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April 20, 2015

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

RE: Comments on Agricultural Worker Population Data for Basic Field-Migrant Grants published at 80 Fed. Reg. 5791 (Feb. 3, 2015)

Dear Mr. Freedman:

The Georgia Legal Services Program submits comments on the Request for Comments regarding Agricultural Worker Population Data for Basic Field--Migrant Grants, published on February 3, 2015. While we generally support the updating of farmworker numbers, we write to raise concern about three aspects of the new data from the perspective of the Southeast region: undercounting of eligible farmworkers based on adjustments from the new data, deficiencies in the H-2 worker counts, and undercounting of discouraged U.S. workers, a significant share of the farmworker population in states with high percentages of H-2 workers. Beyond the data itself, the timing of the present implementation presents concerns that it would too quickly lower funding levels, harming ongoing litigation. Because there are almost no private funds available for this type of litigation, existing litigation which will continue into FY2016 most likely could not be funded, or funded adequately, without access to existing levels of Legal Services Corporation grant funds.

The new data, based on the National Agricultural Worker Survey (NAWS), applies regional eligibility adjustments that significantly reduce the number of agricultural workers counted for funding purposes in Georgia. Under the proposed adjustments, out of an estimated total of 60,532 farmworkers in Georgia, only 7 percent are deemed LSC funding eligible. *See*, App'x. B, Estimates of the LSC-Eligible Agricultural Worker Population by State and Nationally. By contrast, if adjustments were based on nationwide eligibility data, the share of LSC-eligible farmworkers in Georgia would more than double. Before turning to specific data issues, we note that it is difficult to provide specific comments on the formulas and calculations used, because LSC did not provide commenters with their underlying data sets, the mathematical formulas or the actual numbers used to arrive at their adjusted figures.

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The NAWS Data Income Adjustments Do Not Accurately Reflect Farmworker Poverty Levels in the Southeast Region

The NAWS survey upon which the new data is based found that income levels among farmworkers in the seven Southeastern states were the highest in the nation, resulting in the lowest percentage in poverty figures. But this data has obvious shortcomings, particularly for apportioning funds between states, and in some cases, the adjustments made to account for these shortcomings may not have been sufficient. For example, the NAWS data for 2012 is based on interviews with only 105 workers across the seven Southeastern states: Arkansas, Louisiana, Mississippi, Alabama, Georgia, South Carolina, and Florida. Such a low number of interviews increases the likelihood that sampling error may have skewed interview results. That results were skewed is readily apparent when the NAWS data is contrasted with wage and income data in the Southeast, a region marked by low wages across the board.

Survey data from the Farm Labor Survey, which forms the basis for the Adverse Effect Wage Rate used in the H-2A program, shows that Southeast states have low, not high, average wages in agriculture. The National Average AEW wage rate for 2012 was \$10.36 per hour. Each southeast state in 2012 had a wage well below this, Alabama (\$9.39), Florida (\$9.54), Georgia (\$9.39), Louisiana (\$9.30), Mississippi (\$9.30), South Carolina (\$9.39) and Tennessee (\$9.38). *See* OFLC AEW Rates: 2010-2015. Indeed, the \$9.30 AEW wage was the *lowest* in the nation, and \$9.38 was the second lowest in the nation, with Georgia a close third-lowest AEW wage rate in the nation. *Id.* Accordingly, external data used by the Department of Labor suggests agricultural workers in the Southeast region have below average wages that are the lowest average hourly wages in the country. This clearly conflicts with an income level adjustment for Southeast farmworkers that is far greater than similar adjustments for other regions. Additionally, wage survey data like that contained in the Department of Labor's online wage library also suggests regional wages are low, not high. The wage data for 2012-2013 for South Georgia for the job category "Agricultural Workers, All Other" at the basic low-skilled level is only \$8.10 an hour, which only barely gets above the poverty level if the worker is assumed to have 2080 hours of work per year—an unlikely assumption for an agricultural worker.

