



April 20, 2015

Mark Freedman
Senior Assistant General Counsel
Legal Services Corporation
3333 K St. NW
Washington, DC 20007

Re: Comments on Agricultural Worker Population Data for Basic Field—Migrant Grants

Dear Mr. Freedman:

We write on behalf of the National Legal Aid and Defender Association (NLADA) Farmworker Section, Agricultural Worker Project Group in response to the Legal Services Corporation's (LSC) "Request for Comments—Agricultural Worker Population Data for Basic Field—Migrant Grants" published in the Federal Register on February 3, 2015, requesting comments by March 20, 2015, extended to April 20, 2015.

The NLADA Agricultural Worker Project Group is comprised of large and small programs from across the country that provide legal services to agricultural workers and their dependents (hereinafter "Farmworker Programs"). Many of these programs receive LSC funding to provide such services through what are known as "Migrant Grants." Program representatives have decades of experience working to meet the legal needs of migrant and seasonal agricultural workers and their families, arguably one of the most vulnerable groups of people in our country. We bring our breadth of experience working with and serving the agricultural worker community to our review of LSC's report, and we thank LSC for the opportunity to respond to this request for comments. The comments are submitted by the members of that group.

We commend LSC's efforts in its gathering and analysis of information and its production of the "LSC AGRICULTURAL WORKER POPULATION ESTIMATE UPDATE: LSC Management Report to LSC Board of Directors" (hereinafter "Management Report"). Our experience supports LSC's conclusion that most agricultural workers and their dependents continue to face unique legal needs and barriers to access and that there is therefore an ongoing need for funding the specialized delivery of legal services to agricultural workers as the most efficient and effective delivery system. We appreciate the thorough examination of the issues by a panel of experts and issuance of the report on the scope of the farmworker population and the legal needs of this population.

The ultimate question before the Corporation is how many of the individuals determined by the Census Bureau to be financially eligible for LSC-funded legal assistance in each state are likely to be better served by specialized agricultural worker legal services programs than by basic field legal services programs. We agree with the Management Report that individuals identified as "agricultural workers,"

and their dependents, are likely to be better served by specialized programs designed with the special legal needs and special access challenges of such workers in mind. We ask that the Management Report's proposed count of agricultural workers be adjusted upward to include more categories of financially eligible individuals as agricultural workers and that the method of determining the distribution of agricultural workers among the states be modified to better reflect the actual distribution of such workers. If these changes are adopted, the resulting changes in funding levels for the basic field programs and the agricultural worker programs will be reduced in most states compared to what will happen if the Management Report is implemented. As a result, there will be less disruption in service delivery and a more efficient transition to the updated count.

We summarize below our comments on the questions posed by LSC and then provide further detail in our comments and make requests for additional clarification and adjustments to the report. We note that the Management Report estimate will result in significant disruptive changes in the current national legal service delivery system. This substantial impact is the underpinning for our requests detailed below.

I. Summary of Comments

**The Legal Services Corporation has requested comments on its proposal to:
“(1) use the new data for grants beginning in January 2016”**

- We concur with LSC's findings that specialized legal services are needed to serve farmworkers efficiently and effectively.

- We support, with some exceptions, updating of data regarding agricultural workers and how LSC defines eligible agricultural workers. We ask LSC to include Fruit and Vegetable Canning Workers in its definition of agricultural workers.

- We ask LSC to include in the estimate presently uncounted categories of LSC-eligible agricultural workers, including eligible farmworker victims of violence, trafficking, and abuse under anti-abuse statutes and beneficiaries of pending I-130 petitions who have the requisite relationship to a U.S. citizen child, parent, or spouse, because they share the unique legal needs and barriers to access as the groups already included and because they are eligible and served efficiently and effectively by specialized legal services for agricultural workers.

- We concur with the general approach of using a top-down method to determine the number of agricultural workers and request adjustments to account for implicit limitations in the data and/or methodology regarding total state numbers of agricultural workers, household size, poverty rates, eligibility categories, and numbers of dependents.

“(2) phase in the funding changes to provide intermediate funding halfway between the old and new levels for 2016 and to fully implement the new levels for 2017”

- We concur with a phase-in period to apply any funding changes resulting from the updated estimates, and we request instead a three-year phase-in period commencing in 2017 because of the magnitude of the redistribution of funding among and within states and the potential negative impact such significant funding changes will have on the existing delivery system of providing the most efficient, economical, and effective services to this uniquely vulnerable population.

- We assume that LSC will be addressing delivery systems in a second phase, following receipt of comments to this Federal Register notice, and we request the opportunity for further meaningful input and comment on any resulting proposed or contemplated changes to the delivery system.

“(3) update the data every three years on the same cycle as LSC updates poverty population data from the U.S. Census Bureau for the distribution of LSC’s Basic Field—General grants.”

- We generally support regular intervals to update the data and updating the data on a three-year interval.
- We request the opportunity to provide additional comments regarding the appropriate interval for updating the data once additional information is known about the impact of the Census Bureau’s recent announcement concerning discontinuing the so-called “three-year estimates” produced in conjunction with the American Community Survey.

II. We support an update of the data regarding LSC-eligible agricultural workers and dependents.

We support LSC’s recognition of the need to update the estimate of the number of agricultural workers in the United States and have the numbers reflect the agricultural workers and their dependents who require specialized legal services and who have been and are being served by Farmworker Programs. Federal law requires that LSC “insure that grants and contracts are made so as to provide the most economical and effective delivery of legal assistance to persons in both urban and rural areas.” 29 U.S.C. § 2996f(a)(3). Congress also recognized that there are certain subpopulations that have “special difficulties of access to legal services or special legal problems” and mandated that LSC study the needs of certain subpopulations, including migrant and seasonal agricultural workers, and implement appropriate recommendations of what was required to serve them. 29 U.S.C. § 2996f(h). The study, known as the “1007(h) study,” found that (1) migrant and seasonal agricultural workers face unique barriers that restrict their access to legal assistance delivered by the basic field office programs; and (2) migrant and seasonal agricultural workers have specialized legal needs that cannot be adequately served through the regular basic field office delivery system. LSC determined that specialized legal services delivery programs are the most economic and effective way to provide legal services to this population.

LSC, with the support of a panel of experts, conducted a thorough, high-quality review of academic research, data, and information about LSC grantees and consulted with other government agencies and community partners in its preparation of the Management Report. LSC determined that agricultural workers continue to face unique legal needs and barriers of access to services mandating a need for a specialized legal services delivery model. LSC’s separate funding allocations to meet the civil legal needs of agricultural workers mirror the targeted federal funding of myriad other programs that meet the unique needs of agricultural workers and their families. There are at least ten federal programs specifically designed to serve the particular needs of agricultural workers. Those programs include Migrant Head Start (which also has served children of low-income seasonal agricultural workers since 1998), the Migrant Health Program (which also serves seasonal and temporary agricultural workers), the Migrant Education Program, High School Equivalency Program (HEP), College Assistance Migrant Program (CAMP), the Migrant Education Even Start Program, the Vocational Rehabilitation Special Projects for Disabled MSFWs, the National Farmworker Jobs Program (WIA 167, formerly JTPA 402), and the USDA Farm Labor Housing Program. This determination also is supported by our experience summarized below.

A. Agricultural workers have unique legal needs.

We commend LSC's analysis of the unique legal needs faced by agricultural workers. LSC correctly finds that the primary legal needs faced by agricultural workers are related to their work or their status as agricultural workers and describes appropriately that agricultural workers' employment and housing circumstances often involve dangerous and unhealthy conditions, arduous manual labor, and low pay. The work is often unstable, temporary, and characterized by high turnover. Workers often are dependent upon their employer for family income, housing, transportation, the ability to remain in this country, and future employment for themselves and their families. These common dynamics in their workplaces cause agricultural workers to have legal problems with wages, workplace health and safety, harassment, and housing.

Agricultural workers often face complicated legal problems that involve violations of multiple state and federal laws. Many of these laws were expressly designed to protect agricultural workers because these workers are exploited in ways that other low-wage workers are not. Some of the specialized federal laws that protect agricultural workers and their families include the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), the Field Sanitation Regulations of the Occupational Safety and Health Act (OSHA), the U.S Department of Agriculture Rural Development Farm Labor Housing programs, the regulations governing the H-2A agricultural temporary worker program, and the Worker Protection Standards of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).¹ Agricultural workers also have unique legal needs and increased vulnerability because of the agricultural exceptions that apply to the federal laws protecting most other workers, such as the agricultural exclusions in the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA). Advocates must know how other federal and state laws regarding wages, housing, health and safety, discrimination, workers' compensation benefits, unemployment benefits, civil rights, and taxes, among others, relate specifically to agricultural workers. These legal cases are unique to specialized farmworker legal services offices and programs and are generally not handled by the basic field programs.

B. Agricultural workers face unique barriers in accessing civil legal services.

Agricultural workers and their families continue to have difficulties achieving access to legal services and the civil justice system due to a unique combination of adverse factors in their work and home lives. The Management Report identifies correctly that workers face geographic and social isolation, lack of knowledge of available community resources, lack of knowledge of their rights (as well as of legal norms and procedures), justified fear of retaliation jeopardizing their homes and livelihoods, and significant cultural and linguistic barriers. Many agricultural workers have very few years of education and extremely low literacy levels. Many agricultural workers depend on their employers or supervisors not only for pay and future employment, but also for housing and transportation, and sometimes even access to food and medical care. Agricultural workers who harvest or process perishable crops often work long hours outside of normal business hours, seven days per week. These barriers apply to both migrant and uniquely vulnerable non-migrant agricultural workers.

C. Serving agricultural workers requires specialized legal services.

Equal access to justice for agricultural workers requires access to lawyers and legal workers with the specialized skills, training, and support needed to handle the workers' unique legal needs. These unique legal needs stem not only from the types of legal problems presented, but also from the difficult and

¹ S. Reed & I. Jacobs., "Serving Farmworkers," Clearinghouse Review Journal of Poverty Law and Policy (September – October 2004), pp. 371-72.

unique factual situations involved and the different types of advocacy strategies required. Farmworker Programs have expended and continue to expend considerable resources to regularly train staff at state, regional, and national levels on agricultural worker communities' cultures, the particular barriers they face, the means to overcome those barriers, the particular federal and state laws that protect agricultural workers, and strategies to effectively apply those legal protections. The specialized legal services programs serving agricultural workers have developed a particular set of skills, knowledge, systems, and expertise needed to understand and address these barriers with culturally sensitive, linguistically appropriate, and legally effective specialized means and strategies. This specialized legal services delivery model includes hiring and training experienced staff with appropriate cultural and language skills, extensive outreach and community education, flexible office hours, and a willingness to go to workers who need assistance. Advocates must have knowledge of the wide range of laws and legal issues described above and how they apply to agricultural workers. Advocates also must have the legal and practical expertise to conduct complex state and federal litigation and to engage in complex administrative advocacy.

III. We generally support LSC's definition of the agricultural worker population served by LSC-funded farmworker programs.

LSC's definition of agricultural workers is broadly inclusive and encompasses migrant and seasonal crop workers, horticultural workers, livestock workers, certain forestry workers, and the dependents of these workers.² We agree that all of these workers generally share the unique legal needs and barriers to being able to access the civil justice system to meet those needs. There also are other groups of agricultural workers who share the identical special barriers and unique legal needs. It appears, however, that they have not been considered in LSC's definition or estimate. The significance of their omission in both the definition and the estimate, as well as our recommendations to include them, are addressed below.

We support the concept that the estimate should not be limited solely to workers who are migrants. Our programs were expected to serve, and continue to serve, more than migrant workers, from the very beginning of special funding for Farmworker Programs. The original Congressional mandate asked LSC also to examine the needs of seasonal farmworkers. LSC reiterated the importance of serving a broader population of similarly-situated agricultural workers in former LSC President John McKay's June 19, 2000 letter (hereinafter "McKay Letter") stating LSC's position on the proper scope of farmworker projects. Other federal programs that serve agricultural workers, such as the Migrant Health Program, also target a broader population than solely migrant workers. Farmworker Programs typically represent seasonal agricultural workers who work in sectors of the agricultural economy where such workers are subject to the same access-to-justice barriers and unique legal needs as migrant agricultural workers or who labor alongside in the same workplace or are subject to the same recruitment systems and exploitative labor and housing practices as migrants.

A. LSC should include additional groups of agricultural workers in the estimated count who face substantially similar barriers and unique legal needs.

1. LSC should include migrant and seasonal workers who work in off-farm Fruit and Vegetable Canning (NAICS code 31142).

² LSC Agricultural Worker Population Estimate Update: LSC Management Report to LSC Board of Directors (January 30, 2015), p. 6 (hereinafter "Mgt. Rpt.").

We ask LSC to include other workers who share the unique barriers to accessing civil legal assistance and legal needs experienced by those agricultural workers counted. It appears from the Management Report and the ETA-commissioned report attached thereto that the estimate of agricultural workers may not include those workers who would be included under NAICS code 31142, Fruit and Vegetable Canning (off-farm). LSC should include agricultural workers classified under Fruit and Vegetable Canning (NAICS code 31142) in its estimate pursuant to LSC's mandate for Farmworker Programs as articulated in the McKay letter. These workers have a history of being served, and continue to be served, by LSC-funded Farmworker Programs. Most of the federal programs serving agricultural workers and their dependents also serve these workers.

The agricultural industry has significantly shifted towards larger producers. As a result, agricultural labor required to bring crops to market is increasingly outsourced "off-farm" and to different parts of the agriculture process. The labor required in these "off-farm" entities typically comes from the same populations and labor pool as those working officially "on-farm", but the workers are enumerated outside of the standard agricultural industry classification (NAISC 11). However, this "industrial" (as opposed to "agricultural") classification of such "off-farm" employers does not change the nature of exploitation of these vulnerable workers, who face similar workplace dynamics and experience similar legal issues as those who work in "on-farm" processing plants. Likewise, those in both the "on-farm" and "off-farm" packing or processing entities are typically seasonal agricultural workers, and their workplaces are often controlled by the same employers, supervisors, or contractors controlling the fields from which the produce was harvested. Processing is dangerous, temporary, low-paid work tied to agricultural harvests; the workers suffer from similar isolation, cultural, and linguistic barriers. The mainly immigrant, seasonal workforce faces substantially similar economic and social dependencies as other agricultural workers. Because these agricultural workers perform related work outside the more typical industrial classifications of NAISC 11, there is little reason to exclude this type of so-called "off-farm" agricultural work from the agricultural worker count. The industry clearly depends on the same seasonal labor force, which often moves from work on a farm to processing plants during the same year.

2. We support inclusion of agricultural workers' dependents and of temporarily out-of-work and retired agricultural workers.

LSC has appropriately included dependents, those who are temporarily out-of-work, and retired agricultural workers.³ While many dependents also are agricultural workers, advocates regularly represent dependents who are not directly employed in agriculture yet are significantly impacted in claims involving labor camp housing, non-labor camp housing, pesticide exposure, education, civil rights, access to public services, and public benefits issues. Studies have shown that families face the risk of experiencing adverse health symptoms due to pesticide exposure because workers bring home contaminated clothing, without the availability of hand-washing facilities, and because of pesticide drift from nearby areas into the workers' families' housing. They certainly face the same housing conditions, health threats, retaliation, and related violations of rights. Many of the statutes protecting agricultural workers specifically include workers' dependents in their protections. Most of the partner federal programs serving agricultural workers include the dependents and families of agricultural workers as eligible.

³ Mgt. Rpt., p. 13.

Retired and disabled agricultural workers often present legal claims related to their former status as agricultural workers. Pursuant to local priorities and resources, advocates may help these workers gain access to available employment benefits and social security benefits, obtain corrected workers' compensation benefits, and ensure equal access to public services, including agricultural worker housing. Long-term discouraged workers, as well as those temporarily out of the agricultural work force, historically have been served by Farmworker Programs. Parents may temporarily exit the work force to care for children or to try to enter another field of work. Farmworker Programs assist these workers pursuant to local priority-setting and where the legal issue presented is connected to the person's status as an agricultural worker. This is consistent with the Bureau of Labor Statistics' concept of labor force participation. It is also consistent with other federal farmworker programs' use of extended look-back periods. The federal Migrant Child Education Program, for example, looks to whether the worker moved to obtain temporary or seasonal agricultural work in the preceding 36 months to determine eligibility. Such a "look-back" period is especially critical in the legal services context due to the existence of multi-year statutes of limitations on bringing claims arising out of an individual's farm work (e.g., the statute of limitations for pursuing AWP claims is as long as six years in many states).

IV. We request the inclusion in the update of estimates of other LSC-eligible agricultural workers who do not appear to have been counted by the methodology used by ETA.

The proposed ETA estimate, after determining the total number of agricultural workers in each state, then adjusts that number to reflect the number of "LSC-eligible" workers and dependents. The Management Report states that "[t]he ETA estimate of the LSC-eligible agricultural worker population includes only those persons who meet the LSC eligibility criteria regarding citizenship and alien status as set forth in Part 1626 of the LSC Regulations."⁴ However, a closer examination of the detailed explanation of the estimation methodology in the ETA Memorandum and Appendix A to the Management Report (hereinafter "ETA Memo") shows that the resulting estimates contain a significant undercount of the "1626-eligible" agricultural worker and dependent population. These estimates are based upon NAWS survey data that use questions asking about "authorized" and "unauthorized" status. Commonly-held definitions of "unauthorized" are not coextensive with the definitions used in 45 C.F.R. § 1626 for purposes of determining LSC eligibility. Despite its intent, the ETA Memo's narrative description of the "LSC-eligible" agricultural worker population used for its estimates indicates that the ETA methodology did not include *many* "persons who meet the LSC eligibility criteria regarding citizenship and alien status as set forth in Part 1626 of the LSC Regulations." There are certain categories of "LSC-eligible" workers and dependents which appear not to have been included in the estimate of agricultural workers but are "LSC eligible" and should be included. These include, but are not limited to, beneficiaries of pending I-130 petitions with a corresponding U.S. citizen parent, child, or spouse,⁵ and unauthorized victims of sexual assault, domestic violence, trafficking, and other crimes that would render them LSC-eligible. We believe that LSC should include these eligible agricultural workers and dependents in order to produce a more accurate estimate of the population served by farmworker programs and to assure that specialized services are available to serve these very vulnerable workers.

⁴ *Id.* p. 11.

⁵ While these comments specifically refer to I-130 beneficiaries, when we use that term we also make the same arguments in regards to the other LSC-eligible farmworkers who are BOTH the spouse or parent or unmarried child under 21 years old of a U.S. citizen and have filed an application for adjustment of status to permanent residence and have filed for or been granted other forms of immigration relief as listed in the Appendix to 45 CFR Part 1626.

A. We ask LSC to include those eligible for assistance under anti-abuse laws in its estimate.

LSC laws and regulations make a broad category of immigrants and their children eligible for legal assistance if they are victims of abuse (extreme cruelty, sexual assault, trafficking, domestic violence, and U-visa-qualifying criminal activity). This type of eligibility has become so significant over the past 15 years that LSC last year amended its immigration eligibility regulation to more clearly state the conditions under which victims of abuse are eligible for LSC-funded legal services,⁶ which is set forth in detail in a new 45 C.F.R. § 1626.4.⁷ LSC's implementation guidance provides the definitions of eligible victims of abuse and their eligible derivatives. The guidance describes in detail the types of cases (typically, for victims of U-visa-qualifying criminal activity⁸ and for victims of human trafficking eligible for T visas⁹) in which LSC programs can provide legal assistance.

It is widely documented that farmworkers, and particularly farmworker women, frequently are victims of sexual assault, sexual violence, domestic violence, cruelty, and human trafficking. Studies, both formal and informal, have documented the pervasiveness of these forms of abuse among agricultural workers.¹⁰ These agricultural workers are some of the most vulnerable in the service populations. Due

⁶ See 79 Fed. Reg. 21861 (Apr. 14, 2014) (final rule on restrictions on legal assistance to aliens); 79 Fed. Reg. 30052 (May 27, 2014) (corrections to final rule on restrictions on legal assistance to aliens).

⁷ Section 1626.4 is set out in full as an appendix to our comments.

⁸ The list of U visa "qualifying crimes" is provided by DHS at: <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>.

⁹ T visa eligibility is provided by DHS at: <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status>.

¹⁰ These studies include: OXFAM America. *Working in Fear: Sexual Violence Against Women Farmworkers in the United States – A Literature Review* (Apr. 2015); P. Tjaden & N. Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence, Findings From the National Violence Against Women Survey*, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, July 2000; *Costs of Intimate Partner Violence Against Women in the United States*. Atlanta (GA): Centers for Disease Control and Prevention, 2003; M.J. Breiding, J. Chen, & M.C. Black, *Intimate Partner Violence in the United States — 2010*, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. Atlanta, GA, 2014; U.S. Department of Justice (DOJ), Bureau of Justice Statistics BLS, *Family Violence Statistics: Including Statistics on Strangers and Acquaintances*, 2005; DOJ, BLS, *Nonfatal Domestic Violence, 2003–2012*, April 2014; DOJ, BLS, *Intimate Partner Violence, 1993–2010*, November 2012; Maria M. Dominguez, "Sex Discrimination & Sexual Harassment in Agricultural Labor," *Gender and the Law*, 1997; Irma Morales Waugh, "Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women," *Violence Against Women*, 2010; Human Rights Watch, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, 2012; Southern Poverty Law Center, *Under Siege: Life for Low-Income Latinos in the South*, April 2009; Southern Poverty Law Center, *Injustice on Our Plates: Immigrant Women in the U.S. Food Industry*, 2010; EEOC, "Selected List Of Pending And Resolved Cases Involving Farmworkers From 1999 To The Present (as of Aug. 2014)" at http://www.eeoc.gov/eeoc/litigation/selected/farmworkers_august_2014.cfm (last accessed Dec. 3, 2014); Bon Appétit Management Company Foundation & United Farm Workers, *Inventory Of Farmworker Issues And Protections In The United States*, Mar. 2011; "Rape in the Fields" available at <http://www.pbs.org/wgbh/pages/frontline/rape-in-the-fields>; Coalition of Immokalee Workers, "Anti-Slavery Campaign," (<http://ciw-online.org/slavery>) (last accessed Dec. 4, 2014); Verité, *Immigrant Workers in U.S. Agriculture: The Role of Labor Brokers in Vulnerability to Forced Labor*, June 2010; Kelle Barrick, Pamela K. Lattimore, Wayne Pitts, & Sheldon X. Zhang, "Indicators of Labor Trafficking Among North Carolina Migrant Farmworkers," Report Prepared for the Department of Justice, National Institute of Justice, NIJ Grant Number 2009-IJ-CX-0045, RTI Project Number 0212466, Aug. 2013; Sheldon X. Zhang, "Looking for a Hidden Population: Trafficking of Migrant Laborers in San Diego County," United States Department of Justice, Office of Justice Programs, National Institute of Justice Grant No.: 2009-IJ-CX-0011, Nov. 2012; Amanda M. Kjar, "U -Visa

to their unique vulnerabilities, these agricultural workers also often require the most intense and specifically targeted resources to identify and serve them. Thus, the inclusion of this population within an estimate of the agricultural worker population using the lens of LSC-eligibility is critical.

The Management Report identifies the prevalence of abuse among farmworkers and the studies that have shown that a significant portion of farmworkers, especially farmworker women, are victims, or are at significant risk of being victims, and that victims of these crimes tend not to report them. The ETA enumeration, however, fails to include an estimate of the numbers of farmworkers who are eligible for farmworker legal assistance pursuant to anti-abuse statutes, apparently because no formal national estimate of this population has previously been published. We believe that LSC should determine a conservative estimate of unauthorized farmworker abuse victims based upon the ample research available and adjust the number or percentage of unauthorized farmworkers who are LSC-eligible accordingly.

Research and data have been developed about such crimes, U- and T-visa eligibility, and their prevalence among farmworker women by numerous agencies and reputable organizations, including the U.S. Departments of Labor and Justice, the Equal Employment Opportunity Commission, the National Human Trafficking Resource Center, the Department of Homeland Security, the Southern Poverty Law Center, Human Rights Watch, OXFAM, and in law review articles. Based upon the existing body of research, we believe that a reasonable estimate can be made of the percentage of farmworkers, farmworker women, and their children who are eligible for farmworker legal assistance under these provisions concerned with the abuse of immigrants.

Victims of Sexual Assault

Farmworkers are particularly vulnerable to labor abuses because of the transitory and temporary nature of their work. Sexual harassment among women in the agricultural industry is extremely prevalent for the same reasons. It is estimated that on a national level 35% to 50% of women are sexually harassed at some point in their working lives.¹¹ Studies focusing on farmworker women have noted the factors that make harassment more prevalent in the fields and the types of harassment experienced, not necessarily on an overall number of women sexually harassed. Nevertheless, these studies tell us that farmworker women experience harassment in the fields regularly. They also show that harassment is often unreported and undeterred by supervisors. Another study found that “[a] majority of 150 female farmworker interviewees across the country indicated they endured some sort of sexual harassment . . . working in the fields, packinghouses or processing plants.”¹²

The Project Against Workplace Sexual Assault of Indigenous Farmworkers was funded in part by the Robert Wood Johnson Foundation Local Funding Partnerships in 2008 to help improve the health of indigenous farmworkers by reducing the incidents of sexual harassment/sexual assault on the job and increasing farmworkers' access to health care, counseling, and legal remedies if they experienced sexual

Certification Requirements Are Blocking Congressional Intent Creating the Need for a Writ of Mandate and Training – Unauthorized Immigrant Female Farmworkers Remain Hiding in the Fields of Sexual Violence and Sexual Harassment,” 22 San Joaquin Agricultural Law Review, 2012-2013.

¹¹ B.A. Gutek & R.S. Done, *Sexual harassment*, in R. K. Unger (Ed.), *Handbook of Psychology of Women and Gender*, pp. 367-387; see also Irma M. Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*. Violence Against Women (2010), p. 240.

¹² Southern Poverty Law Center, “Injustice on our Plates: Immigrant Women in the U.S. Food Industry” (Nov. 2010).

harassment or assault at work. The Project, using a community- based participatory research approach, was led by the Oregon Law Center in collaboration with other community- based organizations, Virginia Garcia Memorial Health Center, and experienced researchers, including those from the Johns Hopkins University School of Nursing. The Project used both qualitative and quantitative methods to obtain direct input from the indigenous farmworkers. The themes emerging from focus groups with 59 indigenous and Latina farmworkers included direct and indirect effects of sexual harassment and sexual assault on women, risk factors associated with the farmworker workplace environment, and the increased vulnerability due to low social status, poverty, cultural and linguistic issues, and isolation.¹³ According to Nargess Shadbeh of Oregon Law Center, “[t]he Project also conducted a first ever survey of 250 female indigenous farmworkers in Oregon conducted by trained indigenous community educators in the key areas of concentration of farmworkers in Oregon. The results of the study indicated that almost all the respondents (94%) thought sexual harassment was a serious problem in the agricultural workplace. 34% personally experienced or knew a peer who had experience sexual harassment in the workplace and about half of the women surveyed (44%) said that they had at some point in their work life worked in agricultural production where there was at least some degree of sexual harassment. The study’s results indicated a strong under-reporting of incidents of sexual harassment in the workplace for fear of not being believed or fear of losing their jobs. While the survey focused on indigenous women farmworkers, in two out of three follow up focus group discussions after the surveys, women reported that they had seen instances of male workers being harassed by other males.”

Based on these studies, it is reasonable to assume that approximately 20-35% of unauthorized farmworker women would be LSC-eligible pursuant to Section 1626.4. By consulting NAWS data regarding the percentage of women farmworkers who are unauthorized, LSC should be able to reasonably estimate the number of unauthorized women farmworkers at a regional and national level who are potentially U-visa-eligible, and therefore LSC-eligible, as victims of sexual assault and analogous sex-based qualifying crimes.

Victims of Trafficking/Severe Forms of Trafficking

Trafficking victims also appear to be largely left out of the current ETA estimates. Certain categories of trafficking victims might have been included in the ETA count, for example, trafficking victims who are brought to the country on H-2A or H-2B forestry visas and who are included in the count as H-2 visa holders but not as trafficking victims. The methodology, however, leaves out most trafficking victims who come into the country by different means. Although research estimating the number of trafficking victims in the United States varies, significant efforts have been made in recent years to estimate trafficking victims using sound and reviewed methodologies. One cross-occupational study conducted with San Diego’s alien victim population found that 58% of the unauthorized migrants currently in the workforce had experienced at least one type of labor trafficking.¹⁴ The study hypothesized that 16% of unauthorized migrant agricultural workers faced trafficking in San Diego.¹⁵

¹³ J. Murphy, J. Samples, M. Morales & N. Shadbeh., “They Talk Like That, But We Keep Working”: Sexual Harassment and Sexual Assault Experiences Among Mexican Indigenous Farmworker Women in Oregon, *Journal of Immigrant and Minority Health* (2014).

¹⁴ S.X. Zhang, *Trafficking of Migrant Laborers in San Diego County: Looking for a Hidden Population* (San Diego State Univ. 2012), p. 11.

¹⁵ The study noted that the number of agricultural workers in San Diego that experienced trafficking was low. The study hypothesized that the small and insular farming community in that area.

In addition to such victims being LSC-eligible, 45 CFR 1626.4 also provides that certain family members of victims of severe forms of trafficking are eligible for related assistance from LSC grantees.

In addition, the U.S. Department of Labor recently announced that its Wage and Hour Division will begin to certify applications from laborers seeking “U” and “T” visas based on certain qualifying criminal activities typical of the agricultural workplace, including extortion, forced labor, and fraud in labor contracting.¹⁶ LSC should use existing studies and sound methodologies to estimate the number of unauthorized agricultural workers who are eligible for LSC-funded civil legal services as potential trafficking victims, but who have been excluded from the ETA enumeration.

Domestic Violence

There is a plethora of research on a national level documenting the pervasiveness of “intimate partner violence” (“IPV”). IPV includes rape, physical violence, or stalking that is perpetuated by a current or former partner.¹⁷ One study found that a startling 5.3 million intimate partner victimizations occur among U.S. women aged 18 and older each year.¹⁸ While these forms of violence occur more frequently in women—“[a]n estimated 1 in 17 women and 1 in 20 men (5.9% and 5.0%)—they are notably prevalent among both genders.” Further, individuals with lower incomes (under \$25,000) are at a greater risk of experiencing IPV.¹⁹ Similarly, individuals who suffer from housing or food instability suffered higher prevalence of IPV during a 12-month study. Among foreign born individuals, 4.1 % experienced IPV within a 12-month period.²⁰ A separate study found that “[a]pproximately one-third of female farmworkers are victims of domestic abuse.”²¹ It is reasonable for LSC’s estimate to include these farmworker victims and their derivatives who also are eligible for assistance by LSC-funded agricultural worker programs.

Conclusion

Farmworker Programs prioritize their limited resources to reach, teach, screen, and represent these eligible immigrant farmworkers. Because of their extreme vulnerabilities, additional resources are needed to serve this population. Basic field offices are not often equipped with the structures or staffing required to reach this most vulnerable sector of the agricultural worker population. Including this group of workers within the estimate is key in recognizing the existence of these eligible clients and the resources needed to reach and serve them. The inability to definitively quantify this population does not justify its complete exclusion from the LSC-eligible agricultural worker count.

B. LSC should include in its estimate the agricultural workers and their dependents who are beneficiaries of pending I-130s and have the requisite relationship to a U.S. citizen child, parent, or spouse.

¹⁶ <http://www.dol.gov/opa/media/press/whd/WHD20150550.htm> (accessed 4/10/2015)

¹⁷ National Center for Injury Prevention and Control. *Costs of Intimate Partner Violence Against Women in the United States*: Centers for Disease Control and Prevention (Atlanta 2003), p. 3

¹⁸ *Id.* at 19.

¹⁹ M.J. Breiding et al., *Intimate Partner Violence in the United States — 2010*. National Center for Injury Prevention and Control, Centers for Disease Control and Prevention (Atlanta 2014), p. 74.

²⁰ *Id.* at 75 (commenting that further research is needed to determine why there is a low reporting among immigrant communities, i.e., does it occur less or is it reported less frequently)

²¹ M. Ontiveros, “Lessons from the Fields: Female Farmworkers and the Law,” *Maine Law Review* (Vol. 55:1, 2002), p. 171.

According to ETA's narrative,²² ETA used the NAWS-derived "legal status variable" to divide farmworker survey respondents into four categories: (1) U.S. citizen; (2) Lawful Permanent Resident ("Green Card" holders); (3) other work authorized (i.e., visa holders); and (4) "unauthorized." With regard to "workers' authorization status," the ETA Memo notes that "[t]he NAWS has a series of questions on legal status that focus on identifying whether foreign-born workers have *authorization to work* in the U.S."²³ The memo further clarifies that only "[t]hese data for *authorized workers* with household incomes below the poverty line were used to calculate the percentage of agricultural workers in each state that was LSC-eligible."²⁴

However, this legal status variable does not seem to include a significant proportion of LSC-eligible farmworker clients (workers and dependents) who qualify for LSC-funded services pursuant to Section 1626.5(b) by virtue of being BOTH (1) a spouse or parent or unmarried child under 21 of a U.S. citizen; and simultaneously (2) the beneficiary of a pending I-130 application filed by either a US citizen or LPR petitioner:

§1626.5 Aliens eligible for assistance based on immigration status.

Subject to all other eligibility requirements and restrictions of the LSC Act and regulations and other applicable law, a recipient may provide legal assistance to an alien who is present in the United States and who is within one of the following categories:

...

(b) An alien who is either married to a United States citizen or is a parent or an unmarried child under the age of 21 of such a citizen and who has filed an application for adjustment of status to permanent resident under the INA, and such application has not been rejected.

Such foreign-born, LSC-eligible farmworker clients, however, do not necessarily have "authorization to work," nor would their "1626-eligible" dependents automatically be considered "lawfully present" in the normal contexts in which these phrases are used.²⁵

Given the explanation in the narrative regarding the four categories of "legal status variables" assigned by NAWS, it seems that these "1626-eligible" farmworkers and dependents would have been consigned to the fourth category--"unauthorized."²⁶ If this assumption is correct, then, despite clearly being

²² ETA Memo, pp. 11-12.

²³ *Id.* p. 11 (emphasis added).

²⁴ *Id.* at 11-12 (emphasis added).

²⁵ The ETA methodology apparently calculated "dependents" based on the following two criteria: (a) their dependence on a poor farmworker; and (b) the "legal status" of the dependent. However, there are no questions in the NAWS that actually elicit whether dependents of farmworkers are "lawfully present." The only NAWS questions relevant to this determination relate to the dependent's "place of birth" and "date of arrival." Foreign-born dependents are, thus, automatically considered to be "unauthorized" by the NAWS even though they may be bona fide beneficiaries of pending I-130 petitions for adjustment of status.

²⁶ The NAWS has a page of survey questions devoted to the determination of a farmworker's legal status ("Estatus Legal" (see L1, p. 25 attached). An individual's answers to the questions on this page would affect whether the respondent would be classified by the NAWS as "unauthorized." Apparently, checking box 6 "Sin documentos" ("without documents") would constitute a finding of "unauthorized," while checking another box, such as box 5

“1626-eligible” clients, foreign-born beneficiaries of pending I-130s would have been undercounted in the state (and, consequently, national) ETA estimates by being erroneously presumed to be part of the cohort of “unauthorized” farmworkers throughout each step in the computation of “Percentage LSC-Eligible Workers” (Col. C.) and “Average Number of LSC Eligible Dependents per Worker” (Col. E.). According to the overview of the methodology described in the ETA Memo, this significant portion of the LSC-eligible client population was excluded from both the state and national ETA calculations of the eligible farmworker and dependent populations due to an overbroad application of the NAWS definition of “unauthorized.”

The 1986 Immigration Reform and Control Act provided special procedures for farmworkers to regularize their immigration status through the Special Agricultural Worker (“SAW”) program. According to the Migration Policy Institute, almost 1.1 million persons became Lawful Permanent Residents (“LPRs”) through the SAW program.²⁷ Further, it is estimated that 877,000 Mexicans gained LPR status through the SAW program.²⁸ Based on our collective experience, a significant proportion of these SAW farmworkers have filed I-130s and other “applications for adjustment of status” for family members since the 1990s, and many of these family members continue to work in agriculture. In addition to the SAW-adjusted farmworkers, other farmworkers adjusted their status to LPR under the regular legalization provisions of IRCA (“pre-1982”) adjustments. LSC farmworker programs often encounter farmworker clients who received their LPR status under either of these formerly-available tracks and have since filed Form I-130 Petitions for Family Visas seeking to adjust their spouses and other eligible dependents. Such “family preference” I-130s for Mexican nationals are subject to lengthy “waiting periods” from two to 21 years before a visa becomes available for the “non-rejected” Mexican beneficiary of such an I-130 petition.²⁹ Presently, of the people with approved “family preference” I-130s that the National Visa Center is holding in its waiting list for consular processing once their priority date becomes current, 1.3 million are from Mexico.³⁰ A significant percentage of these persons are likely to be in farmworker families due to the SAW program being one of the primary vehicles for farmworkers to obtain LPR status in the past 30 years as well as a prominent legal basis to file I-130 petitions for their relatives.³¹ Given the availability of governmental data sources from USCIS and the Department of State and reputable studies documenting these “family preference” petitions, it should be possible to estimate, at least on a national basis, the number of pending I-130 beneficiaries who are

“Estatus pendiente” (“status pending”) could lead to a different conclusion. However, the designations used by the NAWS in L1 do not correlate with the exceptions to alien ineligibility provided in section 1626.5(b). For example, in L.2. “Programas,” box 4 (in English) refers to “Spousal petition/family reunification.” However, “Family Unity” is not in itself a “1626-eligibility” category. Also, advocates in Farmworker Programs are abundantly aware of the fact that many “1626-eligible” clients of farmworker programs do not fully understand their “legal status” until after considerable investigation and analysis by farmworker advocates. Such an unaware, but “1626-eligible,” farmworker client would consistently choose box 6 on L1 because: (1) she does not have legal documents (e.g., she cannot obtain either a federal or state ID); and (2) she is fully aware that she is unlawfully present in the U.S. and could be deported at any time.

²⁷ See <http://www.migrationpolicy.org/pubs/legalization-historical.pdf>.

²⁸ See <https://migration.ucdavis.edu/mn/cir/binational/sum.html>.

²⁹ See US Department of State, March 2015 Visa Bulletin. <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-march-2015.html>

³⁰ See <http://www.travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingListItem.pdf>

³¹ It is recognized that some percentage of these Family Preference I-130 beneficiaries who are farmworkers may not have the requisite relation to a U.S. citizen immediate relative to qualify under Section 1626.5(b) as “LSC-eligible.” However, there is also a significant pool of Mexican beneficiaries of “Immediate Relative” I-130 petitions filed by U.S. citizens (such as by former LPRs who legalized via the SAW Program and then became naturalized U.S. citizens). Some percentage of these uncounted “Immediate Relative” I-130 beneficiaries are also farmworkers and are LSC-eligible pursuant to Section 1626.5(b).

farmworkers or dependents of farmworkers.³² Based on the experience of advocates in farmworker programs, a significant portion of our current clientele falls within this LSC-eligibility category by virtue of having the requisite relationship to a U.S. citizen required by Section 1626.5(b). In light of available data regarding Mexican-born beneficiaries of pending I-130 petitions with the requisite U.S. citizen immediate relative relationship, we believe that this undercount of eligible agricultural workers may be quite substantial.

The result of this undercount of “unauthorized,” yet LSC-eligible, clients in the estimated farmworker pool in each state would be to redistribute funding for serving this omitted farmworker population to the basic field programs in each state. This result is inconsistent with the statutory purpose of “providing efficient and cost-effective delivery of legal services” as expressed in the 1007(h) Study, the McKay Letter, and all other pronouncements of LSC policy on the rationale for specialized funding for farmworker legal services delivery. Such a result also notably fails to address the discrepancy between the identification of the target population for funding purposes versus identification for funding allocations, which the present enumeration is intended to redress. Instead, the proposed count results in “[c]reating a duplicate delivery system for farmworkers” within each state, in contravention of the 1007(h) Study.³³

We appreciate the difficulties of determining a precise estimate of the numbers impacted. As with victims of abuse eligible pursuant to anti-abuse statutes, the inability to definitively quantify this LSC-eligible population with precision is not a defensible justification of their total exclusion from the LSC-eligible agricultural worker count. The fundamental task before LSC is to generate a “best estimate,” not a certain or definite estimate, adjusting it appropriately to address any limitations of data. Many of the barriers that cause this vulnerable community to require specialized legal services also make it impossible to “count” this population. Thus, using best available data from a variety of sources is necessary to provide an estimate upon which a reasonable distribution may be made.

V. We ask LSC to determine what accounts for the resulting significant changes in the agricultural worker population and to make appropriate adjustments based upon its determination.

A. We support LSC’s use of the “top-down” enumeration approach to determine an estimate for the national number of agricultural workers and their dependents.

Given that no “census-based” estimate of the national farmworker population exists, the “top-down” enumeration approach, using recognized national data sources (e.g., COA, FLS, NAWS) is an appropriate method for determining a “base line” estimate of the total national population of agricultural workers as defined in the Management Report. A similar “top-down” estimating approach was used by experts retained by NLADA to derive an independent national enumeration of the farmworker population. We commend LSC for its thoughtful and thorough analysis of the issues and collection of best available data. With exceptions noted above, we generally support the methodology to obtain a national estimate of agricultural workers and their dependents.

B. We are concerned that the ETA estimate’s resulting distribution of agricultural workers does not accurately reflect the reality of how this vulnerable population is

³² See, e.g., N. Rytina study providing ratio of “pre-1982” IRCA applicants to SAW applicants (DHS).

³³ Mgt. Rpt., p. 21.

distributed. We ask LSC to determine what factors contributed to the change in distribution and make appropriate adjustments to account for any inadvertent limitations of the best available data.

We understand agricultural workers and their dependents are difficult to count. Many of the factors that make this population so vulnerable are also what make it difficult to estimate their numbers. We understand that ETA used what it perceived to be the best available data. With the exceptions noted above, we accept the ETA estimates as a base estimate. However, ETA final estimates do not reflect our experience as to the distribution of agricultural workers across the nation.³⁴ We are concerned that this skewing of the distribution will negatively impact our programs' abilities to serve this and other populations effectively and economically. We list below different factors that, while part of a sound data-gathering and methodological process, may have inadvertently caused a skewing of results in regards to the distribution of agricultural workers across the country, as well as overall numbers. While we have attempted to determine the varying impacts these different factors may have caused, our lack of access to the non-public data relied upon by ETA has not allowed us to complete this analysis. There are several factors in the ETA methodology that appear to have caused certain unusual and troubling artifacts in the data specifically in regard to the determination of the percentage of farmworkers and their dependents living in households with incomes below the federal poverty level. The results of the ETA data conflict with our decades of practical experience, specifically as to how the agricultural worker population now appears to be proportionally greater in those states with agriculture activity outside of the traditional migrant streams and in regards to the percentage of agricultural workers whose incomes fall below the poverty level. We ask LSC to further investigate this apparent artifact, including the factors listed below, and consider reasonable adjustments so that the estimate more accurately reflects the vulnerable agricultural worker population that is eligible for LSC services.

Factors related to determination of the number of eligible agricultural workers in each state include:

The ETA methodology appears to use NAWS data relevant to the number of "authorized" agricultural workers and their dependents with household incomes below the federal poverty level, rather than specifically determining the percentage of all agricultural workers and dependents with household incomes below the poverty level.

When farmworker program advocates received the LSC Management Report and ETA study, one of the most immediate responses was that the percentage of agricultural workers and dependents with household incomes below the poverty level was shockingly low and did not match our experiences in serving agricultural workers for decades. Advocate after advocate remarked that the poverty rate in the ETA estimate of agricultural workers for their state did not reflect reality. Many advocates said that, even after decades of serving agricultural workers, they could count on one hand the number of agricultural workers they encountered who were not income-eligible for LSC-funded services.

The ETA Memo explains that "to estimate the number of LSC-eligible agricultural workers (i.e., authorized and in poverty) in a state it was necessary to calculate the percentage of farmworkers in the

³⁴ We note that the ETA estimates may accurately reflect some of the states' agricultural worker populations. We point to the trend that appears to estimate lower numbers of agricultural workers in the more traditional migrant states with more crop workers, and higher numbers of agricultural workers and their dependents in the non-traditional migrant states, including those with higher numbers of livestock workers.

state that was LSC eligible.”³⁵ Apparently, the estimation process involved assigning a factor for the number of agricultural workers in each state who were deemed “authorized” as a percentage of the total farmworker population determined for each state.³⁶ Then, the ETA Memo explains, “[t]hese data for authorized workers with household incomes below the poverty line were used to calculate the percentage of agricultural workers in each state that was LSC-eligible.”³⁷

This description of ETA’s methodology for deriving poverty status belies the apparent fact that the ETA method selectively used only the household incomes of “authorized” workers in deriving its “percent in poverty” ratios, which were subsequently used to determine the number of LSC-eligible farmworkers and dependents in each state. This process is in apparent contradiction to its method of computing “authorized” farmworkers as a percentage of the total worker population in a state. There is no explanation in the ETA methodology for why it would disregard the household incomes of a significant portion of the total number of NAWS-enumerated farmworkers in the process of determining the percent of farmworker households that are in poverty.³⁸ We believe that the portion of the total agricultural workforce that was disregarded in this computation is comprised of the farmworker households with the lowest household incomes.³⁹ If this assumption is correct, it follows that, by disregarding the household incomes of the poorest half of farmworker households, the resulting “percent in poverty” would be substantially understated.

Failing to include all LSC-eligible agricultural workers affects not just the percentage of all LSC-eligible workers but also the percentage of income-eligible workers.

The issue noted above is compounded by the exclusion of eligible unauthorized workers from these estimates. There are many workers who are LSC-eligible but who will not be counted in the NAWS immigration eligibility categories as described above. By properly including these lower-income farmworker households in the estimate, it would be expected that the overall percentage of households with incomes “below poverty” would increase. We believe an increase in the number of eligible foreign-born farmworkers would result in a more accurate representation of the income demographics of

³⁵ The ETA Memo generally describes the data sets and calculations used in computing the “poverty status” of agricultural workers on pages 11-13. However, the ETA Memo does not disclose the underlying formula or specific data inputs that were used to derive the “Percentage of LSC-Eligible Workers” in each state (as listed in Column C of the table “Appendix B” of the ETA Memo, pp.19-20). It seems clear that this “LSC-Eligible Percentage” is derived by some combination of a “percent authorized” factor with a “percent below poverty” factor for each NAWS sampling region. The statistical consultant engaged by NLADA to analyze the ETA methodology requested the specific input data used by ETA to determine “LSC-eligibility” in each state; however, the requested data has not been furnished to date, as it purportedly involves the release of “non-public” data sets of the NAWS.

³⁶ See the discussion above concerning the imprecise use of the NAWS “legal status” variable in assigning the total number of estimated farmworkers to one of four categories, with three categories considered by the enumerators to be “authorized” and one considered “unauthorized.” As explained above, this arbitrary categorization of NAWS farmworker respondents does not correlate with LSC regulations concerning which farmworkers are eligible to be served by LSC-funded farmworker programs and which are not.

³⁷ The ETA Memo reiterates that “each state’s percentage is based on the regional percentage.” ETA Memo, p. 12 and Appendix B., Columns C and D.

³⁸ Nationally, it is estimated that approximately 50% of all farmworkers are “unauthorized.” We believe that ETA’s decision to select only NAWS income data relevant to “authorized” workers to determine an overall “percent below poverty” rate has the effect of double-discounting “unauthorized” farmworkers, many of whom are actually “LSC-eligible” per LSC regulations (see discussion re “1626-eligible” farmworkers and dependents).

³⁹ Also note that in computing LSC-eligible dependents, the ETA methodology apparently only estimated “lawfully-present dependents.” ETA Memo, p.12.

eligible farmworker households and, as a result, a more representative distribution of eligible farmworker numbers across the country.

Regarding the “percentage in poverty” factor incorporated in the “Percentage of LSC-eligible Workers,” the LSC Memo asserts that “[t]he ETA estimate of the LSC-eligible agricultural worker population includes agricultural workers and their dependents who have incomes less than 100% of the U.S. poverty line.”⁴⁰ However, the ETA narrative further explains that “[t]hese data for *authorized* workers with household incomes below the poverty line were used to calculate the percentage of agricultural workers in each state that was LSC-eligible.”⁴¹ It follows that, if the ETA data omit significant numbers of “1626-eligible” *unauthorized* farmworkers (i.e., I-130 beneficiaries and victims of sexual abuse, trafficking, and U-visa-qualifying crimes), then the resulting number of eligible workers with household incomes below the poverty line would be similarly understated. This is true due to the acknowledged fact that workers’ unauthorized status directly correlates to lower household incomes.

These omissions could partially explain the lack of confidence expressed throughout the national farmworker advocate community in LSC estimates showing a surprisingly low proportion of farmworker household incomes that are reported to be below the poverty level. If the estimated pool of “LSC-eligible” workers included all the “1626-eligible” farmworkers identified above, we strongly suspect that the proportion of eligible farmworker households with incomes below poverty would increase significantly.

The ETA Memo does not disclose the actual formula or factors used to derive the “Percentage of LSC-Eligible Workers” in each state (listed in Column C of the Table “Appendix B” on pp.19-20). These ETA “LSC-eligible percentages” range in values from a low of 7% (for states in the NAWS Southeast Region) to 31% (for Arizona and New Mexico in the Mountain 3 Region). Application of this “LSC-eligible” percentage factor appears to result in the greatest disparity in farmworker and dependent estimates among some states, as well as the largest potential disruption to the existing farmworker legal services delivery system.⁴² Thus, because of the drastic changes in state farmworker populations attributed to the application of the “LSC-eligible percentages,” it is important that these rates reflect the actual “LSC-eligible” farmworker and dependent populations in each state as accurately as possible.

The factors used in the “base estimate” formula to convert the Census of Agriculture labor expenses into unique farmworkers -- in particular the average number of weeks worked -- may be responsible for an overcount in states with a high proportion of livestock workers and an undercount in states with a lower ratio of livestock workers.

We believe that the method used to estimate agricultural workers created an unjustified upward bias in non-traditional migrant farmworker states and a countervailing downward bias in traditional migrant states. As explained in the ETA memo, agricultural labor expenses (taken from the Census of Agriculture) were divided by the average wage of workers and then divided by the average hours per week of workers, and then further divided by the average number of weeks per year of workers. We understand that ETA used combined wage data for crop and livestock workers (from the Farm Labor Survey) as the input for portions of this computation, which was otherwise based on NAWS data for crop workers only. As “seasonal workers,” crop workers generally have lower average wages, fewer

⁴⁰ Mgt. Rpt, p. 11.

⁴¹ ETA Memo, p. 12 (emphasis added).

⁴² The relative level of disruption may vary due to different levels of additional support Farmworker Programs may receive.

hours worked per week, and fewer weeks worked per year than other agricultural workers. Thus, in a state with a more stable agricultural workforce (less “seasonal crop workers”), this formula may tend to overcount workers in that state (i.e., the wage “denominators” will be artificially smaller when using the NAWS crop labor data), with the result of potentially inflating the estimate of the farmworker populations in states where the tenure of agricultural workers is more permanent. We believe that such overcounting is compounded by the fact that states with a more stable, less short-term, agricultural workforce also tend to have higher rates of “authorized” workers, further skewing the results when determining a state’s proportion of LSC-eligible workers and dependents.

Also, we understand the ETA solely used NAWS data to determine average numbers of weeks worked per year. NAWS data includes data from only crop workers and not livestock workers. The ETA memo states that it assumed that livestock workers and crop workers work the same average number of weeks.⁴³ In our experience, this is not at all the case. Our experience indicates that livestock workers, even though their work may be nominally seasonal, generally work much longer seasons than crop workers. For example, dairy workers may be employed year-round. Thus, while the NAWS data may have been considered to be “the best available” data, its use in the ETA calculations of the “Total Number of Workers” per state may explain the anomalous result recognized by LSC that “the magnitude of the [agricultural worker population] changes at the state level varies, in many cases significantly.”⁴⁴

The application of regional data may significantly skew the numbers of “LSC-eligible” farmworkers and dependents at the state level of estimation.

The ETA Memo expresses the explicit caveat “**Note that FLS data and NAWS data are available only for the regional level.** Therefore, all states in the region are assigned the same values for factors derived from the FLS and the NAWS.”⁴⁵

As we understand the ETA methodology, after obtaining a state-by-state estimate of total agricultural workers, ETA applied state-specific rates of LSC-eligibility for “authorized” status, household size and

⁴³ JBS International Inc. Memorandum, p. 9.

⁴⁴ Mgt. Rpt., p. 55. We are aware of research that points to certain inherent “bias” the NAWS data and request information on whether and how such biases may have been accounted for in its estimate. For example, Kissam and Williams note certain upward biases in the NAWS data due to grower and farm labor contractor refusal to participate, worker refusal, and worker recall bias. “Estimate of Agricultural Workers and Their Dependents in the United States,” NLADA (June 2013).) In addition, the heavy reliance on NAWS data, which we acknowledge to being best available data may also cause inadvertent skewing of results due to relatively small sample size which may affect the confidence interval. In a study comparing NAWS and CPS data, Gabbard, Mines and Perloff state that “[s]ome of the variation by region may be due to relatively small sample sizes (as reflected in the standard errors). NAWS regional sample sizes range from 60 to 350 interviews for the quarter . . . [n]either sample was designed to provide estimates of agricultural workers characteristics by region. Thus, caution should be exercised in making regional comparisons.” The ETA states that the “goal of the NAWS sampling methodology is to select a nationally representative, random sample of farm workers.” We are concerned that possible survey biases and relatively small samples of workers in the NAWS data on a regional level may be contributing to the significant redistribution of estimated farmworkers within the states. Also, it is recognized that the NAWS data used to calculate the LSC-eligible farmworker population is available only for the regional level. Consequently, we feel that NAWS data is not statistically reliable or accurate at the state level of estimation.

⁴⁵ ETA Memo, p. 5.

poverty level.⁴⁶ These percentages were derived from five years of NAWS data obtained in 12 geographic sampling regions.⁴⁷ However, not all of the states located in each NAWS region have agricultural populations with similar characteristics or even similar agricultural industries. That these states are combined in a single NAWS sampling region is a function of geographic proximity – not due to similarity in their respective agricultural industries, and not due to any inherent similarities in their agricultural workforces.⁴⁸ Thus, the imprecise attribution of regional factors to farmworker populations in individual states within NAWS sampling regions may result in grossly inaccurate rates of LSC-eligibility in some states where the farmworker population does not share key demographic characteristics with the neighboring states in its geographically-defined NAWS region.

The use of national percentages further exacerbates the possible overcounts and undercounts.

The ETA methodology uses certain national percentages when regional or state level information is not available. For example, national averages appear to be used when counting retired or temporarily disabled agricultural workers. These averages are then applied to the state numbers. Again, this process will further continue to inflate the count in those states in which there may be an overcount in the “base estimate” of total agricultural workers.

In addition, while the methodology may be the “best available” way to count the retired, disabled and temporarily out of work farmworkers, it may not reflect the reality of where these workers live. We ask LSC to recognize that these workers normally concentrate in the states that tend to be traditional “migrant” states because these states have the community, support network, and infrastructure to make lives more manageable. We ask LSC to consult with NLADA to identify appropriate adjustments to account for the various upward biases and anomalies in the Management Report that result in the dramatic and unexpected increase in estimates of LSC-eligible farmworkers and dependents in the states that have not been known to have traditional “migrant populations.”

While we accept that the overall methodology devised by ETA and its panel of experts appears sound, we believe that the unexpected and significant “magnitude of the changes at the state level” raises questions about specific assumptions and data choices that may not have been adequately informed by the realities experienced by LSC farmworker programs. In some cases, we believe there may be “better available data” upon which LSC can construct adjustments to the ETA estimates in order to counter the anomalous disparities and unrealistic reallocations of the resources for LSC-eligible populations within or among states.

We ask LSC to study and analyze the above-noted factors and other issues that may play a role in undercounting the agricultural worker population or causing the distribution across and within states to not reflect reality. We have been unable to conduct a deeper analysis of these identified issues due to the use of non-public data sources and computations that are not fully detailed in the ETA Memo. Additional transparency and a fuller understanding of the underlying assumptions and limitations of the

⁴⁶ According to the LSC Memo, p. 60, “[t]hese percentages are determined by factors that can differ across the country, such as income levels, family size (including the number of unaccompanied workers) and the percent of dependents who are citizens that reside with unauthorized workers.”

⁴⁷ ETA Memo, p. 5. Note: NAWS data for the twelve NAWS sampling regions listed in Table IX.c of the LSC Memo is not publically available and has not been accessed by NLADA’s data consultant.

⁴⁸ The 12 NAWS sampling regions are themselves patterned after the 15 multi-state sampling regions of the USDA’s Farm Labor Survey (FLS) which also surveys the single-state regions of California, Florida, and Hawaii. http://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/index.asp

data would assist us in analyzing the causes of the disruptive changes in the allocation of the population of eligible farmworkers who we serve. We therefore request that LSC provide the documentation that was previously requested by NLADA's data consultant and, after a reasonable time to analyze and evaluate the study, convene a meeting with the data experts (ETA and NLADA) and representatives of LSC basic field and farmworker programs with the purpose of identifying areas to strengthen the estimate. After studying and discussing these issues, we would request LSC to make appropriate adjustments based upon available and supported data to diminish the dramatic and disruptive impacts that the present enumeration and allocation would cause to the traditional delivery of legal services to eligible farmworkers and their dependents.

VI. We support a phase-in of funding changes but ask for additional time due the significant disruptive impact the new count will have upon existing service delivery.

The change in migrant population will significantly affect LSC-funded programs regardless of whether a program experiences a net increase or net decrease in agricultural worker population. More time is needed to implement changes. A more effective schedule is a three-year implementation beginning in 2017 with a third of the change occurring each year.

A) We request that LSC, in implementing funding changes, be flexible in considering service-delivery models that optimize the effective and efficient provision of civil legal services to agricultural workers. We request the opportunity for further meaningful input and comment on any resulting proposed or contemplated changes to the delivery system.

Any change in funding for farmworker representation will obviously be somewhat disruptive. This dislocation, however, also presents LSC and the regulated community with an opportunity to revisit the issue of which service-delivery models optimize the effective and efficient provision of civil legal services to agricultural workers.

LSC-funded programs serving agricultural workers, whether gaining or losing funding, will need flexibility in deciding how to implement changes caused by the new estimate of the agricultural worker population. LSC farmworker grants currently cover 43 states and Puerto Rico. No state has more than one migrant service area in it. Historically, one LSC-funded program has typically provided legal services to all farmworkers in its state of operations. Cross-border configurations, however, have also been successful. For example, for decades the Legal Aid Bureau has received the migrant grants for both Maryland and Delaware. In the late 1990s, Texas RioGrande Legal Aid (TRLA) provided legal representation under the migrant grant for Arkansas via an LSC-approved sub-granting arrangement. Both Pine Tree Legal Assistance and TRLA now represent agricultural workers in multiple states through formal multi-state migrant grants. Southern Minnesota Regional Legal Services receives the migrant allocations for Minnesota and North Dakota. Such arrangements were intended to enable Farmworker Programs to take advantage of economies of scale and develop expertise to maximize the impact of what would otherwise be difficult-to-administer, ineffective single-state migrant grants.

The updated estimate will cause significant change within many states in the distribution between the basic field office and agricultural worker programs. Programs will need to carefully evaluate many factors to determine what is the most effective and economical manner to serve the agricultural workers in their state. They will need to consider their current office locations, staff, community partners, the state's agricultural industries, and the specific needs of the farmworker community within their states.

Programs will also need time and flexibility to explore the different options for best serving the agricultural workers in their states. Although currently there are relatively few multi-state programs, this avenue may be an option for serving agricultural workers based upon the updated estimate. Multi-state programs are programs whose geographic area covers two or more contiguous states and whose funding is substantial enough to provide the unique services that farmworkers require. Multi-state programs typically share similarities in client populations, crop patterns, or agricultural practices.⁴⁹ The updated estimate may motivate programs to consider consolidating and becoming multi-state programs. The updated estimate may also lead to new service delivery models. Identifying options and exploring which model will best serve each state will require time to research, communicate with stakeholders (including partners, neighboring programs, agricultural workers, and other advocates), and create, evaluate, and implement plans.

LSC also has formally recognized in other ways the need for flexibility in delivering services to this hard-to-serve population. The Office of Program Performance's Program Quality Visit Reports have expressly acknowledged not only the core capacities of a Farmworker Program as set out in the McKay Letter, but also the different and novel ways in which Farmworker Programs have carried out their core functions. Analogously, LSC has on occasion granted special dispensations to recipients of migrant grants, based on documentation of unique circumstances, with respect to representation of farmworkers and administration of these grants.

We request and urge LSC, in close consultation with Farmworker Programs and basic field programs, to continue to be flexible in making and administering grants for services to agricultural workers as it implements funding changes in light of an updated agricultural worker count. It should consider not only alternatives to the traditional single-state migrant grant service-delivery model, but also whether changes in farmworker funding and service delivery should be phased—for example, with a first phase of updated enumeration and funding, followed by a second phase of considering options for service-delivery mechanisms, perhaps based upon the unique legal needs of the farmworker population of a state or region or upon revisiting the issue of the minimum needed size for an efficient and effective Farmworker Program.

B) We ask LSC for additional time to phase in funding distribution changes.

The updated estimate of the agricultural worker population creates challenges for LSC-funded programs. Both LSC programs that will realize a net increase in population and those that will experience a net decrease in population face challenges in implementing these population changes on the two-year schedule proposed by LSC. We provide additional reasons below why a three-year phase-in for the funding is required for an effective transition.

Farmworkers Programs realizing a net increase in funding due the updated estimate will need to evaluate their state's unique needs, examine options for service delivery, and then create and implement a plan. These programs may need to determine the optimal location for new offices, find appropriate space, and furnish new facilities. Programs may also need to invest considerable time and resources in recruiting and training staff. LSC-funded programs that receive agricultural worker funding have invested time and energy into developing legal services programs armed with lawyers and legal workers who have specialized skills, training, language capabilities, and administrative support needed

⁴⁹ See "Small Migrant Programs: Recommended Responses to the Challenges," Boerne Conference, at 25.

to handle farmworkers' unique legal needs. Programs will need substantial time to recruit multi-lingual and culturally competent staff. Most agricultural workers do not speak English as their first language. Indeed, most do not speak, read, or write English fluently, if at all. Most speak Spanish, but an increasing number of workers speak only an indigenous language. Adequate time is needed to hire and train staff proficient in languages spoken by these vulnerable populations. Two years does not provide adequate time to implement these changes and train staff.

