

*The*  
*Erlenborn Commission*  
*Report*

November 1999



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# LEGAL SERVICES CORPORATION

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## EXECUTIVE SUMMARY

The Legal Services Corporation is a private, nonmembership, nonprofit corporation in the District of Columbia. The Board of Directors of the Corporation is composed of 11 voting members who are appointed by the President of the United States with the advice and consent of the Senate. By law, the Board is bipartisan: no more than six members can be of the same political party.

**Erlenborn Commission.** The Erlenborn Commission was authorized by a resolution of the Corporation's Board of Directors on November 16, 1998, to study the presence requirement in the Corporation's statutory restriction on the representation of eligible aliens. Since 1983, the Corporation's appropriations act and its regulation on the representation of aliens have required that an alien be "present in the United States" to be eligible for legal assistance from an LSC grantee. Neither the appropriations act nor the Corporation's regulations define the term "present in the United States." The Commission solicited written comments from the public and held two public hearings duly noticed in the *Federal Register*. The Report of the Commission is based on a thorough analysis of the applicable statutory provisions, the extensive record compiled from the comments and testimony regarding the circumstances under which representation of eligible aliens occurs and the practices of legal services grantees relating to eligible aliens.

**Scope of alien representation.** Corporation grantees are permitted to represent several classes of aliens, including lawful permanent aliens, refugees, persons granted asylum, and temporary agricultural workers admitted under the "H-2A" program. With the sole exception of H-2A workers, LSC grantees may provide representation to aliens on the same subjects as is provided to citizens. (The report refers to these classes as "unrestricted categories.") The representation of H-2A workers, however, is limited to "matters which arise under the provisions of the worker's specific employment contract" in the areas of wages, housing, transportation and other employment rights under the contract. The "present in the United States" requirement applies to both the unrestricted categories and H-2A workers.

Of particular interest to the Commission was the situation of seasonal agricultural workers, a category that includes both aliens from the unrestricted categories (such as permanent resident aliens) and H-2A workers. Seasonal agricultural workers frequently leave and re-enter the United States; thus the "presence" requirement would have a substantial and direct impact on their ability to receive legal representation from LSC grantees.

The record reveals that it has been a long-standing practice for LSC grantees to provide legal assistance to eligible aliens who have left the United States at some point during representation. This practice has been followed without objection from the Corporation when conducting audits of LSC grantees, or from agricultural employers and growers associations involved in legal disputes. In addition, there has been no formal regulation or opinion of the General Counsel's office regarding the specific scope of the presence requirement. A recent complaint to the Corporation about the activities of a sub-grantee relating to alien representation raised the issue presented to the Commission.

**Statutory Analysis.** Applying the principles of law governing statutory analysis, the Commission considered the presence requirement in light of its plain and ordinary meaning, its context in a statutory scheme and the purpose and design of the statute as a whole. *See* Part III(A). The Corporation’s appropriations act requires that an alien must be “present in the United States” in order to be eligible for legal assistance. Construing the term “present” according to its ordinary meaning, it is clear that the statute requires the alien to be physically present in the United States at some point. This conclusion does not end the inquiry, however, because the relevant question is not *whether* an alien must be physically present in the United States, but *when* the alien must be present in order to be entitled to LSC representation. Here, the language provides no express statement on when an alien must be present in the United States. Indeed, no single interpretation is clearly compelled by the statutory language. For example, nothing in the LSC authorization language keys representation to when the cause of action arises or specifically requires that the alien be present when the representation commences. In particular, the statute does not expressly require that an alien be continuously physically present in the United States throughout the period of representation in order to be eligible for legal assistance.

The factual record and the statutory scheme in which the language arises, on the other hand, provide an important context for consideration of the legal question of when an alien must be “present in the United States.” Consideration of the immediate context in which the language appears raises further questions regarding the meaning of the presence requirement. The statute’s application of the presence requirement to legal permanent residents, for example, is in some tension with the fact that those aliens are legally entitled to leave the United States temporarily without affecting their immigration status. *See* Part II(C)(1). Furthermore, H-2A workers by definition are physically present in the United States only temporarily. Reading “presence” in the statute to require uninterrupted, continuous physical presence would mean that Congress, without using such language, intended to deny LSC representation to aliens who engaged in federally-authorized travel that did not affect their immigration status. In the case of H-2A workers, the reading would require the conclusion that Congress intended to provide H-2A workers with legal services representation on claims arising from their employment contracts only for the very brief periods that the workers are in the United States -- potentially rendering the promise of legal representation largely meaningless. In short, an examination of the language of the presence requirement and the statutory context in which it arises raises a number of interpretive problems and fails to resolve the question of when an alien must be present in the United States in order to be entitled to legal services representation. The Commission concludes that the statutory language is ambiguous on this point. These difficulties support further inquiry into relevant legislative history to help determine the meaning of the presence requirement.

**Legislative History.** The legislative history of the presence requirement in the Corporation’s appropriations and the applicable H-2A provisions in the Immigration Reform and Control Act confirm that Congress intended to provide meaningful representation to eligible aliens, including H-2A workers on claims arising from their employment contract; and that Congress did not understand the presence requirement to severely alter or restrict this representation. *See* Part III(B). The Legal Services Act was adopted to provide effective legal representation to low income persons. The presence language appeared

in the LSC appropriations act as part of an effort to expand LSC representation to aliens other than lawful residents, and does not appear to have been intended to limit LSC representation to aliens who were continuously physically present in the United States. Similarly, the express purpose of Section 305 of IRCA was to “secure the rights of H-2 agricultural workers under the specific contract under which they were admitted to this country.” Such representation was intended to prevent the exploitation of foreign H-2A workers and to ensure that the wages and working conditions of U.S. workers would not be undermined.

**Findings of Fact and Application of Law.** The record compiled by the Commission supports, *inter alia*, the following findings of fact. *See* Part II. Aliens in the unrestricted categories often legally leave the country during the course of their representation. *See* Part II(C)(1). Most H-2A workers are in the United States for brief periods of time and do not seek legal representation until they have completed their contract, often because of fear of retaliation by the growers. *See* Part II (C)(2) and (D)(1). Most claims made by aliens take years to resolve. *See* Part II(E). Requiring legal services attorneys to monitor their clients’ movements and formally withdraw whenever the client leaves the country would create extraordinary burdens for the LSC grantees, the clients, opposing parties, and the courts. *See* Part II(G). Finally, the private bar and other nonprofit legal services providers are neither available, willing, nor able to take over the representation of these populations. *See* Part II(F).

This factual record provided an important context for consideration of the legal question of the meaning of the presence requirement. Three possible interpretations of the presence language were listed in the Corporation’s *Federal Register* notice: (1) an alien must be physically present in the United States when the cause of action for which the recipient provides legal assistance arises; (2) an alien must be physically present only when legal representation is commenced; and (3) an alien must be physically present in the United States any time the alien is provided legal assistance from an LSC grantee. Upon careful consideration of the findings of fact, the language and purposes of the statute and the legislative history, the Commission has determined that none of these formulations fully responds to the purposes of the statute or the intent of Congress. Furthermore, the record demonstrates that the interpretations initially offered by the Corporation in the *Federal Register* notice would contradict Congress’ clear purpose of providing meaningful legal representation to indigent lawful aliens and lead to absurd results. *See* Part III(C).

For example, as applied to the unrestricted aliens, such interpretations would preclude representation for permanent resident aliens who are evicted from their apartments or against whom divorce proceedings were commenced while the alien is legally out of the country for brief periods to attend a family emergency or funeral. These interpretations would also invite exploitation by allowing litigants to simply wait until an alien temporarily departed the United States before cutting off workers compensation benefits, or initiating eviction, repossession, or divorce or custody proceedings.

In regard to H-2A workers, the record demonstrates that Congress’ purpose of providing meaningful representation to these workers cannot be accomplished under the three interpretations in the *Federal Register*. Many of the contract rights of such workers-- such as reimbursement for return

transportation, workers compensation, the 3/4 guarantee, and claims that a grower failed to mail the worker's final paycheck-- often do not arise until after the worker has returned home. In addition, if the worker is required to be in the United States throughout the course of the representation, the right to legal assistance would be lost altogether. By law, H-2A workers must leave the country at the end of their contract period and most such workers are in the United States for only two to five months. The factual record before the Commission demonstrates that the vast majority of the claims of H-2A workers cannot be completed while the alien is in the United States. The Commission recognizes that representation of agricultural workers was a central element in the legislative crafting of the H-2A program. The Commission concludes that this reading of the statute would essentially bar LSC representation of this class of aliens and leave H-2A workers without meaningful representation on their employment contract claims, directly contrary to Congress' express purpose. We decline to sanction such a result.

**Conclusion.** Together, the language, purpose, and legislative history of the applicable statutes, and the factual record before the Commission, suggest an interpretation of the statute that would authorize the following representation:

For an alien in one of the unrestricted categories representation would be authorized so long as the eligible alien is present sufficient to maintain residence or lawful immigration status. Under this interpretation, LSC grantees who have begun representation of a permanent resident alien may continue that representation should the alien be temporarily outside the United States. Grantees may also initiate representation of aliens in the unrestricted categories who are temporarily outside the United States, provided that they have been present sufficient to maintain and have not abandoned their residence or INA status. LSC grantees may not represent aliens in this category who have never entered or been present in the United States.

For H-2A workers, representation is authorized if the workers have been admitted to and have been present in the United States pursuant to an H-2A contract, and the representation arises under their H-2A contract. LSC grantees are authorized to litigate this narrow range of claims to completion, despite the fact that the alien may be required to depart the United States prior to or during the course of the representation. LSC grantees may not represent aliens in this category who have never entered or been present in the United States.

## I. INTRODUCTION

The Erlenborn Commission was established to evaluate the scope of permissible representation for eligible aliens by LSC grantees. Since 1983, the Corporation's appropriations act and its regulation on the representation of aliens have required that an alien be "present in the United States" to be eligible for legal assistance from an LSC grantee. Neither the appropriations act nor the Corporation's regulations defines the term "present in the United States." The Legal Services Corporation Board of Directors adopted Resolution 98-011, on November 16, 1998, providing authority to establish the Commission with the express purpose of studying the presence requirement for the representation of eligible aliens.

LSC grantees are permitted to represent several classes of aliens, including lawful permanent aliens, refugees, persons granted asylum, and temporary agricultural workers admitted under the "H-2A" program.<sup>1</sup> With the sole exception of H-2A workers, LSC grantees may provide general representation to aliens on all the same subjects as is provided to citizens. (These classes will be referred to as "unrestricted categories.") The representation of H-2A workers, however, is limited to matters which arise under the worker's specific employment contract in the areas of wages, housing, transportation and other employment rights. The "present in the United States" requirement applies to both the unrestricted categories and to H-2A workers.

The Commission has gathered an extensive factual record. The Commission solicited comments from the public through a notice duly published in the Federal Register. 64 Fed. Reg. 8140 (1999). The Commission sought public comments on the facts and circumstances surrounding the representation of all eligible aliens who are affected by the presence requirement. It placed particular emphasis on seasonal agricultural workers<sup>2</sup>--which includes temporary H-2A workers as well as aliens from the unrestricted categories such as permanent resident aliens and special agricultural workers (SAWS).<sup>3</sup> The Federal Register notice asked that comments be directed to the following questions:

- (1) How long are seasonal agricultural workers typically in the United States?

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<sup>1</sup> The program's name is derived from the subparagraph of the Immigration and Nationality Act (INA) that defines the status, 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (1994) (an alien "having residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature").

<sup>2</sup> See 8 U.S.C. § 1160(h) (1994). Seasonal agricultural work is defined in the INA as: "the performance of field work related to planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities, as defined in regulations by the Secretary of Agriculture." *Id.*

<sup>3</sup> See 8 U.S.C. § 1160(a)(1)(B)(1994). An alien is eligible for classification as a special agricultural worker if he or she has resided in the United States and performed seasonal agricultural work in the United States for at least 90 man-days during the twelve month period ending May 1, 1986.



- (2) When does the seasonal agricultural worker normally seek legal representation?
- (3) What are the common claims of seasonal agricultural workers seeking legal representation?
- (4) When do the claims of seasonal agricultural workers generally ripen?
- (5) How long does it typically take to resolve seasonal agricultural workers' legal claims?
- (6) What is the established practice of LSC recipients in representing seasonal agricultural workers?
- (7) What is the likelihood that private counsel is available to represent aliens who are in the United States under temporary visas or who may temporarily leave the United States?
- (8) Under what circumstances do seasonal agricultural workers commonly leave the United States?
- (9) What are the implications of the presence requirement on recipient attorneys' professional obligations to their clients?<sup>4</sup>

The Federal Register notice identified a number of possible interpretations of the presence requirement: (1) an alien must be physically present in the United States when the cause of action for which the recipient provides legal assistance arises; (2) an alien must be physically present when legal representation is commenced; and (3) an alien must be physically present in the United States any time the alien is provided legal assistance from an LSC grantee.<sup>5</sup> This Report of the Commission identifies the current interpretation used by LSC grantees and the impact of alternative interpretations on all categories of eligible aliens.

The Commission held hearings at: (1) Duke University Law School, Durham, North Carolina on March 27, 1999; and (2) Stanford University, Stanford, California on April 10, 1999. All requests to provide live testimony at one of the two public hearings were granted.

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<sup>4</sup> 64 Fed. Reg. 8140, 8141 (1999).

<sup>5</sup> *Id.*

## II. FACTUAL FINDINGS

The Commission has compiled factual findings that address the questions identified in the Federal Register notice described above.

### A. Categories of Aliens Eligible for LSC-funded Legal Services

#### 1. *Current Law*

LSC representation of aliens is limited to certain classes of aliens who broadly may be described as lawful permanent residents, prospective lawful permanent residents and one specific group of temporary, nonimmigrants.<sup>6</sup> “Lawful permanent resident” is a term of art under the Immigration and Nationality Act

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<sup>6</sup> Under current law, LSC recipients may provide legal assistance to an alien if the alien is present in the United States and falls within one of several designated categories:

- (A) an alien lawfully admitted for permanent residence as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20));
- (B) an alien who - (i) is married to a United States citizen or is a parent or an unmarried child under the age of 21 of such a citizen; and (ii) has filed an application to adjust the status of the alien to the status of a lawful permanent resident under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), which application has not been rejected;
- (C) an alien who is lawfully present in the United States pursuant to an admission under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157) (relating to refugee admission) or who has been granted asylum by the Attorney General under such Act;
- (D) an alien who is lawfully present in the United States as a result of withholding of deportation by the Attorney General pursuant to section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h)); [Section 1253(h) was redesignated as section 1231(b)(3), Restriction on Removal, and amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)]
- (E) an alien to whom section 305 of the Immigration Reform and Control Act of 1986 (8 U.S.C. 1101 note) applies, but only to the extent that the legal assistance provided is the legal assistance described in such section; or

(INA), 8 U.S.C. § 1101-1504 (1994 & Supp. II 1996), and is defined in the statute as “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws.” 8 U.S.C. § 1101(a)(20) (1994). The group of prospective lawful permanent residents includes both applicants for permanent resident status and likely prospective applicants based on their current status in the United States as individuals fleeing persecution (refugees, asylees, conditional entrants and aliens granted relief from removal by an Immigration Judge).<sup>7</sup> There is one category of eligible aliens, agricultural workers under the H-2A Program, who are aliens only temporarily in the United States. As noted above, representation of H-2A workers is limited to specific subject matters arising under the H-2A employment contract. Because of the special representational issues regarding this category of eligible aliens, we will examine it in detail.

## ***2. Temporary Agricultural Workers under the H-2A Program***

H-2A aliens, as the only category of eligible aliens who reside in the United States temporarily, are particularly affected by the issue before the Commission because of their necessarily short periods of time in the United States. H-2A aliens are non-immigrants, who reside in a foreign country but come to the United States temporarily to perform agricultural labor or services for a specified employer or employers. 8 U.S.C. § 1101(a)(15)(H)(ii)(a)(1994). Their term of stay in the United States is dependent upon the agricultural needs of the employer, but by law cannot exceed one year. 8 C.F.R. § 214.2(h)(5)(iv) (1999).

The H-2A Program for temporary agricultural workers is a complex regulatory scheme devised by Congress to meet competing concerns: the need of agricultural employers for workers, and the need

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- (F) an alien who is lawfully present in the United States as the result of being granted conditional entry to the United States before April 1, 1980, pursuant to section 203(a)(7) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(7)), as in effect on March 31, 1980, because of persecution or fear of persecution on account of race, religion, or political calamity.

Omnibus Consolidated Recissions and Appropriations Act of 1996, tit. V, § 101, Pub. L. No. 104-134, 110 Stat. 1321, 1321-55, *as incorporated by* District of Columbia Convention Center Revenues, Pub. L. No. 105-227, 112 Stat. 1515 (1998), *implemented by* 45 C.F.R. pt. 1626 (1999).

<sup>7</sup>Further, current law allows the representation of any alien who herself or whose child has been subject to domestic violence. However, the representation is limited to preventing or obtaining relief from the violence. The representation may occur only with non-LSC funds. Eligibility for legal assistance for this category of aliens is not dependent upon the alien being “present in the United States.” *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, § 502(a)(2)(C), (b), Pub. L. No. 105-119, 111 Stat. 2440 (1998), *as incorporated by* District of Columbia Convention Center Revenues, Pub. L. No. 105-227, 112 Stat. 1515 (1998), *implemented by* 45 C.F.R. pt. 1626.2, 1626.4(1999).

to protect agricultural laborers, both foreign and domestic. The United States has facilitated the importation of foreign agricultural workers in response to alleged shortages of workers in the United States for many years under various programs.<sup>8</sup> Agricultural employers have consistently asserted that many U.S. workers did not want to work in seasonal agriculture or live in rural areas, and that crops would rot in the fields without foreign workers. Organized labor and advocates for farm workers historically have disputed these assertions based on the general high employment rate among domestic farm workers and the alleged desire of agricultural employers to preserve a cheap labor force with limited legal rights. *Charles Gordon et al., Immigration Law and Procedure*, § 20.09[1] (1999).

The H-2A Program was established by the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. In adopting the H-2A program, Congress sought “a balanced program that would ensure an adequate source of labor, but would not exploit employees or provide an added incentive to hire foreign rather than resident workers.” *See* H.R. REP. NO. 99-682(I), at 106 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5710. Accordingly, the legislation requires that agricultural employers recruit U.S. workers first, and that the terms of work offered foreign workers, when U.S. workers are unavailable, must not adversely affect the wages and working conditions of U.S. workers. 8 U.S.C. §1188(a) (1994). Congress designated a specific set of rights and guarantees for H-2A workers, including workers compensation, housing, and other benefits to ensure that these statutory goals were met. 8 U.S.C. §§ 1188(b)-(d)(1994). The U.S. Department of Labor (USDOL) has also promulgated regulations mandating the minimum benefits that must be provided to H-2A workers. 20 C.F.R. §655.102(a) (1999). In general, the wages, benefits and working conditions the employer intends to offer to H-2A workers must also be offered to recruited U.S. workers, which includes lawful permanent resident aliens. *Immigration Law and Procedure*, *supra* at § 20.09[1]. Growers must replace H-2A workers with any U.S. worker who applies for the job before half of the season is over. 20 C.F.R. § 655.103(3)(1999).

The process for the admission of H-2A workers requires that the grower submit an application for certification to USDOL setting forth all the material terms and conditions of work that the employer intends to offer its workers. If USDOL determines that a labor shortage exists and that the job offer satisfies the federal requirements, USDOL approves the employer’s application for certification. *See* 8 U.S.C. §1188(a)(1994). The U.S. Department of Justice, through the Immigration and Naturalization Service (INS), then approves the employer’s H-2A visa petition to bring in workers, and the U.S. Department of State issues nonimmigrant visas. *See id.* The approved H-2A visa petition and the corresponding H-2A

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<sup>8</sup> The controversial “Bracero” Program operated between 1942 and 1964 and permitted Mexicans to work temporarily in United States agriculture. From 1964 to 1986, entry of foreign agricultural workers was permitted under the H-2 Program which many agricultural employers found inadequate. *Immigration Law and Procedure*, *supra* at § 20.09[1]; *see also* Erlenborn Commission: Comments on “Presence Requirement” (Supplement), Apr. 10, 1999, at 56 (comment of Howard Berman, Member of Congress) [hereinafter April Comments] (describing prior programs as “quite controversial for many years”).

visa permit the worker to stay for the duration of the certified period of employment, but in no event may the visa exceed one year. 8 C.F.R. §214.2 (h)(5)(iv)(1999); April Comments at 9 (comment of D. Michael Hancock, USDOL). Further, the visa is terminated at any time the H-2A worker's employment relationship ends, whether through voluntary departure or involuntary termination. *Id.* The H-2A worker must depart the country and is subject to deportation for failing to do so. *Id.* Thus, the H-2A worker is only admitted to the United States to perform work for a designated employer or employers, and must leave the United States when that employment terminates for any reason.

