



# Migration that Works

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Submitted through: <https://www.regulations.gov/commenton/DOS-2023-0025>

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**Re: Exchange Visitor Program–Au Pair, Doc. No. DOS-2023-0025-0001, 88 Fed. Reg. 74071 (October 29, 2023)**

Dear Director Ward:

Migration that Works writes in support of many of the changes in the Department of State's Proposed Regulations in Public Notice: 11121. The proposed changes address several deficiencies of the Au Pair program that our member organizations have sought to reform for over a decade. The Department's proposed rule also coincides with a historic moment for our country. President Biden's April 18, 2023 Executive Order on Increasing Access to High-Quality Care and Supporting Caregivers and the Administration's Declaration of April as Care Workers Recognition Month, sends a powerful message that the federal government deeply values their vital contributions to American families. Similarly, the Biden-Harris Administration has taken several steps to be "the most pro-union" administration in history and has voiced its support of union and NGO efforts at the state and local level to improve the wages and working conditions of domestic workers. Consequently, the Department's proposed reform of the au pair program is well-timed and can play a critical part in furthering a pro-worker agenda.

We appreciate the ambition of the rules in terms of their scope and the level of careful detail expended to restructure and modernize key provisions, including the wage structure and host family agreement. Specifically, Migration that Works strongly supports the Department's reformulation of the Host Family Agreement and the enhanced transparency it encourages by clearly describing all sponsor fees, expected childcare duties, hours, compensation, and any deductions from au pair pay. Additionally, we applaud the introduction of several safeguards for au pair participants' labor time, including the promise of paid time off, sick leave, a ten-hour maximum workday, and a moratorium on overnight labor. We commend the Department for proposing a long-overdue increase in the program's educational allowance. Similarly, we favor steps the Department is taking to vet all foreign third parties and any attempts at withholding au pair travel documents and personal property or otherwise limiting the participants' free

movement and efforts to report mistreatment. We know such activities have been linked to human trafficking. These are all exciting steps in the right direction.

At the same time, as currently drafted, the rule will fall short of its goals without improved enforcement mechanisms. Additionally, it threatens to harm au pairs by depriving them of other key protections currently available under state and local labor laws. We urge the Department to strengthen certain proposed changes to meet its goals for cultural exchange and to ensure Au Pairs have the fullest labor protections under local, state, and federal law.

## **I. Migration that Works and the Alternative Model for Labor Migration**

Migration that Works is a coalition of labor, migration, civil rights, and anti-trafficking organizations and academics advancing a labor migration model that respects the human rights of workers, families, and communities and reflects their voices and experiences. Founded in 2011 as the International Labor Recruitment Working Group (ILRWG), Migration that Works aims to strategically address worker rights abuses across industries and visa categories.<sup>1</sup> Migration that Works joins workers in supporting an ethical labor migration model. Our model for labor migration shifts control over the labor migration process from employers to workers, elevates labor standards for all workers, responds to established labor market needs, respects family unity, ensures equity and access to justice, and affords migrant workers an accessible pathway to citizenship. For more information about Migration that Works see Appendix A.

## **II. Our Priorities for the Au Pair Program**

### **a. The Centrality of Domestic Labor to the Au Pair Program**

Migration that Works recognizes the Department's commitment to the au pair program and its investment in fostering cultural exchange at home and abroad. At the same time, while au pairs come to the United States to experience the American way of life, they are also domestic workers. International participants spend, at minimum, half of their waking hours performing childcare and other home-making duties. Their employment duties constitute an integral requirement of their visa status, and failure to maintain gainful employment can result in the termination of an au pair's visa. We recognize that it is a challenging balance to strike between the program's goals of cultural exchange and its responsibility to manage the domestic childcare employment activities of thousands of au pairs each year.

We also recognize that the tensions between the stated cultural purpose of the au pair program and the full-time domestic labor performed by participants are nothing new. In 1988, less than two years after the au pair program's founding, the State Department's precursor agency, the United States Information Agency, raised concerns about its legal authority to operate a domestic

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<sup>1</sup> For more information about Migration that Works, visit <https://migrationthatworks.org>. To view Migration that Works' reports, visit <https://migrationthatworks.org/reports>.

childcare program.<sup>2</sup> The USIA’s concerns triggered a Government Accountability Office (GAO) review of the program, the results of which were featured in its 1990 report, *Inappropriate Uses of Educational and Cultural Exchange Visas*.<sup>3</sup> The GAO echoed the USIA’s concerns, citing the inappropriateness of operating what was “essentially [a] childcare work program,” and suggesting that a 40-hour week constitutes full-time employment.<sup>4</sup> In 1995, the USIA issued its first set of comprehensive regulations for the program, a critical acknowledgment that conceptually and practically, au pairs are workers meriting labor protections.<sup>5</sup> The implementation of formal regulations came even though—*then as now*—the cultural exchange industry and some in the host family community opposed the adoption of basic measures like work hour limitations, a modest pay raise, and an educational stipend for au pairs.<sup>6</sup>

Unfortunately, nearly forty years later, a false narrative persists that demanding fair wages, safe working conditions, and greater accountability of host families and sponsors represents a zero-sum game that “would greatly harm the cultural exchange mission of the program.”<sup>7</sup> MTW rejects the premise of this argument and insists that successful cultural exchange *begins* with robust worker protections. By affording full transparency about the nature and terms of employment, the highest available wage rates under local, state, and federal laws, an unambiguous prohibition of recruitment fees, and clearcut, and easy-to-access avenues for au pairs to report and seek redress for labor violations, the au pair program showcases the highest ideals of our nation’s democratic process and sets au pairs up to have a positive experience, free of abuse, during their time in the United States. Otherwise, it threatens the goals of cultural exchange and renders the au pair program vulnerable to allegations that it operates an under-regulated, shadow labor program, charges that have been made many times during the program’s tenure.

#### **b. Strict Adherence to International Anti-Trafficking and Labor Standards**

Domestic workers have historically been subjected to racially motivated exclusions from many of our federal labor laws; however domestic work is work deserving of full labor rights protections. Robust regulation of the au pair program can help to lift and set standards that begin to bring the United States into compliance with the ILO Decent Work for Domestic Workers Convention (C. 189).<sup>8</sup> Under the Obama-Biden administration, the U.S. government fully participated in the C. 189 negotiations and asserted its commitment to “make decent work for domestic workers a reality.”

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<sup>2</sup> Epstein, Susan, *The Au Pair Program*, Congressional Research Service, 1998, p. 2

<https://crsreports.congress.gov/product/pdf/RS/95-256/2>

<sup>3</sup> Government Accountability Office, *Inappropriate Uses of Educational and Cultural Exchange Visas*, Feb 16, 1990. <https://www.gao.gov/products/nsiad-90-61>

<sup>4</sup> *Id* at 19-20

<sup>5</sup> Exchange Visitor Program, 60 Fed. Reg. 8547, 8550 (Feb. 15, 1995)

<sup>6</sup> *Id* at 8551

<sup>7</sup> Alliance for International Exchange (@AllianceExchnge), X (Nov. 17 2023, 10:44 am),

<https://twitter.com/AllianceExchnge/status/1725540304395096348>

<sup>8</sup> International Labor Organization (ILO), *Convention Concerning Decent Work for Domestic Workers*, 16 June 2011, PRNo.15A, available at: <https://www.refworld.org/docid/4e0d784e2.html> [accessed 27 January 2024]

The U.S. government consistently advocates for domestic workers' rights under labor law globally and should use this opportunity to do the same at home. In the annual Department of State Trafficking in Persons report, the U.S. government routinely notes the lack of protections for domestic workers as a vulnerability to forced labor and other forms of human trafficking. The report makes no distinction between types of domestic work or categories of domestic workers, as C. 189 clearly recognizes that any workers, especially migrant workers, who perform domestic work in people's homes need full labor law protections.

