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Immigration and Taxation



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Immigration, Employment and Tax Laws

Why do immigrants without status pay taxes?

- Obligated by law
- Opportunity to contribute
- Document compliance and residency



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Immigration, Employment and Tax Laws

Policy tensions:

- IRS interest in enforcing IRC and tax laws
- Confidentiality rules protect against immigration enforcement
- IRC § 6103 prohibits IRS disclosure of taxpayer information (but exceptions apply)
- Policy tensions exist (TIGTA vs. IRS Commissioner and National Taxpayer Advocate)



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Compliance Requirements for Undocumented Workers

- In 1996, the IRS created the Individual Taxpayer Identification Number (ITIN)
- ITINs are a tax processing number issued by the IRS for taxpayers who are not eligible to obtain SSNs
- Individuals eligible for an ITIN include:
 - Unauthorized immigrants,
 - Lawfully present individuals, and
 - U.S. resident aliens/nonresident aliens



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Social Security Numbers vs. ITINs

What is an ITIN?

- Generally for federal tax filing purposes only
- 9-digit numbers and begin with “9”
- Does not confer immigration status or work authorization
- Cannot be used after obtaining SSN
- Some other limited uses



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Compliance Requirements for Undocumented Workers

Benefits of the ITIN:

Facilitate compliance

- Ensure all workers report income and pay taxes:
 - ITIN filers pay over \$9 billion in annual payroll taxes
- Ensure all workers receive tax benefits:
 - In 2009, the Child Tax Credit protected approximately 1.5 million children from falling into poverty
- Support immigration petitions/applications



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Social Security Numbers vs. ITINs

Tax Credits:

- SSN and ITIN holders *generally* subject to same rules, deductions and credits
- IRC dictates refundable tax credit eligibility requirements
- Refundable tax credits are not “federal public benefits”
- Welfare reform amended Earned Income Tax Credit eligibility to render ITIN holders ineligible
- ITIN holders are still eligible for the Child Tax Credit (CTC) and the Additional Child Tax Credit (ACTC)



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Social Security Numbers vs. ITINs

Challenges to the ITIN

- Allegations of fraud → IRS has separate ITIN division
- Role of tax preparers
- Stricter requirements for obtaining an ITIN
- Threats to limit CTC/ACTC eligibility by excluding ITIN holders from eligibility for the credits



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Social Security Numbers vs. ITINs

Impacts of denying CTC/ACTC to ITIN holders

- Would deny over 2 million working poor families who pay taxes with ITINs access to the ACTC to cover basic expenses for raising children (clothing, food, medicine)
- Would deny up to 4 million U.S. citizen children access to the ACTC



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Social Security Numbers vs. ITINs

Impacts of denying CTC/ACTC to ITIN holders

Latino communities will be the hardest hit

- 80% of those impacted are Latino
- Nearly 40% of the 15 million children living in poverty are Latino
- Children of immigrants—nearly 9 million children—accounted for 30.5 percent of all children in the U.S. in low-income families



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Social Security Numbers vs. ITINs

Impacts of denying CTC/ACTC to ITIN holders

Undermines tax policies and intent of tax credits

- Over 50 percent of families using the refundable CTC earn less than \$20,000 per year
- Over 60 percent earn less than \$25,000 per year
- Over 75 percent earn less than \$30,000 per year
- Nearly half of these workers are raising children on hourly wages of \$10 or less



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Earned Income Tax Credit

- Refundable credit available to eligible individuals who meet the income requirements and other statutory requirements.
- The individual cannot be a nonresident alien in the year the credit is claimed.



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Earned Income Tax Credit, cont.

- Only a social security number can be used on the form to claim the credit. The credit is not available to individuals who file tax returns with an ITIN.
- IRS Position – Only individuals *authorized* to work in the U.S. should benefit from the EITC.



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Qualifying Child Credit

- A taxpayer can claim a \$1,000 credit against taxes owed for each *qualifying child* for which a dependency exemption has been claimed.
- The qualifying child must be a citizen, national or resident of the United States.



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Hope and Lifetime Learning Credits

- Credit available for certain taxpayers enrolled in higher education programs.
- Nonresident aliens must elect to be taxed as resident aliens in order to claim either credit.



