NOTE

All Work and Not Enough Pay: Proposing a New Statutory and Regulatory Framework to Curb Employer Abuse of the Summer Work Travel Program

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ABSTRACT

In the summer of 2011, 400 foreign students working in the United States through the Department of State's Summer Work Travel ("SWT") program went on strike at a Pennsylvania Hershey's factory to protest their wages and working conditions. The strike drew national attention to longstanding problems with the management and oversight of SWT employers, prompting the Department of State to impose new regulations. Those new regulations, however, did not go far enough. This Note proposes more comprehensive reforms that are modeled on the statutory and regulatory framework of the H-1B and H-2B programs—two other programs that permit foreign individuals to temporarily work in the United States. First, it proposes regulations that better protect the wages and working conditions of SWT workers. Second, it argues that Congress should amend the Immigration Nationality Act to transfer the oversight and enforcement of those regulations from the Department of State to the Department of Labor. To accomplish this transfer, this Note proposes that labor attestation be implemented in the SWT context, which would require employers of SWT students to attest to the Department of Labor that they will comply with program regulations and would subject those employers to fines and penalties for violations of those regulations.

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TABLE OF CONTENTS

INTRODUCTION 1296
I. FULBRIGHT-HAYS ACT, SWT PROGRAM, SPONSORS, AND HOST EMPLOYERS 1300
A. Mutual Understanding Through Cultural Exchange . 1300
B. SWT Program Participants 1301
C. Sponsors 1303
D. Host Employers 1304
II. HERSHEY'S AS A CASE STUDY 1305
A. Participant Compensation and Impermissible Deductions 1306
B. Lack of Accountability for Sponsors and Employers 1308
1. Sponsors 1309
2. Host Employers 1311
III. PROPOSAL 1313
A. New Compensation Regulations Prohibiting Impermissible Deductions 1314
B. Amend the Immigration Nationality Act to Transfer Oversight and Enforcement of Wage Regulations to the Department of Labor 1316
1. Attestation 1317
2. Compliance Audits 1319
3. Employer and Sponsor Penalties for Violations. 1320
4. What Would Be Left for Sponsors 1323
IV. COUNTERARGUMENTS 1324
A. SWT Program Should Be Eliminated Altogether 1324
B. Increased Costs of Compliance Would Deter Employers from Hiring SWT Workers 1325
C. Department of Labor Lacks Incentives to Enforce SWT Regulations Against SWT Sponsors and Employers 1326
D. Department of Labor Lacks Funding to Enforce SWT Regulations 1327
CONCLUSION 1328

INTRODUCTION

"[Y]our Work and Travel Program is sure to be a summer you will never forget!"[1] So said the website for the Council for Educational Travel USA ("CETUSA"), formerly a designated sponsor of the Department of State's Summer Work Travel ("SWT") program,[2] which allows foreign students to live and work in the United States for up to four months during their official summer breaks.[3] Indeed, the more than 400 CETUSA-sponsored students who spent their SWT programs at a Hershey's distribution center in Pennsylvania in the summer of 2011 are unlikely to forget their experience.[4] The students performed heavy labor and worked grueling hours, earning only between $1.00 and $3.50 per hour after CETUSA's deductions.[5] The students went unnoticed to government agencies and the American public until a group of more than 300 of them reached out to the National Guestworker Alliance ("NGA") and organized a widely publicized protest of their wages and working conditions.[6]

The Hershey's strike is just one in a series of recent events and investigations that have exposed abuses of students in the SWT program. In 2010, the Associated Press investigated the living and working conditions of SWT students employed up and down the East coast and discovered SWT students who took home less than a dollar per hour, begged for food, lived in apartments so crowded that they had to sleep in shifts, and some who were even forced to work in strip clubs instead of restaurants as they had been promised.[7] Most recently, the SWT program has been linked to human trafficking. There have been at least two federal investigations into human trafficking facilitated by J-1 visas,[8] and in November of 2011, the U.S. Attorney's

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1 *Work and Travel Program for Students*, COUNCIL FOR EDUCATIONAL TRAVEL, USA, http://www.cetusa.org/public/offers/work-and-travel-program/for/students (last visited Jan. 13, 2011). Because CETUSA was barred from the SWT program for violating SWT regulations as to the students working for Hershey, Julia Preston, *Company Banned in Effort to Protect Foreign Students from Exploitation*, N.Y. TIMES, Feb. 2, 2012, at A12, its website no longer advertises SWT sponsor services and thus does not use this slogan anymore.

2 Preston, *supra* note 1.

3 *See generally* Summer Work Travel, 22 C.F.R. § 62.32 (2012).

4 Jennifer Gordon, Op-Ed, *America's Sweatshop Diplomacy*, N.Y. TIMES, Aug. 25, 2011, at A27; Julia Preston, *Foreign Students in Work Visa Program Stage Walkout at Plant*, N.Y. TIMES, Aug. 18, 2011, at A11.

5 Gordon, *supra* note 4.

6 *Id.*

7 Holbrook Mohr, Mike Baker & Mitch Weiss, *U.S. Fails to Tackle Student Visa Abuses*, HUFFINGTON POST (Dec. 6, 2010, 4:18 PM), http://www.huffingtonpost.com/2010/12/06/student-visa-abuses_n_792376.html.

8 *Id.*

Office for the Southern District of New York charged members of a prominent New York crime family with fraudulently obtaining SWT visas for Eastern European women to work as exotic dancers in New York strip clubs.[9]

Abuses such as these are the consequence of program conditions that government auditors have warned about for almost twenty years—inadequate program regulations and lax management and oversight by both sponsors and the Department of State ("DOS").[10] The regulations do not provide sufficient protections for the wages of SWT workers.[11] Moreover, employer compliance with what few regulations do purport to protect SWT workers' wages is not properly monitored or enforced by sponsors or DOS.[12] DOS relies almost entirely upon sponsors to monitor SWT workers and to ensure that employers comply with the program regulations.[13] Sponsors, however, have strong institutional and financial incentives to not report employers who violate regulations, and some sponsors—like CETUSA—have even exploited SWT workers themselves.[14]

Until May of 2012, DOS was reluctant to make the changes to SWT regulations needed to improve the program's management and oversight. Beginning in 2010, in response to complaints about SWT

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9 Press Release, U.S. Attorney's Office for the S. Dist. of N.Y., Manhattan U.S. Attorney Charges Twenty Individuals for Participating in a Scheme to Recruit Illegal Immigrants to Work in Adult Entertainment Clubs Controlled by La Cosa Nostra (Nov. 30, 2011), *available at* http://www.justice.gov/usao/nys/pressreleases/November11/trucchioalphonseetalarrestspr.pdf.

10 *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF STATE & THE BROAD. BD. OF GOVERNORS, ISP-I-12-15, INSPECTION OF THE BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS 1, 5, 28 (2012) (concluding that "[p]ublic criticism of the [SWT] program is the most recent negative consequence of unfettered growth and weak regulation" and that the program "suffers from overexpansion, poor supervision, and weak compliance regulations"); OFFICE OF INSPECTOR GEN., U.S. DEP'T OF STATE, AUDIT REPORT 00-CI-028, THE EXCHANGE VISITOR PROGRAM NEEDS IMPROVED MANAGEMENT AND OVERSIGHT (2000); U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-90-61, U.S. INFORMATION AGENCY: INAPPROPRIATE USES OF EDUCATIONAL AND CULTURAL EXCHANGE VISAS 4 (1990) (concluding that the United States Information Agency ("USIA"), the DOS agency then responsible for the SWT program, "ha[d] not adequately monitored the J-visa program"); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-106, STATE DEPARTMENT: STRONGER ACTION NEEDED TO IMPROVE OVERSIGHT AND ASSESS RISKS OF THE SUMMER WORK TRAVEL AND TRAINEE CATEGORIES OF THE EXCHANGE VISITOR PROGRAM 2–3 (2005).

11 *See, e.g.*, JEREMY KAMMER, CTR. FOR IMMIGRATION STUDIES, CHEAP LABOR AS CULTURAL EXCHANGE: THE $100 MILLION SUMMER WORK TRAVEL INDUSTRY 43 (2011), *available at* http://cis.org/sites/default/files/SWT-Report.pdf (criticizing DOS's "flabby regulatory regime that requires . . . no meaningful protection of the wages, working conditions, and living conditions of the young SWT participants").

12 *See infra* Part II.

13 *See infra* Part II.

14 *See infra* Parts II, III.B.4.

students falling victim to various scams, including human trafficking, DOS revised its regulations to heighten standards for sponsor oversight of program participants.[15] Despite those heightened standards, however, DOS conceded in November 2011, when it first responded to the Hershey's incident, that the number of complaints "continue[d] to remain unacceptably high and include[d], among other issues, reports of improper work placements, fraudulent job offers, job cancellations upon participant arrival in the United States, inappropriate work hours, and problems regarding housing and transportation."[16] In May of 2012, DOS again revised the regulations, going further to address the program's problems than any of its efforts to date.[17] For example, the new regulations prohibit twice as many job placements, including factory jobs of the type held by the Hershey's workers.[18] These regulations, however, still do not go far enough to protect the wages of SWT participants, and systemic problems such as a lack of employer accountability still remain.

Commentators have thus far only generally discussed the need for improved management and oversight of SWT workers.[19] Most

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15 *See* Exchange Visitor Program—Summer Work Travel, 76 Fed. Reg. 23,177, 23,178 (Apr. 26, 2011).

16 Exchange Visitor Program—Cap on Current Participant Levels and Moratorium on New Sponsor Applications for Summer Work Travel Program, 76 Fed. Reg. 68,808, 68,809 (Nov. 7, 2011).

17 *See* Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593, 27,594 (May 11, 2012) (to be codified at 22 C.F.R. pt. 62).

18 *See id.* at 27,610 (prohibiting "positions in . . . warehousing [and] catalogue/online order distribution").

