



November 20, 2009

**VIA ELECTRONIC SUBMISSION**

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U.S. Department of State  
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Electronic Address: <http://www.regulations.gov>

**Re: *Exchange Visitor Program- General Provisions, Proposed Rule, 74 Fed. Reg. 48177 (Sept. 22, 2009).***

Dear Mr. Colvin:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration (SBA) is pleased to submit these comments on the *State Department's Proposed Exchange Visitor Program-General Provisions Rule*.<sup>1</sup> Advocacy is concerned that the State Department has not complied with the requirements of the Regulatory Flexibility Act (RFA), as the agency did not measure the impact of this proposal on small businesses or consider less burdensome alternatives. Based on our conversations with small business representatives, Advocacy believes that the proposed rule may have a significant economic impact on a substantial number of entities. We recommend that the State Department complete an initial regulatory flexibility analysis (IRFA) before proceeding with this rule.

**The Office of Advocacy**

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA,<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>3</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

<sup>1</sup> *Exchange Visitor Program-General Provisions; Proposed Rule with Request for Comment, 74 Fed. Reg. 48177 (Sept. 22, 2009).*

<sup>2</sup> 5 U.S.C. § 601 et seq.

<sup>3</sup> *Small Business Regulatory Enforcement Fairness Act of 1996*, Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.) (*SBREFA*).

## **Background**

The State Department is responsible for designating U.S. government, academic, and private sector entities to conduct educational and cultural exchange programs pursuant to the Mutual Educational and Cultural Exchange Act of 1961, as amended (“Fulbright-Hays Act”). Under this statute, designated program sponsors across a variety of industries facilitate the entry into the United States of more than 275,000 exchange participants each year under a State Department issued J-1 visa. This proposed rule is a comprehensive revision of the regulatory structure of the Exchange Visitor Program, and impacts a wide variety of programs that bring in secondary school students, au pairs, camp counselors, summer work travel, interns, trainees and teachers. The proposed rule would impose new requirements on designated program sponsors that coordinate these programs and the third parties where these participants are placed.

## **Foreign Affairs Exemption to the APA**

In the preamble of the NPRM, the State Department makes two assessments about the proposal:

The State Department has determined that this Proposed Rule involves a foreign affairs function of the United States and is consequently exempt from the procedures required by 5 U.S.C. 553 pursuant to 5 U.S.C. 553(a)(1). Nonetheless, because of its importance to the public, the Department has elected to solicit comments during a 60-day period. Since this Proposed Rule is exempt from 5 U.S.C. 553...it is not subject to the Regulatory Flexibility Act and Executive Order 13272.<sup>4</sup>

We disagree with the agency’s conclusions because Advocacy does not believe that the narrow foreign affairs exemption of the Administrative Procedure Act (APA) applies in this case, which means that the requirements of the APA would apply. Recent past agency practice has not been to invoke the foreign affairs exemption. Because Advocacy believes that the APA applies to this rulemaking, the RFA must also apply.<sup>5</sup>

Section 553(a), the Rulemaking Section of the APA, has an exemption for matters involving the foreign affairs function of the United States.<sup>6</sup> Immigration rules are generally not within the foreign affairs exemption, even though immigration matters typically implicate foreign affairs.<sup>7</sup> In order for the exemption to apply, courts have stated that the cases must be extraordinary situations where “public rulemaking provisions should provoke definitely undesirable international consequences.”<sup>8</sup> Advocacy does not agree that changing the

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<sup>4</sup> 74 *Fed. Reg.* at 48180.

<sup>5</sup> 5 U.S.C. § 601(2).

<sup>6</sup> 5 U.S.C. §553(a).

<sup>7</sup> See *Hou Ching Chow v. Attorney General*, 362 F.Supp. 1288 (D.D.C. 1973).

