



January 26, 2024

VIA ELECTRONIC SUBMISSION

Karen Ward
Director
Office of Private Sector Exchange Designation
Bureau of Educational and Cultural Affairs
U.S. Department of State
2200 C Street NW
Washington, DC 20522-0505

Re: Exchange Visitor Program- Au Pairs, 88 Fed. Reg. 74071 (October 30, 2023).

Dear Ms. Ward:

On October 30, 2023, the U.S. Department of State (Department) published a rule that proposes to amend regulations governing the au pair program, which allows young foreign nationals to travel to the United States to continue their studies and provide in-home childcare for American host families.¹ This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rule.

Au pair sponsors reported to Advocacy that this rule will have a significant detrimental impact on their businesses and even threaten their viability. The Department proposes significant wage increases of up to 78 to 270 percent in the weekly au pair compensation or stipend.² Sponsors are concerned that these increased costs will decrease the demand for au pairs and decrease their revenues. For example, a similar requirement in Massachusetts mandating increases in au pair stipends resulted in an over 60 percent decrease in demand and enrollment for au pairs in this

¹ Exchange Visitor Program-Au Pairs, 88 Fed. Reg. 74071 (Oct. 30, 2023) [hereinafter 2023 Proposed Rule].

² *Id.* at 74,078. See also *infra* Table 1.

state.³ In addition, the agency also proposes other costly and burdensome requirements. Sponsors expressed concern that these changes may have the unintended consequence of damaging and potentially ending the program and job opportunities for au pairs.

Advocacy believes that the Department's initial regulatory flexibility analysis (IRFA) is deficient and underestimates the economic impact of this rule on small sponsors. For example, the Department fails to estimate any costs to sponsors from the decreased au pair demand and decreased revenues. The Department also underestimates the compliance costs and administrative burdens from the many other provisions of this rulemaking. Advocacy recommends that the Department reassess the compliance costs from this rule in a supplemental IRFA to be published in the Federal Register. As part of this analysis, the Department must consider significant alternatives that would accomplish the objectives of the proposed rule while minimizing the economic impacts to small entities as required by the Regulatory Flexibility Act (RFA).

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Regulatory Flexibility Act (RFA),⁴ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁵ 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, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.⁶ If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.⁷ The agency must provide a statement of factual basis that adequately supports its certification.⁸

³ 2023 Proposed Rule, *supra* note 1, at 74,082.

⁴ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

⁵ Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§ 601-612).

⁶ 5 U.S.C. § 603.

⁷ *Id.* § 605(b).

⁸ *Id.*

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁹ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule’s publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.¹⁰

Advocacy’s comments are consistent with Congressional intent underlying the RFA, that “[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”¹¹

B. The Proposed Rule

The Fulbright-Hays Act vests the Department of State with the authority to administer the au pair program, which allows foreign nationals to travel to the United States on a J-1 visa and live with an American host family.¹² Au pairs care for the host families’ children, enroll in educational programs, and engage in a variety of cultural activities. The Department of State emphasizes the cultural immersion purpose of the au pair program, which has always distinguished au pairs from domestic childcare workers.¹³ There are 21,500 host families and au pairs who participate in this program annually.¹⁴ The regulation impacts the operations of 14 sponsors who coordinate this program. The Department has determined that all 14 sponsors are considered small businesses under SBA size standards.¹⁵

On October 30, 2023, the Department released a proposed rule on the au pair program.¹⁶ The Department noted that many provisions of the program would be governed by these federal regulations and would not be supplemented by state or local law. However, for the first time, the rule proposed that state and local minimum wage laws and overtime pay requirements will apply to au pairs where applicable.¹⁷

Advocacy has conducted outreach to small sponsors and their representatives since this proposed rule was published. The following comments are reflective of the issues raised by these small sponsors and examined by Advocacy.

⁹ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

¹⁰ *Id.*

¹¹ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

¹² Mutual Educational and Cultural Exchange Act of 1961, Pub. L. No. 87-256, 75 Stat. 527 (1961) (codified at 22 U.S.C. § 2451 *et seq.*).

¹³ 2023 Proposed Rule, *supra* note 1, at 74,072.

¹⁴ *Id.* at 74,085.

¹⁵ *Id.* See U.S. Small Bus. Admin., Table of Size Standards Matched to North American Industry Classification System Codes (NAICS), 13 CFR § 121.201 (March 2023), https://www.sba.gov/sites/sbagov/files/2023-03/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%281%29%20%281%29_0.p df. The small business size standard for sponsors is NAICS code 622710, Educational Services. The size standard has been increased to \$24 million dollars in average annual receipts. In the IRFA, the Department found that all 14 sponsors were small sponsors with annual revenues of \$15 million or less.

¹⁶ 2023 Proposed Rule, *supra* note 1, at 74,071.

¹⁷ *Id.* at 74,080.

Table 1- Proposed Rule Au Pair Stipend for Full Time Program¹⁸

	Current Stipend	Proposed Rule Stipend (Based on host family city, the highest of federal, state, or local minimum wage)				
		Tier 1 \$7.25- \$8.00/hr	Tier 2 \$8.01- \$12.00/hr	Tier 3 \$12.01- \$15.00/hr	Tier 4 (\$15.01- \$18.00/hr)	Tier 4 + 5 hours Overtime
Hourly Wage	\$7.25/hr	\$8/hr	\$12/hr	\$15/hr	\$18/hr	\$18/hr
Weekly Wage	\$326.25 (\$7.25 x 45 hours)	\$320 (\$8 x 40 hours)	\$480 (\$12 x 40 hours)	\$600 (\$15 x 40 hours)	\$720 (\$18 x 40 hours)	\$855 (\$27 x 5 hours) + (18 x 40 hours)
Less Room & Board ¹⁹	\$130.50	\$130.54	\$130.54	\$130.54	\$130.54	\$130.54
Total Weekly Stipend	\$195.75	\$189.46	\$349.46	\$469.46	\$589.46	\$724.46
Weekly Percent Increase		-3.2 %	78.5%	139.8 %	201.1%	270.1%

The most significant proposed change in this rule is the methodology for calculating an au pair’s stipend. The current compensation mechanism for full-time au pairs is a national wage calculated by multiplying the current federal minimum wage (\$7.25 per hour) by 45 hours and then deducting for the room and board. The Department proposes to adopt a national four-tiered wage formula in au pair compensation across geographic regions and in areas with similar local economic conditions. A host family would determine the highest of the federal, state, or local minimum wage, and choose the proper tier for au pair compensation.²⁰ The four tiers range from \$8 per hour to \$18 per hour.²¹ For example, an au pair’s weekly stipend under this rule under Tier 4 would go from \$195.75 to \$589.46, or a 201 percent increase based on a 40-hour work week. If this au pair works a 45-hour work week, the au pair would receive \$724.46, or a 270 percent increase.²²

¹⁸ *Id.* at 74,078 (Adapted from Table 1: Proposed Compensation Tiered Chart). The current rules allow full-time au pairs to work 45 hours, and the au pair is paid for 45 hours of work. The proposed rule’s full-time program allows for au pairs to work 32 to 40 hours a week, and the au pair is paid for 40 hours of work. Under the new rule, if an au pair works 45 hours, they would be entitled to 5 hours of overtime paid at a rate of time and a half.

¹⁹ *Id.* at 74,078; 29 U.S.C. § 203(m). Under current rules, there is a 40 percent deduction for room and board, or \$130.50. Under the proposed rule, credits for room and board may be taken only when the employee receives the lodging and meals. The total permissible credit for a full seven days of room and board actually provided is \$76.16 (meals) + \$54.38 (lodging) = \$130.54.

²⁰ 2023 Proposed Rule, *supra* note 1, at 74,078.

²¹ *Id.*

²² *See supra* note 18 and accompanying table.

The proposed rule changes other requirements for the au pair program, including:

- Reducing program hours in the full-time program from 45 hours to 32-40 hours a week. The host family will need to report any hours over 40 hours to the sponsors, and pay an overtime premium under applicable federal, state, or local law;²³
- Modifying program hours in 30 hours under the EduCare option to a new part-time program, with a range of 24-31 hours. Any overtime will be compensated at this rate and any hours over 40 will also be paid an overtime premium;²⁴
- Modifying the requirements for room and board to only allow deductions when the employee actually receives the lodging and meals;²⁵
- Requiring host families provide 56 hours of paid sick leave and 80 hours of paid time off for a 12-month program;²⁶
- Increasing the educational component fee from \$500 to \$1,200;²⁷ and
- Requiring host families to provide a private and lockable bathroom to au pairs.²⁸

The proposed rule lists specific new requirements for program sponsors, including:

- Changing procedures for rematching and possible refunds to au pairs from 25 percent to 75 percent of fees if they are unable to rematch to a new family;²⁹
- Customizing host family agreements and placement-specific information for each au pair placement;³⁰
- Updating standard operating procedures to include new requirements;³¹
- Vetting foreign entity contracts;³² and
- Collecting documentation from host families that records the weekly hours and leave time of au pairs.³³

²³ 2023 Proposed Rule, *supra* note 1, at 74,090.

²⁴ *Id.* The Department is renaming the EduCare option to a part-time program, to highlight differences in hour limitations with the full-time program. The current EduCare option limits au pairs to 30 hours of weekly childcare to allow more time to study. The proposed part-time program allows a weekly childcare range of 24-31 hours.

²⁵ *Id.* at 74,095.

²⁶ *Id.* at 74,093.

²⁷ *Id.* at 74,096.

²⁸ *Id.* at 74,092.

²⁹ *Id.* at 74,090.

³⁰ *Id.* at 74,092.

³¹ *Id.* at 74,091.

³² *Id.* at 74,097.

³³ *Id.* at 74,087.

II. The Department's Compliance with the Regulatory Flexibility Act (RFA)

A) The Department's Small Business Analysis Underestimates Costs of Decreased Sponsor Revenues

Under the RFA, an IRFA must contain:

- (1) A description of the reasons why the regulatory action is being considered;
- (2) The objectives and legal basis for the proposed rule;
- (3) A description and estimated number of small entities to which the rule will apply;
- (4) A description and estimate of compliance requirements, including an estimate of the classes of small entities which will be subject to the rule;
- (5) Identification of duplication, overlap, and conflict with other rules; and
- (6) A description of significant alternatives to the rule.³⁴

The RFA requires agencies to describe and assess the compliance costs of a particular rule on small businesses and compare these costs to the revenues of these small business to determine the economic impact. According to Advocacy's RFA compliance guide, one measure for determining the economic impact on small entities is whether the cost of a rule exceeds one to three percent of gross revenues of affected small entities.³⁵

Advocacy is concerned that the Department has underestimated the compliance costs of this rule for small sponsors in the form of significant lost or decreased revenues. Under the RFA, small business compliance costs can include lost sales and profits resulting from the proposed rule.³⁶ Advocacy believes the suggested supplemental IRFA would show a significant economic impact well beyond three percent of the sponsors' revenues. Under this rule, the proposed hourly rate will increase from \$7.25 per hour to four tiers from \$8 to \$18 per hour. For example, under Tier 4, an au pair's weekly stipend could increase 201 percent based on a 40-hour work week and 270 percent based on a 45-hour work week.³⁷

³⁴ 5 U.S.C. § 603.

³⁵ U.S. SMALL BUS. ADMIN., OFF. OF ADVOC., A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT 19 (Aug. 2017), <https://advocacy.sba.gov/wp-content/uploads/2019/06/How-to-Comply-with-the-RFA.pdf> [hereinafter ADVOCACY RFA GUIDE] ("Other measures may be used; to illustrate, the impact could be significant if the cost of the proposed regulation (a) eliminates more than 10 percent of the business' profits; (b) exceeds 1 percent of the gross revenues of the entities in a particular sector or (c) exceeds 5 percent of the labor costs of the entities in the sector."). The guide discusses other agencies, like the U.S. Environmental Protection Agency, that use the baseline of 1 to 3 percent of revenues when analyzing whether a rule will have a significant economic impact on a substantial number of small entities.

³⁶ *Id.* at 37.

³⁷ See *supra* note 18 and Table 1.

The changes in this proposed rule are similar to changes made in the au pair program in Massachusetts. On December 2, 2019, the U.S. Court of Appeals ruled that au pairs must be paid the state's minimum wage and overtime laws effective January 1, 2020.³⁸ Massachusetts minimum wage was \$12.75 in 2020, \$13.50 in 2021, \$14.25 in 2022, and \$15.00 in 2023.³⁹ The changes ultimately led to a decrease in the number of au pairs enrolled in Massachusetts by 63 percent in 2019 and 68 percent in 2022.⁴⁰ A recent report by the Cato Institute found that the number of new au pairs in all other states rose by 4.4 percent from 2019 to 2022.⁴¹

Since the proposed rule's provisions for stipend increases and administrative burdens are higher than the ones adopted in Massachusetts, it would not be unreasonable to expect an even larger decrease in au pair enrollment and an accompanying decrease in sponsor revenues from this proposal nationwide. In a recent survey of over 3,000 host families, 65 percent would probably or definitely not continue with the program if the weekly wage increased to \$346.46 per week (Tier 2), 93 percent if the wage increased to \$469.46 per week (Tier 3), and 97 percent if the weekly wage increased to \$589.46 per week (Tier 4).⁴² Au pair sponsors have informed Advocacy that if 90 percent of families dropped out of the au pair program, they would end up in bankruptcy. From a small business perspective, Advocacy believes the threshold analysis would show a significant impact well beyond three percent even under the less costly options outlined in the rule. Unfortunately, this type of cost analysis was not considered in the rule by the Department.