Migration that Works strongly recommends that the Department adopt the ILO General Principles and Operational Guidelines for Fair Recruitment's policies prohibiting recruitment fees, which stipulate that "No recruitment fees or related costs should be charged to, or otherwise borne by, workers or jobseekers," for all temporary visa programs, including J-1 visas.<sup>9</sup> Nearly all au pairs who contact Migration that Works member organizations report being charged recruitment fees, some in the thousands of dollars. Sponsors collect these recruitment fees, over and above the fees they collect from host families. The au pair program, in effect, gives sponsor agencies the ability to collect multiple sets of fees for each au pair placement. Au pairs are often subject to additional fees by third parties contracted by the sponsor agency to recruit au pairs, most of which are neither monitored nor regulated by the Department.

Migration that Works supports the proposed regulation's requirement that all recruitment fees and fees charged by third parties be disclosed to the au pair through the Host Family Agreement. We also strongly support the Department's proposal that au pairs be refunded recruitment fees and fees paid to third parties in the event of a failed rematch. However, transparency and partial refunds are insufficient to protect the majority of au pairs from a system of unregulated and often egregious fees. The Department should enact policies prohibiting sponsor agencies from charging au pairs recruitment fees, consistent with the U.S. government's prohibition on recruitment fees in the H-2 program. The Department should also enact monitoring and enforcement policies to prevent au pairs from being charged prohibited fees.

### **c. Au Pairs Require Meaningful Opportunities for Enforcement**

Abuse in the au pair program is well documented. Migration that Works member organizations that work closely with au pairs have documented numerous reports of abuses, including sexual harassment, discrimination, physical violence, racism, and labor abuses amounting to human trafficking. Routine labor violations including wage theft, uncompensated overtime, and being on call at all hours of the night are also ubiquitous, even among host families who do not commit more egregious harms. In other words, even host families who have a good relationship with their au pairs overall often fail to recognize au pair's labor rights, including their right to compensation for *all* hours worked, their right to sufficient sleep hours, and their right to enjoy the meaningful cultural exchange opportunities promised by the program.

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<sup>9</sup> International Labor Organization (ILO), *General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Costs*, 22 May 2019, [https://www.ilo.org/global/topics/fair-recruitment/WCMS\\_536755](https://www.ilo.org/global/topics/fair-recruitment/WCMS_536755)

Many of these abuses are consistent with the unique vulnerabilities all domestic workers experience. Domestic workers, including au pairs, labor in conditions of isolation. They work, and occasionally live, inside the homes of their employers, providing care to the very family members engaging in abuse. Available federal data on human trafficking bears out domestic workers' extreme vulnerability to harm. Of the 8000 labor trafficking cases reported to the National Human Trafficking Hotline between 2007 and 2017, the highest number of cases involved domestic workers.<sup>10</sup> In 2017, the highest number of criminal and civil prosecutions for human trafficking were domestic worker-related.<sup>11</sup> The Department itself has recognized domestic workers' extreme vulnerability to abuse through its enactment of oversight protections for domestic workers on A-3 and G-5 visas.<sup>12</sup>

Migration that Works believes that all domestic workers, including au pairs, should have the most robust protections available to them under state, local, and federal law. This includes ensuring that au pairs have access to any protections at the state and local level that exist to protect workers from labor and workplace abuses including wage and hour violations, sexual harassment, and discrimination. In many instances, federal protections provide a floor that has functionally become a ceiling for au pairs. We resist these artificial restrictions on au pairs, including any scheme that would exempt them from the same combination of federal, state, and local laws that protect all other domestic workers in their city or state, including state and local Domestic Worker Bills of Rights.

Au pairs also require meaningful opportunities to enforce their rights under federal, state, and local law. As the proposed regulation acknowledges, “decades of au pair placements have confirmed that regulations governing this category must include enhanced monitoring requirements and protections for au pairs to safeguard their health, safety, and welfare, as well as their positive experiences as exchange visitors and to ensure that the interests of au pairs are fully respected.” As we will discuss further in the section on preemption, this includes the ability to bring workplace harassment, discrimination, and wage and hour claims to state and local enforcers. Meaningful opportunities for enforcement also require that au pairs can file complaints about their host families and sponsor agency with the Department. This office must not only have the authority to receive complaints but also to provide timely remedies directly to au pairs.

Below we provide some specific proposals to improve the proposed regulation’s ability to protect au pairs. We urge the Department to adopt these changes to strengthen the regulation and better allow au pairs meaningful opportunities for safe and productive cultural exchange.

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<sup>10</sup> National Domestic Worker Alliance, *Human Trafficking at Home: Labor Trafficking of Domestic Workers* (2019) [https://www.domesticworkers.org/wp-content/uploads/2021/05/Human\\_Trafficking\\_at\\_Home\\_Labor\\_Trafficking\\_of\\_Domestic\\_Workers.pdf](https://www.domesticworkers.org/wp-content/uploads/2021/05/Human_Trafficking_at_Home_Labor_Trafficking_of_Domestic_Workers.pdf)

<sup>11</sup> *Id.*

<sup>12</sup> Polaris Project, *Labor Trafficking on Specific Temporary Work Visas: Data Analysis 2018-2020* (July 2022), p 40. <https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf>

### III. Specific Recommendations for the Proposed Regulation

#### a. Host Family Agreement

Migration that Works supports the proposed regulation's goal of increasing transparency between au pairs and host families through the Host Family Agreement. Specifically, it supports the proposed requirement that sponsor agencies outline placement-specific requirements, including expected childcare duties, hours, compensation, cost of room and board, other deductions, paid time off and sick leave, a proposed weekly work schedule, and provisions for au pairs to fulfill their educational requirements. We also strongly support the required disclosure of all fees, including recruitment fees, within the Host Family Agreement. But, as currently conceived, the Host Family Agreement is an ineffective tool for promoting transparency or protecting au pair rights. Migration that Works proposes the following modifications to the Host Family Agreement.

##### *i. The Host Family Agreement should be a contract that gives au pairs a right to legally enforce violations of its terms.*

The proposed regulation explicitly states that the Host Family Agreement is not a contract. As such, it would not provide au pairs with legally binding rights that are enforceable in court. Legally enforceable contracts are the cornerstone of any employment relationship, providing clearly articulated terms, expectations, and remedies.<sup>13</sup> This should be no less true of employment relationships in which the parties *also* have other priorities, like cultural exchange. Indeed, ensuring that au pairs have a legally protected right to pursue cultural exchange opportunities is consistent with the Department's stated mandate and policy goals of promoting democratic ideals at home and abroad.

That domestic workers need contract protections is neither new nor unique to the au pair context. Migration that Works member organization, the National Domestic Workers Alliance, has long advocated for contract protections for domestic workers.<sup>14</sup> Contracts are also a key component of state-based Domestic Worker Bills of Rights.<sup>15</sup> The conditions of isolation within which au pairs

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<sup>13</sup> National Domestic Worker Alliance, *Labor Trafficking at Home*

<sup>14</sup> See e.g. National Domestic Workers Alliance, *Fair Contracts for Domestic Work: A Guide for Domestic Workers and Employers* (November, 2023), <https://www.domesticworkers.org/resources/fair-contracts-for-domestic-work-a-guide-for-domestic-workers-and-employers/>

<sup>15</sup> At least five state and local Domestic Worker Bills of Rights require written contracts between employers and domestic workers. Localities include Massachusetts, Nevada, Seattle, Philadelphia, and Washington D.C. For a complete list of all provisions in every state and local Domestic Worker Bill of Rights, please see National Domestic Workers Alliance, *States With Protected Rights*, available at [https://www.domesticworkers.org/programs-and-campaigns/developing-policy-solutions/domestic-workers-bill-of-rights/#domestic\\_workers\\_bill\\_of\\_rights\\_and\\_protections\\_in\\_each\\_state](https://www.domesticworkers.org/programs-and-campaigns/developing-policy-solutions/domestic-workers-bill-of-rights/#domestic_workers_bill_of_rights_and_protections_in_each_state).



work and live make it especially important that they have all possible tools available to enforce violations of their rights.

