

The ABC's of Immigration: Immigration Options for Nannies, Au Pairs and Child Care Workers

by Greg Siskind

While families all over America have foreign-born nannies, the options for hiring them legally are very limited. A high portion of the families hiring such individuals is likely not complying with the nation's immigration laws.

There are some available legal strategies, however. They each have limitations and may require patience and money. But if you want to follow the law, you will need to consider these possibilities.

Many answers to the bold-faced questions are excerpted from *The J Visa Guidebook* by Greg Siskind, William Stock and Steve Yale-Loehr published by Lexis Nexis.

What is the J-1 visa for au pairs?

The au pair program has been controversial since its inception in 1985. When the first two pilot programs ended, the U.S. Information Agency (USIA), which administered the au pair program at the time, wanted to terminate their designation because it claimed that it lacked statutory authority to regulate the programs. In 1988 and 1990, Congress passed legislation authorizing and obliging the USIA to administer and regulate the au pair program. The program was supposed to end in 1995, but it was extended until 1997. In 1997 Congress extended the au pair program permanently.

Au pair programs allow foreign nationals to enter the United States, live with a U.S. family and experience American family life while providing limited child care and attending a U.S. post-secondary educational institution. Au pair participants may elect to participate in the "EduCare" program, a subset of the au pair program, which allows the au pair to reduce the number of hours per week spent on child care and to pursue academic studies more vigorously. Originally, the program was only available to individuals from Western Europe. In 1995, however, Congress expanded the program to admit students from around the world except those countries with which the United States has no diplomatic relations.

What is required of an au pair applicant?

All au pairs must be proficient in English, high school graduates and between the ages of 18 and 26.

Applicants to an au pair program must submit to an in-person interview in English, provide three non-family references, successfully pass a criminal background check, and satisfactorily complete a physical examination. Further, an applicant must have a personality profile done that is based on a psychometric test that measures the differences between the characteristics among applicants and those characteristics considered most important to successfully participate in the au pair program.

What is required of the sponsor of an au pair?

The sponsor is responsible for providing a host family with the prospective au pair's complete application, including references, so the family may determine whether the applicant would be compatible with them.

Host families must be fluent in English and must pass a background check. In addition, they must either be U.S. citizens or legal permanent residents. All adult family members living in the home must submit to an interview conducted by the program sponsor. In addition, the

family must have the financial resources to pay the au pair a weekly stipend of at least the minimum wage and up to \$500 for academic expenses. Au pairs who participate in the EduCare program are paid 75% of the weekly rate paid to non-EduCare participants, and up to \$1000 for the au pair's academic work.

In August 2005, the Department of State proposed regulations requiring the cross checking of family member names through state sex offender registries. Program sponsors would also be required to report any allegations of sexual abuse to law enforcement authorities.

What are the regulations regarding placement of au pairs with host families?

Just days after the USIA merged into the State Department in 1998, the State Department issued new rules on the selection and orientation of both host family and au pair participants. The State Department indicated that the purpose of the new rule was to provide greater consistency in the au pair program (and presumably in response to a highly publicized au pair murder trial in New England involving a British J-1 visa holder). The rules break down into four general categories: placement of the au pair, requirements for selection as a host family, orientation to the program, and reporting requirements.

The following are requirements related to the placement of au pairs:

- A parent or other responsible adult must remain in the home for the first three days the au pair is there.
- An au pair is not to be placed with a family with a child under three unless a parent or responsible adult is in the home.
- An au pair is not to be placed in a family with a child under two unless the au pair has at least 200 hours of documented infant care experience.
- An au pair is not to be placed in a family with a special needs child unless the au pair has documented prior experience and the family has reviewed it.

A written agreement between the au pair and the host family is required, and must spell out that the au pair will provide no more than 45 hours of child care per week. EduCare participants may provide no more than 10 hours per day or 30 hours of child care services each week.

- The au pair must be provided with a private bedroom.
- There must be a telephone interview between the au pair and the host family before the au pair leaves home to come to the United States.
- The requirements for a host family are as follows:
 - The host parents must be U.S. citizens or permanent residents.
 - The host parents must be fluent in spoken English.
 - All adults living in the host family must be interviewed by the program sponsor.
 - All adults living in the host family must pass a background investigation, including employment and personal character references.

- The host family must have financial resources commensurate with its obligations as host.
- The host family must be provided with a copy of the au pair's application, including all references.

The au pair must be provided with copies of all rules and regulations that govern his or her participation in the au pair program, as well as a detailed profile of the family and community where he or she will be placed and any schools in the area, including costs of attendance. The host family must attend a host family conference, and must be provided with copies of regulations governing the au pair program.

What is required of the au pair's sponsor?

The regulation also requires the program sponsor to file an annual report with the State Department. The report must include the following information:

- The results of surveys of host families and au pairs regarding their satisfaction with the program;
- Lists of complaints about the program, including actions taken in response;
- Copies of all promotional literature; and
- A report by a certified public accountant affirming that the program is complying with the procedures and reporting requirements of these regulations.

In addition to these requirements, sponsors have a number of other responsibilities in administering the au pair program:

- Au pairs should provide no more than 45 hours per week or 10 hours per day of child care. EduCare participants may provide no more than 10 hours per day or 30 hours of child care services each week. Au pairs must be given one and one-half days off per week, one full weekend off per month and two weeks of paid vacation per year;
- Au pairs must enroll in an accredited post-secondary educational institution for at least six semester credit hours or its equivalent, or 12 semester hours for EduCare participants;
- Au pairs may not participate in the program for more than one year; and
- Each host family must attend at least one "family day conference" to be given by the sponsor during the placement year.

In addition, sponsors must inform au pairs of their child care duties and what is considered unacceptable behavior. The sponsor must also provide the au pair with a summary of his or her travel arrangements and a detailed description of the host family, the community in which the au pair will live and the educational institutions in that area including the tuition costs. Program sponsors must ensure that the au pair's compensation is at least the minimum wage set forth by the Department of Labor, with appropriate deductions for room and board. Participants in the EduCare program are to be paid 75% of the weekly rate paid to non-EduCare participants.

Program sponsors are also responsible for providing child care training for au pairs. Au pair program participants must receive at least eight hours of child safety instruction, of which

four must be specifically infant-related. In addition, they must receive at least 24 hours of child development instruction, of which no fewer than four hours must be instruction in the care of children under two years old. This child development instruction should include topics such as stress management and Shaken Baby Syndrome. Such training may be provided in the au pair's home country.

The State Department has approved the following au pair program sponsors:

American Institute For Foreign Study

River Plaza

9 West Broad St Stamford CT 06902

Tel.: 203-399-5025

Fax: 203-399-5592

www.aifs.org

AuPairCare Inc.

600 California St., Floor 10

San Francisco CA 94108

Tel.: 415-434-8788 ext. 501

Fax: 415-674-5211

www.aupaircare.com

InterExchange Au Pair

161 Sixth Avenue New York NY 10013

Tel.: 212-924-0446

Fax: 212-924-0575

<http://www.interexchange.org/>

EurAuPair Intercultural Child Care Programs

250 North Coast Highway

Laguna Beach CA 92651

Tel.: 949-494-5500 ext. 215

Fax: 949-497-6235

<http://www.euraupair.com/>

Cultural Care Au Pair

EF Center Boston

1 Education Street Cambridge MA 02141

Tel.: 617-619-1444

Fax: 617-619-2102

<http://www.culturalcare.com/>

USAuPair, Inc.

P.O. Box 2126 Lake Oswego OR 97035

Tel.: 503-697-6872

Fax: 503-699-7776

<http://www.usaupair.com>

Face The World Foundation dba Au Pair Foundation

1010 B Street, Suite 200 San Rafael CA 94901

Tel.: 415-257-4787 ext. 204

Fax: 415-257-4784

<http://www.facetheworld.org/>

Agent Au Pair

1450 Sutter Street #526

San Francisco CA 94109

Tel.: 415-462-1906

Fax: 415-462-0369

<http://agentaupair.com/>

Cultural Homestay International

104 Butterfield Rd. San Anselmo CA 94960

Tel.: 415-459-5397 ext. 122

Fax: 415-459-2182

<http://www.chinet.org/>

American Cultural Exchange, LLC, dba goAuPair

310 Highland Ave. Montclair NJ 07043

Tel.: 201-859-0693

Au Pair International, Inc.

3163 S. Columbine Street Denver CO 80210

Tel.: 720-221-3563

Fax: 720-227-0682

The DOS list of approved au pair programs is also on the Internet at <http://exchanges.state.gov/education/jexchanges/about/catalog/aupair.pdf>

What are the other visa possibilities for au pairs?

While the J-1 visa is by far the most common visa category for au pairs, other child care workers occasionally come in using other visa categories.

If a nanny would like to come to the US to work with a family coming to the US on a work visa, the nanny may be able to work on a B-1 visa. Under Section 41.31 of the Foreign Affairs manual, personal or domestic servants who accompany or follow to join employers entering the US in B, E, F, H, I, J, L or M nonimmigrants may enter the US if

1. The employee has a residence abroad which he or she has no intention of abandoning (notwithstanding the fact that the employer may be in a non immigrant status which does not require such a showing);
2. The employee can demonstrate at least one year's experience as a personal or domestic servant, and
3. The employee has been employed abroad by the employer as a personal or domestic servant, for at least one year prior to the date of the employer's admission to the United States; or
4. If the employee-employer relationship existed immediately prior to the time of visa application, the employer can demonstrate that he or she has regularly employed (either year-round or seasonally) personal or domestic servants over a period of several years preceding the domestic servant's visa application for a nonimmigrant B-1 visa.
5. The employer and the employee have signed an employment contract which contains statements that the employer guarantees the employee the minimum or prevailing wages, whichever is greater, and free room and board and will be the only provider of employment to the servant.

When can an H-2B visa be used and what are the rules associated with this type of visas for au pairs?

H-2B visas are sometimes used by child monitors. H-2B nonimmigrant work visa provides a method for US employers and agents to obtain the services of foreign nationals to fill temporary needs for additional workers. The annual cap on this type of visa is 66,000. Until recently, the limits and requirements of the category caused usage of the visa to be marginal. For example, in 1995, only 2,398 H-2B visas were issued. However, the visa has become very popular in recent years, particularly in the hospitality industry. The limit was reached early in fiscal year 2005, though recent legislative changes should make more H-2Bs available

H-2B visas require employers to go through a process of advertising for a position to show no Americans are available to fill the position and are immediately available.

The length of the stay on an H-2B visa is limited by the duration of the employer's temporary need for additional workers. The maximum authorized period of stay is one year, and the visa may be extended for a total of three years. However, extension applications are closely scrutinized. Either skilled or unskilled workers may be employed on an H-2B visa. Several unpublished decisions provide what little guidance is available on this subject. What does seem to be key is proving the need for the worker is temporary. If an employer does not explain why the need for the child monitor will end or hinting that the position is permanent will hurt the petition. An employer, for example, might want to specify that the need for the child monitor will end when a child registers in school.

Can a Nanny apply for an employment-based immigrant visa?

Yes, an employer can now apply to sponsor an alien as a Nanny or Nanny/Household Manager, under the EB3 employment-based immigrant visa. The new PERM regime now classifies the occupation of "Nanny" as a "Skilled Worker" instead of the previous classification of "Other Worker." The newly defined classification, gives way for favorable treatment by the USCIS as the Specific Vocational Preparation (SVP) range for the occupation of Nanny is now 6.0<7.0. This means this occupation now requires training in vocation schools, relevant work experience, and/or an associates' degree under PERM. Some positions may even require a bachelor's degree. A Nanny's duties may include, but are not limited to, the following:

- Ability to perform CPR and first aid.

- Preparation and planning of meals

- Transportation of children

- Regulation of child's rest periods.

- Participation in regular meetings with parents to discuss child activities and development.
- Child instruction on safe behaviors such as crossing the street with an adult and avoiding dangerous objects.
- Organization and implementation of age-appropriate activities for children.
- Observation of child's behavior for irregularities such taking child's temperature, transporting child to the doctor, maintaining child's health.
- Performance as a role model of appropriate social behaviors and the cultivation of interpersonal relationships and communication skills.
- Participation in the implementation of discipline programs to promote desirable behaviors in the child.
- Observation and development of family schedule.

Note that high demand in the EB-3 category has caused a backlog of applications and potentially long waits for green cards.

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