Immigration and Taxation
Immigration, Employment and Tax Laws

Why do immigrants without status pay taxes?

• Obligated by law
• Opportunity to contribute
• Document compliance and residency
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)
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
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
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
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)
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
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
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% of all children in the U.S. in low-income families
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
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.
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.
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.
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.
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.
• 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.
Affordable Care Act

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

• ACA raises new issues for undocumented workers.
Compliance Requirements for Undocumented Workers

• Tax compliance casts a favorable light on an individual seeking a discretionary U.S. immigration benefit.
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.
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.
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.
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.
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.
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).
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).
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?
Residency Requirements

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

• Resident Aliens:
  – Green card holders; or
  – Individuals with a substantial presence in the U.S.
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.
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?
## Income Thresholds - 2013

<table>
<thead>
<tr>
<th>Filing Status</th>
<th>Age</th>
<th>Gross Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single</td>
<td>Under 65</td>
<td>$10,000</td>
</tr>
<tr>
<td>Single</td>
<td>Over 65</td>
<td>$11,500</td>
</tr>
<tr>
<td>Married (Joint Return)</td>
<td>Under 65 (both spouses)</td>
<td>$20,000</td>
</tr>
<tr>
<td>Married (Joint Return)</td>
<td>Over 65 (one spouse)</td>
<td>$21,200</td>
</tr>
</tbody>
</table>
### Income Thresholds - 2013

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<tbody>
<tr>
<td>Married (Joint Return)</td>
<td>Over 65 (both spouses)</td>
<td>$22,400</td>
</tr>
<tr>
<td>Married (Separate Returns)</td>
<td>Any age</td>
<td>$3,900</td>
</tr>
<tr>
<td>Head of Household</td>
<td>Under 65</td>
<td>$12,850</td>
</tr>
<tr>
<td>Head of Household</td>
<td>Over 65</td>
<td>$14,650</td>
</tr>
</tbody>
</table>
## Income Thresholds - 2013

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<tr>
<th>Filing Status</th>
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<th>Gross Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>Qualifying Widow</td>
<td>Under 65</td>
<td>$16,100</td>
</tr>
<tr>
<td>Qualifying Widow</td>
<td>Over 65</td>
<td>$17,300</td>
</tr>
</tbody>
</table>
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.
What Return to File?

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

Employer Responsibilities

• Civil Penalties

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

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

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<td>Committing or participating in document fraud</td>
<td>$375 per worker; maximum of $3,200 per worker.</td>
<td>$3,200 per worker; maximum of $6,500 per worker.</td>
<td>$3,200 per worker; maximum of $6,500 per worker.</td>
</tr>
<tr>
<td>Committing document abuse</td>
<td>$110 per form; maximum of $1,100 per form.</td>
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<tr>
<td>Unlawful discrimination against an individual authorized to work in the U.S.</td>
<td>$375 per worker; maximum of $3,200 per worker.</td>
<td>$3,200 per worker; maximum of $6,500 per worker.</td>
<td>$4,300 per worker; maximum of $16,000 per worker.</td>
</tr>
<tr>
<td>Asking for a money guarantee that the employee can work in the U.S., i.e., an indemnity bond</td>
<td>$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.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
## Criminal Penalties

<table>
<thead>
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<th>Second Offense</th>
<th>Third Offense</th>
</tr>
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<tr>
<td>Engaging in the practice of hiring, recruiting or referring for a fee unauthorized workers.</td>
<td>Up to $3,000 for each unauthorized worker; up to 6 months in prison.</td>
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</tbody>
</table>
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.
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.
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.
Taxation – Impact on Immigration Cases

- Adjustment of Status Cases.
- Naturalization
- Cancellation of Removal
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;
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*. 
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.
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.
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).
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.
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).
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).
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).
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).
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).
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).
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.
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.
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.
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.