

employer control over the work performed. As explained in the *Goldberg* decision, *supra*, pervasive control exercised by the employer over the work performed is indicative of an employment relationship. This concept of control stems from the English common law theories of master and servant.

As applied today, the concept of control involves the employer setting the terms and conditions of the employment, i.e., hours of work, methods of performing the work, break times, uniforms, and the designation of actual duties. The question of control generally arises in those situations in which an employer seeks to designate an employee as an independent contractor and thereby escapes the obligations of various labor statutes such as the Fair Labor Standards Act. Designation of the au pair as a "family" member would be analogous to this scenario, when made to avoid the employer/employee relationship.

An au pair's relationship to his or her "family" meets the pervasive control theory of *Goldberg*. The "family" determines what hours of the day the au pair will work. The "family" determines what additional duties may be necessary for the au pair to perform on a daily basis. The "family" dictates what the child, under the care of the au pair, will eat, when he will play, and when he will nap. Pursuant to *Goldberg*, an au pair is an employee.

Au Pair Wages

The weekly compensation paid to au pairs generated voluminous comment. All of the comments received objected to an increase in the weekly wage or stipend from the current \$100 to \$155 per week. Many agreed that a substantial increase was appropriate, given that au pairs have been receiving \$100 per week since the inception of the program in 1986. \$120–\$130 per week was the range mentioned most frequently.

Some of the commentators who criticized the increase to \$155 per week reprimanded the Agency for promoting a 55 percent increase, asserting that the decision reflected an insensitivity to the needs of American families. The Agency believes these critics misunderstood the interim regulations and the purpose for the formula proposed in those regulations.

As explained in the interim final rulemaking published December 14, 1994, the \$155 amount was established by examining Department of Labor regulations governing the payment of minimum wage to live-in domestic employees. The \$155 amount reflected

minimum wage less a fixed credit of \$36 permitted under current Department of Labor regulations for room and board. This regulation, set forth at 29 CFR 552.100 also provides for an alternative calculation of the credit for room and board based upon actual cost.

The Agency noted in the interim rule that the \$36 credit was based upon a regulation published in 1979 and that the Agency was of the opinion that the credit should be substantially higher. The Department of Labor is of the same opinion as evidenced by its proposed rule published in the **Federal Register** on December 30, 1993 at page 69312. In this proposed rule the Department of Labor sought to amend 29 CFR 552.100 to reflect the increase in the cost of room and board by determining the permissible credit as a percentage of the hourly minimum wage. This proposed rule has not been finalized.

In an attempt to document costs, certain au pair organizations conducted a nationwide survey of their host families to determine the average cost of room and board provided to au pairs. While not endorsing the methodology used in this survey, the Agency is comfortable with the results presented. This survey suggests that the average cost for room and board is approximately \$65 per week. This survey provides some measure of objective evidence that the allowance for room and board is substantially higher than the 1979 allowance of \$36 per week.

As stated, 29 CFR 552.100 provides two methods for recognizing the cost of room and board provided live-in domestic employees. The first method, which allows a fixed \$36 credit is outdated but still legally applicable. The second method, which allows for a deduction against the minimum wage based on the actual cost of room and board.

The public comments received have convinced the Agency that a credit for room and board based upon actual costs is preferred by the majority of host families. However, the programmatic need for a uniform wage remains. Thus, in order to balance the preference of host families against the programmatic need for a uniform wage, the Agency will rely on the Department of Labor's methodology as set forth in its proposed rule of December 30, 1993. To this end, and until this Department of Labor regulation is adopted as final, the Agency will permit a credit for room and board based upon actual cost but not to exceed \$76 per week. Upon finalization of this Department of Labor regulation, the Agency will adopt the fixed credit method and thereby

alleviate the family's obligation to maintain records.

The Agency concludes this approach will allow the weekly wage or stipend to automatically adjust, using a formula based on the minimum wage and room and board costs routinely calculated by the Department of Labor. The Agency believes this method is fair to host families and au pairs, and will ensure adherence to federal law. Moreover, once the Department of Labor regulations are finalized, this approach will eliminate the need for host families to keep individualized records. Additionally, it will not compel the federal government to expend scarce resources to regulate or otherwise oversee this portion of the program.

Based on the comments received and the above discussions, the Agency is of the opinion that a weekly stipend or wage of not less than \$115 is consistent with Fair Labor Standards Act requirements governing payment of minimum wage and is appropriate for the present time.

Other Statutory Considerations

Finally, a question has arisen regarding the Agency's statutory authority to impose a performance bond. The program guidelines governing au pair placements for the past eight years have required that the au pair participants place with the au pair sponsor a bond in the amount of five hundred dollars. This bond was forfeited if the au pair participant failed to successfully complete the agreed upon one year program or failed to return to their home country.

In discussions with the Department of Labor regarding payment of minimum wage, the Agency was advised by the Department that this bond requirement was a minimum wage violation. For the reasons discussed above, under the *Chevron* doctrine, deference to Department of Labor's interpretation is appropriate. Additionally the Agency's subsequent review of this matter has led it to conclude that it is without statutory authority to impose a bond. Pursuant to provisions of the Immigration and Naturalization Act set forth at 8 U.S.C. 1184(a) the Attorney General is vested with authority governing the admission of aliens into the United States and the giving of a bond to insure the aliens maintenance of status and departure from the United States. The Director of USIA is without such authority and the regulatory provision set forth at 22 CFR 514.31(1) requiring a performance bond is therefore deleted.

List of Subjects in 22 CFR Part 514

Cultural exchange programs.