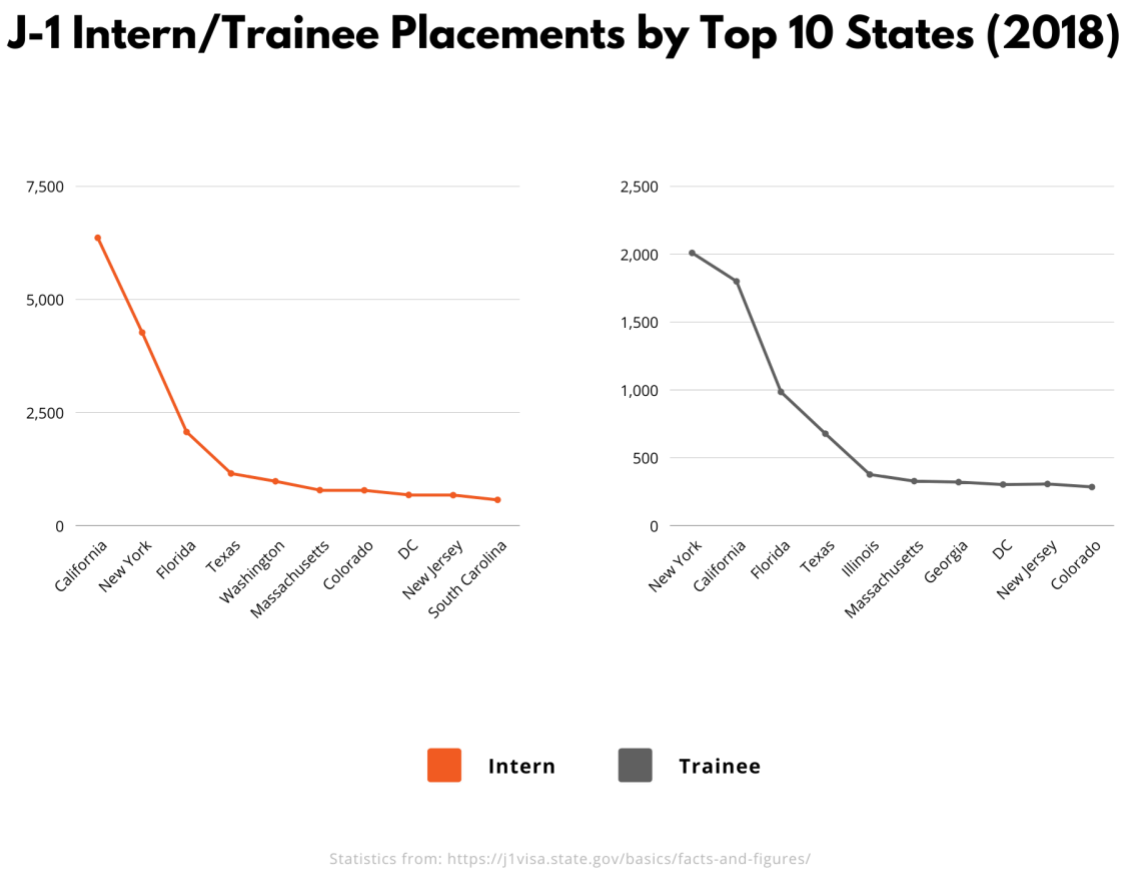
D. Little-Scrutinized Camp Counselors Vulnerable to Abuse

Camp counselors appear to be the least regulated and studied of all the J-1 categories. The fact that there are few reported cases of camp counselor abuse does not mean that problems do not exist. J-1 camp counselors have been identified as potential victims of human trafficking.[235] Several advocates offer stories of J-1 camp counselors performing only janitorial or food service tasks, or working up to 80 hours per week for a fixed salary of just a few thousand dollars for the summer.[236] Without more investigation, the extent of labor abuse in this category will remain uncharted. Rural geographic isolation and the relatively short time on the job contribute to camp counselors' acute vulnerability.

VI. TRAINEES AND INTERNS

A. OVERVIEW

The J-1 category for trainees[237] and subcategory for interns is intended to develop skills in their specific occupational field through participation in structured work-based training and internship programs "and to improve participants' knowledge of American techniques, methodologies, and technology."[238] The program is supposed to enhance both the foreign workers' understanding of U.S. society and their U.S. colleagues' knowledge of foreign cultures "through an open interchange of ideas."[239] As with every J-1 exchange program, the idea is for participants to return home and share their experiences.[240] In 2018, there were 10,857 J-1 trainees and 26,112 interns that were issued J-1 visas.[241]



B. TRAINEE AND INTERN REQUIREMENTS

The Department of State has one set of regulations for both the J-1 trainee and intern exchange visitor programs.[242] Trainees and interns must speak English and have the financial wherewithal to support themselves for their entire stay in the United States.[243]

To qualify as a trainee, workers must either (1) have a degree or professional certificate from a foreign post-secondary academic institution and at least one year of prior related work experience in the field outside the United States; or (2) five years of work experience in their occupational field acquired outside the United States.[244] Interns must be "currently enrolled full-time and pursuing studies in their advanced chosen career field at a degree- or certificate-granting post-secondary academic institution outside the United States or graduated from such an institution no more than 12 months prior to their exchange visitor program begin date."[245]

1. Distinguishing Trainees and Interns

Even though the same set of J-1 program regulations apply to both trainees and interns,[246] there are slight differences. For example, trainees possess a post-secondary degree while interns are currently enrolled university students. J-1 trainee visas are generally valid for up to 18 months, while J-1 intern visas are valid for up to 12 months.[247]

J-1 Trainee and Intern Differences

	Trainee	Intern
Qualifications	Degree or professional certificate from a foreign post-secondary institution + 1 year of prior related work experience outside the U.S. OR 5 years of work experience in their field outside the U.S.	Currently enrolled full-time and pursuing studies in their advanced chosen career field at a degree or certificate-granting post-secondary institution outside the U.S. OR graduated within 12 months of internship start date
Work	Bona fide training	Work-based learning to gain entry level experience
T/IPP	Divided into phases, for each phase describe methodology of training and chronology or syllabus	Describe role of intern, identify areas where intern will work and specific tasks
Maximum duration	18 months 12 months for hospitality and tourism 12 months for agriculture; 18 months in agriculture allowed if original Training/Internship Placement Plan includes 6 months of classroom study	12 months

Source: 22 C.F.R. § 62.22.

