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## CHAPTER 14

### Educational and Cultural Issues

#### A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2019, the United States extended two international agreements, entered into four new agreements, and received four requests pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“Convention”), to which the United States became a State Party in 1983, in accordance with the Convention on Cultural Property Implementation Act (“CPIA”), which implements parts of the Convention. Pub. L. 97-446, 96 Stat. 2351, 19 U.S.C. § 2601 *et seq.*

If the requirements of 19 U.S.C. § 2602(a)(1) and/or (e) are satisfied, the President has the authority to enter into or extend agreements to apply import restrictions for up to five years on archaeological and/or ethnological material of a nation, the government of which has requested such protections and has ratified, accepted, or acceded to the Convention. Accordingly, the United States took steps in 2019 to protect the cultural property of Bulgaria, China, Chile, Honduras, Ecuador, Algeria, Morocco, Turkey, Yemen, and Jordan, by extending an existing memorandum of understanding (“MOU”), or entering into a new one, or considering requests for measures, and imposing corresponding import restrictions on certain archaeological and/or ecclesiastical ethnological material. Current import restrictions and MOUs pertaining to those restrictions are listed at <https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions>.

#### 1. Bulgaria

The United States and Bulgaria signed an MOU regarding the imposition of import restrictions on certain categories of archaeological and ethnological material on January 8, 2019, which entered into force January 14, 2019. 84 Fed. Reg. 112 (Jan. 14, 2019). The

2019 MOU supersedes and replaces the prior MOU, originally entered into in 2014. See *Digest 2014* at 574. The 2019 MOU is available at <https://www.state.gov/19-114/>.

## 2. China

The United States and China signed an MOU regarding the imposition of import restrictions on certain categories of archaeological material on January 10, 2019, which entered into force January 14, 2019. 84 Fed. Reg. 107 (Jan. 14, 2019). The 2019 MOU supersedes and replaces the prior MOU, originally entered into in 2014. See *Digest 2014* at 573-74. The 2019 MOU is available at <https://www.state.gov/19-114-1/>.

## 3. Chile

On February 4, 2019, the U.S. Department of State received a request from the government of Chile under Article 9 of the Convention. Chile's request seeks U.S. import restrictions on archaeological material representing Chile's cultural patrimony. 84 Fed. Reg. 8777 (Mar. 11, 2019).

## 4. Honduras

The United States and Honduras signed an MOU regarding the imposition of import restrictions on certain categories of archaeological and ethnological material on March 5, 2019, which entered into force March 12, 2019. 84 Fed. Reg. 8807 (March 12, 2019). The 2019 MOU supersedes and replaces the prior MOU, originally entered into in 2004 and extended in 2009 and 2014. See *Digest 2009* at 527-28 and *Digest 2014* at 574-75. The 2019 MOU is available at <https://www.state.gov/19-312>.

## 5. Ecuador

The United States and Ecuador signed an MOU regarding imposition of import restrictions on certain categories of archaeological and ethnological material on May 22, 2019. The MOU is available at [https://eca.state.gov/files/bureau/agreement\\_signed\\_-\\_imposition\\_of\\_import\\_restrictions\\_on\\_categories\\_of\\_archaeological\\_and\\_ethnological\\_material.pdf](https://eca.state.gov/files/bureau/agreement_signed_-_imposition_of_import_restrictions_on_categories_of_archaeological_and_ethnological_material.pdf).\*

## 6. Algeria

See *Digest 2018* at 514 for discussion of the request from the Government of Algeria under Article 9 of the Convention for U.S. import restrictions on archaeological and ethnological material representing Algeria's cultural patrimony. The United States and

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\* Editor's note: The MOU entered into force in 2020. 85 Fed. Reg. 8389 (Feb. 14, 2020).

Algeria signed an MOU regarding the imposition of import restrictions on certain categories of archaeological material on August 15, 2019. 84 Fed. Reg. 41,909 (Aug. 16, 2019). The MOU is available at <https://www.state.gov/algeria-19-815>. The State Department's August 14, 2019 press notice regarding the MOU, available at <https://www.state.gov/united-states-and-algeria-sign-cultural-property-agreement/>, makes note that the agreement will protect, "some of the earliest human remains found at Ain Boucherit and cultural objects from many of Algeria's World Heritage sites, including Tipasa, Timgad, and Djémila."

#### **7. Morocco**

On June 12, 2019, the State Department received a request from the government of Morocco, under Article 9 of the Convention, seeking U.S. import restrictions on archaeological and ethnological material representing Morocco's cultural patrimony. 84 Fed. Reg. 43,642 (Aug. 21, 2019).