<sup>8</sup> *Zhang v. Slattery*, 55 F. 3d 732 (2d Cir. 1995); *Jean v. Nelson*, 711 F.2d 1455 (11<sup>th</sup> Cir. 1983). This statement can also be found in the *Attorney General's Manual on the Administrative Procedure Act* (USDOJ 1947). For example, in *Yassani v. Crosland*, 618 F.2d 1356 (1980), the court upheld a 1979 Immigration and Naturalization Service rule released under this exemption which rescinded deferred departure dates of Iranian nationals because this rule implemented the President’s foreign policy response to the Iran hostage crisis.

provisions of the Exchange Visitor Program would provoke undesirable international consequences. Moreover, the U.S. Department of State issued similar regulations changing requirements for the Exchange Visitor Program in 2005 and 2006 and did not invoke the foreign affairs exemption of the APA.<sup>9</sup> In both rulemakings, the agency completed an RFA analysis.<sup>10</sup> The history in this case shows that this proposal is not within the foreign affairs exemption and is thus subject to the APA.

### **Application of the Regulatory Flexibility Act**

Because Advocacy believes that this rulemaking is subject to the APA, the RFA also applies.<sup>11</sup> Accordingly, the States Department should have prepared an IRFA or certified that this proposed rule will not have a significant economic impact on a substantial number of small entities.<sup>12</sup> In order to certify a rule, the head of an agency must provide a factual basis for such certification. Because the State Department has provided no analysis on the impact of this rule on small entities, Advocacy is unable to evaluate whether a certification would be proper.

In order to assist the State Department and provide meaningful content, Advocacy conducted outreach to regulated small entities to ascertain how the proposed changes may impact them. Based on these preliminary discussions, Advocacy recommends that the State Department publish an IRFA as this rule may have a significant economic impact on a substantial number of small entities. The following comments are reflective of these discussions.

### **The Proposed Rule May Impact a Substantial Number of Entities**

Advocacy believes that there may be a substantial number of small entities that may be impacted by this proposed rule, either as sponsors that coordinate these programs or third party employers that hire participants.<sup>13</sup> Advocacy has estimated the percentage of small entities in industries it has identified in the analysis below. Because other small entities may be impacted, Advocacy recommends that the State Department ask the public to comment on the potential small entities impacted by this rule.

*Sponsors:* According to the U.S. Department of State website, there are 3932 sponsor programs participating in the Exchange Visitor Program.<sup>14</sup> Advocacy does not know how

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<sup>9</sup> *Documentation of Nonimmigrants Under the Immigration and Nationality Act-Student and Exchange Visitor Information System (SEVIS)*, 70 Fed. Reg. 7853 (Feb. 16, 2005); *Proposed Exchange Visitor Program-Training and Internship Rule*, 71 Fed. Reg. 17768 (April 7, 2006).

<sup>10</sup> Advocacy submitted a comment letter on the State Department's 2006 rulemaking, stating that the agency's RFA certification was insufficient because it lacked a factual basis. Comment letter from Chief Counsel Thomas M. Sullivan and Assistant Chief Counsel Bruce Lundegren, SBA Office of Advocacy to Stanley S. Colvin, Director, Office of Exchange Coordination and Designation, State Department (May 30, 2006).

<sup>11</sup> 5 U.S.C. § 601(2).

<sup>12</sup> 5 U.S.C. § 603, 605.

<sup>13</sup> The RFA applies to: 1) small organizations (defined as any not-for-profit enterprise that is independently owned and operated and not dominant in its field); 2) small governmental jurisdictions with a population less than 50,000 such as governments of cities, counties, towns, townships, villages, school districts or special districts; and 3) small entities as defined by the Small Business Administration.

<sup>14</sup> The State Department website lists these sponsor programs on their website, *available at*: <http://eca.state.gov/jexchanges/index.cfm>.

many of these sponsors would be considered small entities, as defined by the SBA size standard of less than \$7 million in annual revenue (for educational services) or by the RFA definition for small non-profit organizations.<sup>15</sup> Advocacy recommends that the State Department analyze this information in an IRFA.

