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November 23, 2009

Stanley S. Colvin
Deputy Assistant Secretary, Private Sector Exchanges
US Department of State Office of Designation
SA-5, Floor 5, 2200 C Street, NW
Washington, DC 20522-0505

Submitted via Regulations.gov

Re: Proposed Changes to Exchange Visitor Program – General Provisions; RIN (1400-AC36)

Dear Mr. Colvin:

The American Immigration Lawyers Association (AILA) respectfully submits the following comments with regards to the Notice of Proposed Rule Changes: Exchange Visitor Program published in the *Federal Register* on September 22, 2009 (74 Fed. Reg. 48177). We submit our comments and concerns by topic, but reference the relevant sections of the proposed revisions to Title 22 of the Code of Federal Regulations where appropriate.

AILA is a voluntary bar association of nearly 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. The organization has been in existence since 1946 and is affiliated with the American Bar Association. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed rule and believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that we believe will benefit the public and the government.

First, we commend the United States Department of State (the Department) for acting on its goals to update and improve the Exchange Visitor Program through the first significant proposed rulemaking since 1993. We also

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recognize and applaud the Department's efforts to increase overall program oversight, but we urge the Department not to do so at the risk of weakening the very foundation on which the J-1 program rests. The Mutual Educational and Cultural Exchange Act of 1961 (the "Fulbright-Hays Act") was promulgated at a time when the world was still reeling from the devastating damage of two World Wars and when countless nations, both developed and developing, engaged in a public recognition of the futility of war as a means of achieving resolution of differences. The Act was promulgated as a means for the United States to build bridges of cultural and international understanding by targeting the highly skilled, talented, and motivated youth of nations around our planet.

Second, while we recognize that the Department must demand accountability on the part of sponsors of the J-1 program, we fear that it has used the medium of this proposed regulation as a means of eroding the range and number of opportunities for young men and women to learn about our culture and return to share important skills and insights with their compatriots. AILA recognizes the major role that the Fulbright-Hays Act has played for nearly 50 years to instill trust and promote understanding, education, and training among people of dramatically divergent cultures and for the mutual benefit of our people as well as the people of nations struggling to achieve financial and cultural independence. It is crucial that the full range of these opportunities continues to exist.

Third, AILA notes the absence of any analysis or discussion of the economic impact of the proposed rule. AILA believes that the Department has failed to comply with the Regulatory Flexibility Act (RFA) through its failure to assess the economic impact of this proposal. The Department rests its exemption from the Administrative Procedures Act on the foreign policy exemption to APA requirements and thus the RFA. In contrast, the proposed rule would solely regulate domestic businesses and sponsoring organizations, far removed from the implied foreign policy aspects of the exchange program. Invoking the foreign policy exemption to the APA is a thinly veiled attempt – unsupported by the rule's regulation of domestic entities and their activities – to relieve the Department from having to undertake a regulatory and flexibility analysis. For this reason, AILA recommends that the Department first undertake a detailed analysis of the economic and resource impact on program sponsors prior to implementing a final rule.

Through this letter AILA is opting not to comment on each and every section of the proposed rule. Instead, our comments fall into two categories: (I.) Areas where we feel the proposed rule will clearly benefit the workings of the J-1 Exchange Visitor program, and (II.) Areas where we feel the proposed

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rule will create burdens and inefficiencies that run counter to the legislative intent underlying the Mutual Educational and Cultural Exchange Act of 1961 (the “Fulbright-Hays Act”).

I. AREAS WHERE THE PROPOSED REGULATIONS WILL STRENGTHEN THE J-1 PROGRAM

A. Increased Insurance Coverage Requirement

62.14 Minimum [insurance] coverage must provide.....

(1) medical benefits of at least \$200,000 per accident or illness;

(2) Repatriation of remains in the amount of \$25,000

(3) Expenses associated with the medical evacuation of exchange visitors to his or her home country in the amount of \$50,000.

AILA is pleased to see the increased insurance coverage requirements. The increase shows recognition of the fact that unforeseen and unexpected medical expenses do occur, that the Exchange Visitor should have adequate medical insurance to meet these costs, and that the coverage requirements must be brought into line with present-day costs and premiums. However, AILA’s position is that this new requirement – while justified – will only be fairly applied if there is a “grandfather” provision allowing Exchange Visitors who have already purchased these plans to proceed without having to purchase additional coverage. Similarly, those Exchange Visitors who have already negotiated their coverage and who are in “in the pipeline” and awaiting Forms DS-2019 should also be “grandfathered.” The best way to implement the final rule will be for the Department to choose a fair and appropriate future date to serve as the start date for this new requirement.