#### **8. Turkey**

On September 6, 2019, the State Department received the government of Turkey's request, under Article 9 of the Convention, seeking U.S. import restrictions on archaeological and ethnological material representing Turkey's cultural patrimony. 84 Fed. Reg. 52,550 (Oct. 2, 2019).

#### **9. Yemen**

On September 11, 2019, the State Department received the government of Yemen's request, under Article 9 of the Convention, for U.S. import restrictions on archaeological and ethnological material representing Yemen's cultural patrimony. 84 Fed. Reg. 52,550 (Oct. 2, 2019).

#### **10. Jordan**

On December 16, 2019, the United States and Jordan signed an MOU regarding the imposition of import restrictions on certain categories of archaeological material. The MOU is available at <https://www.state.gov/jordan-20-201>.<sup>\*\*</sup>

### **B. CULTURAL PROPERTY: LITIGATION**

As discussed in *Digest 2018* at 514-19, the United States won summary judgment in the case *United States v. Ancient Coin Collectors Guild (3 Knife Shaped Coins)*, 899 F.3d 295 (4th Cir. 2018). The U.S. Supreme Court denied ACCG's petition for review on February

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<sup>\*\*</sup> Editor's note: The MOU entered into force February 1, 2020. 85 Fed. Reg. 7204 (Feb. 7, 2020).

19, 2019. *American Coin Collectors Guild v. United States*, No. 18-767. On April 8, 2019, the federal district court entered a default judgment and order of forfeiture vesting in the U.S. government all rights of title and possession in the coins. Pursuant to 19 U.S.C. § 2609, the coins are to be offered for return to China and Cyprus and then, should they decline, either transferred to ACCG or otherwise disposed of, in accordance with the statute. On September 23, 2019, U.S. Customs and Border Protection (“CBP”) informed the State Department that, absent its objection, CBP would contact China and Cyprus to initiate repatriation. The State Department informed CBP of its consent.

## **C. EXCHANGE PROGRAMS**

### **1. Albania**

On September 25, 2019, the United States and Albania signed a memorandum of understanding on the Fulbright Academic Exchange Program. The text of the MOU is available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>. A September 25, 2019 State Department media note, available at <https://www.state.gov/the-united-states-and-the-republic-of-albania-expand-fulbright-partnership/>, provides background on the MOU and the Fulbright program in Albania:

The MOU conveys the Albanian Government’s commitment to provide sustainable support to the Fulbright Student Program, in order to provide more opportunities for students to participate in the Fulbright Program.

The Fulbright program in Albania was established in 1991. Since then, more than 350 U.S. and Albanian scholars and students have conducted research, taught, or studied at U.S. and Albanian universities through the Fulbright Program.

### **2. Qatar**

On January 13, 2019, the United States and Qatar signed a statement of intent (“SOI”) to explore potential cooperation to promote cultural understanding. On the same day, the United States and Qatar signed an MOU on cooperation in the field of education. The English language versions of the SOI and the MOU are available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

### **3. Estonia**

On August 30, 2019, the United States and Estonia signed a modification of their 2015 MOU regarding the Fulbright Academic Exchange Program. The text of the signed modification is available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

#### 4. Litigation: *ASSE International*

As discussed in *Digest 2018* at 520-21; *Digest 2017* at 580-81; *Digest 2016* at 582-83; *Digest 2015* at 611; and *Digest 2014* at 576-79, ASSE International, a program sponsor in the State Department’s J-1 Exchange Visitor Program (“EVP”) challenged in federal court the imposition of sanctions by the Department of State for ASSE’s violations of EVP regulations and then brought a second appeal after the Department imposed a lesser sanction. The government’s brief on appeal, submitted May 15, 2019, is excerpted below and available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>. *ASSE Int’l v. Pompeo*, No. 18-55979 (9th Cir.).

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##### A. The State Department Correctly Imputed To Plaintiff The Misconduct Of Plaintiff’s Third-Party Contractors.

In issuing a letter of reprimand to plaintiff, the State Department reasonably concluded that plaintiff—and plaintiff’s third-party contractors ACO and The Cream Pot—had failed to ensure that Ms. Amari possessed sufficient English skills to participate in the Exchange Visitor Program and had failed to ensure that she was placed in a *bona fide* training program. One of plaintiff’s own employees admitted that Ms. Amari had insufficient English to participate in her program. And there is likewise no dispute that The Cream Pot used Ms. Amari to fulfill an ordinary labor need, as she spent hours baking crepes in a restaurant kitchen. Because the State Department “articulated reasoned connections between the record and its conclusions,” this Court should affirm the district court’s judgment that the issuance of a letter of reprimand “was not arbitrary and capricious.” ER19.

