

April 20, 2015

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3333 K St. NW  
Washington, DC 20007  
Via email to: mfreedman@lsc.gov

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

Dear Mr. Freedman:

These comments are submitted 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. We endorse and generally adopt the comments submitted by the NLADA agricultural worker programs and would like to add the following Michigan-specific comments.

- I. **We support an update of the data underlying continued specialized funding to LSC-eligible agricultural workers and dependents, but are alarmed by the significant state-level changes in eligible farmworker allocations resulting from the ETA-contracted estimate.**

We greatly appreciate LSC staff's inclusive process in seeking input from both the basic field and farmworker programs in the course of gathering information for the production of the "LSC Agricultural Worker Population Estimate Update: LSC Management Report to LSC Board of Directors" (hereinafter "LSC Report"). Our experience supports LSC management's conclusion that agricultural workers and their dependents are among the most vulnerable clients that LSC programs serve. We agree that this population continues to face unique barriers to justice and that there is a critical ongoing need for specialized delivery of high quality legal services to eligible low-income agricultural workers and their families in Michigan.

We note, however, that implementation of the recommendations in the LSC Report to adopt the findings of ETA's commissioned state estimates would result in significant disruptive impacts to the existing legal service delivery system for both basic field programs as well as farmworker programs in many states. Based on the table of "Estimates of the LSC-Eligible Agricultural Worker Population by State and Nationally" (App. B to App. A. of the LSC Report), several established farmworker programs would lose funding due to radical reductions of the estimated eligible farmworker populations in these states. Conversely, some states without well established "migrant programs" would be faced with shifting substantial resources away from serving current low-income populations to establishing new, specialized farmworker projects in

their states. Our comments respond to the potential of these substantial impacts on established delivery structures and reflect our experience in administering the largest LSC-funded farmworker program in the Midwestern region of the country.

We generally support the comments submitted by the NLADA Farmworker Section (NLADA) regarding the updated definition of “agricultural worker” for the compelling reasons identified in the LSC Report. We note that many federally-funded farmworker service agencies (including Migrant Health, Head Start, Rural Housing and others) have expanded their respective farmworker eligibility definitions to incorporate the changing nature of farm work and agricultural workers, including the incorporation of “seasonal” farmworkers and workers involved in food processing.

In conducting the current enumeration process, we supported LSC’s engagement of nationally-recognized experts in farmworker demographics and statistical analysis. We are also generally supportive of the “top-down” enumeration methodology utilized by these professionals, to the extent of generating a national estimate of the total population of agricultural workers and their dependents. However, we have serious concerns that some of the methods and data sources utilized in the ETA estimate as it translates the national data to state-specific data have resulted in patently inaccurate allocations of “LSC-eligible” farmworkers and their dependents in several states, including Michigan.

We request that LSC investigate the below-noted factors and issues that may play a role in undercounting the eligible agricultural worker population within Michigan, and that may cause the ETA allocation within other states to not reflect reality. Before finalizing state estimates for funding decisions, we request that LSC make appropriate adjustments to the estimates of Michigan’s eligible farmworkers and dependents, based upon reputable and supported data, to correct the anomalous Michigan allocation. In the event that reliable national data sources are unavailable or unreliable in making such adjustments, we request an opportunity to provide LSC reliable and defensible state or regional level data to assure that all eligible farmworkers and their dependents in Michigan have access to high quality, specialized legal services from Michigan’s experienced and highly-regarded LSC agricultural worker grantee.

- A. The anomalous state allocations produced by the ETA-commissioned study do not comport with reality and should not be adopted by LSC without further independent analysis and consultation with significantly affected farmworker programs.

We agree with the NLADA comments that there are factors in the ETA methodology that result in anomalies, or “artifacts” in the data, which distort the resulting estimates, specifically in the determination of the percentage of farmworkers and their dependents living in households with incomes below the federal poverty level. Before making funding decisions based on the state allocations produced by the ETA-commissioned study, LSC should investigate and analyze

ETA's methodology and the use of certain data sources that may produce such artifacts (i.e., "data outcomes that are not a reflection of the reality that the data are intended to represent").

1. The most significant impact of the ETA allocation results from the application of the "LSC-eligible" percentage factors at the state level.

We agree with the conclusion of the LSC Memo that ETA's application of the "LSC-eligible" percentage factors appears to result in an anomalous disparity in the allocation of farmworkers and dependents among the states.<sup>1</sup> Because of the huge disruptive impact in state allocations caused by application of the variable "LSC-Eligible Percentages," LSC should conduct an independent analysis to ensure that these percentage factors reflect the "LSC-eligible" farmworker and dependent populations in each state accurately. If it is found that they do not, appropriate adjustments should be made.

2. Justification for the significant disruption in state level allocations rests on data that are not available for review in order to assess its accuracy and applicability.

