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Social Security Benefits for Noncitizens: Current Policy and Legislation

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Dawn Nuschler and Alison Siskin
Specialists in Social Legislation
Domestic Social Policy Division

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Summary

Concerns about the number of unauthorized (illegal) aliens residing in the United States and the totalization agreement with Mexico signed in 2004 have fostered considerable interest in the eligibility of noncitizens for U.S. Social Security benefits. The Social Security program provides monthly cash benefits to qualified retired and disabled workers, their dependents, and survivors. Generally, a worker must have 10 years of Social Security-covered employment to be eligible for retirement benefits (less time is required for disability and survivor benefits). Most jobs in the United States are covered under Social Security. Noncitizens (aliens) who work in Social Security-covered employment must pay Social Security payroll taxes, including those who are in the United States working temporarily and those working in the United States without authorization. There are some exceptions. Generally, the work of aliens who are citizens of a country with which the United States has a "totalization agreement," coordinating the payment of Social Security taxes and benefits for workers who divide their careers between two countries, is not covered if they work in the United States for less than five years. In addition, by statute, the work of aliens under certain visa categories is not covered by Social Security.

The Social Security Protection Act of 2004 (P.L. 108-203) requires an alien whose application for benefits is based on a Social Security Number (SSN) assigned January 1, 2004, or later to have work authorization at the time an SSN is assigned, or at some later time, to gain insured status under the Social Security program. Aliens whose applications are based on SSNs assigned before January 1, 2004, may count all covered earnings toward insured status, regardless of work authorization status. The Social Security Act also prohibits the payment of benefits to aliens in the United States who are not "lawfully present"; however, under certain circumstances, alien workers and dependents/survivors may receive benefits while residing outside the United States (including benefits based on unauthorized work).

On June 29, 2004, the United States and Mexico signed a totalization agreement, the effects of which depend on the specific terms and language of the agreement, which has not been transmitted to Congress for review or otherwise made publicly available. Currently, since Mexico meets the "social insurance country" definition, a Mexican *worker* may receive U.S. Social Security benefits outside the United States. Family members of the Mexican worker must have lived in the United States for at least five years to receive benefits in Mexico, but typically under a totalization agreement, this requirement is waived allowing the payment of benefits to alien *dependents and survivors* who have never lived in the United States. The Social Security Administration reports that the projected cost of the agreement would average $105 million annually over the first five years. In September 2003, the Government Accountability Office reported that "the cost of a totalization agreement with Mexico is highly uncertain" because of the large number of unauthorized immigrants from Mexico estimated to be living in the United States. This report will be updated as legislative activity occurs or other events warrant.

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Current Policy

Background

The Social Security program provides monthly cash benefits to retired and disabled workers and their dependents, and to the survivors of deceased workers.[1] To qualify for benefits, workers (whether citizens or noncitizens)[2] must work in Social Security-covered jobs for a specified period of time. Generally, workers need 40 credits (sometimes referred to as "quarters of coverage") to become "insured" for benefits (fewer credits are needed for disability and survivor benefits, depending on the worker's age). In 2006, a worker earns one credit for each $970 in earnings, up to a maximum of 4 credits for the year (i.e., with annual earnings of $3,880 or more).

Social Security-Covered Employment

The Social Security program is financed primarily by mandatory payroll taxes levied on wages and self-employment income. Most jobs in the United States are covered under Social Security (about 96% of the work force is required to pay Social Security payroll taxes). In 2006, Social Security-covered workers and their employers each pay 6.2% of earnings up to $94,200 (this amount is indexed to average wage growth). The self-employed pay 12.4% on net self-employment income up to $94,200 and may deduct one-half of payroll taxes from federal income taxes. The following workers are exempt from Social Security payroll taxes:

- **State and local government workers** who participate in alternative retirement systems,
- **Election workers** who earn less than $1,300 per year,
- **Ministers** who elect not to be covered, and members of certain religious sects,
- **Federal workers** hired before 1984,

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[1] The Social Security program is administered by the Social Security Administration (SSA). SSA also administers the Supplemental Security Income (SSI) program, a *means-tested* entitlement program. Eligibility requirements for noncitizens differ under Social Security and SSI. For more information on noncitizen eligibility for SSI, see CRS Report RL31114, *Noncitizen Eligibility for Major Federal Public Assistance Programs: Policies and Legislation*, by Ruth Ellen Wasem and Joe Richardson.

[2] An *alien* is "any person not a citizen or national of the United States" and is synonymous with *noncitizen*. Aliens/Noncitizens includes those who are legally present and those who are in violation of the Immigration and Nationality Act (INA).

- **College students** who work at their academic institutions,
- **Household workers** who earn less than $1,500 per year, or for those under age 18, for whom household work is not their principal occupation, and
- **Self-employed workers** who have annual net earnings below $400.

In 2002, an estimated 11.3 million noncitizens were in the U.S. labor force comprising approximately 7.9% of the labor force.[3] Aliens who work in Social Security-covered employment must pay Social Security payroll taxes, including those who are in the United States working temporarily and those who may be working in the United States without authorization.[4] There are some exceptions. Generally, the work of aliens who are citizens of a country with which the United States has a "totalization agreement" (see below) is not covered by Social Security if they work in the United States for less than five years. In addition, by statute, the work of aliens under certain visa categories (such as H-2A agricultural workers, F and M students)[5] is not covered by Social Security.

Currently, there are no official published data on the amount of money paid into the Social Security system by aliens, either legal or unauthorized. It is important to note that an alien may be authorized to be in the United States, but not authorized to work. Therefore, an alien who does not have work authorization is not necessarily an illegal alien.[6] The Social Security Administration (SSA) maintains an "earnings suspense file" that represents an estimated $520 billion in wages that cannot be posted to individual work records because the names and Social Security Numbers (SSNs) on wage reports submitted by employers to SSA (W-2 forms) do not match SSA's records.[7] The mismatched information may be due to typographical or other

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[3] Calculations performed by the Congressional Research Service (CRS) using the average of the monthly Current Population Surveys (CPS's) for 2002. The CPS does not include a variable on immigration status.

[4] For Social Security payroll taxes to be withheld from wages, a worker must provide a Social Security Number (SSN) to his/her employer. An alien who is working in the United States without authorization (1) may have an SSN because he/she worked in the United States legally and then fell out of status; or (2) may have obtained an SSN fraudulently.

[5] Most of these nonimmigrant visa categories are defined in §101(a)(15) of the INA. These visa categories are commonly referred to by the letter and numeral that denotes their Subsection in §101(a)(15), e.g., B-2 tourists, E-2 treaty investors, F-1 foreign students, H-1B temporary professional workers, J-1 cultural exchange participants, or S-4 terrorist informants.

[6] For example, an alien present in the United States on a B-2 tourist visa may remain in the United States for six months, but is not legally permitted to work. In addition, the spouses of most temporary noncitizen workers do not have employment authorization. For more information on which categories of noncitizen are entitled to work in the United States, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

[7] Annually, SSA reviews W-2 forms and credits Social Security-covered earnings to workers. If a name or SSN on a W-2 form does not match SSA's records, the earnings credits go into an earnings suspense file while SSA attempts to reconcile the discrepancy.