19 *See* DANIEL COSTA, ECON. POLICY INST., BRIEFING PAPER NO. 317, GUESTWORKER DIPLOMACY: J VISAS RECEIVE MINIMAL OVERSIGHT DESPITE SIGNIFICANT IMPLICATIONS FOR THE U.S. LABOR MARKET 39 (2011), *available at* http://www.epi.org/files/2011/BriefingPaper317.pdf (calling for DOS to suspend the program until its problems are corrected or terminate it and "start over from scratch"); RAY MARSHALL, VALUE-ADDED IMMIGRATION: LESSONS FOR THE UNITED STATES FROM CANADA, AUSTRALIA, AND THE UNITED KINGDOM 218–19 (2011); Patricia Medige & Catherine Griebel Bowman, *U.S. Anti-Trafficking Policy and the J-1 Visa Program: The State Department's Challenge from Within*, 7 INTERCULTURAL HUM. RTS. L. REV. 103, 145 (2012) (arguing, inter alia, that DOS's oversight of the SWT program conflicts with its responsibilities under the Trafficking Victim Protection Act and that DOS should therefore delegate oversight to the Department of Labor); Gordon, *supra* note 4 ("If the program continues, it should be reformed to explicitly incorporate worker protections . . . and should be supervised by the Department of Labor."); *cf. Protecting U.S. and Guest Workers: The Recruitment and Employment of Temporary Foreign Labor: Hearing before the H. Comm. on Educ. and Labor*, 110th Cong. 53 (2007) (statement of Jonathan P. Hiatt, Gen. Counsel, American Federation of Labor and Congress of Industrial Organizations) (arguing that attestation programs allow employers to monitor themselves and do not adequately protect workers, and that every temporary worker program should require employers to test the U.S. labor market through a "rigorous" labor certification process before importing workers).

have focused on the potential for SWT workers to displace young American workers, and thus assert that potential SWT employers should be required to demonstrate that there are no U.S. workers available for the positions they seek to fill with SWT workers.[20] These commentators also assert that the Department of Labor ("DOL") should have some role in the oversight and enforcement of SWT regulations.[21] None of these commentators, however, has attempted to explicitly describe a new regulatory scheme or propose how it should be implemented.

By contrast, this Note proposes and describes in detail a regulatory framework that would improve the program's management and oversight. First, regulations that are more protective of SWT workers' wages should be promulgated. Second, Congress should transfer oversight and enforcement of wage and working conditions regulations from DOS to DOL. Using DOL's role in the H-1B and H-2B programs as a model, this transfer would be accomplished by amending the Immigration and Nationality Act of 1952 ("INA")[22] to implement labor attestation in the SWT context, which would require U.S. employers to attest to DOL that they will comply with wage and working conditions regulations before they are permitted to hire SWT workers. DOL would then be authorized to conduct audits of employers to monitor their compliance with the attestations, as well as to impose fines and penalties on employers found to be in violation of one or more regulations.

Part I of this Note describes the purpose of the SWT program and its authorizing legislation, the Fulbright-Hays Act,[23] as well as the characteristics of SWT participants, sponsors, and host employers. Part II analyzes current SWT regulations and uses the Hershey's incident to demonstrate that the current regulatory framework fails both to protect SWT workers from exploitation by U.S. employers and sponsors and to hold host employers accountable for violations of program regulations. Part III presents a proposal for reform of the SWT

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20 COSTA, *supra* note 19, at 31, 39 (suggesting labor certification in the SWT context); MARSHALL, *supra* note 19, at 218–19 (same). The new regulations require sponsors, at the beginning of each placement season, to "confirm . . . [t]hat host employers will not displace domestic U.S. workers at worksites where they will place program participants." Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. at 27,611.

21 COSTA, *supra* note 19, at 31, 39; MARSHALL, *supra* note 19, at 218–19; Medige & Bowman, *supra* note 19, at 145; Gordon, *supra* note 4.

22 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

23 Mutual Educational and Cultural Exchange ("Fulbright-Hays") Act of 1961, Pub. L. No. 87-256, 75 Stat. 527 (codified at 22 U.S.C. §§ 2451–2464 (2006)).

program modeled on the statutory and regulatory framework of two other temporary foreign worker programs: the H-1B and the H-2B programs. Finally, Part IV addresses counterarguments to the proposal.

I. FULBRIGHT-HAYS ACT, SWT PROGRAM, SPONSORS, AND HOST EMPLOYERS

The SWT program, which has been in operation for fifty years,[24] allows foreign post-secondary school students to work and travel in the United States for up to four months during their official academic breaks.[25] The program's stated purpose is "to provide foreign nationals with opportunities to participate in educational and cultural programs in the United States and return home to share their experiences."[26] In 2011, approximately 103,000 students participated in the program.[27] This Part examines the SWT program's purpose and describes the relevant actors: participants, sponsors, and host employers.

A. Mutual Understanding Through Cultural Exchange

The SWT program is the largest of thirteen categories in the Exchange Visitor Program ("EVP"),[28] a visa program created to implement the Fulbright-Hays Act of 1961.[29] The purpose of the Act is to "increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange."[30] It authorizes the President, "when he considers

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24 Exchange Visitor Program—Cap on Current Participant Levels and Moratorium on New Sponsor Applications for Summer Work Travel Program, 76 Fed. Reg. 68,808, 68,809 (Nov. 7, 2011).

25 22 C.F.R. § 62.32(b) (2012). Students may work for up to three months and may remain in the U.S. for an additional thirty days to travel and prepare for their departure. 8 C.F.R. § 214.2(j) (2012).

26 22 C.F.R. § 62.1(b).

27 Exchange Visitor Program—Cap on Current Participant Levels and Moratorium on New Sponsor Applications for Summer Work Travel Program, 76 Fed. Reg. at 68,809.

28 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 10, at 5, 8, 11. The thirteen categories can be grouped into two larger categories: private sector programs and academic and government programs. *Id.* at 5 ("The private sector programs include the Alien Physician, Au Pair, Camp Counselor, Summer Work Travel, and Trainee Categories. The academic and government programs include the Government Visitor, International Visitor, Professor and Research Scholar, Short-Term Scholar, Specialist, Student (Secondary School Student, College/University Student), and Teacher categories.").

29 Mutual Educational and Cultural Exchange ("Fullbright-Hays") Act of 1961, Pub. L. No. 87-256, 75 Stat. 527 (codified as amended at 22 U.S.C. §§ 2451-2464 (2006)).

30 Fulbright-Hays Act § 101, 75 Stat. at 527.

that it would strengthen international cooperative relations," to provide for or finance "educational" and "cultural exchanges."[31]

The House Report on the Act indicates that legislators saw cultural exchange facilitated by the EVP as a tool to promote pro-American and, relevant at the time, anti-Communist values overseas: "In the current struggle for the minds of men, no other instrument of foreign policy has such great potential."[32] Despite these dated beginnings, DOS still values the SWT program as a "cornerstone of U.S. public diplomacy efforts."[33]

B. SWT Program Participants

The SWT program aims to reach youths who cannot afford travel to the United States unless they can work to offset part of their costs.[34] Through the program, students enter the country on J-1 nonimmigrant visas.[35] To be eligible for a J-1 visa, a foreign student must meet certain basic requirements spelled out in the INA, for example, that the student intends to return to his home country upon completion of the program.[36] Aside from these visa eligibility requirements, the INA is

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31 *Id.* § 102(a), 75 Stat. at 528. Some point out that DOS may have exceeded its authority under the Act when it created the SWT program because the Act does not authorize DOS to create programs that permit foreign students to work in the United States. *See* COSTA, *supra* note 19, at 36 (arguing that DOS may be infringing on Congress's authority when it designates programs like SWT that allow foreign visitors to work in the United States because "Congress has plenary power over immigration"); *see also* Kit Johnson, *The Wonderful World of Disney Visas*, 63 FLA. L. REV. 915, 937, 950–53 (2011) (same). Given that the SWT program has been in operation for fifty years, this Note assumes that DOS was authorized to create the program.

32 H.R. REP. NO. 87-1094, at 1 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2759, 2759. To ensure that EVP participants do in fact bring back what they learn to their home countries, the Act requires that participants return to their home countries for a minimum of two years before reentering the United States. Fullbright-Hays Act § 109(c), 75 Stat. at 535.

33 Exchange Visitor Program—Summer Work Travel, 76 Fed. Reg. 23,177, 23,177 (Apr. 26, 2011); *see also* KAMMER, *supra* note 11, at 22 (explaining that the value of the program is "having future leaders of foreign countries experience life in the United States").

34 Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593, 27,596 (May 11, 2012); Exchange Visitor Program—Cap on Current Participant Levels and Moratorium on New Sponsor Applications for Summer Work Travel Program, 76 Fed. Reg. 68,808, 68,809 (Nov. 7, 2011).

35 *See* 22 C.F.R. § 62.2 (2012) (defining "Exchange visitor" as "a foreign national . . . who is seeking to enter or has entered the United States temporarily on a J-1 visa").

36 *See* 8 U.S.C. § 1101(a)(15)(J) (2006). To be eligible for a J-1 visa a person must be:

> an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee . . . who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of . . . studying, observing . . . consulting, demonstrating special skills, or receiving training.

Id.

largely silent on the SWT program. Thus, the SWT regulations fill in the gaps in eligibility requirements: SWT program participants must be "bona fide foreign students who are enrolled full-time and pursuing studies at accredited post-secondary academic institutions located outside the United States."[37] Unlike some of the other EVP categories, however, SWT does not provide for any stricter requirements, such as requiring that participants have specific professional skills[38] or that they complete some type of educational or training component during their stay.[39]

SWT participants come from all over the world and enter the program for a variety of reasons. The most recent available data show that the vast majority of SWT participants come from Eastern European countries including Poland, Russia, and Bulgaria.[40] Some students enter the program because they are eager to build their English language skills to make themselves more attractive to future employers.[41] Others wish to finance travel to the United States,[42] while still others hope to earn money for school tuition back home.[43] Even at the low wage most SWT workers are paid, many workers earn more than they could by working in their home countries.[44] Interest in the SWT program could also be explained by an "international infatuation" with American popular culture.[45]

SWT participants typically pay between $1,500 and $6,000 upfront to participate in the J-1 program.[46] Many students pay these fees through agencies in their home countries, and experiences at different agencies vary.[47] Although some small portion of these payments is

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37 22 C.F.R. § 62.32(b).