In crafting the H-2A program, Congress was acutely aware of the vulnerability of temporary agricultural workers and of problems that had arisen under other such programs, particularly the Bracero Program. *See* discussion *infra* Part III(B)(2). Congress further recognized that the H-2A provisions required enforcement mechanisms lest they become mere paper guarantees.<sup>9</sup> Thus, in section 305 of IRCA, Congress specifically authorized LSC-funded representation for H-2A workers on matters pertaining to their employment contract. 8 U.S.C. § 1101 note (1994). LSC-funded representation was a core element in the legislative design of the H-2A program. *See* 132 CONG. REC. H9866-68 (1986); Erlenborn Commission: Comments on "The Presence Requirement," Mar. 27, 1999, at 29-43 (comment of Bill Beardall, Texas Rural Legal Aid) [hereinafter March Comments]; April Comments at 53-58 (comment of Howard Berman, Member of Congress); *see also* discussion *infra* Part III(B)(2).

The statutory protections set forth in the H-2A program, and the provision of legal representation to H-2A workers to enforce these rights, thus were intended to accomplish two purposes: to protect foreign workers from exploitation, and to ensure that the employment of such workers would not depress the wages and working conditions of U.S. workers. These considerations explain why H-2A workers are the only category of nonimmigrants eligible for LSC-funded representation. They also point to the differences between the representation authorized for the unrestricted categories and H-2A workers: for the former, grantees may represent eligible aliens on all matters; for the latter, representation is restricted to matters arising under the employment contract.

H-2A workers constitute a small but growing portion of the United States' agricultural workforce. During FY 1998, the most recent year for which statistics are available, the USDOL certified 34,898 job openings and approximately 4,000 employers. *The FY 1998 H-2A Report, U.S. Department of Labor, Division of Foreign Labor Certifications, Revised June 1999* [hereinafter *FY 1998 H-2A Report*]. This is a dramatic increase from FY 1997 where 23,352 job openings were certified and approximately 2,300 employers. April Comments at 8 (comment of D. Michael Hancock, USDOL). The USDOL

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<sup>9</sup> H-2A workers are exempt from other federal laws protecting farmworkers. Of particular significance is their exemption from the Migrant and Seasonal Agricultural Worker Protection Act (MSWPA), 29 U.S.C. § 1801 et seq.(1999), the primary federal statute protecting agricultural workers. *See* April Comments at 9 (comment of D. Michael Hancock, USDOL); Legal Services Corporation, Erlenborn Commission Hearing Transcript, Apr. 10, 1999, at 122 (testimony of Mark Schacht, California Rural Legal Assistance Foundation) [hereinafter April Testimony].

believes that the upward trend will continue. *Id.*; *see also* March Comments at 128 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project). Grower associations organized to obtain approval to bring in H-2A workers are now appearing in a number of states. Legal Services Corporation: Erlenborn Commission Hearing Transcripts, Mar. 27, 1999, at 106 (testimony of Javier Riojas, Texas Rural Legal Aid) [hereinafter March Testimony]; March Comments at 222 (comment of Melissa A. Pershing, Legal Services of North Carolina). In FY 1998 eight states accounted for over seventy-five percent of all H-2A activities. *FY 1998 H-2A Report*. These eight states - North Carolina, Virginia, Kentucky, New York, Connecticut, Massachusetts, Tennessee and Georgia - totaled 27,150 positions in FY 1998. *Id.* The leading H-2A commodities were tobacco (16,984 positions), apples (4,428), vegetable harvesting (4,822), and fruit harvesting (1,483). *Id.*

The USDOL reports that the vast majority of H-2A workers come from Mexico. April Comments at 8 (comment of D. Michael Hancock, USDOL). In 1996, the last year for which country statistics are available, 10,353 H-2A workers came from Mexico while only 4,231 came from the second leading country, Jamaica. *Id.* This is sharply at odds with the relative proportions in 1988, when the majority of temporary foreign agricultural workers came from Jamaica (12,609) and only 2,499 came from Mexico. *Id.* The only other country with a significant presence in the H-2A program -- Peru -- sends about four hundred workers every year as shepherders to the Mountain and Western states. *Id.*

## **B. Matters of Representation for Eligible Aliens**

### **1. Aliens in Unrestricted Categories**

Like U.S. citizens, aliens seek legal assistance on a variety of matters. Aliens may be victims of domestic violence, need assistance with divorce and custody matters, find themselves having to file bankruptcy, or require help applying for social security and unemployment benefits. *See* March Comments at 246 (comment of Marci Seville, Golden Gate University School of Law); April Testimony at 15 (testimony of Cynthia Rice, California Rural Legal Assistance). Housing issues arise over eviction actions, substandard housing, eligibility for public housing, mobile home purchases, housing discrimination, and mortgage foreclosures. *See* March Comments at 68 (comment of Patrick McIntyre, Northwest Justice Project); March Comments at 80 (comment of Marilyn J. Endriss, Attorney at Law); March Comments at 82 (comment of Mark Miller, American Friends Service Committee); March Comments at 141 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 172 (comment of Daniel G. Ford, Colombia Legal Services); March Comments at 206 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); March Comments at 269 (comment of Lisa Butler, Florida Rural Legal Services). LSC eligible aliens may also seek assistance on immigration and consumer matters. *See* April Testimony at 89 (testimony of Bruce Iwasaki, Legal Aid Foundation of Los Angeles). Because of their limited English ability and isolation within communities, many aliens are particularly vulnerable to exploitation by unscrupulous sales and marketing enterprises, landlords and other businesses, and employers. *See* March Comments at 246 (Comment of Marci Seville, Golden Gate University School of Law). They are particularly susceptible to workplace

exploitation in sectors such as agriculture, landscaping, janitorial and restaurant work, and day labor. *See* April Testimony at 16 (testimony of Cynthia Rice, California Rural Legal Assistance).

Alien agricultural workers, who are not temporary H-2A workers, are protected in their employment by the Migrant and Seasonal Agricultural Worker Protection Act (MSWPA), 29 U.S.C. § 1801 et seq. (1994), which governs recruitment, wages, housing, health and safety, vehicle safety standards, drivers' licensure and minimum vehicle insurance levels. *See* April Comments at 9 (comment of D. Michael Hancock, USDOL). Their claims include violations of recruitment promises and disputes over wages, working conditions, wrongful terminations, and the job contract. *See* March Comments at 67 (comment of Patrick McIntyre, Northwest Justice Project); March Comments at 80 (comment of Marilyn J. Endriss, Attorney at Law); March Comments at 82 (comment of Mark Miller, American Friends Service Committee); March Comments at 99 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 141 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 172 (comment of Daniel G. Ford, Columbia Legal Services); March Comments at 269 (Lisa Butler, Florida Rural Legal Services). Legal assistance is also sought for job injuries, and other health and safety issues. *See* March Comments at 68 (comment of Patrick McIntyre, Northwest Justice Project); March Comments at 80 (comment of Marilyn J. Endriss, Attorney at Law); March Comments at 82 (comment of Mark Miller, American Friends Service Committee); March Comments at 141 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 269 (comment of Lisa Butler, Florida Rural Legal Services). Health and safety issues include improper use of pesticides. *See* March Comments at 172 (comment of Daniel G. Ford, Columbia Legal Services); March Comments at 207 (Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); March Comments at 225 (comment of Melissa A. Pershing, Legal Services of North Carolina). Workers are also represented in civil rights and retaliation claims. *See* March Comments at 141 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon).

## **2. H-2A Aliens**

Current law limits the representation of H-2A aliens to matters "relating to wages, housing, transportation, and other employment rights as provided in the worker's specific contract under which the nonimmigrant was admitted." 8 U.S.C. § 1101 note (1994). The H-2A worker's contract must include certain minimum benefits, wages, and working conditions that are mandated by federal law. 20 C.F.R. § 655.102(a) (1999).

H-2A aliens seek legal assistance, *inter alia*, in the following areas:

- a. Housing: Agricultural employers of H-2A workers must provide adequate housing to workers who travel further than 60 miles to the job site. 20 C.F.R. § 655.102(a)(1)(1999). Advocates from programs in New York, Georgia, Virginia, and North Carolina mentioned housing as an issue for which H-2A workers sought legal assistance. *See* March Comments at 22 (comment of Robert J. Willis, Attorney at Law); March Comments at 63 (comment of James F. Schmidt, Farmworker Legal Services of New York); March Comments at 99 (comment of Nan Schivone and Phyllis Holmen,

Georgia Legal Services Program); March Comments at 108 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); March Comments at 125 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project).

- b. Workers Compensation: Agricultural employers of H-2A workers are required to enroll in state workers compensation programs or to provide equivalent insurance coverage for both domestic and foreign workers. *See* 20 C.F.R. § 655.102(a)(2)(1999). Job injuries are common in agriculture. Aliens commonly seek legal assistance on issues related to job injuries. *See* March Comments at 12 (comment of Anita Soucy); March Comments at 15 (comment of Michael Carlin); March Comments at 22 (comment of Robert J. Willis, Attorney at Law); March Comments at 28 (comment of Georgia J. Lewis, Attorney at Law); March Comments at 31 (comment of Bill Beardall, Texas Rural Legal Aid); March Comments at 46 (comments of Carolyn Corrie, Attorney at Law); March Comments at 99 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 107 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworkers Law Project); March Comments at 125 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 159 (comment of Michael Wyatt and Roman Ramos, Texas Rural Legal Aid, Olga Pedroza, Southern New Mexico Legal Services); March Comments at 269 (comment of Lisa Butler, Florida Rural Legal Services); March Comments at 225 (comment of Melissa A. Pershing, Legal Services of North Carolina); April Comments at 103 (comment of Garry G. Geffert, West Virginia Legal Services Plan); March Testimony at 33-37 (testimony of Garry G. Geffert, West Virginia Legal Services Plan); March Testimony at 145 (testimony of Rob Williams, Florida Legal Services).
- c. Roundtrip Transportation: Agricultural employers of H-2A workers are required to reimburse workers for transportation to the workplace if the worker completes half of the season, and for return transportation from the workplace if the worker completes the contract. 20 C.F.R. § 655.102(a)(5)(1999). It is not uncommon for H-2A aliens to seek legal assistance because the employer failed to reimburse them for transportation expenses. *See* March Comments at 32 (comment of Bill Beardall, Texas Rural Legal Aid); March Comments at 99 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 107 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project).
- d. Wage Rate: H-2A employers must pay an adverse effect wage rate, which is a minimum wage rate set by the U.S. Department of Labor reflecting the prevailing wages in the particular agricultural sector. 20 C.F.R. § 655.102(a)(9)(1999). H-2A aliens commonly seek legal assistance for unpaid wages. *See* March Comments at 12 (comment of Anita Soucy); March Comments at 15 (comment of Michael Carlin); March Comment at 20 (comment of Robert J. Willis, Attorney at Law); March Comments at 27 (comment of Melinda Wiggins, Student Action With Farmworkers); March Comments at 32 (comment



of Bill Beardall, Texas Rural Legal Aid); March Comments at 47 (comment of Carolyn Corrie, Attorney at Law); March Comments at 63 (comment of James F. Schmidt, Farmworker Legal Services of New York); March Comments at 99 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 107 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); March Comments at 126 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 225 (comment of Melissa A. Pershing, Legal Services of North Carolina).

- e. The 3/4 Guarantee: Agricultural employers are required to offer their workers either work or wages for at least 3/4 of the contract period. 20 C.F.R. § 655.102(a)(6)(1999). H-2A aliens have sought legal assistance for violations of the 3/4 guarantee right. *See* March Comments at 20 (comment of Robert J. Willis, Attorney at Law); March Comments at 32 (comment of Bill Beardall, Texas Rural Legal Aid); March Comments at 99 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comment at 107 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); March Comments at 127 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 159 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); March Comments at 228 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Comments at 270 (comment of Lisa Butler, Florida Rural Legal Services); March Comments at 92 (comment of Garry G. Geffert, West Virginia Legal Services Plan); April Comments at 103 (comments of Garry G. Geffert, West Virginia Legal Services Plan); March Testimony at 147 (testimony of Rob Williams, Florida Legal Services).
  
- f. Non-waiver/Anti-retaliation Rights: The USDOL regulations prohibit the waiver of any rights provided by law. 29 C.F.R. § 501.4(1999). They also prohibit anyone from blacklisting, intimidating, or retaliating against any worker for “consulting with a legal assistance program” or otherwise asserting her rights under the H-2A program. 29 C.F.R. § 501.3(1999). State laws also prohibit blacklisting. *See* March Testimony at 66-67 (testimony of Mary Lee Hall, Legal Services of North Carolina). H-2A aliens have sought legal assistance for violations of these anti-retaliation rights. *See* March Comments at 12 (comment of Anita Soucy); March Comments at 23 (comment of Robert J. Willis, Attorney at Law); March Comments at 98 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 108 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); March Comments at 128 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 226 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Testimony at 63 (testimony of Mary Lee Hall, Legal Services of North Carolina); March Testimony at 134 (testimony of Michael Carlin).

A number of witnesses before the Commission testified regarding the importance of enforcing these

rights to accomplish the core purposes of the H-2A statute. The federal protections afforded to H-2A workers were intended to protect U.S. workers by eliminating incentives for employers to prefer H-2A workers over U.S. workers. *See* H.R. REP. NO. 99-682(I) (1986), *reprinted in* 1986 U.S.C.A.A.N. 5649; March Testimony at 16-22 (testimony of Garry Geffert, West Virginia Legal Services Plan); March Testimony at 106-107 (testimony of Javier Riojas, Texas Rural Legal Aid). H-2A workers may be more attractive to employers for a number of reasons. Growers are not required to pay unemployment or social security taxes for H-2A workers. *See* March Testimony at 157 (testimony of Rob Williams, Florida Legal Services). H-2A workers provide a guaranteed labor pool. *See* March Testimony at 20-21 (testimony of Garry G. Geffert, West Virginia Legal Services Plan). They are less likely to complain than U.S. workers and have more limited access to legal assistance. *See* March Comments at 31 (comment of Bill Beardall, Texas Rural Legal Aid); March Comments at 53 (comment of Arthur N. Read, Friends of Farmworkers); March Comments at 156 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); April Comments at 105 (comment of Garry G. Geffert, West Virginia Legal Services Plan). Growers may try to evade the requirement of hiring U.S. workers by imposing job requirements that will be unattractive to U.S. workers, by otherwise discouraging U.S. workers from applying, or by purging U.S. workers from their workforce. March Testimony at 106-07, 117-20 (testimony of Javier Riojas, Texas Rural Legal Aid). Grower preference for H-2A's over U.S. workers may be evidenced by their lack of active recruitment of permanent legal residents and other domestic workers. March Comments at 53 (comment of Arthur N. Read, Friends of Farmworkers); *see also* GENERAL ACCOUNTING OFFICE, H-2A AGRICULTURAL GUESTWORKER PROGRAM: CHANGES COULD BETTER IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS 58 (1997) [hereinafter GAO REPORT] (report number GAO/HEHS-98-20).

The H-2A program, in effect, establishes a ceiling for the terms of work that U.S. workers can demand for similar employment. March Testimony at 157-159 (testimony of Rob Williams, Florida Legal Services); March Testimony at 21-22, 24 (testimony of Garry Geffert, West Virginia Legal Services Plan); March Testimony at 106 (testimony of Javier Rojas, Texas Rural Legal Aid); March Comments at 156 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al). For example, H-2A employers must pay a special minimum wage, called the adverse effect wage rate, 20 C.F.R. § 655.102(a)(9)(1999), which is higher than a state or federal minimum wage requirement.<sup>10</sup> 64 Fed. Reg. 6690 (1999). In most instances, a non-H-2A employer, in an area with H-2A workers, who are receiving the adverse effect wage rate, would not be able to attract workers at a wage lower than the H-2A wage rate. These workers would be able to secure jobs from the H-2A employer during the first half of the season because H-2A employers must provide a hiring preference for U.S. workers who apply for a job during the first half of the season. 20 C.F.R. § 655.103(3)(1999). However, unenforcement of the H-2A wage rate and hiring preference implicitly allows the payment of a lower wage which has the effect of driving all wages for the area downward. March Testimony at 24 (testimony of Garry Geffert, West Virginia Legal Services Plan). Moreover, absent enforcement, unscrupulous employers, who violate the protections in the H-2A program,

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<sup>10</sup>For example, the adverse effect minimum wage rate for New York H-2A workers in 1999 is \$7.18 per hour. 64 Fed. Reg. 6690 (1999). In 1999, the federal minimum wage rate for similar workers is \$5.15 an hour, 29 U.S.C. § 206(a)(1)(1994), while the New York minimum wage rate is \$4.25 an hour, N.Y. Lab. Law § 652 (McKinney 1992).

gain a competitive advantage over those law-abiding employers. April Testimony at 57 (testimony of Jack Londen, Attorney at Law); March Testimony at 123-24 (testimony of Javier Riojas, Texas Rural Legal Aid); March Testimony at 21-22 (testimony of Garry Geffert, West Virginia Legal Services Plan); March Testimony at 157 (testimony of Rob Williams, Florida Legal Services).

## **C. Departures from the United States of Eligible Aliens**

### **1. Unrestricted Aliens**

The INA permits and facilitates travel outside of the United States by aliens eligible for LSC representation. April Testimony at 112-113 (testimony of Lynn Coyle, Lawyers Committee for Civil Rights Under Law). Lawful permanent residents and other classes of aliens in the unrestricted categories reside in the United States without time limit. They are also generally permitted to travel to and from the United States without restriction under U.S. immigration laws. *Id.* Lawful permanent residents may depart the United States for extended periods without loss of status, as long as they are not deemed to have abandoned their residence in the United States. March Comments at 156-57 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al). Admission into the United States by a lawful permanent resident after a temporary trip abroad merely requires that the alien present a valid unexpired immigrant visa and a valid unexpired passport or other travel document. 8 U.S.C. § 1181(a) (1994). An alien also must not be inadmissible under the categories of inadmissibility specified in the INA. 8 U.S.C. § 1182(a) (1994). The INA also provides for the discretionary readmission of lawful permanent residents who do not possess valid documents. 8 U.S.C. § 1181(b)(1994).

Applicants for permanent residence status as a rule are more restricted in their travel outside of the United States and must seek permission from the INS to travel or risk abandoning their application. 8 C.F.R. § 245.2(a)(4)(ii)(A)-(C) (1994); April Testimony at 112 (testimony of Lynn Coyle, Lawyers Committee for Civil Rights Under Law). Permission is readily granted for business travel and emergency personal travel. The remaining eligible aliens, those fleeing persecution and permitted to remain in or enter the United States as refugees, asylees or conditional entrants, also generally are freely permitted to travel outside of the United States as long as they satisfy the documentary requirements for admission into the United States. 8 U.S.C. § 1182(a) (1994).

Eligible aliens leave the United States for a variety of reasons, including family emergencies, visits with families and friends, to obtain medical care, and for important holidays. *See* March Comments at 50 (comment of Francisco J. Bricio, Attorney at Law); March Comments at 54 (comment of Arthur N. Read, Friends of Farmworkers); March Comments at 68 (comment of Patrick McIntyre, Northwest Justice Project); March Comments at 76 (comment of Mark Talamantes, Attorney at Law); March Comments at 83 (comment of Mark Miller, American Friends Service Committee); March Comments at 101 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 111 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); March Comments at 140-41 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 157

(comment of Michael Wyatt, Texas Rural Legal Aid, et. al); March Comments at 167 (comment of Kevin G. Magee, Legal Action of Wisconsin); March Comments at 175 (comment of Daniel G. Ford, Colombia Legal Services); March Comments at 199 (comment of Vincent H. Beckman, III, Illinois Migrant Legal Assistance Project); March Comments at 202 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); March Comments at 246 (comment of Marci Seville, Golden Gate University School of Law); March Comments at 268 (comment of Lisa Butler, Florida Rural Legal Services); April Comments at 41 (comment of Nieves Negrete, Washington Alliance for Migrant and Refugee Justice); March Testimony at 69 (testimony of Mary Lee Hall, Legal Services of North Carolina); March Testimony at 113, 116 (testimony of Javier Riojas, Texas Rural Legal Aid); April Testimony at 10 (testimony of Cynthia Rice, California Rural Legal Assistance); April Testimony at 139-140 (testimony of Sylvia Argueta, Mexican American Legal Defense and Education Fund). Many aliens who cannot afford health care in the United States travel to Mexico for needed medical treatment. April Testimony at 143 (testimony of Sylvia Argueta, Mexican American Legal Defense and Education Fund). Family visits are especially important to aliens wishing to preserve their cultural heritage and at Christmas time, which is a particularly significant season to devout Mexican Catholics. *See* April Testimony at 67 (testimony of Gabriel Medel, Parents for Unity); April Comments at 41 (comment of Nieves Negrete, Washington Alliance for Immigrant and Refugee Justice). Further, indigenous Mexican farmworkers have maintained significant family and economic ties to their home villages in Mexico. *See* March Comments at 202 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance).

Some lawful permanent resident aliens regularly travel between the United States and Mexico on a daily basis. So-called “commuter aliens” are a special category of lawful permanent residents recognized by the INS regulations as resident aliens of the United States who may reside outside of the United States in a contiguous territory and who return to work in the United States regularly. 8 C.F.R. § 211.5 (1999). In areas along the Mexico-United States border, it is common for lawful permanent resident aliens to live in Mexico and work in the United States. *See* March Comments at 157 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); March Comments at 194 (comment of Garry M. Restaino, Community Legal Services); March Comments at 215 (comment of Sarah M. Singleton, Attorney at Law); April Comments at 6 (comment of Emma Torres, Puentes de Amistad); April Testimony at 113 (testimony of Lynn Coyle, Lawyers Committee for Civil Rights Under Law). There are many reasons why an individual may choose to live in Mexico and commute to the United States for daily employment. Some live in Mexico because they have not been able to adjust the immigration status of other family members and/or are unable to find inexpensive housing in the United States. *See* March Comments at 195 (comment of Garry M. Restaino, Community Legal Services); April Comments at 6 (comment of Emma Torres, Puentes de Amistad); April Testimony at 113 (testimony of Lynn Coyle, Lawyers Committee for Civil Rights Under Law). In border communities, such as El Paso/Ciudad Juarez, families are spread across the border. Individuals, who are not commuter aliens because they live on the U.S. side of the border, travel between Mexico and the United States to shop or visit family members as a daily routine of life. *See* March Comments at 155 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); April Testimony at 108 (testimony of Lynn Coyle, Lawyers Committee for Civil Rights Under Law).

Testimony identified particular issues regarding agricultural workers who are permanent resident aliens and thus eligible for general representation. Many lawful permanent resident farmworkers enter the

migrant stream and travel from state to state following the growing and harvesting demands for various crops. The low wages and long periods of unemployment in agriculture often compel farmworkers to return seasonally to a home base in Mexico.<sup>11</sup> These departures permit them take advantage of the lower cost of living as well as to be reunited with their spouses and children. *See* March Comments at 140-41 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 168 (comment of Kevin G. Magee, Legal Action of Wisconsin); March Comments at 171 (comment of Daniel G. Ford, Columbia Legal Services); March Comments at 199 (comment of Vincent H. Beckmann, Illinois Migrant Legal Assistance Project); March Comment at 202 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance). Many aliens who became lawful permanent residents as Special Agricultural Workers (SAW) do not have the resources to bring their entire families to the United States, so these aliens also continue to come to the U.S. as single workers and return to Mexico during periods of unemployment. *See* March Testimony at 115-16 (testimony of Javier Riojas, Texas Rural Legal Aid); March Comments at 155 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al). Alien farmworkers may remain in Mexico annually for two to six months. *See* March Comments at 156-57 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); March Comments at 202 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); March Testimony at 116 (testimony of Javier Riojas, Texas Rural Legal Aid); April Testimony at 28 (testimony of Cynthia Rice, California Rural Legal Assistance). Farmworkers in Yakima, Washington, for example, typically work in Yakima from the April asparagus harvest through the October apple harvest, and then return to Mexico until the work resumes the following spring. *See* April Testimony at 77 (testimony of Victor Lara, Attorney at Law). Forestry workers in California may spend April to October in remote parts of California and then return to Mexico from November to March. *See* March Comments at 206 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance).

Legal Services of North Carolina estimated that fifty percent of their farmworker clients left the U. S. at some time during the course of representation. March Testimony at 69 (testimony of Mary Lee Hall, Legal Services of North Carolina). Attorneys at California Rural Legal Assistance report that between forty and ninety percent of their green card holding clients leave the country during the course of representation. *See* April Testimony at 28 (testimony of Cynthia Rice, California Rural Legal Assistance). The National Agricultural Workers Survey (NAWS), a statistical sampling of migrant and seasonal

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<sup>11</sup>A 1994 U.S. Department of Labor survey found that migrant farmworkers in the United States work an average of 29 weeks per year, with annual median incomes of \$5,000. U.S. DEPARTMENT OF LABOR, MIGRANT FARMWORKERS: PURSUING ECONOMIC INSTABILITY IN AN UNSTABLE LABOR MARKET (RESEARCH REPORT NO. 5) 31 (1994) (hereinafter 1994 DOL REPORT), *cited in* March Comments at 266 (comment of Lisa Butler, Florida Rural Legal Services). The average California farmworker is employed 6-9 months per year and earns between \$5,000 and \$7,499 annually. March Comments at 201 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance). Farmworkers in southwest Florida earn an average of \$6,500 to \$7,000 per year. DOROTHY COOK & FRITZ ROKA, FARMWORKERS IN SOUTHWEST FLORIDA, FINAL REPORT 24 (1998) (Southwest Florida Regional Planning Council, and the University of Florida, respectively), *cited in* March Comments at 266 (comment of Lisa Butler, Florida Rural Legal Services).

farmworkers conducted by the U.S. DOL, found that, of married farmworkers, sixty-seven percent of Mexican males immigrated to the United States before their wives. U.S. DEPARTMENT OF LABOR, A PROFILE OF U.S. FARMWORKERS: DEMOGRAPHICS, HOUSEHOLD COMPOSITION, INCOME AND USE OF SERVICES (1997), *cited in* March Comments at 141 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon). In fact, at least thirty percent of all farmworkers return to their countries of origin annually. 1994 DOL REPORT, *cited in* March Comments at 140-41 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon). Of the farmworkers who migrate (that is, they are absent overnight from their homes), seventy-one percent consider their home to be outside of the United States and return to it annually. *See id.* For such workers, leaving the United States is a survival strategy, permitting them to survive their periods of unemployment by taking advantage of the lower cost of living in the countries of origin. *See id.*; April Testimony at 113 (testimony of Lynn Coyle, Lawyers Committee for Civil Rights Under Law). Ultimately, growers and consumers reap the economic benefits of such migrancy through lower agricultural labor costs. *See* April Testimony at 50 (testimony of Jack Londen, Attorney at Law); *see also* 1994 DOL REPORT at vii, *cited in* March Comments at 266 (comment of Lisa Butler, Florida Rural Legal Services).

## **2. H-2A Aliens**

H-2A agricultural workers are required to maintain a foreign residence which they have no intention of abandoning. 8 U.S.C. 1101 § (a)(15)(H)(ii)(a) (1994). Their authorized stay in the United States depends upon the terms of their employment contract; and they are required to leave the United States within 10 days of the end of their contract. *See* GAO REPORT at 61. H-2A workers are legally prohibited from remaining in the United States for more than one year. 8 C.F.R. § 214.2(h)(5)(iv)(1999).

The actual length of an individual worker's H-2A visa varies depending upon the geographic location of the employer and the nature of the farmwork to be performed. The comments submitted to the Commission and live testimony indicated widely disparate agricultural needs. In North Carolina, a visa may be issued for six weeks to seven months. *See* March Comments at 14 (comment of Michael Carlin); March Comments at 223 (comment of Melissa A. Pershing, Legal Services of North Carolina). A small percentage of North Carolina H-2A workers work for eight to nine months. *See* March Comments at 14 (comment of Michael Carlin). In New York, the average H-2A visa is for four months. *See* March Comments at 62 (comment of James F. Schmidt, Farmworker Legal Services of New York). In West Virginia, the H-2A visa is for a seven to ten week apple harvest. *See* April Comments at 101 (comment of Garry G. Geffert, West Virginia Legal Services Plan). In Georgia, the H-2A visa will be from a few weeks to six months. *See* March Comments at 99 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program). In Virginia, the H-2A visa typically runs from April 15 to November 1, or from July 1 to November 1. *See* March Comments at 120 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project). In Arkansas, Kentucky, and Texas the H-2A visa generally will be for two to three months. *See* March Comments at 158 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al). Florida H-2A contracts usually range from three to five months. *See* March Comments at 268 (comment of Lisa Butler, Florida Rural Legal Services).

## **D. When Legal Assistance is Typically Sought by Eligible Aliens**

### **1. *Unrestricted Aliens***

Eligible aliens in the unrestricted categories seek legal assistance at any time and in a manner similar to the U.S. citizen population. These aliens may seek legal assistance at any time during the year, although limited English ability and lack of knowledge of rights and procedures may provide obstacles to seeking and obtaining representation. *See* March Comments at 246 (comment of Marci Seville, Golden Gate University School of Law); April Testimony at 15 (testimony of Cynthia Rice, California Rural Legal Assistance). Some claims of eligible aliens may arise while the alien is temporarily out of the country. Unlawful lock-outs or evictions are often timed to coincide with brief absences, and may ripen while an alien is out of the country visiting relatives. *See* March Comments at 207-208 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); April Testimony at 91-97 (testimony of Bruce Iwasaki, Legal Aid Foundation of Los Angeles).

It is not uncommon for alien agricultural workers to withhold asserting claims against an employer or farm labor contractor until after the work has ended and the farmworker is away from the area of employment. *See* March Comments at 57 (comment of Arthur N. Read, Friends of Farmworkers); March Comments at 68 (comment of Patrick McIntyre, Northwest Justice Project); March Comments at 80-81 (comment of Marilyn J. Endriss, Attorney at Law); March Comments at 99 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 142 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 158 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); March Comments at 167 (comment of Kevin G. Magee, Legal Action of Wisconsin); March Comments at 171 (comment of Daniel G. Ford, Columbia Legal Services); March Comments at 196 (comment of Gary M. Restaino, Community Legal Services); March Comments at 198 (comment of Vincent H. Beckman, III, Illinois Migrant Legal Assistance Project); March Comments at 205 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); March Comments at 268-69 (comment of Lisa Butler, Florida Rural Legal Services); April Comments at 40 (comments of Nieves Negrete, Washington Alliance for Immigrant and Refugee Justice). Farmworkers commonly are dependent upon their employer for both their income and housing. *See* March Comments at 142 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon). Poverty makes farmworkers unwilling to jeopardize their employment. *See* March Comments at 158 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al). Farmworkers fear retaliation by the employer if they complain. *See* March Comments at 57 (comment of Arthur N. Read, Friends of Farmworkers); March Comments at 68 (comment of Patrick McIntyre, Northwest Justice Project); March Comments at 142 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 269 (comment of Lisa Butler, Florida Rural Legal Services); April Comments at 40 (comment of Nieves Negrete, Washington Alliance for Immigrant and Refugee Justice); March Testimony at 126 (testimony of Javier Riojas, Texas Rural Legal Aid). They may also fear retaliation by other local employers, and often will not want to pursue a claim until after they leave the area. *See* March Comments at 142 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 270 (comment of Lisa

Butler, Florida Rural Legal Services). Geographic isolation often makes it difficult for farmworkers to obtain legal assistance while they are employed. *See* March Comments at 271 (comment of Lisa Butler, Florida Rural Legal Services). Farmworker hours are often long, and their access to telephones and transport may be nonexistent. *See* March Comments at 142 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon). Further, farmworkers may not know how to contact legal services in their community or may be discouraged by their employer from contacting legal services in their community. *See id.*; March Comments at 272 (comment of Lisa Butler, Florida Rural Legal Services).

Often farmworkers contact legal services after they have returned to their home base, which may be a foreign country. *See* March Comments at 58 (comment of Arthur N. Read, Friends of Farmworkers); March Comments at 171 (comment of Daniel G. Ford, Columbia Legal Services); March Comments at 198-99 (comment of Vincent H. Beckmann, III, Illinois Migrant Legal Assistance Project); March Comments at 268 (comment of Lisa Butler, Florida Rural Legal Services). As described above, many alien farmworkers may have a home base in Mexico as commuter aliens or as special agricultural workers who travel through the migrant stream around the United States and return to Mexico during periods of unemployment. Farmworker community organizations have found that agricultural workers are more willing to discuss issues arising out of their employment in base communities where they have the support of family and friends in pursuing their claims. *See* March Comments at 58 (comment of Arthur N. Read, Friends of Farmworkers); March Comments at 158 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al).

Some legal issues may not arise until the farmworker has returned to her home base. The full extent of unpaid wage damages, failure to pay end-of-season bonuses, wrongful discharge, retaliation, and disputes over periods of employment often may not be determined until the work is finished. *See* March Comments at 142 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 172-73 (comment of Daniel G. Ford, Columbia Legal Services); March Comments at 269-70 (comment of Lisa Butler, Florida Rural Legal Services); March Comments at 207 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance). Further, when recruitment occurs in Mexico, a farmworker may seek legal assistance for misrepresentations in recruitment that are actionable under the Migrant and Seasonal Agricultural Worker Protection Act. This is one of the most important federal protections for agricultural workers, and green card holders who were recruited in Mexico by agents of U.S. growers have a federal cause of action for such misrepresentations. *See* 29 U.S.C. § 1821(a), (f), (g) (1994); 29 C.F.R. § 500.75(b) (1999); March Comments at 56-57 (comment of Arthur N. Read, Friends of Farmworkers); April Testimony at 26-27 (testimony of Cynthia Rice, California Rural Legal Assistance). A farmworker may need legal assistance on other claims at any time during the year. *See* March Comments at 68 (comment of Patrick McIntyre, Northwest Justice Project); March Comments at 205 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance).

## **2. H-2A Aliens**

H-2A workers overwhelmingly seek legal assistance at the end of their work contract or after they have returned to their home country. *See* March Comments at 32 (comment of Bill Beardall, Texas Rural



Legal Aid); March Comments at 62-63 (comment of James F. Schmidt, Farmworker Legal Services of New York); March Comments at 99 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 107 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); March Comments at 127 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 226-28 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Comments at 158 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); March Comments at 256 (Comment of Alan Houseman, Center for Law & Social Policy); March Comments at 269 (comment of Lisa Butler, Florida Rural Legal Services); April Comments at 102 (comment of Garry G. Geffert, West Virginia Legal Services Plan); March Testimony at 51, 55-58 (testimony of Mary Lee Hall, Legal Services of North Carolina). This is so for a number of reasons relating to the extreme dependency of such workers, the time that their claims arise or become known, their lack of access to legal representation in the United States, and other barriers to representation such as cultural differences, lack of information and language barriers.

### **a. Dependency**

H-2A workers are dependent upon their employers for virtually every aspect of their daily lives in the United States. H-2A workers are legally entitled to work only for their designated employer, and thus are uniquely dependent upon their employer for their right to work and remain in the United States. *See* March Comments at 31 (comment of Bill Beardall, Texas Rural Legal Aid); March Comments at 123 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 158 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); March Comments at 221 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Testimony at 20 (testimony of Garry G. Geffert, West Virginia Legal Services Plan); March Testimony at 52 (testimony of Mary Lee Hall, Legal Services of North Carolina). H-2A employers control the amount of work assigned to their workers, their earnings, housing, food, transportation, access to telephone and postal services, future employment, and return transportation to their home country. *See* March Comments at 31 (comment of Bill Beardall, Texas Rural Legal Aid); March Comments at 123 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 221-23 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Comments at 98 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Testimony at 140 (testimony of Rob Williams, Florida Legal Services). This dependency can be acute because of the costs incurred by workers in getting to the United States, their poverty, and their corresponding desire to remain and work in the United States and to return in future years.

Many H-2A workers come to the United States because of desperate financial circumstances at home. *See* March Comments at 123 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 223 (comment of Melissa A. Pershing, Legal Services of North Carolina). Many H-2A workers are subsistence farmworkers in their home villages and must borrow money to make the journey to the United States. The costs incurred to come to the United States are substantial. *See* March Comments at 123 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 158-59 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); March Comments at 223 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Testimony

at 60 (testimony of Mary Lee Hall, Legal Services of North Carolina); March Testimony at 92-93 (testimony of Jim Albright, Catholic Diocese of Virginia). While the cost of transportation to the U.S. job site must be reimbursed by the U.S. employer, the H-2A alien still incurs expenses of \$500 to \$600 just to obtain the job in the U.S. primarily because of high fees charged by recruiters for agricultural employers. *See* March Comments at 158 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al). Typically, this money is borrowed from family or friends or from a money lender, who charges interest up to twenty percent. *See id.* at 159; March Testimony at 92-98 (testimony of Jim Albright, Catholic Diocese of Virginia). If the H-2A alien is terminated early in the season, the worker runs the risk of ending in debt as result. *See* March Comments at 159 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al). The need to recoup this investment, and then hopefully to accrue some net earnings beyond these expenses, impels the H-2A alien to stay in the good graces of his employer as long as possible during the work period, avoiding any type of dispute, if possible, and/or injuries while on the job. *See id.* As one witness before the Commission put it, “[t]oo much is on the line for them. They are not willing to risk losing their job and getting blacklisted for three to five years just so they can get the difference between the adverse effect wage rate and the minimum wage rate.” March Testimony at 131 (testimony of Michael Carlin); *see also* March Comments at 128 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project).

During the contract period H-2A aliens are very fearful of losing their job or of not being accepted by their employer for future employment should they complain. *See* March Comments at 12 (comment of Anita Soucy); March Comments at 14-15 (comment of Michael Carlin); March Comments at 62-63 (comment of James F. Schmidt, Farmworker Legal Services of New York); March Comments at 84 (comment of John W. Morehouse, Wake County Human Services); March Comments at 98 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 106 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); March Comments at 128 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 190 (comment of Elizabeth Freeman); March Comments at 226 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Comments at 269 (comment of Lisa Butler, Florida Rural Legal Services); April Comments at 102 (comment of Garry G. Geffert, West Virginia Legal Services Plan); March Testimony at 97 (testimony of Jim Albright, Catholic Diocese of Virginia); *see also*, GAOREPORT at 60-61. H-2A’s have attempted to obtain legal assistance anonymously due to fear of employer reprisal. *See* March Testimony at 65 (testimony of Mary Lee Hall, Legal Services of North Carolina); March Testimony at 142 (testimony of Rob Williams, Florida Legal Services); March Comments at 226-27 (comment of Melissa A. Pershing, Legal Services of North Carolina). H-2A aliens’ fear of retaliation stems from observing punitive measures taken against fellow workers or from being told by the employer or the employer’s agent not to talk to legal services. *See* March Comments at 11-12 (comment of Anita Soucy); March Comments at 14 (comment of Michael Carlin); March Comments at 27 (comment of Melinda Wiggins, Student Action With Farmworkers); March Comments at 78 (comment of Sister Evelyn Mattern, North Carolina Council of Churches); March Comments at 85 (comment of Dawn Burtt, Wake County Human Services); March Comments at 190 (comment of Elizabeth Freeman); March Comments at 226-28 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Testimony at 131 (testimony of Michael Carlin); March Testimony at 141 (testimony of Rob Williams, Florida Legal Services). The relationship between H-2A workers’ unwillingness to complain and their bonded status is illustrated by the fact that when the

possibility arose that Florida H-2A sugar industry workers may be able to remain permanently in the United States and work anywhere in the U.S., the number of workers willing to complain to legal services significantly increased. March Testimony at 144 (testimony of Rob Williams, Florida Legal Services).

Testimony provided to the Commission established that an H-2A alien's fear of not being accepted for future employment if he or she complains can be well founded. Legal Services of North Carolina reports three cases, which the program filed under North Carolina's whistle blower statute, where the H-2A worker alleged that he was not accepted for future employment because of asserting his legal rights under the contract the previous season. *See* March Comments at 230 (comment of Melissa A. Pershing, Legal Services of North Carolina). Workers blacklisted in North Carolina are barred from employment on an association-wide basis. *Id.* at 229. In a West Virginia case, a worker reported that he was never accepted for future employment after being seen with a legal services attorney the previous season. *See* April Comments at 102 (comment of Garry G. Geffert, West Virginia Legal Services Plan). Oregon nursery workers are specifically warned not to speak to legal services or they may lose the opportunity to work in the U.S. *See* March Comments at 142 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon). Virginia growers' association recruiters in Mexico maintain a blacklist. *See* March Comments at 128 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project). Florida sugar cane employers kept a blacklist of unsatisfactory workers and included workers who had complained to legal services. *See* March Testimony at 142 (testimony of Rob Williams, Florida Legal Services).

#### **b. Awareness of claims**

As with other alien farmworkers, many H-2A claims may not arise until the workers are on their way home or after they have returned to their home country. Employers may improperly fire and deport workers who are injured, who speak to legal services, or who complain about working conditions or wages. *See* March Testimony at 58-62 (testimony of Mary Lee Hall, Legal Services of North Carolina); March Testimony at 127, 133 (testimony of Michael Carlin); March Testimony at 142 (testimony of Rob Williams, Florida Legal Services); March Comments at 63 (comment of James F. Schmidt, Farmworker Legal Services of New York). In one reported incident, a Colorado grower prematurely terminated his H-2A workers by driving them to New Mexico and depositing them on the Mexican side of the border. *See* March Comments at 162 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al). Mass deportations of workers for wage complaints occurred in the Florida sugar industry. *See* March Testimony at 150 (testimony of Rob Williams, Florida Legal Services); *see also* STAFF OF HOUSE COMMITTEE ON EDUCATION AND LABOR, REPORT ON THE USE OF TEMPORARY FOREIGN WORKERS IN THE FLORIDA SUGAR CANE INDUSTRY, 102D CONG. 17-18 (Comm. Print 1991) (hereinafter 1991 HOUSE REPORT). Terminations often happen abruptly, and employers immediately put terminated workers on a bus home. *See* March Comments at 126-27 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 227 (comment of Melissa A. Pershing, Legal Services of North Carolina). Workers terminated under these circumstances will contact legal services from the bus station while in the process of being deported. *See* March Testimony at 58-62 (testimony of Mary Lee Hall, Legal Services of North Carolina); March Testimony at 133 (testimony of Michael Carlin); March Testimony at 142 (testimony of Rob Williams, Florida Legal Services); March Comments at 63 (comment of James F. Schmidt, Farmworker Legal Services of New York). Alternatively, workers will also contact legal services

after the worker's return home. *See* March Comments at 228 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Testimony at 150 (testimony of Rob Williams, Florida Legal Services). In such circumstances, the worker's legal claim essentially arises simultaneously with the worker's departure from the U.S.

Legal claims involving transportation reimbursement, unpaid wages, the three-fourths guarantee, blacklisting and retaliation, and problems with obtaining workers compensation benefits may all arise while the H-2A aliens are back home. *See* March Comments at 32 (comment of Bill Beardall, Texas Rural Legal Aid); March Comments at 226-28 (comment of Melissa A. Pershing, Legal Services of North Carolina); April Comments at 103 (comment of Garry G. Geffert, West Virginia Legal Services Plan); March Testimony at 63 (testimony of Mary Lee Hall, Legal Services of North Carolina). Claims that an employer failed to reimburse the worker for the return transportation do not arise until after the worker has returned home. *See* March Comments at 12 (comment of Anita Soucy); March Comments at 23 (comment of Robert J. Willis, Attorney at Law); March Comments at 32 (comment of Bill Beardall, Texas Rural Legal Aid); March Comments at 74 (comment of Keith S. Ernst, Attorney at Law); March Comments at 99-100 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 107 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); March Comments at 159 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); March Comments at 229 (comment of Melissa A. Pershing, Legal Services of North Carolina). The 1997 GAO study found that almost 40 percent of North Carolina H-2A workers did not receive their transportation home. GAO REPORT at 61. Claims that the employer failed to mail the worker the final paycheck also often do not arise until after the worker's departure. *See* March Testimony at 64 (testimony of Mary Lee Hall, Legal Services of North Carolina); March Comments at 12 (comment of Anita Soucy); March Comments at 32 (comment of Bill Beardall, Texas Rural Legal Aid); March Comments at 74 (comment of Keith S. Ernst, Attorney at Law).

Workers compensation provides a number of difficulties of this type. Workers may discover injuries resulting from their employment after they return home, or a prior work-related injury may require further medical attention. *See* March Comments at 165 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al). These workers seek legal assistance when they encounter difficulties obtaining workers compensation benefits. *See* March Comments at 12 (comment of Anita Soucy); April Comments at 102 (comment of Garry G. Geffert, West Virginia Legal Services Plan); March Testimony at 34-37 (testimony of Garry G. Geffert, West Virginia Legal Services Plan). Workers compensation benefits may also be improperly terminated after the worker has left the country, requiring the worker to retain legal assistance to reinstate them. An employer may deny coverage after the worker departs the country or stop paying workers compensation benefits that are owed. *See* March Comments at 23 (comment of Robert J. Willis, Attorney at Law); March Comments at 46-47 (comment of Carolyn Corrie, Attorney at Law); March Comments at 129 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 165 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); March Comments at 270 (comment of Lisa Butler, Florida Rural Legal Services); March Testimony at 145 (testimony of Rob Williams, Florida Legal Services).

Claims for the 3/4 guarantee are calculated based on the total work offered during the employment period and do not arise until the end of work or after the work is completed. *See* March Comments at 23

(comment of Robert J. Willis, Attorney at Law); March Comments at 99-100 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 108 (comment of Robert Salzman, Legal Aid Society of Mid-New York, and Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); April Comments at 103 (comment of Garry G. Geffert, West Virginia Legal Services Plan); March Comments at 127-28 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 159 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); March Comments at 228-29 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Comments at 270 (comment of Lisa Butler, Florida Rural Legal Services); March Testimony at 37-39 (testimony of Garry G. Geffert, West Virginia Legal Services Plan); March Testimony at 147 (testimony of Rob Williams, Florida Legal Services). A Florida court has ruled that the claims for the 3/4 guarantee do not ripen until after the end of the work period. *See Joseph v. Okeelanta Corp.*, 656 So.2d 1316 (Fla. Dist. Ct. App. 1995). The GAO has found that the timing of 3/4 guarantee claims makes monitoring of compliance and enforcement while the worker is still in the United States particularly difficult. GAO REPORT at 61.

Where the prevailing wage required by federal law is disputed or under administrative review, a worker's claim that the employer failed to pay the prevailing wage may not arise until the worker has returned home. March Testimony at 148 (testimony of Rob Williams, Florida Legal Services). Workers whose employer fails to provide them with a copy of the employment contract will be unaware of their rights during the period of employment and thus unable to enforce them. *See id.* at 151-53. Claims that a worker's savings under the H-2A contract had been improperly withheld would not be discovered until after a worker returns home. *See id.* at 146-47. Finally, workers are unlikely to discover that the employer has blacklisted or retaliated against them until they fail to be requested to work again the following season. *See* March Comments at 12 (comment of Anita Soucy); March Comments at 23 (comment of Robert J. Willis, Attorney at Law); March Comments at 100 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 108-109 (comment of Robert Salzman, Legal Aid Society of Mid-New York, and Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); March Comments at 128 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 229-30 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Testimony at 63-64 (testimony of Mary Lee Hall, Legal Services of North Carolina); March Testimony at 134-135 (testimony of Michael Carlin).

### **c. Isolation and lack of access to legal assistance**

H-2A aliens also wait until the end of the season or after they have returned home to seek legal assistance due to their limited access to legal services when they are in the United States. *See* March Comments at 11 (comment of Anita Soucy); March Comments at 31 (comment of Bill Beardall, Texas Rural Legal Aid); March Comments at 46 (comment of Carolyn Corrie, Attorney at Law); March Comments at 62 (comment of James F. Schmidt, Farmworker Legal Services of New York); March Comments at 84 (comment of John W. Morehouse, Wake County Human Services); March Comments at 106 (comment of Robert Salzman, Legal Aid Society of Mid-New York, and Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); March Comments at 126 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 226-28 (comment of Melissa A. Pershing, Legal Services of North Carolina). H-2A labor camps are located in extremely remote, rural areas, which are far-removed from community centers. *See* March Comments at 11 (comment of Anita

Soucy); March Comments at 46 (comment of Carolyn Corrie, Attorney at Law); March Comments at 124 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 141 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comment at 222 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Testimony at 90 (testimony of Jim Albright, Catholic Diocese of Virginia). Labor camps such as those in Virginia may be small, housing an average of four to seven workers. *See* March Comments at 122 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Testimony at 94 (testimony of Jim Albright, Catholic Diocese of Virginia). Thus, workers are even isolated from each other. The H-2A visa does not allow the worker to bring in his or her family. *See* March Comments at 224 (comment of Melissa A. Pershing, Legal Services of North Carolina). Workers thus are socially isolated, having no support systems of family or friends, and no familiarity, contacts, or shared history with the communities where they are located. *See* March Comments at 124 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 224 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Testimony at 96 (testimony of Jim Albright, Catholic Diocese of Virginia).

Typically, H-2A aliens have no access to telephones and postal service while residing in the labor camps. *See* March Comments at 11 (comment of Anita Soucy); March Comments at 26 (comment of Melinda Wiggins, Student Action With Farmworkers); March Comments at 46 (comment of Carolyn Corrie, Attorney at Law); March Comments at 122 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 222 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Comments at 105-106 (comment of Robert Salzman, Legal Aid Society of Mid-New York, and Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project). Most H-2A aliens must rely on employer-provided transportation to town centers. *See* March Comments at 105-106 (comment of Robert Salzman, Legal Aid Society of Mid-New York, and Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); March Comments at 122 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 222 (comment of Melissa A. Pershing, Legal Services of North Carolina). Florida sugar workers generally took only one day off every two weeks, and thus had little opportunity to seek out legal assistance. *See* March Testimony at 140 (testimony of Rob Williams, Florida Legal Services). Growers may only give their H-2A workers Sundays off, when most service providers are closed. *See* March Comments at 122 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 222 (comment of Melissa A. Pershing, Legal Services of North Carolina). H-2A workers may contact the legal services office when they first have access to a telephone, which is often at a bus station on their way back home. *See* March Comments at 227 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Testimony at 58-62 (testimony of Mary Lee Hall, Legal Services of North Carolina); March Testimony at 133 (testimony of Michael Carlin). Some H-2A workers will seek legal assistance at the Laredo office of Texas Rural Legal Aid on their way back to Mexico. *See* March Testimony at 111, 126 (testimony of Javier Riojas, Texas Rural Legal Aid). This office is located near the bus station in Laredo and well known to Mexican H-2A workers. *See id.*

The short time H-2A workers spend in a location makes it difficult for them to learn of the availability of legal services. *See* March Comments at 123 (comment of Shelley Latin, Virginia

Farmworkers Legal Assistance Project); March Comments at 223 (comment of Melissa A. Pershing, Legal Services of North Carolina). H-2A workers may be unaware of the availability of legal services or may not know how to contact legal services even if they know it exists. *See* March Comments at 159 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); March Comments at 127 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 228 (comment of Melissa A. Pershing, Legal Services of North Carolina); *see also* GAO REPORT at 58. Legal services representatives are unable to contact the majority of H-2A workers in their regions during the work season. The legal services program in Virginia reports that it is able to service only about half of Virginia's 3,000 tobacco workers. *See* March Comments at 122 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project). Legal Services of North Carolina reaches only about 250 out of the state's 4,000 labor camps during the season, and does not have the capacity to conduct outreach to the vast majority of the state's 10,000 or more H-2A workers. *See* March Comments at 228 (comment of Melissa A. Pershing, Legal Services of North Carolina).

The Commission received reports of growers actively seeking to prevent or dissuade workers from contacting legal services representatives. *See* March Testimony at 54-55 (testimony of Mary Lee Hall, Legal Services of North Carolina); March Testimony at 129 (testimony of Michael Carlin). In North Carolina, two H-2A employers confiscated mail from legal services to their clients. *See* March Comments at 228 (comment of Melissa A. Pershing, Legal Services of North Carolina). A publication prepared by the North Carolina Growers Association, Inc. and distributed in English and Spanish to all H-2A workers in North Carolina describes farmworker legal services as "enemies of the H-2A program." *Id.* at 240. The Spanish version of the publication further warns workers that they will be immediately fired for any violation of the rules. *Id.* at 226. Workers suspected of trying to assert their rights have been interrogated by grower association members or staff. *Id.* At a recruitment site for sugar cane H-2A workers in Kingston, Jamaica, a sign was posted stating that Florida Rural Legal Services was not a friend of the West Indian worker, and similar signs were posted in the workers' barracks. *See* March Testimony at 141 (testimony of Rob Williams, Florida Legal Services). Attempts have been made to prevent legal services workers from talking to H-2A aliens in public places. In Virginia, one farmer refused to allow his workers to attend a Mexican fiesta sponsored by the local Catholic Diocese if legal services workers would be present. *See* March Testimony at 102 (testimony of Jim Albright, Catholic Diocese of Virginia). In Kentucky, a grower threatened a legal services worker who was handing out legal education materials to H-2A workers at a Wal-Mart parking lot. *See* March Comments at 161 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al). In another Kentucky incident, a legal services worker was asked to leave a Catholic church where he was invited to discuss legal rights with H-2A workers. *Id.*

Where legal services workers have attempted to overcome these barriers by going to the labor camp to see H-2A workers, in some cases legal services workers have been denied access to the camps. *See* March Comments at 27 (comment of Melinda Wiggins, Student Action With Farmworkers); March Comments at 78 (comment of Sister Evelyn Mattern, North Carolina Council of Churches); March Comments at 126 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 227-28 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Testimony at 132-133 (testimony of Michael Carlin); March Testimony at 140 (testimony of Rob Williams, Florida Legal Services). A number of witnesses testified to the atmosphere of intimidation in some labor

camps and the chilling effect on workers when the employer was present. *See* March Testimony at 94 (testimony of Jim Albright, Catholic Diocese of Virginia); March Testimony at 129-131 (testimony of Michael Carlin); March Testimony at 141 (testimony of Rob Williams, Florida Legal Services). At times, legal services workers have been threatened with charges of trespass. *See* March Comments at 12 (comment of Anita Soucy); March Comments at 229 (comment of Melissa A. Pershing, Legal Services of North Carolina). In Florida into the 1990s, “no trespassing” signs were posted at the labor camps housing sugar cane workers, and a number of the labor camps had gate houses and posted security guards. *See* March Testimony at 140 (testimony of Rob Williams, Florida Legal Services). Florida Rural Legal Services twice had to sue to gain access to the sugar companies’ labor camps. *See id.*; March Comments at 272 (comment of Lisa Butler, Florida Rural Legal Services). When legal services personnel did visit the camps, they generally were followed by company supervisors, and workers who spoke to legal services attorneys often were interrogated later by supervisors. *See* March Testimony at 140-41 (testimony of Rob Williams, Florida Legal Services). In North Carolina, a migrant health outreach worker was told that as long as she was from the clinic and not legal services, the outreach worker could visit the workers in the camp. *See* March Comments at 190 (comment of Elizabeth Freeman). Farmers have criticized religious workers and kept them off their property for providing pamphlets to workers informing them of their legal rights. March Testimony at 97, 100 (testimony of Jim Albright, Catholic Diocese of Virginia).

#### **d. Other barriers**

Ethnic and cultural differences, language barriers, and lack of information about their rights in the United States or understanding of the U.S. legal system also contribute to the isolation of H-2A workers and increase the probability that claims will not be asserted until after the termination of the H-2A contract. *See* March Comments at 11 (comment of Anita Soucy); March Comments at 31-32 (comment of Bill Beardall, Texas Rural Legal Aid); March Comments at 98 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 121 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 223-24 (comment of Melissa A. Pershing, Legal Services of North Carolina). Their status as H-2A workers may lead them to believe that they have no legal rights. *See* March Comments at 127 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 224 (comment of Melissa A. Pershing, Legal Services of North Carolina). Experiences with the legal systems of their own countries, or with U.S. immigration and law enforcement authorities, may deter aliens from seeking legal assistance. *See* March Comments 124 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 221 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Comments at 255 (comment of Alan Houseman, Center for Law & Social Policy). Workers may fear that seeking legal advice will jeopardize their immigration status even though their status is entirely legal. *See* March Comments at 124 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 221 (comment of Melissa A. Pershing, Legal Services of North Carolina). Migrant farmworkers in general are much more reliant upon personal contact and experience for acquiring information than on print or other mass media, and for this reason, health care providers, migrant ministries, and legal services conduct outreach to effectively serve farmworker populations. *See* March Comments at 121-25 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 221-24 comment of



Melissa A. Pershing, Legal Services of North Carolina). Some H-2A workers see the need to discuss their legal problem with family members before seeking legal assistance. *See* March Comments at 32 (comment of Bill Beardall, Texas Rural Legal Aid); March Comments at 127 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 228 (comment of Melissa A. Pershing, Legal Services of North Carolina); April Comments at 103 (comment of Garry G. Geffert, West Virginia Legal Services Plan).

## **E. Time Periods for Resolution of the Legal Claims of Eligible Aliens**

### **1. Unrestricted Aliens**

Most of the comments and testimony provided to the Commission concerning time periods to resolve claims dealt with the representation of agricultural workers. Nevertheless, some of the information in the record is relevant to non-agricultural worker aliens. The Commission takes notice that representation of all clients by LSC grantees frequently continues for many months. For example, in Washington State, wrongful discharge claims which cannot be resolved informally may take as long as one year to resolve at the administrative level and as long as three years if litigation is required. *See* April Testimony at 73, Exhibit 1 (testimony of Victor Lara, Attorney at Law). Sexual harassment claims filed with the EEOC similarly may require six to eighteen months at the administrative level, and as long as three years if a case goes to trial. *See id.* Cases concerning education related claims such as a challenge to the expulsion or suspension of a student, or a denial of equal access claim can require between one to three years in state court. *See id.* Social Security disability claims can last two years at the administrative level in Washington if the case goes to the Appeals Council. Housing matters similarly may require a minimum of one month to resolve informally, and as long as eighteen months for an unlawful eviction action in state court, or three years relating to a claim for public housing eligibility. *See id.* Unemployment compensation claims in California frequently require pursuing a preliminary administrative process to account for unreported earnings, which may take a year or more. *See* March Comments at 205 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance).

Cases which are filed in state or federal court on behalf of alien farmworkers typically take months if not years to resolve throughout the country. *See* March Comments at 49 (comment of Francisco J. Bricio, Attorney at Law); March Comments at 58 (comment of Arthur N. Read, Friends of Farmworkers); March Comments at 69 (comment of Patrick McIntyre, Northwest Justice Project); March Comments at 100 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 142 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 168 (comment of Kevin G. Magee, Legal Action of Wisconsin); March Comments at 173 (comment of Daniel G. Ford, Columbia Legal Services); March Comments at 196 (comment of Garry M. Restaino, Community Legal Services); March Comments at 198 (comment of Vincent H. Beckman, III, Illinois Migrant Legal Assistance Project); March Comments at 206 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); March Comments at 216 (comment of Sarah M. Singleton, Attorney at Law); March Comments at 246 (comment of Marci Seville,

Golden Gate University School of Law); March Comments at 271 (comment of Lisa Butler, Florida Rural Legal Services). Similarly, administrative matters may also take months to years to resolve. *See* March Comments at 205 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); March Comments at 247 (comment of Marci Seville, Golden Gate University School of Law); April Testimony at 19 (testimony of Cynthia Rice, California Rural Legal Assistance Program); April Testimony at 73, Exhibit 1 (testimony of Victor Lara, Attorney at Law). Consequently, there is a strong likelihood that alien clients, especially those from Mexico, will be out of the United States temporarily during the adjudication of their case.

In Pennsylvania, effective advocacy of farmworker claims may take years. *See* March Comments at 58 (comment of Arthur N. Read, Friends of Farmworkers). In Washington, litigation takes from one to two years to resolve. *See* March Comments at 69 (comment of Patrick McIntyre, Northwest Justice Project); April Testimony at 73, Exhibit 1 (testimony of Victor Lara, Attorney at Law). Trial dates in Washington are rarely set less than a year from the date of filing a complaint. *See* March Comments at 69 (comment of Patrick McIntyre, Northwest Justice Project). Employment cases in Washington typically take from several months to several years to resolve. *See* March Comments at 173 (comment of Daniel G. Ford, Columbia Legal Services). In Georgia, litigation involving federal labor laws protecting farmworkers may take up to two or three years to resolve from the date of violation. *See* March Comments at 100 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program). In some instances, a Georgia case may take five or more years to fully resolve. *See id.* In Oregon, cases dealt with through a mediation program take an average of six to eight months. *See* March Comments at 142 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon). Full scale litigation, with discovery, arbitration, and sometimes trial and appeal may continue for years in Oregon. *See id.* This is especially true in farmworker cases where delays in scheduling and communicating with the farmworker plaintiffs occur because of the workers' migratory lifestyle. *See id.*

In the U.S. District Court for the Eastern District of Wisconsin, trials are scheduled within eighteen months of filing a complaint and in the Western District, trials are held within ten months after filing. *See* March Comments at 168 (comment of Kevin G. Magee, Legal Action of Wisconsin). In Wisconsin small claims court, trials are scheduled six weeks to two months after filing the complaint. *See id.* Farmworkers may have already left the state before their small claims trials are scheduled. *See id.* In Arizona, cases take up to two years to litigate and even negotiated settlements take a number of months to resolve. *See* March Comments at 196 (comment of Garry M. Restaino, Community Legal Services). Litigation on behalf of Arizona farmworkers who live in Mexican border towns is delayed because of difficulties in communicating with the client. *See id.* Very few Arizona clients, who live in Mexico, have telephones or daily postal service, which requires the legal services representative to go to the Mexican border town to locate the client. *See id.* In Illinois, claims involving false promises, failure to pay wages, unsafe housing, dangerous field conditions, illegal wage deductions take months to resolve. *See* March Comments at 198 (comment of Vincent Beckman, III, Illinois Migrant Legal Assistance Project). In California, cases in the areas of labor and employment, housing, education, public benefits and health, which cannot be resolved informally, take months to years to resolve at the administrative level or in court. *See* March Comments at 246-47

(comment of Marci Seville, Golden Gate University School of Law); March Comments at 205-206 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance). In New Mexico, farmworker claims may take several months to longer than a year to resolve. *See* March Comments at 216 (comment of Sarah M. Singleton, Attorney at Law). In Florida, the period to resolve a farmworker's claim can range from within a month to years, depending on various circumstances, including the type of claim, the complexity of the issue, the time needed to investigate the claim, the evidence needed to establish the claim, and the damages at issue. *See* March Comments at 270 (comment of Lisa Butler, Florida Rural Legal Services). Administrative actions on behalf of Florida farmworkers, including complaints to federal or state departments of labor and workers compensation claims, may take six months to over a year to resolve. *See id.* at 271. Litigation in Florida involving substantial claims may go on for six months to two or more years if the case goes to trial. *See id.* Even pre-litigation settlement of employment claims are time consuming, often requiring the attorney to fully investigate the workers' claims. *See id.* at 270-71. In many of these cases, additional time will be required if cases are appealed or new trials are granted.

## **2. H-2A Aliens**

In most instances, as discussed above, H-2A aliens seek legal assistance when they are in the process of leaving the United States or after they have returned to their home country. In those few cases where H-2A workers seek legal assistance on work issues while they are still in the United States, it is generally impossible for those issues to be resolved before the workers leave the United States. *See* March Comments at 22 (comment of Robert J. Willis, Attorney at Law); March Comments at 46-47 (comment of Carolyn Corrie, Attorney at Law); March Comments at 50 (comment of Francisco J. Bricio, Attorney at Law); April Comments at 101 (comment of Garry G. Geffert, West Virginia Legal Services Plan); March Comments at 108 (comment of Robert Salzman, Legal Aid Society of Mid-New York, and Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); March Comments at 231 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Comments at 188 (comment of Janet E. Hill, National Employment Lawyers Association); March Testimony at 107 (testimony of Javier Riojas, Texas Rural Legal Aid); March Testimony at 41 (testimony of Garry G. Geffert, West Virginia Legal Services Plan); March Testimony at 52 (testimony of Mary Lee Hall, Legal Services of North Carolina); March Testimony at 148 (testimony of Rob Williams, Florida Legal Services). Legal Services of North Carolina testified that, with the exception of claims for delayed mid-contract transportation reimbursement, ninety-eight percent of H-2A cases cannot be successfully completed while the H-2A worker is still in the country. *See* March Testimony at 67-68 (testimony of Mary Lee Hall, Legal Services of North Carolina); *see also* March Comments at 231-33 (comment of Melissa A. Pershing, Legal Services of North Carolina). For example, in North Carolina the average time period to pursue work related injury, bad housing, and wage claims in state or federal court or before the North Carolina Industrial Commission is “well beyond a full year if not two full years.” March Comments at 22 (comment of Robert J. Willis, Attorney at Law). Contested North Carolina workers compensation claims may take years to resolve. *See* March Comments at 231-32 (comment of Melissa A. Pershing, Legal Services of North Carolina). Even uncontested North Carolina workers compensation claims cannot be resolved during the H-2A contract period. *See id.* at 232. North Carolina state court litigation takes at least two years before the case is set for trial. *See id.* at 233. State and federal employment discrimination claims often require pre-

litigation exhaustion of administrative processes, which under North Carolina law require at least 180 days to complete. *See id.* at 232-33.

In West Virginia, federal court litigation on behalf of H-2 workers from Jamaica took four years to resolve in one case and three years in another, including the time period to distribute the back wage award. *See* April Comments at 101 (comment of Garry G. Geffert, West Virginia Legal Services Plan). A West Virginia state court case routinely takes one year to go to trial and longer if a jury is demanded. *See id.* West Virginia workers compensation claims continue long after the worker has left the United States even in uncontested cases. *See id.* In New York, developing, filing, and resolving litigation on behalf of H-2A workers takes well over one year. *See* March Comments at 112 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project). In Virginia, virtually all H-2A claims are settled without resorting to litigation or administrative complaints. *See* March Comments at 128 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project). But even these cases often cannot be resolved while the worker is still in the United States. *See id.* at 128-29. This is especially true for Virginia workers compensation claims. *See id.* at 129. In Georgia, it regularly takes from two to three years for federal court litigation. *See* March Comments at 188-89 (comment of Janet E. Hill, National Employment Lawyers Association). Texas cases typically involve preliminary disputes regarding jurisdiction and venue before the case reaches the merits, and civil cases on the border move very slowly due to court congestion with alien and drug smuggling cases. *See* March Testimony at 108 (testimony of Javier Riojas, Texas Rural Legal Aid). Florida cases involving H-2A sugar workers have resulted in full-blown litigation sometimes lasting a decade or more. *See* March Testimony at 144 (testimony of Rob Williams, Florida Legal Services).

## **F. Availability of Alternative Representation for Low-income Aliens**

### **1. Private Attorneys and Non-LSC Funded Non-profit Organizations**

#### **a. Unrestricted aliens**

Private attorneys are unlikely to undertake the representation of alien agricultural worker clients. *See* March Comments at 28 (comment of Georgia J. Lewis, Attorney at Law); March Comments at 70 (comment of Patrick McIntyre, Northwest Justice Project); March Comments at 76-77 (comment of Mark Talamantes, Attorney at Law); March Comments at 81 (comment of Marilyn J. Endriss, Attorney at Law); March Comments at 101 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 143 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 168 (comment of Kevin G. Magee, Legal Action of Wisconsin); March Comments at 174-75 (comment of Daniel G. Ford, Columbia Legal Services); March Comments at 187 (comment of Michael L. Monahan, State Bar of Georgia); March Comments at 199 (comment of Vincent H. Beckman, III, Illinois Migrant Legal Assistance Project); March Comments at 216 (comment of Sarah M. Singleton, Attorney at Law); March Comments at 247 (comment of Marci Seville, Golden Gate University School of Law); April Comments at 6 (comment of Emma Torres,

Puentes de Amistad); April Comments at 41 (comment of Nieves Negrete, Washington Alliance for Immigrant and Refugee Justice); April Comments at 45 (comment of Doreen Dodson, American Bar Association Standing Committee on Legal Aid and Indigent Defendants (ABA/SCLAID)); April Testimony at 41 (testimony of Jack Londen, Attorney at Law). Four chief reasons are the mobility of the client population, language barriers involved in serving a non-English speaking population, the high costs incurred in cases involving aliens, and the lack of any potential for large fee awards. *See* March Comments at 46-47 (comment of Carolyn Corrie, Attorney at Law); March Comments at 49-50 (comment of Francisco J. Bricio, Attorney at Law); March Comments at 74 (comment of Keith S. Ernst, Attorney at Law); March Comments at 81, (comment of Marilyn J. Endriss, Attorney at Law); March Comments at 84 (comment of John W. Morehouse, Wake County Human Services); March Comments at 85 (Dawn Burtt, Wake County Human Services); March Comments at 130-31 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 143 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 160 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); March Comments at 168 (comment of Kevin G. Magee, Legal Action of Wisconsin); March Comments at 174-75 (comment of Daniel G. Ford, Columbia Legal Services); March Comments at 187 (comment of Michael L. Monahan, State Bar of Georgia); March Comments at 189 (comment of Janet E. Hill, National Employment Lawyers Association); April Comments at 41 (comment of Nieves Negrete, Washington Alliance for Immigrant and Refugee Justice); April Comments at 44 (comment of Walt Auvil, Attorney at Law); April Comments at 48 (comment of Doreen Dodson, ABA/SCLAID); March Testimony at 70 (testimony of Mary Lee Hall, Legal Service of North Carolina); April Testimony at 23 (testimony of Cynthia Rice, California Rural Legal Assistance); April Testimony at 139 (testimony of Sylvia Argueta, Mexican American Legal Defense and Education Fund).

The migratory and isolated nature of alien farmworker populations makes them extremely difficult for private attorneys to represent. *See* April Testimony at 23 (testimony of Cynthia Rice, California Rural Legal Assistance); April Testimony at 78 (testimony of Victor Lara, Attorney at Law). Private attorneys are unfamiliar with the location of rural labor camps and lack the resources and knowledge of farmworker migratory behavior necessary to maintain contact with their clients. Farmworker cases are very labor intensive — clients generally cannot be accessed by phone or fax, clients may not be able to communicate in writing, and interviewing a client or obtaining or preparing documents may require multiple visits in person to the worker’s location. *See* April Testimony at 78 (testimony of Victor Lara, Attorney at Law); March Comments at 208 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance). Farmworkers’ long and unpredictable hours of work may require that the attorney be available to meet with them at a labor camp late at night, or when work is canceled due to rain and the client happens to show up. April testimony at 80; March Comments at 76 (comment of Mark Talamantes, Attorney at Law). The time, energy, and expense involved in communicating with the client can preclude representation by private attorneys and most pro bono programs. *See* March Comments at 47 (comment of Carolyn Corrie, Attorney at Law); March Comments at 74 (comment of Keith S. Ernst, Attorney at Law); March Comments at 77 (comment of Mark Talamantes, Attorney at Law); March Comments at 143 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); April Testimony at 43, 46 (testimony of Jack Londen, Attorney at Law); April Testimony at 80-81 (testimony of Victor Lara, Attorney at Law).

Language barriers are formidable. Spanish speaking attorneys are rare, and for attorneys who do not speak Spanish, representing farmworker clients is unfeasible. *See* April Testimony at 80-81 (testimony of Victor Lara, Attorney at Law); March Comments at 45 (comment of Jena L. Matzen, North Carolina Justice and Community Development Center); March Comments at 50 (comment of Francisco J. Bricio, Attorney at Law). Many states in the southeastern United States where farmworkers are common lack a significant Spanish-speaking bar. *See id.* North Carolina, for example, is estimated to have fewer than one hundred private attorneys with bilingual capacity in the state, and most live in metropolitan areas. *See* March Comments at 45 (comment of Jena L. Matzen, North Carolina Justice and Community Development Center); *see also* March Comments at 235 (comment of Melissa A. Pershing, Legal Services of North Carolina). Farmworkers from southern Mexico and Central America may speak indigenous languages such as Mixtec, posing “an absolute showstopper” even for firms with significant pro bono resources. April Testimony at 43 (testimony of Jack Londen, Attorney at Law); *see also* March Comments at 124 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 208 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); March Comments at 223 (comment of Melissa A. Pershing, Legal Services of North Carolina).

The barriers involved in representing alien farmworkers are compounded by the low compensation available in such cases. The low level of farmworker wages results in damages awards that are extremely low. *See* April Testimony at 49 (testimony of Jack Londen, Attorney at Law). Fees on wage and hour cases, farm labor safety cases, and many workers compensation cases are too low relative to the time needed to resolve the case for most private attorneys to litigate. *See* March Comments at 50 (comment of Francisco J. Bricio, Attorney at Law); March Comments at 74 (comment of Keith S. Ernst, Attorney at Law). In California, even large labor rights cases are difficult to refer to the private bar because of the unavailability of contingency fees, the inadequacy of statutory fees, and the difficulty involved in representing farmworker clients. *See* March Comments at 208 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance). Private attorneys are not available to represent aliens in California administrative proceedings, for which legal fees are not provided. *See id.*; April Testimony at 18 (testimony of Cynthia Rice, California Rural Legal Assistance). It is extremely difficult to obtain alternative representation for housing eviction, benefits, education, and health access cases, whether the client is an alien or a citizen. *See* March Comments at 208 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance).

Alien farmworker representation is further compromised by the lack of private attorneys in rural areas. Georgia, for example, has several rural agricultural counties with fewer than five practicing lawyers, and at least one such county with no attorney at all. *See* March Comments at 187 (comment of Michael L. Monahan, State Bar of Georgia). Private attorneys who engage in the most pro bono work are located in large firms in major cities, far removed from farmworker locales. *See* April Testimony at 41-42 (testimony of Jack Londen, Attorney at Law). The few attorneys who do reside in locations where farmworkers are likely to live and work generally represent agricultural employers and are conflicted out of representing farmworkers. *See* March Comments at 174 (comment of Daniel G. Ford, Columbia Legal Services); April Testimony at 42 (testimony of Jack Londen, Attorney at Law); April Testimony at 87

(testimony of Victor Lara, Attorney at Law). Even in major cities located near farmworker areas, it is extremely difficult to find pro bono lawyers able to represent farmworkers because agricultural employers are predominant clients in those areas. *See* April Testimony at 42 (testimony of Jack Londen, Attorney at Law). The Florida sugar industry, for example, retained many of the major firms in Florida to defend H-2A litigation. *See* March Testimony at 144 (testimony of Rob Williams, Florida Legal Services).

Attorneys with expertise in employment matters, a common claim of alien farmworkers, also generally practice in urban areas far from the farmworker clients. *See* March Comments at 81 (comment of Marilyn J. Endriss, Attorney at Law). The National Employment Lawyers Association, whose members represent plaintiffs in employment law matters, reports that while its members have expertise on employment law matters, very few attorneys, other than legal services lawyers, are willing to take on these cases because of the complexity of farmworker legal claims, the time and financial resources needed to litigate these cases, and the practical problems of representing farmworkers. *See* March Comments at 189 (comment of Janet E. Hill, National Employment Lawyers Association); *see also* March Comments at 81 (comment of Marilyn J. Endriss, Attorney at Law).

The American Bar Association reports that pro bono programs, operated through its Center for Pro Bono, typically do not represent aliens for many of the reasons noted above. *See* April Comments at 48 (comment of Doreen Dodson, ABA/SCLAID). The ABA further notes that while the immigration bar is generous with its time and equipped to overcome some of the practical barriers in representing aliens, its members often do not have expertise to deal with general civil matters. *See id.* The ABA further reports on efforts it has made to expand pro bono services to the immigrant community. *See id.* at 49. These efforts have yet to result in significant new pro bono resources and it is not expected that private pro bono lawyers will be able to meet a significant portion of the demand for service. *See id.* The President of the North Carolina Bar Association reports that “there just are not enough civil legal resources available from the private bar, paid or pro bono, to ensure that migrant workers achieve even minimum access to their basic human and contract rights.” *See* April Comments at 50 (comment of Larry B. Sitton, North Carolina Bar Association). The limited lawyers available and the barriers to farmworker representation make farmworker cases more difficult to place with pro bono attorneys than any other type of case, including death penalty convictions. *See* April Testimony at 44 (testimony of Jack Londen, Attorney at Law). Moreover, it would be impossible to find private counsel to handle emergency situations that arise for eligible alien clients. *See* April Testimony at 97 (testimony of Bruce Iwasaki, Legal Aid Foundation of Los Angeles).

To the extent that private attorneys are willing to take cases involving aliens, they are likely to counsel with LSC-funded programs. *See* March Comments at 21 (comment of Robert J. Willis, Attorney at Law); March Comments at 77 (comment of Mark Talamantes, Attorney at Law); March Comments at 130-31 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 160 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); March Comments at 208 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); March Comments at 216 (comment of Sarah M. Singleton, Attorney at Law); March Comments at 234 (comment of Melissa A. Pershing, Legal Services of North Carolina); April Comments at 51 (comment of Larry B. Sitton, North

Carolina Bar Association); April Testimony at 43-45, 47 (testimony of Jack Londen, Attorney at Law); April Testimony at 81 (testimony of Victor Lara, Attorney at Law). Co-counseling with LSC recipients remedies many of the barriers to private representation of aliens by providing private attorneys access to specialized legal expertise, language capability, familiarity with aliens' communities, and the skills and resources necessary to keep in touch with migrating witnesses and clients. If the assistance of the LSC-funded program were not available in these co-counseled cases, it is very unlikely that the private attorney would agree to become involved in the case. *See* April Testimony at 45 (testimony of Jack Londen, Attorney at Law).

Finally, the availability of legal assistance from non-LSC funded, non-profit organizations is limited. *See* March Comments at 45 (comment of Jena L. Matzen, N.C. Justice & Community Development Center); March Comments at 65 (comment of James F. Schmidt, Farmworker Legal Services of New York); March Comments at 76 (comment of Mark Talamantes, Attorney at Law); March Comments at 143 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 147 (comment of Mary Bauer, Virginia Justice Center); March Comments at 236 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Comments at 247 (comment of Marci Seville, Golden Gate University School of Law); March Comments at 208 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); March Comments at 110 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); March Testimony at 149 (testimony of Rob Williams, Florida Legal Services); April Testimony at 44 (testimony of Jack Londen, Attorney at Law). These organizations have very limited resources and small staffs, and often receive funding for specific projects. April Testimony at 44 (testimony of Jack Londen, Attorney at Law); March Testimony at 149 (testimony of Rob Williams, Florida Legal Services); March Comments at 45 (comment of Jena L. Matzen, N.C. Justice & Community Development Center); March Comments at 131 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 208 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); March Comments at 236 (comment of Melissa A. Pershing, Legal Services of North Carolina). Many important agricultural states, such as Arkansas, Kentucky, New Mexico, and Texas have no such entities. *See* March Comments at 160 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al). Major nonprofit organizations, such as the Mexican American Legal Defense and Education Fund, rely heavily on referrals of low income clients to LSC providers. *See* April Testimony at 146 (testimony of Sylvia Argueta, Mexican American Legal Defense and Education Fund). Consequently, these non-profit legal organizations are not a feasible alternative to LSC-funded representation.

#### **b. H-2A Workers**

Private attorneys are extremely unlikely to serve as sole counsel in H-2A cases. *See* March Comments at 15 (comment of Michael Carlin); March Comments at 20 (comment of Robert J. Willis, Attorney at Law); March Comments at 26 (comment of Melinda Wiggins, Student Action with Farmworkers); March Comments at 65 (comment of James F. Schmidt, Farmworker Legal Services of New York); April Comments at 103 (comment of Garry G. Geffert, West Virginia Legal Services Plan); March Comments at 109 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte



Sibley and Patricia C. Kakalec, Farmworker Law Project); March Comments at 234-35 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Comments at 130-31 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 147 (comment of Mary Bauer, Virginia Justice Center); March Comments at 160 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); April Comments at 44 (comment of Walt Auvil, Attorney at Law); April Testimony at 41 (testimony of Jack Londen, Attorney at Law). This is due to problems faced by representation of alien farmworkers generally, as well as by difficulties particular to the H-2A program.

Assuming an H-2A worker wants to retain private counsel, the H-2A worker's isolation makes it practically impossible to reach private counsel while residing in the U.S. *See* March Comments at 271 (comment of Lisa Butler, Florida Rural Legal Services); April Comments at 103 (comment of Garry G. Geffert, West Virginia Legal Services Plan). As discussed above, H-2A workers live in labor camps outside of towns and depend on their employers for transportation. *See id.* They have no access to telephones while in the labor camp. *See* March Comments at 11 (comment of Anita Soucy); March Comments at 46 (comment of Carolyn Corrie, Attorney at Law); March Comments at 122 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 222 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Comments at 106 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project). The workers' lack of language ability or familiarity with the rural communities in which they work acts as a further barrier to accessing private counsel. Private counsel do not engage in outreach or education efforts with H-2A workers. *See* March Comments at 130 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project).

Private attorneys also have no financial incentive to undertake H-2A cases. *See* March Comments at 47 (comment of Carolyn Corrie, Attorney at Law); March Comments at 50 (comment of Francisco J. Bricio, Attorney at Law); March Comments at 74 (comment of Keith S. Ernst, Attorney at Law); March Comments at 109 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); March Comments at 131 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 235 (comment of Melissa A. Pershing, Legal Services of North Carolina); April Comments at 44 (comment of Walt Auvil, Attorney at Law). H-2A aliens lack financial resources to retain private counsel. *See* March Comments at 235 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Comments at 20 (comment of Robert J. Willis, Attorney at Law); March Comments at 26 (comment of Melinda Wiggins, Student Action With Farmworkers). Damages generally are too low for attorneys to accept H-2A cases on a contingency basis. *See* March Comments at 21 (comment of Robert J. Willis, Attorney at Law). The H-2A statute does not provide for attorneys fees, and statutory fees are not always available. *See id.* at 20; March Testimony at 32 (testimony of Garry G. Geffert, West Virginia Legal Services Plan). In North Carolina, statutory attorneys fees are awarded only on contract claims involving wages or wage-like benefits. *See* March Comments at 235 (comment of Melissa A. Pershing, Legal Services of North Carolina). Statutory fees are not available for wrongful discharge, housing and health and safety contract claims. *See id.* In North Carolina, the statutory twenty-five percent contingent fee available in workers compensation cases includes all out-of-pocket costs the attorney has incurred on the case. *See* March Comments at 21 (comment of Robert J. Willis, Attorney at Law). These costs can be substantial. *See id.*

Consequently, workers compensation recoveries, except in catastrophic injury cases, are too small to make it financially feasible for the private attorney to undertake these cases. *See id.*; March Comments at 235 (comment of Melissa A. Pershing, Legal Services of North Carolina). Moreover, H-2A contract cases are expensive to litigate. *See* March Comments at 131 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 235 (comment of Melissa A. Pershing, Legal Services of North Carolina); April Comments at 104 (comment of Garry G. Geffert, West Virginia Legal Services Plan). These costs, which may include the costs of bringing the client back to the United States for hearings or depositions, must be advanced by the attorney. *See id.*

Private counsel also lack expertise in legal claims under the H-2A program. *See* March Comments at 21 (comment of Robert J. Willis, Attorney at Law); March Comments at 130 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 234 (comment of Melissa A. Pershing, Legal Services of North Carolina); April Comments at 104 (comment of Garry G. Geffert, West Virginia Legal Services Plan). Representing H-2A workers typically requires specialized knowledge of the H-2A administrative law and regulations, OSHA field sanitation and other health and safety standards, and venue laws controlling access to forums. *See* March Comments at 130 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 234 (comment of Melissa A. Pershing, Legal Services of North Carolina). Even attorneys who specialize in employment law are unfamiliar with the specialized practice involved in presenting H-2A claims. March Comments at 189 (comment of Janet E. Hill, National Employment Lawyers Association).

Finally, as with the representation of other alien farmworkers, private attorneys typically do not have the language skills, special resources and knowledge necessary to maintain contact with a client, who resides thousands of miles from their office and does not have a telephone or regular mail delivery, and who may not even know the name of his employer. *See* March Comments at 20 (comment of Robert J. Willis, Attorney at Law); *see also* March Comments at 235 (comment of Melissa A. Pershing, Legal Services of North Carolina). Often it is difficult, if not impossible, to conduct a client interview and fact investigation before the H-2A alien leaves the United States, *see* discussion *infra* Part III(D)(2), and difficulties of communicating are compounded by the fact that many H-2A workers reside in small Mexican villages where the mail system is unreliable and telephone access extremely limited. *See* March Comments at 235 (comment of Melissa A. Pershing, Legal Services of North Carolina).

As in other alien cases, in H-2A cases private counsel have depended upon the assistance and expertise of LSC recipients to identify H-2A employers, locate supporting witnesses in the U.S. and Mexico, locate H-2A housing sites, communicate the client and witnesses, and assist with other basic access issues that are essential to the successful resolution of any legal claim. *See* March Comments at 21 (comment of Robert J. Willis, Attorney at Law); April Comments at 51 (comment of Larry B. Sitton, North Carolina Bar Association); March Comments at 65 (comment of James F. Schmidt, Farmworker Legal Services of New York); March Comments at 236 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Testimony at 70 (testimony of Mary Lee Hall, Legal Services of North Carolina). Farmworker Legal Services of New York reports that it has not successfully referred an H-2A case to private counsel in fifteen years unless the LSC recipient remained actively involved. *See* March Comments at 65 (comment of James F. Schmidt, Farmworker Legal Services of New York); *see also* March Comments at 130-31 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project).

## ***2. Mediation and Alternative Dispute Resolution***

Mediation mechanisms alone, to the extent that these are available to settle legal claims, will not necessarily resolve aliens' claims. Commentators recognize that people will often refuse to participate in mediation if the other parties to the dispute lack the resources to litigate, and they question the fairness of mediation if only one side is represented by counsel or if a disputant has difficulty negotiating effectively in English. Stephen Goldberg et al., *Dispute Resolution: Negotiations, Mediation and Other Processes* (3<sup>rd</sup> ed. 1999). The barriers to private bar representation experienced by alien clients are also applicable to ADR. *See* March Comments at 209 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance).

Further, mediation mechanisms may not be available to many eligible aliens. Alien clients may not have the financial means to use these procedures. *See* March Comments at 77 (comment of Mark Talamantes, Attorney at Law); March Comments at 209 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance). Pre-litigation mediation is almost always subject to sharing of costs. *See* March Comments at 209 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance). Court referred mediation is available after litigation is filed, and often has a cost-sharing component. *See id.* Even if a party agrees to pay the costs of the mediator, for example, in California, there are other costs which the alien must bear, such as paying for interpreters and translation of documents. *See id.* In some cases, the possibility of a mediated settlement does not forgo the need to file litigation, conduct discovery or obtain pre-trial orders. *See* March Comments at 173 (comment of Daniel G. Ford, Columbia Legal Services); March Comments at 233 (comment of Melissa A. Pershing, Legal Services of North Carolina). Oregon has an effective mediation program, but pre-trial mediation still requires representation by counsel and the availability of counsel to pursue litigation should mediation fail. *See* March Comments at 142 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon). Mediation conducted in bad faith by a party can delay resolution of the case. *See* March Comments at 49 (comment of Francisco J. Bricio, Attorney at Law).

Finally, as a practical matter in farmworker litigation, agricultural employers may choose not to use mediation programs. *See* March Testimony at 28-31 (testimony of Garry G. Geffert, West Virginia Legal Services Plan). In New York, the legal services program, the New York Farm Bureau, the state Department of Labor and Cornell University established a mediation program operating out of Cornell University. *See* March Comments at 65-66 (comment of James F. Schmidt, Farmworker Legal Services of New York). In its three years of operation not one agricultural employer agreed to use the procedures as an alternative to litigation. *See id.* at 66. A similar program established in West Virginia also proved ineffective. *See* March Testimony at 31 (testimony of Garry G. Geffert, West Virginia Legal Services Plan).

## ***3. Government Agency Enforcement***

In alien agricultural worker cases, including cases involving H-2A workers, state and federal government agencies are unable to fully enforce a worker's legal rights. *See* March Comments at 32 (comment of Bill Beardall, Texas Rural Legal Aid); March Comments at 63 (comment of James F.

Schmidt, Farmworker Legal Services of New York); March Comments at 205 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); March Comments at 143-44 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 160 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); April Comments at 10 (comment of D. Michael Hancock, USDOL); March Testimony at 108 (testimony of Javier Riojas, Texas Rural Legal Aid); April Testimony at 57 (testimony of Jack Londen, Attorney at Law). The USDOL reports that despite high violation rates in agriculture, farmworkers generally do not file complaints with USDOL due to their isolation, lack of knowledge regarding labor protections, and fear of government agencies. *See* April Comments at 10 (comment of D. Michael Hancock, USDOL). Wage and Hour Division investigations of H-2A cases during FY 1996, 1997 and 1998 found an employer violation rate of fifty-seven percent, though only nineteen percent of the cases investigated were the result of a complaint from an H-2A worker. *See id.*

Moreover, government agencies have competing priorities and limited resources. *See id.* By law, the USDOL has only seven days to review an application for H-2A certification to determine its compliance with the statutory requirements. *See* March Testimony at 109 (testimony of Javier Riojas, Texas Rural Legal Aid). The USDOL relies on private enforcement to play a major role in the overall enforcement scheme. *See* March Comments at 160 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al). The USDOL reports that “[t]here is no certainty that the Wage and Hour Division will be able to represent all aggrieved H-2A workers if they are no longer able to bring private actions on their own behalf.” April Comments at 10-11 (comment of D. Michael Hancock, USDOL). This is not surprising. The USDOL lacks adequate resources to enforce its regulations, April Testimony at 57 (testimony of Jack Londen, Attorney at Law), and has a long history of weak enforcement of the H-2A program. *See* March Comments at 160 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al). In 1991 a congressional committee found that USDOL failed to enforce the rights of both H-2A and United States workers. The USDOL had documented repeated and long-standing violations of the H-2A statute and regulations, but failed to take action either to correct the violations or to ensure that full restitution was made to the workers. *See* 1991 HOUSE REPORT, *cited in* April Comments at 104 (comment of Garry G. Geffert, West Virginia Legal Services Plan). The GAO reports that USDOL continues to face inherent obstacles in enforcing the H-2A protections. GAO REPORT at 58; *see also* March Comments at 160 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al).

Enforcement by state agencies may be less effective. Over a nine year period, the California Industrial Relations Department issued only 120 citations for minimum wage violations to the state’s 80,000 agricultural employers and their farm labor contractors. By contrast, in a targeted enforcement of the Fresno County raisin harvest in September 1998, USDOL found a fifty percent violation rate among farm labor contractors, and a twenty percent violation rate among growers. *See* April Testimony at 147-49 (testimony of Mark Schacht, California Rural Legal Assistance Foundation). The Oregon state agency responsible for housing enforcement inspects labor camps once every seventeen years. *See* March Comments 143 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon).

Government agencies may also lack the legal authority to seek private remedies for individual workers. For example, USDOL cannot seek private remedies for violations of the Migrant and Seasonal

Agricultural Worker Protection Act. *See id.* at 143-44. Even when the government agency has the legal authority to seek private remedies for individuals, as in the case of unpaid wages, the agency may choose not to pursue those remedies and only seek civil money penalties against the employer. *See* March Comments at 111 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project).

## **G. Burdens of Requiring LSC Funded Attorneys to Withdraw from Cases When the Client Leaves the United States**

### **1. Administrative Burdens**

Several witnesses testified about terminating representation once the alien left the country. An interpretation that legal services recipients can represent aliens only during the times that they are physically present in the United States would present LSC providers with two options. Either they would be required to terminate representation each time the client leaves the country, April Testimony at 12 (testimony of Cynthia Rice, California Rural Legal Assistance), or clients at the outset of representation would be faced with having to choose between giving up their right to travel outside the country, even for a family emergency, or giving up their right to legal services representation. *See* March Comments at 70 (comment of Patrick McIntyre, Northwest Justice Project); April Testimony at 12, 17-18 (testimony of Cynthia Rice, California Rural Legal Assistance); April Testimony at 72 (testimony of Gabriel Medel, Parents for Unity). Faced with this choice, clients likely would preserve their right to leave the country. *See* April Testimony at 12, 17-18 (testimony of Cynthia Rice, California Rural Legal Assistance); April Testimony at 72 (testimony of Gabriel Medel, Parents for Unity); March Comments at 209 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance).

Requiring LSC attorneys to terminate representation whenever a client left the country would impose substantial administrative burdens on attorneys. *See* March Comments at 209 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); March Comments at 247 (comment of Marci Seville, Golden Gate University School of Law); April Comments at 46 (comment of Doreen Dodson, ABA/SCLAID); April Testimony at 25 (testimony of Cynthia Rice, California Rural Legal Assistance). LSC-funded attorneys would be required to monitor the movements of their clients, and to withdraw from cases whenever their alien clients leave the United States. *See* April Testimony at 12, 24-25 (testimony of Cynthia Rice, California Rural Legal Assistance); March Testimony at 155-56 (testimony of Rob Williams, Florida Legal Services); April Testimony at 90 (testimony of Bruce Iwasaki, Legal Aid Foundation of Los Angeles). Notices to opposing counsel and the court or administrative agency would have to be sent. *See* March Comments at 204 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance). In federal court, a formal motion to withdraw would have to be filed. *See id.* Similar motions would have to be filed in state court actions. *See id.* In all cases, significant steps would have to be taken to avoid prejudicing the client's claims. *See id.* Case files would have to be copied and provided to the client. *See id.* Case files may need to be translated for those clients who read a language other than English. *See id.* For clients who are illiterate in any language, materials would have to be carefully explained to them. *See id.*

A motion to withdraw may be denied by the court, and the attorney required to personally support the costs of the litigation. *See* April Testimony at 83 (testimony of Victor Lara, Attorney at Law). Courts may be unlikely to allow withdrawal where no substitute counsel is available. *See* March Comments at 22 (comment of Robert J. Willis, Attorney at Law). Some state courts could reject a motion to withdraw *sua sponte* if they believed withdrawal would compromise the court's ability to maintain the litigation. *See* April Testimony at 21 (testimony of Cynthia Rice, California Rural Legal Assistance). Even if withdrawal were allowed, this may not protect the attorney from ethical obligations to vigorously represent the client, or from claims of malpractice. *See* April Testimony at 82 (testimony of Victor Lara, Attorney at Law).

Temporarily suspending legal representation during a client's absence by seeking a continuance is not a viable alternative to formally withdrawing from the case. The court may not grant a continuance, and other plaintiffs and defendants in the litigation may object to suspending the proceedings. *See* April Testimony at 82 (testimony of Victor Lara, Attorney at Law). Absent a formal motion to withdraw, an attorney of record in federal court remains responsible, both ethically and under the rules of court, for responding to any matter that should arise. *See* April Testimony at 30 (testimony of Cynthia Rice, California Rural Legal Assistance); April Testimony at 82 (testimony of Victor Lara, Attorney at Law). If opposing counsel filed a motion for summary judgment while a client was out of the country and the court refused to grant a continuance, the attorney would be placed in the impossible position of either taking the steps necessary to respond to the motion, or violating her ethical and professional responsibility. *See* April Testimony at 30 (testimony of Cynthia Rice, California Rural Legal Assistance). As one witness put it, "it's hard to know what we could do if we found out that a client was outside the country. Would we not answer a phone call, not respond to a question, cancel a deposition, or not go to the library and research a case? None of those things would advance any interest at all." April Testimony at 90 (testimony of Bruce Iwasaki, Legal Aid Foundation of Los Angeles).

Requiring attorneys to monitor the movements of eligible aliens at all times of the year would impose monumental burdens on LSC grantees. *See* April Testimony at 24-25 (testimony of Cynthia Rice, California Rural Legal Assistance); April Testimony at 90 (testimony of Bruce Iwasaki, Legal Aid Foundation of Los Angeles). Alien farmworkers move frequently within the United States. It would be extremely difficult for a legal services attorney in California to know whether a client, who has been working in the migrant stream in Arizona, has temporarily crossed the border into Mexico. *See* April Testimony at 24-25 (testimony of Cynthia Rice, California Rural Legal Assistance). Requiring the client to contact the attorney periodically is not technically feasible for many of farmworker clients. *See id.* at 25. In border communities where aliens travel back and forth across the border on a daily basis, legal services offices would have to require their clients -- who may be illiterate -- to keep a daily log to account for their movements. *See* April Testimony at 109 (testimony of Lynn Coyle, Lawyers Committee for Civil Rights Under Law). The confusion created by a such a requirement would be significant.

When the client returned to the United States, the administrative burdens to resume representation would once again have to be undertaken. This start-and-stop representation would be confusing to the client and would significantly undermine the effectiveness of representation. *See* March Comments at 209 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); April Comments at 47 (comment of Doreen Dodson, ABA/SCLAID); April Testimony at 90 (testimony of Bruce Iwasaki, Legal

Aid Foundation of Los Angeles). The rule would also create significant administrative burdens for the client, other parties, the courts, and administrative agencies. *See* March Comments at 209 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); April Comments at 47 (comment of Doreen Dodson, ABA/SCLAID). Withdrawal may severely prejudice the clients' claim. *See* March Comments at 50 (comment of Francisco J. Bricio, Attorney at Law). Clients whose counsel withdrew would face the possibility of having their case dismissed if the client failed to respond to discovery or comply with procedural requirements. *See* April Testimony at 82 (testimony of Victor Lara, Attorney at Law). In California, the client's rights to representation would be lost in certain administrative proceedings. *See* March Comments at 209 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); April Testimony at 19-20 (testimony of Cynthia Rice, California Rural Legal Assistance).

The rule would also invite abuse. Opposing counsel and parties could seek to compromise the alien client's rights by delaying the litigation or intentionally filing discovery and other motions when they know the client is out of the country and unrepresented. *See* March Comments at 74 (comment of Keith S. Ernst, Attorney at Law); March Comments at 209 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); April Testimony at 21 (testimony of Cynthia Rice, California Rural Legal Assistance). Opponents could also seek to dismiss the litigation or to disqualify the alien's counsel for engaging in unauthorized representation. *See* April Testimony at 83 (testimony of Victor Lara, Attorney at Law).

## ***2. Professional Obligations***

After examining rules of professional responsibility in their states, attorneys in North Carolina, Pennsylvania, Washington, Oregon, and New Mexico have concluded that the rules would prohibit them from commencing representation of an alien client if they would be required to terminate representation upon the alien's temporary departure from the United States. *See* March Comments at 22 (comment of Robert J. Willis, Attorney at Law); March Comments at 52 (comment of Arthur N. Read, Friends of Farmworkers); March Comments at 70 (comment of Patrick McIntyre, Northwest Justice Project); March Comments at 73 (comment of Keith S. Ernst, Attorney at Law); March Comments at 143 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 217 (comment of Sarah M. Singleton, Attorney at Law). In Georgia, the rules of professional responsibility would limit representation to matters that could be quickly settled while the client was still in the United States. *See* March Comments at 101 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program). A professor at the College of William and Mary School of Law, on the other hand, concludes that ethical obligations do not bar representation of aliens who will not be in the United States continuously during the course of the representation. *See* March Comments at 262-63 (comment of John Levy, College of William & Mary School of Law). This commentator concluded that if the client agrees to the representation with the knowledge that the attorney must seek to withdraw under the rules, and the court refuses to grant the withdrawal motion, the attorney would be required to continue the representation. *See id.* at 262. Other commentators stated that, even where rules of professional responsibility would not absolutely bar representation, the unavailability of substitute counsel could ethically compel LSC attorneys to refuse representation. *See* March Comments at 38 (comment of Bill Beardall, Texas Rural Legal Aid); March Comments at 73 (comment of Keith S. Ernst, Attorney at Law); March Comments at 209 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance).

## H. Practice of Grantees

It has been a long-standing practice of legal services recipients to continue legal representation of alien clients, including H-2A clients, after the clients have left the United States. *See* March Comments at 203 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); March Comments at 144 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Testimony at 51 (testimony of Mary Lee Hall, Legal Services of North Carolina); March Testimony at 113 (testimony of Javier Riojas, Texas Rural Legal Aid). Virtually every legal services recipient that submitted written comments to this Commission described cases where the program continued to represent alien clients after they have left the U.S. *See, e.g.*, March Comments at 32 (comment of Bill Beardall, Texas Rural Legal Aid); March Comments at 54-55 (comment of Arthur N. Read, Friends of Farmworkers); March Comments at 69 (comment of Patrick McIntyre, Northwest Justice Project); March Comments at 99-100 (comment of Nan Schivone and Phyllis Holmen, Georgia Legal Services Program); March Comments at 107 (comment of Robert Salzman, Legal Aid Society of Mid-New York, Charlotte Sibley and Patricia C. Kakalec, Farmworker Law Project); March Comments at 129 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 159 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al); March Comments at 168 (comment of Kevin G. Magee, Legal Action of Wisconsin); March Comments at 194 (comment of Gary M. Restaino, Community Legal Services); March Comments at 198 (comment of Vincent H. Beckman, III, Illinois Migrant Legal Assistance Project); March Comments at 201 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); March Comments at 228 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Comments at 271 (comment of Lisa Butler, Florida Rural Legal Services); April Comments at 106 (comment of Garry G. Geffert, West Virginia Legal Services Plan); April Testimony at 89 (testimony of Bruce Iwasaki, Legal Aid Foundation of Los Angeles).

To date, LSC has never taken action against programs that have continued to represent alien clients after they have left the United States. *See* March Comments at 144 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 201 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); April Comments at 106 (comment of Garry G. Geffert, West Virginia Legal Services Plan); April Testimony at 22 (testimony of Cynthia Rice, California Rural Legal Assistance). This lack of LSC action on the alien representation issue occurred in the face of vigorous LSC audits and scrutiny of the recipient's practices. *See* March Comments at 144 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); April Testimony at 22 (testimony of Cynthia Rice, California Rural Legal Assistance).

In 1993 the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants published an exhaustive study of farmworker legal services. AMERICAN BAR ASSOCIATION, STUDY OF FEDERALLY FUNDED LEGAL AID FOR MIGRANT FARMWORKERS (1993). *See* April Testimony at 37 Exhibit 2 (testimony of Jack Londen, Attorney at Law). This study addressed the list of legislative proposals which agricultural enterprises were attempting to impose on legal services recipients. In preparation of the final report, the Standing Committee during a fourteen month period conducted hearings, solicited comments and testimony, and reviewed the literature from supporters and critics of legal services for migrant farmworkers. *See id* at 39. Throughout the study period, the presence requirement was never mentioned as an issue. *See id*.



The agricultural employer community has been aware that alien farmworkers, both H-2As and other aliens, continued to be represented by LSC-grantees after workers had left the country. Individual employers were aware as claims were pursued against them after their former H-2A workers had left the United States. *See* April Testimony at 22 (testimony of Cynthia Rice, California Rural Legal Assistance). LSC attorneys have requested and received court continuances, special provisions, and discovery orders based on representations to the court and to the opposing party that the client would be out of the country when the hearing or deposition was scheduled. *See id.*; March Comments at 203 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance). Courts and opposing counsel have cooperated in scheduling hearings for times when the parties are likely to be in the country. *See id.* No evidence was submitted to the Commission that either the agricultural community or individual growers have ever previously contended that an LSC recipient was acting improperly by representing an alien who was out of the United States. *See* March Testimony at 26-27 (testimony of Garry G. Geffert, West Virginia Legal Services Plan); April Testimony at 32 (testimony of Cynthia Rice, California Rural Legal Assistance). The North Carolina Farm Bureau stated that since 1983, it had never complained that an LSC recipient was improperly representing aliens who were no longer in the United States. *See* March Testimony at 77 (testimony of Paula Gupton, North Carolina Farm Bureau Federation). The Farm Bureau witness testified that the Bureau was more concerned about recruitment of new clients outside the United States than about ongoing representation of aliens. *See id.* at 85-86.

### III. LEGAL ANALYSIS

Part III of this report analyzes applicable law and applies it to the findings in Part II.

#### A. The Statutory Language

The appropriations language that regulates the scope of representation that may be provided by LSC recipients to aliens provides that:

None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to [a recipient] . . . (11) that provides legal assistance for or on behalf of any alien, *unless the alien is present in the United States* and is :

(A) an alien lawfully admitted for permanent residence as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20));

(B) an alien who - (i) is married to a United States citizen or is a parent or an unmarried child under the age of 21 years of such a citizen; and (ii) has filed an application to adjust the status of the alien to the status of a lawful permanent resident under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), which application has not been rejected;

(C) an alien who is lawfully present in the United States pursuant to an admission under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157) (relating to refugee admission) or who has been granted asylum by the Attorney General under such Act;

(D) an alien who is lawfully present in the United States as a result of withholding of deportation by the Attorney General pursuant to section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h));

(E) an alien to whom section 305 of the Immigration Reform and Control Act of 1986 (8 U.S.C. 1101 note) applies, but only to the extent that the legal assistance provided is the legal assistance described in such section; or

(F) an alien who is lawfully present in the United States as a result of being granted conditional entry to the United States before April 1, 1980, pursuant to section 203(a)(7) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(7)), as in effect on March 31, 1980, because of

persecution or fear of persecution on account of race, religion, or political calamity.

Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. No. 104-134, tit. V, § 504(a)(11), 110 Stat. 1321, 1321-54 (emphasis added).

A statutory term is to be interpreted based on its plain and ordinary meaning, in light of its context and the purpose and design of the statute as a whole. “[I]t is a ‘fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.’” *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Automobile, Aerospace, & Agricultural Implement Workers of America, Int’l Union*, 523 U.S. 653, 118 S.Ct. 1626, 1629 (1998) (citation omitted). “The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also Bailey v. United States*, 516 U.S. 137, 145 (1995) (“We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme.”). Moreover, it is a well-established rule that Congress is presumed not to have intended absurd results. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994), *citing Public Citizen v. United States Department of Justice*, 491 U.S. 440, 453-55 (1989); *cf. Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring) (“We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the [language] that avoids this consequence. . . .”).

Analyzed in light of these canons of interpretation, the Corporation’s appropriations act requires that an alien must be “present in the United States” in order to be eligible for legal assistance.<sup>12</sup> Construing the term “present” according to its ordinary meaning, it is clear that the statute requires the alien to be physically present in the United States<sup>13</sup> at some point. This conclusion does not end the inquiry, however, because the question before the Commission is not *whether* an alien must be physically present in the United States, but *when* the alien must be present in order to be entitled to LSC representation. Here, the language provides no express statement on when an alien must be present in the United States and other familiar terms of immigration law, such as “continuous physical presence” are not used.

The factual record and the statutory scheme in which the language arises, on the other hand, provide an important context for consideration of the legal question of when an alien must be “present in

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<sup>12</sup> The statutory provision is implemented in the corporation’s alien eligibility rule. 45 C.F.R. pt. 1626 (1999).

<sup>13</sup> The term “United States” is defined in the INA and Part 1626 as “the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.” *See id* §1626.2(h); 8 U.S.C. § 1101(a)(38).

the United States.” As the Corporation has noted, the statutory language may be read alternately to require that (1) an alien must be physically present in the United States when the cause of action for which the recipient provides legal assistance arises; (2) an alien must be physically present only when legal representation is commenced; or (3) an alien must be physically present in the United States any time the alien is provided legal assistance from an LSC grantee.<sup>14</sup> No single interpretation, however, is clearly compelled by the statutory language. For example, nothing in the LSC authorization language keys representation to when the cause of action arises or specifically requires that the alien be present when the representation commences. In particular, the statute does not expressly require that an alien be continuously physically present in the United States throughout the period of representation in order to be eligible for legal assistance.

Consideration of the immediate context in which the language appears raises further questions regarding the meaning of the presence requirement. The statute’s application of the presence requirement to legal permanent residents, for example, is in some tension with the fact that those aliens are legally entitled to leave the United States temporarily without affecting their immigration status. *See* discussion *supra* Part II(C)(1). Furthermore, H-2A workers by definition are physically present in the United States only temporarily. Reading “presence” in the statute to require uninterrupted, continuous physical presence would mean that Congress, without using such language, intended to deny LSC representation to aliens who engaged in federally-authorized travel that did not affect their immigration status. In the case of H-2A workers, the reading would require the conclusion that Congress intended to provide H-2A workers with legal services representation on claims arising from their employment contracts only for the very brief periods that the workers are in the United States -- potentially rendering the promise of legal representation largely meaningless. These difficulties support further inquiry into the meaning of the presence requirement.

In short, an examination of the language of the presence requirement and the statutory context in which it arises raises a number of interpretive problems and fails to resolve the question of when an alien must be present in the United States in order to be entitled to legal services representation. The Commission concludes that the statutory language is ambiguous on this point.

## **B. Legislative History**

### ***1. Origins of the Presence Requirement***

The legislative history provides assistance in analyzing the presence requirement. The LSC Act of 1974, as amended, was adopted “to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances; . . . to provide high quality legal assistance to those who would otherwise be unable to afford adequate legal counsel; . . . [and to] provid[e] legal assistance to those who face an economic barrier to adequate legal counsel.” 42 U.S.C. § 2996 (1994). The LSC Act itself

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<sup>14</sup> 64 Fed. Reg 8140, 8141 (1999).

includes no restrictions on the provision of legal assistance by LSC recipients to aliens. However, in the early 1980s Congress began restricting legal assistance to aliens by LSC recipients pursuant to *provisos* in the Corporation's appropriations acts. Originally, these *provisos* permitted the use of LSC funds for legal assistance to an alien if the alien was "a resident of the United States" and fell within one of the permissible alien categories, all of which required that an alien was in lawful status.<sup>15</sup> *See, e.g.*, Fiscal Year Appropriations, 1982, Pub. L. No. 97-51, 95 Stat. 958 (1981); Fiscal Year Appropriations, 1983, Pub. L. No. 97-377, 96 Stat. 1830 (1982); and a long series of continuing resolutions which included the residency requirement. "Residence" is a term of art within the meaning of immigration law and is not synonymous with physical presence. *In re Olan*, 257 F. Supp. 884 (S.D. Cal 1966).<sup>16</sup> Resident aliens are allowed to enter and leave the United States temporarily without relinquishing their status. *See* discussion *infra* Part II (C)(1). Thus, prior to FY 1984, LSC recipients were authorized to represent aliens who were legal residents of the United States regardless of whether the alien was absent from the United States during some part of the representation.

In drafting the Corporation's Fiscal Year (FY) 1984 appropriations act, Congress for the first time replaced the language "resident of the United States" with "present in the United States." Departments of Commerce, Justice, and State, the Judiciary, and Related Appropriations Act, 1984, Pub. L. 98-166, 97 Stat. 1071 (1983). The legislative history reveals no explanation for this change. The phrase "present in the United States" appears to have originated in proposed legislation that would have expanded the categories of aliens eligible for LSC funded representation.<sup>17</sup> The shift in language may have been based

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<sup>15</sup> From before the 1983 amendment until 1986, the categories of eligible aliens included: (1) an alien lawfully admitted for permanent residence; (2) an alien who was either married to a United States citizen or was a parent or an unmarried child under the age of twenty-one years of such a citizen and who had filed an application for adjustment of status under the INA; (3) an alien who was lawfully present in the United States as a refugee or who had been granted asylum by the Attorney General; (4) an alien who was lawfully present in the United States as a result of the Attorney General's withholding of deportation; and (5) an alien lawfully present in the United States as a result of being granted conditional entry. *See e.g.*, Public Laws 98-107 (1983); 98-166 (1983); 98-411 (1984); 99-103 (1985).

<sup>16</sup>The term "residence" is defined in the INA as "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. 8 U.S.C. § 1101(a)(33) (1994).

<sup>17</sup> The expanded list of eligible aliens included: "(1) spouses, parents, and unmarried citizens [sic] [children] of permanent residents; (2) Cuban and Haitian entrants as defined in paragraph (1) or (2) of § 501(e) of Public Law 96-422, as in effect on April 1, 1983; (3) persons paroled into the United States; and (4) aliens eligible for derivative U.S. citizenship under § 212(d)(5) of the Immigration and Nationality Act." H.R. REP. NO. 98-206, at 49 (1983). Spouses and parents of permanent residents could only be in the United States, if at all, in temporary, nonimmigrant classification and therefore would not be residents of the United States.

on the recognition that aliens in some of the proposed categories would not possess “residence” in the United States under the meaning of the INA (for example, parolees and Cuban/Haitian entrants). As noted above, the requirement of “presence” is frequently used in immigration laws to describe categories of aliens within the United States who may not have established “residence.” The proposed legislation was defeated, but the phrase “present in the United States” replaced the residence language found in earlier statutes. The new language received virtually no discussion; nothing in the legislative history suggests that Congress intended to adopt new or more stringent restrictions on alien representation. Statements in the Senate suggest that Congress may not have been aware that the presence language survived the defeat of the amendment.<sup>18</sup> In short, the FY 1984 change appears to have been the result of the proposal to expand LSC representation to aliens who were merely “present” as opposed to lawful residents. There is no evidence that Congress intended to deprive permanent resident aliens of continuous representation upon their leaving the country. Following the statutory change, LSC issued no new regulations interpreting the language, Congress called for no new interpretation, and LSC grantee practice did not change.

## ***2. H-2A Representation***

In 1986, Congress passed the Immigration Reform and Control Act of 1986, which expressly authorized LSC recipients to provide legal assistance to H-2A workers and Special Agricultural Workers (SAWS). Immigration Reform and Control Act of 1986 § 305, 302, Pub. L. No. 99-603, 100 Stat. 3359 (codified at 8 U.S.C. §§ 1101 note and 1160(g) (1994)). Congress avoided having to amend the LSC appropriations bills by specifically creating in IRCA the legal fiction that H-2A workers would be deemed lawful “permanent resident aliens” for the purposes of legal services representation under the existing categories of eligible aliens. IRCA § 305, 8 U.S.C. § 1101 note; April Comments at 55 (comment of Howard L. Berman, Member of Congress); April Testimony at 131 (testimony of Romano L. Mazzoli, Louis D. Brandeis School of Law, University of Louisville); April Testimony at 128 (testimony of Mark Schacht, California Rural Legal Assistance Foundation). Because SAWS and H-2A workers were deemed to be permanent resident aliens, they became subject to the presence requirement in the Corporation’s appropriations act. *See* March Comments at 33 (comment of Bill Beardall, Texas Rural Legal Aid). Legal assistance to H-2A workers was expressly limited to “matters relating to wages, housing, transportation, and other employment rights as provided in the worker’s specific contract.” IRCA § 305, 8 U.S.C. § 1101 note (1994).

The legislative history establishes that legal representation for H-2A workers was a crucial part of the legislative compromise that established the H-2A program. The creation of the H-2A program was controversial, given the history of prior temporary agricultural programs such as the Bracero program. Congress was aware of the problems that had arisen under such programs, and of the special vulnerability of temporary foreign workers.<sup>19</sup> During floor debate, considerable concern was expressed about the

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<sup>18</sup>*See* 129 CONG. REC. S28937 (Oct. 21, 1983) (Statement of Sen. Grassley); 129 CONG. REC. S29836 (Oct. 21, 1983) (Statement of Sen. Rudman).

<sup>19</sup>The Conference Report on IRCA noted in discussing the SAW program that “the Committee was ever mindful of the reports of abuses that occurred during the old Bracero program.” *See* H.R.

vulnerability and exploitation of such workers and the need for legal representation to give meaning to their legal rights. Congressman Berman explained on the House floor:

Part and parcel of that agreement was an understanding that the H-2 workers would be entitled if they otherwise qualified, and only if they otherwise qualified, to legal services representation, because without that, the protections contained for those workers, the housing protections, the domestic, the transportation protections, the piecework rate and adverse impact wage rates protections become utterly meaningless. The fact is the history of the abuses in that H-2 program, which has been documented time and time again, cannot be corrected without effective representation, as you could easily contemplate guest workers coming here for a short period of time, hoping to come back again, anxious to pick up a wage considerably higher than the wage they might be making in their own country, have no individual ability and no effective collective ability to enforce the protections that the U.S. law is supposed to guarantee them.

132 CONG. REC. H9866-68 (Oct. 10, 1986) (statement of Rep. Berman); *see also* March Comments at 35 (comment of Bill Beardall, Texas Rural Legal Aid); April Comments at 53-58 (comment of Howard L. Berman, Member of Congress). Representative Schumer agreed:

[Y]ou can give people all the rights you want, but if they have no way to enforce those rights, those rights are meaningless. We all know that INS is terribly overburdened; we all know that the Department of Agriculture,

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REP. NO. 99-682(I), at 83 (1986). The Report quoted the following testimony from the Western Growers Association:

The Bracero program has been likened by some to indentured slavery where employer exploitation was rampant and inhumane. . . . Some of the abuses that took place under the Bracero program can be directly attributed to the way the program was administered. The most glaring problem was the contractual relationship that existed requiring an employee to work for one employer. This, some argue, gave employers the ability to require more from Bracero workers based on a threat or promise they would be sent back to Mexico. . . .”

*Id.* at 83-84. The House Report noted that the H-2A program was designed to remedy “the inadequacy of current protections for farmworkers,” *id.* at 80, and to “protect the rights and welfare of all workers,” *id.* at 106; *see also* April Comments at 56 (comment of Howard L. Berman, Member of Congress).

the Department of Labor are overburdened . . . If we are not going to have legal services, why kid ourselves? Why not just abolish all the laws that are supposed to protect these folk; because if you do not have legal services, the laws are unenforceable and useless.

132 CONG. REC. H9867 (Oct. 10, 1986) (statement of Rep. Schumer). Representative Morrison also stressed the importance of giving H-2A aliens “a realistic way to enforce their rights.” 132 CONG. REC. H9868 (Oct. 10, 1986) (statement of Rep. Morrison).

The legislative history of IRCA makes clear that Congress intended for LSC recipients to provide meaningful legal representation to H-2A workers on matters arising under the employment contract. The conference report to IRCA explained the provision of legal services to H-2A aliens as follows:

Legal services are to be made available to H-2 aliens with regard to housing, wages, transportation and other conditions of employment under their H-2 contract. . . . It is the intent of the Conferees that contracts entered into shall not violate any provision of the Immigration and Nationality Act authorizing the H-2 program or any regulations issued pursuant to that Act. Further, the Conferees intend that the Conference substitute will secure the rights of H-2 agricultural workers under the specific contract under which they were admitted to this country.

*See* H. CONF. REP. NO. 91-1000, at 3 (1986); *see also* March Comments at 34 (comment of Bill Beardall, Texas Rural Legal Aid). The legislative history contains no evidence that Congress believed it was limiting legal representation of H-2A workers to the period when such workers were physically present in the United States. Neither the proponents nor the opponents of legal services representation argued that such a time limit applied. All the comments made regarding limitations on LSC representation for H-2A workers focused on the restriction of the subject matter of such representation to claims arising from the worker’s employment contract.<sup>20</sup>

In adopting the H-2A provision in IRCA, Congress was aware that H-2A workers were allowed

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<sup>20</sup>Representative Simpson, for example, stressed that “[t]he legal services that will be available to H-2 workers - and they are foreign nationals . . . — are limited only to housing, and transportation and wages and anything within the terms of the contract, nothing more. . . .The legal services are strictly limited to that.” 132 CONG. REC. S16900 (Oct. 17, 1986) (statement of Rep. Simpson); *see also* 132 Cong. Rec. H10588 (daily ed. Oct. 15, 1986) (statement of Rep. McCollum); 132 CONG. REC. H10587 (daily ed. Oct. 15, 1986) (statement of Rep. Mazzoli); 132 CONG. REC. H10590 (daily ed. Oct. 15, 1986) (statement of Rep. Rodino); 132 CONG. REC. S16911 (Oct. 17, 1986) (statement of Sen. Kennedy); March Comments at 36 (comment of Bill Beardall, Texas Rural Legal Aid); April Comments at 55 (comment of Howard L. Berman, Member of Congress).



to remain in the United States only temporarily. Congress must also be presumed to have authorized the representation with knowledge of the presence requirement in the Corporation's appropriations act. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 801 (1998); *United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999). It is unlikely that Congress would have added H-2A workers to the categories of eligible aliens without reviewing the restrictions on representation — including the presence requirement — that had been included annually in the Corporation's appropriations act. Indeed, Congress crafted the provision in IRCA permitting H-2A representation to be consistent with the language in the LSC appropriations act. Thus, IRCA deemed H-2As to be “permanent resident aliens” -- a category eligible for LSC legal assistance -- for the purposes of receiving legal assistance from the Corporation.<sup>21</sup> According to the comment from Representative Berman provided to the Commission, Congress was aware of the presence requirement and intended that the requirement be consistent with the provision of meaningful representation to the H-2A workers under IRCA:

Those of us who actively participated in drafting section 305, granting LSC the ability to represent H-2A workers and H-2A eligibility for such services, were very much aware of the alien-representation restrictions in the annual LSC appropriations bills... Congress did not view the *present in the United States* language in the appropriations bill as limiting the representation of H-2A workers to the time period during which they remained in the United States. The H-2A workers' presence in the United States under the temporary worker visa entitled them to LSC eligibility.

April Comments at 55-56 (comment of Howard L. Berman, Member of Congress). H-2A workers were to be treated as permanent legal residents for the limited purpose of legal services representation for claims on their contracts.

This legislative history suggests that Congress, with full knowledge that H-2A workers were only in the United States on a temporary basis, intended that their rights under their H-2A contracts be protected by being given access to meaningful legal services. Nothing in the congressional debate discussing the

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<sup>21</sup> Section 305 of IRCA provided that:

A nonimmigrant worker admitted to or permitted to remain in the United States under section 101(a)(15)(H)(2)(a) of the Immigration and Nationality Act . . . for agricultural labor or service shall be considered to be an alien described in section 101(a)(2) of such Act [a permanent resident alien] . . .for purposes of establishing eligibility for legal assistance under the Legal Services Corporation Act (42 U.S.C. 2996 et seq.) But only with respect to legal matters relating to wages, housing, transportation, and other employment rights as provided in the worker's specific contract under which the nonimmigrant was admitted.

limitation of legal services to rights under the H-2A contract ever suggested that representation could last only as long as the H-2A worker remained in the United States. Therefore, we should choose the interpretation of presence that effectuates the Congressional purpose to provide meaningful representation to H-2A workers under their contracts.

### **3. 1996 Continuing Resolution**

In the 1996 Omnibus Continuing Resolution, Congress revised the restrictions on alien assistance by applying the restrictions to all funds received by LSC entities. Pub. L. No. 104-134, 110 Stat. 1321. Congress also for the first time explicitly added H-2A workers to the categories of aliens eligible for legal assistance under the LSC appropriations act, although that assistance remained limited to claims under the workers' employment contract. The other categories of aliens and the presence requirement were retained. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, *incorporating by reference* Omnibus Consolidated Recissions and Appropriations Act of 1996, § 504(a)(11), Pub. L. No. 104-134, 110 Stat. 1321. Nothing about the application of the "is present" language to the alien categories was altered.

The legislative history of the 1996 revision contains no discussion of the "present in the United States" requirement and no indication that Congress sought to alter existing practice regarding the representation of aliens. *See* March Comments at 251 (comment of Alan Houseman, Center for Law & Social Policy). The McCollum-Stenholm bill, on which the 1996 appropriations were based, did not address the presence requirement, and the statement accompanying the introduction of that bill noted only that the bill incorporated the provisions from IRCA into the existing appropriation's provisions on representation of certain aliens. *See id.* Thus, the 1996 revision simply brought together in one place the pre-existing provisions regarding representation of aliens, and applied these restrictions to all funds of an LSC recipient. Neither the language nor the legislative history of the statute suggest that Congress intended to alter the application of the presence requirement.

In sum, the legislative history of the presence requirement confirms that Congress intended to provide meaningful representation to eligible aliens, including H-2A workers on claims arising from their employment contract; and that Congress did not understand the presence requirement to severely alter or restrict this representation. The Legal Services Act was adopted to provide effective legal representation to low income persons. *See* April Testimony at 9 (testimony of Cynthia Rice, California Rural Legal Assistance Program). The presence language appeared in the LSC appropriations act as part of an effort to expand LSC representation to aliens other than lawful residents, and does not appear to have been intended to limit LSC representation to aliens who were continuously physically present in the United States. Similarly, the express purpose of section 305 of IRCA was to "secure the rights of H-2 agricultural workers under the specific contract under which they were admitted to this country." *See* H. CONF. REP. NO. 91-1000, (1986). Such representation was intended to prevent the exploitation of foreign H-2A workers and to ensure that the wages and working conditions of U.S. workers would not be undermined. Finally, nothing in the 1996 legislation altered the effect of the presence requirement on H-2A's or any other alien category.

## C. Implications of the Presence Requirement

The factual record provides an important context for consideration of the legal question of the meaning of the presence requirement for representation by LSC grantees. As noted above, three possible interpretations of the presence language were listed in the Corporation's Federal Register notice: (1) an alien must be physically present in the United States when the cause of action for which the recipient provides legal assistance arises; (2) an alien must be physically present only when legal representation is commenced; and (3) an alien must be physically present in the United States any time the alien is provided legal assistance from an LSC grantee.<sup>22</sup> Upon careful consideration of the language and purposes of the statute and the legislative history, the Commission has determined that none of these formulations fully responds to the purposes of the statute or the intent of Congress. Furthermore, the record demonstrates that the interpretations initially offered by the Corporation in the Federal Register notice would contradict Congress' clear purpose of providing meaningful legal representation to indigent lawful aliens and lead to absurd results.

### 1. *Unrestricted Categories*

In giving content to the presence requirement, it is important to distinguish between the unrestricted categories of aliens and H-2A workers. The record before the Commission establishes that permanent residents and other aliens frequently leave the United States to visit spouses and children, to address family problems, and to survive during long periods of unemployment in the United States. The category of permanent residents includes commuter aliens, who work in the United States but whose actual residence is across the border in Mexico. All of these aliens are legally authorized to leave and re-enter the United States.

As applied to the situation of unrestricted aliens, the three interpretations of the presence requirement suggested in the Federal Register notice would lead to unintended and absurd results. Under an interpretation that the alien must be physically present when the cause of action commenced, or legal representation began, an alien who was evicted from her apartment, or against whom divorce proceedings were commenced while she was temporarily out of the United States to attend a funeral or attend to a family emergency, would be barred from LSC representation. LSC attorneys representing commuter aliens who migrate daily would be placed in the predicament of representing such aliens only in claims that happened to arise during the portion of the day when the alien was in the United States. Under an interpretation that the alien must be physically present when the representation commenced, an alien who was temporarily outside the United States would be barred from obtaining legal services representation on

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<sup>22</sup> 64 Fed. Reg. 8140, 8141 (1999).

any matter during her absence. These interpretations would also invite exploitation by allowing litigants to simply wait until an alien temporarily departed the United States before cutting off workers compensation benefits, initiating eviction, repossession, divorce or child custody proceedings, or otherwise triggering the cause of action or a need for representation. U.S. agricultural recruiters in Mexico could willfully misrepresent working conditions to permanent legal residents across the border, knowing the alien would be barred from legal assistance on her federally-protected MSWPA claim.

Requiring a permanent legal resident alien to be physically present in the United States throughout the course of LSC legal representation would also be unworkable and lead to absurd results. The record is undisputed that many of the kinds of lawsuits involving permanent resident aliens and other unrestricted aliens take months, if not years, to reach a conclusion, and that permanent residents and other eligible aliens regularly travel outside the United States. An interpretation that required the alien to be continuously present throughout the course of the litigation would confront indigent aliens with the Hobson's choice of either accepting representation or visiting their families abroad.

Moreover, requiring legal services attorneys to monitor their clients' movements and formally withdraw whenever the client left the country would create extraordinary burdens for the LSC grantees, the clients, opposing parties, and the courts. An attorney whose client had to travel to Mexico to attend her father's funeral, for example, would have to withdraw from the case during the client's absence. *See* April Testimony at 139-140 (testimony of Sylvia Argueta, Mexican American Legal Defense and Education Fund). LSC attorneys representing alien clients living in border communities would face the prospect that they could work on a client's case in the morning when the client was in El Paso but not in the afternoon when the client was shopping in Juarez. *See* April Testimony at 109 (testimony of Lynn Coyle, Lawyers Committee for Civil Rights Under Law). Application of this interpretation to the U.S.-Mexico border would disrupt access of permanent legal residents to the legal system in the poorest region of the United States. *See* March Comments at 155 (comment of Michael Wyatt, Texas Rural Legal Aid, et. al). It also would provide perverse incentives to opposing litigants to drag out legal proceedings with the expectation that an alien might have to temporarily depart from the country, or engage in other forms of procedural abuse. *See* March Comments at 74 (comment of Keith S. Ernst, Attorney at Law); March Comments at 201 (comment of Jose Padilla and Cynthia L. Rice, California Rural Legal Assistance); April Testimony at 21 (testimony of Cynthia Rice, California Rural Legal Assistance).

The private bar and other nonprofit legal services providers are neither available, willing, or able to take over the representation of these populations. As one witness with extensive experience organizing private pro bono activities put it, "the likelihood that private lawyers will take on clients who would be excluded from LSC representation by the stringent interpretation of [the presence] requirement is zero." April Testimony at 41 (testimony of Jack Londen, Attorney at Law).

The legislative history contains no evidence that Congress intended LSC representation of legal permanent residents and other aliens to turn on the accident of where an alien happened to be at the moment the cause of action arose or the litigation commenced, or to require the alien to be continuously physically present throughout the course of representation. The Commission does not believe that Congress intended to force resident aliens to choose between temporary trips outside the United States

and continued representation in pending litigation. The Commission has not been able to discern any congressional purpose that would be served by tying the right to representation on movements that have no effect on either the alien's lawful immigration status or her legal right to pursue her claim in U.S. courts. The Commission is unwilling to recommend an interpretation of the statute that produces such consequences, absent an express congressional intent that such burdens be imposed.

## **2. H-2A Aliens**

The factual record before the Commission demonstrates that Congress' purpose of providing meaningful representation to H-2A workers for claims arising under their employment contracts cannot be accomplished under the original interpretations offered in the Federal Register notice. Many of the contract rights that were mandated by Congress in IRCA -- such as reimbursement for return transportation, workers compensation, the 3/4 guarantee, and claims that a grower failed to mail the worker's final paycheck -- often do not arise until after the worker has returned home. A requirement that the H-2A worker be physically present in the United States when the cause of action arises or the representation commences thus would deprive H-2A workers of representation on many of the most basic employment contract protections afforded by Congress, directly contrary to Congress' purpose. As a practical matter, this interpretation would also bar most other legal representation for H-2A workers, since the record clearly demonstrates that, due to their fear of losing their jobs, their isolation, lack of resources and language skills, and vulnerability, H-2A workers often are both unwilling and unable to contact a legal services office until after they have left their employment. H-2A aliens are required by law to leave the country within ten days of the termination of their employment, and generally remain in the control of the employer during this period.

The interpretations could also create incentives for abuse. An interpretation that the representation must commence while the alien is still in the United States would encourage employers to create even greater obstacles to access to legal services while the workers are physically in the United States. Employers who successfully excluded legal services representatives from their labor camps or intimidated workers into not contacting legal services during the course of employment could ensure a workforce without access to legal representation. Under an interpretation that the claim must arise while the worker was in the United States, unscrupulous employers would be able to exploit the system by, for example, failing to mail a final paycheck or 3/4 guarantee payment after the H-2A worker left the country, with knowledge that the worker would not be entitled to legal representation on the claim.

Alternatively, an interpretation of the presence requirement that required H-2A workers to be present in the United States throughout the course of the representation would eviscerate their right to legal representation altogether. H-2A workers by definition are required to leave the United States within a year, and the record establishes that most H-2A workers are physically present in the United States for only two to five months. The record establishes that, with the exception of the most minor and undisputed claims, none of the employment claims for which Congress authorized representation can be completed during the brief period that the H-2A worker is in the country, even if the claim arose early during the worker's stay and the worker was immediately able to contact legal services. Many of the claims of H-2A workers are legally complex, and all take months, if not years, to litigate to completion. The contradiction

between this interpretation and Congress' purpose of providing meaningful representation for H-2A workers is patent. The interpretation assumes that Congress took from H-2A workers with one hand what it gave with the other. The law will not impute such a purpose to Congress.

The factual record, moreover, demonstrates the absurdity of this approach. As the record shows, it is not uncommon for H-2A workers to contact legal services for the first time as they board the bus on the way home, and an interpretation that LSC representation is available only while the alien is physically present creates the prospect that Congress authorized legal services attorneys to represent such H-2A workers only during the bus ride to the border. The rule again would invite exploitation. Employers could veto a worker's decision to seek legal representation by terminating the worker and immediately deporting her. *See* March Comments at 128 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 231 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Comments at 272 (comment of Lisa Butler, Florida Rural Legal Services). Employers wishing to avoid paying workers compensation could deny coverage until the worker was no longer in the country, or discontinue payments after the worker had returned home. Opposing litigants and H-2A employers could prolong the legal process simply by refusing to return legal service attorneys' phone calls or delaying provision of records to which the worker was entitled to ensure that the H-2A worker left the United States before a dispute could be resolved. *See* March Comments at 231 (comment of Melissa A. Pershing, Legal Services of North Carolina); March Testimony at 34 (testimony of Garry G. Geffert, West Virginia Legal Services Plan). In all of these cases, legal services would be barred from assisting the worker in these valid employment contract claims.

In short, the record is clear that H-2A workers are unlikely to raise legal claims before the end of their employment contract, that they are required to leave the United States at the end of their contracts, that many of their claims arise after their departure, and that legal proceedings cannot be completed before they depart. Furthermore, the availability of legal services for H-2A workers from non-LSC funded non-profit organizations and private attorneys is extremely limited; and government agencies either lack the resources or the legal authority to enforce the statutory rights of these workers. The Commission recognizes that representation of agricultural workers was a central element in the legislative crafting of the H-2A program. We conclude that a reading of the statute that would bar representation of an H-2A worker based on the fact that he or she has left the United States would leave H-2A workers without meaningful representation on their employment contract claims, directly contrary to Congress' express purpose, and we decline to sanction such a result.

#### **IV. CONCLUSION: THE MEANING OF THE PRESENCE REQUIREMENT**

Together, the language, purpose, and legislative history of the applicable statutes, and the factual record before the Commission, suggest an interpretation of the statute that would authorize the following representation:

For an alien in one of the unrestricted categories representation would be authorized so

long as the eligible alien is present sufficient to maintain residence or lawful immigration status. Under this interpretation, LSC grantees who have begun representation of a permanent resident alien may continue that representation should the alien be temporarily outside the United States. Grantees may also initiate representation of aliens in the unrestricted categories who are temporarily outside the United States, provided that they have been present sufficient to maintain and have not abandoned their residence or INA status. LSC grantees may not represent aliens in this category who have never entered or been present in the United States.

For H-2A workers, representation is authorized if the workers have been admitted to and have been present in the United States pursuant to an H-2A contract, and the representation arises under their H-2A contract. LSC grantees are authorized to litigate this narrow range of claims to completion, despite the fact that the alien may be required to depart the United States prior to or during the course of the representation. LSC grantees may not represent aliens in this category who have never entered or been present in the United States.

As discussed above, this interpretation comports with the language of the presence requirement in light of Congress' object and purpose. The language and legislative history of the LSC appropriations acts and the H-2A statute make clear that Congress intended to provide meaningful legal representation to aliens in the designated categories, and there is no evidence that Congress considered the presence requirement to severely restrict this interpretation. To the contrary, the presence requirement was inserted into the statute for the apparent purpose of expanding LSC representation of legal aliens. Moreover, as interpreted by the Commission, the presence requirement sustains Congress' clear goal, since the early 1980s, of restricting LSC representation to aliens with lawful status.

The Commission's interpretation also comports with the consistent practice of LSC grantees, and the understanding of growers, and of Congress. As noted above, LSC grantees have regularly provided legal assistance to eligible aliens who have left the United States at some point during the representation. LSC has never taken action against a recipient which continued to represent alien clients after the client had left the United States. Until recently critics of legal services recipients, who had knowledge of the alien representation practices of legal services recipients, never questioned the legality of a recipient's representation of an alien after the alien had left the United States. It is well settled that a history of practice under a statute can aid in its interpretation, particularly when Congress has amended the statute without disapproving of the administrative practice. *N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 (1981). In this case, the practices of LSC recipients, of growers, and of Congress all support the Commission's interpretation.

Finally, the Commission's interpretation of the presence requirement is fully consistent with the overarching purpose of the relevant congressional statutes. The Legal Services Act was adopted to provide full and effective legal representation to low income persons. In enacting the LSC Act, Congress declared the need to provide equal access to the nation's system of justice for individuals who seek redress of grievances and said attorneys providing legal assistance must have full freedom to protect the best

interests of their clients in keeping with the Code of Professional Responsibility, the Canon of Ethics, and the high standards of the legal profession. The protections of the H-2A statute were adopted, *inter alia*, to ensure that the employment of foreign workers would not undermine the wages and working conditions of U.S. workers, and Congress provided legal services representation “to secure the rights of H-2 agricultural workers” under their employment contracts. The record before the Commission is undisputed that LSC entities cannot provide full and meaningful representation to H-2A workers and to many other eligible aliens under the alternative constructions of the presence requirement. *See* March Comments at 132 (comment of Shelley Latin, Virginia Farmworkers Legal Assistance Project); March Comments at 143 (comment of D. Michael Dale, Oregon Law Center, and Janice Morgan, Legal Aid Services of Oregon); March Comments at 267 (comment of Lisa Butler, Florida Rural Legal Services); March Testimony at 41 (testimony of Garry G. Geffert, West Virginia Legal Services Plan); March Testimony at 51-52 (testimony of Mary Lee Hall, Legal Services of North Carolina); March Testimony at 107 (testimony of Javier Riojas, Texas Rural Legal Aid); March Testimony at 148 (testimony of Rob Williams, Florida Legal Services). Instead, such interpretations would simply promote the exploitation of vulnerable, low income aliens. The Commission’s interpretation is the only interpretation which comports with the language and legislative history of the presence requirement and which permits full and meaningful representation to aliens eligible for legal assistance consistent with Congress’ purpose.



# ***APPENDIX***

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# **ERLENBORN COMMISSION MEMBERS**

## **Thomas Alexander Aleinikoff**

Thomas Alexander Aleinikoff is a Professor of Law at Georgetown University Law Center, where he has taught courses in immigration and refugee law, citizenship law, constitutional law, and public law and legislation since June 1997. He also serves as a Senior Associate at the Carnegie Endowment for International Peace where he is Director of the Comparative Citizenship Project.

Professor Aleinikoff has experience both in the public sector and in academia that has provided him with expertise in immigration law. After serving as a law clerk to the Honorable Edward Weinfeld, U.S. District Judge, from 1977-8, he worked for the Department of Justice from 1978 through 1981, first as an Attorney Advisor in the Office of Legal Counsel then as Counselor to the Associate Attorney General. He then began his academic career at the University of Michigan, where he earned the title of full Professor in 1986. He took a leave of absence in 1994 to join the Clinton Administration as General Counsel of the Immigration and Naturalization Service, then moved into the position of Executive Associate Commissioner of Programs for this agency from 1995 through 1997.

Professor Aleinikoff's own education consists of a Bachelor of Arts degree, earned *summa cum laude* from Swarthmore College in 1974, and a Juris Doctor from Yale Law School in 1977. He has been engaged in many activities through his professional and university life, including serving on the Editorial Board of the Journal of Legal Education, as Faculty Advisor for the Georgetown Immigration Law Journal, and on the Committee on International Migration for the Social Science Research Council.

Additionally, Professor Aleinikoff has published several books and countless articles relating to immigration, international migration, and constitutional law. These include Immigration: Process and Policy, co-authored with Professor David A. Martin and first published in 1985, which helped to define immigration law as a legitimate field of academic study. The articles he has authored include "Between Principles and Politics: The Direction of United States Citizenship Policy" (Carnegie Endowment of International Peace, 1998), and "A Multicultural Nationalism?" (American Prospect, Jan.-Feb. 1998).

## **Gilbert F. Casellas**

Gilbert Casellas is currently the President and Chief Operating Officer of the Swarthmore Group, an Investment and Financial Advisory firm located in West Chester, Pennsylvania. Before coming to the firm in January 1999, Mr. Casellas had over twenty years of successful leadership and management experience in the public and private sectors.

Mr. Casellas began his career at the Philadelphia law firm Montgomery, McCracken, Walker &

Rhoads, where he worked for sixteen years. He also taught at the University of Pennsylvania School of Law and was a frequent lecturer at professional seminars throughout the United States. Mr. Casellas began his government service in 1993 when he was appointed General Counsel of the U.S. Department of the Air Force, where he served as the chief legal officer and final legal authority to more than 2000 military, civilian, and reserve attorneys. In 1994, President Clinton appointed Mr. Casellas as Chairman of the U.S. Equal Employment Opportunity Commission, a position he held until January 1998.

Mr. Casellas received a Bachelor of Arts degree from Yale University and his Juris Doctor from the University of Pennsylvania School of Law. From 1978 to 1980 he also served a two year clerkship with the Honorable A. Leon Higginbotham, Jr., of the United States Court of Appeals for the Third Circuit.

To add to his outstanding career achievements, Mr. Casellas has been a leader in many local, state, and national associations and received numerous awards for service and leadership, including the “Spirit of Excellence” Award from the American Bar Association. He has served as President of the Hispanic National Bar Association, Chairman of the Board of Directors of the Philadelphia Bar Association and a member of the House of Delegates of the American Bar Association. Currently, he serves on the boards of the University of Pennsylvania, the Prudential Insurance Company of America, the Puerto Rican Legal Defense & Education Fund, and the American Arbitration Association. In March 1998, he was appointed to serve on the bi-partisan U.S. Census Monitoring Board to oversee the 2000 decennial census.

## **Sarah H. Cleveland**

Sarah Cleveland is currently an Assistant Professor at the University of Texas School of Law teaching courses and doing research in foreign affairs and the Constitution, public international law, international human rights, and federal civil procedure.

Professor Cleveland's distinguished career includes experience working with refugee issues, human rights, and legal services. At the Yale Law School Lowenstein International Human Rights Clinic, she co-directed a litigation effort on behalf of Haitian refugees in federal challenge to the United States interdiction program, which included testifying before the U.S. Congress. From 1993 through 1994 she clerked for Associate Justice, Harry A. Blackmun of the U.S. Supreme Court. Professor Cleveland worked for two years (1994-1996) for Florida Legal Services as a Skadden Fellow, conducting civil impact litigation on behalf of Caribbean H-2A migrant farmworkers in the southeastern U.S.

Professor Cleveland earned a Bachelor of Arts degree *magna cum laude* from Brown University in 1987. She studied at Oxford University as a Rhodes Scholar from 1987 - 1989 then attended Yale Law School and was awarded her Juris Doctor in 1992.

In addition to receiving various academic awards, such as the Annual Human Rights Award from the American Immigration Lawyers' Association (1992) and a Mary McCarthy Fellowship in Public

Interest Law (1992), Professor Cleveland has published several articles. She was the author of “Global Labor Rights and the Alien Tort Claims Act,” published in the Texas Law Review in 1998, and the co-author of “Aliens and the Duty of Nonrefoulement: Haitian Centers Council v. McNary,” published in the Harvard Human Rights Journal in 1993.

### **John N. Erlenborn**

John Erlenborn has been an adjunct professor at Georgetown University Law Center since 1994 and member of the Legal Services Corporation Board of Directors since 1996. Mr. Erlenborn previously served on the LSC Board from 1989 – 1990. He has been serving as Vice Chair of the Board since 1997.

Mr. Erlenborn's career of public service has spanned four decades. In Illinois, he served as an Assistant State's Attorney in DuPage County from 1950 - 1952 and as State Representative in the Illinois General Assembly from 1957 - 1964. Mr. Erlenborn then was elected as U.S. Congressman from the 14th District of Illinois in 1965 and remained in office until 1984. He served on the Committee on Government Operations and the Committee on Education and Labor, and was one of the managers of the legislation that established LSC. In addition to his service on the LSC Board, he has also served special appointments to the International Labor Organization, the U.S. Department of Labor, the Pension Benefit Guaranty Corporation, and the U.S. Chamber of Commerce.

Mr. Erlenborn attended undergraduate courses at the University of Notre Dame, Indiana University, the University of Illinois, and Loyola University of Chicago. He received a Juris Doctor from Loyola University of Chicago in 1949.

### **Nancy Hardin Rogers**

In addition to her position on the Board of Directors of the Legal Services Corporation, Nancy Rogers is the Vice Provost for Academic Administration and Platt Professor of Law at Ohio State University.

Professor Rogers began her career by clerking for The Honorable Thomas D. Lambros of the United States District Court for the Northern District of Ohio. She also worked as a staff attorney for the Legal Aid Society of Cleveland. She first taught at Ohio State as a visiting professor in 1975, then as an adjunct professor. She became an assistant professor in 1983.

Professor Rogers earned a Bachelor of Arts degree from the University of Kansas and a Juris Doctor from Yale Law School.

Among Professor Rogers' publications are two books on mediation and the law that received Book Prizes in 1987 and 1989, respectively: a text for law students written with Richard A. Salem and a legal treatise written with Craig McEwen.

### **Enid F. Trucios-Haynes**

Enid Trucios-Haynes is an Associate Professor at the Louis D. Brandeis School of Law at the University of Louisville, where her main areas of academic interest are immigration law and administrative law.

Professor Trucios-Haynes began her legal career in the litigation department of the New York firm Rosenman & Colin. In 1988, she began to practice immigration and nationality law at the firm of Fragomen, Del Rey & Bernsen, P.C., where she participated in Congressional and Executive Department lobbying efforts and successfully engaged in appellate work before the U.S. Department of Labor 's Board of Alien Labor Certification Appeals. Among her many professional achievements, her work resulted in the revising of the U.S. Department of Labor's standard of review regarding U.S. employment experience acquired by foreign nationals in the permanent resident process.

Professor Trucios-Haynes graduated from Stanford Law School in 1986, where she served as Associate Editor of the *Stanford Law Review* and also volunteered at The Kingston Legal Aid Clinic in Kingston, Jamaica, West Indies, during a semester abroad. Her most recent publication, "Training Visas in the United States," appeared in *Immigration Briefings* in May 1993.

**LEGAL SERVICES CORPORATION**

**750 First Street, N.E., 11<sup>th</sup> Floor  
Washington, DC 20002-4250**

**Telephone: (202) 336-8800**

**Facsimile: (202) 336-8959**

**[www.lsc.gov](http://www.lsc.gov)**