Farmworkers' precarious economic standing is reinforced by the lack of state minimum wage regulation of agricultural workers in all but one state in the Southeast region. Of all the states in the Southeast, only Florida has a state minimum wage which governs agriculture. Georgia for example exempts agricultural from the state minimum wage, O.C.G.A. § 34-4-3(a), and from the state's work compensation provisions, O.C.G.A. § 34-9-2(a)(2). This is consistent with minimal employment regulation in the region as a whole. Across the Southeast, employers have expanded manufacturing jobs and auto plants as they have sought out the region's low wages and non-unionized workforce. The NAWS results, however, purport to show the opposite, that wages in the region are actually above the norm with a lower percentage of agricultural workers in poverty in the region than in the nation as a whole. That seems highly unlikely and suggests that stretching the NAWS data to apply state- or regional-level adjustments may introduce errors of such a degree that it would be preferable to use national rather than regional-level figures.

Indeed, available poverty data suggests the opposite. Nationally, the poverty rate is 15.4 percent, according to the American Community Survey. Yet in each of the seven states in the Southeast

region, the poverty rate is higher: Arkansas, 19.2 percent; Louisiana, 19.1 percent; Mississippi, 22.7 percent; Alabama, 18.6 percent; Georgia, 18.2 percent; Florida, 16.3 percent; and South Carolina, 18.1 percent. It thus seems surprising that farmworkers in the Southeast have lower levels of poverty than the general population and have a higher level of above poverty wages than the rest of the nation even though the exact opposite is true for the general population in the Southeast.

Beyond state laws, agricultural workers in the Southeast enjoy few resources to protect their rights. With the exception of Florida, the Southeast has no presence of agricultural worker unions and no wage enforcement by state agencies. There is only limited enforcement by federal agencies, and nearly no non-LSC farmworker advocacy.

In light of available poverty data, the regional regulatory climate, and the experience of Georgia Legal Services Program, it seems highly questionable that agricultural workers in the Southeast are the best paid in the country given (1) the generally low wages in the region, (2) the lack of legal structure requiring higher wages, and (3) the very limited, and poorly funded, advocacy in the area to improve conditions for agricultural workers in the region. Accordingly, it seems surprising for survey results to suggest that workers in a region so lightly regulated, and not known for its high wages or cost of living, would have a far lower percentage below the poverty line than those in other regions. For these reasons, the NAWS data is not sufficiently reliable to make region-wide adjustments, it would be preferable to use NAWS national-level data, applying the same adjustments to all regions.

Problems with H-2 Worker Count

While Georgia Legal Services supports the inclusion of H-2 visa laborers in considering farmworker numbers, there are three errors associated with the introduction of H-2 worker numbers, in the consultant's estimates. The first is that the count fails to consider H-2A workers who have a multi-state itinerary. The Department of Labor OFLC summary data used to count H-2A and H-2B workers takes only the first state on what can be multi-state itineraries. So for example, where H-2A workers may begin their work in Florida, but include Georgia as part of their itinerary, funding is provided to Florida for those workers but not Georgia, despite the presence of the workers in Georgia for part of the season. So for instance, Alpine Forestry, a Georgia forestry contractor is listed as seeking H-2B workers for Alabama, not Georgia, simply because Alabama was the first worksite on the itinerary that also include Georgia and other Southern states. This could be adjusted by providing a different count for H-2A agricultural workers employed by H-2A Labor Contractors ("H-2ALC") whose job orders contain itinerary information not contained in the summary data from which the H-2A data used by the consultants was pulled.

There are also errors in the count of H-2B workers. While including workers employed under one job title, "Forest Worker," it excludes the other two job titles included in that same SOC code:

454011	Forest and Conservation Workers	LABORER, TREE TAPPING
454011	Forest and Conservation Workers	TREE PLANTER

It also excludes landscaping workers under SOC_CODE 373011, which includes a number of forestry workers in the Southeast (employed raking and preparing the forestry commodity “pinestraw” for market). This excludes approximately 1,628 forestry workers nationwide, many of whom are in the Southeast region.

