

TO: Operations and Regulations Committee

FROM: Ronald S. Flagg, General Counsel and Vice President for Legal Affairs
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DATE: January 21, 2015

SUBJECT: Agricultural Worker Population Estimate Update

OVERVIEW

LSC has provided grants to serve migrant and other agricultural workers (generally referred to as “Migrant Grants”) with appropriated funds since the 1970s. Since 1996, funds appropriated for “Basic Field Programs” have been allocated to each state, territory and the District of Columbia via a per-capita funding formula based on data from the U.S. Census Bureau regarding the size and location of the poverty population. The entire state, territory, or District of Columbia is a single “geographic area” within which LSC may designate one or more “service areas” for grants. Within most of these geographic areas, LSC distributes those funds through general-purpose “Basic Field—General” grants and through separate “Basic Field—Migrant” grants.¹ The amount of the Migrant Grant in each geographic area is based on the migrant population of that area, which is deducted from the total poverty population for that area for purposes of calculating the general-purpose Basic Field—General grant.

The basis on which LSC allocates Migrant Grants raises at least two fundamental issues. First, the data used to estimate the migrant population of each geographic area are outdated. There is no U.S. Census Bureau estimate of migrant population or agricultural worker population, and the migrant population figures LSC uses to compute migrant grants are based on historical estimates dating back to 1990. Second, there is a mismatch between the population served by so-called “Migrant Grants” – generally migrant and other agricultural workers – and the population used to determine the distribution and allocation of Migrant Grants – solely migrant workers.

LSC management has investigated and analyzed these issues over the course of the past 15 months and contracted with the U.S. Department of Labor to provide updated data regarding the current population of agricultural workers and their dependents eligible for LSC-funded services. Based on that work, management recommends to the Board that LSC seek public comment on a proposal to (1) use the new Department of Labor data for grants beginning in January 2016, (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, and (3) update the data every

¹ There are Migrant Grants covering 43 states and Puerto Rico. There is no more than one migrant service area in a state. Services to migrants in six New England states (CT, MA, ME, NH, RI, and VT) are provided by Pine Tree Legal Assistance through a single service area (under a single Migrant Grant). Service to migrants in seven Southern states (AL, AR, KY, LA, MS, TN, and TX) are provided by Texas Rural Legal Assistance through a single service area (under a single Migrant Grant). FY14 grant amounts for service areas in individual states ranged from \$24,318 (DE) to \$2,585,613 (CA).

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.

Attached are (1) LSC Management's Report providing the details of the work on these issues and the data provided by the Department of Labor, and (2) a proposed request for public comments for publication in the Federal Register. The balance of this memorandum provides an executive summary of LSC's Management Report.

LSC FUNDING OF LEGAL SERVICES TO AGRICULTURAL WORKERS

Since its establishment, LSC has provided "Migrant Grants" to serve migrant and other agricultural workers and their dependents under the authority of the LSC Act to structure grants for the most economic and effective delivery of legal assistance. 42 U.S.C. § 2996f(a)(3). Congress amended the LSC Act in 1977 to require that LSC conduct a study of the special legal needs of various subpopulations, including migrant or seasonal farmworkers, and develop and implement appropriate means of addressing those needs. 42 U.S.C. § 2996f(h). LSC's study, issued in 1979, concluded that specialized legal expertise and knowledge were needed to address the distinctive "unmet special legal problems" that migrant and seasonal farmworkers shared because of "the type and conditions of work in which they are engaged and their cultural and ethnic background."²

Over the last forty years, through direct work with and service to agricultural workers, grantees with Migrant Grants ("Migrant Grantees") have gained a deep understanding of those workers' legal needs and have developed delivery models designed to address those needs. Migrant Grantees have adapted those models over time to respond to the changing circumstances of agricultural workers, new developments in agricultural labor markets, and evolving best practices in legal aid delivery.

LSC's funding of specialized grants to serve agricultural workers and their dependents parallels the approach Congress has taken in funding a range of programs to address the particular of needs of migrant and other agricultural workers, and their dependents, in areas such as education, health services, housing, and job placement and training.³

STUDY METHODOLOGY

LSC Management's analysis of the agricultural population issues had two components. The first component focused on identifying the population of agricultural workers and their dependents, if any, that face similar barriers to access to the civil justice system and whose legal needs can be addressed most effectively and efficiently by specialized legal assistance and delivery approaches. LSC conducted this part of the analysis itself. The second part of the analysis was

² Legal Services Corporation (1979). Special Legal Problems and Problems of Access to Legal Services of Veterans, Migrant and Seasonal Farm Workers, Native Americans, People with Limited English-Speaking Ability, and Individuals in Sparsely Populated Areas ("1007(h) Study"), p.34.

³ See Management Report Section III.

the development of an estimate of the size and distribution of the population of agricultural workers and their dependents that are eligible for LSC-funded services (LSC-eligible population). LSC contracted with the Department of Labor's Employment and Training Administration to perform this task.

A. LSC Analysis of the Legal Needs of Agricultural Workers and Their Dependents

1. Information and Data Sources⁴

LSC Management based its analysis of the legal needs of agricultural workers and their dependents on data from multiple sources, including:

- Internal LSC data regarding grantee staffing, funding, and case services, as well as reports from grantee reviews conducted by LSC staff and grantees' funding applications;
- Relevant government reports, academic and other research publications, and reports and publications of groups with subject-matter expertise;⁵
- Interviews with current and former staff of government agencies, academics and other researchers, and staff of organizations with subject-matter expertise⁶;
- A survey of LSC's Migrant Grantees (LSC Migrant Grantee Survey) with a 100% response rate and a survey of LSC's Basic Field Grantees (LSC Basic Field Grantee Survey) with a response rate of 68.6%⁷;
- Consultations with the Executive Directors and staff of LSC grantees, members of the National Legal Aid and Defender Association (NLADA) Agricultural Workers Group Project, and managers and staff of other providers of legal services to agricultural workers and their dependents; and
- Consultations with staff of the U.S. Department of Labor (DOL) Employment and Training Administration (ETA) and ETA contractors.

2. The Legal Needs of the Agricultural Worker Population⁸

A combination of factors creates the legal needs of the agricultural worker population. Several of these factors are rooted in the nature of agricultural work. Government data show that agriculture is the most dangerous industrial sector in the U.S. – in 2012, it had the highest fatal and non-fatal occupational injury rates of all private industries. Agricultural work is often insecure, temporary, and low-paid. A labor surplus of 2 to 2.5 farmworkers for each year-round equivalent job contributes to high unemployment. The seasonality of work means that very few farmworkers have year-round work. And the industry median wage is only 55% of the median wage for all full-time wage and salary workers.

⁴ See Management Report Section II.

⁵ See Management Report Appendix C for a list of works cited in the Report.

⁶ See Management Report Appendix D for a list of persons interviewed.

⁷ See Management Report Appendices E and F for copies of the survey instruments.

⁸ See Management Report Section V.

The legal needs of agricultural workers arise in the context of laws and regulations, some that apply solely to agricultural workers and others that exclude agricultural workers from legal protections generally afforded to other workers and thereby directly affect the legal advice and strategies applicable to such workers. In the latter category, for example, the Fair Labor Standards Act (FLSA) requires employers to pay workers for all hours they work and to pay workers at least the Federal minimum wage. However, farms with fewer than 11 employees – which employ nearly half (46%) of all hired workers – are exempt from the federal minimum wage requirement. FLSA also exempts agricultural employers from paying overtime and from child labor requirements that apply to other employers. Provisions of the Occupational Health and Safety Act (OSHA) require employers to meet field sanitation standards (e.g., drinking water, toilets) and temporary labor camp housing standards and provide safety equipment. However, appropriation riders prohibit Federal health and safety inspections at small farms without temporary labor camps and also exempt those establishments from OSHA’s worker protection provisions. Agricultural employers are also exempt from the National Labor Relations Act (NLRA), which protects workers’ rights associated with collective bargaining to improve the terms and conditions of employment. At the same time, other laws create a legal framework unique to agriculture. One federal law, the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), is designed specifically to protect the rights of agricultural workers. Section H-2A of the Immigration and Nationality Act authorizes growers to hire “temporary, nonimmigrant” guest workers (H-2A workers) when they demonstrate there are not sufficient U.S. workers qualified and available to perform the needed work.

As described in Section V of the Management Report, LSC Migrant Grantees and other farmworker legal aid programs not funded by LSC, report that the most pressing areas of legal need for their clients include: non-payment of wages or violations of minimum wage laws, issues arising under the AWPA (including claims involving substandard housing and employment contract disputes), violations of occupational safety and health laws, violations of field sanitation standards, sexual abuse and sexual harassment, and human trafficking.

3. Factors Creating Barriers to Access to Civil Legal Assistance to Address the Legal Needs of the Agricultural Worker Population⁹

Government resources to enforce the legal rights of agricultural workers in the areas listed above are limited. Accordingly, the surveys of LSC grantees and other sources of information indicate that agricultural workers often require the assistance of legal services lawyers to enforce their rights in these areas. A combination of factors, however, creates barriers to access to legal services to address the legal needs of the agricultural worker population. The agricultural worker population is isolated from sources of assistance. This population is often geographically isolated given the remote locations of job sites and employer-provided housing. Even off-farm housing in urban areas is often located in enclaves isolated from non-farmworker communities. Agricultural workers are often isolated by limited transportation and many must rely on their employers or farm labor contractors for transport.

⁹ See Management Report Section VI.

Social and cultural isolation compounds geographic isolation. Compared to the total U.S. population, agricultural workers are far more likely to be Latino/Hispanic (76%) and foreign born (71%). Only 39% have schooling beyond the ninth grade. Only 33% report they can speak English “well” and nearly as many (27%) report they cannot speak English at all. Many are from southern Mexico (*e.g.*, Oaxaca, Chiapas) where the native language is not Spanish.

4. The Specialized Expertise and Services Provided by Farmworker Programs¹⁰

LSC Migrant Grantees employ a variety of techniques to address most effectively and efficiently the barriers to civil justice and unique legal needs of the LSC-eligible agricultural worker population. These include:

- Employing bilingual and multilingual staff with the necessary cultural competency to communicate effectively and credibly with the agricultural worker population;
- Using special intake procedures, maintaining flexible staff work hours, and making extensive use of technology (such as special toll-free lines, cell/text phones, laptops) to serve clients in remote areas;
- Conducting outreach at labor camps and other places workers live as well as at locations other than workers’ job sites and homes;
- Performing extensive community legal education;
- Maintaining partnerships with community organizations and agencies that serve the agricultural worker population and working with agencies responsible for enforcing laws pertaining to the rights of the agricultural worker population;
- Having expertise regarding federal and state laws with special provisions affecting agricultural workers; and
- Coordinating work with advocates providing services to agricultural workers in other states.

5. The Agricultural Population Eligible for LSC-Funded Assistance¹¹

To allocate funding for the delivery of specialized assistance to the agricultural worker population, LSC management recommends that this population be defined to include migrant and seasonal crop workers, horticultural workers, livestock workers, and certain forestry workers, and these workers’ dependents, *who have incomes below the poverty line* (the benchmark used by the U.S. Census Bureau for defining the poverty population) and *meet LSC eligibility criteria regarding citizenship and alien status*.

The range of factors identified above combine to create access barriers and legal needs that are shared by this population. First, agricultural labor is distinctive for its dangers, insecurity, and low pay. Second, this population experiences distinctive social, cultural, and geographic isolation. Third, these workers are subject to statutory and regulatory provisions that are unique to agriculture. Fourth, this population is served by other federal and state programs that are specifically designed to address the distinctive needs of agricultural workers in areas such as

¹⁰ See Management Report Section VII.

¹¹ See Management Report Section VIII.

education, employment, health, and housing. Finally, these workers all work in industrial sectors that are classified as “agriculture” by the Census Bureau’s North American Industry Classification System.

B. The Department of Labor Estimate of the Size and Distribution of the Agricultural Worker Population Eligible for LSC-Funded Legal Services

LSC contracted with the Department of Labor’s Employment and Training Administration (ETA) to estimate the size and distribution of the population of agricultural workers and their dependents that are eligible for LSC-funded services (LSC-eligible population). ETA contracted with JBS International (JBS) to use Department of Labor and other government data¹² to develop these estimates. Details regarding this work are set forth in Section II and Appendix A of the Management Report.

Based on the estimates provided by ETA, the following table sets forth the state-by-state estimates of the agricultural worker population eligible for LSC services. It also contrasts the ETA estimates with the estimates currently used for allocating Migrant grants. For both the population estimates currently used and the ETA estimates, the table shows the estimated population of the LSC-eligible agricultural worker population nationally, and each state’s percentage share of the national LSC-eligible agricultural worker population. The table also shows the extent to which the ETA estimates and the estimates currently used differ in numerical and percentage terms.

As the data in the table show, the ETA estimate of the total LSC-eligible agricultural worker population national population is 1,553,003, 4.13% less than the estimate currently used of 1,619,982. The magnitude of the changes at the state level varies, in most cases more significantly.

¹² Data from the following sources were used in these calculations: the United States Department of Agriculture (USDA) 2012 Census of Agriculture (COA), the USDA Farm Labor Survey (FLS), the Department of Labor (DOL) Bureau of Labor Statistics’ Quarterly Census of Employment and Wages (QCEW), the DOL National Agricultural Workers Survey (NAWS), the DOL Office of Foreign Labor Certification (OFLC) H2-A and H-2B worker certification data, the DOL “Adverse Effect Wage Rate” (AEWR) data, and the U.S. Census Bureau poverty thresholds.

LSC-Eligible Agricultural Worker Population by State
Comparison of Current Population Estimates and Department of Labor Employment and Training
Administration (ETA) Estimates

State	Current Population Estimate		ETA Population Estimate		Change: ETA Estimate +/- Current	
	Persons	Percent (%) of Total	Persons	Percent (%) of Total	Persons	Percent (%) Change
Alabama	4,712	0.291%	13,120	0.845%	8,408	178.4%
Alaska	0	0.000%	1,485	0.096%	1,485	n/a
Arizona	21,265	1.313%	40,135	2.584%	18,870	88.7%
Arkansas	11,321	0.699%	13,245	0.853%	1,924	17.0%
California	378,096	23.340%	323,521	20.832%	(54,575)	-14.4%
Colorado	21,272	1.313%	27,458	1.768%	6,186	29.1%
Connecticut	2,386	0.147%	8,889	0.572%	6,503	272.5%
Delaware	3,556	0.220%	1,472	0.095%	(2,084)	-58.6%
Florida	128,633	7.940%	91,727	5.906%	(36,906)	-28.7%
Georgia	56,155	3.466%	28,820	1.856%	(27,335)	-48.7%
Hawaii	0	0.000%	12,701	0.818%	12,701	n/a
Idaho	26,771	1.653%	32,852	2.115%	6,081	22.7%
Illinois	35,754	2.207%	35,394	2.279%	(360)	-1.0%
Indiana	16,285	1.005%	26,006	1.675%	9,721	59.7%
Iowa	5,404	0.334%	45,938	2.958%	40,534	750.1%
Kansas	0	0.000%	29,978	1.930%	29,978	n/a
Kentucky	6,096	0.376%	25,017	1.611%	18,921	310.4%
Louisiana	3,945	0.244%	16,849	1.085%	12,904	327.1%
Maine	10,281	0.635%	12,264	0.790%	1,983	19.3%
Maryland	13,022	0.804%	5,729	0.369%	(7,293)	-56.0%
Massachusetts	2,384	0.147%	9,004	0.580%	6,620	277.7%
Michigan	86,214	5.322%	43,522	2.802%	(42,692)	-49.5%
Minnesota	28,656	1.769%	38,462	2.477%	9,806	34.2%
Mississippi	8,174	0.505%	13,991	0.901%	5,817	71.2%
Missouri	11,668	0.720%	27,461	1.768%	15,793	135.4%

LSC-Eligible Agricultural Worker Population by State
Comparison of Current Population Estimates and Department of Labor Employment and Training
Administration (ETA) Estimates
(continued)

State	Current Population Estimate		ETA Population Estimate		Change: ETA Estimate +/- Current	
	Persons	Percent (%) of Total	Persons	Percent (%) of Total	Persons	Percent (%) Change
Montana	7,818	0.483%	13,854	0.892%	6,036	77.2%
Nebraska	6,056	0.374%	31,440	2.024%	25,384	419.2%
Nevada	0	0.000%	5,740	0.370%	5,740	n/a
New Hampshire	1,424	0.088%	3,845	0.248%	2,421	170.0%
New Jersey	17,281	1.067%	8,008	0.516%	(9,273)	-53.7%
New Mexico	12,509	0.772%	19,564	1.260%	7,055	56.4%
New York	39,645	2.447%	38,244	2.463%	(1,401)	-3.5%
North Carolina	76,764	4.739%	51,741	3.332%	(25,023)	-32.6%
North Dakota	16,602	1.025%	16,851	1.085%	249	1.5%
Ohio	18,042	1.114%	31,834	2.050%	13,792	76.4%
Oklahoma	8,963	0.553%	15,574	1.003%	6,611	73.8%
Oregon	79,782	4.925%	60,176	3.875%	(19,606)	-24.6%
Pennsylvania	23,739	1.465%	20,234	1.303%	(3,505)	-14.8%
Puerto Rico	41,642	2.571%	7,098	0.457%	(34,544)	-83.0%
Rhode Island	253	0.016%	988	0.064%	735	290.5%
South Carolina	28,330	1.749%	13,547	0.872%	(14,783)	-52.2%
South Dakota	0	0.000%	15,572	1.003%	15,572	n/a
Tennessee	9,084	0.561%	17,928	1.154%	8,844	97.4%
Texas	198,948	12.281%	83,809	5.397%	(115,139)	-57.9%
Utah	9,715	0.600%	10,247	0.660%	532	5.5%
Vermont	1,161	0.072%	4,880	0.314%	3,719	320.3%
Virginia	22,589	1.394%	21,058	1.356%	(1,531)	-6.8%
Washington	104,545	6.453%	79,936	5.147%	(24,609)	-23.5%
West Virginia	0	0.000%	3,792	0.244%	3,792	n/a
Wisconsin	13,040	0.805%	45,482	2.929%	32,442	248.8%
Wyoming	0	0.000%	6,521	0.420%	6,521	n/a
Total U.S.	1,619,982	100.000%	1,553,003	100.000%	(66,979)	-4.13%