38 *See, e.g.*, *id.* §§ 62.24(c), .27(b) (participants in the Alien Physician and Teacher categories are required to have professional skills).

39 *See, e.g.*, *id.* §§ 62.22–.23, .25 (participants in Secondary Student, College/University Student, and Trainee categories must complete an educational component).

40 COSTA, *supra* note 19, at 12, 14 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 10, at 2).

41 KAMMER, *supra* note 11, at 5.

42 *Id.*

43 *See* COSTA, *supra* note 19, at 21.

44 KAMMER, *supra* note 11, at 5; *see* COSTA, *supra* note 19, at 33 (noting that the median disposable family income in Peru, a country that sends nationals to the United States through the SWT program, is only $4,385 per year).

45 KAMMER, *supra* note 11, at 5–6.

46 *See* COLLEEN P. BRESLIN ET AL., REPORT OF THE AUGUST 2011 HUMAN RIGHTS DELEGATION TO HERSHEY, PENNSYLVANIA 15 (2011), *available at* http://www.brandeis.edu/ethics/pdfs/internationaljustice/Hersheys.pdf; COSTA, *supra* note 19, at 32.

47 BRESLIN ET AL., *supra* note 46, at 15.

attributable to the $ 160 visa fee[48] and other costs associated with travel to the United States, there has been a lack of transparency as to what the balance of these fees pays for and to whom it is ultimately paid.[49]

C. Sponsors

DOS facilitates cultural exchanges provided for in the Act by designating entities as "sponsors."[50] The sponsors, in turn, implement the various EVP programs by performing functions such as selecting and screening applicants, placing participants with host employers, monitoring visitors during their stays, and ensuring that host employers meet their obligations to visitors under the regulations.[51] Sponsors are not necessarily employers of J-1 participants, although in some cases they may be.[52] Some sponsors, like CETUSA,[53] find and screen applicants for placement with third-party host employers, and host employers typically pay nothing for these services.[54] CETUSA, for example, placed the SWT students in Pennsylvania through a temp agency called SHS Onsite Solutions, which then placed the students with Exel, the Ohio-based company that operates the Hershey's distribution center.[55]

To be designated, sponsors must meet certain eligibility requirements, such as demonstrating their ability to comply with SWT regulations.[56] Designations last for five years,[57] and upon expiration of a

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48 *Fees for Visa Services*, TRAVEL.STATE.GOV, http://travel.state.gov/visa/temp/types/types_1263.html (last visited May 26, 2013).

49 BRESLIN ET AL., *supra* note 46, at 15. The new regulations require sponsors to "specify the itemized costs that participants must pay to both foreign agents and sponsors to participate in the Summer Work Travel Program." Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593, 27,604 (May 11, 2012) (to be codified at 22 C.F.R. pt. 62).

50 22 C.F.R. § 62.1(b) (2012).

51 *See id*. § 62.32.

52 *See id.* § 62.1(b) (to conduct an EVP, "[s]ponsors may act independently or with the assistance of third parties").

53 CETUSA is a non-profit organization that no longer administers the SWT program, but currently administers programs in several other EVP categories, including Secondary School and Community College programs and Trainee and Intern programs. COUNCIL FOR EDUCATIONAL TRAVEL, USA, http://www.cetusa.org (last visited May 26, 2013).

54 KAMMER, *supra* note 11, at 7–9 (reporting that sponsors go to extravagant lengths to "woo" employers by providing them with free recruiting trips overseas to interview foreign students and other perks).

55 BRESLIN ET AL., *supra* note 46, at 4. The new regulations limit the circumstances under which sponsors may use staffing agencies like SHS Onsite Solutions to place participants. *See* Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593, 27,609 (May 11, 2012) (to be codified at 22 C.F.R. pt. 62).

56 22 C.F.R. § 62.3(b). Sponsors must be legal entities that are either "(1) United States

term, sponsors may seek redesignation for another term of five years.[58] Sponsors pay a fee of $2,700 for each designation and redesignation,[59] which goes toward funding DOS's administration of the EVP.[60]

According to DOS, there are currently forty-nine entities that sponsor placement of SWT workers.[61] There were previously fifty-three sponsors, thirty-four of which had annual revenues of less than seven million dollars and accounted for about twelve percent of annual SWT exchange participants.[62] This means that only nineteen SWT sponsors, each making at least seven million dollars annually, accounted for the remaining eighty-eight percent of annual program participants.[63] Thus, the SWT sponsors accounting for the majority of participants "are not small organizations earning nominal amounts of revenue in order to facilitate cultural and educational exchanges . . . . [T]hey are labor contracting businesses earning large profits for their services."[64]

D. Host Employers

U.S. host employers are located all over the country and typically hire SWT participants to work in unskilled jobs.[65] For example, Morey's Piers, a Jersey Shore amusement and water park, claims in its recruitment brochure that 700 to 800 of its 1500 seasonal associates hired annually are "international students on visa programs," meaning J-1 visa students.[66] Disney hires J-1 students to work as ride opera-

local, state and federal government agencies; (2) International agencies or organizations of which the United States is a member and which have an office in the United States; or (3) Reputable organizations which are 'citizens of the United States.'" *Id.* § 62.3(a).

57 *Id*. § 62.6.

58 *Id*. § 62.7.

59 *Id.* § 62.17(b)(1). DOS recently raised these fees to $3,982. Exchange Visitor Program—Fees and Charges, 78 Fed. Reg. 28,137, 28,139 (May 14, 2013) (to be codified at 22 C.F.R. pt. 62).

60 COSTA, *supra* note 19, at 7.

61 Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593, 27,608 (May 11, 2012) (to be codified at 22 C.F.R. pt. 62).

62 Exchange Visitor Program—Summer Work Travel, 76 Fed. Reg. 23,177, 23,182 (Apr. 26, 2011).

63 *See id.*

64 COSTA, *supra* note 19, at 37.

65 *See* Exchange Visitor Program—Cap on Current Participant Levels and Moratorium on New Sponsor Applications for Summer Work Travel Program, 76 Fed. Reg. 68,808, 68,808 (Nov. 7, 2011); *see also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 10, at 20, 22 (noting that SWT students work as ride operators, waiters, lifeguards, receptionists, and tour guides in amusement parts, resorts, hotels, and restaurants).

66 COSTA, *supra* note 19, at 33.

tors, waiters, and lifeguards in its amusement parks in Florida.[67] Xanterra Park & Resorts, manager of accommodations and facilities at Yellowstone National Park, has hired SWT workers for twelve years.[68]

In the past, employers have also included factories and distribution centers like Exel, which hired the 400 SWT participants to pack chocolate at the Hershey's distribution center in Palmyra, Pennsylvania.[69] The new regulations, however, prohibit sponsors from placing SWT participants with such employers.[70] Participants now may only be hired to perform "jobs that require minimal training and are seasonal or temporary," like the amusement park jobs described above.[71]

II. HERSHEY'S AS A CASE STUDY

The Hershey's incident demonstrated that SWT regulations lack sufficient protections for the wages of SWT workers and that sponsors—the parties charged with ensuring that employers comply with such regulations[72]—do not sufficiently oversee employers and are prone to violating the regulations themselves. DOS's 2012 regulations attempt to address these shortcomings by, for example, prohibiting SWT students from working in factory jobs like the Hershey's jobs.[73] However, the improvements made to participant compensation regulations do not go far enough. Moreover, the regulations do little to address systemic problems—e.g., lack of employer accountability—that could lead to a Hershey's-like incident in another industry.

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67 *See generally* Johnson, *supra* note 31.

68 COSTA, *supra* note 19, at 35.

69 BRESLIN ET AL., *supra* note 46, at 1, 4.

70 Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593, 27,610 (May 11, 2012) (to be codified at 22 C.F.R. pt. 62).

71 *Id.* at 27,609 (defining "seasonal" work as "tied to a certain time of year by an event or pattern and requir[ing] labor levels above and beyond existing worker levels" and "temporary" work as a "one-time occurrence, a peak load need, or an intermittent need").

72 *See* 22 C.F.R. § 62.32(g) (2012) (providing that sponsors must "ensure" that participants are compensated in accordance with regulations); *id.* § 62.32(m) (providing that sponsors must ensure that employers compensate participants in accordance with applicable overtime laws and notify sponsors of any event that "impacts the welfare of participants"); *see also id.* § 62.32(h)(2) (providing that sponsors must be available to SWT workers to "assist as facilitators, counselors, and information resources").

73 *See* Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. at 27,610.

A. Participant Compensation and Impermissible Deductions

Sponsors must ensure that participants are compensated in accordance with SWT regulations.[74] Under the 2011 regulations (the regulations applicable to CETUSA), sponsors were required to ensure that participants earned the "prevailing local wage, which must meet the higher of either the applicable state or the Federal minimum wage requirement, including payment for overtime in accordance with state-specific employment laws."[75] This is the full extent of those compensation regulations. They included no further guidance for sponsors as to how they should "ensure" that participants are properly paid.

CETUSA arguably fulfilled its obligations under the 2011 compensation regulations because the students at Hershey's earned $7.85 to $8.35 an hour, at least $.60 more than the federal and Pennsylvania state minimum wage rates.[76] But CETUSA took improper housing deductions from the participants' pay, reducing their salaries to between $1.00 and $3.50 per hour.[77] As a result, some students netted as little as $20 in their first week.[78] CETUSA's housing deductions—a fixed $400 per month per student—were improper because they were made without regard to location, size, or market value of the hous-

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74 22 C.F.R. § 62.32(g).