B. International Education Experience Requirement

62.3(b)(3) Demonstrates that the organization or its proposed RO has no fewer than three years experience in international exchange; and

This proposed rule will allow new designated sponsors to qualify by hiring an RO who has three years of experience in international education. It will also allow organizations that have many years experience in international education to hire an RO with less than three years experience without jeopardizing their sponsorship status. AILA recognizes that inexperienced Responsible Officers may be more likely to make administrative and SEVIS data errors and provide less precise or complete advice than an experienced Responsible Officer. Again, we feel it most fair if the Department implements

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the final rule with enough notice to afford all programs the opportunity to “staff up” accordingly.

II. AREAS WHERE THE PROPOSED REGULATION WILL CREATE BURDENS AND INEFFICIENCIES

A. Proposed change in definition for an “accredited educational institution.”

*62.2 Accredited academic institution. Any publicly or privately operated primary, secondary, or post-secondary institution in the United States that offer primarily academic programs and is duly accredited by the appropriate academic accrediting authority of the state in which such institution is located; provided, however, that in addition, all post-secondary institutions must also be accredited by a nationally recognized accrediting agency or association as recognized by the Secretary of Education. **An institution that offers primarily vocational or technical programs does not fall within the purview of an academic institution for this purpose** (Emphasis supplied).*

AILA is most concerned about the proposed rule’s redefinition of Accredited Academic Institution. The proposed rule would limit educational participation to those programs that are “academic” in nature. In its Supplementary Information to the proposed rule, the Department merely notes:

The term “accredited educational institution” has been changed to “accredited academic institution... Vocational programs are not included under the Mutual Educational and Cultural Exchange Act of 1961.”

74 Fed. Reg. at 48179. By the same token, AILA notes that the Act never expressed that vocational or technical program should be excluded from consideration, and 48 years of practice have shown the myriad benefits of including vocational and technical programs in the definition of an “Accredited Institution.” Indeed, the “Skills List” itself is a listing of academic disciplines as well as skills – many of which are vocational or technical in nature – that may be in short supply in the Exchange Visitor’s home country.

Moreover, the Department points to no abuses or concerns about the tens of thousands of Exchange Visitors who have profited from the J-1 program over the past 48 years and who have brought important vocational or technical

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know-how back to the home country for the benefit of others. A viable educational program in the U.S. may commingle both academic and vocational elements. AILA seriously questions what the Department is possibly hoping to gain through constricting this definition and argues for the current definition to remain undisturbed.

B. Sections relating to Accompanying Spouse and Dependents

62.10(d)(6) Report Employment Authorization Document (EAD) information in SEVIS for the accompanying spouse and each dependent, if applicable, by entering the EAD number, validation and expiration dates as issued by the Department of Homeland Security. [Companion proposed rule to 62.16(c)]

62.16(c) The acceptance of employment by an accompanying spouse or dependent of an exchange visitor is governed by Department of Homeland Security regulations. An exchange visitor must report to his or her sponsor the Employment Authorization Document (EAD) number and the validation and expiration dates of the authorized period of employment for any accompanying spouse and each dependent. As required by Sec. 6210(d)(6), sponsors must report accompanying spouse and dependent EAD information to SEVIS.

(a)(4) Accompanying spouse and dependent records. A sponsor must report in SEVIS if an accompanying spouse and/or dependents depart from the United States prior to the exchange visitor's departure date.

The rule adds additional layers of responsibility for the Responsible Officers. This is of concern for one major reason: by asking ROs to track the activities of J-2 dependents, it duplicates efforts rather than expanding the channels of interagency communication between the Department and DHS/CIS. The proposed rule, if implemented, would create additional burdens for already burdened ROs and, at the end of the day, would be asking them to collect information that the CIS already has at its disposal. Rather than requiring the sponsoring organization to manually enter this data in SEVIS, the Department should instead work closely with DHS to improve its computer interface with DHS/CIS/CBP so that the Department may receive accurate and timely information relating to the EAD card or the travels of a J-2 spouse.