Discouraged U.S. Workers Are Undercounted

Discouraged farmworkers, who are unlikely to be present at farm work sites during the interview periods, risk being undercounted by the NAWS. Not considering the state referral data when estimating the size of the discouraged worker workforce undercounts discouraged agricultural workers, particularly in states with high concentrations of H-2A workers. The Southeast region has three of the nation’s top 10 H-2A worker states: Florida, Georgia, and Louisiana. As such, these states have a high number of U.S. worker referrals and a corresponding large number of discouraged U.S. workers. As the Farm Bureau has noted, “36,000 domestic workers” were referred by state agencies to H-2A employers nationwide, with only 5 percent actually obtaining employment. *See*, American Farm Bureau Foundation, Report: “Gauging the Farm Sector’s Sensitivity to Immigration Reform via Changes in Labor Cost and Availability,” (Feb. 2014) at 5.

Accordingly, in H-2A states where those workers are located there are additional workers, not likely to be found on worksites during the NAWS survey periods, because they have been discouraged or discriminated against in the process of seeking agricultural employment. Two recent suits in Georgia suggest there are a large number of these workers in the labor pool. The first, *EEOC v. Hamilton Growers, Inc.*, No. 7:11-cv-134 (M.D. Ga.) concerned a class of 347 discouraged (and discriminated against) U.S. farmworkers. The second, *EEOC v. J & R Baker Farms, LLC*, No. 7:14-cv-136 (M.D. Ga.) concerns a similar class numbering approximately 300.

It is my understanding that the NAWS currently estimates that the discouraged farmworker population constitutes 0.5 percent of the agricultural workforce. For Georgia’s estimated 60,000 farmworkers, this would mean 300 additional individuals. But our two recent suits anecdotally suggest that there are more than 600 discouraged farmworkers in one county alone (Colquitt). Accordingly, I think the survey’s assessment of farmworkers pushed out of work by the use of migrant or H-2A labor should be reevaluated.

The Timeline for Implementing Funding Changes will Impact Current Litigation Harming Current Clients.

LSC proposes implementing the adjustments in funding in two tiered steps with a 50% adjustment next fiscal year and a full adjustment in the following fiscal year. Because of the time, expense, and staffing required to engage in federal litigation and the length of federal

cases, this adjustment will severely curtail funding, forcing staff-layoffs, mid-litigation for some programs. This would harm existing clients and the program's ability to continue the litigation. Georgia Legal Services proposes that funding adjustments should be made more slowly for programs involved in on-going federal litigation so as not to undermine their ability to bring the litigation to a successful end. This is particularly important in the Southeast region where there is little outside funding available and a limited donor base to support farmworker advocacy work.

Thank you for the opportunity to comment.

Sincerely,

/s/ D. Morton
Dawson Morton
Senior Staff Attorney
Georgia Legal Services Program

Adverse Effect Wage Rate (AEWR) Chart 2010-2015

Denotes Substantial Wage Increase (above 4%)

Denotes Wage Decrease

STATE	2010	2011	% CHANGE	2011	2012	% CHANGE	2012	2013	% CHANGE	2013	2014	% CHANGE	2014	2015	% CHANGE
National Average	\$10.11	\$10.22	1.1%	\$10.22	\$10.36	1.4%	\$10.36	\$10.80	4.2%	\$10.80	\$11.10	2.8%	\$11.10	\$11.29	1.7%
Alabama	\$9.11	\$9.12	0.1%	\$9.12	\$9.39	3.0%	\$9.39	\$9.78	4.2%	\$9.78	\$10.00	2.2%	\$10.00	\$10.00	0.0%
Arizona	\$9.71	\$9.60	-1.1%	\$9.60	\$9.94	3.5%	\$9.94	\$9.73	-2.1%	\$9.73	\$9.97	2.5%	\$9.97	\$10.54	5.7%
Arkansas	\$9.10	\$8.97	-1.4%	\$8.97	\$9.30	3.7%	\$9.30	\$9.50	2.2%	\$9.50	\$9.87	3.9%	\$9.87	\$10.18	3.1%
California	\$10.25	\$10.31	0.6%	\$10.31	\$10.24	-0.7%	\$10.24	\$10.74	4.9%	\$10.74	\$11.01	2.5%	\$11.01	\$11.33	2.9%
Colorado	\$10.06	\$10.48	4.2%	\$10.48	\$10.43	-0.5%	\$10.43	\$10.08	-3.4%	\$10.08	\$10.89	8.0%	\$10.89	\$11.37	4.4%
Connecticut	\$10.16	\$10.25	0.9%	\$10.25	\$10.56	3.0%	\$10.56	\$10.91	3.3%	\$10.91	\$11.22	2.8%	\$11.22	\$11.26	0.4%
Delaware	\$9.94	\$10.60	6.6%	\$10.60	\$10.34	-2.5%	\$10.34	\$10.87	5.1%	\$10.87	\$11.06	1.7%	\$11.06	\$11.29	2.1%
Florida	\$9.20	\$9.50	3.3%	\$9.50	\$9.54	0.4%	\$9.54	\$9.97	4.5%	\$9.97	\$10.26	2.9%	\$10.26	\$10.19	-0.7%
Georgia	\$9.11	\$9.12	0.1%	\$9.12	\$9.39	3.0%	\$9.39	\$9.78	4.2%	\$9.78	\$10.00	2.2%	\$10.00	\$10.00	0.0%
Hawaii	\$11.45	\$12.01	4.9%	\$12.01	\$12.26	2.1%	\$12.26	\$12.72	3.8%	\$12.72	\$12.91	1.5%	\$12.91	\$12.98	0.5%
Idaho	\$9.90	\$9.90	0.0%	\$9.90	\$10.19	2.9%	\$10.19	\$9.99	-2.0%	\$9.99	\$10.69	7.0%	\$10.69	\$11.14	4.2%
Illinois	\$10.51	\$10.84	3.1%	\$10.84	\$11.10	2.4%	\$11.10	\$11.74	5.8%	\$11.74	\$11.63	-0.9%	\$11.63	\$11.61	-0.2%
Indiana	\$10.51	\$10.84	3.1%	\$10.84	\$11.10	2.4%	\$11.10	\$11.74	5.8%	\$11.74	\$11.63	-0.9%	\$11.63	\$11.61	-0.2%
Iowa	\$10.86	\$11.03	1.6%	\$11.03	\$11.50	4.3%	\$11.50	\$11.41	-0.8%	\$11.41	\$12.22	7.1%	\$12.22	\$12.62	3.3%
Kansas	\$10.66	\$11.52	8.1%	\$11.52	\$11.61	0.8%	\$11.61	\$12.33	6.2%	\$12.33	\$13.41	8.8%	\$13.41	\$13.59	1.3%
Kentucky	\$9.71	\$9.48	-2.4%	\$9.48	\$9.38	-1.1%	\$9.38	\$9.80	4.5%	\$9.80	\$10.10	3.1%	\$10.10	\$10.28	1.8%
Louisiana	\$9.10	\$8.97	-1.4%	\$8.97	\$9.30	3.7%	\$9.30	\$9.50	2.2%	\$9.50	\$9.87	3.9%	\$9.87	\$10.18	3.1%
Maine	\$10.16	\$10.25	0.9%	\$10.25	\$10.56	3.0%	\$10.56	\$10.91	3.3%	\$10.91	\$11.22	2.8%	\$11.22	\$11.26	0.4%
Maryland	\$9.94	\$10.60	6.6%	\$10.60	\$10.34	-2.5%	\$10.34	\$10.87	5.1%	\$10.87	\$11.06	1.7%	\$11.06	\$11.29	2.1%
Massachusetts	\$10.16	\$10.25	0.9%	\$10.25	\$10.56	3.0%	\$10.56	\$10.91	3.3%	\$10.91	\$11.22	2.8%	\$11.22	\$11.26	0.4%
Michigan	\$10.57	\$10.62	0.5%	\$10.62	\$10.78	1.5%	\$10.78	\$11.30	4.8%	\$11.30	\$11.49	1.7%	\$11.49	\$11.56	0.6%
Minnesota	\$10.57	\$10.62	0.5%	\$10.62	\$10.78	1.5%	\$10.78	\$11.30	4.8%	\$11.30	\$11.49	1.7%	\$11.49	\$11.56	0.6%
Mississippi	\$9.10	\$8.97	-1.4%	\$8.97	\$9.30	3.7%	\$9.30	\$9.50	2.2%	\$9.50	\$9.87	3.9%	\$9.87	\$10.18	3.1%
Missouri	\$10.86	\$11.03	1.6%	\$11.03	\$11.50	4.3%	\$11.50	\$11.41	-0.8%	\$11.41	\$12.22	7.1%	\$12.22	\$12.62	3.3%
Montana	\$9.90	\$9.90	0.0%	\$9.90	\$10.19	2.9%	\$10.19	\$9.99	-2.0%	\$9.99	\$10.69	7.0%	\$10.69	\$11.14	4.2%
Nebraska	\$10.66	\$11.52	8.1%	\$11.52	\$11.61	0.8%	\$11.61	\$12.33	6.2%	\$12.33	\$13.41	8.8%	\$13.41	\$13.59	1.3%
Nevada	\$10.06	\$10.48	4.2%	\$10.48	\$10.43	-0.5%	\$10.43	\$10.08	-3.4%	\$10.08	\$10.89	8.0%	\$10.89	\$11.37	4.4%
New Hampshire	\$10.16	\$10.25	0.9%	\$10.25	\$10.56	3.0%	\$10.56	\$10.91	3.3%	\$10.91	\$11.22	2.8%	\$11.22	\$11.26	0.4%
New Jersey	\$9.94	\$10.60	6.6%	\$10.60	\$10.34	-2.5%	\$10.34	\$10.87	5.1%	\$10.87	\$11.06	1.7%	\$11.06	\$11.29	2.1%
New Mexico	\$9.71	\$9.60	-1.1%	\$9.60	\$9.94	3.5%	\$9.94	\$9.73	-2.1%	\$9.73	\$9.97	2.5%	\$9.97	\$10.54	5.7%
New York	\$10.16	\$10.25	0.9%	\$10.25	\$10.56	3.0%	\$10.56	\$10.91	3.3%	\$10.91	\$11.22	2.8%	\$11.22	\$11.26	0.4%
North Carolina	\$9.59	\$9.30	-3.0%	\$9.30	\$9.70	4.3%	\$9.70	\$9.68	-0.2%	\$9.68	\$9.87	2.0%	\$9.87	\$10.32	4.6%
North Dakota	\$10.66	\$11.52	8.1%	\$11.52	\$11.61	0.8%	\$11.61	\$12.33	6.2%	\$12.33	\$13.41	8.8%	\$13.41	\$13.59	1.3%
Ohio	\$10.51	\$10.84	3.1%	\$10.84	\$11.10	2.4%	\$11.10	\$11.74	5.8%	\$11.74	\$11.63	-0.9%	\$11.63	\$11.61	-0.2%
Oklahoma	\$9.78	\$9.65	-1.3%	\$9.65	\$9.88	2.4%	\$9.88	\$10.18	3.0%	\$10.18	\$10.86	6.7%	\$10.86	\$10.35	-4.7%
Oregon	\$10.85	\$10.60	-2.3%	\$10.60	\$10.92	3.0%	\$10.92	\$12.00	9.9%	\$12.00	\$11.87	-1.1%	\$11.87	\$12.42	4.6%
Pennsylvania	\$9.94	\$10.60	6.6%	\$10.60	\$10.34	-2.5%	\$10.34	\$10.87	5.1%	\$10.87	\$11.06	1.7%	\$11.06	\$11.29	2.1%
Rhode Island	\$10.16	\$10.25	0.9%	\$10.25	\$10.56	3.0%	\$10.56	\$10.91	3.3%	\$10.91	\$11.22	2.8%	\$11.22	\$11.26	0.4%
South Carolina	\$9.11	\$9.12	0.1%	\$9.12	\$9.39	3.0%	\$9.39	\$9.78	4.2%	\$9.78	\$10.00	2.2%	\$10.00	\$10.00	0.0%