75 Exchange Visitor Program—Summer Work Travel, 76 Fed. Reg. 23,177, 23184 (Apr. 26, 2011) (to be codified at 22 C.F.R. pt. 62). Despite the regulation's use of the term "prevailing local wage," this is not a true prevailing wage requirement because the regulations do not provide a methodology for calculating the prevailing wage and because to comply with this rule, employers need only pay the higher of the state or federal minimum wage. *Id.*; *see also* COSTA, *supra* note 19, at 28. By contrast, a "prevailing wage" under the H-1B regulations is defined as the average wage rate "for the occupation in which the H-1B [worker] . . . is to be employed in the geographic area of intended employment." 20 C.F.R. § 655.715 (2012). Executive Director of the National Guestworker Alliance Saket Soni estimates that if the Hershey's jobs had been "living wage" jobs under a union contract, U.S. workers would have earned at least eighteen dollars an hour, instead of the minimum wage the SWT workers were paid. *Justice at Hershey's: Students, PA Allies Halt Production at Hershey's Plant*, NAT'L GUESTWORKER ALLIANCE (Aug. 17, 2011, 6:25 PM), http://www.guestworkeralliance.org/2011/08/justice-at-hersheys-students-pa-allies-halt-production-at-hersheys-plant.

DOS's new regulations set a slightly higher bar for participant compensation, and require that participants be compensated "at the higher of (i) [t]he applicable Federal, State, or Local Minimum Wage (including overtime); or (ii) [p]ay and benefits commensurate with those offered to their similarly situated U.S. counterparts." Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. at 27,610. The "similarly situated" language hints at a prevailing wage requirement, though the regulations still do not provide a methodology for how to calculate that wage.

76 BRESLIN ET AL., *supra* note 46, at 12, 14.

77 Gordon, *supra* note 4.

78 BRESLIN ET AL., *supra* note 46, at 1.

ing.[79] For example, one student reported that she and three other students collectively paid $1600 per month to live in a one-bedroom apartment that cost only $600 per month on the market.[80] The students further reported that CETUSA refused their requests to find their own living arrangements and told the students that they would lose their housing deposits if they moved.[81] CETUSA claimed that the $400 monthly rate was necessary to convince landlords to rent to students for such a short period of time, and it denies that it profited from the arrangement,[82] but CETUSA was ultimately banned from the SWT program at least in part because of its handling of these deductions.[83]

The 2012 regulations provide sponsors with slightly more guidance as to their duty to "ensure" that participants are compensated in accordance with SWT regulations, but they still leave much to be desired in terms of clarity. The regulations address pay deductions for housing and transportation in two separate provisions, but neither provision explicitly defines an improper deduction or otherwise makes clear sponsors' or employers' obligations as to deductions. The first provision, in the "Participant Placement" section of the new regulations, only requires that certain information about deductions taken for housing or transportation be included in a participant's job offer:

> If employers provide housing and/or transportation to and from work, job offers must include details of all such arrangements, including the cost to participants; whether such arrangements deduct such costs from participants' wages; and the market value of housing and/or transportation in accordance with the Fair Labor Standards Act regulations set forth at 29 C.F.R. part 531, if they are considered part of the compensation packages.[84]

According to DOS's "Executive Summary" accompanying the new regulations, requiring this information on a job offer will make "clear whether the participants are being compensated in compliance with program regulations, including compliance with state wage requirements and section 531 of the [FLSA], which requires that such deductions be voluntary and not include a profit to the employer or to

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79 *Id.* at 14.

80 *See id.*

81 *Id.*

82 KAMMER, *supra* note 11, at 26.

83 Preston, *supra* note 1.

84 Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593, 27,610 (May 11, 2012) (to be codified at 22 C.F.R. pt. 62).

any affiliated person."[85] Although this is an improvement over failing to address deductions at all, having employers merely itemize the cost and market value of housing or transportation in participants' job offers does not make "clear" whether participants are *actually* being paid in accordance with the regulations.

The second provision, found in the "Participant Compensation" section of the new regulations, provides even less information about how pay deductions for housing or transportation expenses should be handled. The provision only requires sponsors to "demonstrate that participants are . . . compensated according to the [regulations]" in a situation where "[t]he host employers provide housing and/or transportation as part of participants' compensation, but the compensation package does not explain that the lower hourly wage reflects such benefits."[86] The regulations fail to explain how a sponsor must "demonstrate" that a participant's wage meets the requirements in this situation. Such an explanation is important because "demonstrat[ing]" presumably requires more than "ensur[ing]" that participants are paid according to the regulations, which is the standard for sponsors in all other situations.[87] Moreover, even though the demonstration requirement purports to apply in situations that are "similar" to those enumerated , it is unclear what would qualify as a similar situation.[88] The situation described above appears to be fairly narrow, e.g., it presumably would not apply where a host employer takes housing deductions from a participant's pay but *does* explain that the lower hourly wage paid reflects the housing benefits, regardless of whether the deduction is a proper one. Finally, there is no mention of a situation in which *sponsors* provide housing and/or transportation, as was the case with CETUSA and the Hershey's workers.

B. Lack of Accountability for Sponsors and Employers

DOS relies almost entirely upon sponsors to monitor SWT participants and host employers and to report violations of regulations to DOS.[89] DOS, however, does little to monitor the sponsors themselves or to ensure that they administer the program in accordance with its regulations and its overall purpose.[90] Moreover, DOS infrequently

85 *Id.* at 27,602.

86 *Id.* at 27,610.

87 *Id.*

88 *Id.*

89 COSTA, *supra* note 19, at 38.

90 *See id.* at 16–17, 38.

and inconsistently sanctions sponsors for violations of SWT regulations.[91] As a result, sponsors like CETUSA are able to take advantage of the participants they are charged with protecting. Further, when sponsors fail to prevent abuses of the program by host employers, DOS has no means of sanctioning or penalizing those employers directly because employers have no enforceable obligations to SWT students under the regulations.[92]

1. Sponsors

The EVP regulations, of which the SWT regulations are a part, require sponsors to monitor SWT participants and employers, as well as notify DOS of "any serious problem or controversy, which could be expected to bring the Department of State or the sponsor's exchange visitor program into notoriety or disrepute."[93] Specifically, the SWT regulations give sponsors alone the responsibility of vetting host employers,[94] "confirm[ing] the terms and conditions of [participants'] job offers,"[95] and "ensur[ing]" that participants are compensated in accordance with the regulations.[96]

DOS, however, does little to ensure that sponsors actually fulfill these obligations.[97] For example, when sponsors report a problem, DOS officials typically follow up only by telephone, email, fax, or letter, rarely conducting actual visits to sponsors.[98] A recent government auditing report indicated that DOS officials had visited only eight of the 206 SWT and Trainee program sponsors.[99] The Hershey's incident exemplified this record: the SWT workers at the Hershey's factory complained to their employer, their sponsor, and DOS to no avail.[100] Thus, their working conditions did not come to light until the workers

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91 *See id.*

92 Daniel Costa & Ross Eisenbrey, *A Bold Step Forward: Assessing the State Department's New J-1 Summer Work Travel Regulations*, ECON. POL'Y INST. (May 16, 2012), http://www.epi.org/publication/assessing-j1-summer-work-travel/.

93 22 C.F.R. § 62.13(b) (2012).

94 Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593, 27,611 (May 11, 2012) (to be codified at 22 C.F.R. pt. 62).

95 *Id.* at 27,610.

96 *Id.*

97 *See, e.g.*, COSTA, *supra* note 19, at 18. (claiming that DOS's role is limited to reviewing information provided by sponsors, with minimal effort placed on verifying such information through program visits); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 10, at 9 (finding in 2005 that DOS "ha[d] not exerted sufficient management oversight of the Summer Work Travel . . . programs to guard against abuse").

98 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 10, at 10.

99 *Id.*

100 Julia Preston, *Pleas Unheeded as Students' U.S. Jobs Soured*, N.Y. TIMES, Oct. 17, 2011,

involved contacted the NGA and organized a widely publicized protest.[101]

Moreover, the regulations do not provide sponsors with the specific guidance they need to function in the absence of close (or any) supervision from DOS. The SWT-specific regulations account for less than four pages in the Federal Register.[102] Further, the regulations use vague or weak language to describe sponsors' obligations to SWT participants. For example, sponsors need only "ensure" that participants are compensated in accordance with program regulations,[103] and they need only "hesitate" before placing a participant with an employer that has been recently sanctioned by DOL for violations of wage and workplace safety statutes.[104]

The EVP regulations do, however, give DOS broad authority to sanction or remove sponsors[105] for violations of regulations, for endangering the health, safety, or welfare of SWT workers, or for generally "bring[ing] the Department or the Exchange Visitor Program into notoriety or disrepute."[106] The most extreme sanction available is revocation of sponsor designation, after which a sponsor may not apply for a new designation for five years.[107] Other sanctions include letters of reprimand warning of possible suspension or revocation of sponsor designation; declaration of probation against the sponsor; or up to a fifteen percent reduction in the number of authorized exchange visitors in the sponsor's program or in the geographic area of its recruitment or activity, with further reductions available in ten percent increments for continued violations.[108]

Although DOS ultimately barred CETUSA from participating in the SWT program as a result of the violations that occurred at the

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at A18 (describing letters written by students at the Hershey's factory to DOS that went unanswered).

101 *Id.*

102 *See* Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593, 27,609, 27,612 (May 11, 2012) (to be codified at 22 C.F.R. pt. 62).

103 *Id.* at 27,610.

104 *Id.* at 27,604.

105 Sanctions may be subject to internal review by a panel of Review Officers, 22 C.F.R. § 62.50(h) (2012), and may also be overturned in federal court if review fails to comply with the Administrative Procedure Act, *see District Court Vacates DOS's Revocation of Exchange Program Status*, 80 Interpreter Releases (West) No. 7, at 246 (Feb. 19, 2003) (describing an unpublished decision in *Nat'l Collegiate Recreation Servs. v. Powell*, No. 9:02 cv02676 (D.S.C. Nov. 26, 2002), holding that revocation of sponsor's designation was arbitrary and capricious because DOS imposed the harshest penalty without sufficient findings of fact).

106 22 C.F.R. § 62.50.

107 *Id*. § 62.61, .50(d).

108 *Id*. § 62.50(b).

Hershey's factory,[109] DOS had previously exercised its sanctioning authority rarely and inconsistently. Few, if any, sponsors have been removed from the program on the basis of unacceptable treatment of students, and only a small number have ever been officially reprimanded.[110] Thus, the effective removal of CETUSA was a largely unprecedented move, coming only after repeated calls from foreign worker advocacy programs[111] and a five-month investigation that revealed a broad and severe pattern of noncompliance.[112]

2. Host Employers

Host employers have no enforceable obligations under the SWT regulations. The new regulations make this abundantly clear by renaming the section entitled "Host employer obligations"—the only section outlining host employers' obligations under the regulations—to "Host employer *cooperation*."[113] Sponsors are the only entities with enforceable obligations and they are solely responsible for employers' compliance—sponsors are required to place participants only with host employers that agree to "[m]ake good faith efforts" to comply with certain regulations, including "provid[ing] participants the number of hours of paid employment per week as identified on their job offers and agreed to when sponsors vetted the jobs."[114]

The regulations thus do not provide DOS with the authority to sanction or penalize employers for failing to make "good faith efforts" to comply with the regulations or for otherwise violating their implicit obligations to SWT participants. Rather, employers who fail to pay SWT participants according to the SWT regulations are only subject

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109 DOS gave CETUSA a "Notice of Intent to Deny Redesignation Application," and CETUSA then withdrew from the SWT program. *Closed Sanction Cases Covering the Period 2006 to Date*, J1 VISA.STATE.GOV, http://j1visa.state.gov/wp-content/uploads/2013/01/santioncases.pdf (last visited May 26, 2013) [hereinafter *Closed Sanction Cases*]. Under the current SWT rules, CETUSA could reapply for designation in two years. *See* Preston, *supra* note 1.

110 DOS maintains a list of EVP sponsor organizations that have been sanctioned from 2006 to date, which shows that only one SWT sponsor, the International Advertising Association ("IAA"), has been terminated since 2006. *Closed Sanction Cases*, *supra* note 109, at 3. The cause for IAA's termination is listed as "[f]ailing to meet minimum activity requirement," but the list does not explain this phrase or any of the other short phrases describing DOS's reasons for imposing sanctions. *Id.* In addition to CETUSA, which received a "Notice of Intent to Deny Redesignation," three other SWT sponsors were given lesser sanctions in 2009, one sponsor was sanctioned in 2008, and another sponsor was sanctioned in 2007. *Id.*

111 BRESLIN ET AL., *supra* note 46, at 3.

112 Preston, *supra* note 1.

113 Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593, 27, 604, 27,611 (May 11, 2012) (to be codified at 22 C.F.R. pt. 62) (emphasis added).

114 *Id.*

to sanctions from DOL for violations of the Fair Labor Standards Act ("FLSA").[115] Thus, all sponsors can do is report violations to DOL. The Federal Register entry introducing the new regulations acknowledges this by stating that "[i]f a sponsor has reason to suspect that a participant is not being compensated in accordance with Federal State or local law, the sponsor must contact the appropriate authorities, including, but not limited to the U.S. Department of Labor's Wage and Hour Division."[116]

Even if an employer is sanctioned by DOL for violating the rights of SWT workers under the FLSA, that employer is not foreclosed from participating in the SWT program again. Although DOS states that sponsors should determine whether an employer has been sanctioned recently by DOL's Occupational Safety and Health Administration ("OSHA") or Wage and Hour Division for violations against any workers—not just SWT workers—it only requires that "[s]ponsors should *hesitate* to place participants with recently sanctioned employers."[117] Thus, an employer such as Exel—the host employer in the Hershey's case that was recently fined by OSHA for failure to report forty-two serious workplace injuries (representing forty-three percent of all serious injuries over four years at the plant)[118]—could conceivably participate in the SWT program in the future.[119]

If the SWT program is to continue, its regulatory framework must be reformed to provide greater protections for SWT workers vulnera-

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115 Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219 (2006) (codifying labor standards and penalties for violation of standards for industries engaged in commerce or in the production of goods for commerce). Courts have held that the FLSA applies to employers of foreign workers. *See* Arriaga v. Fla. Pac. Farms, LLC., 305 F.3d 1228, 1235 (11th Cir. 2002) (holding that minimum wage protections of the FLSA "indisputably apply to [H-2A] Farmworkers"); *In re* Reyes, 814 F.2d 168, 170 (5th Cir. 1987) ("[I]t is well established that the protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant."); Castellanos-Contreras v. Decatur Hotels, LLC, 488 F. Supp. 2d 565, 569–72 (E.D. La. 2007) (holding that H-2B workers are entitled to FLSA protections), *aff'd in part*, 622 F.3d 393, 397 (5th Cir. 2010).

116 Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. at 27,602.

117 *Id.* at 27,604 (emphasis added).

118 Julia Preston, *Hershey's Packer Is Fined over Its Safety Violations*, N.Y. TIMES, Feb. 22, 2012, at A12.

119 *See supra* text accompanying note 117. Exel, however, could be foreclosed from hiring SWT workers in the future for another reason: the new regulations categorically prohibit sponsors from placing students in the types of factory jobs for which Exel hired the Hershey's SWT workers. *See* Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. at 27,610 (prohibiting "positions in . . . warehousing [and] catalogue/online order distribution").

ble to exploitation by sponsors and employers and to hold sponsors and employers accountable for misuses of the program.

III. PROPOSAL

The Hershey's case study demonstrates that the current SWT regulations inadequately protect SWT workers' wages, and that DOS and sponsors have failed to adequately monitor and enforce regulations against both sponsors and employers. This Note proposes a two-prong solution: first, regulations providing greater protection for the wages of SWT workers should be promulgated, and second, Congress should transfer authority to oversee and enforce those regulations from DOS to DOL by amending the INA to implement labor attestation in the SWT context.

This Note's proposed regulatory and statutory framework for the SWT program draws from two existing temporary foreign worker programs: H-1B and H-2B.[120] Both are categories in the H visa program, which is the primary nonimmigrant category for temporary foreign workers,[121] accounting for approximately one-third of all temporary foreign workers in the United States.[122] The H-1B program, created in 1990 to meet the demand of U.S. businesses for a "brain gain" of skilled foreign workers, allows U.S. employers to bring foreign workers with a bachelor's degree or the equivalent to the United States to fill temporary positions in a "specialty occupation."[123] By contrast, the H-2B program, part of a program designed by Congress in 1952 to respond to temporary shortages in the U.S. labor market generally,[124] permits U.S. employers to bring foreign nationals to the United States

120 This Note does not address H-2A visas because those visas are narrowly defined as visas for agricultural workers. *See* 20 C.F.R. § 655.100 (2012).

121 RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL31381, U.S. IMMIGRATION POLICY ON TEMPORARY ADMISSIONS 7 (2011).

122 RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33977, IMMIGRATION OF FOREIGN WORKERS: LABOR MARKET TESTS AND PROTECTIONS 12 (2010).

123 Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 131–32 (2009). Although Congress created the H-1B visa primarily to respond to a perceived shortage in skilled information technology workers, *see id.* at 127, 131, Congress has since expanded the scope of occupations covered by the visa to include any job that "requires theoretical and practical application of a body of highly specialized knowledge," 8 C.F.R. § 214.2(h)(4)(i)(A)(1) (2012). H-1B visas are typically issued for three years, with the possibility of a three-year extension. WASEM, *supra* note 122, at 13.

124 Castellanos-Contreras v. Decatur Hotels, LLC, 488 F. Supp. 2d 565, 569–72 (E.D. La. 2007) ("The essential objective of the [H-2] program . . . is to permit employers to utilize temporary foreign workers if domestic workers cannot be found and if it can be shown that the use of such foreign labor would not adversely affect the wages and working conditions of domestic

to fill temporary non-agricultural jobs that do not require any particular skills or achievement.[125]

A. New Compensation Regulations Prohibiting Impermissible Deductions

As explained in Part II, sponsors like CETUSA are arguably in compliance with SWT regulations when they ensure that host employers pay SWT workers at or above the applicable minimum wage but then deduct improper amounts for expenses, bringing the workers' pay far below minimum wage.[126] SWT compensation regulations, like the regulations for the H-1B and H-2B programs, should therefore explicitly define improper deductions and prohibit employers or sponsors from taking such deductions from workers' take-home pay. Specifically, SWT should adopt a regulation, modeled on the H-1B regulations, providing that "[t]he required wage must be paid to the employee, cash in hand, free and clear, when due, *except that* deductions made in accordance with . . . this section may reduce the cash wage below the level of the required wage."[127] Under such a provision, deductions not made in accordance with the regulations would be considered "unauthorized," and if an employer or sponsor makes an unauthorized deduction that brings the employee's take-home pay below the required level, that employer would be in violation of compensation regulations and subject to SWT program penalties.[128] As in the H-1B regulations, unauthorized deductions under the proposed SWT regulations would be defined as deductions in "an amount that . . . exceed[s] the fair market value or the actual cost (whichever is lower) of the matter covered."[129]

CETUSA's deductions from the Hershey's workers' take-home pay most likely would have violated the proposed compensation regulations. Evidence provided by the Human Rights Delegation to Hershey, Pennsylvania ("Delegation")—a group of academics and immigration law specialists who investigated the SWT students' wages

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workers similarly employed." (quoting H.R. REP. NO. 99–682, at 50–51 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5654)), *aff'd in part*, 622 F.3d 393, 397 (5th Cir. 2010).

125 *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (2006) (defining an H-2B nonimmigrant as "an alien . . . having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country").

126 *See supra* Part II.A.

127 20 C.F.R. § 655.731(c)(1) (2012).

128 *Id.* (describing requirements for "satisfaction of required wage obligation").

129 *Id.* § 655.731(c)(9)(iii)(D).

and working conditions at the Hershey's factory[130]—shows that the housing deductions taken from the workers' take-home pay were in excess of both the fair market value and the actual cost of the housing.[131] Further, the deductions reduced the workers' wages well below the minimum wage, to about $1.00 per hour in some cases.[132] As a result, CETUSA's deductions would have been unauthorized and the sponsor would have failed to satisfy its obligation to SWT workers under this Note's proposed compensation regulations.

Although employers, including employers of SWT workers, may already be prohibited by the FLSA from making unreasonable deductions that bring an employee's take-home pay below the federal minimum wage,[133] adding a prohibition on unauthorized deductions to the SWT regulations would subject employers to SWT program-related penalties for FLSA violations. Moreover, as the FLSA applies only to employers,[134] a prohibition on unauthorized deductions in the SWT regulations would provide greater protection for SWT workers' wages because the prohibition would explicitly apply to sponsors as well as employers. Finally, incorporating explicit language prohibiting and defining impermissible deductions would clarify sponsors' and employers' obligations under the program.

Further, as in the H-1B program, each SWT employer should be required to "develop and maintain documentation sufficient to meet its burden of proving" its compliance with wage regulations.[135] This documentation would be made available to DOL upon request as well as to the public, and would include the following: (1) employee's full name, home address, occupation, and pay rate; (2) hours worked each day and week by the employee; (3) total additions or deductions from pay each pay period, by employee; (4) and total wages paid each pay

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130 BRESLIN ET AL., *supra* note 46, at 27.

131 *See id.* at 13–14.

132 Gordon, *supra* note 4.

133 *See supra* note 115 and accompanying text. FLSA regulations require that the minimum wage mandated by the Act be paid "free and clear," 29 C.F.R. § 531.35 (2012), and that employers may only credit toward their minimum wage obligations the "reasonable cost . . . of furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by [the] employer to his employees," 29 U.S.C. § 203(m) (2006). The regulations define "reasonable cost" as "not more than the actual cost to the employer of the . . . facilities" and as not including any profit "to the employer or any affiliated person." 29 C.F.R. § 531.3.

134 *See* 29 U.S.C. § 203(d) (definition of "employer" under the FLSA).

135 20 C.F.R. § 655.731(b) (2012).

period, date of pay, and pay period covered by the payment, by employee.[136]

Such an explicit requirement for maintaining this documentation would do more to protect the wages of SWT participants than the provisions in the May 2012 regulations. Those provisions only require that deductions be itemized in participants' job offers and that sponsors "demonstrate" that participants are compensated in accordance with the regulations.[137] Moreover, under the May 2012 regulations, there is no requirement that sponsors report to DOS what deductions are actually taken from participants' pay, and the regulations do not explain what it means to demonstrate that participants are compensated properly.[138]

B. Amend the Immigration Nationality Act to Transfer Oversight and Enforcement of Wage Regulations to the Department of Labor

In addition to substantive changes to the regulations, this Note argues that DOS should amend the INA to delegate authority to DOL to enforce SWT wage and working conditions regulations.[139] Such an enforcement role should be modeled on DOL's roles in the H-1B and H-2B programs as administrator of labor attestation and labor certification, respectively. The proposed SWT enforcement mechanism would (1) require that employers attest to DOL that they will comply with the applicable wage and working conditions regulations; (2) provide that DOL may conduct audits of employers' applications to ensure compliance with regulations; and (3) provide that DOL may impose SWT program-related fines and penalties on employers and sponsors for violations of wage and working condition regulations.

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136 *See id.*

137 *See supra* text accompanying notes 86–87.

138 *See supra* text accompanying notes 86–87.

139 Currently, the INA is largely silent on the J visa, aside from a short description of eligibility. *See* 8 U.S.C. § 1101(a)(15)(J) (2006). Although this Note argues for an amendment to the INA, a more informal grant of authority to DOL may be possible: DOS could delegate its enforcement power to DOL pursuant to an agreement between the two agencies, which could be modeled on an existing agreement between DHS and DOL by which DHS delegated to DOL its enforcement authority in the H-2B context. Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78,020, 78,020 (Dec. 19, 2008) (to be codified at 20 C.F.R. pts. 655–56) [hereinafter Labor Certification Process]. But some commentators might argue that any plan for reform "need[s] the assistance of Congress." KAMMER, *supra* note 11, at 42.

1. Attestation

Under an enforcement scheme modeled on that of the H-1B and H-2B programs, SWT employers, before they may hire SWT workers, would be required to attest to DOL that they will comply with certain program regulations. The attestations would be made in an application like the H-1B Labor Condition Application ("LCA") or the H-2B Labor Certification Application.[140] DOL would then certify the LCA, which would be used by the employer to petition the U.S. Customs and Immigration Services for visas for foreign workers.

This Note's proposed regulations would require employers to attest to each of the new wage regulations, as well as to relevant existing SWT regulations. As in the H-1B and H-2B programs, an attestation would be "a statement of intent rather than a documentation of actions taken."[141] Although employers' attestations would not be closely reviewed by DOL prior to approval of an application for either program,[142] employers would ultimately be responsible for the representations they make because noncompliance with the terms and conditions of labor applications would serve as a basis for the imposition of fines and penalties.[143]

Thus, Congress should amend title 8 of the U.S. Code (the INA) to add the following language requiring labor attestation in the SWT context[144]:

> Labor Condition Application
> (1) No alien may be admitted or provided status as a J-1 nonimmigrant in the Summer Work Travel program unless the employer has filed with the Secretary of Labor an application stating the following:
> (A) The employer—
> (i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as a J-1 nonimmigrant wages equal to

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140 *See generally* 20 C.F.R. § 655 subpts. A, H (covering both H-1B and H-2B applications).

141 WASEM, *supra* note 122, at 13.

142 The INA provides that the "Secretary of Labor shall review such an application only for completeness and obvious inaccuracies" and, if the application is complete and no such inaccuracies are found, shall provide certification within seven days of the application filing date. 8 U.S.C. § 1182(n)(1)(G)(ii) (2006).

143 *See infra* Part III.B.3. In the H-2A context, the labor certification application may also serve as an enforceable contract in the absence of a "separate, written work contract entered into between the employer and the worker." 20 C.F.R. § 655.122(q); Martinez-Bautista v. D & S Produce, 447 F. Supp. 2d 954, 960–61 (E.D. Ark. 2006).

144 The proposed amendment is modeled on 8 U.S.C. § 1182(n)(1) (providing requirements for H-1B labor condition applications).

> the higher of (1) the applicable Federal, State, and Local Minimum Wage requirements (including overtime); or (2) pay and benefits commensurate with those offered to their similarly situated U.S. counterparts;[145] and
>
> (ii) will comply with applicable Federal, State, and local employment-related laws and regulations, including employment-related health and safety laws.[146]
>
> (B) The application shall contain a specification of the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.[147]

This amendment would clarify employers' responsibilities under the regulations and provide a mechanism for holding them liable for failures to fulfill those responsibilities. The proposed attestation process would also provide DOL with information about the wages and working conditions of SWT workers. At present, sponsors are not required to report information about SWT workers' wages or working conditions at the time of visa application or at any point during or after the program; thus, information on these conditions is lacking.[148] The May 2012 regulations require some of this information to be documented in participants' job offers, but the rule is unclear as to how

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145 This compensation requirement recites the current SWT compensation regulation. *See* Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593, 27,610 (May 11, 2012) (to be codified at 22 C.F.R. pt. 62). Despite the "similarly situated" language, this regulation does not demand a true prevailing wage, and this Note does not address whether SWT workers should be compensated at a true prevailing wage; it only argues for improved enforcement of the current compensation requirement. Although H-1B and H-2B regulations arguably provide more protection of foreign workers' wages by requiring a true prevailing wage, the effectiveness of that prevailing wage requirement has been subject to significant criticism. *See, e.g.*, Daniel Costa, *H-2B Employers and Their Congressional Allies Are Fighting Hard to Keep Wages Low for Immigrant and American Workers*, ECON. POL'Y INST. (Oct. 6, 2011), http://www.epi.org/publication/2b-employers-congressional-allies-fighting (pointing out that the prevailing wage requirement can be easily undermined by the methodology for establishing the wage). Moreover, instituting a prevailing wage requirement in the SWT context would require the development of a methodology to be applied by DOL in determining whether an employer has met that requirement, which is beyond the scope of this Note. For a discussion of the effects on U.S. workers of paying SWT workers less than a prevailing wage, see COSTA, *supra* note 19, at 22–35.

146 This requirement is modeled on H-2B regulations. *See* 20 C.F.R. § 655.22(d).

147 This provision is modeled on 8 U.S.C. § 1182(n)(1)(D) (requiring H-1B employers to submit comprehensive employment information including wage rate). As explained previously, the new regulations require some of this information to be included in applicants' job offers. *See supra* text accompanying note 84.

148 *See* COSTA, *supra* note 19, at 12.

that information is reported, verified, or used.[149] Under the proposed attestation process, however, employers would not only be required to provide wages and deduction information, they would also be required to compile that information and make it available to the public.[150] This is the type of information DOL needs to properly monitor the wages and working conditions of SWT workers.[151]

2. Compliance Audits

In addition to administering the attestation process for SWT host employers, DOL would be required to perform post-attestation audits of employers, which would "serve . . . as both a quality control measure and a means of ensuring program compliance."[152] The SWT audits would be modeled on audits in the H-1B and H-2B programs, and would be authorized by the proposed amendment to the INA: "The Secretary may, on a case-by-case basis, subject an employer to random investigations . . . ."[153]

To promote the flexibility needed to detect violations, DOL should be authorized to select employer LCAs to audit at its "sole discretion."[154] In other words, DOL should be able to conduct audits of any SWT host employer at random, meaning "without regard to whether [DOL] has reason to believe a violation . . . has been committed."[155] Such an approach would maximize flexibility in detecting and responding to program violations, which is essential for a workable enforcement scheme.[156]

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149 *See supra* Part II.A.

150 This would be accomplished through language modeled on 8 U.S.C. § 1182(n)(1).

151 *See generally* COSTA, *supra* note 19.

152 Labor Certification Process, 73 Fed. Reg. 78,020, 78,023 (Dec. 19, 2008) (to be codified at 20 C.F.R. pts. 655–56).

153 This is modeled on language from 8 U.S.C. § 1182(n)(2)(F).

154 20 C.F.R. § 655.24(a) (2012). This regulation comes from the H-2B context, where audits are conducted on applications meeting certain criteria and on randomly-selected applications. Labor Certification Process, 73 Fed. Reg. at 78,023. By contrast, the H-1B program provides that only employers that have willfully violated program regulations in the past may be subject to random investigations, and then only within five years after the violations occurred. 20 C.F.R. § 655.808(a).

