

No. 18-55979

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ASSE INTERNATIONAL, INC.,

Plaintiff-Appellant,

v.

MICHAEL POMPEO, Secretary of State of the United States, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California

BRIEF FOR APPELLEES

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INTRODUCTION

This case concerns the reasonableness of the State Department's decision to issue a letter of reprimand to plaintiff ASSE International, Inc., for violating the regulations governing the State Department's Exchange Visitor Program. ASSE is one of the organizations known as "sponsors" that are responsible for selecting qualified foreign nationals to participate in the Exchange Visitor Program, placing them in appropriate programs in the United States, and monitoring their welfare during their programs. The State Department originally sanctioned ASSE in 2014. After the district court dismissed ASSE's challenge to the original sanctions determination, this Court held that prior sanctions imposed against ASSE were subject to judicial review. *See ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059 (9th Cir. 2015). The State Department conducted further administrative proceedings, revisited the sanctions it had imposed against ASSE, and concluded that only a letter of reprimand was warranted.

In issuing the letter of reprimand, the State Department found that ASSE had violated at least three of the regulations that govern program sponsors. First, the State Department found that ASSE had failed to ensure that a Japanese exchange visitor, Noriko Amari, had the requisite English proficiency to participate in her training program. Second, the State Department found that ASSE had failed to ensure that Ms. Amari was provided with a *bona fide* training program, and that Ms. Amari was instead being used to fulfill a labor need. Third, the State Department

found that ASSE's actions could have placed Ms. Amari at risk of exploitation, citing both the aforementioned violations and the fact that the Department of Homeland Security ("DHS") had granted Ms. Amari T Non-Immigrant Status—a visa status reserved for victims of human trafficking.

On this appeal, ASSE has abandoned its argument that Ms. Amari's English skills were sufficient to qualify her for participation in the Exchange Visitor Program. ASSE has also abandoned its argument that Ms. Amari, who spent her time in its program baking crepes in a restaurant kitchen, was participating in a *bona fide* training program, rather than being used to fulfill an ordinary labor need. Despite these unchallenged findings, ASSE contends that no letter of reprimand should have been issued for two reasons, both of which were correctly rejected by the district court.

As an overarching matter, ASSE argues that the conduct of its contractors—who placed Ms. Amari in a restaurant kitchen and who also failed to verify her English proficiency—cannot be imputed to ASSE itself. That argument is foreclosed by the plain terms of the State Department's regulations, which explicitly state that the conduct of a sponsor's third-party contractors will be imputed to the sponsor. 22 C.F.R. § 62.22(g)(1). ASSE separately contends that the State Department should not have relied on DHS's finding that Ms. Amari was eligible for T-visa status without addressing the opinion of a single law-enforcement official in the State Department that Ms. Amari's circumstances did not rise to the level of human trafficking. But DHS—not the State Department—is charged with making T-visa determinations.

And the preliminary assessment of one law-enforcement official at the State Department in no way undermines the formal conclusion of DHS. In any event, if there were any doubt, the two other unchallenged regulatory violations provide ample support for the issuance of a letter of reprimand.

STATEMENT OF JURISDICTION

Plaintiff invoked the jurisdiction of the district court under 28 U.S.C. § 1331. The district court entered summary judgment for the government on June 19, 2018. Excerpts of Record (“ER”) 24. Plaintiff filed a timely notice of appeal on July 19, 2018. ER25. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the State Department’s issuance of a letter of reprimand to plaintiff is supported by substantial evidence.

PERTINENT REGULATIONS

Pertinent regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

In the Mutual Educational and Cultural Exchange Act of 1961, Pub. L. No. 87-256, 75 Stat. 527, Congress authorized the State Department to provide for “educational exchanges . . . by financing visits and interchanges between the United States and other countries.” 22 U.S.C. § 2452(a)(1)(B)(ii). The purpose of the Exchange Visitor Program is “to assist in the development of friendly, sympathetic,

and peaceful relations between the United States and the other countries of the world.” *Id.* § 2451. The State Department has implemented this congressional directive by, among other things, allowing individuals from other countries to come to the United States as trainees. Such training programs are “intended to increase participants’ understanding of American culture and society,” so that “participants will return to their home countries and share their experiences with their countrymen.” 22 C.F.R. § 62.22(b)(1)(i).

In overseeing the Exchange Visitor Program, the State Department relies on entities known as sponsors, which are often drawn from the private sector. 22 C.F.R. § 62.1(b). Sponsors help qualifying visitors find appropriate training, study, or teaching opportunities within the United States, oversee the visitors’ stays, and monitor the visitors’ welfare during the programs. *Id.* § 62.9.

The State Department’s regulations contain multiple provisions governing sponsors’ conduct. As particularly relevant here, a sponsor must ensure that the exchange visitor “possesses sufficient proficiency in the English language to participate in his or her program.” 22 C.F.R. § 62.10(a)(2); *id.* § 62.22(d)(1). In addition, a sponsor must ensure that training programs provide “bona fide training” and are not “used as substitutes for ordinary employment or work purposes.” *Id.* § 62.22(b)(1)(ii).

The State Department’s regulations contemplate that a sponsor may contract with third parties to perform its duties under the Exchange Visitor Program. *See* 22

C.F.R. § 62.2 (defining “third party”). However, “[a] sponsor’s use of a third party does not relieve the sponsor of its obligations to comply with and to ensure third party compliance with Exchange Visitor Program regulations.” *Id.* § 62.22(g)(1).

Each sponsor must “[e]nsure that any host organizations and third parties . . . adhere to all” regulations. *Id.* § 62.22(f)(1)(v); *see also id.* § 62.2. To enforce this requirement, the regulations expressly provide that any violations committed by such third parties are “imputed to the sponsors” themselves. *Id.* § 62.22(g)(1).

The State Department may sanction sponsors for failing to adhere to its regulations. Sanctions may be imposed upon a finding that the sponsor violated one or more regulations; committed an act or omission which had or could have had the effect of endangering an exchange visitor’s health, safety, or welfare; or otherwise conducted its program in such a way as to undermine the foreign-policy objectives of the United States, compromise the national-security interests of the United States, or bring the State Department or the Exchange Visitor Program into notoriety or disrepute. 22 C.F.R. § 62.50(a). Before sanctions are imposed, the State Department gives the sponsor written notice of its intent to impose sanctions and offers the sponsor an opportunity to respond. *Id.* § 62.50(b)(2).

II. Factual Background

A. The 2014 Sanctions Determination

Plaintiff ASSE International, Inc. is a program sponsor. ASSE contracted with a third-party organization called American Career Opportunity (“ACO”) to help

ASSE place exchange visitors from Japan. *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1065 (9th Cir. 2015). ASSE also approved The Cream Pot restaurant in Hawaii as a host organization. *Id.*

With ACO's assistance, ASSE placed a Japanese exchange visitor named Noriko Amari in a training program at The Cream Pot. *ASSE*, 803 F.3d at 1066. In 2012, a few weeks after beginning her program, Ms. Amari informed the State Department that The Cream Pot was requiring her to work excessive hours, paying her inadequate compensation, and subjecting her to labor exploitation. *Id.* The Department initiated a review of ASSE's compliance with program regulations. *Id.*

The State Department concluded that, although ASSE had responded appropriately to Ms. Amari's allegations, ASSE had nevertheless violated several important regulations. *See ASSE*, 803 F.3d at 1066. ASSE, through counsel, disputed the Department's findings and submitted evidence in support of its arguments. *Id.* at 1067. After considering ASSE's submissions, the State Department determined that sanctions were warranted. The State Department reduced the number of visitors permitted in ASSE's trainee program by 15%; required ASSE to submit a Corrective Action Plan to remedy future violations; and issued ASSE a letter of reprimand, indicating that repeated regulatory violations might result in more serious discipline. *Id.*

B. Prior Litigation

ASSE challenged the State Department's sanctions determination in district court on two grounds: that the sanctions were arbitrary or capricious in violation of the Administrative Procedure Act ("APA"), and that the State Department's sanctions procedures violated the Due Process Clause of the Fifth Amendment. *ASSE*, 803 F.3d at 1067. The district court dismissed the complaint. The court ruled that the State Department's sanctions determinations are not subject to judicial review under the APA because they are "committed to agency discretion by law." *Id.* at 1067-68. And the court ruled ASSE had failed to state a Due Process claim because the "process by which ASSE was sanctioned was fundamentally fair." *Id.* at 1068.

This Court reversed and remanded for further proceedings. This Court held that the State Department's sanctions determinations are reviewable under the APA and may be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *ASSE*, 803 F.3d at 1072 (quoting 5 U.S.C. § 702(2)(A)). This Court also held that the State Department's hearing procedures satisfied due process, *id.* at 1078, but that ASSE did not have a "meaningful opportunity to rebut" two pieces of material evidence: the "specific allegations [of harassment] on which [the State Department] relied" in sanctioning ASSE and an email from an ASSE representative, *id.* at 1076-79.

The district court remanded the case to the State Department at the agency's request so the State Department could reconsider whether sanctions were warranted. ER4. The court also vacated the 2014 sanctions determination. ER4.

C. The 2016 Letter of Reprimand

On remand, the State Department conducted a fresh review and again concluded that ASSE had violated several program regulations, but determined to issue only a letter of reprimand. ER4. The State Department notified ASSE of its preliminary findings and indicated that—in contrast to its 2014 decision—the new notice did “not rely upon the allegations of harassment.” ER4; *see* ER146-52 (2016 Notice of Intent to Impose Lesser Sanctions). ASSE contested the State Department's findings by submitting a written statement accompanied by documentary exhibits. ER6.

In 2016, the State Department issued a new sanctions determination. ER6; *see* ER42-50 (Imposition of Lesser Sanctions). The State Department notified ASSE that, after reviewing ASSE's submissions, it had concluded that a letter of reprimand was the appropriate response to ASSE's regulatory violations. ER42, 47.

First, the State Department found that ASSE had failed to ensure that Ms. Amari had the requisite English skills to participate in her program, in violation of 22 C.F.R. § 62.22(d)(1). ER42-47. The State Department reached that conclusion based in part on an ASSE employee's admission that, “[d]uring the time we spoke with Noriko Amari, her English appeared to be not at an acceptable level for the purpose

of the program.” ER43. The State Department also found that ACO—ASSE’s third-party contractor—had itself failed to ensure that Ms. Amari possessed “sufficient verifiable English language skills to be eligible for selection” as an exchange visitor, in violation of 22 C.F.R. § 62.22(f)(1)(i). ER43 n.1 (emphasis omitted). The State Department held ASSE responsible for ACO’s misconduct, which an ASSE official described as “negligent.” ER43; ER47 (citing 22 C.F.R. § 62.22(g)(1)).¹

Second, the State Department found that ASSE had failed to ensure that ACO complied with Program regulations pertaining to the administration of ASSE’s exchange-visitor program. ER47 (citing 22 C.F.R. § 62.9(f)(2)). The State Department determined that Ms. Amari had spent her first weeks at The Cream Pot “working extensive hours in the kitchen baking crepes,” which was “neither consistent with the placement program outlined” in Ms. Amari’s training plan “nor with the purpose of an [Exchange Visitor] training program more generally.” ER48. Because Ms. Amari’s placement at The Cream Pot by ACO “did not constitute *bona fide* training,” the State Department concluded that ASSE had failed to discharge its supervisory obligations. ER48.

¹ After considering ASSE’s submissions, the State Department withdrew its preliminary finding that ASSE had violated 22 C.F.R. § 62.10(a)(2), which requires sponsors to establish a method to “screen and select prospective exchange visitors to ensure that they are eligible for program participation.” The State Department found that ASSE had indeed established such a system. ER45. The State Department noted, however, that in Ms. Amari’s case, the system failed. ER46.

Third, the State Department found that ASSE 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 rested this conclusion on two independent facts. It explained that, by failing to ensure that Ms. Amari had sufficient English skills to participate in her program and by permitting The Cream Pot to use her to fulfill an ordinary labor need, ASSE had placed her welfare at risk. ER49. In addition, the State Department noted that DHS had found that Ms. Amari had shown sufficient evidence of human trafficking while participating in ASSE’s program to warrant T Non-Immigrant Status, which is reserved for victims of human trafficking. ER49 & n.4. In making these findings, the State Department expressly disclaimed reliance on Ms. Amari’s allegations of harassment. ER50.

As a result of these findings, the State Department determined that a letter of reprimand was in order, but did not impose any of the other additional sanctions that were at issue in the prior litigation. ER50.

III. Proceedings Below

In this action, ASSE challenged the State Department’s decision to issue a letter of reprimand. ASSE alleged that the State Department’s procedures violated its due process rights, ER8, and that the decision to issue a written reprimand was arbitrary and capricious under the APA, ER8.

On cross-motions for summary judgment, the district court upheld the State Department's decision. With respect to ASSE's constitutional claim, the court ruled that, even assuming that the letter of reprimand implicates a constitutionally protected liberty or property interest, "ASSE was accorded all the process it was due." ER20. With respect to ASSE's APA claim, the court ruled that the State Department had reasonably concluded that "ASSE failed to ensure that" Ms. Amari's English skills were sufficient, ER10-12; and that the State Department had reasonably concluded that Ms. Amari "was being used to fulfill a labor need, rather than being provided with a *bona fide* training program," ER12-14. The court rejected ASSE's contention that the State Department wrongly imputed the conduct of ASSE's contractors to ASSE itself, explaining that the regulations expressly provide that "violations committed by third parties are imputed to the sponsors themselves." ER17 (citing 22 C.F.R. §§ 62.9(f), 62.22; *ASSE*, 803 F.3d at 1065). And the court noted that DHS's formal decision to grant Ms. Amari T-visa status was not undermined by a preliminary assessment by a State Department law-enforcement official that the situation did not rise to the level of human trafficking. ER15.

SUMMARY OF ARGUMENT

Substantial evidence supports the State Department's determination to issue a letter of reprimand to plaintiff, which, as a sponsor in the Exchange Visitor Program, was responsible for Ms. Amari's welfare while she participated in plaintiff's program. The State Department found that plaintiff failed to ensure that Ms. Amari had

sufficient English skills to qualify for the program. Furthermore, the State Department found that Ms. Amari was not placed in a *bona fide* training program but was being used to fulfill a labor need—baking crepes in a restaurant kitchen. Either of these findings would support a letter of reprimand under the governing regulations, and plaintiff has abandoned its contention that these findings are not supported by substantial evidence.

Plaintiff instead seeks to blame the third-party contractors that placed Ms. Amari in the restaurant and supervised her work. As the district court explained, however, the State Department’s regulations explicitly provide that the conduct of a sponsor’s third-party contractors will be imputed to the sponsor itself. Thus, there is no doubt that substantial evidence supports the issuance of a letter of reprimand.

Plaintiff also argues that, in making its third finding (that plaintiff’s actions had or could have had the effect of endangering Ms. Amari’s welfare), the State Department relied on DHS’s T-status determination without also considering the preliminary assessment of a State Department law-enforcement official that Ms. Amari’s circumstances did not rise to the level of human trafficking. But as the district court explained, that assessment in no way undermines DHS’s independent determination that Ms. Amari qualified for T-visa status—in particular because DHS and not the State Department is charged with making such determinations. In any event, the State Department had sufficient justification for its third finding based on ASSE’s other two regulatory violations, irrespective of the DHS determination.

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed de novo. *See Churchill County v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001). The State Department's decision must be upheld unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1072 (9th Cir. 2015) (quoting 5 U.S.C. § 706(2)(A)).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE STATE DEPARTMENT'S DECISION TO ISSUE A LETTER OF REPRIMAND TO PLAINTIFF.

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.

Plaintiff’s reliance on *Amoco Oil Co. v. EPA*, 501 F.2d 722 (D.C. Cir. 1974), is misplaced. That case concerned regulations governing the introduction of leaded

gasoline into converter-equipped cars. “At oral argument[,] counsel for the Agency conceded that” imposition of strict vicarious liability under the regulations would be unjust. *Id.* at 748-49. So the D.C. Circuit unsurprisingly held that the regulations did not impose strict vicarious liability. Here, by contrast, the 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* ER151-52.²

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

² In district court, plaintiff accused the State Department of imputing to plaintiff Amari’s allegations of harassment by individuals who were not plaintiff’s third-party contractors. *See* ER19. This argument, which plaintiff has abandoned on appeal, lacks merit. As the district court explained, the State Department “expressly disclaimed that it relied on Ms. Amari’s allegations of harassment.” ER19.

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).³

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*

³ In district court, plaintiff argued that the State Department violated the APA by failing to discuss statements by Amari's fellow trainee Chiharu Tokudome that conflicted with Amari's account of her experience at The Cream Pot. Although plaintiff's opening brief refers to Tokudome's statements, Br. 6, 9-10, 16, plaintiff has abandoned this argument on appeal as well. The argument would in any event lack merit. As the district court explained, the record contains "clear evidence that the [State Department] considered these statements" and "provided reasonable grounds for its contrary conclusion." ER16-17.

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.

CONCLUSION

For these reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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May 2019

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellees state that they know of no related case pending in this Court.

/s/ Michael Shih
MICHAEL SHIH

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,223 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Michael Shib
MICHAEL SHIH

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Michael Shib
MICHAEL SHIH

ADDENDUM

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22 C.F.R. § 62.9

§ 62.9 General obligations of sponsors.

(a) Adherence to Department of State regulations. Sponsors are required to adhere to all regulations set forth in this part.

....

(f) Staffing and support services. Sponsors must ensure that:

(1) Adequate staffing and sufficient support services are provided to administer their exchange visitor program; and

(2) Their employees, officers, agents, third parties, volunteers or other individuals or entities associated with the administration of their exchange visitor program are adequately qualified, appropriately trained, and comply with the Exchange Visitor Program regulations and immigration laws pertaining to the administration of their exchange visitor program(s).

....

22 C.F.R. § 62.10

§ 62.10 Program administration.

Sponsors are responsible for the effective administration of their exchange visitor program(s). These responsibilities include:

(a) Selection of exchange visitors. Sponsors must establish and utilize a method to screen and select prospective exchange visitors to ensure that they are eligible for program participation, and that:

(1) The program is suitable to the exchange visitor's background, needs, and experience; and

(2) The exchange visitor possesses sufficient proficiency in the English language, as determined by an objective measurement of English language proficiency, successfully to participate in his or her program and to function on a day-to-day basis. A sponsor must verify an applicant's English language proficiency through a recognized English language test, by signed documentation from an academic institution or English language school, or through a documented interview conducted by the sponsor either in-person or by videoconferencing, or by telephone if videoconferencing is not a viable option.

....

(d) Monitoring of exchange visitors. Exchange visitors' participation in their exchange program must be monitored by employees of the sponsor. Monitoring activities must not include any retaliation or discrimination against exchange visitors who make adverse comments related to the program. No sponsor or employee of a sponsor may threaten program termination, remove from the program, ban from the program, adversely annotate an exchange visitor's SEVIS record, or otherwise retaliate against an exchange visitor solely because he/she has filed a complaint; instituted or caused to be instituted any proceeding; testified or is about to testify; consulted with an advocacy organization, community organization, legal assistance program or attorney about a grievance or other work-related legal matter; or exercised or asserted on behalf of himself/herself any right or protection. Sponsors must:

- (1) Ensure that the activities in which exchange visitors are engaged are consistent with the category and activity listed on their Forms DS-2019;
- (2) Monitor the physical location (site of activity), and the progress and welfare of exchange visitors to the extent appropriate for the category;

....

....

22 C.F.R. § 62.22

§ 62.22 Trainees and interns.

(a) Introduction. These regulations govern Exchange Visitor Programs under which foreign nationals with significant experience in their occupational field have the opportunity to receive training in the United States in such field. These regulations also establish a new internship program under which foreign national students and recent graduates of foreign post-secondary academic institutions have the opportunity to receive training in the United States in their field of academic study. These regulations include specific requirements to ensure that both trainees and interns receive hands-on experience in their specific fields of study/expertise and that they do not merely participate in work programs. Regulations dealing with training opportunities for certain foreign students who are studying at post-secondary accredited educational institutions in the United States are located at § 62.23 (“College and University Students”). Regulations governing alien physicians in graduate medical education or training are located at § 62.27 (“Alien Physicians”).

(b) Purpose.

(1)(i) The primary objectives of the programs offered under these regulations are to enhance the skills and expertise of exchange visitors in their academic or occupational fields through participation in structured and guided work-based training and internship programs and to improve participants' knowledge of American techniques, methodologies, and technology. Such training and internship programs are also intended to increase participants' understanding of American culture and society and to enhance Americans' knowledge of foreign cultures and skills through an open interchange of ideas between participants and their American associates. A key goal of the Fulbright–Hays Act, which authorizes these programs, is that participants will return to their home countries and share their experiences with their countrymen.

(ii) Exchange Visitor Program training and internship programs must not be used as substitutes for ordinary employment or work purposes; nor may they be used under any circumstances to displace American workers. The requirements in these regulations for trainees are designed to distinguish between bona fide training, which is permitted, and merely gaining additional work experience, which is not permitted. The requirements in these regulations for interns are designed to distinguish between a period of work-based learning in the intern's academic field, which is permitted (and which

requires a substantial academic framework in the participant's field), and unskilled labor, which is not.

(2) In addition, a specific objective of the new internship program is to provide foreign nationals who are currently enrolled full-time and pursuing studies at a degree- or certificate-granting post-secondary academic institution or graduated from such an institution no more than 12 months prior to their exchange visitor program begin date a period of work-based learning to allow them to develop practical skills that will enhance their future careers. Bridging the gap between formal education and practical work experience and gaining substantive cross-cultural experience are major goals in educational institutions around the world. By providing training opportunities for current foreign students and recent foreign graduates at formative stages of their development, the U.S. Government will build partnerships, promote mutual understanding, and develop networks for relationships that will last through generations as these foreign nationals move into leadership roles in a broad range of occupational fields in their own societies. These results are closely tied to the goals, themes, and spirit of the Fulbright–Hays Act.

....

(d) Selection criteria.

(1) In addition to satisfying the general requirements set forth in § 62.10(a), sponsors must ensure that trainees and interns have verifiable English language skills sufficient to function on a day-to-day basis in their training environment. Sponsors must verify an applicant's English language proficiency through a recognized English language test, by signed documentation from an academic institution or English language school, or through a documented interview conducted by the sponsor either in-person or by videoconferencing, or by telephone if videoconferencing is not a viable option.

....

....

(f) Obligations of training and internship program sponsors.

(1) Sponsors designated by the Department to administer training and internship programs must:

- (i) Ensure that trainees and interns are appropriately selected, placed, oriented, supervised, and evaluated;

- (ii) Be available to trainees and interns (and host organizations, as appropriate) to assist as facilitators, counselors, and information resources;
- (iii) Ensure that training and internship programs provide a balance between the trainees' and interns' learning opportunities and their contributions to the organizations in which they are placed;
- (iv) Ensure that the training and internship programs are full-time (minimum of 32 hours a week); and
- (v) Ensure that any host organizations and third parties involved in the recruitment, selection, screening, placement, orientation, evaluation for, or the provision of training and internship programs are sufficiently educated on the goals, objectives, and regulations of the Exchange Visitor Program and adhere to all regulations set forth in this Part as well as all additional terms and conditions governing Exchange Visitor Program administration that the Department may from time to time impose.

(2) Sponsors must certify that they or any host organization acting on the sponsor's behalf:

- (i) Have sufficient resources, plant, equipment, and trained personnel available to provide the specified training and internship program;
- (ii) Provide continuous on-site supervision and mentoring of trainees and interns by experienced and knowledgeable staff;
- (iii) Ensure that trainees and interns obtain skills, knowledge, and competencies through structured and guided activities such as classroom training, seminars, rotation through several departments, on-the-job training, attendance at conferences, and similar learning activities, as appropriate in specific circumstances;
- (iv) Conduct periodic evaluations of trainees and interns, as set forth in § 62.22(l);
- (v) Do not displace full- or part-time or temporary or permanent American workers or serve to fill a labor need and ensure that the positions that trainees and interns fill exist primarily to assist trainees and interns in achieving the objectives of their participation in training and internship programs; and
- (vi) Certify that training and internship programs in the field of agriculture meet all the requirements of the Fair Labor Standards Act, as amended

(29 U.S.C. 201 et seq.) and the Migrant and Seasonal Agricultural Worker Protection Act, as amended (29 U.S.C. 1801 et seq.).

(3) Sponsors or any third parties acting on their behalf must complete thorough screening of potential trainees or interns, including a documented interview conducted by the sponsor either in-person or by videoconferencing, or by telephone if videoconferencing is not a viable option.

(4) Sponsors must retain all documents referred to in § 62.22(f) for at least three years following the completion of all training and internship programs. Documents and any requisite signatures may be retained in either hard copy or electronic format.

(g) Use of third parties.

(1) Sponsors use of third parties. Sponsors may engage third parties (including, but not limited to host organizations, partners, local businesses, governmental entities, academic institutions, and other foreign or domestic agents) to assist them in the conduct of their designated training and internship programs. Such third parties must have an executed written agreement with the sponsor to act on behalf of the sponsor in the conduct of the sponsor's program. This agreement must outline the obligations and full relationship between the sponsor and third party on all matters involving the administration of their exchange visitor program. A sponsor's use of a third party does not relieve the sponsor of its obligations to comply with and to ensure third party compliance with Exchange Visitor Program regulations. Any failure by any third party to comply with the regulations set forth in this Part or with any additional terms and conditions governing Exchange Visitor Program administration that the Department may from time to time impose will be imputed to the sponsors engaging such third party.

....

22 C.F.R. § 62.50

§ 62.50 Sanctions.

(a) Reasons for sanctions. The Department of State (Department) may impose sanctions against a sponsor upon a finding by its Office of Exchange Coordination and Designation (Office) that the sponsor has:

- (1) Violated one or more provisions of this Part;
- (2) Evidenced a pattern of failure to comply with one or more provisions of this Part;
- (3) Committed an act of omission or commission, which has or could have the effect of endangering the health, safety, or welfare of an exchange visitor; or
- (4) Otherwise conducted its program in such a way as to undermine the foreign policy objectives of the United States, compromise the national security interests of the United States, or bring the Department or the Exchange Visitor Program into notoriety or disrepute.

(b) Lesser sanctions.

(1) In order to ensure full compliance with the regulations in this Part, the Department, in its discretion and depending on the nature and seriousness of the violation, may impose any or all of the following sanctions (“lesser sanctions”) on a sponsor upon a finding that the sponsor engaged in any of the acts or omissions set forth in paragraph (a) of this section:

- (i) A written reprimand to the sponsor, with a warning that repeated or persistent violations of the regulations in this part may result in suspension or revocation of the sponsor's Exchange Visitor Program designation, or other sanctions as set forth herein;
- (ii) A declaration placing the exchange visitor sponsor's program on probation, for a period of time determined by the Department in its discretion, signifying a pattern of violation of regulations such that further violations could lead to suspension or revocation of the sponsor's Exchange Visitor Program designation, or other sanctions as set forth herein;
- (iii) A corrective action plan designed to cure the sponsor's violations; or
- (iv) Up to a 15 percent (15%) reduction in the authorized number of exchange visitors in the sponsor's program or in the geographic area of its recruitment or activity. If the sponsor continues to violate the regulations

in this Part, the Department may impose subsequent additional reductions, in ten-percent (10%) increments, in the authorized number of exchange visitors in the sponsor's program or in the geographic area of its recruitment or activity.

(2) Within ten (10) days after service of the written notice to the sponsor imposing any of the sanctions set forth in paragraph (b)(1) of this section, the sponsor may submit to the Office a statement in opposition to or mitigation of the sanction. Such statement may not exceed 20 pages in length, double-spaced and, if appropriate, may include additional documentary material. Sponsors shall include with all documentary material an index of the documents and a summary of the relevance of each document presented. Upon review and consideration of such submission, the Office may, in its discretion, modify, withdraw, or confirm such sanction. All materials the sponsor submits will become a part of the sponsor's file with the Office.

(3) The decision of the Office is the final Department decision with regard to lesser sanctions in paragraphs (b)(1)(i) through (iv) of this section.