

selection for participation in the au pair program. Given the educational and cultural exchange overlay of this program, criteria for program participation is necessary. As published, the interim rule required that all family members resident in the home be fluent in spoken English, be personally interviewed, and have successfully passed a background investigation. The Agency is amending this regulation by substituting "host parents" for "all family members" based upon comments received which convinced the Agency that the change is needed to avoid confusion and unintended senseless results.

#### Placement and Orientation

The Agency has reviewed certain requirements governing the terms and conditions of an au pair placement and has determined that greater flexibility is both possible and desirable. At 22 CFR 514.31(e)(4) the Agency amends the interim rule language in order to permit the host family and au pair the latitude of establishing flexible work hours. As amended, this regulation will require only that the au pair and host family have signed a written agreement that outlines the au pair's obligation to provide not more than 45 hours of child care services per week.

A small, but vocal, minority expressed strong disagreement with the interim regulations' nine hour ceiling on an au pair's work day. Many of these commentators apparently failed to realize that the nine hours per day limit had been in effect since 1986 and was not new. Nevertheless, upon reconsidering this provision, the Agency has concluded that the 45 hour week limit, if aggressively enforced, in conjunction with other oversight changes, makes the nine hours per day cap unnecessary. Thus, the Agency amends 22 CFR 514.31(j)(2) by deleting the requirement that au pairs provide not more than nine hours of child care services per day. The Agency adopts instead language that will permit the au pair to provide a "reasonable" number of hours per day. The Agency does not define what is reasonable, leaving this determination to the host family and au pair in the first instance, working with the sponsoring au pair organization as necessary. Given the monthly contact by organizational representatives, the Agency is of the belief that the documented abuses that prompted the limitation of hours will be prevented. As a result of striking the nine hour per day limit, the Agency believes the program will be opened to potential host families previously unable to participate.

Many comments objected to the requirement that host families and au pairs attend quarterly conferences or seminars devoted to cross cultural or child development issues. Some comments criticized the number as excessive, others disagreed with the nature of the events, and still others considered any such events as an intrusive nuisance. The gatherings suggested by the Agency have been a traditional hallmark of educational and cultural exchange programs, and the Agency does not agree with the characterization that they are an intrusive nuisance or otherwise inappropriate for a cultural and educational exchange program. However, based on the comments, the Agency agrees to amend 22 CFR 514.31(i)(3) to require attendance at one family day event sponsored by the au pair organization. Thus, not only are the number of events reduced, but the Agency is making clear it did not intend to prescribe a narrow agenda to the activity.

#### Au Pair Employment Status

Much of the criticism of the au pair program is directly related to the work component that is an integral part of the program. Because of this, domestic nanny services, and others, have long and loudly objected to these programs. Critics contend that since 45 hours of work per week exceeds the traditional 40 hour American work week, it leaves the au pair insufficient time to either meet the educational exchange requirement or truly pursue a cultural experience. They assert that the program displaces American workers and amounts to no more than the import of cheap foreign labor in the guise of an educational and cultural exchange program. While the Agency does not agree with this characterization, it may not ignore these claims. Accordingly, the Agency has been obligated to examine the question of whether au pairs are employees subject to the provisions of the Fair Labor Standards Act. The Agency has also sought the views and guidance of the Department of Labor on this matter. The Department of Labor has specifically advised the Agency that an employment relationship is established. Because the Department of Labor is the Federal agency entrusted with regulating labor laws, including the definition of employer and employee and determining when an employment relationship is established, it is appropriate for the Agency to defer to Department of Labor in this area. *Chevron, U.S.A. versus NRDC*, 467 U.S. 837 (1984). To assist the public in their

understanding of this matter a short analysis is set forth.

To fall within the purview of the Fair Labor Standards Act, 29 U.S.C.S. 202 *et seq.*, an individual must meet the threshold requirement of "employee" status. The Act, at 29 U.S.C.S. 203(e)(1) and (g), defines "employee" as an individual employed by an employer and "employ" as to suffer or permit to work. Three United States Supreme Court decisions provide the controlling authority for the determination of employee status.

In seeking to answer directly the question of who is an employee, the Court in *Bartels versus Birmingham*, 332 U.S. 126 (1947) at page 130 pronounced that "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." This concept of "economic reality" was first developed in *Rutherford Food Corp. versus McComb*, 331 U.S. 722 (1947) which has, along with *Bartels*, been controlling authority for almost fifty years.

The decision in *Goldberg versus Whitaker House Corp., Inc.*, 366 U.S. 28 (1961) dictates that determination of an employee relationship requires review of the circumstances of the whole activity. Pursuant to this decision, pervasive control exercised by the employer over the work performed is indicative of employee status. Application of these judicially established criteria to the au pair and to his or her host "family" clearly reveals an employment relationship.

The most obvious indication of employment is the inherent financial basis upon which the relationship is built. The au pair provides child care services and currently receives one hundred dollars per week room and board. The au pair is dependent upon her host "family" for her subsistence. This economic dependence is the measure of "economic reality" set forth in the *Rutherford* and *Bartels* decisions, *supra*. The Agency believes it to be unlikely that an au pair is going to uproot his or herself from his or her home country, travel to the United States, and provide forty-five hours of child care per week for someone's children without compensation. The au pair provides a service and expects and receives payment therefore. Designation of the wage paid as "pocket money" is immaterial given that the consideration for the receipt of the "pocket money" is the child care services of the au pair. Pursuant to *Rutherford* and *Bartels*, an au pair is an employee.

A second criterion routinely applied to determine employee status is that of