Neither the LSC Report nor the memorandum from the U.S. Department of Labor Employment and Training Administration ("ETA Memo") disclose the underlying values or factors by which the state-based "LSC-Eligible Percentages" were derived.<sup>2</sup> The ETA Memo notes only that regional factors regarding authorization status and poverty rates were referenced, but does not disclose the underlying factors or specific data values that were used to derive the "Percentage of LSC-Eligible Workers" in each state. It is noted that this "LSC-Eligible Percentage" is derived by some combination of a "percent authorized" factor and a "percent below poverty" factor for each NAWS sampling region. We understand that the statistical consultant engaged by NLADA to analyze the ETA methodology requested the specific factors used to determine "LSC-eligibility" in each state, and that the requested data has not been furnished, to date, as it would involve releasing "non-public" data sets of the NAWS. Consequently, it is impossible for us to definitively assess the reliability or accuracy of the resulting state allocations determined by the ETA methodology. What is clear is that the resulting allocation, with respect to Michigan, is not consistent with our experience or view of reality.

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<sup>1</sup> LSC Report, p. 60, "The state estimates are substantially affected by variances in the percentage of the agricultural population in each state that are LSC-eligible (i.e., have incomes below the poverty line and meet LSC eligibility criteria regarding citizenship and alien status)." "These 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." The "Percent of Agricultural Workers that are LSC-Eligible" rates range in values from a low of 7%, for states in the NAWS Delta Southeast (DSE) Region, to 31%, for Arizona and New Mexico in the Mountain III (MT 3) Region. Michigan's "percent eligible" rate for agricultural workers in the state is reported as 13%.

<sup>2</sup> ETA Memo, Column C of the Table "Appendix B" on pp.19-20).

In our attempt to understand the ETA estimates, and in the absence of the *non-public* NAWS data sets relied on, it is necessary to use comparable *public* data sets of the NAWS to extrapolate the approximate underlying percentages of “unauthorized” and “below poverty” used by ETA to arrive at the “LSC-Eligible Percentage” in each NAWS region. By using the published NAWS conclusions regarding the percentage of “unauthorized” farmworkers found by NAWS in each of the six collapsed *analysis* regions for which NAWS publicly accessible data are available (“NAWSPAD regions”), one can deduce for each NAWSPAD region an approximation of the “percentage of farmworkers below poverty” utilized in the ETA methodology.<sup>3</sup>

Using the Midwest region as an example, if one assumes that the individual states of the NAWSPAD twelve-state Midwest analysis region share a similar “percent authorized” rate (e.g., 67% authorized), then the approximate corresponding “percent below poverty” factor assigned to each of the 12 states in the Midwest can be mathematically derived from the overall “Percent LSC-Eligible” rates listed in Column C of Appendix B. The twelve states comprising the Midwest NAWSPAD region include OH, IN, IL, IO, MO, KS, NE, SD, ND, MI, WI and MN.<sup>4</sup> Factoring out the assumed “67% authorized” portion from the “LSC-Eligible Percentage” listed in Column C results in an approximation of the “percent below poverty” factors assigned for each state in the NAWSPAD Midwest region. As the LSC Report shows in Table IX.c., NAWS divides the twelve Midwest region states into two sampling regions consisting of the nine-state CBNP (Corn Belt Northern Plains) NAWS region and the three-state LK (Lake States) NAWS region. For each of these NAWS regions, Table IX.c. shows the “Percent of Agricultural Workers that are LSC-Eligible” used in the ETA estimates. By applying the assumed “percent authorized” rate to each of the twelve states in the Midwest region, one can derive an approximation of the “percent below poverty” rate that ETA applied in each Midwest state.<sup>5</sup> Consequently, based on the assumption that 67% of NAWS respondents in the Midwest region are authorized, it can be estimated that ETA used a 34% “percent below poverty” factor for the

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<sup>3</sup> Underlying NAWS data for the twelve individual NAWS sampling regions listed in Table IX.c of the LSC memo is not publicly available. However, data is published for the six collapsed NAWS reporting regions which are known as NAWSPAD regions (NAWS Public Access Data).

<sup>4</sup> See Col. C. of Table “APPENDIX B”, where “Percent LSC-Eligible” for the 9 states in the NAWS “Corn Belt Northern Plains” (“CBNP”) sampling region (OH, IN, IL, IO, MO, KS, NE, SD, ND) are assigned a “Percent LSC-Eligible” factor of 23%, whereas the three states in the “Lake States” sampling region (MI, WI, MN) are assigned a 13% “Percent LSC-Eligible” factor.

<sup>5</sup> In publicly reporting on migration pattern findings in the NAWS, its administrators report findings regarding legal status in three regional groupings – Western, Midwest and Eastern – and they report common survey findings regarding legal status in each of these three migration streams. See Gabbard, Carroll and Saltz, “How is the Farmworker Population Changing? What Does This Mean for Health Clinics?” Western Migrant Stream Conference, Del Mar, CA, 1/24/2009. Consequently, one may assume for this analysis that the states in the Midwest NAWS analysis region share a similar “percentage authorized” rate (67% in this example). This relatively high legal status rate in the Midwest region compares to significantly lower rates in both the Western and Eastern regions.

nine states in the CBNP NAWS region, compared to a “percent below poverty” rate of only 19% applied to the three states comprising the Lake States NAWS region.<sup>6</sup>

3. The critical “percent below poverty” factor presumably used to determine the allocation of LSC-eligible farmworkers and their dependents in Michigan is unreasonable and unjustified by the publicly-available data.