Advocacy met with representatives from the Alliance for International Educational and Cultural Exchange (the Alliance), an association representing 79 nongovernmental sponsors. The Alliance believes that a majority of their for-profit and non-profit sponsors would be considered small entities under the SBA and RFA definitions.<sup>16</sup> The Council on Standards for International Educational Travel (CSIET) is an association that represents 70 non-profit high school program sponsor members. These non-profit sponsors are responsible for approximately 27,000 placements under the high school student exchange program. A majority of these organizations will likely meet the RFA definition of a small organization.<sup>17</sup>

*Amusement parks:* According to a representative for the International Association of Amusement Parks and Attractions, the exchange visitor program is widely utilized by its members to obtain temporary workers in the peak summer season.<sup>18</sup> Advocacy estimates that approximately 90 percent of the amusement park industry is composed of small entities, as defined by the SBA size standard of \$7 million in annual revenue for this industry.<sup>19</sup>

*Ski areas:* The National Ski Area Association reports that approximately 2/3 to 3/4 of their members utilize this program during peak seasons.<sup>20</sup> Advocacy estimates that approximately 84 percent of ski areas are composed of small entities, as defined by the SBA size standard of \$7 million in annual revenue for this industry.<sup>21</sup>

*Camps:* According to the American Camp Association (ACA), 94 percent of their 2700 camps would be considered small businesses, as defined by the SBA size standard of \$ 7 million in annual revenue. Some of these camps are also non-profit operations, and would likely fall under the SBA definition of a small organization. ACA reports that its members placed more 25,000 international camp staff were placed at U.S. camps in 2008.<sup>22</sup>

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<sup>15</sup> 13 C.F.R. 121.201 (Subpart A) (see: <http://www.sba.gov/size/sizetable2002.html>).

<sup>16</sup> The Alliance believes that it is a conservative estimate that more than half of their members qualify as small entities. More than half of their members in the chart fall into the lowest three dues categories (adjusted salaries and benefits under \$499,999), only four members are in the highest dues category (above \$7 million), and the rest fall somewhere in between.

<sup>17</sup> Telephone interview with John O. Hishmeh, Executive Director, Council on Standards for International Education Travel, in Alexandria, VA (Nov. 18, 2009). According to Mr. Hishmeh, 62 percent (or 44 out of 70) of his sponsors have less than 300 participants; he considers these programs to be small non-profit programs.

<sup>18</sup> Telephone interview with Stephanie Thienel See, Manager, Government Relations, International Association of Amusement Parks and Attractions, in Alexandria, VA (Nov. 12, 2009).

<sup>19</sup> Small Business Administration, Office of Advocacy, *U.S. all industries data by receipt size, 2002*, (Advocacy Data) based on data provided by the U.S. Census Bureau, available at: [http://www.sba.gov/advo/research/us\\_rec02.txt](http://www.sba.gov/advo/research/us_rec02.txt). Advocacy analyzed data for the Amusement Park NAICS code (713110), 607 out of 675 businesses had annual receipts of less than 5 million.

<sup>20</sup> Telephone interview with David Byrd, Director of Education and Risk, National Ski Area Association (Nov. 18, 2009).

<sup>21</sup> See note 19. Advocacy analyzed data for Skiing Facilities, NAICS code (713920), 286 out of 344 businesses had annual receipts of less than 5 million.

<sup>22</sup> E-mail from Sharon Kosch, National Chair for American Camp Association's Public Policy Committee (Nov. 6, 2009).

## **The Proposed Rule May Have a Significant Economic Impact on Small Entities**

Advocacy believes that the proposed rule will increase compliance costs for small sponsors and the small businesses where exchange visitors are placed, resulting in a significant drop in participation in the Exchange Visitor Program. Advocacy recommends that the U.S. Department of State publish an IRFA analyzing these and other small business costs, and adopt suggested alternatives that minimize these costs for these small entities.