**RECOMMENDATION 1: THE DEPARTMENT SHOULD REQUIRE THAT THE HOST FAMILY AGREEMENT IS A CONTRACT WITH LEGALLY ENFORCEABLE RIGHTS.**

***ii. The Department should require that the Host Family Agreement articulate the responsibilities and obligations of all parties, including sponsor agencies and third parties.***

The Department requires that the Host Family Agreement outline certain rights and obligations of au pairs and host families. However, except concerning fee transparency, the proposed regulation does not require that the Host Family Agreement address the responsibility of sponsor agencies or third parties.

Sponsor agencies are more than just facilitators of the au pair and host family relationship; they are often the primary, if not the sole entity responsible for addressing au pair complaints. However, sponsor agencies have little incentive to respond to the complaints of individual au pairs or elevate these concerns over the concerns of host families from whom they can collect multiple sets of fees. In recent years, many of the au pairs who contacted Migration that Works member organization, Centro de los Derechos del Migrante, reported receiving misinformation from their sponsor agency, including about the consequences of filing a complaint with law enforcement or the Department. Other au pairs have reported being threatened with removal if they elected to file a complaint. That the proposed regulation requires sponsor agencies to adopt standard operating procedures governing rematch, which they are required to share with au pairs, demonstrates the Department's recognition that sponsor agencies have not always fulfilled their obligation to au pairs, or been transparent with au pairs about those obligations.

**RECOMMENDATION 2: THE DEPARTMENT SHOULD REQUIRE THAT THE HOST FAMILY AGREEMENT OUTLINE THE RESPONSIBILITIES AND OBLIGATIONS OF SPONSOR AGENCIES. THE DEPARTMENT SHOULD REQUIRE THAT SPONSOR AGENCIES IDENTIFY:**

- **THE RESPONSIBILITIES OF LOCAL COORDINATORS, INCLUDING REQUIRED MEETINGS AND CHECK-INS WITH AU PAIRS.**
- **PROCEDURES FOR REPORTING VIOLATIONS OF THE HOST FAMILY AGREEMENT, AS WELL AS PROCEDURES FOR THE ENFORCEMENT OF ANY REMEDIES CONTAINED THEREIN.**
- **POLICIES GOVERNING REMATCH AND TERMINATION OF HOST FAMILIES FROM THE PROGRAM.**
- **SPONSOR AGENCIES' COMMITMENT TO SUPPORTING AU PAIRS WHO NEED TO FILE COMPLAINTS WITH STATE, LOCAL, OR FEDERAL LAW ENFORCEMENT, AS WELL AS THEIR PROCESS FOR ASSISTING AU PAIRS IN FILING THESE COMPLAINTS.**

*iii. The Department should release sample agreements akin to those released by the Department of Labor for domestic workers.*

Migration that Works supports the proposed regulation's commitment to transparency between host families and au pairs. However, the Host Family Agreement also serves many functions beyond transparency. First, it places all parties on notice of their responsibilities towards each other. Second, it is an opportunity to communicate crucial information to au pairs and host families about their rights and obligations under U.S. law. Third, it is an opportunity for the Department to provide clear guidance to all parties about the program's minimum requirements, including the requirement that au pairs have a protected right to meaningful cultural exchange opportunities. Providing model agreements akin to those released by the Department of Labor for domestic workers would promote uniformity between sponsor agencies.<sup>16</sup> It would also allow the Department to ensure that sponsor agencies include all required information in the Host Family Agreement.

**RECOMMENDATION 3: THE DEPARTMENT SHOULD RELEASE MODEL AGREEMENTS IN ENGLISH AND THE MOST COMMON FIRST LANGUAGES SPOKEN BY AU PAIRS. THE MODEL AGREEMENTS SHOULD CONTAIN SPECIFIC PROVISIONS DETAILING THE RIGHTS, RESPONSIBILITIES, AND REMEDIES OF ALL PARTIES, INCLUDING THE SPONSOR AGENCY. THESE MODEL AGREEMENTS SHOULD INCLUDE:**

- LANGUAGE STATING THAT AU PAIRS HAVE THE RIGHT TO FILE COMPLAINTS WITH FEDERAL, STATE, AND LOCAL AUTHORITIES FOR VIOLATIONS OF THEIR LABOR RIGHTS AND THAT NO LANGUAGE IN THE HOST FAMILY AGREEMENT CAN ABROGATE THOSE RIGHTS.
- LANGUAGE CONFIRMING THAT THE AU PAIR HAS HAD AN OPPORTUNITY TO ASK QUESTIONS ABOUT THEIR LABOR RIGHTS AND CAN CONTACT THEIR SPONSOR AGENCY WITH ADDITIONAL QUESTIONS.
- LANGUAGE CONFIRMING THAT THE AU PAIR HAS RECEIVED THE WILBERFORCE PAMPHLET AND HAS ACCESS TO THE NUMBER OF THE NATIONAL HUMAN TRAFFICKING HOTLINE
- CLEAR ARTICULATION OF THE REMEDIES AVAILABLE TO AU PAIRS FOR VIOLATIONS OF THEIR LABOR RIGHTS, INCLUDING INFORMATION ABOUT HOW TO FILE A COMPLAINT WITH STATE AND FEDERAL DEPARTMENTS OF LABOR, STATE AND FEDERAL EEOC OFFICES, AND OTHER AGENCIES RESPONSIBLE FOR ENFORCING LABOR LAW.
- CLEAR ARTICULATION OF THE REMEDIES AVAILABLE TO THE AU PAIR IN THE EVENT OF A VIOLATION OF THE HOST FAMILY AGREEMENT.
- A COPY OF THE SPONSOR AGENCY'S POLICIES FOR REMATCH, ALONG WITH LANGUAGE CLARIFYING IN NO UNCERTAIN TERMS THAT THE SPONSOR AGENCY CAN NEITHER PREVENT THE AU PAIR FROM FILING A LABOR COMPLAINT NOR THREATEN THEM WITH SANCTIONS IF THEY CHOSE TO FILE SUCH A COMPLAINT.
- INFORMATION ON HOW TO FILE A COMPLAINT WITH THE DEPARTMENT AGAINST A HOST FAMILY OR SPONSOR AGENCY.

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<sup>16</sup> Department of Labor, *Sample Employment Agreements for Domestic Workers*, available at <https://www.dol.gov/agencies/wb/Domestic-Workers>



***iv. Violations of the Host Family Agreement should disqualify host families from being matched with a new au pair.***

A host family that routinely fails to comply with the terms of the Host Family Agreement with one au pair is unlikely to comply with those terms should a successive au pair be placed in their home. However, the proposed regulation fails to provide for any enforcement mechanisms to address even routine violations of the Host Family Agreement. The Department merely provides that sponsor agencies have the *option* of terminating a relationship with host families who do not comply with the terms articulated in the Host Family Agreement.

As discussed further in the next section, Migration that Works proposes that the Department require sponsor agencies to terminate host families who repeatedly violate the Host Family Agreement and develop procedures for ensuring that those families cannot simply turn to another sponsor.