The wide disparity in the “percent below poverty” rates applied to states in the Midwest appears to be a significant cause of the radical decrease in Michigan’s share of the national “LSC-eligible” farmworker population as estimated by the ETA methodology. Since the mid-1990’s, it has been accepted that the State of Michigan hosts between 5.2% and 5.3% of the total national LSC-eligible farmworker and dependent population.<sup>7</sup> However, after applying the new LSC-eligibility factor (13%) apparently utilized by the ETA methodology to determine the “LSC-eligible” farmworker population in the three-state “Lake States” NAWS sampling region, Michigan’s share of the national “LSC-eligible” farmworker population is radically reduced to 2.8%. As noted, this overall reduction of Michigan’s national share of eligible farmworkers is mainly a function of the undisclosed “percent below poverty” factor applied by the ETA method in estimating the number of LSC-eligible farmworkers in the “Lake States” NAWS region.

It is further noted that this NAWS-assigned “percent below poverty” rate accounts for a significantly lower percentage of eligible farmworkers determined by the ETA method to work in Michigan compared to our neighboring states to the south. For example, according to the LSC allocation formula in use for the past 20 years, Indiana has been allocated 16,285 migrants and dependents (or 1.01% of the national farmworker population). Under the present ETA methodology, the allocation of LSC-eligible farmworkers and dependents in Indiana would dramatically increase by 25,935 (or 1.67% of the national total).<sup>8</sup> This constitutes an increase in Indiana’s identified farmworker population of nearly 60%. In Ohio, the ETA-assigned factors result in an increase of over 76% in its historic allocation of farmworkers eligible for LSC-funded services. In comparison, the decrease in Michigan’s historical allocation from the ETA estimate is equally dramatic. The LSC-eligible agricultural worker population estimated by the ETA methodology in Michigan declines from 86,214 (current estimate) to 43,484 (ETA estimate) – a decrease of nearly 50% from 5.32 % to 2.80% of the national LSC-eligible population. This significant redistribution of the LSC-eligible farmworker populations in these neighboring Midwestern states raises the fundamental question: Is there any basis in reality for the sharp disparity in the percent of the farmworker population that is assumed to be “below poverty” in Indiana (34%) versus Michigan (19%); or are these dramatic changes the result of an

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<sup>6</sup> The NAWS “Lakes State” sampling region consists of the states of Michigan, Wisconsin, and Minnesota.

<sup>7</sup> See LSC Memo, Table IX.a. ; and see “Summary of State Estimates: Migrant and Dependent Potential Client Population,” Larson and Plasencia Study (May, 1993).

<sup>8</sup> Table IX.a, LSC Memo, p.56

“artifact” in the data and methods used by ETA to derive the “percentage below poverty” rate applicable to each state?

4. The nature of agricultural work and farmworker populations are substantially similar in Michigan and its neighboring states.

The answer requires a detailed examination of the nature of the farm work and farmworker populations among the states in the Midwest’s “Corn Belt” NAWS sampling region (OH, IN, IL, IA, MO) and the “Lake States” sampling region (MI, WI, MN). Since 2000, when LSC sponsored the “Migrant Legal Services Delivery Conference” held in Boerne, Texas (“Boerne”), the neighboring states of Ohio, Indiana, Illinois, Iowa, Missouri, Michigan, Wisconsin and Nebraska have organized themselves into an “Upper Midwest” consortium of farmworker programs for the purposes of cross-program collaboration on outreach, training and advocacy. Farmworker advocates from these states routinely attend the annual Midwest Migrant Farmworker Conference conducted by the Committee on Regional Training (“CORT”). Consequently, advocates in these Upper Midwest farmworker programs are well-acquainted with the demographics, employment opportunities, recruitment scenarios and supportive services for farmworker families in the other participating Midwest states.

As farmworker advocates in Michigan, we are intimately acquainted with the farmworker populations in the “Corn Belt” states just to the south of Michigan. For instance, during specific periods since 1997, FLS’ supervisory attorneys have administered formal “subcontracts” with fellow farmworker programs in the states of Ohio and Indiana, through which FLS has provided on-site technical support and advice on outreach, intake and service delivery to farmworker advocates in these two states. These three adjoining states – OH, IN and MI – also constitute traditional “destination states” for two primary “migrant streams” of farmworkers originating in the major “supply states” of Florida and Texas. Accordingly, these three states share numerous similarities in terms of both the farmworker populations and the crops being harvested. The farming occupations in these states share a similar heavy reliance on “hand-harvest” farmworkers during the relatively short harvest seasons. Similar crops that predominate in each of these states include: cucumbers for pickling “pickles,” melons, apples, tomatoes, and seed corn detasseling. As a consequence, these three states share similarities in their agricultural labor recruitment systems, rates of unionization, state minimum wage levels,<sup>9</sup> unemployment compensation laws, H2A program usage, immigration status, family composition and the availability of farm labor housing. Based on the past 15 years of direct involvement and on-the-ground experience with the traditional hand-harvest farmworker populations in these three states, we see no basis in reality for applying the significantly higher “percent below poverty” rate of

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<sup>9</sup> The minimum wage was not appreciably different in these three states during 2012 (the year used as the standard for the ETA analysis, e.g., H2A worker usage). The Michigan hourly minimum wage was \$7.40 in 2012, whereas the federal minimum wage was \$7.25 per hour.