South Dakota	\$10.66	\$11.52	8.1%	\$11.52	\$11.61	0.8%	\$11.61	\$12.33	6.2%	\$12.33	\$13.41	8.8%	\$13.41	\$13.59	1.3%
Tennessee	\$9.71	\$9.48	-2.4%	\$9.48	\$9.38	-1.1%	\$9.38	\$9.80	4.5%	\$9.80	\$10.10	3.1%	\$10.10	\$10.28	1.8%
Texas	\$9.78	\$9.65	-1.3%	\$9.65	\$9.88	2.4%	\$9.88	\$10.18	3.0%	\$10.18	\$10.86	6.7%	\$10.86	\$10.35	-4.7%
Utah	\$10.06	\$10.48	4.2%	\$10.48	\$10.43	-0.5%	\$10.43	\$10.08	-3.4%	\$10.08	\$10.89	8.0%	\$10.89	\$11.37	4.4%
Vermont	\$10.16	\$10.25	0.9%	\$10.25	\$10.56	3.0%	\$10.56	\$10.91	3.3%	\$10.91	\$11.22	2.8%	\$11.22	\$11.26	0.4%
Virginia	\$9.59	\$9.30	-3.0%	\$9.30	\$9.70	4.3%	\$9.70	\$9.68	-0.2%	\$9.68	\$9.87	2.0%	\$9.87	\$10.32	4.6%
Washington	\$10.85	\$10.60	-2.3%	\$10.60	\$10.92	3.0%	\$10.92	\$12.00	9.9%	\$12.00	\$11.87	-1.1%	\$11.87	\$12.42	4.6%
West Virginia	\$9.71	\$9.48	-2.4%	\$9.48	\$9.38	-1.1%	\$9.38	\$9.80	4.5%	\$9.80	\$10.10	3.1%	\$10.10	\$10.28	1.8%
Wisconsin	\$10.57	\$10.62	0.5%	\$10.62	\$10.78	1.5%	\$10.78	\$11.30	4.8%	\$11.30	\$11.49	1.7%	\$11.49	\$11.56	0.6%
Wyoming	\$9.90	\$9.90	0.0%	\$9.90	\$10.19	2.9%	\$10.19	\$9.99	-2.0%	\$9.99	\$10.69	7.0%	\$10.69	\$11.14	4.2%

Foreign Labor Certification Data Center Online Wage Library

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Job Zones updated
July 1, 2014
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You selected the All Industries database for 7/2012 - 6/2013.

Your search returned the following: [Print Format](#)

Area Code: [1300004](#)
Area Title: South Georgia nonmetropolitan area
OES/SOC Code: 45-2099
OES/SOC Title: Agricultural Workers, All Other
GeoLevel: 2
Level 1 Wage: \$8.10 hour - \$16,848 year
Level 2 Wage: \$8.80 hour - \$18,304 year
Level 3 Wage: \$9.50 hour - \$19,760 year
Level 4 Wage: \$10.20 hour - \$21,216 year
Mean Wage (H-2B): \$9.50 hour - \$19,760 year

This wage applies to the following O*Net occupations:

[45-2099.00 Agricultural Workers, All Other](#)

All agricultural workers not listed separately.

O*Net™ JobZone: [NA](#)

Education & Training Code: [No Level Set](#)

For information on determining the proper occupation and wage level see the new [Prevailing Wage Guidance on the Skill Level page](#).

The prevailing wage must be at, or above the federal or state or local minimum wage, whichever is higher. The federal minimum wage is \$7.25/hr effective July 24, 2009.

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