**RECOMMENDATION 4: SPONSOR AGENCIES SHOULD BE REQUIRED TO CONSIDER REPORTED VIOLATIONS OF THE HOST FAMILY AGREEMENT WHEN DETERMINING WHETHER A HOST FAMILY IS ELIGIBLE TO BE MATCHED WITH A NEW AU PAIR. THE DEPARTMENT SHOULD REQUIRE THAT ANY HOST FAMILY WHO ROUTINELY COMMITS VIOLATIONS OF THE HOST FAMILY AGREEMENT BE TERMINATED FROM THE PROGRAM AND ENACT INTERNAL PROCEDURES TO NOTIFY ALL OTHER AU PAIR SPONSOR AGENCIES OF THE TERMINATION.**

**b. Rematching au pairs to new host families and matching host families with new au pairs.**

Migration that Works strongly supports the proposed regulation's requirement that sponsor agencies develop standard operating procedures governing rematching au pairs to new host families. We also strongly support requiring that au pairs be refunded fees paid to sponsor agencies and third parties in the event of no rematch.

Abuse perpetrated against au pairs by host family members is well documented. Numerous investigative reports, academic articles, and journalistic investigations of the au pair program have detailed widespread abuse, ranging from sexual harassment, physical violence, and inadequate access to food and other basic needs.<sup>17</sup> Nearly all the au pairs who contacted Migration that Works member organization, Centro de los Derechos del Migrante, for assistance in recent years reported finding little or no help from sponsor agencies to address these abuses.

The proposed regulation's requirement that sponsor agencies adopt standard policies governing rematch that they share with au pairs is an important step towards protecting au pairs from abuse;

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<sup>17</sup> See e.g. International Labor Recruitment Working Group et al., *Shortchanged: The Big Business Behind the Low Wage J-1 Au Pair Program*, at 7-13 (March 2020), <https://cdmigrante.org/shortchanged/>; Zack Kopplin, "They Think We Are Slaves." *Politico*, March 27 2017, <https://www.politico.com/magazine/story/2017/03/au-pair-program-abuse-state-department-214956/>

however, these requirements are insufficient to protect au pairs. Consistent with our recommendation around guidance more generally, we encourage the Department to provide clear guidelines and requirements to sponsor agencies on rematch. The Department should also require that sponsor agencies adopt standard operating procedures governing when a *host family* may receive a new or successive au pair.

Sponsor agencies lack financial incentive to terminate host families, who may require multiple au pairs over the years. Because any one au pair's time in the program is limited, the current structure allows sponsor agencies more opportunities to collect multiple sets of fees from the same host family. Put bluntly, sponsor agencies have a strong financial incentive to place new au pairs with any host family willing to pay the placement fee, even families with a known history of abuse. Journalistic and academic investigations of au pairs have indicated that host families are routinely matched with new au pairs, even if a previous au pair has reported hostile or abusive conditions.<sup>18</sup> Au pairs also report not being made aware of problems reported by prior au pairs.

Neither the Department's existing policies nor the proposed regulation require sponsor agencies to have clear and transparent policies governing when a host family should be terminated from the program. This lack of regulation allows sponsor agencies to continue engaging in the same kinds of profit-maximizing practices that prompted the Department to propose more stringent rematch procedures. Absent meaningful Department oversight over the field overall, even sponsor agencies' ability to prevent an abusive host family from being matched with a new au pair is limited, given that families can simply go to *another* sponsor agency if they are terminated by a separate sponsor agency.

**RECOMMENDATION 5: PURSUANT TO DEPARTMENT GUIDANCE, SPONSOR AGENCIES SHOULD BE REQUIRED TO DEVELOP TWO STANDARDS FOR DETERMINING WHEN A FAMILY IS ELIGIBLE TO HOST A NEW AU PAIR. THE FIRST STANDARD SHOULD ESTABLISH WHETHER THE HOST FAMILY'S HOME IS A SAFE ENVIRONMENT FOR AU PAIRS. IF A HOST FAMILY IS FOUND TO HAVE ACTED IN WAYS THAT ARE ABUSIVE TO AN AU PAIR, INCLUDING COMMITTING SEXUAL HARASSMENT, PHYSICAL ABUSE, DENIAL OF BASIC NEEDS, OR VIOLATIONS AMOUNTING TO A HOSTILE WORK ENVIRONMENT, THE FAMILY SHOULD BE IMMEDIATELY TERMINATED FROM THE PROGRAM. THE SECOND STANDARD MUST CLEARLY ESTABLISH WHEN A HOST FAMILY SHOULD BE TERMINATED FOR REPEATED VIOLATIONS OF PROGRAM EXPECTATIONS, INCLUDING THOSE ARTICULATED IN THE HOST FAMILY AGREEMENT. TO INCREASE ITS OVERSIGHT OVER HOST FAMILIES THAT VIOLATE THEIR OBLIGATIONS, THE DEPARTMENT SHOULD ENACT SIMILAR NOTIFICATION REQUIREMENTS ON SPONSOR AGENCIES AS THOSE PROPOSED FOR AU PAIRS SEEKING REMATCH. THESE INCLUDE A REQUIREMENT THAT THE SPONSOR AGENCY TRANSMIT THE NAMES OF FAMILIES TERMINATED FROM THE PROGRAM PURSUANT TO ONE OF THESE POLICIES BY THE NEXT BUSINESS DAY. THE DEPARTMENT SHOULD THEN ENACT INTERNAL POLICIES TO MONITOR AND ENFORCE THAT TERMINATION, INCLUDING NOTIFYING OTHER SPONSOR AGENCIES WHEN A HOST FAMILY HAS BEEN TERMINATED FOR ABUSIVE LABOR PRACTICES.**

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<sup>18</sup> Janie Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, Harvard Journal of Law and Gender, Vol. 36, 2013.

### **c. Hours: Limitations and Protections**

Migration that Works applauds the Department's proposed changes to labor hours provisions aimed at preventing erratic schedules, overwork, underpay, or more egregious scenarios of forced labor and human trafficking.

Like the Department, we wholeheartedly agree that participants “deserve to know the hours of childcare they are expected to provide and the amount of compensation they will receive each week.” In our years of experience assisting J-1 participants in labor disputes, a recurrent problem is the lack of predictable work hours and pay.<sup>19</sup> Consequently, we fully support the Department's proposal to require the au pair's hours and weekly schedule to be outlined in the Host Family Agreement. Likewise, we commend the Department's explicit reference to host families' obligation to pay au pairs for each additional hour worked over the agreed hourly threshold as outlined in the agreement. We also commend the proposal to pay au pairs the set rate for the agreed-upon hourly schedule even if the au pair works fewer than hours in a given week. We support the prohibition on host families carrying over “unworked” hours from one week to the next.

We agree with the Department's proposed stipulations, which together, seek to limit an au pair's work time to a maximum weekly 40-hour schedule. Migration that Works celebrates several steps the Department has taken to set clear expectations about au pair participants' need for rest and leisure time, including:

- §62.31(m)(4)(i) “au pairs' regular work schedules may not include providing childcare between hours of 11 p.m. and 5 a.m., unless exigent circumstances arise, in which case the au pair may work no more than three consecutive nights”
- §62.31(m)(1)(iii) no more than “ten hours of childcare each day”
- §62.31(k)(ii) one and one-half consecutive days off (36 hours) each calendar week and one complete weekend (48 hours) off each calendar month
- §62.31(k)(iv) 56 hours of paid sick leave for a 12-month program and a pro-rated amount for extensions shorter than 12 months
- §62.31(k)(v) 80 hours of paid time off prior to the completion of the 12-month program

Our praise notwithstanding, Migration that Works recognizes that with in-home care work arrangements, daily schedules often change, family members contend with illness, and adult family members juggle work obligations with fluid commitments and deadlines. While the proposed rule acknowledges that such unforeseen scenarios may occur, it lacks a straightforward process for au pairs to seek redress if a host family—wittingly or unwittingly—violates the regulations related to hourly work schedules, time off, sick leave, and paid time off. Furthermore, it privileges the weekly reporting of host families without enumerating a mechanism for au pairs to report on whether the agreed-upon schedule was followed or not, other than signing a document created by the host family.

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

Additionally, we appreciate the Department's proposed rules aimed at strengthening au pairs' control over their labor time by delineating between part-time (1-31 hours per week) and full-time (32-40-hour week). Nonetheless, we have concerns that a part-time option available to host families will result in hiring au pairs and underpaying them—either intentionally, or because they underestimated the work hours they thought they would need, resulting in au pairs working extra hours without pay. Thus, we recommend that the Department take concrete steps to prevent wage and hour abuses.

**RECOMMENDATION 6: THE DEPARTMENT SHOULD CREATE A UNIFORM, ONLINE WEEKLY TRACKING (TIMESHEET) FORM ADMINISTERED BY ALL PARTICIPATING SPONSORS AND REQUIRE THAT BOTH AU PAIRS AND HOST FAMILIES REPORT THEIR WEEKLY SCHEDULE.**

A dual reporting scheme will provide au pairs with a means to track and report on their labor hours independently instead of merely signing a document that acknowledges the accuracy of the host family's reporting.

**RECOMMENDATION 7: THE DEPARTMENT SHOULD REQUIRE THE FOLLOWING PROVISIONS TO ENSURE THAT AU PAIRS HAVE MEANINGFUL OPPORTUNITY TO EXERCISE THEIR WAGE AND HOUR RIGHTS:**

- **REQUIRE LOCAL COORDINATORS TO REVIEW HOST FAMILY AND AU PAIR REPORTS MONTHLY, AT MINIMUM, AND TO CONDUCT TIMELY FOLLOW-UP WITH THE AU PAIR IN INSTANCES WHERE S/HE REPORTS FREQUENT VIOLATIONS OF THE AGREED-UPON SCHEDULE.**
- **PROVIDE A PRACTICAL MECHANISM FOR AU PAIRS TO RECOUP THE FINANCIAL EQUIVALENT OF UNPAID LABOR TIME SHOULD BREACHES OF THE AGREED-UPON SCHEDULE OCCUR REGULARLY AND WITHOUT RESOLUTION OR REPAYMENT, AND PAY ANY RESULTING DAMAGES (E.G. COSTS PERTAINING TO MISSED APPOINTMENTS OR LOST SCHOOLING). ONE EXAMPLE WOULD BE THE REQUIREMENT OF A HOST FAMILY SURETY BOND AGAINST WHICH AU PAIRS COULD BE MADE WHOLE BECAUSE OF RECURRENT AND UNPAID WEEKLY SCHEDULE CHANGES.**

**RECOMMENDATION 8: INSTITUTE A PROCESS WHEREBY HOST FAMILIES WITH FOUR OR MORE MONTHS OF RECURRENT SCHEDULING AGREEMENT BREACHES AND PARTIAL OR ENTIRE SURETY BOND FORFEITURES ARE SUBJECT TO TERMINATION.**

Such measures are essential for au pairs to have meaningful opportunities to “pursue education, social engagement in the community, and rest and leisure.” While Migration that Works considers the Department's comprehensive labor hour protection proposals to be an exciting and welcome step, our recommended changes provide the mechanisms and additional accountability to give au pairs actionable channels for safely reporting potential labor hours problems and gaining access to assistance and compensation should it be necessary.

**d. Deductions for room and board as well as other costs**

Migration that Works supports the proposed regulation's commitment to greater transparency in the deductions, fees, and costs that an au pair will incur. It also supports the proposed regulation's limiting of costs for room and board to \$130.54, following FLSA metrics. However, the proposed rule leaves host families nearly unfettered discretion to deduct costs from an au

pair's wages, so long as those deductions are identified in the Host Family Agreement. The Department's lack of clear guidance on what host families *can* charge for continues to leave au pairs vulnerable to gross underpayment, including for costs that should be covered by the room and board deduction.

- i. The Department should require that Host Family Agreements clearly identify what is covered under the “room and board” deduction and prohibit host families from requiring au pairs to pay for these items.*

The deductions for room and board permitted by the proposed regulation include costs for food and other household necessities, as defined by federal law. However, au pairs routinely report being denied access to the family's food or sufficient food to meet their basic needs. Others report being forced to purchase their own food out of their wages, despite deductions taken out for room and board.

**RECOMMENDATION 9: THE DEPARTMENT SHOULD INCLUDE IN THE PROPOSED REGULATION CLEAR GUIDANCE ON WHAT IS COVERED UNDER THE ROOM AND BOARD DEDUCTION AND REQUIRE THAT HOST FAMILY AGREEMENTS CLEARLY IDENTIFY THESE ITEMS. HOST FAMILIES SHOULD BE EXPRESSLY PROHIBITED IN THE HOST FAMILY AGREEMENT FROM REQUIRING AU PAIRS TO PAY FOR ANY ITEMS COVERED BY THE ROOM AND BOARD DEDUCTION, INCLUDING FOOD AND OTHER HOUSEHOLD NECESSITIES.**

- ii. The Department should prohibit host families from deducting additional costs from au pair wages, beyond room and board.*

Although the proposed regulation requires that “room and board and all other deductions from compensation” be enumerated in the Host Family Agreement, it provides no guidance or limiting requirements on the number and type of deductions a host family may impose. Put another way, a host family is free, under the terms of the proposed regulation, to deduct as many costs as it chooses from an au pair's wages provided those deductions are identified in the Host Family Agreement.

**RECOMMENDATION 10: THE DEPARTMENT SHOULD PROHIBIT HOST FAMILIES FROM DEDUCTING ADDITIONAL COSTS FROM AU PAIR WAGES BEYOND THOSE ALLOWED FOR ROOM AND BOARD. IF THE DEPARTMENT ALLOWS HOST FAMILIES TO DEDUCT ADDITIONAL COSTS, IT SHOULD PROVIDE CLEAR GUIDELINES FOR HOST FAMILIES ON WHAT DEDUCTIONS ARE PERMISSIBLE AND SET A TOTAL MONTHLY LIMIT FOR ALL DEDUCTIONS BEYOND ROOM AND BOARD.**

#### **e. Wages and Compensation**

Migration that Works strongly supports the Department's proposal to pay au pairs the highest minimum rate under state, local, or federal law. We applaud this significant and substantial step towards fair compensation for the work that au pairs perform.

As we have discussed in other sections of this comment, Migration that Works advocates that the Department eliminate program requirements that create a shadow system for au pairs. Domestic work is the work that makes all other work possible. It is also one of the fastest-growing sectors

of the U.S. economy.<sup>20</sup> Migration that Works member organization, The Economic Policy Institute (EPI), published a report in late 2021 showing that childcare and home health care workers are deeply undervalued and underpaid, and as the report authors explain, the devaluation of the care sector is fundamentally intertwined with historical and current ableism, sexism, xenophobia, and racism.<sup>21</sup> The proposed regulation must not perpetuate these realities and disparities and instead should look to lift standards for childcare workers, including by setting an hourly wage that reflects the value of the work au pairs perform.

We strongly support the Department's clear intention to create a wage and hour scheme that compensates au pairs according to the highest applicable wage rate in their region. However, as proposed, the Tier system will be difficult to administer, result in lower wages for some au pairs overall, and increase the burden on Department officials to update a system that should, instead, be tied to the local average wage paid to other childcare workers in the area where the host family resides. Below we include some specific proposals for how the wage and hour scheme could be modified to better reflect the Department's intent to fairly compensate au pairs for their work.