34% to the farmworker populations in Ohio and Indiana, while applying an unrealistically low 19% rate to the same population in Michigan. In terms of the actual farmworker counts, the ETA Memo shows Indiana with a “base estimate” of 46,347 “Total Farmworkers.”<sup>10</sup> After applying the NAWS-derived “Percentage LSC-Eligible” rate, the estimated number of “LSC-Eligible Workers” is determined to be 11,065. Similarly, Ohio starts with an ETA “base estimate” of 56,497 workers and, after application of the “Percentage LSC-Eligible” factor, is found to have 13,651 “LSC-Eligible” farmworkers. On the other hand, Michigan’s “base estimate” of total farmworkers is 80,549, a number that is significantly higher than either Indiana or Ohio. However, after application of the NAWS “LSC-Eligible” percentage, the ETA estimate of “Total LSC-Eligible Workers” in Michigan declines to just 10,514, an estimate that is lower than either Indiana or Ohio.<sup>11</sup>

This result is “anomalous” because of Michigan’s position as the traditional “end of the road” for the migrant streams coming to the upper Midwest from Florida and Texas through Ohio and Indiana. Due to this fact, the farmworker populations in these three upper Midwest states are often the very same workers and families who move across state lines for work depending on the crop and the time of season. As an example, the seed corn detassling crews that work the border areas between Ohio, Indiana and Michigan are often employed by the same farm labor contractors who harvest for the same seed corn companies with processing facilities located in southern Michigan and northern Indiana. That the ETA estimate would call for Michigan to lose nearly 50% of its allocation, while Indiana sees an increase of 60% and Ohio’s eligible population increases over 76% is an anomaly of the largest proportion. It makes no rational sense to apply such disparate reduction factors to essentially the same farmworker populations just because they cross an invisible state line to work.

So, if the illogical disparity in numbers of allocated LSC-eligible farmworkers in these three Upper Midwest states does not reasonably align with reality, as experienced by farmworker advocates and as indicated by other reputable MSFW data, what might explain the anomalous results of ETA’s estimate? In other words, what “artifacts” are there in the ETA assumptions and/or data that could potentially explain the aberrant results obtained by the ETA methodology?

5. The imprecise attribution of regional data factors to individual states within NAWS sampling regions.

In contrast to the similarities between the types of farm work and farmworkers in Indiana, Ohio, and Michigan, there are stark differences in the dominant agricultural industries as well as the farmworker populations in the three states that make up the NAWS “Lake States” sampling region (Michigan, Wisconsin and Minnesota). Michigan is predominantly a producer of fresh

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<sup>10</sup> ETA Memo, Column B of Appendix B.

<sup>11</sup> Id.

fruits and vegetables that require short-season, hand-harvest, labor. Although Wisconsin produces some of the same agricultural products (e.g. a limited production of apples), its most prevalent agricultural businesses are food processing (i.e., vegetable canneries) and livestock (i.e., dairies). Minnesota's main hand-labor agricultural production is in sugar beets and vegetable packers (e.g., Green Giant).<sup>12</sup> The industrial-style operations of the large processing and packaging facilities common to both Wisconsin and Minnesota are not commonplace in Michigan, where there is a much wider diversification of hand-harvest crops and the overwhelming majority of the agricultural labor workforce still consists of "migrant" workers (who outnumber "seasonal" workers by a ratio of over 2:1).<sup>13</sup>

That these three states are combined in a single NAWS sampling region is an arbitrary classification by the NAWS administrators – not due to any inherent similarity in their respective agricultural industries, and not based on express similarities in their agricultural workforces. (Michigan is barely contiguous with either of these states—it never abuts Minnesota and shares a border only in its non-agricultural Upper Peninsula with Wisconsin. This border is not part of any migrant stream.) The twelve NAWS sampling regions are 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.<sup>14</sup> The NAWS is an employment-based, random-sample survey begun in 1989 that seeks to monitor the characteristics of hired crop workers and their dependents by collecting data via randomly-chosen establishments and locations throughout each sampling region. Annually, approximately 1500 worker interviews are conducted nationwide. In the whole Midwest Region (Region 3), 209 interviews were conducted in 2012. It is not reported how many of these interviews were of Michigan farmworkers or in which locations they were working when interviewed.<sup>15</sup> It is essential to note that the NAWS "random-sample" survey approach is formulated to obtain statistically-relevant results at the *regional* level of sampling, not at the state level. In fact, except for California, the NAWS does not report its data at the state level.<sup>16</sup> For the sole purpose of the LSC-commissioned enumeration, JBS, International used NAWS data that was generated at the regional level to extrapolate "Percentage LSC-Eligible" factors at the state level.<sup>17</sup> Given the relatively small sample size in the annual randomized survey of workers in the "Lake States" NAWS sampling region, it is to be expected

