From: Mills, Cheryl D <MillsCD@state.gov>
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Subject: Fw: A bold step forward: Assessing the State Department's new J-1 Summer Work Travel regulations-Economic Policy Institute

From: Sonenshine, Tara D
Sent: Thursday, May 17, 2012 05:59 PM
To: Mills, Cheryl D
Subject: FW: A bold step forward: Assessing the State Department's new J-1 Summer Work Travel regulations-Economic Policy Institute

Hi there,
I like sending you GOOD NEWS on Summer Work Travel!
These authors, below, have always been highly critical of State Department on SWT.
This is pretty good stuff.

A bold step forward: Assessing the State Department's new J-1 Summer Work Travel regulations-Economic Policy Institute
By Daniel Costa and Ross Eisenbrey
On Friday, May 4, the State Department's Bureau of Educational and Cultural Affairs released a new set of rules for the Summer Work Travel program, a part of the J-1 visa Exchange Visitor Program originally designed to facilitate cultural exchange between Americans and citizens of other countries. Despite the original intent of the program, EPI has documented and explained how the Summer Work Travel (SWT) program has over the past few decades morphed into the country's largest guest worker program and lacks adequate regulation and oversight by the State Department or any other governmental body.
Partly in response to inadequacies in the program described by EPI and the abuses revealed by hundreds of J-1 workers who went on strike in August at a Hershey's chocolate packing plant in Palmyra, Pennsylvania, the State Department undertook a comprehensive review of the SWT program. The May 2012 regulations are the first installment of SWT reforms planned by the State Department; another set of rules will be issued before the end of the year.
While not a panacea, the new rules are a significant improvement and go far toward protecting the rights of U.S. and J-1 workers. Secretary of State Hillary Clinton and the State Department deserve to be commended for acting swiftly to better protect American workers from displacement by SWT participants—and SWT workers from exploitation by abusive employers, program sponsors, and labor recruiters.
Protecting U.S. workers
The new rules will better protect U.S. workers for several reasons. First, SWT jobs must now be seasonal or temporary. The State Department now explicitly prohibits employers from filling permanent jobs with temporary workers who are rotated every few months. This is exactly how Hershey's replaced full-time, decent-paying unionized jobs; the company essentially outsourced them to a steady stream of SWT workers, while still technically keeping the jobs in the country.
The new rules also define a job as seasonal or temporary by borrowing regulatory language found in the H-2B program, a temporary labor program intended to fill short-term labor shortages. This consistency between the two programs makes sense because many SWT jobs are in occupations similar to those filled by H-2B workers.
In addition, new provisions require SWT program "sponsors"—the nongovernmental companies and organizations that recruit workers and manage the program in practice—to confirm that SWT employers will not displace U.S. workers by hiring program participants; have not experienced layoffs in the past 120 days; and do not have workers on lockout or on strike. This will help prevent employers from laying off and replacing U.S. workers with SWT workers or from

undermining the collective bargaining efforts of their employees. These provisions resemble regulations in other visa programs in the H category. However, it is unclear whether program sponsors have the ability, expertise, and access to employer information to determine if U.S. workers might be displaced by the hiring of SWT workers. And from the perspective of a U.S. worker who has been displaced, he or she still lacks any official avenue to ameliorate the situation via the sponsor or the State Department.

The State Department has taken another positive step by capping the number of annual participants in the SWT program at 109,000, a move that will mainly benefit young U.S. workers. For years, the program grew rapidly despite scathing criticisms of mismanagement from government auditors and inspectors. It expanded from about 21,000 participants in 1996 to a peak of more than 152,000 in 2008. Halting the program's growth is the smart thing to do considering its inherent weaknesses. But in light of the high unemployment rate among young people in the United States—which is holding steady at 16.4 percent for 16- to 24-year-olds and 8.5 percent for college graduates under age 25—we recommend the number of participants be reduced further. The size of the SWT program should vary inversely with the youth unemployment rate.

Protecting SWT participants

In addition to protecting U.S. workers, the new State Department rules will protect SWT participants. For the first time, there is a mandatory cultural exchange component to the SWT program that strives to achieve the goals and purposes of the Fulbright-Hays Act, the 1961 law that led to the creation of the SWT program. For decades, the program has operated as an unregulated temporary labor program with no requirements at all regarding cultural exchange. The new provisions will go a long way toward refocusing it on facilitating interaction between foreign students and Americans. They achieve this by requiring that SWT student workers interact with Americans both in and out of the workplace and that sponsors organize additional cultural activities, as well as by prohibiting jobs that are normally performed during overnight shifts.

Furthermore, sponsors are now required to assist SWT workers if they wish to switch jobs and "must not pose obstacles to job changes." This represents real progress on a serious and common issue. SWT workers sometimes arrive at their jobs and find the conditions differ from what they were promised or from what should reasonably be expected of them, considering they are participating in a cultural exchange program. Unfortunately, we have heard from multiple sources that when workers seek to switch jobs, sponsors and employers often respond by threatening SWT workers with program termination if they do not remain on their assigned job, even if the conditions are unsafe or if the employer has been abusive or acted unlawfully. In some cases, labor recruiters have traveled from abroad to threaten SWT workers in person with severe consequences if they fail to stay on the job.

Nevertheless, this rule could have easily been strengthened by more explicitly prohibiting sponsors from forcing a SWT worker to remain with a particular employer if she has legitimate, substantiated complaints, or from threatening the worker with program termination if she does not remain on the job. When SWT workers have their program terminated unjustly and prematurely, the resulting financial loss can be significant. SWT workers typically invest thousands of dollars to participate in the program and expect to earn that money back after working for four months. If their program is terminated early because they seek to leave an unacceptable situation, they instantly become deportable and may end up thousands of dollars in debt through no fault of their own.

The State Department must also be recognized for doing an excellent job in determining the occupations that should be excluded from the SWT program. The expanded list of occupations now excludes jobs that have been declared hazardous to youth by the Secretary of Labor, as well as numerous other dangerous and difficult jobs in agriculture, forestry, fishing and hunting, mining, quarrying, oil and gas extraction, construction, and manufacturing. It makes sense to exclude these jobs for two reasons: First, participants working in a cultural exchange program should not work in dangerous jobs they are not adequately trained and prepared for. Second, employers with labor shortages in such occupations have adequate access to foreign temporary workers through the H-2A and H-2B guest worker programs, which are managed by the departments of Labor and Homeland Security. In fact, these two programs were created specifically to fill temporary labor shortages in many of the newly prohibited occupations. Although the protections for U.S. workers and foreign temporary workers in the H-2A and H-2B programs are minimal (and have been criticized in detail by EPI on many occasions), their worker safeguards are much more extensive than those of the SWT program in its past or present forms.

While most of the new rules go into effect immediately, the ban on these jobs has been delayed until Nov. 1, 2012. This grants employers dependent on SWT workers ample time to modify their workforce by recruiting local workers or petitioning for guest workers in the H-2 programs. Because the vast majority of SWT workers are employed in the United

States during the summer months, most employers with SWT workers in the prohibited industries will not be affected this calendar year, and have an entire year to plan for next season.

The rules also require that sponsors "use extra caution when placing students in positions at employers in lines of business that are frequently associated with trafficking persons"—such as "modeling agencies, housekeeping, [and] janitorial services." Disturbingly, the public has already learned from press reports of multiple cases of SWT participants victimized by human trafficking as a direct result of their participation in the program. Thus, instead of relying on sponsors to use "extra caution," the State Department should additionally ban these three occupations. Employers in all three industries may use the H-1B or H-2B visa programs if they have trouble hiring enough U.S. workers.

The State Department also took an important step by banning staffing agencies that use the program from subcontracting SWT workers. Before this rule change, staffing agencies were allowed to act as both employers and subcontractors in the program, making it difficult to distinguish which of the multiple employers is ultimately responsible for the SWT employee. In the case of Hershey's, for example, there were two staffing agency subcontractors—Exel and SHS—between the sponsor (CETUSA) and the ultimate employer (Hershey's). These subcontractors profited from SWT workers earning near the minimum wage by receiving a portion of the (already low) wages earned by the workers; this share was deducted by the employer or the subcontractor directly (sometimes by both). This creates an incentive to deduct more of their earnings, which can lead to improper and excessive deductions. Multiple layers of subcontractors and employers also make it difficult to hold employers liable for legal violations because companies pass the buck to the sponsor or subcontractor, and vice versa.

Having requested that the State Department make this change, we applaud their consideration and responsiveness on this important matter. Staffing agencies are still allowed to hire SWT workers if the workers are employed and controlled by the agencies directly and not subcontracted out to another employer or subcontractor. But by ending the practice of staffing agencies subcontracting and outsourcing SWT workers to other employers, the State Department has increased accountability and helped SWT workers who have legitimate claims of minimum wage and overtime violations.

Important criticisms

Although the rules are generally praiseworthy, we have two important criticisms. While the revised prevailing wage rule is a slight improvement, it still fails to protect against adverse impacts on the wages of U.S. workers or against the underpayment of foreign workers, and it is completely unenforceable. The rule should require that a SWT worker be paid the average wage in the local area for the occupation, and the Department of Labor should be involved by certifying the wage and auditing employers to ensure workers are paid appropriately.

Next, we were surprised by the State Department's unambiguous statement that it has no jurisdiction over employers participating in the program. The department puts its faith in nongovernmental companies—the sponsors—and hopes that they will be able to convince employers to act in good faith and comply with the rules, despite the fact that employers and sponsors are de facto business partners. Although it may be reasonable for the State Department to shy away from directly monitoring employers because its staff lacks expertise in labor and employment law, the department is wrong to conclude that it is powerless. In fact, the department has total authority over the program's rules. It could, for example, simply require that employers certify that they will comply with all program rules as well as relevant labor and employment laws, stipulating that if they do not (e.g., if there is a credible, substantiated complaint or if they commit a legal violation), they will be banned from the program entirely. The State Department could then keep a list of bad actor employers and prohibit all sponsors from working with these employers.

Conclusion

Overall, the **State Department under Secretary Clinton's leadership has boldly made positive changes to improve a program** that was desperately in need of reform and has had identifiable negative consequences for the U.S. labor market. Thanks to these efforts, vulnerable foreign workers and young American workers will be better protected from employers across the country that seek to depress wages and degrade working conditions by using cheap, exploitable labor from abroad. While there is still much more to do, **we are encouraged by the genuine progress achieved so far.**

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