C. Sponsor Obligations

The Department of State authorized 90 trainee sponsors and 88 intern sponsors for 2018.[248] Many of these sponsors have been designated to place both trainees and interns. Sponsors are charged with monitoring all aspects of the program, including selection, orientation and placement.[249] They conduct site visits of small first-time employers to confirm the program's goals, objectives, and regulations are understood.[250] Sponsors are required to periodically evaluate trainees and interns and make sure that they are working full-time and receiving necessary training and guidance.[251]

1. Job placement

Upon acceptance by the sponsor, trainees and interns are matched with an employer. The program is documented in an individualized Training/Internship Placement Plan (T/IPP), Form DS –7002.[252] The T/IPP details the internship or training location, whether there will be phases or rotations through different departments, specific job duties, skills to be learned, and the amount and manner of compensation. The T/IPP is completed by both the sponsor and the employer, and then signed by the sponsor, employer and trainee or intern. Once both the T/IPP and Form DS-2019 have been issued, the trainee or intern applies for the J-1 visa. The details of each job placement are thus set prior to departure for the U.S.

a) Types of jobs

The ten occupations eligible for J-1 training and internships cover almost every profession.[253]

- Agriculture, forestry, and fishing
- Arts and culture
- Construction and building trades
- Education, social sciences, library science, counseling and social services
- Health related occupations
- Hospitality and tourism
- Information media and communications
- Management, business, commerce and finance
- Public administration and law
- Sciences, engineering, architecture, mathematics, and industrial occupations

Trainees and interns are specifically barred from working in jobs that involve child or elder care, any position in which the duties involve more than 20% clerical work, any clinical or medical work, or any position that could put the Department of State into "notoriety or disrepute."[254] Additionally, J-1 training and internship programs "must not be used as substitutes for ordinary employment or work purposes; nor may they be used under any circumstances to displace American workers."[255] In that vein, sponsors may not place trainees and interns in "unskilled or casual labor."[256] The Department of State published a list of 49 occupations that are prohibited, including hotel and motel cleaners, cashiers, groundskeepers, janitors, dining room attendants, receptionists, assemblers, and short order cooks.[257]

In reality, trainees and interns have often been employed "in fast food service restaurants, convenience stores, and in other similar counter service positions."[258] The Department of Homeland Security even reported that dairies in Florida were "exploiting the J-1 trainees for cheap labor and in most cases were not concerned with actually training them beyond what was necessary to perform their work."[259] Many internships that require work in the hospitality and tourism field amount to unskilled labor.[260] Notwithstanding this clear prohibition on work in these entry-level, casual jobs, J-1 trainees and interns are routinely placed in them. For example, in the T/IPP for hospitality and tourism interns and trainees, housekeeping tasks are listed under the guise of rotating through different aspects of the hotel industry. The regulations do contemplate "rotations through several departments."[261] However, if a trainee or intern in the hospitality and tourism occupational track is on a program of at least six months, there must be at least three "functional or departmental" rotations.[262] The rules do not specify the length of each rotation.

Regardless, some employers ignore the individual T/IPPs. In one Florida case, the hospitality trainee's T/IPP included rotations in orientation, housekeeping, front desk and advance guest services, each with a specific duration and description.[263] However, in reality, the trainee spent the entire program period working in housekeeping.[264] This also happened with hospitality trainees and interns in South Carolina who worked full time in the dining hall as bus boys, even though their T/IPPs had defined other roles for them.[265]

In 2017, a complaint was filed with DOS alleging that a Southern California resort violated the regulations for the J-1 cultural and educational exchange visa, as well as human trafficking and labor laws. J-1 visa holders from the Philippines, Malaysia and India agreed to work at the Terranea Resort as culinary interns, where they were promised experience working at the resort's eight restaurants. The interns hoped to gain expertise in preparing cuisines from around the world, but in reality, were placed as entry level cooks subject to exploitative conditions, having received no meaningful training. Unite Here, a local union representing hotel workers, filed the DOS complaint on behalf of the aggrieved workers.[266]

On June 25, 2019, a proposed class action complaint was filed against the luxury Grand America Hotel in Salt Lake City, Utah. Grand America Hotel was accused of exploiting workers from the Philippines. The four named plaintiffs were promised training and cultural immersion but instead were "[forced to] work long hours doing menial jobs for low pay." The plaintiffs, being represented by various organizations, stated in their suit that the hotel misused the J-1 visa to avoid travel costs and other fees. According to the suit, the workers were treated as H-2B visa employees. Under the H-2B visa requirements, the hotel should have paid for the travel costs and other fees that were not required through the J-1 visa.[267]

B) Displacing U.S. workers

The J-1 regulations clearly prohibit placing trainees and interns in positions instead of U.S. workers.[268] However, no mechanism is set up to ensure compliance with this prohibition, other than to simply not place interns and trainees in any of the forty-nine unskilled occupations.[269]

2. VETTING THIRD-PARTY RECRUITERS AND EMPLOYERS

As with other J-1 subcategories, the functioning of the trainee and intern program relies upon third parties to recruit and hire the J-1 workers. Yet, as with all J-1 categories, DOS does not directly regulate them. Instead sponsors are trusted to make sure rules are followed.[270]

Sponsors must vet third-party recruiters and host employers and enter into written and signed contracts with any entity acting on the sponsor's behalf.[271] Any failure by a third party to comply with the regulations is imputed to the sponsor.[272] DOS may sanction the sponsor for a third party's noncompliance with program rules, but it is not clear that this has ever happened.

A) HOST EMPLOYERS

Sponsors must "adequately screen all potential host organizations" by obtaining the employer's tax identification number and verifying telephone numbers, address, professional activities, and workers' compensation insurance.[273] Sponsors must then make sure that host organizations do a number of things:[274]

- Verify that all placements are appropriate and consistent with the objectives outlined in their T/IPPs;
- Notify sponsors about any concerns with, deviations from or changes in the training or intern program;
- Certify that any training and internship programs in the field of agriculture comply with both the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act;[275]
- Obey all safety and health laws; and
- Adhere to State Department regulations.

Because these regulations are not directly applicable to the host organization or "employer", the remedy for any violations is DOS sanctioning or decertifying the sponsor.

B) FOREIGN RECRUITERS

If a sponsor uses a foreign third party to recruit workers, it must ascertain whether the entity is legitimate "within the context of their home country environment."[276] Written agreements with foreign recruiters must indicate that they are trained in all aspects of the program and include their "annually updated price lists" of costs to the participants.[277]

D. TRAINEES, INTERNS AND LABOR RIGHTS

The fact that an individual works on a J-1 intern or trainee visa does not preclude treatment as an employee under the Fair Labor Standards Act (FLSA).[278] Internships and training programs in the for-profit private sector almost always amount to employment under the FLSA and therefore must be paid according to its minimum wage and overtime provisions. Under the FLSA, an "employee" is "any individual employed by an employer."[279] "Employ" means "suffer or permit to work."[280] This definition is broad: all

individuals who are "suffered or permitted" to work are employees and must be compensated for services they provide.

DIGGING DEEPER: NARROW CIRCUMSTANCES ALLOW UNPAID INTERNSHIPS

Nevertheless, under certain narrow circumstances, trainees and interns are not considered employees. The inquiry is fact-specific. There are six factors used to determine whether an intern or trainee is not within the definition of employee and thus not covered by the FLSA:

- Training is similar to that which would be given in a vocational school, even though it includes actual operation of the facilities of the employer;
- Training is for the benefit of the trainee;
- Trainees do not displace regular employees, but work under close observation;
- Employer who provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded;
- Trainees are not necessarily entitled to a job at the completion of the training period; and
- Employer and trainees understand that the trainees are not entitled to wages for the time spent in training.[281]