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<sup>12</sup> See "Employing Agriculture: How the Midwest farm and food sector relies on immigrant labor," Chicago Council on Global Affairs, 12/9/14, [http://www.thechicagocouncil.org/sites/default/files/Midwest\\_Ag\\_final.pdf](http://www.thechicagocouncil.org/sites/default/files/Midwest_Ag_final.pdf)

<sup>13</sup> "Migrant and Seasonal Farmworker Enumeration Profiles Study, Michigan Update June 2013," State of Michigan Interagency Migrant Services Committee, 2013 <http://www.farmworkerlaw.org/numbers2013>

<sup>14</sup> [http://www.nass.usda.gov/Surveys/Guide\\_to\\_NASS\\_Surveys/Farm\\_Labor/index.asp](http://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/index.asp)

<sup>15</sup> <http://www.doleta.gov/agworker/naws.cfm#s-regions>

<sup>16</sup> Id. It has been argued that NAWS does not yield statistically reliable findings at the state level for at least 34 states. For this reason, NAWS has consistently reported that its findings refer only to USDA crop regions and to the nation as a whole, but are not to be used at the state level of estimation.

<sup>17</sup> The ETA Memo notes that for its enumeration for LSC, "...all states in the region are assigned the same values for factors derived from the FLS and the NAWS." ETA Memo, p. 5. and p. 10.



that this process of extrapolating the regional NAWS findings down to the state level results in numbers that have no statistical reliability.<sup>18</sup>

Therefore, it is not surprising that factors that are barely statistically relevant at the regional level would appear highly unrealistic when applied at the state level. This is obviously the case with the widely divergent “percentage below poverty” factors applied to Michigan farmworkers compared with their counterparts just across the state lines in Indiana and Ohio. We assume (again, without having the specific “non-public” NAWS data points to analyze) that this huge disparity in the “percent below poverty” rates between Michigan and its southern neighboring states is the direct cause of the resulting huge disparity in the critical “Percentage of LSC-eligible Workers” factor applied to the agricultural worker estimates in these states – 23% in Indiana and Ohio versus 13% in Michigan.<sup>19</sup>

6. Other suspected artifacts in the data and methods used in the ETA estimates noted in the Agricultural Worker Program Group comments

We support the comments of the Agricultural Worker Program Group with respect to the following examples of other suspected artifacts in the data and method used by ETA that may explain allocations that do not seem accurate or reliable to us.

a. The selective application of NAWS wage factors to derive poverty status rates for farmworker households.

The ETA methodology appears to solely use NAWS wage data relevant to the number of “authorized” agricultural workers and their dependents with household incomes below the federal poverty level, rather than determining the rate of all agricultural workers and dependents with household incomes below the poverty level. Using this determinant in the computation of “percent below poverty” disregards a large portion of the total agricultural workforce that is comprised of the farmworker households with the lowest household incomes.<sup>20</sup> By disregarding the household incomes of the poorest half of farmworker households, the resulting “percent in poverty” rate is substantially understated throughout the ETA enumeration. At a minimum, the household incomes of the significant portion of “unauthorized but LSC-eligible” farmworkers

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<sup>18</sup> “To achieve the sample size needed for robust regional estimates from the NAWS, five years of data were combined.” ETA Memo, p. 5. This explanation begs the question: “If five years of NAWS data are needed for robust *regional* estimates, how many years would be required for statistically significant *state level* estimates?” See also Kissam and Williams, “Estimate of Agricultural Workers and their Dependents in the United States,” NLADA, June 2013, sec. 2.3 “Adjusting for Hypothesized Data Biases”

<sup>19</sup> See ETA Memo, Column C of Appendix B.

<sup>20</sup> Nationally, the percent of “unauthorized” farmworkers identified by the NAWS is approximately 50%. Also note that in computing LSC-eligible dependents, the ETA methodology apparently only estimated “lawfully-present dependents.” ETA Memo, p.12.

and their dependents should be included in determining the “percent below poverty” rate that is applied in deriving the “Percentage of LSC-Eligible” factors listed in Column C of Appendix B. Failure to do this amounts to a “double discounting” for unauthorized status; and, as noted below, the NAWS does not accurately reflect significant portions of so-called “unauthorized” farmworkers and dependents who are eligible for LSC services pursuant to 45 CFR1626.

b. Farmworkers and their dependents who are beneficiaries of pending I-130 petitions