### *Timing for DS-2019 Forms*

When a participant is accepted into an exchange program, the designated program sponsor issues the trainee a “Certificate of Eligibility for Exchange Visitor (J-1) Status” (Form DS-2019) which allows the participant to obtain a J-1 visa from the U.S. consulate for entry into the United States. This proposed rule would require that prior to issuing a DS-2019 form, a sponsor must verify that the prospective exchange visitor is accepted for a program (for example, as certified in an offer letter from a specific camp or a written acceptance from a secondary school).<sup>23</sup> The regulations state that since the exchange visitor program deals with “high risk” categories, the agency would like to ensure that the young adults are not being placed in dangerous or non-educational/cultural exchange programs.<sup>24</sup>

Certain industries require participants during set seasons, such as summer work (amusement parks/camps) and fall (high school programs). For these positions, sponsors currently issue the DS-2019 form before most participants are placed or accepted at a specific third party (such as a camp or school) to account for the visa processing times. This method helps embassies overseas by spreading their heavy workload over a longer period. Since placements in these season dependent industries occurs later the process, small business representatives are concerned that this change will result in a majority of the DS-2019 forms being issued by sponsors too late to obtain a visa due to the processing times.

For example, a 2009 CSIET study found that 42.5 percent of all placements in high schools (for fall enrollment) occur in July and August, and 57.4 percent of all placements are finalized in June, July or August.<sup>25</sup> If this proposed provision is implemented, CSIET believes that there will not be enough time to move students through the visa process for arrival in the United States for the start of school. CSIET estimates that this single provision will reduce participation in this program by 30 to 60 percent and result in late arrivals. CSIET states that this change is not necessary, as regulations and standards are already in place requiring school permission to be secured in writing before a student’s departure to the United States.

This provision will also negatively impact small employers that hire exchange visitor participants, as they utilize the Exchange Visitor Program to access a reliable pool of international workers for a particular season. For example, the American Camp Association (ACA) estimates that this provision would decrease their members’ international camp staff

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<sup>23</sup> 74 *Fed. Reg.* at 48187; 52.12(b) Control Forms (DS-2019).

<sup>24</sup> *Id.* at 48178.

<sup>25</sup> CSIET, *Hosting Capacity Collection Report* (March, 2009).

by 30 to 50 percent, or from 25,000 staff to 12,500-17,500 staff.<sup>26</sup> The ACA believes this would result in a heavy administrative burden on these small camps, which must struggle to find replacements for this staff. This may result in camps being forced to cut camp participation rates, which would significantly alter their revenue stream.

The National Ski Area Association (NSAA) also believes that this provision would result in a 25 to 50 percent decrease in their members' international staff. Ski areas utilize international staff throughout the year, as they need access to highly skilled ski instructors and multi-lingual staff for their guests. NSAA states that it is difficult to find qualified and reliable domestic replacements in ski resorts, which are mostly located in rural mountain areas, and alternative programs are more difficult to use and expensive.<sup>27</sup> The International Association of Amusement Parks and Attractions also stated that it is difficult to obtain domestic replacements to work in the seasonal amusement park industry. Advocacy recommends that the State Department reconsider this proposed provision.

#### *Requiring Dun & Bradstreet Numbers*

This proposed rule requires sponsors seeking re-designation to submit: 1) a current Business Information Report from Dun & Bradstreet (D&B) on the sponsor, 2) a list of all third parties (foreign and domestic) with whom the sponsor has executed a written agreement for the person or entity to act on behalf of the sponsor and 3) certify that they have obtained a D&B report on each of these third parties. Advocacy has confirmed that it costs approximately \$150 to obtain a D&B number, \$500- \$1000 to maintain a profile with references, and approximately \$65 to obtain a D&B report on another company.

Small business representatives are concerned that this provision will be prohibitively costly for small sponsors who must set up a D&B profile and obtain dozens of D&B reports; and for small businesses that must set up their own D&B profiles. For example, CSIET surveyed eight small non-profit sponsors and found that they had 4 to 25 third party placements, meaning that these entities would pay \$250 to \$1,600 to comply with these provisions. These sponsors would also have to obtain a D&B number and maintain a profile, which may cost \$650 to \$1150.

Experience International, a small non-profit exchange program, will have to obtain 75 D&B reports for third parties, incurring \$4,875 (in addition to obtaining a D&B number and profile). Additionally, this non-profit also estimates that they will utilize many hours of staff time to help hosts and partners in acquiring these numbers, and lose potential hosts due to these requirements.<sup>28</sup> Third parties hosting exchange visitors such as camps and amusement parks would incur the costs of obtaining a D&B number and obtaining a profile (\$650-\$1150), in addition to any additional costs of obtaining an exchange visitor that the sponsor passes down to them.

Because businesses self-report information regarding their businesses in the D&B database, small business representatives do not see how this costly requirement will add to the

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<sup>26</sup> See note 22.

<sup>27</sup> See note 20.

<sup>28</sup> Telephone interview with Lori Anderson, J-1 Program Manager and ARO, Experience International, in Everson, WA (Nov. 12, 2009).

accountability or reliability of the Exchange Visitor Program. Advocacy recommends that the State Department consider the alternative of exempting certain small sponsors and third parties from this requirement. The agency can also find other ways that sponsors can improve their screening procedures and site visits on these third parties.

### *Annual Management Audits*

The proposed rule would also require nongovernmental sponsors to complete annual management compliance audits, which the U.S. Department of State estimates will be \$6,000 to \$10,000 a year.<sup>29</sup> The Alliance and CSIET, organizations that have small sponsors as members, have stated that this provision would actually cost \$10,000 to \$20,000 annually.

Small sponsors are concerned that they will be required to incur a disproportionately high program cost given their organizational size and resources. Experience International, a small non-profit exchange program, estimates that this provision alone will cost \$30,000 (to cover both intern and trainee programs) or 16 percent of their annual operating budget; they estimate that compliance with the entire rule would utilize 23 percent of their budget.<sup>30</sup> The Cordell Hull Foundation for International Education, a small non-profit sponsor, estimates that their organization will incur \$20,000 to comply with this provision, and that it will cost over \$56,000 to comply with all of the provisions of this rule.<sup>31</sup> Small businesses that utilize the Exchange Visitor Program are also concerned that the costs of this management audit report will be passed down to them.

The State Department should consider alternatives to this management audit requirement that would minimize the impact on small entities. For example, the agency could require small entities to complete an initial audit, and then a cycle of audits every five years provided that the sponsor is in good standing and has no complaints. The agency could also consider such alternatives as an exemption for small entities to this provision, later compliance dates for small entities for this provision, or the submission of a management report without hiring an independent auditor.

### **Conclusion**

Advocacy appreciates the opportunity to comment on this rule. The Exchange Visitor Program is a vital program that brings in more than 275,000 exchange visitors from around the world to the United States to complete educational and cultural programs. Advocacy is concerned that the proposed rule may have a significant economic impact on a substantial number of small entities. This proposed rule will increase the compliance cost for small sponsors and small businesses that utilize this program, and may result in a 30 to 60 percent drop in participation rates and decreased revenue. Additionally, small businesses may lose access to reliable and skilled exchange visitors in critical peak seasons.

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<sup>29</sup> 74 *Fed. Reg.* at 48178.

<sup>30</sup> See note 28.

<sup>31</sup> Telephone interview with Marianne Mason, Executive Director, the Cordell Hull Foundation, New York, NY (Nov. 18, 2009). A list of these costs is available at: [http://www.cordellhull.net/CHF2/Costs\\_of\\_New\\_Rule.html](http://www.cordellhull.net/CHF2/Costs_of_New_Rule.html).

Advocacy recommends that the State Department publish an IRFA analyzing small business costs and consider suggested alternatives that minimize these small business costs before proceeding with this rule. Advocacy would be happy to assist you in any way we can. Please feel free to contact me or Janis Reyes at (202) 205-6533 (or [Janis.Reyes@sba.gov](mailto:Janis.Reyes@sba.gov)) if you have any questions or require additional information.

Sincerely,

/s/

Susan M. Walthall  
Acting Chief Counsel for Advocacy

/s/

Janis C. Reyes  
Assistant Chief Counsel

cc: Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget