

SPECIAL REPORT:

IMMIGRATION AND
TAX CONSEQUENCES
FOR THE LOW-INCOME
U.S. NEWCOMER

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The U.S. newcomer's foremost consideration is his or her immigration status in the United States. With this in mind, it should come as no surprise that many U.S. newcomers' requests for tax assistance and representation are the result of an impending immigration related crisis. The interaction of our tax and immigration policies is most apparent when the U.S. newcomer is forced to interact with the tax administration in order to help alleviate his or her immigration-related problem.

Several immigration law provisions have consequences for tax policy and practice. Immigration sponsorship rules permit U.S. newcomers who are permanent residents of this country to "sponsor" or petition for their relatives located abroad to come to the United States.¹ Sponsoring relatives have to produce the last three years of individual income tax returns as well as other materials that show that they can financially support the beneficiary relatives in the United States.² If there are any problems with the sponsoring relative's application, including the income tax returns, the petition may fail and the beneficiary relatives will not be able to immigrate to the United States

under that petition. Thus information furnished on the sponsoring U.S. newcomer's individual income tax return can impact immigrant families seeking to come to the United States.

Similar requirements are found within the Cancellation of Removal (formerly known as Suspension of Deportation) provisions.³ This vehicle for immigration relief is available to undocumented aliens in removal (deportation) proceedings if they are able to prove that they meet section 240A's requirements and if they can obtain the favorable exercise of discretion by immigration authorities. Among other important showings, the section requires that the alien show "physical [presence] in the United States for a continuous period of not less than 10 years"⁴ and that he or she "has been a person of good moral character during such period."⁵

How does this relate to the tax system? Immigration authorities consider an alien's compliance with the tax regime as evidence of "good moral character" and also to substantiate the alien's "continuous presence" in this country for the requisite time period. When aliens are eligible to receive the immigration related benefits that stem from these and other immigration law provisions they suddenly find themselves in need of tax assistance and representation. Such representation usually involves the reentry of nonfilers, amending fraudulent or erroneous income tax returns, and pursuing relief from collection action with

respect to the tax debt created by the filing of these returns.

Since immigration authorities closely review individual income tax returns, some immigration practitioners feel that INS uses these returns as a vehicle for impeachment of the alien during immigration proceedings and that this is done in order to undermine the alien's petition for immigration relief. The INS "examines" the alien's compliance with the tax system and sometimes mandates amendments to reflect inaccuracies. Aliens regularly have to amend earlier returns that incorrectly list the alien's filing status or dependents, thus changing tax benefits and credits and in many cases resulting in higher tax liability. In cases where the alien taxpayer has erroneously received the Earned Income Credit in the past, the amended returns result in substantial tax liabilities. Because the alien considers adjusting his or her immigration status the top priority, the alien is willing to incur the debt associated with amending past erroneous income tax returns. Essentially the alien "buys" his or her lawful permanent residence status or "greencard" by incurring back taxes.

Entering these alien nonfilers into the tax system often involves reconstructing income tax returns when there is hardly any documentation, thus leaving the taxpayer open to examination by the Service without any of the protection provided by paper records. When many U.S. newcomers initially arrive, they live

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1. See Immigration and Nationality Act § 204, 8 U.S.C. § 1154(a)(1)(B)(i) (1994).

2. See Immigration and Nationality Act § 213A, 8 U.S.C. § 1183a(f)(1)(E) & (f)(6)(A)(i) (Supp. III 1997). See also Affidavits of Support on Behalf of Immigrants, 8 C.F.R. § 213a.2(c)(2)(1)(A) & (B) (2000).

3. See Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b(b) (Supp. III 1997).

4. Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b(b)(1)(A) (Supp. III 1997).

5. Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b(b)(1)(B) (Supp. III 1997).

and work in the cash economy. This creates major problems for the alien who desires to receive the immigration benefits discussed above by achieving compliance with the tax system. In many cases, the alien will have to pay large interest and penalty charges in addition to income and self-employment taxes from tax years in the early 1990s.

Even U.S. newcomers under no obligation to file an individual income tax return because of their low earnings may have to file and present income tax returns to immigration authorities to benefit from the immigration acts mentioned above. For these and other U.S. newcomers, it is clear that they are, in essence, under a higher standard for record keeping. The taxpayer's difficulties are often compounded by the unavailability of accurate return preparers. U.S. newcomers often must rely on unscrupulous or untrained preparers for assistance.

This article reflects only a fraction of the problems encountered during legal representation of U.S. newcomers in tax matters. Members of the tax bar working with U.S. newcomers may face additional challenges. For instance, sometimes employers misclassify U.S. newcomers as independent contractors. As a result of this misclassification, U.S. newcomers are held accountable for substantial self-employment tax liability. Also, they may not qualify for other public benefits, such as unemployment or worker's compensation, on the basis of this misclassification.

A practitioner may encounter identity fraud when working with U.S. newcomers. Some undocumented U.S. newcomers work and earn income under another individual's valid social security number. This

causes problems for the victims of identity fraud, who may be held accountable for income tax liability on the misidentified income. However, it also causes problems for the perpetrators of identity fraud, who cannot comply with the tax regime because of their fraudulent documentation regarding wages and income.

Finally, there are many problems with the provision of adequate translation and interpretation services for low income taxpayers who speak English as a Second Language (ESL). For example, many ESL taxpayers cannot read or understand the notices generated by the Service. This becomes particularly hazardous when the notices contain important time restrictions therein that guarantee procedural protections for the taxpayer, such as the statutory notice of deficiency

or a Collections Due Process notice. Other problems arise with the accurate translation of both tax terminology and the cultural concepts inherent in our tax policy. Many ESL taxpayers are not familiar with a tax regime focussing on the taxation of income. This point emphasizes the need for tax education for U.S. newcomers and a basic orientation that promotes understanding of their tax responsibilities as new residents of this country. ■