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Dependency Exemption

- Taxpayers can claim exemptions against adjusted gross income for themselves, their spouses and dependents. In 2013, the amount of each exemption is \$3,900.
- Dependent is a qualifying child or a qualifying relative.



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Dependency Exemption, cont.

- A dependent includes only an individual who is a citizen, resident or national of the United States. It also includes a resident of a country contiguous to the United States.



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Affordable Care Act

- Coverage for health benefits is available only to individuals who are citizens, nationals or lawfully present in the U.S.



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Affordable Care Act

- ACA raises new issues for undocumented workers.



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Compliance Requirements for Undocumented Workers

- Tax compliance casts a favorable light on an individual seeking a discretionary U.S. immigration benefit.



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Compliance Requirements for Undocumented Workers

- Return filing requirements:
 - Resident aliens must report their worldwide income.
 - Nonresident aliens must report their income effectively connected with the U.S. and their U.S. sourced income.



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Individual Taxpayer Identification Number (ITIN)

- Individuals who do not have or are not eligible for a social security number must apply for an ITIN.
- The application is made on IRS Form W-7 and requires approximately 6 to 10 weeks for processing.



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Individual Taxpayer Identification Number (ITIN)

- Applications must include documentation to prove foreign status and identity.
- Documents include original passports, USCIS photo ID, U.S. driver's license, visa issued by the U.S., foreign military ID, birth certificate, medical records, birth records, etc.



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Individual Taxpayer Identification Number (ITIN)

- Issues:
 - IRS requires original and/or certified copies of documents used to support information on Form W-7;
 - Taxpayers can use certifying acceptance agents to submit documents to apply for an ITIN.



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Taxpayer Identification Number

- Social Security Number: An individual can apply for a social security number if the individual has been lawfully admitted to the U.S. for permanent residence or has an immigration visa that authorizes the individual to work in the U.S.
- An applicant should file Form SS-5 with the Social Security Administration.



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Taxpayer Identification Number

- IRS guidance provides:
 - “If the individual has used someone else’s SSN to obtain employment, that SSN should be reflected on the Form W-2 the employer issues to that individual. So long as the individual uses his or her ITIN to properly report the wages that are reflected on the Form W-2 and pay the tax associated with that income, the individual has not violated the internal revenue laws.”
 - Chief Counsel Memorandum POSTN-122111-10 (June 21, 2010).



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Taxpayer Identification Number

- The same guidance further provides that the individual who provides the employer with false identification documents to obtain employment has violated 18 U.S.C. § 1028(a)(1).



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Scenario 1

- Undocumented worker who earned income comes in to your office. He does not have a social security number.
- **First question:** Is this taxpayer a U.S. resident for U.S. income tax purposes?



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Residency Requirements

- The Residency test for U.S. tax purposes is different than the Residency test applied for immigration and employment purposes.



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Residency Requirements

- Resident Aliens:
 - Green card holders; or
 - Individuals with a substantial presence in the U.S.



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Substantial Presence Test

- Individual is physically present in the U.S. for:
 - At least 31 days during the tax year; AND
 - A total of 183 days during the current year and the preceding two years. Years 1 and 2 require use of weighted average to calculate dates.



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Scenario 1 (cont.)

- Second Question: What is this taxpayer's taxable income for the year(s) before me?
- Does the taxpayer have to report and pay self-employment tax?



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Income Thresholds - 2013

Filing Status	Age	Gross Income
Single	Under 65	\$10,000
Single	Over 65	\$11,500
Married (Joint Return)	Under 65 (both spouses)	\$20,000
Married (Joint Return)	Over 65 (one spouse)	\$21,200



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Income Thresholds - 2013

Filing Status	Age	Gross Income
Married (Joint Return)	Over 65 (both spouses)	\$22,400
Married (Separate Returns)	Any age	\$3,900
Head of Household	Under 65	\$12,850
Head of Household	Over 65	\$14,650



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Income Thresholds - 2013

Filing Status	Age	Gross Income
Qualifying Widow	Under 65	\$16,100
Qualifying Widow	Over 65	\$17,300



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Scenario 1 (cont.)

- The next step is to file true and accurate tax returns.
- Since the taxpayer does not have a SSN, you must apply for an ITIN by filing Form W-7.



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What Return to File?

- Taxpayers are required to file one of the following:
 - Form 1040EZ
 - Form 1040A
 - Form 1040
 - Form 1040NR
 - Form 1040NR-EZ



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Employment Considerations Employer Responsibilities

- Employment Status Verification
 - Employers must file Form I-9 to verify that employees are authorized to work in the U.S. The Form requires the employee to submit a valid social security number.



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Employment Considerations Employer Responsibilities

- Employees must be:
 - Citizens
 - Non-citizen nationals (American Samoa)
 - Lawful permanent residents; or
 - Aliens authorized to work in the U.S.



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Employment Considerations Employer Responsibilities

- Individuals authorized to work in the U.S.:
 - U.S. Citizens;
 - Permanent Residents;
 - Temporary Workers with E visas;
 - Specialized Workers with H visas;
 - Temporary professionals from Mexico or Canada with TN visa;



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Employment Considerations Employer Responsibilities

- Individuals authorized to work in the U.S.:
 - Skilled workers with permanent work EB visa;
 - Individuals with student visas who receive proper authorization from the school being attended;
 - Temporary visitors for business.



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Employment Considerations Employer Responsibilities

- Civil Penalties
 - Employers who fail to comply with these requirements face the following civil penalties:



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Civil Penalties

Civil Violations	First Offense	Second Offense	Third Offense
Knowingly hiring or continuing to employ an individual not authorized to work in the U.S.	\$375 per worker; maximum of \$3,200 per worker.	\$3,200 per worker; maximum of \$6,500 per worker.	\$4,300 per worker; maximum of \$16,000 per worker
Failure to comply with Form I-9 requirements	\$110 per form; maximum of \$1,100 per form.	\$110 per form; maximum of \$1,100 per form.	\$110 per form; maximum of \$1,100 per form.



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Civil Penalties

Civil Violations	First Offense	Second Offense	Third Offense
Committing or participating in document fraud	\$375 per worker; maximum of \$3,200 per worker.	\$3,200 per worker; maximum of \$6,500 per worker.	\$3,200 per worker; maximum of \$6,500 per worker.
Committing document abuse	\$110 per form; maximum of \$1,100 per form.	\$110 per form; maximum of \$1,100 per form.	\$110 per form; maximum of \$1,100 per form.



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Civil Penalties

Civil Violations	First Offense	Second Offense	Third Offense
Unlawful discrimination against an individual authorized to work in the U.S.	\$375 per worker; maximum of \$3,200 per worker.	\$3,200 per worker; maximum of \$6,500 per worker.	\$4,300 per worker; maximum of \$16,000 per worker
Asking for a money guarantee that the employee can work in the U.S., i.e., an indemnity bond	\$1,100 per indemnity bond and a full refund of the bond amount. If employee cannot be found, the refund must be paid to the U.S. Treasury.		



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Criminal Penalties

Criminal Violations	First Offense	Second Offense	Third Offense
Engaging in the practice of hiring, recruiting or referring for a fee unauthorized workers.	Up to \$3,000 for each unauthorized worker; up to 6 months in prison.	Up to \$3,000 for each unauthorized worker; up to 6 months in prison.	Up to \$3,000 for each unauthorized worker; up to 6 months in prison.



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Employment Considerations

Employer Responsibilities

- Ketchikan Drywall Services, Inc.: Paid \$173,250 fine for failure to comply with Form I-9 requirements. KDS did not retain unauthorized employees.
- Most DOJ cases involve investigations of alleged violations of the anti-discrimination policies. Penalties include monetary fines, required training and monitoring.



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Employee Withholding

- Employers must file Form W-2 with the Social Security Administration for every employee who has income, Social Security or Medicare taxes withheld.
- The employer must verify his/her social security number.



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Employee Withholding

- IRS encourages employers to obtain a copy of an employee's social security card to verify employment status.
- A taxpayer ITIN cannot be used in lieu of a social security number. The ITIN does not verify that the employee is authorized to work in the U.S.



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Taxation – Impact on Immigration Cases

- Adjustment of Status Cases.
- Naturalization
- Cancellation of Removal



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Naturalization

- An individual can apply to become a U.S. citizen when:
 - The individual was lawfully admitted for permanent residence;
 - The individual has been physically present in the U.S. for at least 5 years and during the five immediately preceding years the individual was present in the U.S. for at least half that time;



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Naturalization, cont.

- The individual has resided in the State in which the application was filed for at least three months;
- The individual has resided continuously within the U.S. from the date the application was filed through the time of admission for citizenship; and
- During these periods the individual has been and still is a person of *good moral character*.



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Naturalization (cont.)

- Applicants are frequently asked to show proof of tax filings for previous years in the U.S.
- Prudent practitioner should provide evidence of tax compliance for all years where the applicant has worked in the U.S.



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Naturalization (cont.)

- Where there is tax due after returns are filed, immigration judges want to see that the taxpayer has entered into a formal agreement with the IRS to pay back taxes.



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Cancellation of Removal

- The Attorney General can cancel the removal of a deportable alien when:
 - The alien has been physically in the U.S. for at least 10 years continually;
 - The alien has been a person of *good moral character* during that time;
 - The alien has not been convicted of certain offenses; and
 - The alien demonstrates that removal would result in an exceptional and extremely unusual hardship to himself, his spouse, parent or child who is a citizen of the U.S. 8 USC § 1229b(b)(1).



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Good Moral Character

- Failure to file true and accurate income tax returns can suggest that an individual lacks the good moral character that is needed to qualify for cancellation of removal.



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Good Moral Character

- The consistent filing of income tax returns is a positive factor considered when determining whether an individual has good moral character. See e.g. Dominguez-Capistran v. Gonzales, 413 F.3d 808 (8th Cir. 2005).



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Good Moral Character

- The filing of amended income tax returns during a cancellation of removal proceeding may not mitigate the negative impression caused by previous filing of inaccurate income tax returns. See e.g. Sumbundu v. Holder, 602 F.3d 47 (2d Cir. 2010).



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Deportable Offenses

- Any alien present in the U.S. in violation of immigration laws or *any other laws of the United States*, is deportable. 8 USC § 1227(a)(1)(B).



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Deportable Offenses

- Aggravated Felony: Any alien convicted of an aggravated felony at any time after admission is deportable. 8 USC § 1227(a)(2)(A)(iii).
- A conviction under IRC § § 7206(1) or (2) where the loss to the U.S. is more than \$10,000 is an aggravated felony that subjects an individual to deportation. See Kawashima v. Holder, 132 S.Ct. 1166 (2012).



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Deportable Offenses, cont.

- **Falsely Claiming Citizenship.** Any alien who presents or represents himself to be a U.S. citizen for the purpose of benefitting under any Federal or State law is deportable. 8 USC § 1227(a)(3)(D)(i).



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Deportable Offenses, cont.

- An individual who presents false documents, including Form I-9 for the purpose of securing employment with a private employer is deportable. See e.g. Ferrans v. Holder, 612 F.3d 528 (6th Cir. 2010).



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Voluntary Disclosure

- A voluntary disclosure is a process to minimize a taxpayer's exposure to criminal prosecution.
- Immunity from prosecution is not guaranteed.
- A voluntary disclosure will not protect a taxpayer from prosecution for engaging in illegal activities to earn income.



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Voluntary Disclosure - Process

- In order to make a voluntary disclosure a taxpayer must:
 - Communicate in a truthful, timely and complete manner;
 - Show a willingness to cooperate with the IRS to determine the correct tax liability.
 - Make a good faith arrangement to pay taxes, interest and penalties in full.



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Voluntary Disclosure - Timeliness

- A disclosure is timely when received before:
 - The IRS initiates a civil or criminal investigation of the taxpayer or the IRS notifies the taxpayer of its intent to commence the investigation.
 - The IRS receives information from a third-party alerting it of the specific taxpayer's non-compliance.



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Voluntary Disclosure - Timeliness

- A disclosure is timely when received before:
 - The IRS initiated a civil or criminal investigation that is directly related to the specific taxpayer's liability.
 - The IRS received information directly related to the taxpayer's liability from a criminal enforcement action, e.g., search warrant or grand jury subpoena.