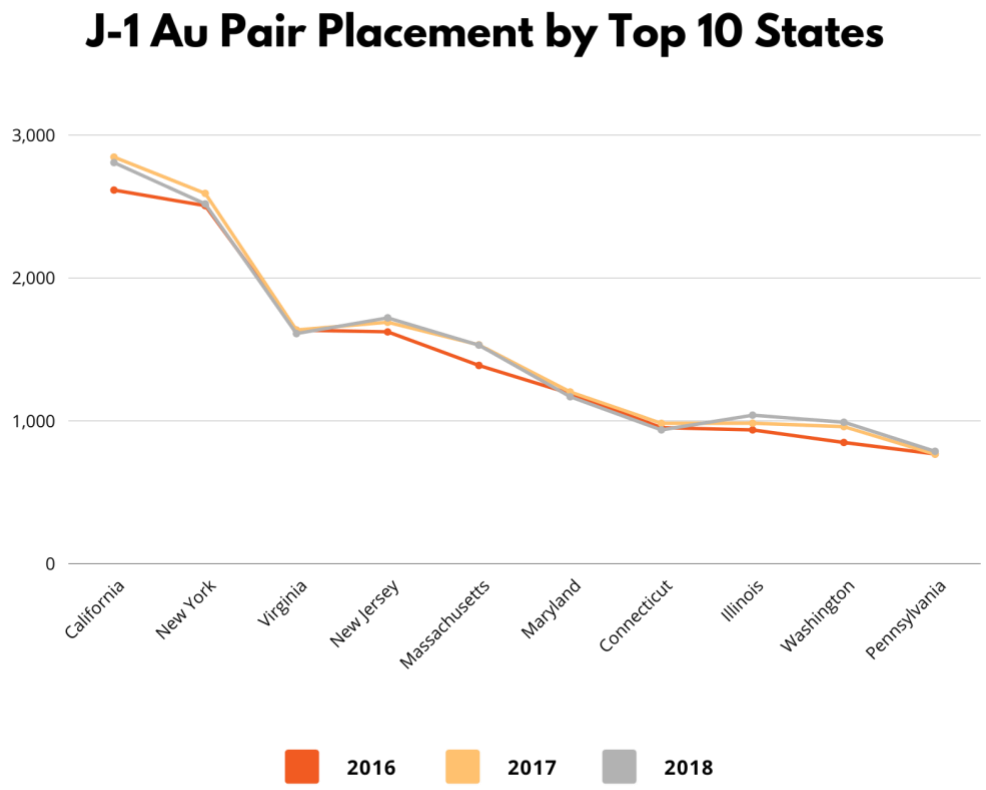
Generally, the more a program is structured around an academic experience, the more likely the internship will be viewed as an extension of the individual's education rather than an employment relationship. If the skills developed can be used in multiple settings, as opposed to just for the employer's operation, it is more likely the intern or trainee is not an employee under the FLSA.[282] However, if the program is a mere continuation of the employer's actual operations, and the employer benefits from a trainee performing productive work, then the fact that they may be receiving some benefits in the form of a new skill or improved work habits does not exclude them from the FLSA. Furthermore, if an employer uses trainees to augment its existing workforce, they are employees.[283] There is a different rule for trainees or interns who are also non-profit volunteers.

The FLSA makes a special exception under certain circumstances for individuals who volunteer to perform services for a state or local government agency and for individuals who volunteer for humanitarian purposes for private non-profit food banks. The Wage and Hour Division of the U.S. Department of Labor (WHD) also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. WHD is reviewing the need for additional guidance on internships in the public and non-profit sector.[284]

VII. AU PAIRS

A. OVERVIEW

The J-1 nonimmigrant visa program has a specific category for au pairs.[285] Au pairs live with host families and provide in-home childcare. J-1 visas for au pairs are initially valid for one year, and extensions are usually available. As with other J-1 visas, private sponsor organizations are designated by DOS to administer all aspects of the program: au pairs and host families are recruited, selected, matched and trained by sponsors. In 2018, 20,678 au pairs worked in the U.S. under the J-1 program. The majority of au pairs were placed in just six states. Nearly half of all au pairs work in either the New York or DC metro regional areas.[286]



Statistics from: https://j1visa.state.gov/basics/facts-and-figures/

B. AU PAIR REQUIREMENTS

Individuals between the ages of 18 and 26 may be au pairs if they speak English proficiently, are physically capable of taking care of children, and successfully pass a criminal background check and personality profile.[287] Once selected, the sponsor matches an au pair with a host family.

C. Employment Terms

Au pairs may work up to 10 hours per day but no more than 45 hours per week.[288] The host family must provide free room and board.[289] Au pairs must be allowed one and a half days off per week, a full weekend off each month, and two weeks paid vacation.[290] In addition, the host family pays up to $500 towards classes at a post-secondary school and au pairs enroll in at least 6 semester hours during their stay.[291] The regulations set out different rules for EduCare au pairs, who care exclusively for school-age children who attend school five full days a week. Weekly work hours for EduCare au pairs must not exceed 30 hours. All au pairs must be paid in compliance with all applicable federal and state minimum wage laws.[292]

Au Pair vs EduCare Au Pair

	Au Pair	EduCare Au Pair
Education requirement	6 semester hours during 12 months	12 semester hours during 12 months
Host family contribution to education	$500	$1,000
Hours per day	10 hours per day	10 hours per day
Hours per week	45 hours per week	30 hours per week
Compensation	Weekly rate in compliance with FLSA	75% of weekly rate paid to non-EduCare au pairs
Days off	1.5 days off per week, plus 1 complete weekend per month	1.5 days off per week, plus 1 complete weekend per month
Paid vacation	2 weeks	2 weeks
Age of children in the home	Children must be at least 2 years old unless au pair has at least 200 hours of infant child care experience	Children must be older than pre-school unless alternative full-time care for pre-schoolers

D. Employer Requirements

A family that wants to employ an au pair must proceed through a DOS designated sponsor. Adults in the host family's household must be U.S. citizens or legal permanent residents, be fluent in English, pass a criminal background investigation and have financial wherewithal to pay their au pairs to required weekly stipend.[293] Once approved

by the sponsor, the sponsors usually charge the host family a fee, which is paid to the sponsor – in July 2019, the average fee ranges from $8,000 to $10,000.[294] The sponsor facilitates the match between the host family and the au pair, and purportedly handles logistics for the au pair's immigration applications, training, and travel to the United States.

DIGGING DEEPER: DEMOGRAPHIC SHFT

DOS does not disaggregate their published J-1 numbers by program category and nationality.[295] Therefore, the countries of origin of J-1 au pairs are not available. Despite the lack of data, some researchers have noted a "demographic shift in the U.S. au pair population from primarily consisting of Western Europeans to being dominated by Eastern Europeans, South Americans, and Africans."[296] With the establishment of the European Union (EU), a smaller number of au pairs have come from Western Europe.[297] This is principally because EU citizens are able to easily change employment and move to any other EU member-country "if the au pair placement becomes problematic."[298] It also helps that in Europe au pair "hours are lower and more strictly regulated" than in the United States.[299] However, because data on the country of origin of au pairs is not public, it is difficult to confirm this demographic shift.