In addition to the specialized training and knowledge mentioned above, many farmworker programs take advantage of the preeminent biannual training for farmworker advocates: the NLADA-sponsored training conference for agricultural worker advocates. Regionally, the Committee on Regional Training (CORT) sponsors the annual Midwest Farmworker Staff Training. The NLADA training has historically been held in conjunction with a new advocates training. This training is critical for new advocates and programs new to agricultural worker legal services.

The next national NLADA agricultural law training is not until November 2016. This wide gap between training conferences prevents programs that are receiving a substantial increase in farmworker population from effectively implementing changes on the two-year schedule. Implementing one-third of the population changes in 2017 would allow programs experiencing a net increase in population numbers to train advocates on a national level with other experienced advocates in the fall prior to the first year of implementation. During the second year of implementation, programs should conference with experienced "traditional" agricultural worker legal services programs and utilize the time to develop skills learned at the national conference. During the final year, ideally these programs would have a core staff to carry out work on behalf of farmworkers.

Agricultural worker legal services programs experiencing a net decrease in farmworker population will also need substantial time to implement changes. Many of the LSC-funded programs experiencing reductions in farmworker population funding are traditional migrant legal services programs. Over the course of the last 30-40 years these programs have committed substantial time and energy to handling cases on behalf of agricultural workers. These programs have developed highly skilled legal advocates, forged important connections within their states and local communities, and prosecuted strategic litigation. They are recognized by both governmental and non-governmental organizations as experts in farmworker law.

Many programs have ongoing and complex federal litigation that for the foreseeable future will require the same dedication and funding despite the change in population. Programs routinely represent large groups of workers in federal actions that take a substantial amount of time and resources. These actions may take years to litigate. Regionally, the amount of time a court has to calendar and hear an action can vary; however, it is not uncommon for cases to last as long as six years, and in some cases longer. Programs that traditionally receive farmworker funding have developed firm priority-setting and litigation-approval standards recognizing that these cases may run over into different LSC funding cycles. Programs that have current litigation have an ethical obligation to their clients to continue to fund and zealously advocate for their clients.

Programs will need extensive time to plan for the transition that will provide for the continued provision of effective services. Programs will need to determine how to prioritize service and how to change their existing system of providing service. To do this planning, they will need time to confer with basic field programs, neighboring programs, and community partners. They may need to close and consolidate offices and reduce or change staffing. After determining a plan and timeline, programs will need time to

adequately communicate the changes in the provision of service to agricultural workers, government and other community partners to provide for the least amount of disruption possible.

A three-year implementation schedule beginning in 2017 would more adequately address the needs of programs with current litigation. This would allow programs the end of this year and 2016 to plan and wind down current litigation prior to implementation of the population changes. LSC recognizes that funding for migrant legal services programs is limited compared to the level of need.⁵⁰ As a result, LSC programs experiencing a net loss in agricultural worker population will need time to develop alternative avenues to advocate for this population. Without sufficient time to implement changes, there will be gaps in critical services that are currently being provided to farmworkers.

VII. At this time, we support LSC’s proposal to review changes every three years.

We generally support LSC’s proposal to review changes every three years. However, we request the opportunity to provide additional comments regarding the appropriate interval for updating the data once additional information is known about the impact of the Census Bureau’s recent announcement concerning discontinuing the so-called “three-year estimates” produced in conjunction with the American Community Survey.

Thank you for the opportunity to comment on the proposed use of new data and plan to phase in the anticipated funding changes.

Sincerely,

NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, FARMWORKER SECTION, AGRICULTURAL WORKER PROJECT GROUP

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⁵⁰ McKay Letter, p. 2.

APPENDIX: 45 C.F.R. § 1626.4

§ 1626.4 Aliens eligible for assistance under anti-abuse laws.

(a) Subject to all other eligibility requirements and restrictions of the LSC Act and regulations and other applicable law:

(1) A recipient may provide related legal assistance to an alien who is within one of the following categories:

(i) An alien who has been battered or subjected to extreme cruelty, or is a victim of sexual assault or trafficking in the United States, or qualifies for immigration relief under section 101(a)(15)(U) of the INA (8 U.S.C. 1101(a)(15)(U)); or

(ii) An alien whose child, without the active participation of the alien, has been battered or subjected to extreme cruelty, or has been a victim of sexual assault or trafficking in the United States, or qualifies for immigration relief under section 101(a)(15)(U) of the INA (8 U.S.C. 1101(a)(15)(U)).

(2)(i) A recipient may provide legal assistance, including but not limited to related legal assistance, to:

(A) An alien who is a victim of severe forms of trafficking of persons in the United States; or

(B) An alien classified as a non-immigrant under section 101(a)(15)(T)(ii) of the INA (8 U.S.C. 1101(a)(15)(T)(ii), regarding others related to the victim).

(ii) For purposes of this part, aliens described in paragraphs (a)(2)(i)(A) and (a)(2)(i)(B) of this section include individuals seeking certification as victims of severe forms of trafficking and certain family members applying for immigration relief under section 101(a)(15)(T)(ii) of the INA (8 U.S.C. 1101(a)(15)(T)(ii)).

(b) (1) *Related legal assistance* means legal assistance directly related:

(i) To the prevention of, or obtaining relief from, the battery, cruelty, sexual assault, or trafficking;

(ii) To the prevention of, or obtaining relief from, crimes listed in section 101(a)(15)(U)(iii) of the INA (8 U.S.C. 1101(a)(15)(U)(iii)); or

(iii) To an application for relief:

(A) Under section 101(a)(15)(U) of the INA (8 U.S.C. 1101(a)(15)(U)); or

(B) Under section 101(a)(15)(T) of the INA (8 U.S.C. 1101(a)(15)(T)).

(2) Such assistance includes representation in matters that will assist a person eligible for assistance under this part to escape from the abusive situation, ameliorate the current effects of the abuse, or protect against future abuse, so long as the recipient can show the necessary connection of the representation to the abuse. Such representation may include immigration law matters and domestic or

poverty law matters (such as obtaining civil protective orders, divorce, paternity, child custody, child and spousal support, housing, public benefits, employment, abuse and neglect, juvenile proceedings and contempt actions).

(c) *Relationship to the United States.* An alien must satisfy both paragraph (c)(1) and either paragraph (c)(2)(i) or (ii) of this section to be eligible for legal assistance under this part.

(1) *Relation of activity to the United States.* An alien is eligible under this section if the activity giving rise to eligibility violated a law of the United States, regardless of where the activity occurred, or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States.

(2) *Relationship of alien to the United States.* (i) An alien defined in §1626.2(b), (h), or (k)(1) need not be present in the United States to be eligible for assistance under this section.

(ii) An alien defined in §1626.2(j) or (k)(2) must be present in the United States to be eligible for assistance under this section.

(d) *Evidentiary support—(1) Intake and subsequent evaluation.* A recipient may determine that an alien is qualified for assistance under this section if there is evidentiary support that the alien falls into any of the eligibility categories or if the recipient determines there will likely be evidentiary support after a reasonable opportunity for further investigation. If the recipient determines that an alien is eligible because there will likely be evidentiary support, the recipient must obtain evidence of support as soon as possible and may not delay in order to provide continued assistance.

(2) *Documentary evidence.* Evidentiary support may include, but is not limited to, affidavits or unsworn written statements made by the alien; written summaries of statements or interviews of the alien taken by others, including the recipient; reports and affidavits from police, judges, and other court officials, medical personnel, school officials, clergy, social workers, other social service agency personnel; orders of protection or other legal evidence of steps taken to end abuse; evidence that a person sought safe haven in a shelter or similar refuge; photographs; documents; or other evidence of a series of acts that establish a pattern of qualifying abuse.

(3) *Victims of severe forms of trafficking.* Victims of severe forms of trafficking may present any of the forms of evidence listed in paragraph (d)(2) of this section or any of the following:

(i) A certification letter issued by the Department of Health and Human Services (HHS).

(ii) Verification that the alien has been certified by calling the HHS trafficking verification line, (202) 401-5510 or (866) 401-5510.

(iii) An interim eligibility letter issued by HHS, if the alien was subjected to severe forms of trafficking while under the age of 18.

(iv) An eligibility letter issued by HHS, if the alien was subjected to severe forms of trafficking while under the age of 18.

(e) *Recordkeeping.* Recipients are not required by §1626.12 to maintain records regarding the immigration status of clients represented pursuant to this section. If a recipient relies on an immigration document for the eligibility determination, the recipient shall document that the client presented an immigration document by making a note in the client's file stating that a staff member has seen the document, the type of document, the client's alien registration number ("A number"), the date of the document, and the date of the review, and containing the signature of the staff member that reviewed the document.

(f) *Changes in basis for eligibility.* If, during the course of representing an alien eligible pursuant to §1626.4(a)(1), a recipient determines that the alien is also eligible under §1626.4(a)(2) or §1626.5, the recipient should treat the alien as eligible under that section and may provide all the assistance available pursuant to that section.