(continued...)

clerical errors (such as a misspelled name or an individual's failure to report a new married name to SSA), as well as to the use of invalid or stolen Social Security Numbers by aliens who are working in the United States without authorization. There is no official published data on the amount of wages posted to the earnings suspense file that is directly attributable to aliens who are working in the United States without authorization based on fraudulent documents. However, SSA Inspector General Patrick P. O'Carroll stated in testimony before Congress that "we believe the chief cause of wage items being posted to the [earnings suspense file] instead of an individual's earnings record is unauthorized work by noncitizens."[8]

Social Security Payment Rules

Workers become *eligible* for Social Security benefits when they meet the insured status and age requirements specified in the Social Security Act.[9] They become *entitled* to benefits when they have met all of the eligibility requirements and filed an application for benefits. Because Social Security is an *earned* entitlement program, there are few restrictions on benefit payments once a worker becomes entitled to benefits. The Social Security Act does prohibit the payment of benefits to: individuals residing in certain countries;[10] individuals confined to a jail, prison, or certain other public institutions for commission of a crime; most individuals removed from the United States (i.e., deported);[11] aliens residing in the United States unlawfully; and, in some cases, aliens residing outside the United States for more than six months at a time.

Social Security Protection Act of 2004. On March 2, 2004, the President signed into law the Social Security Protection Act of 2004 (P.L. 108-203, H.R. 743). Among other changes, P.L. 108-203 restricts the payment of Social Security benefits (retirement, survivors, and disability benefits) to certain noncitizens who file an application for benefits based on an SSN assigned on or after January 1, 2004. Specifically, a noncitizen who files an application for benefits based on an SSN assigned *on or after* January 1, 2004, is required to have work authorization at the

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[7] (...continued)
The figure shown here represents the amount of wages (from 255 million wage items) posted to the earnings suspense file through tax year 2003, as of Oct. 2005.

[8] Statement of the Honorable Patrick P. O'Carroll, Inspector General, Social Security Administration, Before the Subcommittee on Oversight of the House Committee on Ways and Means, February 16, 2006. The testimony is available at [http://waysandmeans.house.gov/hearings.asp?formmode=printfriendly&id=4710].

[9] In the case of disability benefits, a worker is eligible for benefits when he/she has met insured status requirements and established a period of disability.

[10] U.S. Treasury Department regulations or Social Security restrictions prohibit payments to individuals living in Cuba, Democratic Kampuchea (formerly Cambodia), North Korea, Vietnam and areas in the former Soviet Union (excluding Armenia, Estonia, Latvia, Lithuania, and Russia).

[11] One exception is aliens who are removed on status violations (i.e., aliens who are removed from the United States because they are illegally present, not because they have committed a crime).

time an SSN is assigned, or at some later time, to gain insured status under the Social Security program. If the individual had work authorization at some point, all of his/her Social Security-covered earnings would count toward insured status. If the individual *never* had authorization to work in the United States, none of his/her earnings would count toward insured status and Security benefits would not be payable on his/her work record (i.e., benefits would not be payable to the worker or to the worker's family).[12]

A noncitizen who files an application for benefits based on an SSN assigned *before* January 1, 2004, is not subject to the work authorization requirement under P.L. 108-203. All of the individual's Social Security-covered earnings would count toward insured status, regardless of his/her work authorization status. The new law provides exceptions to the work authorization requirement for certain noncitizens, however, it is not clear how many individuals potentially could come under the exception.

Recently, the treatment of unauthorized earnings for Social Security purposes became the focus of debate in the Senate. On May 18, 2006, Senator Ensign offered an amendment to S. 2611, the Comprehensive Immigration Reform Act of 2006, that would have tightened restrictions on the use of unauthorized earnings for purposes of qualifying for Social Security benefits. Under the amendment offered by Senator Ensign (S.Amdt. 3985), all individuals (citizens and noncitizens) who are assigned a valid Social Security Number on or after the date of enactment of the immigration reform bill (S. 2611) would be allowed to count only the earnings credits obtained after assignment of a valid SSN toward insured status under the Social Security program (i.e., any past unauthorized earnings would not count for purposes of establishing eligibility for Social Security benefits and determining the amount of benefits payable on a worker's earnings record). Following floor debate, the Senate approved a motion to table the amendment by a vote of 50 to 49, preventing a direct vote on the substance of the measure. S. 2611 was passed by the Senate on May 25, 2006.

Special Payment Rules for Noncitizens. Section 202(y) of the Social Security Act requires noncitizens in the United States to be "lawfully present" to receive benefits.[13] If a noncitizen is entitled to benefits, but does not meet the lawful presence requirement, his/her benefits are suspended. In such cases, a noncitizen may receive benefits while residing outside the United States (including benefits based on work performed in the United States without authorization) if he/she meets one of the exceptions to the "*alien nonpayment provision*" under Section 202(t) of the Social Security Act. Under the alien nonpayment provision, a noncitizen's

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[12] Before enactment of P.L. 108-203, all Social Security-covered earnings would count toward insured status regardless of an alien's work authorization status.

[13] The definition of "lawfully present" is provided in **Appendix B**. The lawful presence requirement was added by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208). For more information, see "Legislative History of Payment Rules for Noncitizens" below.

benefits are suspended if he/she remains outside the United States[14] for more than six consecutive months,[15] unless one of several broad exceptions is met. For example, an alien may receive benefits outside the United States if he/she is a citizen of a country that has a social insurance or pension system that pays benefits to eligible U.S. citizens residing outside that country (a "social insurance country"), or if he/she is a citizen or resident of a country with which the United States has a totalization agreement (see **Table 1**). If an alien does not meet one of the exceptions to the alien nonpayment provision, his/her benefits are suspended beginning with the seventh month of absence and are not resumed until he/she returns to the United States lawfully for a full calendar month.

In addition, to receive payments outside the United States, alien *dependents and survivors* must have lived in the United States for at least five years previously (lawfully or unlawfully), and the family relationship to the worker must have existed during that time (see **Table 2**). The law provides several broad exceptions to the five-year U.S. residency requirement for alien dependents and survivors. For example, an alien is exempt from the five-year U.S. residency requirement if he/she is a citizen of a "treaty obligation" country (i.e., if nonpayment would be contrary to a treaty between the United States and the individual's country of citizenship), or if he/she is a citizen or resident of a country with which the United States has a totalization agreement (see **Table 3**).

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[14] "Outside the United States" means outside the territorial boundaries of the 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

[15] The six-month period of absence begins with the first full calendar month following the period in which the individual has been outside the United States for more than 30 consecutive days. If the individual returns to the United States for any part of a day during the 30-day period, the 30-day period starts over.

Table 1. Exceptions to the Alien Nonpayment Provision for Workers and Dependents/Survivors

An alien's benefits are suspended if he/she is outside the United States for more than six consecutive months, unless one of the following exceptions is met:
the individual is a citizen of a country that has a social insurance or pension system under which benefits are paid to eligible U.S. citizens who reside outside that country (for example, Brazil, Finland, Mexico, Philippines and Turkey) (see **Appendix A** for a complete list of countries)
the individual is entitled to benefits on the earnings record of a worker who lived in the United States for at least 10 years or earned at least 40 quarters of coverage under the U.S. Social Security system (exception does not apply if the individual is a citizen of a country that does not provide social insurance or pension system payments to eligible U.S. citizens who reside outside that country)
the individual is entitled to benefits on the earnings record of a worker who had railroad employment covered by Social Security
the individual is outside the United States while in the active military or naval service of the United States
the individual is entitled to benefits on the earnings record of a worker who died while in the U.S. military service or as a result of a service-connected disease or injury
the nonpayment of benefits would be contrary to a treaty obligation of the United States in effect as of August 1, 1956 (i.e., the individual is a citizen of a treaty obligation country) (see **Appendix A** for a list of countries)
the individual is a citizen or resident of a country with which the United States has a totalization agreement (see **Appendix A** for a list of countries)
the individual was eligible for Social Security benefits as of December 1956

Source: Section 202(t) of the Social Security Act.

Table 2. Additional Residency Requirement for Alien Dependents/Survivors Outside the United States

In addition to the requirements in **Table 1**, to receive payments outside the United States, an alien dependent/survivor must have lived in the United States for at least five years (lawfully or unlawfully) under one of the following circumstances:
A **spouse, divorced spouse, widow(er), surviving divorced spouse, or surviving divorced mother or father**:
must have resided in the United States for at least five years and the spousal relationship to the worker must have existed during that time
A **child**:
must have resided in the United States for at least five years as the child of the worker; *or* the worker and the child's other parent (if any) each must have either resided in the United States for at least five years or died while residing in the United States
An **adopted child**:
must have been adopted in the United States; *and* lived in the United States with the worker; *and* received at least half of his or her support from the worker in the year before the worker's entitlement or death

Source: Section 202(t) of the Social Security Act.

Table 3. Exceptions to the Additional Residency Requirement for Alien Dependents/Survivors Outside the United States

An alien dependent/survivor living outside the United States is not subject to the five-year U.S. residency requirement if one of the following exceptions is met:
the individual was eligible for Social Security benefits before January 1, 1985
the individual is entitled to benefits on the earnings record of a worker who died while in the U.S. military service or as a result of a service-connected disease or injury
the nonpayment of benefits would be contrary to a treaty obligation of the United States in effect as of August 1, 1956 (i.e., the individual is a citizen of a treaty obligation country) (see list of countries in **Appendix A**)
the individual is a citizen or resident of a country with which the United States has a totalization agreement, unless otherwise specified in the agreement (see list of countries in **Appendix A**)

Source: Section 202(t) of the Social Security Act.

Note: Aliens who live abroad may not receive payments in countries to which the U.S. Treasury Department is prohibited from mailing benefit checks. See *Your Payments While You Are Outside the United States* (updated April 2004) on the SSA website at [http://www.ssa.gov/pubs/10137.html].

Legislative History of Payment Rules for Noncitizens. When the Social Security program began paying benefits in 1940, there were no restrictions on benefit payments to noncitizens. In 1956, amid concerns that noncitizens were working in the United States for relatively short periods and returning to their native countries where they and their family members would collect benefits for many years, Congress enacted restrictions on benefits for alien *workers* living abroad (restrictions did not apply to alien dependents and survivors). The Social Security Amendments of 1956 (P.L. 84-880) required noncitizens to reside in the United States to receive benefits and suspended benefits if the recipient remained outside the United States for more than six consecutive months, with broad exceptions (see **Table 1**).

In 1983, Congress placed restrictions on benefit payments to alien *dependents and survivors* living abroad. The Social Security Amendments of 1983 (P.L. 98-21) made dependents and survivors subject to the same residency requirement as workers (described above) and further required that they (or their parents, in the case of a child's benefit) must have lived in the United States for at least five years, with broad exceptions (see **Tables 2** and **3**).

Several factors led to the enactment of tighter restrictions on benefit payments to alien dependents and survivors living abroad in 1983, including the large number of dependents that were being added to the benefit rolls (in some cases under fraudulent circumstances) after workers had returned to their native country and become entitled to benefits, and difficulties associated with monitoring the continued eligibility of recipients living abroad.

At the time, the General Accounting Office (GAO, now named the Government Accountability Office) estimated that, of the 164,000 dependents living abroad in 1981, 56,000 were added to the benefit rolls after the worker became entitled to benefits. Of that number, an estimated 51,000 (or 91%) were noncitizens.[16] Two years earlier, the Social Security Commissioner stated that SSA investigators had found evidence that some recipients living abroad were faking marriages and adoptions and failing to report deaths in order to "cheat the system." At the time, the commissioner stated that such problems were particularly acute in Greece, Italy, Mexico and the Philippines where large numbers of beneficiaries were residing. He stated further that, in some countries, "there is a kind of industry built up of so-called claims-fixers who, for a percentage of the benefit, will work to ensure that somebody gets the maximum benefit they can possibly get out of the system."[17]

In 1996, Congress enacted tighter restrictions on the payment of Social Security benefits to aliens residing in the United States. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)[18] prohibited the payment of Social Security benefits to aliens in the United States who are not lawfully present,

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[16] General Accounting Office, *Issues Concerning Social Security Benefits Paid to Aliens*, GAO/HRD-83-32, Mar. 24, 1983.

[17] CRS Issue Brief IB82001, *Social Security: Alien Beneficiaries*, by David Koitz (archived; available from Dawn Nuschler or Alison Siskin on request).

[18] P.L. 104-193, § 401(b)(2).

unless nonpayment would be contrary to a totalization agreement or Section 202(t) of the Social Security Act (the alien nonpayment provision).[19] This provision became effective for applications filed on or after September 1, 1996. Subsequently, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[20] added Section 202(y) to the Social Security Act. Section 202(y) of the act, which became effective for applications filed on or after December 1, 1996, states:

> Notwithstanding any other provision of law, no monthly benefit under [Title II of the Social Security Act] shall be payable to any alien in the United States for any month during which such alien is not lawfully present in the United States as determined by the Attorney General.

Tax Treatment of Social Security Benefits

Noncitizens who reside outside the United States are subject to different rules regarding federal income tax treatment of Social Security benefits. U.S. citizens and resident aliens[21] pay federal income tax on a portion of their benefit if their income exceeds specified thresholds. Specifically, they pay federal income tax on up to 50% of their benefit if their modified adjusted gross income (adjusted gross income (AGI) plus tax-exempt interest income plus 50% of Social Security benefits) is more than $25,000 but no more than $34,000 for a single person, or more than $32,000 but no more than $44,000 for a married couple filing jointly. They pay federal income tax on up to 85% of their benefit if their modified AGI is more than $34,000 for a single person or more than $44,000 for a married couple filing jointly. These thresholds do not apply to married couples who live together and file separate returns. Currently, about one-third of Social Security recipients pay federal income tax on their benefits.

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[19] Also, under PRWORA, federal agencies that administer "federal public benefits" are required to report to the Department of Homeland Security (DHS) information on any alien that is known to be unlawfully present in the United States. (P.L. 104-193, §404). Nonetheless, this requirement does not apply to SSA with respect to Title II of the Social Security Act (Old-Age, Survivors and Disability Insurance Program). *Federal Register*, vol. 65, no. 189, Sept. 28, 2000, pp. 58301-58302.

[20] P.L. 104-208, § 503(a).

[21] Resident alien is a term used in tax law. An alien is considered to be a U.S. resident for income tax purposes if he/she (1) is a lawful permanent resident of the United States. at any time during the calendar year; (2) meets the requirements of the "substantial presence" test; or (3) makes the first-year election under 26 U.S.C. § 7701(b)(4) and 26 C.F.R. § 301.7701(b)-4(c)(3). An alien individual meets the substantial presence test if: (1) the alien is present in the United States for at least 31 days during the calendar year and (2) the sum of the number of days on which such individual was present in the U.S. during the current year and the two preceding calendar years (when multiplied by the applicable multiplier — one for the current year, one-third for the first preceding year, and one-sixth for the second preceding year) equals or exceeds 183 days. Even though an alien individual otherwise meets the requirements of the substantial presence test, there are circumstances when an alien will not be considered a resident of the United States. An alien who does not qualify under either of these tests will be treated as a nonresident alien for purposes of the income tax. [26 U.S.C. § 7701(b)].

Noncitizens who live outside the United States pay federal income tax on their benefits without regard to these thresholds. Section 871 of the Internal Revenue Code imposes a 30% rate of tax withholding on the U.S. income of noncitizens who live outside the country (unless a lower rate is established by treaty) because there is no practical way for the U.S. government to determine the income of such persons. Under the withholding, noncitizens who reside outside the United States pay 30% of the maximum taxable amount of Social Security benefits (85%) in federal income taxes. For example, the tax withholding on an annual Social Security benefit of $12,000 would be $3,060 [($12,000 x 0.85) x 0.30].[22]

Totalization Agreements

As shown in **Tables 1 and 3**, alien workers and alien dependents/survivors may receive payments while living outside the United States if they are a citizen or resident of a country with which the United States has a totalization agreement.[23] Section 233 of the Social Security Act authorizes the President to enter into a totalization agreement with a foreign country to coordinate the collection of payroll taxes and the payment of benefits under each country's Social Security system for workers who split their careers between the two countries. For example, without a totalization agreement, an individual who is sent by a U.S. company to work in a foreign country (and his or her employer) must contribute to the Social Security systems in both countries, resulting in dual Social Security coverage and taxation based on the same earnings. With one exception (Italy), totalization agreements allow workers (and their employers) to contribute only to the foreign system if the worker is employed in that country for five or more years, or only to the U.S. system if the worker is employed in that country for less than five years.

Totalization agreements also allow workers who divide their careers between the two countries to combine earnings credits under both systems to qualify for benefits if they lack sufficient coverage under either system.[24] While a worker may combine earnings credits to *qualify* for benefits under one or both systems, his/her benefit is prorated to reflect only the number of years the worker paid into each system. The same treatment applies to foreign workers in the United States.

Totalization agreements are subject to congressional review. Section 233(e) of the Social Security Act requires the President to submit to Congress the text of the agreement and a report on (1) the estimated number of individuals who would be

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[22] For more information on the taxation of noncitizens, see CRS Report RS21732, *Federal Taxation of Aliens Working in the United States*, by Erika Lunder.

[23] Social Security regulations (20 C.F.R. § 404.1928) specify that a totalization agreement "may provide that a person entitled to benefits under title II of the Social Security Act may receive those benefits while residing in the foreign country party to the agreement, regardless of the alien non-payment provision."

[24] This applies to Social Security retirement and disability benefits. Generally, a minimum of 40 credits is required to qualify for Social Security retirement benefits. Fewer credits are required to qualify for disability benefits, depending on the worker's age at the onset of the disability. In some cases, a worker may qualify for disability benefits with a minimum of six credits.

affected by the agreement and (2) the estimated financial impact of the agreement on programs established by the Social Security Act. Section 233(e)(2) of the Social Security Act specifies that a totalization agreement automatically goes into effect unless the House of Representatives or the Senate adopts a resolution of disapproval within 60 session days of the agreement's transmittal to Congress.

It should be noted that the provision of Section 233(e)(2) that allows for the rejection of a totalization agreement upon adoption of a resolution of disapproval by either House of Congress is an unconstitutional legislative veto. This conclusion is compelled by the holding in *INS v. Chadha*, where the Supreme Court struck down a provision in the Immigration and Nationality Act that gave either House of Congress the authority to overrule deportation decisions made by the Attorney General.[25] The Court declared that a legislative veto constitutes an exercise of legislative power, as its use has "the purpose and effect of altering the legal rights, duties, and relations of persons ... outside the legislative branch."[26] Accordingly, the Court invalidated the disapproval mechanism, holding that Congress may exercise its legislative authority only "in accord with a single, finely wrought and exhaustively considered procedure," namely bicameral passage and presentation to the President.[27] Given that the disapproval mechanism in Section 233(e)(2) authorizes the exercise of legislative authority outside the strictures of bicameralism and presentment, it is likewise unconstitutional.[28]

Congress has never rejected a totalization agreement. As a result, the fact that the mechanism under Section 233(e)(2) is unconstitutional has not been an issue. Congressional utilization of the mechanism in Section 233(e)(2) to reject a totalization agreement could give rise to a judicial challenge, potentially resulting in an invalidation of the disapproval mechanism and a determination that the agreement is effective. Specifically, in considering the effect of the unconstitutional disapproval mechanism, a reviewing court would consider whether the remainder of Section 233 is valid, or whether the entire statute must be nullified. The Supreme Court has held that "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid

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[25] 462 U.S. 919 (1983). Shortly after its decision in *Chadha*, the Court without opinion and with one dissent summarily affirmed lower court opinions that had struck down a two-House legislative veto provision of the Federal Trade Commission Improvements Act, 15 U.S.C. § 57a-1. See *United States Senate* v. *Federal Trade Commission*, 463 U.S. 1216 (1983); *United States House of Representatives* v. *Federal Trade Commission*, 463 U.S. 1216 (1983).

[26] *Chadha*, 462 U.S. at 952.

[27] 462 U.S. at 951.

[28] The unconstitutionality of legislative veto provisions is noted at 42 U.S.C. §433 (codifying §233), where it is further stated that the provisions of §233(e) are similar to those struck down in *INS v. Chadha*. For a consideration of bicameralism and presentment requirements generally, see CRS Report RL30249, *The Separation of Powers Doctrine: An Overview of Its Application and Rationale*, by T.J. Halstead.

part may be dropped if what is left is a fully operative law."[29] In *Westcott v. Califano*, the court noted that "the existence of a broad severability clause in the Social Security Act reflects the Congressional wish that judicial interpretation of the act leave as much of the statute intact as possible."[30] The existence of this severability clause, coupled with the fact that the operative provisions of Section 233 would remain fully functional absent the disapproval mechanism in Subsection (e)(2), gives rise to the likelihood that a reviewing court would invalidate any attempt to utilize the disapproval mechanism, while giving effect to an otherwise properly executed totalization agreement.[31]

In the 109th Congress, legislation has been introduced that would amend the congressional review process for totalization agreements under Section 233(e) of the Social Security Act. H.R. 2339, the Totalization Agreement Congressional Approval Act of 2005, introduced by Representative Cubin on May 12, 2005, would require the President to notify each House of the Congress of the intention to enter into an agreement at least 90 calendar days in advance and publish a notice of intent in the *Federal Register*. The measure would require the President to transmit the text of the agreement and a report containing specified information to each House of the Congress. The agreement would go into effect only after a joint resolution approving the agreement is passed by both Houses of the Congress and signed into law.

Since 1978, the United States has entered into totalization agreements with 21 countries (the effective date for each agreement is shown in **Appendix A**):

> Australia, Austria, Belgium, Canada, Chile, Finland, France, Germany, Greece, Ireland, Italy, Japan, South Korea, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.

In addition, on June 29, 2004, the United States signed a totalization agreement with Mexico. Once an agreement has been signed, it is sent to the Secretary of State and then to the President for review. The President may then transmit the agreement to Congress for review. The agreement with Mexico has not yet been transmitted to Congress and, reportedly, is still undergoing review at SSA. In addition, SSA reports

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[29] *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 [1932]).

[30] 460 F.Supp 737 (D. Mass 1978). In *Califano*, the court was referring to 42 U.S.C. § 1303, which states: "[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby."

[31] In light of the Court's holding in *Chadha*, it is apparent that any congressional action taken to restrict or control executive authority to enter into totalization agreements, or to invalidate any such agreements, must be accomplished through bicameral passage and presentment to the President. Accordingly, congressional options in this regard would appear to be limited to imposing additional requirements on the adoption of totalization agreements, restricting authority to enter into such agreements unless approved by both Congress and the President on a case by case basis, or to pass a law disapproving a particular agreement before or after it is finalized. See *Chadha*, 462 U.S. at 951. Information on legal issues regarding Section 233(e)(2) of the Social Security Act provided by T.J. Halstead, CRS Legislative Attorney.

that discussions on a possible agreement are currently underway with the Czech Republic and Denmark.