E. Au Pairs and Labor Rights

J-1 au pair program regulations explicitly state that wage payments must comply with the Fair Labor Standards Act (FLSA), the federal law covering minimum and overtime wages. Au pairs must be compensated at "a weekly rate based upon 45 hours of child care services per week and paid in conformance with the requirements of the Fair Labor Standards Act as interpreted and implemented by the United States Department of Labor (USDOL)."[300] The USDOL may enforce the FLSA with respect to any employer, including host families. Under the FLSA, au pair workers have the same rights as any employees to sue their employers in federal court when they are not paid in accord with the law.[301]

The J-1 program regulations do not contemplate any direct role for the Department of State in monitoring compliance with the FLSA. Rather, sponsors are required to file an annual report with the Department of State including "a summation of all complaints regarding host family or au pair participation in the program, specifying the nature of the complaint, its resolution, and whether any unresolved complaints are outstanding."[302] If documented evidence shows that a sponsor fails to "enforce and monitor host family's compliance with the stipend and hours requirements set forth in [the wages and hours provisions] of this section," DOS may sanction a sponsor and revoke its program designation.[303]

1. Wages, Hours, and State Law

Employers must comply with all federal, state and local employment laws when employing J-1 exchange visitors under the au pair program. Under the FLSA, domestic workers who reside in the household where they work are entitled to the same hourly minimum wage as employees.[304] Generally, live-in domestic workers are exempt from federal overtime requirements.[305]

The Department of State has stated that in addition to complying with federal minimum wage laws, au pair sponsors are required to ensure employer compliance with applicable state and local laws, "including any state minimum wage requirements."[306] In many states, the minimum wage is higher than the federal minimum wage and au pairs must be paid at least the higher state minimum wage rate for each hour worked, unless there is a specific state exemption.[307]

In March 2015, several au pairs filed a class action lawsuit against sponsor agencies, claiming that the sponsors maintain artificially low wages and break federal and state minimum wage laws.[308] In January of 2019, the parties entered into a settlement requiring the payment of $65.6 million in damages to the plaintiffs[309] and several changes in the industry allowing au pairs the freedom to bargain for fair-market wages, and requiring sponsors to adequately inform future au pairs about their rights under U.S. laws.[310] The settlement also requires that, going forward, the sponsor agencies will give notice to au pairs and host families that the weekly au pair stipend is a minimum payment requirement, and not a maximum payment set by DOS, and that they are free to agree to compensation higher than the legally applicable minimum.[311] Additionally, in December of 2019, the First Circuit Court of Appeals validated a 2014 Massachusetts law requiring that au pairs be paid the Massachusetts state minimum wage.[312]

2. Counting the hours worked

The FLSA regulations do not require the employer to keep track of the number of actual hours worked by the au pair. Rather, the host family just needs to keep "a copy of the agreement and indicate that the employee's work time generally coincides with the agreement."[313] If "there is a significant deviation from the initial agreement, a separate record should be kept for that period or a new agreement should be reached that reflects the actual facts."[314]

The amount of sleeping time, mealtime and other periods of complete freedom from all duties is generally not included as time worked. However, for periods of free time to be excluded from hours worked, the periods must be of sufficient duration to enable the employee to make effective use of the time. If the sleeping time, meal periods or other periods of free time are interrupted by work duties, the entire on-call time must be counted as hours worked.[315]

3. Au Pair Exploitation

Some argue that the structure of the au pair program makes it a boon for families with young children, offering a cheap source of domestic labor in the guise of cultural exchange that lacks the framework necessary to adequately protect against exploitation and human trafficking.[316] There are other temporary visa categories that provide domestic workers, but the J-1 au pair program is unique in its portrayal as a cultural exchange and diplomacy tool. An au pair sponsor representative has stated that "The goal of the program is for young men and women to come to the United States and have a positive cultural exchange experience."[317] Many participants become au pairs in order to experience American culture. They are also promised a familial relationship while living

with host families, educational opportunities, and sponsor support and guidance with any problems.[318] Furthermore, critics claim that the "rhetoric of kinship" benefits the host family as everyone views the relationship in familial instead of employment terms. For example, when the domestic worker is called an "au pair" instead of an "employee" and the people setting work hours, job duties and issuing payment are called "host parents" instead of "employers," it makes it more uncomfortable for the au pair to assert his or her rights.[319]

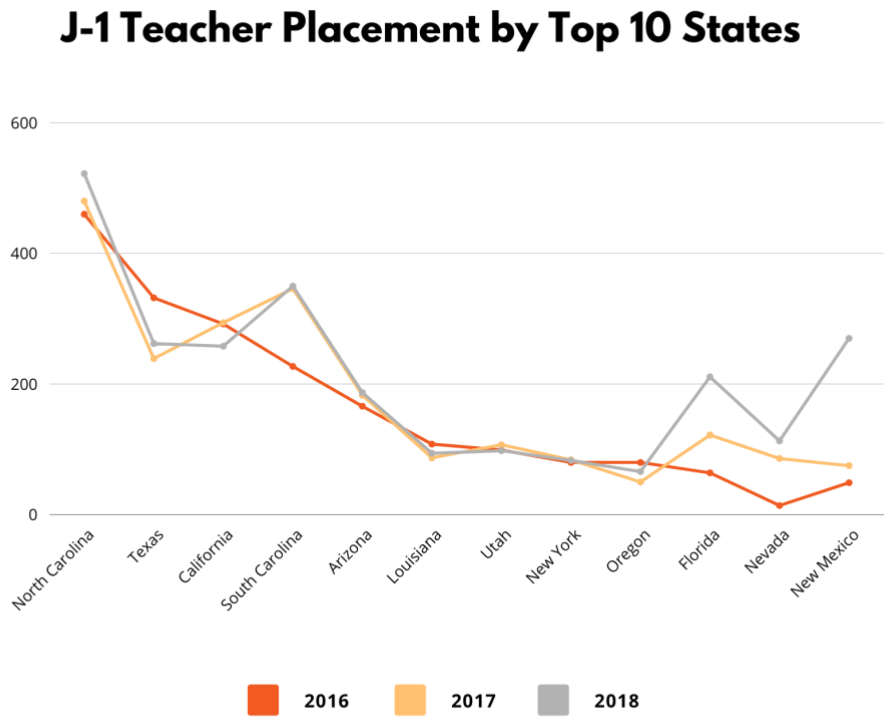
A critique of the au pair program written by the International Labor Recruitment Working Group reported that au pairs have experienced wage theft, coercion, sexual harassment, retaliation, and misrepresentation, among other abuses.[320] Indeed, abuse of J-1 au pairs is not widely reported. A 2017 critique of the program alleges that DOS either does not receive or does not respond to complaints lodged by au pairs. According to DOS documents obtained through Freedom of Information requests, in 2015, 3,505 complaints were received by program sponsors, and nearly half of these complaints were resolved by terminating the au pair. Officially however, DOS reported that a total of 62 complaints were received in 2015. A 2014 audit of the program reported that many au pairs work more than the number of hours per day and week permitted by the program.[321] Due to lack of transparency in the program and weak oversight, it is impossible to know the scope of the problem.

VIII. TEACHERS

A. OVERVIEW

The purpose of the J-1 visa for teachers is "to promote the interchange of American and foreign teachers in public and private schools and the enhancement of mutual understanding between people of the United States and other countries."[322] The J-1 visa provides foreign teachers with opportunities to teach full time in primary and secondary schools, to participate actively in cross-cultural activities with Americans in schools and communities, and to return home ultimately to share their experiences and their increased knowledge of the United States. Such exchanges enable visitors to understand better American culture, society, and teaching practices at the primary and secondary levels, and enhance American knowledge of foreign cultures, customs, and teaching approaches.[323]

J-1 visas for teachers may be valid for up to three years.[324] In 2018, 3,252 foreign teachers were issued visas under the J-1 Exchange Visitor Program.[325] The top states employing J-1 teachers were North Carolina and South Carolina. Advocates report that these teachers have suffered significant labor exploitation, including paying thousands of dollars in recruitment fees, having their immigration documents confiscated, and living in substandard housing.[326]



Statistics from: https://j1visa.state.gov/basics/facts-and-figures/

B. Teacher Requirements

In addition to the general requirements for participation in the J-1 program, foreign teachers must be authorized as primary or secondary teachers in their home country, intend to teach full-time at a U.S. primary or secondary school, meet all standards of the state in which they will teach, and have at least three years of experience teaching or a related professional experience, and possess good reputation and character.[327] A teacher must have accepted an offer of employment prior to applying for the actual J-1 visa. As with other subcategories, after the visa expires, foreign teachers must return home to satisfy a two-year residency requirement, unless they qualify for an exception.

C. Sponsor Requirements

In 2018, the J-1 teacher category had 237 designated sponsors.[328] Many of these sponsors are state education departments or local school boards. To qualify as a sponsor for J-1 teachers, organizations must have at least five exchange visitors per calendar year who are enrolled in programs that last at least three weeks.[329] Sponsors are responsible for screening and selecting the foreign teachers, placing the teachers with schools, and monitoring their stay in the U.S. In the teacher category, many of the designated sponsors directly employ J-1 teachers.

D. Employment Terms

Before the DS-2019 Certificate of Eligibility for Exchange Visitor (J-1) Status is issued, the teacher must have received and accepted a written offer for a job.[330] Before the program begins, the sponsor must provide information on the length and location(s) of the program. The written disclosure must include the teaching requirements and related professional obligations, the compensation, if any, and any other financial arrangements.[331] The teacher is only allowed to teach at the school listed on his or her Form DS-2019.[332]

1. Wages and working conditions

The regulations suggest the possibility that J-1 teachers are sometimes not compensated for their work.[333] Nonetheless, it is clear that the position must "be in compliance with any applicable collective bargaining agreement, where one exists."[334] If there is no union, however, there are no wage requirements. Schools do not have to pay J-1 teachers the prevailing wage, let alone the minimum wage.

2. Recruitment Fees

Like all of the J-1 programs, high recruitment fee costs can be problematic for J-1 teachers. Seeking better employment opportunities in the United States, foreign teachers often pay thousands of dollars in recruitment fees, in addition to thousands more to obtain a visa, travel to the U.S., and pay for room and board. These recruitment fees are paid to J-1 sponsors and recruiters either in lump sums at the beginning of the recruitment process, or as monthly installments after they begin to work in the U.S. Under both payment methods, teachers often borrow hundreds or thousands of dollars at very high interest rates in order to participate. This high-interest debt often forces teachers to

endure work conditions that are less than what they were promised for pay that doesn't cover living costs and recruitment fees.

- A teacher in New Mexico paid 25% of his $44,000 salary to his U.S. based recruiter while attempting to pay down the debt he took on in his native country in order to participate in the program. He shared a three-bedroom house with six other people. Two years into his three-year visa, he was unable to save much money to send back home.[335]
- A teacher in Arizona took on $12,500 in debt to secure a job that paid $40,000. During his first year of employment, he shared an apartment with five other teachers. An additional payment of $1,000 must be paid to his J-1 sponsor for each additional year that he works in the U.S.[336]

In response to this growing trend documented in the American Federation of Teachers 2009 study titled, "Importing Educators: Causes and Consequences of International Teacher Recruitment,"[337], the Alliance for Ethical International Recruitment Practices, consortium of mostly union representatives, drafted a standard in 2015 for international teacher recruitment. This standard requires that potential J-1 teachers be provided complete details of the teacher licensure/credential requirements for the state in which they will be employed before they are contracted. It also calls for the elimination of recruitment fees, requiring school districts to bear all recruitment and legal costs, and for J-1 teachers to be personally responsible for no more than a nominal application processing fee, less than $150.[338] Unfortunately, the standard was largely ignored, and is no longer being actively promoted by the alliance.[339]

E. Third-Party Recruiters and Employer

No regulations pertain to the relationship between sponsors and foreign recruiters or host employers. Employers must comply with the terms of any applicable collective bargaining agreement, if one exists.[340] Employers also must monitor the J-1 teacher's performance and involve them in school and community activities. The teacher regulations mention no other obligations.

ENDNOTES

[1] U.S. Department of State, Exchange Visitor Program, available at https://j1visa.state.gov/programs (December 2019).
[2] U.S. Department of Labor, *Wages*, available at https://www.dol.gov/general/topic/wages (December 2019).
[3] SEVIS is a computer database designed to track information about students and exchange visitors, which include workers with a J-1 visa. See 22 C.F.R. Part 62, Subpart F.
[4] 8 U.S.C. §101(a)(15)(J). The categories of participant eligibility are listed in 22 C.F.R. § 62.4. Note that there are seven separate categories listed in (a) through (g), and there are seven more subcategories listed within (h) (other person of similar description). Throughout this visa page the word "categories" is used and refers to the fourteen distinct categories and subcategories found in Part 62. While there are fourteen categories, there are thirteen sets of regulations because interns and trainees are grouped together. The thirteen bodies of regulations are found in 22 C.F.R. Part 62, Subpart B.
[5] According to the data available on j1visa.state.gov, in 2018 these six categories together totaled 190,330 out of 330,536 altogether, or 58% of the total J-1 visas issued.
[6] U.S. Department of State, *FY 1997-2018 NIV Detail Table*, available at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html (October 2018). This number is higher than the total number of "Total Participants" summed from the Data spreadsheet downloaded on the agency's J1 website, http://j1visa.state.gov/basics/facts-and-figures/ (October 2018).
[7] Mutual Educational and Cultural Exchange Act, commonly known as the Fulbright–Hays Act, Public Law 87-256, as amended, 22 U.S.C. §§ 2451, et. seq. (1988).
[8] 22 C.F.R. § 62.16(a) ("An exchange visitor may receive compensation from the sponsor or the sponsor's appropriate designee, such as the host organization, when employment activities are part of the exchange visitor's program.").
[9] 22 C.F.R. § 62.16(b).
[10] U.S. Department of State, *Exchange Visitor Program*, available at https://j1visa.state.gov/ (Jan. 2020).
[11] 22 C.F.R. §§ 62.2, 62.3(a).
[12] Government Accountability Office, *Stronger Action Needed to Improve Oversight and Assess Risks of the Summer Work Travel and Trainee Categories of the Exchange Visitor Program*, at 10 (October 2005), available at http://www.gao.gov/new.items/d06106.pdf (December 2019).
[13] This number is the sum total of the "Sponsor" column in the spreadsheet downloaded from the "Download data" link. See U.S. Department of State, *Facts and Figures*, available at http://j1visa.state.gov/basics/facts-and-figures/ (June 2019).
[14] 26 U.S.C. § 3121(b)(19)(FICA exemption) and 26 U.S.C. § 3306(c)(19) (FUTA exemption); Southern Poverty Law Center, Culture Shock: The Exploitation of J-1 Cultural Exchange Workers, 17, (2014), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/j-1_report_v2_web.pdf (December 2019).
[15] 22 C.F.R. § 62.4 ("Participation is limited to foreign nationals who meet the following criteria for each of the following categories."); and § 62.10(a). See 22 C.F.R. Part 62, Subpart B for specific category rules.
[16] 22 C.F.R. § 41.62(a)(2).
[17] The sponsor must require all exchange visitors to have health insurance during their stay. See 22 C.F.R. § 62.14. Sponsors may offer health insurance but must disclose all payment terms to the exchange visitor ahead of time.
[18] 22 C.F.R. §§ 41.62(a)(3), 62.10(a).
[19] 8 U.S.C. § 1101(a)(15)(j).
[20] Section 212(e) of the Immigration and Naturalization Act, as amended, or Public Law 94-484 (substantially quoted in 22 CF.R. § 41.63). In some exchange program categories, the visitor is required to return to their home country for a period of two years so that they share their knowledge and experience gained in the United States. Usually this requirement only applies if the exchange visitor receives government funding, works or studies in a field on a specific "skills list," or participates in a graduate medical training program. See U.S. Department of State, *Exchange Visitor Master Skills List 2009*, available at https://travel.state.gov/content/travel/en/us-visas/study/exchange/waiver-of-the-exchange-visitor/exchange-visitor-skills-list.html (December 2019).
[21] 22 C.F.R. Part 62, Subpart A – General Provisions.
[22] U.S. Department of State official, personal email, August 13, 2020. Contrast this number with the sum total of the "Sponsor" column in the spreadsheet downloaded from the "Download data" link, available at U.S. Department of State, Facts and Figures, at http://j1visa.state.gov/basics/facts-and-figures, (January 2020). This spreadsheet shows a dramatic increase in the number of recognized sponsors since 2016. The number of Au Pair sponsors increased by 413 for FY2018 from 17 in FY2017 and 2016. The total number of SWT sponsors increased by 11 from 29 in FY2016

to 40 in FY2017 and increased by 1,062 in FY2018. This same Department of State official clarified that the sponsor sum on the website is erroneous.
[23] 22 C.F.R. § 62.9.
[24] 22 C.F.R. § 62.9(c), (f).
[25] 22 C.F.R. § 62.9(e).
[26] 22 C.F.R. § 62.9(d)(2).
[27] 22 C.F.R. §§ 62.9(d)(3).
[28] 22 C.F.R. § 62.10(b) (pre-arrival information) and (c) (orientation).
[29] *Id.* Based on personal interviews with J-1 visa holders, Catherine Bowman describes her assessment of the orientation J-1 SWT participants actually receive as "a generic orientation before arriving (often a digital presentation) and it was not locally tailored. In some cases, the employer followed up with an orientation more specific to the community…" Bowman was doubtful that orientations generally included information about local resources such as legal aid information. Catherine Bowman, personal messages, May 1, 2020.
[30] 22 C.F.R. § 62.10(c).
[31] 22 C.F.R. § 62.10(d).
[32] *Id.*
[33] 22 C.F.R. § 62.17(b)(1).
[34] 22 C.F.R. § 62.3.
[35] 22 C.F.R. 62 Subpart A - General Provisions.
[36] 22 C.F.R. § 62.11(a).
[37] See DS-2019 example at https://hackinglawpractice.com/wp-content/uploads/2015/07/DS-2019.jpg.
[38] 22 C.F.R. § 62.12(c).
[39] 22 C.F.R. § 62.2 (Definitions); § 62.12 (Control of Forms DS-2019).
[40] The U.S. will only charge a visa issuance fee if the applicant's home country charges U.S. citizens for a similar type of visa.
[41] William Wilberforce Trafficking Victims Protection Reauthorization Act (Public Law 110-457) Sec. 202; see also U.S. Department of State, *Rights and Protections for Temporary Workers*, available at https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/temporary-workers.html (December 2019).
[42] U.S. Department of State, *Know Your Rights, An information pamphlet describing your rights while working in the United States (The Wilberforce Pamphlet on the Rights and Protections for Temporary Workers),* available at https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce/Wilberforce-ENG-100116.pdf (January 2020).
[43] 8 C.F.R. § 214.2(j)(1)(ii) ("Regulations of the State Department published at 22 CFR part 62 give general limitations on the stay of the various classes of exchange visitors.").
[44] 9 FAM 41.62 Notes, "Categories of Exchange Visitors," at 8.
[45] 22 C.F.R. § 62.20(i)(1).
[46] 8 C.F.R. § 214.2(j)(1)(ii).
[47] 8 C.F.R. § 214.2(j). There are exceptions to this, such as, for example, if a J-1 worker applies to change his or her status based on marriage to a U.S. Citizen or Lawful Permanent Resident.
[48] 8 C.F.R. § 214.2(j)(1)(i); 9 FAM 41.62 N3.4 Requirements for Spouse and Minor/Unmarried Children.
[49] *Id.* ("Should you receive a Form DS 2019 supporting a J-2 visa application from an individual claiming such status, contact CA/VO/F/P and ECA for guidance immediately.")
[50] 8 C.F.R. § 214.2(j)(1)(ii).
[51] 8 C.F.R. § 214.2(j)(1)(v); 22 C.F.R. § 62.16(c); 9 FAM 41.62 N7 c.
[52] 9 FAM 41.62, Ex. V at 2 ("If you change employment without the permission of your sponsoring agency, your status in the program may be terminated... Participants found to be in violation of program regulations and/or sponsors' rules may be terminated from the program... [G]rounds for termination include, but are not limited to 1) failure to pursue the exchange activities for which the participant was admitted to the United States... Participants who withdraw or are terminated from their exchange programs are expected to leave the United States immediately.")
[53] See, e.g., 22 C.F.R § 62.32(g) (setting out rule for summer work travel category).
[54] For example, while the regulations state that the intern trainee subcategory may not "be used under any circumstances to displace American workers," there is no mention of how such displacement would be prevented, uncovered, or penalized. 22 C.F.R. § 62.22(b)(1)(ii).
[55] Southern Poverty Law Center, Culture Shock: The Exploitation of J-1 Cultural Exchange Workers, 17, (2014), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/j-1_report_v2_web.pdf (December 2019).
[56] Catherine Bowman, *Flexible Workers, Fissured Workplaces: Cultural Exchange For Hire In An Era of Precarious Labor*, Ph.D dissertation (2019), University of Colorado.
[57] See https://j1visa.state.gov/.

[58] DOS's website j1visa.state.gov publishes data for each subcategory by U.S. state of destination. The numbers of visas granted per category are searchable per state via an interactive map. The data is available in list form if the search is done by category. However, while the category totals per state are listed, the total per category is not. The numbers here were calculated by downloading the data spreadsheet (clicking "Download Data" at http://j1visa.state.gov/basics/facts-and-figures/) and by summing the Total Participants column in 2018 based on data available on the website at that time.
[59] U.S. Department of State, *FY 1997-2018 NIV Detail Table*, available at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html (October 2019). Data only available in downloadable Excel format.
[60] See https://j1visa.state.gov/.
[61] U.S. Department of State, FY 1997-2018 NIV Detail Table, available at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html (October 2019).
[62] These totals were calculated by hand based on the subcategory per-state data listed on j1visa.state.gov. DOS's NIV detail table does not break down J-1 visa numbers by subcategory.
[63] U.S. Department of Homeland Security, *Table 25. Nonimmigrant Admissions by Class of Admission: Fiscal Years 2015 to 2017*, available at https://www.dhs.gov/immigration-statistics/yearbook/2017/table25 (December 2019).
[64] See https://www.ice.gov/foia/library.
[65] The SEVIS quarterly reports are found in DHS's FOIA library, available at http://www.ice.gov/foia/library/ (last visited June 2019). There is a tab for the Student Exchange Visitor Program that contains a list of various reports, including quarterly reports dating back to 2009.
[66] 22 C.F.R. 62 Subpart F – Student and Exchange Visitor Information System.
[67] "The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 authorized the former Immigration and Naturalization Service (INS) to create an electronic system to collect information on F, M, and J nonimmigrants to address the problem of F, M, and J nonimmigrants who are out of status and remain in the United States without authorization." U.S. Department of Homeland Security, Immigration and Customs Enforcement, *Student & Exchange Visitor Information System (SEVIS*), SEVIS History, available at https://www.ice.gov/sevis/overview (December 2019).
[68] 8 C.F.R. § 214.2(j)(1)(vii).
[69] U.S. Department of State, *SEVIS by the Numbers Quarterly Review* (April 2018), available at https://www.ice.gov/doclib/sevis/pdf/byTheNumbersApr2018.pdf., (December 2019).
[70] U.S. Department of Homeland Security, *User Manual for Exchange Visitor Program Sponsor Users (RO/ARO) of SEVIS Version 6.1: Volume II Form DS-2019*, p. 35 (Dec. 7, 2012) (field 13, "Exchange Visitor Category" presents drop down menu).
[71] U.S. Department of State, *FY 1997-2018 NIV Detail Table*, available at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html (October 2018).
[72] *Id.*
[73] U.S. Department of State, *Yearbook of Immigration Statistics, Supplemental Table 1*, available at https://www.dhs.gov/immigration-statistics/yearbook/2017 (2017). Canadian nonimmigrant workers are not required to obtain a J-1 visa prior to presenting at the border for entry. Rather, Canadians set to come as J-1 workers present at the border with the DS-2019. Therefore, Canadian J-1s are not counted in the DOS data but are included in the DHS admissions count.
[74] *Id.* For example, in 2018, the United Kingdom and Northern Ireland had 19,128 J-1 visas but only 371 J-2 visas: 371/19,128 = 1.9%. Furthermore, Thailand had 9,467 J-1 visas but only 63 J-2 visas: 63/9,467 = 0.0066%.
[75] U.S. Department of Homeland Security, *User Manual for Exchange Visitor Program Sponsor Users (RO/ARO) of SEVIS Version 6.1:Volume II Form DS-2019*, p. 35 (Dec. 7, 2012) [hereinafter SEVIS Manual] (field 13, "Exchange Visitor Category" presents drop down menu offering fifteen J-visa participant subcategory options, detailed in Appendix 3).
[76] U.S. Department of Homeland Security, Nonimmigrant Admissions (I-94 Only) by Selected Category of Admission, Age and Sex: Fiscal Year 2017, available at https://www.dhs.gov/immigration-statistics/yearbook/2017 (2017).
[77] *Id.*
[78] SEVIS Manual, p. 39-43. The site of activity is oftentimes a worksite, in that it is where the J-1 visitor is spending their exchange program, and in the case of the categories highlighted in these visa pages, performing work.
[79] 77 Fed. Reg. 27593, 27594 and 27604 (May 11, 2012).
[80] GAO-06-106, at 10.
[81] Holbrook Mohr, Mike Baker, and Mitch Weiss, *U.S. Fails To Tackle Student Visa Abuse*, The Associated Press (December 6, 2010), available at http://archive.boston.com/news/education/higher/articles/2010/12/06/ap_impact_us_fails_to_tackle_student_visa_abuses/.

[82] Immigration Practice Mintz Levin, *J-1 Visa Site Visits to Begin: Business Immigration*, The National Law Review, February 17, 2015, available at https://www.natlawreview.com/article/j-1-visa-site-visits-to-begin-business-immigration (January 2020).
[83] Office of Private Sector Exchange Administration, *J-1 Visa Exchange Visitor Program Incident Reporting – OPA*, YouTube, October 11, 2017, available at https://www.youtube.com/watch?v=ILGgzx-Pd6I, (January 2020).
[84] 22 C.F.R. § 62.50(a).
[85] 22 C.F.R. § 62.50(c)-(e).
[86] Government Accountability Office, *Stronger Action Needed to Improve Oversight and Assess Risks of the Summer Work Travel and Trainee Categories of the Exchange Visitor Program*, p. 10, (October 2005), available at http://www.gao.gov/products/GAO-06-106 (December 2019)
[87] Office of Private Sector Exchange, J1 Visas Mailbox, personal communication, June 18, 2019. "The Office of Private Sector Exchange is not, at this time, publishing a sanctioned sponsors list on j1visa.state.gov; in the future, however, we intend to update our webpages and plan to include an updated sanctioned sponsors list."
[88] 22 C.F.R. § 62.10(d).
[89] 22 C.F.R. § 62.10(d)(1).
[90] 22 C.F.R. § 62.10(d).
[91] *Id.*
[92] 22 C.F.R. § 62.32(j)(1).
[93] 22 C.F.R. § 62.13(d).
[94] 22 C.F.R. § 62.15.
[95] *Id.*
[96] Patricia Medige and 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, 108 FN 16 (2012).
[97] *Id.*
[98] Government Accountability Office, *Inappropriate Uses of Educational and Cultural Exchange Visas*, p. 3 (February 1990), available at http://archive.gao.gov/t2pbat12/140621.pdf (December 2019).
[99] U.S. Department of State, Office of Inspector General, *The Exchange Visitor Program Needs Improved Management and Oversight*, No. 00-CI-028 (September 2000), available at https://www.stateoig.gov/system/files/8539.pdf (December 2019).
[100] GAO-06-106, at 9 and 12.
[101] Medige, 7 INTERCULTURAL HUM. RTS. L. REV. at 122-23.
[102] International Labor Recruitment Working Group, *Shining A Light on Summer Work: A First Look at the Employers Using the J-1 Summer Work Travel Visa*, p. 29-30, ILRWG, (2019), available at https://fairlaborrecruitment.files.wordpress.com/2019/07/shining-a-light-on-summer-work.pdf.
[103] Ashwini Sukthankar, *Visas, Inc.: Corporate Control and Policy Incoherence in the U.S. Foreign Labor System*, p. 53 Global Workers Justice Alliance, (2012).
[104] Medige, 7 INTERCULTURAL HUM. RTS. L. REV. at 141-42.
[105] *Id.*
[106] Medige, 7 INTERCULTURAL HUM. RTS. L. REV. at 123.
[107] 5 U.S.C. § 553(a)(1) (The rulemaking section does not apply to "foreign affairs" functions of the United States.); DOS has opined that "administration of the Exchange Visitor Program" is "a foreign affairs function of the U.S. Government and that rules implementing this function are exempt" from the APA. 77 Fed. Reg. 27593, 27605 (May 11, 2012).
[108] *Id.*
[109] Eric Veronikis, *Ex-midstate McDonald's franchisee to pay nearly $206K to 291 employees*, PennLive.com, (Feb 18, 2014), available at https://www.pennlive.com/midstate/2014/02/former_midstate_mcdonalds_fran.html (December 2019).
[110] U.S. Department of Labor, Wage and Hour Division, *Wedding planner pays more than $35K in back wages and damages to 25 employees following U.S. Labor Department investigation in Hawaii*, March 25, 2015, available at https://www.dol.gov/newsroom/releases/whd/whd20150325 (September 2020).
[111] 29 U.S.C. § 216(b).
[112] Jatupornchaisri v. Wyndham, *Order Denying Motion to Dismiss*, Case No. 6:12-cv-59-Orl-31GJK (M.D. Fla., May 7, 2012). This case was filed by J-1 workers who were intern/trainees - however the same principles apply to other J-1 program categories.
[113] *Id.*
[114] *Id.* ("The harm inflicted by violation of the FLSA cannot be remedied by administrative action against the sponsor organization.")
[115] See, e.g., Ivanov v. Sunset Pools Management, Inc., 567 F. Supp.2d 189, 194-96 (D.D.C. 2008) (rejecting J-1 plaintiffs' joint employer claim in FLSA overtime lawsuit against State Department-designated sponsor because sponsor did not exercise management control over the SWT lifeguards).
[116] 29 U.S.C. § 215(a)(3).

[117] 29 U.S.C. § 215(a)(3).
[118] 29 U.S.C. § 215(a).
[119] See, e.g., Centeno-Bernuy v. Perry, 302 F.Supp. 2d 128, 135 (W.D.N.Y. 2003) (finding FLSA's anti-retaliation provisions applicable to family member of employer who reported former H-2A agricultural guestworkers to INS after the workers complained about their FLSA rights).
[120] 45 C.F.R. Part 1626 (Restrictions on Legal Assistance to Aliens).
[121] See, e.g., Legal Services Corporation Program Letter 05-2 (Oct. 6, 2005), available at http://www.lsc.gov/sites/default/files/Grants/pdfs/Progltr05-2.pdf (December 2019).
[122] See e.g., Southern Poverty Law Center, Culture Shock: The Exploitation of J-1 Cultural Exchange Workers, 17, (2014), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/j-1_report_v2_web.pdf (December 2019).
[123] 22 C.F.R. § 62.4(h)(6).
[124] Catherine Bowman & Jennifer Bair, *From cultural sojourner to guestworker? The historical transformation and contemporary significance of the J-1 visa Summer Work Travel Program*, (2017), Labor History, 58:1, available at https://www.tandfonline.com/doi/abs/10.1080/0023656X.2017.1239889, (January 2020).
[125] 22 C.F.R. § 62.32(b).
[126] 76 Fed. Reg. 68808 (Nov. 7, 2011). As of October 2014, DOS "had no current plans for lifting the program cap." GAO-15-265, at 13. No other exchange visitor category or subcategory has this annual cap.
[127] U.S. Department of States, *Facts and Figures*, available at http://j1visa.state.gov/basics/facts-and-figures/ (June 2019).
[128] 22 C.F.R. § 62.32(d)(2),(4).
[129] 22 C.F.R. § 62.32(c).
[130] 22 C.F.R. §§ 62.10, 62.32(h).
[131] U.S. Department of State official, personal email, August 13, 2020. Contrast this number with the sum total of the "Sponsor" column in the spreadsheet downloaded from the "Download data" link, available at U.S. Department of State, Facts and Figures, at http://j1visa.state.gov/basics/facts-and-figures/, (January 2020). This same Department of State official clarified that the sponsor sum on the website is erroneous.
[132] 77 Fed. Reg. 27593, 27608 (May 11, 2012); 22 C.F.R. § 62.32(l)(1).
[133] Office of Private Sector Exchange, personal phone call, June 18, 2019.
[134] 22 C.F.R. § 62.32(l)(2).
[135] 22 C.F.R. § 62.32(k)-(n).
[136] 22 C.F.R. § 62.32(m).
[137] 22 C.F.R. § 62.32(m)(6) (emphasis added).
[138] 77 Fed. Reg. 27593, at 27603 (May 11, 2012).
[139] 22 C.F.R. § 62.32(l)(1)(i)-(v).
[140] 22 C.F.R. § 62.32(l)(1)(iii).
[141] 77 Fed. Reg. 27593, at 27604 (May 11, 2012).
[142] *Id.*
[143] 9 FAM 41.62 N4.12-3 d.
[144] 22 C.F.R. § 62.32(p)(2)
[145] *Id.*
[146] 77 Fed. Reg. 27593, 27603 (May 11, 2012)
[147] 9 FAM 41.62 N4.12-3 d.
[148] *Id.*
[149] 22 C.F.R. § 62.32(n)(1).
[150] 22 C.F.R. § 62.32(n)(2)(i)-(iii).
[151] 22 C.F.R. § 62.32(l)(2).
[152] 22 C.F.R. § 62.32(n).
[153] 22 C.F.R. § 62.32(n)(2).
[154] 22 C.F.R. § 62.32(n)(3).
[155] 22 C.F.R. § 62.32(g)(2).
[156] *Id.*
[157] 77 Fed. Reg. 27593, at 27600 (May 11, 2012).
[158] 22 C.F.R. § 62.32(g)(1).
[159] Catherine Bowman, *Flexible Workers, Fissured Workplaces: Cultural Exchange For Hire In An Era of Precarious Labor*, Ph.D dissertation (2019), University of Colorado, at 102.
[160] 22 C.F.R. § 62.32(g)(4)
[161] 22 C.F.R. § 62.32(b).
[162] *Id.*
[163] 22 C.F.R. § 62.32 (g)(7).
[164] 22 C.F.R. § 62.32(f)(1).

[165] 77 Fed. Reg. 27593, at 27597.
[166] 22 C.F.R. § 62.32(g)(8). The regulations list modeling services, housekeeping, and janitorial services as examples.
[167] 22 C.F.R. § 62.32(g)(6).
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[190] 22 C.F.R. § 62.32(j)(1).
[191] *Id.*
[192] *Id.*
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[288] 22 C.F.R. § 62.31(j).
[289] 22 C.F.R. § 62.31(e)(6) ("Sponsors shall secure . . . a host family placement for each participant. Sponsors shall not . . . place the au pair with a family who cannot provide the au pair with a suitable private bedroom."); 29 C.F.R. § 531.30 (the reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where customarily 'furnished' and acceptance of the facility is voluntary and un-coerced).
[290] 22 C.F.R. § 62.31(j)(3)-(4).
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[294] See, e.g., Au Pair in America's fees at www.aupairinamerica.com/fees/ and Cultural Care Au Pair's fees at http://www.culturalcare.com/(July 2019).
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[297] *Id.* at 41-42.
[298] *Id.* at 42.
[299] *Id.*, citing to MacDonald at 51-52.
[300] 22 C.F.R. § 62.31(j).
[301] 29 U.S.C. § 216(b).
[302] 22 C.F.R. § 62.31(m)(1).
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[312] Joseph Fawbush, *In Massachusetts, Au Pairs Must be Paid State Minimum Wage*, FindLaw, December 5, 2019, available at https://blogs.findlaw.com/first_circuit/2019/12/in-massachusetts-au-pairs-must-be-paid-state-minimum-wage.html, (January 2020).
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[316] Patricia Medige and 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, 135 (2012).
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[320] *Id.*
[321] U.S. Department of State, *2014 Au Pair Program Annual Reports Overview*, available at https://www.politico.com/f/?id=0000015b-0cf1-d373-a17b-4ff399fb0001, (December, 2019).
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[323] *Id.*
[324] 22 C.F.R. § 62.24(h).
[325] U.S. Department of State, *Facts and Figures*, available at http://j1visa.state.gov/basics/facts-and-figures/ (June 2019).
[326] American Federation of Teachers, *Importing Educators: Causes and Consequences of International Teacher Recruitment*, June 2009, available at http://www.aft.org/sites/default/files/wysiwyg/importingeducators0609.pdf (December 2019).
[327] 22 C.F.R. § 62.24(c).
[328] U.S. Department of State, *Facts and Figures*, available at http://j1visa.state.gov/ (June 2019).
[329] 22 C.F.R. § 62.8. Federal agencies are exempt from this rule.
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[331] 22 C.F.R. § 62.24(f).
[332] 22 C.F.R. § 62.24(g).
[333] 22 C.F.R. § 62.24(f)(3) (Sponsor must disclose to teacher "[a] written statement which clearly states the compensation, if any, to be paid to the teacher and any other financial arrangements in regards to the exchange visitor program.").
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[336] Dana Goldstein, *Teacher Pay Is So Low in Some U.S. School Districts That They're Recruiting Overseas*, New York Times, May 2, 2018, available at https://www.nytimes.com/2018/05/02/us/arizona-teachers-philippines.html (December 2019).
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