155 20 C.F.R. § 655.808(c).

156 *See* Letter from Jennifer Rosenbaum, Counsel, Nat'l Guestworker Alliance, to Michael Jones, Acting Adm'r, Office of Pol'y Dev. & Research, Emp't & Training Admin., U.S. Dep't of Labor 20 (May 17, 2011) [hereinafter NGA Comments], *available at* http://www.guestworkeralliance.org/wp-content/uploads/2011/05/NGA-Comments-H-2B-NPRM-5.17.2011.pdf.

3. Employer and Sponsor Penalties for Violations

Finally, upon discovering a violation of wage and working conditions regulations by sponsors or employers through audits or otherwise, DOL would have authority to impose SWT program-related penalties on those sponsors or employers. Penalties for noncompliance with wage and working conditions regulations would include back pay awards, civil monetary penalties, and debarment of employers from participation in the program. This proposed enforcement structure would also be incorporated into title 8 of the U.S. Code:

> (2) If the Secretary finds, after notice and opportunity for a hearing, a substantial failure[157] to meet a condition of paragraph (1), or a misrepresentation of a material fact in an application—
>
> (A) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $1,000 per violation) as the Secretary deems to be appropriate; and
>
> (B) the Attorney General shall not approve petitions filed with respect to that employer during a period of at least 1 year for aliens to be employed by the employer.[158]
>
> (3) If the Secretary finds, after notice and an opportunity for a hearing, that an employer has not paid wages at the wage level specified under the application and required under paragraph (1), the Secretary shall order the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of paragraph (1), whether or not a penalty under subparagraph (2) has been imposed.[159]

Regulations would then expand on these amendments, for example to clarify what a back pay award is and when it should be awarded.

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157 *See* 20 C.F.R. § 655.65(a), (d) (defining "substantial failure" in the H-2B context as "a willful failure that constitutes a significant deviation from the terms and conditions of the labor condition application"). Under the H-2B regulations, "willful failure" means "a knowing failure or a reckless disregard with respect to whether the conduct was contrary to [the applicable] sections." *Id.* § 655.65(e).

158 This proposed amendment is modeled on 8 U.S.C. § 1182(n)(2)(C)(i). Omitted here is 8 U.S.C. § 1182(n)(2)(A)–(B), which provides that the Secretary "shall establish a process for the receipt, investigation, and disposition of complaints" relating to LCAs and shall adjudicate complaints with a "reasonable basis" in a specified amount of time. These types of provisions would be included in the proposed amendment, but a discussion of them is beyond the scope of this Note.

159 This requirement is modeled on 8 U.S.C. § 1182(n)(2)(D).

Such regulations would provide that back pay is an amount "equal to the difference between the amount that should have been paid and the amount that actually was paid to" the SWT workers.[160] Moreover, they would provide that back pay could be assessed against an employer that takes an unauthorized deduction from wages:

> Any unauthorized deduction taken from wages is considered by the Department to be non-payment of that amount of wages, and in the event of an investigation, will result in back wage assessment (plus civil monetary penalties and/or disqualification from [SWT] and other immigration programs, if willful).[161]

The situation at the Hershey's factory demonstrates that DOL should be permitted to assess back pay against sponsors as well as employers (if they are not the same entity). As discussed above, CETUSA's deductions from the workers' paychecks would be "unauthorized" because they were in excess of the market value or actual cost of the housing.[162] Thus, under the proposed regulations, the deductions would have been treated as a "non-payment of that amount of wages," resulting in at least a back pay assessment against CETUSA, and perhaps a civil monetary penalty or disqualification from the program for one year or more.

Like in the H-1B program, DOL should be authorized to award back pay for *any* failure to provide the requisite wages and working conditions.[163] This Note's proposed enforcement scheme would differ from the H-2B regulations in this regard, as back pay in the H-2B context is reserved for "willful failure,"[164] which is defined as "knowing failure or a reckless disregard" on the part of the employer as to whether its conduct violated H-2B regulations.[165] The proposed enforcement scheme rejects a willfulness standard for back pay because it would set the bar too high and make the enforcement system inflexible and unworkable.[166] Such a result is problematic given the impor-

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160 This proposed language is modeled on 20 C.F.R. § 655.810(a).

161 This proposed regulation is modeled on 20 C.F.R. § 655.731(c)(11) (satisfaction of required wage obligation).

162 *See supra* Part II.A.

163 *See supra* Part II.A.

164 20 C.F.R. § 655.65(e).

165 *Id.*

166 *See* NGA Comments, *supra* note 156, at 20 (arguing that a willfulness standard for proving a violation is too high and that a substantial failure standard without willfulness language should be sufficient for even the harshest penalties of revocation of certification or debarment).

tance of the enforcement scheme to "enhanc[ing] the integrity" of the SWT program.[167]

A "willfulness" standard would, however, be appropriate for higher penalties such as civil monetary penalties and debarment. As in the H-1B and H-2B contexts, DOL would be authorized to assess civil monetary penalties against employers upon a finding that an employer "willfully" failed to pay wages in accordance with SWT regulations.[168] The penalties would be in an amount "equal to the difference between the amount that should have been paid and the amount that actually was paid to such nonimmigrant(s), not to exceed $10,000."[169] Moreover, upon a finding that an employer committed a "willful" violation of SWT regulations, DOL would also be authorized to "debar" that employer from future participation in the SWT program.[170] To achieve maximum flexibility in the enforcement scheme, debarment would be for any period of time deemed appropriate by DOL. In this respect, the SWT regulations would depart from both the H-1B and the H-2B regulations, which require a minimum debarment period of two to three years[171] or a maximum of three years,[172] respectively.

Finally, SWT regulations should supplement remedies available under the U.S. Code with additional remedies against sponsors that are unique to the SWT context, such as a refund of the program fees paid by SWT workers upon a finding of violations of wage and working conditions regulations. The following H-1B regulation providing for "other administrative remedies" could serve as a model for such a penalty: "If the Administrator finds a violation [of these provisions] . . . the Administrator may issue an order requiring the em-

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167 Labor Certification Process, 73 Fed. Reg. 78,020, 78,020 (Dec.19, 2008) (to be codified at 20 C.F.R. pts. 655–56) (claiming that adoption of an interim final rule providing for post-adjudication audits and procedures for penalizing employers for noncompliance "enhances the integrity of the H-2B program"); *see also Protecting U.S. and Guest Workers: The Recruitment and Employment of Temporary Foreign Labor, Hearing before the H. Comm. on Educ. and Labor*, 110th Cong. 54–55 (2007) (statement of Jonathan P. Hiatt, General Counsel, American Federation of Labor and Congress of Industrial Organizations) ("[A] robust remedial scheme is key to discouraging illegal conduct by employers [in guestworker programs].")

168 *See* 20 C.F.R. § 655.65(e) (defining "willful failure" in the H-2B context); *id.* § 655.805(c) (defining "willful failure" in the H-1B context).

169 *Id*. § 655.65(a) (providing for up to $10,000 per violation in the H-2B context).

170 In the H-1B program, debarment for wage and working condition violations is reserved for willful failure. *Id.* § 655.810(d). In the H-2B program, debarment is available for "substantial failure" to meet the conditions of the labor certification or for willful misrepresentation of a material fact in an application form. *Id.* § 655.65(h).

171 *Id.* § 655.810 (providing for minimum debarment period of two or three years for "willful" violations and minimum of one year for "substantial" violations).

172 *Id.* § 655.31(c).

ployer to return to the employee (or pay to the U.S. Treasury if the employee cannot be located) any money paid by the employee in violation of these provisions."[173]

Providing for penalties against both sponsors and employers and giving enforcement authority to an agency with the expertise to enforce the SWT regulations against those entities would significantly improve the SWT system of oversight and enforcement.

4. What Would Be Left for Sponsors

Reassigning authority to enforce SWT wage and working condition regulations to DOL would relegate sponsors to those program functions that they are best suited to perform, such as screening, placement, and monitoring of program applicants.[174] In addition, they would be responsible for ensuring that students receive the quality of cultural exchange mandated by the regulations.[175] Most importantly, sponsors would no longer be wholly responsible for monitoring the actions of employers.

Not only would the proposed reforms confine sponsors to more appropriate program functions, they would encourage sponsors to report violations by employers and provide better-considered placements for SWT students. Sponsors might be more inclined to report employer wage and working conditions violations knowing that DOL has a mechanism in place for penalizing employers rather than just sponsors.[176] At present, DOS can only impose penalties on sponsors, so a sponsor that learns of an employer violation might not report it for fear of repercussions.[177] Sponsors might also provide better-considered placements because they could no longer delay making arrangements for some students' employment until those students arrived in the United States—the attestation process would require sponsors to arrange for job placements for all SWT students prior to their arrival in the United States, as SWT employers would need to

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173 *Id.* § 655.810(e)(1).

174 *See generally* 22 C.F.R. § 62.32 (2012). In order to become designated, sponsors are required to demonstrate that they are suited to perform these functions. *See id.* § 62.3(b).

175 *See generally* Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593 (May 11, 2012) (to be codified at 22 C.F.R. pt. 62) (giving sponsors heightened responsibility to ensure that participants receive the cultural experience intended by the SWT program).

176 *See* COSTA, *supra* note 19, at 38 (discussing the "institutional and financial" incentives that prevent sponsors from adequately enforcing SWT regulations, given that a sanction by a sponsor may take the form of revocation of a sponsor's program designation, which could mean a significant loss in revenue for the SWT sponsor).