While the specific terms of each totalization agreement may differ, the provisions of a totalization agreement must be consistent with the Social Security Act. Section 233(c)(4) of the Social Security Act states: "any such agreement may contain other provisions which are not inconsistent with the other provisions of [Title II of the Social Security Act] and which the President deems appropriate to carry out the purposes of this section." Currently, about $18 million is paid each month to about 106,000 recipients under totalization agreements.[32]

Issues

Perceived Disparate Treatment Under Social Security and Immigration Law

Some believe there is somewhat of a disconnect between how the Social Security and immigration rules affect unauthorized aliens. Basically, immigration policies are designed to discourage and punish those unauthorized to work in the United States. On the other hand, under Social Security rules there are certain circumstances when an unauthorized alien can collect Social Security benefits. As a result of this perceived inconsistency, some oppose paying Social Security benefits to such aliens arguing that aliens who violate immigration law should not be rewarded by receiving Social Security benefits. Others contend that aliens who work in Social Security-covered employment (i.e., had payroll taxes withheld from their earnings) should be eligible for benefits whether or not they had employment authorization.

Totalization Agreement with Mexico

On June 29, 2004, the Social Security Administration announced that a totalization agreement with Mexico had been signed by U.S. and Mexican government officials. In a press release and summary document, SSA reports that the agreement would save 3,000 U.S. workers and their employers approximately $140 million in Mexican payroll taxes over the first five years of the agreement. In addition, SSA reports that the projected cost to the U.S. Social Security system would average $105 million annually over the first five years.[33] To date, the totalization agreement with Mexico has not been transmitted to Congress for review or otherwise made publicly available.

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[32] In Dec. 2004, the average monthly benefit paid under totalization agreements was $202 for retired workers and $367 for disabled workers. SSA, *Social Security Bulletin, Annual Statistical Supplement 2005*, table 5.M1.

[33] The SSA press release and summary document may be accessed online at SSA's website at [http://www.ssa.gov/pressoffice/pr/USandMexico-pr-alt.htm].

With respect to legislative activity in the 109th Congress related to the totalization agreement with Mexico, Representative Hayworth offered an amendment to H.R. 3010 (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 2006) that would prohibit the Commissioner of Social Security and the Social Security Administration from using funds appropriated by the measure to pay the compensation of SSA employees to administer Social Security benefit payments under a totalization agreement with Mexico that are inconsistent with federal law. The Hayworth amendment (H.Amdt. 365) was agreed to by the House by voice vote on June 24, 2005. The provision was struck from the version of H.R. 3010 reported by the Senate Appropriations Committee and was not part of the final measure signed into law.

In addition, on January 4, 2005, Representative Hayworth introduced a resolution of disapproval (H.Res. 20) against the Social Security totalization agreement between the United States and Mexico signed on June 29, 2004, pursuant to Section 233(e)(2) of the Social Security Act (see related discussion under the section of this report titled "Totalization Agreements"). Similarly, on February 9, 2005, Representative Goode introduced a concurrent resolution (H.Con.Res 50) expressing disapproval by the Congress of the totalization agreement with Mexico.

The announcement in 2004 that an agreement with Mexico had been signed revived a debate that began in December 2002 following media reports that negotiations were underway on a potential totalization agreement between the United States and Mexico.[34] Among the approximately 5.5 million Mexican-born workers in the U.S. labor force in 2002, approximately 4.2 million (76%) were noncitizens[35] and 1.3 million (24%) were naturalized citizens.[36] The effects of the totalization agreement with Mexico depend on the specific terms and language of the agreement, which have not been released. However, unless otherwise specified in the agreement, the totalization agreement with Mexico would waive the five-year U.S. residency requirement for alien dependents and survivors to receive benefits outside the United States (see **Tables 2** and **3**). Under current law, an alien *worker* entitled to Social Security benefits (based on work performed with or without authorization in the United States) may receive benefits outside the United States if he/she is a citizen of Mexico, because Mexico meets the definition of a "social insurance country." An alien *dependent or survivor* entitled to Social Security benefits may receive benefits outside the United States only if he/she had lived in the United States previously for at least five years (and the family relationship on which benefits are based existed during that time), unless he/she meets one of several exceptions. As a general rule, a totalization agreement with Mexico would allow alien dependents and survivors in Mexico who have never lived in the United States to receive Social Security benefits outside the United States.

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[34] See, for example, Jonathan Weisman, "U.S. Social Security May Reach Mexico," *Washington Post*, Dec. 19, 2002, p. A1.

[35] As discussed above, "noncitizen"s include aliens who are legally present, as well as those who are unauthorized. The Current Population Survey (CPS) does not include a variable on immigration status.

[36] Calculations performed by CRS using the average of the monthly CPSs for 2002.

Some observers express concern that, although Section 202(y) of the Social Security Act prohibits the payment of benefits to aliens in the United States who are not lawfully present, a totalization agreement with Mexico could allow unauthorized aliens to receive payments in the United States, depending on how the agreement is written.[37] They contend that a totalization agreement with Mexico may be used as a *de facto* way to legalize unauthorized aliens and assert that the question remains unresolved until the exact language of the agreement becomes available. Still others express concern that a totalization agreement with Mexico could provide an incentive for unauthorized workers from Mexico to come to the United States. In addition, given the Social Security system's long-range financing problems, some question the feasibility of adding a potentially large number of recipients to the rolls in the absence of structural reform.

Others argue that an agreement (that excludes payments to unauthorized aliens in the United States) could be beneficial to the United States and that the cost could be reasonable.[38] They argue that there could be substantial savings for certain U.S. workers and employers by removing the burden of double taxation. For example, without a totalization agreement, U.S. citizens and legal permanent residents (LPRs)[39] sent by U.S. companies to work in Mexico must contribute to both the U.S. and Mexican Social Security systems. Moreover, some workers may not qualify for U.S. or Mexican Social Security benefits because they do not have enough earnings credits under either system. In addition, proponents of totalization agreements argue that such agreements remove financial barriers to multinational companies and their employees working in foreign countries.

General Accounting Office Study. In February 2003, the House Committee on Ways and Means and the House Committee on the Judiciary asked the General Accounting Office (GAO)[40] to provide information to Congress on the possible effects of a totalization agreement with Mexico. In a press release dated February 24, 2003, House Ways and Means Social Security Subcommittee Chairman E. Clay Shaw, Jr., and House Judiciary Committee Chairman F. James Sensenbrenner, Jr., expressed particular interest in the potential impact of an agreement with Mexico on the Social Security trust funds, given the large number of noncitizens who may be working in the United States without authorization. According to the press release, the committee asked specifically for information on the potential effects of an agreement on workers, beneficiaries, service delivery by the SSA, program finances, immigration and illegal work by noncitizens.

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[37] None of the 21 totalization agreements currently in effect make such provision.

[38] Joel Mowbray, "Illegal but Paid? The Question of Social Security for Mexicans," *National Review*, Jan. 27, 2003, pp. 22-23.

[39] Foreign nationals may be admitted to the United States temporarily or may come to live permanently. Those admitted on a permanent basis are known as immigrants or legal permanent residents.

[40] Since this study was published, the General Accounting Office has been renamed the Government Accountability Office.

In September 2003, GAO presented its findings before the House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims at a hearing titled *Should There Be a Totalization Agreement with Mexico?*[41] and shortly afterward released its report to Congress — *Social Security: Proposed Totalization Agreement with Mexico Presents Unique Challenges*.[42] Among the advantages associated with totalization agreements, GAO notes that they foster international commerce, protect benefits for workers who divide their careers between the United States and a foreign country, allow multinational companies and their employees to avoid paying dual Social Security taxes on the same earnings, and enhance diplomatic relations. GAO also notes that, because such agreements represent a cost to the U.S. Social Security system, associated risks should be assessed and mitigated during the negotiation process. Overall, GAO found that the procedures followed by SSA in the development of the totalization agreement with Mexico (and all other agreements) are not well documented. GAO goes on to state: "... SSA provided no information showing that it assessed the reliability of Mexican earnings data and the internal controls in place to ensure the integrity of information that SSA will rely on to pay Social Security benefits."[43] Records on which SSA would rely to determine a worker's (and family members') initial and continued eligibility for benefits include birth, death and marriage records.

In addition, GAO found that a totalization agreement with Mexico would increase the number of Mexican workers and their family members eligible for Social Security benefits for two reasons. First, Mexican workers who otherwise would not have enough earnings credits to qualify for benefits in the United States could combine U.S. and Mexican credits to qualify for a partial U.S. Social Security benefit. Second, more family members in Mexico would qualify for U.S. Social Security benefits because a totalization agreement generally exempts dependents and survivors residing outside the United States from the five-year U.S. residency requirement.

In terms of the potential cost of a totalization agreement with Mexico, GAO evaluated a March 2003 cost estimate prepared by SSA's Office of the Chief Actuary. SSA projects that an agreement with Mexico would cost $78 million in the first year and $650 million (constant 2002 dollars) by 2050. The cost estimate assumes an initial increase of 50,000 new beneficiaries in Mexico based on the number of persons (U.S. citizens and others) in Mexico currently receiving U.S. Social Security benefits and projects that the number of additional beneficiaries under the agreement would increase to 300,000 over time. SSA projects that the

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[41] The Sept. 11, 2003 hearing document (Serial No. 47) may be accessed online at [http://judiciary.house.gov/media/pdfs/printers/108th/89298.PDF].

[42] The Sept. 11, 2003 testimony (GAO-03-1035T) may be accessed online at [http://www.gao.gov/new.items/d031035t.pdf]. The Sept. 30, 2003 GAO report (GAO-03-993) may be accessed at [http://www.gao.gov/new.items/d03993.pdf].

[43] GAO-03-1035T, p. 2.

totalization agreement with Mexico would have a negligible effect on the long-range actuarial balance of the Social Security trust funds.[44]

GAO found that "the cost of a totalization agreement with Mexico is highly uncertain," even more so than for previous agreements, because of the large number of unauthorized immigrants from Mexico estimated to be living in the United States. According to GAO's assessment, the base used for the number of initial new beneficiaries in Mexico under a totalization agreement (50,000) does not take into account the "estimated millions of current and former unauthorized workers and family members from Mexico and appears small in comparison with those estimates."[45] Furthermore, GAO points out that the cost estimate does not take into account the potential change in behavior by Mexican citizens under a totalization agreement. GAO notes that an agreement could provide an additional incentive for unauthorized workers from Mexico to come to the United States.

In regard to the number of unauthorized immigrants from Mexico currently living in the United States, GAO cites a range of estimates. For example, the Pew Hispanic Center estimates the number to be between 3.4 and 5.7 million, while the Urban Institute estimates the number to be more than 4 million. The federal government estimates that there are about 5 million unauthorized immigrants from Mexico living in the United States (as of January 2000) and that the number is expected to increase by 240,000 each year. According to federal government statistics, unauthorized immigrants from Mexico make up an estimated 69% of unauthorized immigrants in the United States. By comparison, the number of unauthorized U.S. immigrants from all of the other totalization countries combined is estimated at less than 3%.

In regard to the potential number of former unauthorized workers who have returned to Mexico, GAO points out that fewer than one-third of immigrants from Mexico stay in the United States for more than 10 years, the minimum number of years of Social Security-covered earnings generally needed to qualify for Social Security retirement benefits. Given the limited information regarding the age, work history, Social Security coverage and number of dependents of these former unauthorized workers, the potential cost of a totalization agreement with Mexico is considered even more difficult to predict.

As mentioned previously, the SSA cost estimate shows that a totalization agreement with Mexico would have a negligible effect on the long-range actuarial balance of the Social Security trust funds. However, a sensitivity analysis performed by SSA at GAO's request shows that a 25% or more increase in the number of initial new beneficiaries (i.e., 13,000 or more above the base estimate of 50,000) would

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[44] SSA's Mar. 2003 cost estimate of a totalization agreement with Mexico (and GAO's evaluation) do not incorporate the effects of P.L. 108-203 (discussed above). However, SSA has stated that the cost estimate is still appropriate following enactment of the work authorization requirement in P.L. 108-203. To clarify, SSA projects that an additional 50,000 workers and an additional 17,000 dependents and survivors would receive totalized benefits under the agreement by the end of the first five years.

[45] GAO-03-1035T, p. 2.

result in a measurable impact on the long-range actuarial balance of the trust funds. GAO found that error rates in estimating the number of initial new beneficiaries under previous totalization agreements often exceeded 25%. Based on the large number of unauthorized workers from Mexico in the United States, GAO considers the estimated cost of a totalization agreement with Mexico more uncertain than cost estimates for previous agreements. In its report, GAO states that "a totalization agreement with Mexico is both qualitatively and quantitatively different than any other agreement signed to date."[46]

SSA Comment on the GAO Report. The Social Security Commissioner and SSA's Office of the Chief Actuary provided written comments on a draft of the GAO report. SSA disagreed with the GAO evaluation on a number of issues.[47] Specifically, in regard to SSA's estimate of the number of persons who initially would receive totalized benefits under the agreement (50,000), SSA maintains that the estimate is "based on the best available data and includes potential benefits for both documented and undocumented workers in the U.S. in the past."[48] Furthermore, SSA notes that the unprecedented six-fold increase in this number (300,000 by 2050) takes into account recent increases in immigration and visas. SSA's response includes (but is not limited to) the following:

- Not all unauthorized Mexican workers work in Social Security-covered jobs. Those who are employed on an unofficial basis (i.e., paid cash in the "underground economy") do not qualify for benefits (with or without a totalization agreement) because their earnings are not reported for Social Security purposes. SSA notes that the percentage of unauthorized workers who could become eligible for benefits is more limited than GAO suggests, because GAO does not include this group of workers in their discussion.

- GAO found that SSA's proxy for the number of individuals who initially would receive totalized benefits under the agreement (i.e., the number of Social Security recipients currently living in Mexico) seems low and bears no direct relationship to the estimated number of current and former unauthorized Mexican workers in the United States and their family members. SSA maintains that this is a reasonable proxy and points out that the 50,000 Social Security recipients currently living in Mexico include Mexican citizens who qualified for benefits based on unauthorized work in the United States.

- GAO points out that the agreement could provide an additional incentive for unauthorized Mexican workers to come to the United States. In SSA's view, this type of behavioral effect would be very small. SSA contends that most Mexican citizens who come to the

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[46] GAO-03-993, p. 17.

[47] The full text of SSA's comments are provided in Appendix II of the GAO report.

[48] GAO-03-993, p. 27.

United States. to work without authorization are young and more likely to be motivated by current earnings than the prospect of future Social Security retirement benefits.

- In evaluating whether the number of Social Security recipients currently living in Mexico is a reasonable proxy for the number of individuals who initially would receive totalized benefits under an agreement with Mexico, SSA used comparison data for Canada, a country with which the United States has had a totalization agreement for 20 years, because it too is a NAFTA trading partner and shares a border with the United States. By applying the same ratio of totalized to non-totalized (fully insured) Canadian beneficiaries to the number of current non-totalized Mexican beneficiaries, SSA came up with an estimate of 37,000 initial new beneficiaries under the agreement and determined that the 50,000 proxy was reasonable. According to GAO, such comparisons between Canada and Mexico are problematic because of the much higher estimates of illegal immigration from Mexico. While SSA acknowledges the large number of unauthorized Mexican citizens estimated to be in the United States, it contends that these individuals tend to be young and would become eligible for totalized benefits well into the future. SSA points out that the purpose of the Canada/Mexico comparison is to provide a current estimate of totalized beneficiaries under an agreement with Mexico.

- GAO states that error rates associated with SSA's projections of new beneficiaries under previous agreements frequently have exceeded 25%. SSA acknowledges that for six of the 11 agreements that became effective between 1985 and 1994, the number of individuals receiving totalized benefits in the fifth year after implementation exceeded their estimates. SSA further points out, however, that estimates for recent agreements have been high. For example, SSA overestimated the number of individuals receiving totalized benefits for the four agreements that became effective between 1992 and 1994. Overall, for the 11 agreements, SSA estimates that their projections have been within 3% of the actual number.

No-Match Letters

Over the past few years, a policy change at SSA which substantially increased the number of "no-match" letters sent to employers has received much attention because of the impact on unauthorized aliens. In 1993, SSA began sending no-match letters to employers to inform them of a discrepancy between a W-2 form and SSA's records. Importantly, as discussed above, receipt of a no-match letter does not imply that the employee is using a fraudulent SSN; the discrepancy could be the result of a clerical error. For tax years 1993 through 2000, an employer received no-match

letters only if 10 or more employees had discrepancies and the number of employees with mismatches equaled at least 10% of the employer's workforce.[49]

For the 2001 tax year, SSA implemented a new policy of sending no-match letters to every employer with at least one employee with discrepancies on their W-2. For tax year 2000,[50] SSA sent out approximately 110,000 no-match letters[51] compared to approximately 950,000 for tax year 2001.[52] Employers are not required to respond to or act on the letters; however, under the INA employers are subject to penalties for hiring or retaining unauthorized alien workers.[53] Additionally, the Internal Revenue Service can penalize employers for providing incorrect information on wage forms (W-2's).[54]

SSA maintained that the letters were sent to employers to ensure that workers are properly credited with their earnings, and to combat identity fraud. Due to the controversy surrounding the increase in the number of no-match letters, SSA currently sends a no-match letter to an employer only if 10 or more employees have discrepancies and the number of employees affected equals at least 0.5% of the employer's workforce. In 2005, SSA sent 127,652 no-match letters for tax year 2004.

Some argue that SSA should not reduce the number of no-match letters that are sent to employers. They contend that SSA should coordinate with other agencies to locate unauthorized alien workers, and that no-match letters can be a tool to help reduce the unauthorized population in the United States. Additionally, the no-match letters may help employers who do not know that the employees' documents are fraudulent but would be liable if they were caught employing unauthorized aliens.

Others contend that SSA has no immigration-related enforcement powers, and it is not SSA's job to enforce laws. In addition, immigration advocates contend that tens of thousands of immigration aliens left their jobs or were fired as a result of the letters.[55] They argue that no-match letters do little to combat unlawful employment as those who use false documents simply find employment in another company, increasing the risk of workplace exploitation. Additionally, they contend that some firms may have experienced a loss of revenue caused by worker shortages or by terminated employees who do not have employment authorization moving to competitors. The letters also raised concerns that employers were discriminating based on alienage (i.e., that an employer who received a no-match letter for a

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[49] "Social Security No-Match Letter," *Interpreter Releases*, vol. 80, Apr. 7, 2003, pp. 508-509.

[50] No-match letters for tax year 2000 are sent in calendar year 2001.

[51] "Social Security No-Match Letter," *Interpreter Releases*, vol. 80, Apr. 7, 2003, p. 508.

[52] Mary Beth Sheridan, "Social Security Scales Back Worker Inquiries," *Washington Post*, June 18, 2003, p. A6. No-match letters for tax year 2001 are sent in calendar year 2002.

[53] INA § 274A.

[54] 26 U.S.C. § 6647.

[55] Sheridan, "Social Security Scales Back Worker Inquiries."

noncitizen would fire the noncitizen worker without ascertaining if they have employment authorization).

Legislation in the 109th Congress

This section includes legislation that would directly alter the treatment of unauthorized earnings for Social Security eligibility and benefit computation purposes.[56] Legislation that may indirectly affect a noncitizen's eligibility for Social Security benefits (such as comprehensive immigration reform legislation or legislation that would provide, for example, for enhanced Social Security cards or new employment eligibility verification systems) is addressed in other CRS reports.[57]

H.R. 858: "Social Security for Americans Only Act of 2005"

Under H.R. 858, which was introduced by Representative Paul on February 16, 2005, Social Security-covered earnings paid to noncitizens after December 31, 2005, would not be counted for purposes of gaining insured status under the program and would not be credited for benefit computation purposes. Thus, all noncitizens — those who are authorized to work in the United States as well as those who work without authorization — would be ineligible for Social Security benefits in the future unless they have insured status as of December 31, 2005, or they obtain U.S. citizenship and subsequently gain additional earnings credits under Social Security.[58]

In addition, H.R. 858 would terminate all existing Social Security "totalization" agreements between the United States and foreign countries. The bill would authorize new "international" agreements for the purpose of "resolving questions of entitlement to, and participation in, the Social Security system established by [Title II of the Social Security Act] and the Social Security system of such foreign country." These international agreements would be required to take into account the restriction on earnings credits for noncitizens beginning in 2006, as specified in the legislation.

H.R. 858 could have significant implications for the financial status of the Social Security system, as well as for workers and their families in terms of eligibility and benefit levels. Much of the effect would depend on details that are not specified in the legislation, such as whether noncitizens who would be ineligible to receive Social Security benefits in the future would continue to pay Social Security payroll taxes. In addition, it is not known whether other countries would respond in a similar manner by prohibiting U.S. citizens who had worked and paid into a foreign Social Security system from receiving benefits under that system.

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[56] The current treatment of unauthorized earnings for Social Security purposes was established under the *Social Security Protection Act of 2004* (P.L. 108-203). For an explanation of the treatment under current law, see the section of this report titled "Social Security Protection Act of 2004."

[57] For example, see CRS Report RL33125, *Immigration Legislation and Issues in the 109th Congress*, coordinated by Andorra Bruno.

[58] A similar bill (H.R. 489) was introduced by Rep. Paul in the 108th Congress.

H.R. 1438: "No Social Security For Illegal Immigrants Act of 2005"

H.R. 1438, introduced by Representative Rohrabacher on March 17, 2005, would exclude earnings of noncitizens not legally authorized to work in the United States from being credited under Social Security (i.e., such earnings would not have been counted for benefit computation purposes).[59] The exclusion would apply to all such wages and self-employment income earned *before, on or after* the date of enactment. The bill would require the Commissioner of Social Security to recompute benefits to the extent necessary to carry out such amendments.

Because H.R. 1438 would prevent aliens from gaining eligibility for Social Security benefits based on unauthorized work in the United States, it can be argued that the bill would prevent individuals who violate immigration law from being "rewarded" for their improper behavior, and that potential eligibility for Social Security benefits (for themselves and their family members) makes illegal migration more attractive.[60] Others contended that, because Social Security is an earned entitlement, workers who pay into the system should receive benefits regardless of their immigration status.[61] Like H.R. 858 (discussed above), H.R. 1438 could have a significant impact on the financial status of the Social Security system and on individuals, including current recipients. Much of the effect would depend on details that are not specified in the legislation.

H.R. 4313: "TRUE Enforcement and Border Security Act of 2005"

H.R. 4313, introduced by Representative Hunter on November 14, 2005, includes, among other provisions, the same provisions as H.R. 1438 (described above), and it authorizes the appropriation of such funds as may be necessary for fiscal years 2007 through 2011 to carry out these changes (see Subtitle F — *Limitations on Illegal Alien Collection of Social Security*).

S. 2117: "Engaging the Nation to Fight for Our Right to Control Entry (ENFORCE) Act"

S. 2117, introduced by Senator Inhofe on December 15, 2005, includes a provision that would require noncitizens to have a valid Social Security Number and authorization to work in the United States at the time work is performed in covered employment for earnings credits to count toward insured status under the Social

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[59] As discussed above, an alien may be authorized to be in the United States, but not authorized to work.