B) The Department's IRFA is Deficient and Underestimates Other Costs and Paperwork Burdens

The Department's IRFA underestimates the economic impact of the new paperwork requirements under this rule. Small sponsors have expressed concern that the Department is turning an international cultural exchange program into a domestic labor program, requiring a litany of new paperwork requirements. The IRFA lists the new requirements for sponsors including customization of host family agreements and information packets, updated orientation

³⁸ *Capron v. Off. of the Att'y Gen. of Mass.*, 944 F.3d 9 (1st Cir. 2019). The court held that the district court did not err in rejecting a federal preemption claim by a placement agency. Au pairs were found to be domestic workers protected by the Massachusetts minimum wage, overtime, and Domestic Worker Bill of Rights (DWBOR) laws.

³⁹ Massachusetts Domestic Workers Bill of Rights, Mass. Gen. Laws Ann. ch. 151, § 1 (West 2019), <https://www.mass.gov/files/documents/2019/06/24/MGL%20Chapter%20151%20Section%201%202019-2023.pdf>.

⁴⁰ 2023 Proposed Rule, *supra* note 1, at 74,082. The Department reported that there were 1,457 au pairs placed in Massachusetts in 2019. The numbers of au pairs in Massachusetts declined each year since the ruling. In 2021 and 2022, there were 528 and 454 au pairs respectively placed in Massachusetts. This is a decrease in demand of 63 to 68 percent.

⁴¹ Alex Nowrasteh & Vanessa Brown Calder, *The Minimum Wage Undermined the Au Pair Program in Massachusetts* (CATO Inst., Working Paper No. 73, 2023), <https://www.cato.org/working-paper/minimum-wage-undermined-au-pair-program-massachusetts>.

⁴² Paul W. Hughes, Partner, McDermott Will & Emery, on behalf of the Alliance for International Exchange, *Au Pair Host Family Survey* (forthcoming January 2024). There were 3,157 responses to the survey. There were 3,053 - 3,054 individual responses to Questions 10-12, asking whether they would continue the program if the weekly minimum stipend rose to \$348.46-\$589.46.

materials, and vetting of foreign entity staff.⁴³ However, the IRFA does not include or estimate other new compliance costs and paperwork burdens anticipated by sponsors and host families. For example, the proposed rule would require sponsors to collect and track an au pair's weekly hours, overtime, and leave, and approve any changes in an au pair's schedule and duties.⁴⁴ The proposed rule requires host families and sponsors to stay up to date on state and local minimum wages and overtime laws.⁴⁵ Host families would be required to track an au pair's meals and where they sleep for room and board deduction purposes, and sponsors would have to ensure that these records are correct.⁴⁶ The proposed rule also changes the procedures for rematching au pairs if they are removed from the host family, and sponsors are now responsible for possible refunds to au pairs from 25 percent to 75 percent of fees if they are unable to match with a new family.⁴⁷ Sponsors have commented that they are also responsible for transportation and room and board costs in the rematching process.

C) The Department's IRFA Fails to Estimate Compliance Costs by Revenues

The Department's IRFA fails to estimate the compliance cost of this rule by small entity size and revenue, as required by the RFA.⁴⁸ Without this information, the agency cannot determine the rules' true economic impact on covered small entities. This is done by comparing the costs of the rule to the revenues of a business. Unless agencies perform small business impact analysis on detailed size groups, they will lack full understanding of their regulatory proposals on small entities. This will lessen the chances that the agency will develop regulatory alternatives contemplated by the RFA.⁴⁹

In the Department's IRFA, it lists 14 sponsors that qualify as small businesses under the SBA size standards.⁵⁰ However, the agency does not categorize these sponsors and their compliance costs by revenue. For example, the agency notes that one sponsor only sponsors six au pairs and the largest sponsor hosts approximately 10,500 au pairs annually.⁵¹ The small business size standard for small sponsors is \$24 million dollars in annual receipts.⁵² There will be differences in the impact of this rule for a small sponsor with a revenue of \$2 million dollars and that with a revenue of \$14 million dollars. The smallest businesses often incur disproportionate costs because they have less funds and staff. This rule will require sponsors to track many aspects of the au pair's employment, which will require many hours of staff time. Small businesses may have to hire outside staff to understand and implement this rule, as they often have limited to no

⁴³ 2023 Proposed Rule, *supra* note 1, at 74,085.

⁴⁴ *Id.* at 74,087.

⁴⁵ *Id.* at 74,095.

⁴⁶ *Id.*

⁴⁷ *Id.* at 74,090.

⁴⁸ *See supra* note 35.

⁴⁹ Michael J. McManus, *Examining Small Business Impacts in the Regulatory Development Process: The Drawbacks of Averaging* 6 (Aug. 30, 2018), <https://advocacy.sba.gov/2018/08/30/examining-small-business-impacts-in-the-regulatory-development-process-the-drawbacks-of-aver/>.

⁵⁰ *See supra* note 15.

⁵¹ 2023 Proposed Rule, *supra* note 1, at 74,085.

⁵² *See supra* note 15.

human resources personnel, legal counsel, or financial personnel on staff.

In the IRFA, the Department only lists a range of potential compliance costs for each provision, instead of the total compliance cost of the rule for each size of small entity. For example, the agency estimates that the cost to customize one host family agreement is \$72.97 per placement. The estimated range of costs for small entities is \$438 for the sponsor with the smallest program and \$766,185 for the sponsor with the largest program.⁵³ This wide range of costs does not help small sponsors understand the potential impact of this rule to their operations and allow them to provide meaningful public comment on the proposed rule.

D) The Department Should Reexamine Small Sponsor Impacts

Advocacy recommends that the Department reassess the compliance costs of this rule on small sponsors in a supplemental IRFA and publish this expanded economic analysis in the Federal Register for public comment. The Department should estimate the compliance costs of this rule by the small entity size and revenue, as required by the RFA. The Department should also estimate the impact of adopting significant increases in au pair compensation to small sponsors, and the corresponding decrease in demand and revenues for this program. The agency should also reexamine the other compliance costs and paperwork burdens for sponsors under this rule, particularly those that were omitted from the IRFA.

E) The Department Should Consider Less Burdensome Alternatives that Would Still Accomplish the Agency's Objectives

Under the RFA, an IRFA must contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of the applicable statutes.⁵⁴ The Department's IRFA is incomplete because it does not analyze any regulatory alternatives that would minimize the economic impact of the rule for small sponsors. The Department seeks to modernize the au pair program and update the compensation structure for au pairs to reflect geographical differences. However, sponsors are concerned that these significant increases in au pair stipend and administrative burdens may have the unintended consequence of damaging and potentially ending the program and job opportunities for au pairs.

Small sponsors recommend that the Department provide a clear statement of federal preemption, that the agency's comprehensive au pair regulations continue to preempt state and local labor laws including wage and overtime laws. The First Circuit noted in the *Capron* decision that the Department "would be free to preempt...state laws now by revising the regulations."⁵⁵ Under the proposed rule, sponsors and host families will have difficulties keeping track of the applicable state and local minimum wage and overtime laws, creating substantial liability. Sponsors recommend a federally uniform au pair rate that has moderate increases, providing a balance between fairly compensating au pairs and keeping the program affordable for host families.

⁵³ 2023 Proposed Rule, *supra* note 1, at 74,085.

⁵⁴ 5 U.S.C. § 603(c).

⁵⁵ *Capron v. Off. of the Att'y Gen. of Mass.*, 944 F.3d 9 (1st Cir. 2019).

After the Department completes a more thorough supplemental IRFA on the impacts of this rule for small sponsors, the agency can better analyze less burdensome significant regulatory alternatives that would also meet the agency objectives. Advocacy recommends that the Department carefully consider the sponsors' recommendations provided during the comment period.

III. Conclusion

Advocacy is concerned that the proposed regulation's significant wage increases may have detrimental economic impacts for the fourteen small sponsors that coordinate the au pair program and may even threaten their viability. Sponsors are concerned that these increased costs will significantly decrease the demand for au pairs and decrease their revenues.

Advocacy believes that the Department's initial regulatory flexibility analysis is deficient and underestimates the economic impact of this rule on small sponsors. Advocacy recommends that the Department reassess the compliance costs from this rule in a supplemental IRFA, to be published in the Federal Register. As part of this analysis, the Department must consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small entities as required by the Regulatory Flexibility Act.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Janis Reyes at (202) 798-5798 or by email at Janis.Reyes@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Janis C. Reyes
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Office of Advocacy
U.S. Small Business Administration

Copy to: The Honorable Richard L. Revesz, Administrator
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