177 *See id.*

submit their applications to DOL before SWT students could be issued a visa. Currently, this "pre-placement" requirement only applies to students from Non-Visa Waiver Program countries—countries whose nationals are considered to be at greater risk of becoming victims of fraudulent schemes once they arrive in the United States.[178] "Pre-placement" for all SWT participants, however, could improve the quality of workers' placements by providing sponsors with more time to vet employers and by giving DOL and DOS a greater opportunity to detect inappropriate or questionable placements before it is too late.[179]

IV. COUNTERARGUMENTS

A. SWT Program Should Be Eliminated Altogether

Some may argue that the SWT program is outdated, given its conception as a foreign policy tool in the Cold War era, and thus should be eliminated altogether. DOS, however, is adamant that the SWT program continues to be a valuable diplomacy tool today.[180] For example, former Secretary of State Colin Powell has been credited as saying that a good stay in the United States is the most valuable diplomacy tool that this country has.[181] In targeting foreign students specifically, DOS argues that the SWT program allows "future leaders of foreign countries [to] experience life in the United States."[182] The program is a "visa diplomacy" tool in another respect: DOS uses SWT visas "as a tangible good that it can give to other countries as an expression of goodwill that garners their goodwill in return."[183] In light of these and other recognized benefits, it is unlikely that the SWT program would be eliminated altogether.

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178 *Id.* at 32. Until 2011, DOS only required sponsors to pre-arrange employment for fifty percent of SWT workers. Exchange Visitor Program—Summer Work Travel, 76 Fed. Reg. 23,177, 23,179 (Apr. 26, 2011). As a result, some SWT workers arrived in the United States jobless and many became the victims of fraudulent job offers or job cancellations, with some even being drawn into illegal money laundering schemes or Medicare fraud. *See id.* at 23,177.

179 *But see* Act of Oct. 21, 1998 § 405, 22 U.S.C. § 1474 (2006) (explicitly authorizing DOS to conduct work and travel programs without regard to "pre-placement").

180 KAMMER, *supra* note 11, at 22.

181 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 10, at 1.

182 KAMMER, *supra* note 11, at 22.

183 COSTA, *supra* note 19, at 39 (citing Kevin D. Stringer, *The Visa Dimension of Diplomacy*, DISCUSSION PAPERS IN DIPLOMACY, no. 91, 2004, *available at* http://www.clingendael.nl/sites/default/files/20040300_cli_paper_dip_issue91.pdf).

B. Increased Costs of Compliance Would Deter Employers from Hiring SWT Workers

Others may argue that an increase in the costs that employers might incur in order to comply with the proposed regulatory and enforcement scheme would deter employers from hiring SWT workers. For example, employers incur significant legal fees in order to comply with the attestation and certification processes in the H-1B and H-2B contexts,[184] so SWT employers would presumably be subject to similar fees if attestation were adopted in the SWT context. Moreover, employers would have to account for liability under the regulations in assessing the cost of hiring an SWT worker.

Nevertheless, employers would still have many incentives to hire SWT workers. First, employers would have strong financial incentives to participate in the program because they are exempt from paying Social Security, Medicare, and federal unemployment taxes for SWT workers[185] and they do not have to pay for health care.[186] Second, some employers prefer foreign workers because they allegedly have a stronger work ethic than young U.S. workers.[187] Additionally, foreign students often have longer academic breaks than American students, enabling them to work for the entirety of an employer's tourist season.[188] Finally, sponsors cover many of employers' fees already, so they might cover these additional fees as well.[189]

Thus, any increase in the costs of hiring SWT workers is not likely to deter employers from hiring SWT workers. To prevent the employers from passing on their increased costs to the program participants, regulations should be promulgated that prohibit deductions from or reductions in participants' wages for filing fees[190] and that cap participants' program fees.

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184 Labor Certification Process, 73 Fed. Reg 78,020, 78,022 (Dec. 19, 2008) (to be codified at 20 C.F.R. pts. 655–56).

185 COSTA, *supra* note 19, at 30.

186 SWT workers must supply their own health insurance. 22 C.F.R. § 62.14 (2012).

187 *See, e.g.*, KAMMER, *supra* note 11, at 12–13.

188 *See e.g.*, *id.* at 12.

189 *See id.* at 7–9.

190 The language for these regulations could be modeled on H-1B regulations. *See* 20 C.F.R. § 655.731(b)(10)(ii) (2012) ("The employer may not receive, and the H-1B nonimmigrant may not pay, any part of the . . . filing fee . . . whether directly or indirectly, voluntarily or involuntarily.").

C. *Department of Labor Lacks Incentives to Enforce SWT Regulations Against SWT Sponsors and Employers*

Some may argue that DOL does not have a stake in the SWT program, and it lacks incentives to enforce wage and workplace conditions regulations against SWT employers and sponsors. DOL, however, has strong institutional incentives to become involved in the enforcement of SWT regulations.

DOL is obligated under existing statutes to protect the wages and working conditions of all employees in the United States,[191] including SWT workers. Under the FLSA, DOL must ensure that U.S. employers meet minimum wage and hour standards, and courts have held that the protections provided by these statutes extend to nonimmigrant workers.[192] DOL's recent investigation of the wage and hour violations at the Hershey's factory[193] demonstrates that DOL is interested in protecting nonimmigrant workers by enforcing the FLSA against SWT employers.

Additionally, if DOL fails to protect the wages and working conditions of SWT workers, it could adversely impact the wages and working conditions of U.S. workers.[194] Although data describing the actual effects of importing SWT workers on the wages and working conditions of U.S. workers remains largely unavailable due to the lack of information about SWT workers generally,[195] when employers pay SWT workers less than the minimum wage for their services, the average wage in the relevant occupation falls, exerting downward pressure on the wages of all U.S. workers in the occupation.[196] Regardless of whether employers are required to pay SWT workers a true prevailing wage,[197] allowing for unreasonable housing deductions that reduce

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191 DOL's stated mission is "[t]o foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights." *Our Mission*, U.S. DEP'T OF LABOR, http://www.dol.gov/opa/aboutdol/mission.htm (last visited May 26, 2013).

192 *See supra* note 115.

193 *See* BRESLIN ET AL., *supra* note 46, at 3.

194 *See* COSTA, *supra* note 19, at 31, 39; *see also* MARSHALL, *supra* note 19, at 218–19. As a note, the attestation process proposed by this Note is more akin to labor attestation in the H-1B context in that it does not require employers to recruit U.S. workers before hiring an SWT worker, which is required in labor certification in the H-2B context.

195 *See* COSTA, *supra* note 19, at 12 (noting that lack of data on SWT participants' occupations and wages makes it difficult to assess impact of SWT workers on U.S. labor market).

196 *Id*. at 30.

197 As discussed above, a prevailing wage is typically the "average wage earned by U.S. workers in the same occupation in the same geographical region." *Id*.

SWT workers' take-home pay to less than a dollar per hour, as was the case with the Hershey's workers, threatens to depress U.S. wages.

Finally, DOL has an interest in maintaining the integrity of its other temporary foreign worker programs. Currently, some employers hire through the SWT program as a means of circumventing the more stringent requirements imposed on them by other temporary foreign worker programs such as the H-1B and H-2B programs.[198] It is cheaper and easier for employers to obtain temporary worker visas through the SWT program because SWT does not provide what former Secretary of Labor Ray Marshall describes as "procedural safeguards" for U.S. workers, such as labor market tests, prevailing wage determinations, or labor condition applications.[199] As a result, many employers openly prefer to obtain visas through the SWT program even when other temporary employment visas would be more appropriate.[200] Government auditors identified this problem as early as 1990, asserting that employer use of the easier-to-obtain J-1 visa, when an H, L, or M visa would be more appropriate, "dilutes the integrity of the J visa" and "obscures the distinction between [it] and other visas."[201]

D. Department of Labor Lacks Funding to Enforce SWT Regulations

Lack of funding to take on responsibilities under the SWT regulations might be an argument against DOL's involvement in the SWT program. Inadequate funding is admittedly an important issue, and DOL has already expressed concerns that an increase in the popularity of the H-2B program makes the efficient and timely processing of H-2B applications a challenge.[202] Another potential challenge is that the INA does not authorize DOL to charge employers a processing fee.[203]

Funding for DOL's participation in the SWT program, however, could be generated by increasing low sponsor fees on a pro rata basis. SWT sponsors, especially large sponsors generating significant revenue from SWT workers, can and should pay more for participation in the SWT program, and funds generated from raising sponsor certifica-

198 *See* MARSHALL, *supra* note 19, at 218.

199 *Id.*

200 *Id.*

201 U.S. GEN. ACCOUNTING OFFICE, *supra* note 10, at 20, 22.

202 *See* Labor Certification Process, 73 Fed. Reg. 78,020, 78,022 (Dec. 19, 2008) (to be codified at 20 C.F.R. pts. 655–56).

203 *Id.*

tion fees could be appropriated to DOL. Sponsors in 2012 only paid $2700 to obtain program designation, an amount that DOS recently raised to $3982.[204] Either amount stands in stark contrast to the millions of dollars a year in annual revenues generated by the largest SWT sponsors.[205] Moreover, those large sponsors account for the majority of SWT participants—as of 2011, there were nineteen sponsors that accounted for 87.5% of annual program participants,[206] but paid the same $2700 fee that the other smaller sponsors did. DOS should require sponsors to pay per SWT worker sponsored. Raising certification fees and tying them to the number of SWT workers sponsored could generate the funds needed for DOL's proposed role in administering the SWT program.

CONCLUSION

The Hershey's incident demonstrates that current SWT regulations and enforcement bodies—sponsors and DOS—fail to adequately protect the wages of SWT workers and the overall reputation of the program. Amending the INA to require labor attestation for the SWT program would ensure much-needed oversight and enforcement of SWT employers by DOL, an agency with the institutional experience and incentives to effectively protect SWT workers' wages and working conditions. Labor attestation for the SWT program would incidentally improve other aspects of the SWT program, such as the quality of employment placement by necessitating pre-placement for all participants. By better protecting SWT workers and enhancing the quality of their experiences in the United States, each of these proposed measures would help to realign the program with its purpose as originally intended by Congress: to promote mutual understanding through cultural exchange.

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204 Exchange Visitor Program—Fees and Charges, 78 Fed. Reg. 28,137, 28,139 (May 14, 2013) (to be codified at 22 C.F.R. pt. 62).

205 COSTA, *supra* note 19, at 7, 37.

206 *Id.* at 37.