As the NLADA comments explain, the NAWS legal status variable fails to identify a substantial portion of LSC-eligible farmworker clients (workers and dependents) who would 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 (2) the beneficiary of a pending I-130 application filed by either a US citizen or LPR petitioner (or similar “pending application for adjustment of status”). We agree that it appears that a significant portion of the LSC-eligible client population was excluded from both the state and national ETA estimates due to incorrect assumptions concerning LSC eligibility and an overbroad application of the NAWS definition of “unauthorized.” From our analysis and discussions with the NLADA data consultants, this error in the methodology could result in an undercount, nationally, of up to 300,000 eligible farmworkers and their dependents. And, since these uncounted and under-documented persons are likely to be the poorest farmworkers, the numbers of farmworker households “below poverty” are very likely to be underestimated throughout the ETA enumeration.

c. Farmworkers and dependents who are abuse victims

Our experience informs us that that farmworkers, particularly farmworker women, are frequently victims of sexual assault, sexual violence, crimes of cruelty, and human trafficking. Such rampant abuses of agricultural workers render them one of the most vulnerable populations among LSC service populations. Due to their unique recruitment practices and working and living conditions, these abused agricultural workers require uniquely skilled and targeted outreach resources in order to identify and appropriately serve them. The failure of the ETA-commissioned report to include this population in its estimate is emblematic of the need for LSC to make appropriate adjustments to the threshold ETA estimates in order to derive more suitable allocations for LSC funding purposes.

d. The computation of the “base estimate” of agricultural workers in states with significant livestock worker populations.

We agree with the NLADA comments that the method ETA used to estimate agricultural workers resulted in an unjustified upward bias in non-traditional migrant farmworker states and a countervailing downward bias in traditional migrant states. For the reasons cited in the NLADA comments, we strongly suspect that in states with a more stable agricultural workforce (less

“seasonal crop workers”), the ETA formula results in an overcount of workers. Our experience with dairy workers in Michigan shows that most dairy workers are employed year-round, usually are not living in employer-provided “migrant” housing, and generally have higher incomes (and smaller household sizes) than typical fruit and vegetable crop workers. We agree that the overcounting in traditional livestock states would be compounded by the fact that states with a more stable, less short-term, agricultural workforce tend to have higher rates of “authorized” workers as that term is defined in the NAWS. Furthermore, longer-term workers are obviously likely to have higher annual incomes. All the above are reasons for LSC to re-examine the assumptions and methods employed by the ETA-commissioned report and, where appropriate, make necessary adjustments to account for data artifacts in the resulting estimates.

7. Before making funding decisions based on the threshold ETA estimates, LSC should analyze the assumptions, data sources and specific methods used in enumerating “LSC-eligible” farmworkers and dependents – nationally and within Michigan – and make adjustments to more appropriately align state level allocations to the realities experienced by farmworker advocates.

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 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 join the request of the NLADA that LSC provide the documentation 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 within the proposed estimates where adjustments are required to ameliorate aberrant allocations.

Although the “top-down” methodology is the method preferred by most national farmworker enumerators, it is recognized that the method, and data sets used, do not automatically produce an accurate count of the target population without making adjustments to accommodate the specific population and program eligibility criteria involved. For instance, the NLADA-commissioned estimate of the national number of agricultural workers served by LSC farmworker programs made adjustments for the tendency of the national data “to count the wrong farmworkers.”<sup>22</sup> This Kissam/Williams study made data-derived assumptions and adjustments to account for various aspects of the available national data that tend to otherwise

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<sup>22</sup> Kissam & Williams (2013), cited in App. C. of the LSC Report.

skew the count away from depicting traditional migrant and seasonal farmworker households toward counting more established, and less vulnerable, agricultural worker populations.<sup>23</sup>

Similarly, the National Center for Farmworker Health (“NCFW”) conducted a recent farmworker estimation for use in producing its new online [2012 Crop Production Workers Map](#) . The NCFH summarizes its enumeration methodology, which was conducted in partnership with JBS International, as incorporating “[e]ven sources of data, most of which are publicly available, from four federal agencies.”<sup>24</sup> However, after setting out the “basic formula” the NCFH methodology notes that, “NCFH considers the numbers generated from the initial Census of Agriculture calculations to only be threshold numbers. Supplemental information from various sources, including community experts, is then collected and used to corroborate, and/or adjust the threshold number.”<sup>25</sup>

In the history of LSC’s allocation of “migrant grants” there is also precedent for adjusting data resulting from national enumeration studies to “fit” the particularly vulnerable, traditional farm labor workforce which LSC intends to serve. In the early 1990’s, Congressional appropriations directed the use of the Migrant Health Atlas to provide the “threshold” estimate of migrant farmworkers throughout the United States.<sup>26</sup> However, this “base estimate” was adjusted by the subsequent Larson-Plasencia Study (“L/P Study”) upon which LSC relied for the empirical basis for distributing the national population of “migrants and dependents” throughout the nation.<sup>27</sup> As is often noted, the L/P Study used a different “bottom-up” enumeration method for the purpose of allocating the national farmworker population between individual states. This was predominantly due to recognizing inherent difficulties and statistical barriers in attempting to use the “top-down” data sets and methodology for allocating farmworkers at the state level.

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<sup>23</sup> For example, Kissam/Williams employed steps in generating their national estimate to account for extraneous data such as: Step 1.2 – “wages paid to farm employees who were not laborers (e.g., accounting clerks, managers, farmers’ family members, etc.)”; Step 1.3 – “labor costs reported in COA that were not hourly wages (e.g., workers compensation, unemployment insurance, health care insurance.”); Step 2.2 – “Agricultural workers out of the labor force”; Step 2.3 – “Adjustment for hypothesized biases in data.” *Id.*, pp 1-2. In comparison, the ETA methodology only reports making an adjustment for “LSC-Eligible Retirees/Temporarily Out of Work force & Dependents,” Table, App.B, Col.J.

<sup>24</sup> <http://www.ncfh.org/docs/NCFH%20Farmworker%20Estimation%20Methodology.pdf>

<sup>25</sup> *Id.*

<sup>26</sup> US DHHS, see “Funding of Legal Assistance for Migratory and Other Farmworkers,” Appendix B to the LSC Memo, p. 6, fn.6.

<sup>27</sup> It must be noted, although LSC consulted these two national studies to develop its migrant funding allocations in the early 1990’s, the studies themselves differed dramatically in their actual estimates of the total national farmworker population, with the Migrant Health Atlas counting approximately 1.6 million farmworkers and dependents, and the L/P study’s “final combined estimate” of 3.08 million migrants and dependents nationally. Also, following the initial allocation resulting from the Migrant Health Atlas and L/P Study, and independent from the data outcomes and estimates of those two enumerations, “LSC determined in 1975 that 70% of this population – 1,116,195 – had incomes below the poverty line.” LSC Memo, p.6, fn.7.

We are not asking LSC to replicate Larson-Plasencia at this date. We believe that LSC could review and adjust this data quickly and inexpensively. If NLADA were given access to the non-public data, we believe that the data experts from ETA, LSC, and NLADA can either agree that the current data is the best available data and that it reasonably reflects the reality in agricultural worker labor—or can agree to principled, data-based adjustments that bring the current DOL data more in line with programs’ perceptions of reality.

In summary, ample precedent exists for LSC to determine what “adjustments” should be made to the “threshold” results of commissioned farmworker enumeration studies, particularly one that employs data sets and methods that are not statistically predictive at the state level. We think a short additional delay to understand the significant anomalies in the ETA numbers and, if necessary and possible, to correct serious anomalies is a far better outcome than to disrupt services across the whole country because of imperfections in the ETA data. Otherwise, the most vulnerable LSC-eligible farmworkers and their dependents will be underserved in traditional migrant and seasonal farmworker states, while states with more stable, established agricultural workforces will experience serious disruptions in their established legal service delivery systems.

B. Specific Recommendations for Adjustments to Correct the Accuracy and Relevance of the ETA Threshold Enumeration for Michigan

Before finalizing the estimates and making funding decisions, LSC should provide further detailed information underlying the ETA’s assumptions and data factors and convene a meeting with representative, affected farmworker and basic field programs, and the data consultants, to identify best available data and assumptions related to LSC-eligibility guidelines, and to make concrete adjustments to state allocations supported by reliable and defensible studies. The following are our specific requests for adjustments affecting Michigan’s allocation decision:

1. Based on available, reputable data sources, LSC should determine an estimate of the number of LSC-eligible farmworkers and dependents in Michigan and nationally who were misidentified by the inaccurate application of the NAWS legal status variable (i.e., immediate relative beneficiaries of pending adjustment applications and victims of sexual abuse, crimes and trafficking); and add these vulnerable farmworker clients back in to the “Total Number of Workers” allocated to Michigan and other states in Column B of Appendix B, in order to ensure that all LSC-eligible farmworkers in Michigan and nationally will have access to the specialized farmworker program’s unique competencies and resources.
2. LSC should apply the “Percentage of LSC-Eligible Workers” factor of 23% (rather than 13%) to the estimated “Total Number of Workers” in computing the “Total LSC-Eligible Workers” in Michigan (Column D of Appendix B), in order to reflect the reality that the

vulnerable, LSC-eligible, agricultural worker population in Michigan is more closely related to similar seasonal crop worker populations in the neighboring states of Indiana and Ohio (in the “Corn Belt I” NAWS region) than the more stable workforces in Wisconsin and Minnesota (in the “Lake States” region).

**II. We support a phase-in of funding changes but ask for additional time due the significant impact the data will have upon existing service delivery.**

1. The “phase-in” of funding changes resulting from the new state allocations of farmworker populations must be extended over three years to adequately address current caseload requirements and to provide meaningful access to competent legal services.

We agree, for the reasons identified in the NLADA comments, that LSC should adopt, at a minimum, a 3-year “phase-in” of the funding allocations resulting from the ETA enumeration. In Michigan’s legal service delivery system, Farmworker Legal Services is currently staffed by four experienced, bilingual staff attorneys, one bilingual law graduate, one bilingual/bicultural office assistant, and several bilingual seasonal interns. The proposed 50% reduction in Michigan’s LSC-eligible farmworker allocation will cause significant disruption to these staffing resources with disastrous effects on our client population. None of the basic field programs in Michigan is presently equipped with significant bilingual legal staff with the specialized training and experience to effectively provide legal services to the overwhelmingly Spanish-speaking, foreign born population of agricultural workers in Michigan. These other legal services providers are not likely to immediately staff their offices with staff who can serve mono-lingual, foreign born clients in such a culturally-competent manner. Therefore, the sudden redistribution of 50 % of the current farmworker funding from the statewide farmworker program to the five regional field programs will result in inefficient utilization of scarce resources, at least in the short term. While we presume that former farmworker funding would shift to each of the field programs *pro rata* on the basis of poverty populations located within the geographic regions that they serve, we note that the eligible farmworker population in Michigan is overwhelmingly located in ten counties on the far western edge of Michigan (80% are located along Lake Michigan).<sup>28</sup> To the extent that the ETA allocation undercounts Michigan’s LSC-eligible farmworker and dependent population, the reallocation of resources away from the current statewide program to the regional field programs will literally move accessible legal resources further away from the vulnerable population that needs them.

Additionally, we wish to underscore NLADA comments about established farmworker programs, such as Farmworker Legal Services, that over time have developed highly skilled legal advocates, forged important connections within their states and local communities, and

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<sup>28</sup> See Ibid. “MSFW Enumeration Profiles Study, Michigan Update June 2012.”

prosecuted strategic litigation. These established programs are recognized by both governmental and non-governmental organizations as experts in both farmworker law and the particular characteristics and needs of the farmworker population in their states. Like many farmworker programs, attorneys at Farmworker Legal Services are developing and currently prosecuting ongoing and complex federal litigation that for the foreseeable future will require dedicating the same level of legal resources despite changes in the special funding earmarked for this population. As farmworker programs represent groups of agricultural workers with potential federal law claims, resolution of their claims often take years to litigate or otherwise resolve. A two-year phase-in of such a drastic reduction in farmworker funding to Michigan would result in a catastrophic loss of competent staff resources to handle even the existing farmworker caseload, which includes over a dozen multi-client cases with current federal employment claims.

2. LSC should allow grantees maximum input and flexibility in implementing the most effective service delivery responses necessitated by changes in funding allocations.

While we agree with the comments of the NLADA concerning the need for the Corporation to allow affected programs maximum input and flexibility in designing service delivery systems to address the changing landscape of funding and specialized resources, we stress that such flexibility must be in the context of delivering high-quality and culturally-appropriate services to this uniquely vulnerable client population. To this end, we strongly encourage LSC to revisit the respective papers from the Boerne Conference and ensure that quality options are investigated and encouraged for delivering services via effective mechanisms given the particular situation, e.g., multi-state programs make sense in certain sub-regions that share common state borders, farmworkers and agricultural operations that allow for efficient outreach and delivery efforts. We also agree that, in order to ensure that appropriate discussions take place, LSC should convene a process in which farmworker providers will affirmatively address the delivery issues identified at Boerne and timely resolve any barriers to cooperation or collaboration needed to develop effective systems for delivering legal services to agricultural workers in their jurisdictions.

### **III. We support LSC's proposal to review future allocation and funding changes every three years, and even sooner given exigent circumstances.**

We generally support LSC's proposal to review changes every three years. As noted in the NLADA comments, we also request the opportunity to provide additional comments regarding the appropriate interval for updating the data after 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. Also, in Michigan, we are experiencing an unprecedented and dramatic increase in the use of the H2A visa program by agricultural employers wishing to recruit temporary foreign workers. Already in 2015, Michigan Farm Bureau announced the formation of a new labor services company to

assist Michigan growers in utilizing the federal H2A program.<sup>29</sup> The Michigan LLC is modeled after the Washington Farm Labor Association; and it is expected that the number of LSC-eligible H2A farmworkers in Michigan will rapidly increase in the next couple of years to levels similar to other states with similar agricultural industries, such as WA (with over 4,000 H2A workers in 2012) and NC (over 10,000). Accordingly, it will be important to monitor the rapidly-changing agricultural workforce to ensure that scarce legal service resources are appropriately deployed to serve the most vulnerable farmworker populations.

We thank you for the opportunity to comment on LSC’s proposed **Agricultural Worker Population Data** and reiterate our request that LSC institute a mechanism to afford affected programs an opportunity to meaningfully analyze the assumptions and data sources underlying the recent estimates and to provide further detailed input based on the relevant experience of farmworker advocates (and their data consultants) as to appropriate adjustments to be made to the data and as to the resulting service delivery models suggested by the substantial changes in state allocations.

Very truly yours,

/s/ Robert F. Gillett

/s/ Thomas K. Thornburg

/s/ B. Daniel Inquilla

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Co-Managing Attorney  
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Encl: “Farm Labor Regions,” NASS, USDA, May 2002

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<sup>29</sup> <https://www.youtube.com/watch?v=rwHKYeZoMpE&feature=youtu.be>