***i. The Department should use the Department of Labor's Occupational and Wage Statistics (OWES) data set to calculate the minimum wage paid to au pairs.***

Two main data sets can be looked to for setting the minimum for childcare workers. First, are data from the U.S. Census, specifically the Current Population Survey (CPS). While the CPS is a useful data set that can be used to tie the surveyed wages paid to childcare workers to other demographic information, unfortunately, those data are not always readily available for every locality and the sample sizes may be too small to be reliable in smaller states and localities. The other data set is Occupational Employment and Wage Statistics (OEWS), which publishes survey data for virtually every occupation with a corresponding Standard Occupational Classification code and for every local region in the United States, whether it be a county, metropolitan statistical area, or a nonmetropolitan statistical area.<sup>22</sup> The OEWS has data on employment and wages and major industries for childcare workers at the page on its website for "39-9011, Childcare Workers" (39-9011 is the SOC code for child care workers).<sup>23</sup> The OEWS page for child care workers specifies that it covers workers who attend to children in private households, and excludes preschool teachers and teaching assistants. Thus, the OEWS data for 39-9011, Childcare Workers is adequately specific to the work that J-1 au pairs will be doing in

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<sup>20</sup> U.S. Bureau of Labor Statistics, *Occupational Outlook Handbook*, September 6, 2023. <https://www.bls.gov/ooh/fastest-growing.htm>

<sup>21</sup> Asha Banerjee, Elise Gould, and Marokey Sawo, [\*Setting higher wages for child care and home health care workers is long overdue\*](#), Economic Policy Institute, November 18, 2021.

<sup>22</sup> See Occupational Employment and Wage Statistics, "[Overview](#)," U.S. Bureau of Labor Statistics, U.S. Department of Labor (Last Modified Date: April 25, 2023).

<sup>23</sup> Occupational Employment and Wage Statistics, "[39-9011 Childcare Workers](#)," U.S. Bureau of Labor Statistics, U.S. Department of Labor, May 2022.



the United States and should be used to set the lowest permissible wage rates in the Au Pair program.

Examples from two cities illustrate where the local average au pair wage would be higher than the applicable minimum wage. In Merced, California, an area where housing costs are relatively much lower than in the rest of the state, the applicable minimum wage is the California state minimum wage of \$16 per hour. According to FLCdatacenter.com, the current average wage for childcare workers in Merced is \$17.53 per hour.<sup>24</sup> Thus, in Merced, California, the minimum au pair wage should be set at \$17.53 per hour, since that is what childcare workers earn on average in the local area.

Meanwhile, in Savannah, there is no city or country minimum wage law, and Georgia has a state minimum wage law setting an amount that is lower than the federal minimum wage, meaning that the federal minimum wage of \$7.25 an hour applies as the default minimum wage law for workers in Savannah. Under the Department's proposed formula, au pair workers would be paid \$8 per hour because Savannah would fall under Tier 1. However, the OWES data at FLCdatacenter.com shows that the local average wage for childcare workers in Savannah is \$12.15 per hour.<sup>25</sup> An hourly wage of \$12.15 an hour represents a 68% increase from the federal minimum wage that would otherwise apply and represents a 52% increase from what the Tier 1 wage in the Department's formula would require. Thus, using the Department's formula, J-1 au pair workers in Savannah would continue to be vastly underpaid vis-à-vis the going rate for childcare workers in the Savannah area, and employer/host families would get significant savings on labor costs compared to hiring a childcare worker in the Savannah area. This would also result in putting downward pressure on local wages and labor standards.

**RECOMMENDATION 11: THE DEPARTMENT SHOULD FOREGO THE TIER SYSTEM AND REQUIRE THAT AU PAIRS BE PAID THE LOCAL AVERAGE WAGE BASED ON DATA FROM THE OWES.**

***ii. If the Department retains the proposed four-tiered wage formula, the formula should be updated annually to reflect changes in minimum wage laws***

As discussed above, Migration that Works proposes that the Department forego the Tier system in favor of a system that compensates au pairs according to the average compensation in their area. An additional benefit of adopting a wage scheme tied to OWES data is that it would update automatically to reflect “real-time” changes in the regional minimum wage. In other words, adopting a wage system tied to OWES data would reduce the administrative burden on the Department to continually recalculate and update the Tier compensation tables to ensure that au pairs receive fair compensation for their work.

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<sup>24</sup> *Childcare Workers Data* for Merced, California, U.S. Department of Labor: Foreign Labor Certification (FLC) Data Center Online Wage Library, retrieved January 18, 2023. <https://flcdatacenter.com/>

<sup>25</sup> *Childcare Workers Data* for Savannah, Georgia, U.S. Department of Labor: Foreign Labor Certification (FLC) Data Center Online Wage Library, retrieved January 18, 2023. <https://flcdatacenter.com/>

If the Department retains the wage formula in place as proposed, we urge the Department to update the formula every year to reflect changes in local and state minimum wage laws, rather than every three years. Only updating the formula every three years will mean that the formula will not continue to reflect local and state minimum wage laws which are often updated annually and may not even reflect the federal minimum wage if it is amended and increased.

**RECOMMENDATION 12: IF THE DEPARTMENT RETAINS THE PROPOSED REGULATION'S TIER SYSTEM, THE COMPENSATION SHOULD BE UPDATED ANNUALLY TO REFLECT REAL-TIME CHANGES TO THE MINIMUM WAGE.**

#### **f. Preemption**

Migration that Works strongly supports the Department's decision not to preempt state and local minimum wage and overtime laws. We also understand why, in the interest of promoting uniform standards for au pairs, the Department proposes a national standard for paid time off, paid sick time, and other benefits. We applaud the Department for proposing strong minimum requirements for paid time off, sick leave, consecutive sleep hours, and other benefits for which Migration that Works member organizations have long advocated.

However, the dual system of labor laws articulated in the proposed regulation will likely have significant negative consequences for au pairs seeking to enforce their labor rights with state and local agencies, by creating an un-administrable patchwork of state and federal laws. The scheme articulated in the proposed regulation may also leave au pairs without crucial protections only available to them at the state or local level, including laws governing workplace discrimination. Finally, the hybrid state and federal framework articulated in the proposed regulation may leave au pairs without a way to enforce violations of their rights, including retaliation, because they are or may not be covered by the state law in the area in which they experienced retaliation. This lack of clarity will likely result in a patchy and uncertain enforcement framework for au pairs that may leave many functionally unable to enforce violations of their rights.

#### ***i. Au Pairs require the legal and functional ability to redress violations of their rights with state and local enforcement agencies.***

Even where the proposed rule replaces the state and local protections purports to preempt with comparable benefits, it will deprive workers of access to state and local enforcement systems that are much better positioned to enforce minimum labor standards than the Department. For certain kinds of violations, like retaliation, the preemption framework articulated by the rule may leave au pairs without access to enforcement, because au pairs are functionally unable to avail themselves to the state and local schemes available for the redress of their claims. Au pairs whose sick leave rights, for instance, are violated under the program rules will have no recourse but to complain to their sponsor agencies, who too often side with host families in disputes—and who are not in a position to conduct impartial investigations or facilitate fair and consistent resolutions due to the economic incentives addressed elsewhere in the document. If the sponsor agency fails to resolve the matter, which the experience of the hundreds of au pairs Migration that Works member organizations have worked with over the years suggests is the most likely outcome, the

worker may have no avenue seek redress for her lost wages or the other harms she may suffer on account of the paid sick leave violation.

The proposed rule appears to attempt to address this likelihood by saying that “[i]f a sponsor cannot reach a resolution acceptable to all parties, the Department of State will monitor any incidents or complaints until a resolution is reached, ensuring there is no retaliation by any party and allowing au pairs to file complaints to any local, state, or federal enforcement agency,” but describes no mechanism by which it will “ensure there is no retaliation.” Moreover, it is unclear whether a state or local enforcement agency would accept a complaint about an issue the Department has explicitly preempted, even if the Department gives an individual worker permission to file a complaint after the fact as it seems to suggest it would do here.

More broadly, it is impractical to expect state and local enforcement agencies to develop brand new enforcement and coordination frameworks specifically tailored to the au pair program. However, agencies will be required to do this if they are to continue enforcing minimum wage and overtime laws that apply to au pairs but not to other protections within their purview. The proposed rule’s preemption framework creates a risk that au pairs may not benefit from state and local enforcement even of laws that do not, in the State Department’s view, “pose an obstacle” to the realization of the au pair program’s stated objectives. The proposed preemption framework risks creating confusion and unnecessary complications for state and local enforcement agencies, who will be left to guess what the State Department might consider to pose an obstacle to the goals of the au pair program outside of the enumerated, broadly defined categories in the proposed rule.

**RECOMMENDATION 13: THE PROPOSED RULE SHOULD REMOVE ALL PREEMPTION LANGUAGE PERTAINING TO STATE AND LOCAL LABOR LAWS.**

**IF THE DEPARTMENT DECLINES TO REMOVE PREEMPTION LANGUAGE FROM THE PROPOSED REGULATION, IT SHOULD MORE CLEARLY CARVE OUT ANTI-RETALIATION PROVISIONS OF STATE AND LOCAL LAW FROM THE PREEMPTION FRAMEWORK. THIS COULD BE ACCOMPLISHED BY MODIFYING §62.31(T) AS FOLLOWS:**

**(1) . . . THE REGULATIONS IN THIS SECTION ... MAY NOT BE SUPPLEMENTED BY STATE OR LOCAL LAW EXCEPT AS PROVIDED BY PARAGRAPHS (T)(3)-(5) BELOW.**

**. . .**

**(2) . . . THE REGULATORY FRAMEWORK PROVIDED UNDER THIS SECTION SHALL PREEMPT ANY STATE OR LOCAL LAW THAT, IN THE DEPARTMENT OF STATE’S VIEW, OTHERWISE POSES AN OBSTACLE TO THE REALIZATION OF THE OBJECTIVES OF THE AU PAIR CATEGORY OF THE EXCHANGE VISITOR PROGRAM EXCEPT AS PROVIDED IN PARAGRAPHS (T)(3)-(5) BELOW . . .**

**(3) NOTWITHSTANDING THE FOREGOING, STATE AND LOCAL MINIMUM WAGE AND OVERTIME PAY REQUIREMENTS, INCLUDING ANY RELATED ANTI-RETALIATION PROTECTIONS, SHALL APPLY TO AU PAIRS WHERE APPLICABLE AND SHALL NOT BE DEEMED TO POSE AN OBSTACLE TO THE REALIZATION OF THE OBJECTIVES OF THE AU PAIR CATEGORY.**

**(4) NOTWITHSTANDING THE FOREGOING, ALL ANTI-RETALIATION PROTECTIONS OF STATE OR LOCAL LAWS APPLICABLE TO THE MATTERS LISTED PARAGRAPH (T)(1)(i)-(vi) SHALL APPLY TO AU PAIRS AND SHALL NOT BE DEEMED TO POSE AN OBSTACLE TO THE REALIZATION OF THE OBJECTIVES OF THE AU PAIR CATEGORY. FOR EXAMPLE, AU PAIRS IN JURISDICTIONS WHOSE PAID SICK LAWS PROHIBIT RETALIATION FOR USE OR ATTEMPTED USE OF PAID SICK LEAVE ARE COVERED BY THESE LAWS' ANTI-RETALIATION PROTECTIONS AND MAY MAKE COMPLAINTS TO THE RELEVANT STATE OR LOCAL ENFORCEMENT AGENCIES IF THEY BELIEVE THEY HAVE EXPERIENCED RETALIATION FOR USING OR ATTEMPTING TO USE PAID SICK LEAVE UNDER THE TERMS OF THE HOST FAMILY AGREEMENT.**

**(5) NOTWITHSTANDING THE FOREGOING, ALL ANTI-DISCRIMINATION PROTECTIONS OF APPLICABLE STATE OR LOCAL LAWS, INCLUDING PROTECTIONS AGAINST SEXUAL HARASSMENT, SHALL APPLY TO AU PAIRS AND SHALL NOT BE DEEMED TO POSE AN OBSTACLE TO THE REALIZATION OF THE OBJECTIVES OF THE AU PAIR CATEGORY.**

**g. Enforcement**

Migration that Works supports many of the steps the proposed regulation takes toward protecting au pairs. These include increased transparency between host families and au pairs, requiring that au pairs have meaningful limits on their working hours, ensuring that they are compensated according to state and local wage minimums, and requiring that sponsor agencies adopt standard operating procedures governing a range of issues of important issues. However, absent mechanisms for au pairs to enforce violations of these provisions, they are unlikely to realize many of the benefits the proposed regulation affords them.

***i. The Department should identify established procedures for monitoring incidents and complaints between host families and au pairs that sponsors are not able to resolve.***

As the proposed regulations acknowledge, the Department relies on sponsor agencies to resolve complaints between au pairs and host families. It further states that “if a sponsor cannot reach a resolution acceptable to all parties, the Department of State will monitor any incidents or complaints until a resolution is reached, ensuring there is no retaliation by any party and allowing au pairs to file complaints to any local, state, or federal law enforcement agency.”

Migration that Works supports the Department taking a more active role in directly managing the relationship between sponsor agencies, host families, and au pairs. As we and our member organizations have long argued, the Department must provide forums for au pairs to seek relief directly from the federal agency (or agencies) responsible for administering the program. However, the proposed regulation does not provide any details as to how disputes will be “monitored,” who will determine when an impasse has been reached, or how the Department will ensure that au pairs have not been coerced into accepting a result they are satisfied with. It also does not specify the procedures by which au pairs can contact the Department, or how the Department will intervene if these conditions are not met.

**RECOMMENDATION 14: THE DEPARTMENT SHOULD ESTABLISH CLEAR AND TRANSPARENT PROCEDURES FOR DETERMINING WHEN AN INCIDENT REQUIRES ITS OVERSIGHT AND WHAT “MONITORING” WILL ENTAIL. THESE PROCEDURES SHOULD BE COMMUNICATED TO HOST FAMILIES AND AU PAIRS THROUGH THE HOST FAMILY AGREEMENT. ANY PROCEDURES MUST INVOLVE A MECHANISM FOR AU PAIRS TO CONTACT THE DEPARTMENT DIRECTLY IF THEY REQUIRE DEPARTMENT MONITORING AND OVERSIGHT.**

**RECOMMENDATION 15: THE DEPARTMENT SHOULD ENTER INTO A MEMORANDUM OF UNDERSTANDING WITH THE DEPARTMENT OF LABOR TO REFER REPORTED INCIDENTS OF LABOR VIOLATIONS TO THAT AGENCY FOR FURTHER INVESTIGATION.**

- i. The Department must provide sponsor agencies with concrete and specific criteria for the standard operating procedures it requires them to adopt.***

The proposed regulation requires sponsor agencies to develop standard and transparent procedures to address many common au pair complaints, including procedures pertaining rematch, refunding of fees and costs, and emergency procedures. However, the proposed regulation provides no requirements for what those procedures should contain or how they should be enforced. The fact that a sponsor agency has standard procedures governing rematch, or refunding of fees, in no way guarantees that those procedures will reflect the needs and interests of au pairs or be responsive to their concerns. Absent meaningful oversight from the Department, sponsor agencies are likely to develop policies that vary significantly from each other, subjecting au pairs to vastly different and possibly unequal standards. Sponsor agencies are also likely to develop policies that maximize their own financial interests, which already disproportionately favor host families over au pairs.

**RECOMMENDATION 16: THE PROPOSED REGULATION OR ACCOMPANYING GUIDANCE SHOULD PROVIDE SPONSOR AGENCIES WITH MINIMUM STANDARDS AND REQUIREMENTS FOR ANY STANDARD OPERATING PROCEDURES IT REQUIRES SPONSORS TO DEVELOP. THE DEPARTMENT SHOULD FURTHER REQUIRE THAT SPONSOR AGENCIES DEVELOP SUCH PROCEDURES BY THE TIME THE RULE GOES INTO EFFECT AND SUBMIT THOSE PROCEDURES TO THE DEPARTMENT TO ENSURE THAT THEY COMPLY WITH THE DEPARTMENT’S REQUIREMENTS. SPONSOR AGENCIES WHO FAIL TO COMPLY WITH THEIR OWN POLICIES SHOULD FACE MEANINGFUL SANCTION BY THE DEPARTMENT.**

- ii. The Department should provide concrete and specific guidance on the duties and obligations of local coordinators.***

Migration that Works supports the proposed regulation’s limitation on the number of host families and au pairs a local coordinator can be responsible for. Requiring that local coordinators, often an au pair’s sole point of contact, have sufficient bandwidth to respond to the needs of their charges is an important step towards protecting au pairs. However, the proposed regulation provides no requirements for local coordinators beyond the number of families they can be responsible for. As such, the proposed regulation fails to adequately respond to many of the concerns au pairs have expressed to Migration that Works member organizations, including that

their coordinators failed to assist them when they reported abuses, provided them with misinformation about their labor rights, or otherwise failed to monitor the au pair and host family relationship.

In the absence of on-the-ground oversight by the Department, local coordinators effectively function as the Department's delegates, as the proposed rule acknowledges under the section on program conditions. They are often an au pair's sole source of information about the program, their expected duties, protected opportunities for cultural exchange, and their rights under U.S. law. However, because local coordinators are employees of the sponsor agency, they are likely to represent the sponsors' interests over those of au pairs. Even if, as this comment proposes, the Department enacts policies that are directly responsive to au pair complaints, local coordinators are often best placed to respond immediately to a wide variety of common violations, including violations best enforced in state or local forums. They are also best placed to catch problems before they become abuses – to course correct, clarify, and otherwise manage the relationship between host families and au pairs.

**RECOMMENDATION 17: THE PROPOSED REGULATION OR ACCOMPANYING GUIDANCE SHOULD PROVIDE SPONSOR AGENCIES WITH CLEAR AND SPECIFIC REQUIREMENTS ON THE DUTIES AND OBLIGATIONS OF LOCAL COORDINATORS. THE DEPARTMENT SHOULD REQUIRE THAT LOCAL COORDINATORS MEET WITH AU PAIRS INDIVIDUALLY ON A REGULAR BASIS, AT A REQUIRED CADENCE ESTABLISHED BY THE DEPARTMENT.**

**RECOMMENDATION 18: THE DEPARTMENT SHOULD ALSO CONSIDER A “WHISTLE-BLOWER” PROVISION TO ALLOW COORDINATORS TO REPORT TO THE DEPARTMENT ANY UNETHICAL OR ILLEGAL BEHAVIOR ON THE PART OF SPONSOR AGENCY PERSONNEL.**

#### **IV. Conclusion**

Migration that Works applauds the Department for its efforts toward ensuring that au pairs receive fair compensation for the work they perform. It also commends the Department for the steps the proposed regulation takes towards securing safe working conditions for au pairs. The proposed changes address some of the fundamental flaws in the au pair program. Adopting these changes would promote the Department's stated goal of meaningful cultural exchange for au pairs and host families. We urge the Department to adopt the changes we have recommended, which align with its statutory mandate and policy goals.

Sincerely,

Migration that Works



## APPENDIX A

An ethical labor migration model would robustly protect workers, while also ensuring that employers who uphold their legal obligations are not undercut by low-road employers. Internationally recruited workers would self-petition for their visas, and all workers would connect directly with certified employers through a multilingual, government-hosted database of available jobs. The simple and accessible self-petition process would eliminate the need for recruiters and would root out the abuses that recruiters perpetuate—from charging fees and discriminating to retaliating against workers who speak out about abuses. Through the government’s job-matching database, workers could more easily change employers. Finally, an ethical labor migration model would allow workers to easily petition for their families to join them and provide a pathway to lawful permanent residency and citizenship. This model should replace the patchwork of inadequate regulations that currently harm workers across visa categories and industries, including J-1 workers.

Worker rights and labor standards are pillars of Migration that Works’ Alternative Model for Labor Migration.<sup>26</sup> The following chart compares the existing, broken model of labor migration with the proposed, ethical model.

Rights	Existing Model	Proposed Ethical Model
<b>Freedom of Movement</b>	Workers are generally tied to one employer, cannot control where they live, and often have their passports and documents confiscated.	Workers petition for and control their work visas, choose a residence, and change jobs or industry sectors. Workers maintain control of their documents at all times.
<b>Freedom from Economic Coercion</b>	Recruiters charge workers recruitment fees, contracts include breach fees, and travel costs result in work-related debt that forces workers to remain with abusive employers.	Employers pay recruitment fees and costs. Workers arrive at the job site free of recruitment- and work-related debt.
<b>Self-Determination and Secure Employment</b>	Work visas are time-limited, and workers must return home when their visas expire. Previously full-time jobs are made insecure and temporary. Political participation is limited.	Workers have a pathway to citizenship, freely exercise their political views, and freely pursue economic, social, and cultural development. Work visas no longer facilitate precarious work.

<sup>26</sup> See Migration that Works, *Proposal for an Alternative Model for Labor Migration* (2020), available at <https://migrationthatworks.files.wordpress.com/2020/01/alternative-model-for-labor-migration.pdf>.

<b>Migration as a Family</b>	Workers generally cannot migrate with their families. When family members can migrate, they do not have work authorization.	Workers migrate with their families. All family members have equal rights, including access to work authorization.
<b>Equal Labor Protections</b>	The law limits some workers' rights and labor protections. Workers are paid less as compared to U.S. workers, which undercuts wages and working conditions for all workers. Employers use work visas to displace existing workers.	Workers are guaranteed high labor standards and just and favorable working conditions, including equal pay for equal work compared to both other migrant and U.S. workers. Genuine need is established before posting job opportunities.
<b>Organize</b>	Workers face barriers when they attempt to organize and join unions. Workers who do organize can face retaliation. The prevalence of staffing agencies and other contractors prevents workers at the same job site from having the same employer.	Workers freely join trade unions and other worker-led organizations. Third-party employers are not eligible for certification, clarifying the employment relationship and reducing discrimination.
<b>Non-Discrimination</b>	Employers and recruiters hire and assign job duties based on discriminatory bases.	Workers are free from discrimination in hiring, job placement, and re-hiring.
<b>Whistleblower Protections, Personal Security, and Freedom from Intimidation</b>	Employers and recruiters retaliate against workers, threaten to blacklist workers who complain, and attack workers.	Workers freely report abuses without retaliation, intimidation, threats, or attacks.
<b>Access to Justice</b>	The border acts as a barrier to justice. Complaint mechanisms are not accessible. Legal services are only available to some workers.	All persons are equal before the courts, tribunals, and decision-making bodies. Workers access fair and just processes and remedies, as well as legal services.
<b>Access to Benefits</b>	Workers have difficulty accessing health care and other	Workers have access to health care, mental health care, childcare benefits,

<b>and Services</b>	support services. Government benefits to which workers are entitled are difficult, if not impossible, to access across borders.	workers' compensation, Social Security (including survivors' benefits), and retirement benefits across borders.
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