Before the agency and in district court, plaintiff argued that Ms. Amari was sufficiently proficient in English. *See, e.g.*, ER10-12. Plaintiff has abandoned that contention on appeal, and for good reason: The State Department reasonably credited the contemporaneous judgment of one of plaintiff’s employees that Ms. Amari lacked the requisite language skills. *See* ER10. Before the agency and in district court, plaintiff also argued that Ms. Amari’s crepe-baking tasks in fact constituted *bona fide* training. *See, e.g.*, ER12-14. Plaintiff has abandoned that contention on appeal as well, and for equally good reason: The State Department regulations explicitly provide that exchange programs must provide “bona fide training” and are *not* to be “used as substitutes for ordinary employment or work purposes.” 22 C.F.R. § 62.22(b)(1)(ii).

On appeal, plaintiff simply asserts (Br. 42-49) that it cannot be held responsible for the misconduct of ACO or The Cream Pot restaurant. The district court correctly rejected this contention, which flies in the face of the regulations’ plain terms. The governing regulation, 22 C.F.R. § 62.22(g)(1), provides that “[a]ny failure by any third party to comply with [Program] regulations”—not merely failures for which a sponsor shares fault—“will be imputed to the sponsors engaging such third party.” *Id.* § 62.22(g)(1); *see ASSE*, 803 F.3d at 1065 (explaining that, under the State Department’s regulations, “any violations committed by such third parties are ‘imputed to the sponsors’ themselves”). The regulations thus ensure that sponsors—which have ultimate responsibility for their program participants’ health, safety, and welfare, *see* 22

C.F.R. §§ 62.10(d)(2), 62.50(a)(3))—cannot insulate themselves from their regulatory obligations or put exchange visitors at risk by subcontracting out their own duties.

Plaintiff observes (Br. 42) that the State Department’s regulations elsewhere provide that a sponsor may be sanctioned for its own regulatory violations, *see* 22 C.F.R. § 62.50(a), and argues (Br. 44-45) that § 62.22(g)(1) should be read to create liability for a sponsor only when a third party’s regulatory violations resulted from the sponsor’s failure to comply with the sponsor’s supervisory obligations. This argument is foreclosed by the text of § 62.22(g)(1)—which permits the imputation of “any” third-party violations, and which “contains no ... language implying a requisite state of mind” on the part of the sponsor. *See United States v. Kent*, 945 F.2d 1441, 1446 (9th Cir. 1991); *accord United States v. Wilson*, 438 F.2d 525 (9th Cir. 1971) (per curiam) (holding that a regulation speaking solely of action, with no reference to volition, imposes strict liability).

Plaintiff incorrectly contends (Br. 46) that, if § 62.22(g)(1) permits the imputation of all third-party violations to the associated sponsor, the State Department’s “detailed and specific list of the responsibilities program sponsors bear with respect to their third parties” would be superfluous. But enforcing the express terms of the imputation provision does not render those oversight provisions superfluous. Both the imputation provision and the oversight provisions have the practical effect of encouraging sponsors to supervise their third parties carefully.

However, the provisions address misconduct by different entities. A sponsor that fails to discharge its oversight responsibilities has failed to comply with regulations governing its own primary conduct and may be sanctioned on that basis. The imputation provision of § 62.22(g)(1) serves a different function: It allows the State Department to hold a sponsor accountable for the regulatory violations committed by the sponsor’s third parties, even if the sponsor is not directly at fault.

We note that the State Department retains discretion to tailor its choice of sanction to “the nature and seriousness of the [sponsor’s] violation[s].” 22 C.F.R. § 62.50(b)(1). Here, for example, the State Department imposed the minimum sanction—a letter of reprimand—in part because “ASSE’s third parties kept [their misconduct] hidden.” ER151. Nothing in the regulations, however, relieves a sponsor of responsibility for the conduct of its third parties.

Plaintiff argues (Br. 47) that, as a policy matter, the State Department should not hold it strictly liable for the regulatory violations of its third parties if plaintiff has fully discharged its supervisory responsibilities. That approach would undermine the purposes of the regulations: to protect foreign nationals who participate in the Exchange Visitor Program, to ensure that they receive genuine training, and to ensure they have a positive experience in the United States. In any event, plaintiff’s policy arguments are no basis to disregard the plain terms of the regulations.

...[T]he State Department has consistently maintained—in accordance with the plain terms of its regulations—that “[a]ny failure by any third party to comply with” the regulations “will be imputed to the sponsors engaging such third party.” 22 C.F.R. § 62.22(g)(1).

Plaintiff mistakenly suggests (Br. 50-53) that the State Department held it responsible for the conduct of unidentified third parties with which plaintiff had no relationship. The State Department did no such thing. Rather, the State Department imputed to plaintiff the misconduct of ACO and The Cream Pot Restaurant. There is no dispute that these entities are third parties encompassed by the imputation provision. Plaintiff responds that, by taking notice of the fact that DHS had granted Ms. Amari T Non-Immigrant Status, the State Department imputed the conduct underlying DHS’s determination (which plaintiff speculates may have been committed by

entities that were not plaintiff's third parties) to plaintiff. But plaintiff has misunderstood the State Department's letter of reprimand, which did not impute the conduct giving rise to DHS's determination to ASSE itself—as evinced by the fact that the Department did not cite § 62.22(g)(1) when making that specific finding. *See* ER48-50; ER151. In noting the fact that “DHS considers Ms. Amari to have shown sufficient evidence of human trafficking while participating in ASSE's exchange visitor program to merit” T-visa status, ER151, the Department faulted no entity other than ASSE itself, *see* ER151-52.

**B. The State Department Permissibly Took Into Account DHS's Grant Of T-Visa Status To Ms. Amari.**

In addition to finding the two regulatory violations discussed above, the State Department also concluded that plaintiff had “committed acts of omission and commission which had or could have had the effect of endangering” Ms. Amari's welfare. ER48 (citing 22 C.F.R. § 62.50(a)(3)). The State Department made this third finding for two reasons. First, the State Department noted that plaintiff had left Ms. Amari at risk of exploitation by failing to ensure that she had sufficient English skills and by permitting her placement in a labor position instead of a *bona fide* training program. ER49. And second, the State Department noted that DHS found that Ms. Amari had shown sufficient evidence of human trafficking to warrant T-visa status. ER49 & n.4.

Plaintiff does not appear to contend that it was impermissible for the State Department to take into account DHS's grant of T-visa status in making this third finding. Plaintiff suggests, however, that the State Department should instead have credited the allegedly formal determination of the State Department's Bureau of Diplomatic Security (“Bureau”) that Ms. Amari's circumstances did not rise to the level of criminal human trafficking. But no such formal determination was made. Plaintiff relies principally on an email dated February 13, 2012—just weeks after the State Department learned of Ms. Amari's complaints—in which an agent at the Bureau's District of Columbia headquarters stated that Ms. Amari's case “does not resemble a trafficking situation in my humble opinion. . . . I am not seeing the coercion and exploitation that I associate with trafficking in my mind.” Br. 10-11 (quoting ER252-53). This statement, which reflects the preliminary and subjective opinion of a single Diplomatic Security agent, does not constitute a final determination that Ms. Amari was not a victim of criminal trafficking. Plaintiff also relies on meeting notes setting forth the Bureau's process in Ms. Amari's case, Br. 11 (citing ER271), but those simply summarize the email discussed above. ER271. Finally, plaintiff relies on a “Summary of Investigation.” Br. 10-11 (citing ER267). But that summary does not discuss whether Amari was the victim of criminal trafficking.

Even assuming that the Bureau of Diplomatic Security had formally determined that Ms. Amari was not a trafficking victim, its assessment would not undermine DHS's independent determination that Ms. Amari had shown sufficient evidence to qualify for T-visa status. For one, the Bureau investigates criminal conduct, *see, e.g.*, 18 U.S.C. §§ 1542-1546, 1590, and the standard for a criminal prosecution is more demanding than the showing needed for a T-status determination. For another, DHS is the Executive Branch agency with exclusive authority to adjudicate applications for T-visa status; the Bureau has no role in that process and no authority to make those determinations. ER15 & n.7; *see* 8 U.S.C. § 1101(a)(15)(T). DHS's formal determination to grant T-visa status to Ms. Amari was “the unified work product of a U.S. government agency carrying out governmental responsibilities” that is “clothed with a presumption of regularity.” *See Angov v. Lynch*, 788 F.3d 893, 905 (9th Cir. 2015). It was entirely reasonable for the Department to rely on DHS's formal determination, and to credit that

formal determination over the preliminary opinion of a Diplomatic Security agent that Amari's case did not resemble a criminal-trafficking situation. See *ASSE Int'l*, 803 F.3d at 1077 n.16 (finding "no error" in the Department's reliance on the fact of DHS's T-status determination).

Plaintiff responds (Br. 24-25) that, at a minimum, the State Department was required to discuss the Bureau of Diplomatic Security's alleged finding in issuing the letter of reprimand. But agency action is reversible on this ground only if the agency "entirely failed to consider an important aspect of the problem" before it. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The evidence to which plaintiff points falls short of that high threshold. As explained, the Bureau never made a formal finding. And even if the Bureau had made a formal finding, its conclusion would not undermine the fact that DHS had granted Ms. Amari T-visa status, or the fact that, in DHS's view, Ms. Amari had introduced enough evidence of human trafficking to entitle her to that status.

Finally, even if the State Department were obliged to address the Bureau's alleged finding, remand is unwarranted because a finding of human trafficking was not necessary to support the State Department's third finding. That finding, as explained, was premised not merely on DHS's grant of T-visa status but also on other regulatory violations that plaintiff no longer contests. Specifically, ACO and The Cream Pot "abused the purpose of the Exchange Visitor Program" by using Amari to fulfill The Cream Pot's labor needs. ER151. "Together with ASSE's inappropriate selection of Ms. Amari and failure to assess Ms. Amari's English language skills adequately," the third-party contractors' actions could have placed Amari in jeopardy. ER151. Moreover, the State Department's issuance of a letter of reprimand was predicated not merely on its third finding but on "multiple regulatory violations" by plaintiff and its third-party contractors, most of which plaintiff again no longer contests. ER151. Particularly given the State Department's decision to impose the least severe sanction available, it is apparent that the choice of sanction would have remained the same even had the Department not relied on DHS's T-status determination. Indeed, plaintiff itself relies on evidence suggesting that Ms. Amari was aware that her limited English skills made her unqualified for the Exchange Visitor Program. Br. 10-11 (citing ER267). That only underscores the extent to which plaintiff and its third-party contractors failed to ensure that Ms. Amari was qualified for (and placed in) a suitable training program, and failed to adequately oversee her experience while in their care.

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## 5. *Capron v. Massachusetts*—the au pair program

See *Digest 2018* at 521-25 for discussion of the U.S. brief filed in 2018 in the U.S. Court of Appeals for the First Circuit in *Capron v. Massachusetts*, No. 17-2140. On December 2, 2019, the First Circuit Court of Appeals affirmed the district court's dismissal of the case, disagreeing with the U.S. position that the federal regulations for the U.S. au pair program regarding wages and hours preempt state law. *Capron v. Massachusetts*, 944 F.3d 9 (1st Cir. 2019). The court also acknowledged (see final paragraph in excerpts below) the possibility that the federal regulations could be revised to expressly preempt state and local law. Excerpts follow from the decision. \*\*\*

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\*\*\* Editor's note: Plaintiffs have filed a petition for writ of certiorari in the Supreme Court of the United States. Supreme Court denied cert. Case no. 19-1031 (June 22, 2020).

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We now turn to the heart of the dispute: are the state law measures at issue—in whole or in part—preempted, insofar as they protect au pair participants by imposing obligations on their host families as their employers that may be enforced against those host families? The Supremacy Clause provides that federal law “shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. This Clause gives Congress “the power to preempt state law,” which Congress may exercise either expressly or impliedly. *Arizona v. United States*, 567 U.S. 387, 399, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012). A federal agency, however, also may preempt state law through its regulations, and a federal agency, too, may do so either expressly or impliedly. See *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982).

\* \* \* \*

The notion that underlies obstacle preemption is that the federal government would want a federal measure to be preemptive of any state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives” of that federal measure, *Hines*, 312 U.S. at 67, 61 S.Ct. 399; see also *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000). ...

\* \* \* \*

The plaintiffs ... tie up their argument for finding obstacle preemption this way. They contend that the enforcement of each of the challenged Massachusetts measures necessarily would frustrate the federal objective of establishing such a nationally uniform system of compensation. The enforcement of each such measure, they argue, necessarily would exceed the regulatory ceiling that the Au Pair Program established by imposing an independent and additional state obligation on host families not imposed by the Au Pair Program itself.

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To show the requisite ceiling-setting intent, the plaintiffs focus chiefly on the provision of the au pair exchange program regulations that is entitled “Wages and hours.” 22 C.F.R. § 62.31(j). The provision states: “Sponsors shall require that au pair participants: (1) Are compensated at a weekly rate based upon 45 hours of child care services per week and paid in conformance with the requirements of the [FLSA] as interpreted and implemented by the [DOL].” *Id.* That provision further states, with respect to hours, that sponsors “shall require” that “au pair participants ... do not provide more than 10 hours of child care per day, or more than 45 hours of child care in any one week.” *Id.* § 62.31(j)(2).

\* \* \* \*

But, the text of this provision imposes the obligation to require that au pair participants receive a certain amount of weekly compensation only on the sponsors. No obligation, enforced by the DOS, is imposed on the host families themselves. The obligation that DOS may enforce against the sponsors is defined, moreover, in terms that make it hard to draw the ceiling-setting inference that the plaintiffs ask us to make.

An au pair participant is clearly paid “in conformance with” the FLSA minimum wage for a domestic worker who provides 45 hours a week in childcare services, so long as that participant receives not less than that minimum amount of weekly compensation. Indeed, the plaintiffs concede that this text does not forbid au pair participants from being paid more. Thus, the plaintiffs acknowledge, for example, that, in accord with this provision, a host family may voluntarily pay an au pair participant more than the minimum wage required by the FLSA for that amount of work without creating any conflict with this provision. But, if a sponsor would meet its obligation—which is the obligation that the regulations empower the DOS to enforce—in the event a host family chooses to be that generous, then we fail to see what in the provision’s text indicates that a host family may not be required to pay that higher wage in order to comply with a state wage and hour law. After all, a sponsor would be no less able to fulfill its obligation to ensure that au pair participants are paid “in conformance with” the FLSA—given that it merely sets a non-preemptive floor—in that circumstance.

The au pair exchange program regulations do contain a section that purports to describe the “objectives” of the Au Pair Program. See 22 C.F.R. § 62.31(a)-(b). But, this provision does not refer to a federal governmental interest in setting a uniform national standard for either au pair participant wages or for host family recordkeeping requirements. *Id.* Nor do the plaintiffs contend otherwise, as they do not argue that the “objectives” provision itself supports their position about what the implicit objectives of the Au Pair Program are.

The “objectives” section does state that “[a]u pair participants provide up to forty-five hours of child care services per week and pursue not less than six semester hours of academic credit ... during their year of program participation.” *Id.* § 62.31(a). But, neither the “objectives” section nor any other provision of the DOS regulations refers—at least in any express way—to an agency interest in capping, based on the FLSA minimum wage, the costs of a host family that chooses to have an au pair participant provide the full amount of childcare services that the Au Pair Program allows. Nor do the Au Pair Program regulations reference state wage and hour laws, which is not surprising given the lack of any indication that the agency anticipated at the time of the regulations’ promulgation that state wage and hour laws would apply to domestic workers. ...

From all one can tell from the text of these provisions, in other words, the Au Pair Program operates parallel to, rather than in place of, state employment laws that concern wages and hours and that protect domestic workers generally, at least with respect to the obligations that such state law wage and hour measures impose on host families to do more than what the FLSA itself requires. Thus, the text of au pair exchange program regulations themselves does not supply the affirmative evidence that the state measures at issue will frustrate the federal scheme’s objectives that the plaintiffs need to identify if they are to meet their burden to show obstacle preemption.

\* \* \* \*

We recognize that the DOS, as reflected in its amicus filing, reads its current regulations—as well as the regulatory history that we have just reviewed—differently than we do. We thus consider the contentions that the DOS makes, too. ...

In doing so, however, we are mindful that we may not defer to an “agency’s conclusion that state law is preempted.” *Wyeth*, 555 U.S. at 576, 129 S.Ct. 1187. Instead, we must attend to the “thoroughness, consistency, and persuasiveness” of the agency’s explanation of how state law affects the federal regulatory scheme that the agency administers. *Id.* at 577, 129 S.Ct. 1187. And here, as we will explain, the DOS’s explanation, even if not in conflict with any previously articulated and well-considered DOS explanation, fails to warrant a finding of either field or obstacle preemption.

Like the plaintiffs, the DOS points to the fact that the “Exchange Visitor Program” regulations for certain other exchange visitor programs, unlike those for the Au Pair Program, explicitly reference state and local minimum wage laws. See 22 C.F.R. § 62.32(i)(1)(i). The DOS contends that this aspect of the regulations shows that when the DOS “intends to require payment in accordance with state and local law for [other exchange visitor program] participants the Department say[s] so expressly[.]” But, as we have noted, by terms, the “Exchange Visitor Program” regulations address only the obligations that sponsors must meet in order to avoid the sanctions that the DOS may impose on them under the regulations. The regulations do not, by terms, purport to define the obligations of the employers themselves that those whom they employ may enforce against them. ...

The DOS does not attempt to account for this disjuncture between the Au Pair Program’s focus on the obligations of sponsors and the state wage and hour measures’ focus on the obligations of the employers to the domestic workers whom they employ. The DOS merely asserts that, because sponsors of au pair exchange programs are not required to ensure that employers comply with state wage and hour laws, while the sponsors of other exchange visitor programs are so required, the participants in au pair exchange programs may not independently ensure that their employers do comply with those state laws. There is no indication, however, that the participants in those other exchange visitor programs would be prevented from enforcing their state law wage and hour rights against their employers unless the sponsors of those programs were required to show that the employers of those participants complied with them. The DOS thus fails to provide a persuasive explanation for drawing the negative inference that, because au pair exchange programs are not required to ensure such compliance, au pair participants may not enforce state wage and hour rights against their employers.

The DOS also asserts that the federal obligations on sponsors to require that au pairs are paid “in conformance with the requirements of the FLSA” based on the au pair having worked 45 hours in a week should be understood to be a preemptive ceiling on what the au pair participant may claim as a wage from her host family. But, as we have explained, that language simply does not by terms establish such a ceiling. ...

The DOS separately contends that the regulations that govern the Au Pair Program should be construed to be preemptive in the same way that the federal statute that authorized the President of the United States to impose sanctions on Burma that was at issue in *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 380, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000), was construed to be. The DOS contends that the regulations, like the federal Act in *Crosby*, are “drawn not only to bar what they prohibit but to allow what they permit.” *Id.* But, in *Crosby*, as the Court expressly recognized, Congress’s purpose was clear—to give the President full discretion in regard to trade with “Burma.” *Id.* at 374-76, 120 S.Ct. 2288. It is not similarly clear

that, in setting the compensation obligation of a sponsor of an au pair exchange program—enforceable only by the DOS against that sponsor—the regulatory scheme’s purpose was to set not only the minimum amount that the sponsor must ensure that au pair participants must receive but also a ceiling on what a state may require a host family to pay that au pair participant. In fact, the wages and hours obligation that the DOS imposes on sponsors is pegged to the requirements of a federal statute that itself makes clear that the floor that it sets for the wage that employers must pay is not also a ceiling on what states may require them to pay. See 29 U.S.C. § 218.

Turning to the DOS’s discussion of the regulatory history, the DOS points only to the very same passages in the agency commentary that we have already reviewed. The DOS does not purport to examine the context within which the passages appear. Instead, it seizes on certain phrases in isolation. As we have explained, though, considered in context, the passages that the DOS invokes show that the agency intended to establish a uniform rather than variable compensation floor—pegged to the FLSA minimum—that sponsors would be obliged to ensure was met. . . . The agency interest in ensuring that kind of uniformity, however, accords with the agency having merely established a floor for sponsors to meet. The DOS thus fails to explain why these references affirmatively indicate that the agency also had the requisite ceiling-setting intent.

There is, moreover, regulatory text that appears to point directly against the DOS’s view. Specifically, DOS appears to acknowledge that the au pair regulations include an “employment component,” and that the general “Exchange Visitor Program” regulations’ requirement that sponsors who “work with programs with an employment component” must have “Responsible Officers” who have “a detailed knowledge of federal, state, and local laws pertaining to employment” applies to the Au Pair Program. See 22 C.F.R. § 62.11(a).

To respond to this seemingly problematic language, the DOS contends that state wage and hour laws only apply to “Exchange Visitor Programs” that have additional, specific regulations regarding state laws on top of the general regulations, such as the summer work-travel program. According to the DOS’s construction of the regulations, the general “Exchange Visitor Program” regulations’ requirement that sponsors have “Responsible Officers” who understand all state laws that are relevant to their programs applies to the Au Pair Program only “with respect to matters” beyond wage and hour laws, such as state negligence laws. But, insofar as this assertion by the DOS depends on our granting the negative inference that the plaintiffs ask us to draw from the requirement that sponsors of other exchange visitor program ensure that employers of the participants in those programs do comply with such laws, we have already explained why such an inference is unwarranted. . . . And, insofar as this assertion does not depend on that premise, it cannot be squared with the plain text of the regulations, for reasons that we have already explained. See *id.*

Thus, while we do owe respectful deference to the DOS’s own view of its regulations, the portions of the regulatory text and the passages in the underlying regulatory history that the DOS invokes to support the assertions that it makes about them simply do not support those assertions. And, of course, an agency’s mere “conclusion that state law is pre-empted” is not one to which we may defer. *Wyeth*, 555 U.S. at 576-77, 129 S.Ct. 1187.

