



May 30, 2006

BY ELECTRONIC MAIL

Mr. Stanley S. Colvin
Director, Office of Exchange Coordination and Designation
U.S. Department of State, SA-44
301 4th Street, SW, Room 734
Washington, DC 20547
Electronic Address: jexchanges@state.gov (RIN 1400-AC15; 22 CFR Part 62)

Re: Proposed Exchange Visitor Program – Training and Internship Programs Rule

Dear Mr. Colvin:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) is pleased to submit the following comments on the *U.S. Department of State's Proposed Exchange Visitor Program – Training and Internship Programs Rule*.¹

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, on August 13, 2002, President Bush signed Executive Order 13272,⁴ which requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

¹ 71 Fed. Reg. 17768 (April 7, 2006).

² 5 U.S.C. § 601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁴ Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking (67 Fed. Reg. 53461) (August 16, 2002).

Background

The U.S. Department of State is responsible for designating U.S. government, academic, and private sector entities to conduct educational and cultural exchange programs pursuant to the Mutual Educational and Cultural Exchange Act of 1961, as amended (“Fulbright-Hays Act”). Under this statute, designated program sponsors across a variety of industries facilitate the entry into the United States of more than 275,000 exchange participants each year.⁵ As we understand the program, when a trainee is accepted into an exchange program, the designated program sponsor issues the trainee a “Certificate of Eligibility for Exchange Visitor (J-1) Status” (Form DS-2019) which allows the trainee to obtain a J-1 (Exchange Visitor) visa from the U.S. consulate for entry into the United States.

The proposed rule would impose a variety of new requirements on designated program sponsors before they could accept a participant into their exchange program.⁶ For example, designated program sponsors would have to: verify the participant’s prior academic/work experience, English proficiency, and finances; conduct in-person interviews with potential trainees in their home country; develop a detailed individualized training plan (Form DS-7002); and, provide oversight, counseling, and evaluations during the course of the exchange program. In addition, the proposed rule includes special provisions related to aviation flight training schools that limit the ratio of on-the-job training to classroom study (to a ratio of one month to four) and reduce the maximum duration of the training program from 24 to 18 months.⁷

The U.S. Department of State’s Regulatory Flexibility Act Certification Lacks a Factual Basis

As indicated above, the RFA requires federal agencies to assess the impact of their regulatory proposals on small entities and consider less burdensome alternatives. However, if the agency determines that the proposed rule will not “have a significant economic impact on a substantial number of small entities,” the head of the agency may so certify and avoid having to prepare and publish an initial regulatory flexibility analysis (IRFA) for public comment. The RFA certification must include a statement providing the factual basis for the determination.

The U.S. Department of State’s RFA certification in the *Federal Register* states in its entirety that:

These proposed changes to the regulations are hereby certified as not expected to have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act, 5 U.S.C. 601-612, and Executive Order 13272, section 3(b).⁸

This certification statement lacks a factual basis and, therefore, appears to be improper under the RFA. Further, as discussed below, the proposed rule may in fact have a very significant

⁵ Id. at 17769.

⁶ Id. at 17772.

⁷ Id. at 17773.

⁸ 71 Fed. Reg. 17770.

impact on at least one group of small entities (J-1 designated aviation flight training schools) that the U.S. Department of State should consider.

The Proposed Rule Could Have a Significant Economic Impact on a Substantial Number of Small Entities

Advocacy periodically hosts informal regulatory roundtables for small business representatives to discuss regulatory issues of concern to them. At one of our recent roundtables on aviation safety issues, this proposed rule was identified as one that could have a very significant economic impact on a substantial number of small aviation flight training schools. According to information provided to Advocacy, there are approximately nine aviation flight training schools in the United States operating as designated sponsors in the J-1 visa program, all of whom appear to meet the SBA size standard for small business (less than \$23.5 million in annual revenue).⁹ These small businesses have indicated to us that because so many of their flight students are foreign exchange participants under the J-1 visa program, that as much as 50 percent or more of their revenue could be lost if this proposed rule is finalized. There are four primary provisions in the proposed rule that the aviation flight training schools claim would severely curtail the likelihood that foreign students would continue to come to the U.S. to train under the J-1 visa program.¹⁰ These include the following:

First, the proposed rule includes a requirement that all participants have “at least three years of prior related work experience in his or her occupational field”¹¹ However, it appears unlikely that any of these flight school foreign trainees would have prior work experience as a pilot, otherwise they either would not need to attend flight school to obtain it or they would have already have received it.

Second, the proposed ratio of one month of on-the-job training for each four-months of classroom study (a 4-to-1 ratio)¹² would fundamentally alter the nature of the training program and make it undesirable for foreign students to participate. The current structure used by these J-1 flight schools allows trainees to work as instructors for subjects they have already completed. This allows them to gain far more flight time than they otherwise could accumulate and that they can become commercial pilots in 24 months – making the U.S. program far more desirable than any overseas program.

Third, the proposed reduction in the maximum duration of the training program from 24 to 18 months¹³ will make it less likely that foreign students would participate in the program because they would not obtain sufficient practical experience as a flight instructor to make them employable as a commercial pilot in their home country.

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

¹⁰ The J-1 designated flight school representatives also claim that the M-1 (Student) visa program, under which they are all also designated, is not a viable alternative to the J-1 program because it would take several years longer for a student to become a certified commercial pilot.

¹¹ 71 Fed. Reg. 17771.

¹² 71 Fed. Reg. 17773.

¹³ Id.

Finally, the proposed new requirements for completing the individualized training plan (on Form DS-7002)¹⁴ and the new provision that would require sponsors to conduct “in-person interviews with potential trainees in their home country”¹⁵ would impose significant new costs on small businesses that the U.S. Department of State should quantify.

Conclusion

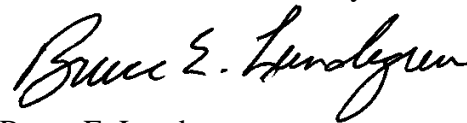
Advocacy appreciates the opportunity to comment on *U.S. Department of State’s Proposed Exchange Visitor Program – Training and Internship Programs Rule* and recommends that the U.S. Department of State either provides a factual basis for its RFA certification or prepares and publishes an initial regulatory flexibility analysis (IRFA) for public comment before proceeding with this rule. Advocacy is mindful that there are important security implications associated with this proposed rule (particularly with respect to aviation flight training schools and foreign nationals training to be pilots here) and defers to the U.S. Department of State and others to assess the security implications of this and other programs. However, Advocacy notes that if the aviation flight training schools are correct and the proposed rule will deter legitimate foreign students from training here in the United States, the stated purpose of the proposed rule will be defeated¹⁶ and the worldwide supply of trained pilots will be reduced.

Again, we appreciate the opportunity to comment on this proposed rule and would be happy to assist you in any way we can. Please feel free to contact me or Bruce Lundegren at (202) 205-6144 (or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,



Thomas M. Sullivan
Chief Counsel for Advocacy



Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

cc: Steven G. Aitkin, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

¹⁴ 71 Fed. Reg. 17772.

¹⁵ Id.

¹⁶ The proposed rule states that: “The primary objectives of the programs offered under these regulations are to enhance the skills and expertise of exchange visitors in their occupational or educational fields through participation in structured and guided training and internship programs and to improve participants’ knowledge of American techniques, methodologies and technology.” 71 Fed. Reg. 17771.