As written, the proposed rule imposes a burden on the RO/ARO to find some methodology for tracking EAD application and issuance for J-2s. USCIS, as issuer of the EAD, is already responsible for ensuring that the SEVIS record is

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updated. AILA is concerned that sponsors have no reasonable mechanism for determining or discovering that a J-2 family member has departed the U.S. Other than by happenstance, it is rare that an RO/ARO learns of a J-2's departure unless a travel signature is required. It is also unclear as to whether this proposed rule refers to any departure, even those of a temporary nature where the J-2 intends to return after a brief vacation or some other trip abroad. The question of whether the departure has to be permanent is left unanswered by the proposed rule.

Also, unlike the proposed EAD reporting requirements, no requirement is imposed on the J-2 to inform the sponsor of their departure prior to the J-1 program end date. This creates a burden on the sponsor to establish a method of learning of J-2 departures. However, at the end of the day, there is no reasonably reliable method that can be utilized to allow a sponsor to obtain the departure information on a consistent basis.

C. Expenses Related to State Department Site Visit

62.3(b)(4) Has successfully completed a site visit conducted by the Department of State or its agent, the cost for which will be borne by the applicant.

While AILA is not adverse to the requirement of a site visit, additional information about the expense related to this visit should be provided. The proposed rule states that the expense of the site visit must be borne by the applicant. However, the Department does not clarify whether this expense is included in the designation fees or is a separate expense. Clarification would be very beneficial given the growing cost of obtaining sponsor designation especially in light of the financial and budgetary constraints on many sponsors.

D. Clarification of Student Internship Program Requirements:

62.4(a)(4) Engaged full-time in a student internship program conducted by a post-secondary accredited educational institution.

62.4(h)(7) Intern. A foreign national participating in a structured and guided work-based internship program in his or her specified academic field.....

AILA notes that the proposed rule adds the Student Intern category but states that the student internship program can be at an educational institution. We

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note that the proposed rule does not change the term “accredited educational institution” to “accredited academic institution” in keeping with its intention to distinguish between academic institutions and institutions that primarily offer technical or vocational courses of study. There is likely to be confusion among sponsors as to whether the internship must be at an “academic institution” or whether any “educational institution” will suffice.

AILA also notes that the proposed rule at §62.4(h)(7) does not specify that the student internship to be undertaken at a US post-secondary academic institution. All that is required is that the student be currently enrolled full-time and actively pursuing studies at a degree or certificate granting post-secondary academic institution outside of the USA, or have graduated from such an institution no more than 12 months prior to the start of the EV program date on the DS-2019.

It would be an odd oversight for the Department to have twice forgotten to specify that the internship had to be at any post-secondary academic institution, so it would not be illogical to conclude is that the student internship can be undertaken at any educational institution as long as it is within the intern’s specified academic field. To avoid confusion among sponsors, however, the Department should clarify whether the student intern can receive sponsorship from any educational institution.

E. Criminal Background Check Requirement for all RO/ARO:

62.5(b)(9) A statement signed by the Chief Executive Officer, President, or equivalent certifying that:
(iii) The sponsor has completed a criminal background check on the potential RO and all ARO(s) and has determined their suitability for these positions;

62.7(c)(8) A statement signed by the Chief Executive Officer, President, or equivalent certifying that the sponsor has completed a criminal background check on the RO and all AROs and has determined their suitability for these positions.

AILA recognizes the importance of ethical and fiscal responsibility on the part of program sponsors, particularly those who are working with impressionable young men and women who are far away from home. While in the past there may have been certain isolated incidents, the Department points to no widespread abuse of the J-1 program that would necessitate a criminal background check of all RO/AROs.

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The proposed rule adds the requirement of criminal background checks for all applicants for EV Program sponsor status. Currently, this requirement is attached to secondary school programs or programs that involve secondary school age children. The criminal background check report is to be retained by the President or CEO and made available to the Department upon request. The criminal background check has to be undertaken at the time of the initial application for sponsor designation and re-done each time a sponsor seeks redesignation.

Most, if not all, college and university-level sponsors already undertake a criminal background check of their employees and have an established contractual relationship with a background screening company for this purpose. Though the cost of the background check is not expected to be exorbitant, or prohibitive, AILA is concerned that the proposed rule provides no guidance as to how to assess “suitability” to serve as an RO or ARO.

With the exception of the most egregious crimes, it is unclear what past criminal activity should be considered sufficient to disqualify a person from serving as an RO or ARO. AILA can understand the need to disqualify persons who have been convicted of certain crimes, as those persons would likely not meet the requirements for employment in the first place. However, if a person’s criminal background does not prevent employment, how does management effectively assess whether that person can be an RO or ARO? If the Department will use the information to assess an employee “nominated” by the sponsor (as described in the proposed rule’s revised definition of “ARO and “RO”), then both the sponsor and the “nominated” employee should know – in advance – the standard the Department plans on using.

In the Supplementary Information the Department indicates that “a thorough criminal background check would provide management decision makers with sufficient information to determine . . . whether there is pertinent information regarding their suitability for the proposed position such as credit-worthiness . . .” 74 Fed. Reg. at 48178. This statement would suggest that criminal background checks normally address credit-worthiness, which seems inaccurate. Further, and more troubling, it suggests that sponsors should consider a potential RO/ARO’s credit-worthiness in determining suitability for the position. The Department provides no basis for correlating credit-worthiness to suitability as an RO/ARO, it cites no instances in which RO/ARO’s with credit problems have thereby proven unfit, and it provides no guidance as to what sort of credit-worthiness problems would make a potential RO/ARO unsuitable. If the Department intends sponsors to consider potential RO/AROs’ credit-worthiness, which we think would be misguided, then it should state a means for doing so.

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In addition, the proposed regulations require the sponsor to use a bona fide background screening company and points out that NAPBS has over 700 members. Though there is not requirement to use a company that is a NAPBS member, given that the Department took the time to provide this information and the e-mail address of the organization, it would stand to reason that any background screener chosen should have NAPBS membership. The proposed rule should simply mandate NAPBS membership to at least provide the sponsor with a basic degree of assurance that they are complying the with “bona fide background screening company” requirement.

F. Redesignation:

62.7(c) The complete application must include the following supporting documents and certifications:

(1) A current Dun & Bradstreet on the sponsor;

(2) A list of all third parties (foreign and domestic) with whom the sponsor has executed a written agreement . . . and, if requested by the Department of State, a separate certification that the sponsor has obtained a Dun & Bradstreet Business Information Report for each third party . . .

The Department states, in the Supplementary Information, that “the requirement of these reports will help to ensure that sponsors are working with and/or placing exchange visitors with viable third party entities,” 74 Fed. Reg. at 48179, but the Department offers no explanation for requiring a Dun & Bradstreet report on the sponsor. Nor does it explain how such a report would be useful in evaluating the third party. It is unclear why the Department has chosen to rely on Dun & Bradstreet reports in making determinations as to redesignation, but the value of such reports is questionable, and – in light of the other extensive information required for redesignation – such a report would be superfluous at best. Like several other provisions of the proposed rule, this requirement will be a heavy financial burden for some sponsors, for instance, those who have many third-party agreements.

G. Reporting Requirements:

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62.15(e)(3) . . . In addition to the Annual Report required above, all P-3 and P-4 “Private Sector” programs must file a program specific management audit (in a format approved by the Department of State.

While AILA recognizes the Department’s need to ensure that sponsors maintain internal control necessary for compliance with the regulations, we believe that expensive annual audits would be an overly-burdensome new requirement of “Private Sector” programs. While the Department notes, in the Supplementary Information to the rule, that it anticipates the cost of such an audit to be “between \$6,000 and \$10,000,” 74 Fed. Reg. at 48178, many sponsors fear that the actual cost of such an audit will be as much as twice that estimated by the Department. We anticipate that such a large annual expense will dissuade many qualified potential sponsors from applying and may lead current sponsors, for example small non-profit sponsors, to drop their programs. We would urge the Department to consider alternatives to management audits, such as the redesignation process, for assessing sponsors’ compliance. In the alternative, we would suggest that the Department consider a longer audit report cycle, such as requiring a management audit every five years rather than every year.

AILA recognizes the large number of “sub-categories” within the J-1 Exchange Visitor designation. Some program sponsors are highly acclaimed international leaders in education who have been in existence for more than 300 years and have demonstrated great sophistication and exemplary leadership in administering their J-1 programs. Others are newer programs that may require additional guidance and oversight as they develop. AILA cautions the Department against adopting a “one size fits all” approach to the oversight of these programs.

As the Department proceeds to review comments and finalize the rule, we urge the Department to take the “middle path” that balances the need for security and accountability with the overarching and worthy philosophical goal of promoting global understanding and stability.

AILA appreciates the opportunity to comment on the proposed rule, and is hopeful that our feedback will inform the Department’s decisions on this matter.

Sincerely,

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AMERICAN IMMIGRATION LAWYERS ASSOCIATION