There is one last set of materials to which the DOS—and, in passing, the plaintiffs—point: a series of agency guidance documents and fact sheets concerning changes to the federal minimum wage that were issued by the USIA and the DOS between 1997 and 2007. The DOS does not contend that we owe such material any deference. But, the DOS does contend that these

materials show that the Au Pair Program regulations were long understood by the agency itself to oust state minimum wage laws. We do not agree.

The 1997 agency documents merely clarify that federal changes to minimum wage laws affect the stipend and wage calculated in the 1995 regulations. Thus, these guidance documents serve only to reinforce the conclusion—already evident from the text—that the DOS regulations apply only to sponsoring organizations and that Au Pair Program participants’ actual entitlement to wages that they may enforce against their host families comes from the FLSA—not the DOS regulations. In particular, the documents warn host families that if they fail to “abide by the ... au pair stipend increases” they are “in violation of federally-mandated minimum wage law,” not DOS regulations. These documents thus show, at most, that state wage and hour laws were not considered, not that they were considered and preempted.

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... We thus do not see how that one guidance document, insofar as it even comports with the text of the DOS regulations themselves, could supply the basis for inferring an intent from the Au Pair Program to transform the non-preemptive FLSA floor on the wage and hour rights that au pair participants have vis-a-vis their host family employers into a preemptive federal ceiling on those rights.

In fact, if we are considering past agency practice, the DOS acknowledges that, when litigation first arose to enforce a state wage and hour measure for the benefit of au pair participants in 2015, a DOS spokesperson publicly stated that au pair exchange program sponsors must “comply with all other applicable federal, state, and local laws, including any state minimum wage requirements.” Lydia DePillis, *Au Pairs Provide Cheap Child Care. Maybe Illegally Cheap.*, Wash. Post, Mar. 20, 2015. With regard to communicating these requirements to au pair sponsor agencies, moreover, the DOS spokesman went on to say: “The Department has been communicating with au pair sponsors to confirm that they are aware of their obligations under the regulations—including with respect to host family requirements—and will continue to do so.” *Id.* 17

We recognize that the DOS asserts that it is not “clear” that the agency’s public response at that time represented a considered view. We do not suggest otherwise. But, insofar as the agency means to invoke other aspects of its past practice that it concedes do not represent the kind of considered agency view that merits deference to demonstrate how unthinkable it has always been that the Au Pair Program could function if state wage and hours laws could be enforced against host families, this aspect of the agency’s past history at least suggests that the supposedly unthinkable was thought.

The regulatory history does suggest that the au pair exchange program regulations were promulgated at a time when it may not have been evident that there were independently enforceable wage and hour protections for domestic workers beyond those established by the FLSA itself. ... State laws providing such protections are never mentioned by the agency. But, the fact that the agency may not have had those state laws in view does not permit us to conclude that the agency must therefore have preempted them, at least given the sponsor-targeting, floor-setting words that the agency chose to use in the regulations and what the history underlying those words reveals about the agency’s focus. For, while we may assume that the DOS would be free to preempt such state laws now by revising the regulations, it may not simply ascribe to them, retrospectively, a ceiling-setting character that neither the text, nor the regulatory history, nor even past practice demonstrates that they have had.

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## E. INTERNATIONAL EXPOSITIONS

### **Expo Dubai 2020**

In 2019, the Department of State terminated its relationship with the partner selected for the U.S. Pavilion at Expo Dubai 2020. The U.S. Congress did not appropriate funds for participation in Expo 2020. See December 17, 2019 State Department media note, available at <https://www.state.gov/u-s-participation-in-expo-2020-dubai-in-jeopardy/>.\*\*\*\*

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\*\*\*\* Editor's note: The State Department announced in January 2020 that the U.S. would have a Pavilion at Expo Dubai 2020 due to the generosity of the government of the United Arab Emirates.

**Cross References**

*Visa Regulations and Restrictions*, **Ch. 1.B.4.**

*Chabad v. Russia*, **Ch. 10.A.6.b.**