[60] Testimony of Matthew James Reindl, Stylecraft Interiors Inc., before the Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary, U.S. House of Representatives, *New Jobs in Recession and Recovery: Who Are Getting Them and Who Are Not?* hearing, 109th Congress, 2nd Sess. (May 4, 2005), at [http://judiciary.house.gov/media/pdfs/reindl050405.pdf].

[61] A similar bill (H.R. 1631) was introduced in the 108th Congress.

Security program (i.e., any earnings credits obtained while working without a valid SSN and work authorization would not count for purposes of establishing eligibility for Social Security benefits). This provision would apply to noncitizens who file an application for benefits based on a Social Security Number assigned on or after January 1, 2004 (see Section 613 — *No Social Security Credit for Work Performed While Unlawfully Present*).

H.R. 5211: "Senior Citizen's Improved Quality of Life Act"

H.R. 5211, introduced by Representative Paul on April 26, 2006, includes, among other provisions, the same provisions as H.R. 858 (described above) with minor modifications to the effective dates (see Section 3 — *Social Security for Americans Only*).

Appendix A: Exception Countries

The following country lists, which are subject to change periodically, are taken from the *Code of Federal Regulations* (C.F.R., revised through April 1, 2002) and the Social Security Administration's International Program web page.

Social Insurance or Pension System Countries

The following countries meet the "social insurance or pension system" exception in Section 202(t)(2) of the Social Security Act:

Antigua and Barbuda, Argentina, Austria, Bahamas, Barbados, Belgium, Belize, Bolivia, Brazil, Burkina Faso (formerly Upper Volta), Canada, Chile, Colombia, Costa Rica, Cyprus, Czechoslovakia, Denmark, Dominica, Dominican Republic, Ecuador, El Salvador, Finland, France, Gabon, Grenada, Guatemala, Guyana, Iceland, Ivory Coast, Jamaica, Liechtenstein, Luxembourg, Malta, Mexico, Monaco, Netherlands, Nicaragua, Norway, Panama, Peru, Philippines, Poland, Portugal, San Marino, Spain, St. Christopher and Nevis, St. Lucia, Sweden, Switzerland, Trinidad and Tobago, Trust Territory of the Pacific Islands (Micronesia), Turkey, United Kingdom, Western Samoa, Yugoslavia, Zaire
(20 C.F.R. § 404.463)

Treaty Obligation Countries

The following countries meet the "treaty obligation" exception in Section 202(t)(3) of the Social Security Act:

Germany, Greece, Ireland, Israel, Italy, Japan, Netherlands*
(20 C.F.R. § 404.463)

*Treaties between the United States and the Netherlands preclude the application of residency requirements for noncitizens with respect to monthly survivor benefits only.

Totalization Agreement Countries

The following countries meet the "totalization agreement" exception in Section 202(t)(11)(E) of the Social Security Act. The effective date is shown for each agreement.

Australia	October 1, 2002
Austria	November 1, 1991
Belgium	July 1, 1984
Canada	August 1, 1984
Chile	December 1, 2001
Finland	November 1, 1992
France	July 1, 1988
Germany	December 1, 1979
Greece	September 1, 1994

Ireland	September 1, 1993
Italy	November 1, 1978
Japan	October 1, 2005
South Korea	April 1, 2001
Luxembourg	November 1, 1993
Netherlands	November 1, 1990
Norway	July 1, 1984
Portugal	August 1, 1989
Spain	April 1, 1988
Sweden	January 1, 1987
Switzerland	November 1, 1980
United Kingdom	1985/1988*

* Provisions that eliminate double taxation became effective January 1, 1985; provisions that allow persons to use work in both countries to qualify for benefits became effective January 1, 1988.

Note: Agreements with Austria, Belgium, Germany, Sweden and Switzerland permit the individual to receive benefits as a dependent or survivor while a *resident* in those countries only if the worker is a U.S. citizen or a citizen of the country of residence.

A description and the complete text of each agreement are available on SSA's website at [http://www.ssa.gov/international/agreement_descriptions.html].

Appendix B: Definition of "Lawfully Present"

The following is the definition of the term "lawfully present" aliens for purposes of applying for Title II Social Security benefits under P.L. 104-193 (the Personal Responsibility and Welfare Reform Act) as defined in 8 C.F.R. § 103.12.

An alien who is lawfully present in the United States includes:

(1) A "qualified alien" as defined by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA);[62]

(2) An alien who has been inspected and admitted to the United States and who has not violated the terms of his status;

(3) An alien who has been paroled[63] into the United States pursuant to Section 212(d)(5) of the act for less than one year, except: (i) Aliens paroled for deferred inspection or pending exclusion proceedings under Section 236(a) of the act; and (ii) Aliens paroled into the United States for prosecution pursuant to 8 C.F.R. § 212.5(b)(3);

(4) An alien who belongs to one of the following classes of aliens permitted to remain in the United States because the Attorney General has decided for humanitarian or other public policy reasons not to initiate deportation or exclusion proceedings or enforce departure: (i) Aliens currently in temporary resident status

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[62] PRWORA created the term "qualified alien," a term which does not exist in immigration law, to encompass the different categories of noncitizens who were not prohibited by PRWORA from receiving federal public benefits. Qualified aliens (noted in P.L. 104-193 § 431; 8 U.S.C. § 1641) are defined as:

(1) Legal Permanent Residents (an alien admitted for lawful permanent residence (LPRs));
(2) refugees (an alien who is admitted to the United States under § 207 of the Immigration and Nationality Act (INA));
(3) asylees (an alien who is granted asylum under INA § 208);
(4) an alien who is paroled into the United States (under INA § 212(d)(5)) for a period of at least one year;
(5) an alien whose deportation is being withheld on the basis of prospective persecution (under INA § 243(h) or § 241(b)(3));
(6) an alien granted conditional entry pursuant to INA § 203(a)(7) as in effect prior to April 1, 1980; and
(7) Cuban/Haitian entrants (as defined by P.L. 96-422).

For a discussion of the different categories of noncitizens, see CRS Report RS20916, *Immigration and Naturalization Fundamentals*, by Ruth Ellen Wasem. Additionally, victims of trafficking (T-visa holders) are treated as refugees for the purpose of receiving benefits.

[63] "Parole" is a term in immigration law which means that the alien has been granted temporary permission to enter and be present in the United States. Parole does not constitute formal admission to the United States and parolees are required to leave when the parole expires, or if eligible, to be admitted in a lawful status.

pursuant to Section 210 or 245A of the INA; (ii) Aliens currently under Temporary Protected Status (TPS);[64] (iii) Cuban-Haitian entrants, as defined in Section 202(b) P.L. 99-603, as amended; (iv) Family Unity beneficiaries pursuant to Section 301 of P.L. 101-649, as amended; (v) Aliens currently under Deferred Enforced Departure (DED); (vi) Aliens currently in deferred action status pursuant to Service Operations Instructions at OI 242.1(a)(22); (vii) Aliens who are the spouse or child of a United States citizen whose visa petition has been approved and who have a pending application for adjustment of status;

(5) Applicants for asylum and applicants for withholding of removal under Section 241(b)(3) of the act or under the Convention Against Torture who have been granted employment authorization, and such applicants under the age of 14 who have had an application pending for at least 180 days.

An alien may not be deemed to be lawfully present solely on the basis of the Service's decision not to, or failure to, issue an Order to Show Cause or solely on the basis of the Service's decision not to, or failure to, enforce an outstanding order of deportation or exclusion.

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[64] For more information on TPS, see CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem.