
# Social Security Benefits for Noncitizens: Current Policy and Legislation

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# Summary

Concerns about the number of unauthorized (illegal) aliens residing in the United States and the totalization agreement with Mexico 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 U.S. jobs are covered under Social Security. Noncitizens who work in Social Security-covered employment must pay Social Security payroll taxes, including those who are in the United States working temporarily or 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 U.S. for less than five years. Also, 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. 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).

In June 2004, the United States and Mexico signed a totalization agreement. In early 2007, a copy of the agreement was made publicly available, but it has not been transmitted to Congress for review. The agreement has not been finalized. 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. The agreement does not waive the requirements that aliens in the United States must be lawfully present to receive benefits in the United States, and that aliens must have work authorization at some time to gain insured status, but would allow 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, but the Government Accountability Office reported that "the cost of [the] totalization agreement ... is highly uncertain" due to the large number of unauthorized aliens 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, among other requirements. 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 2008, a worker earns one credit for each $1,050 in earnings, up to a maximum of 4 credits for the year (i.e., with annual earnings of $4,200 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 2008, Social Security-covered workers and their employers each pay 6.2% of earnings up to $102,000 (this amount is adjusted annually according to wage growth). The self-employed pay 12.4% on net self-employment income up to $102,000 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,
- **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 2006, an estimated 13.9 million noncitizens were in the U.S. labor force comprising approximately 9.2% of the labor force.[3] Aliens who work in Social Security-covered employment

[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 RL33809, *Noncitizen Eligibility for Federal Public Assistance: Policy Overview and Trends*, by Ruth Ellen Wasem.

[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).

[3] Calculations performed by the Congressional Research Service (CRS) using the average of the monthly Current (continued...)

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 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] SSA's Office of the Chief Actuary estimates that about 5.6 million unauthorized immigrants are working and paying Social Security taxes in 2007.[9]

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Population Surveys (CPS's) for 2006. 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 Chad C. Haddal and 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. 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 October 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 from the committee website at http://waysandmeans.house.gov/hearings.asp?formmode=printfriendly&id=4710, visited June 22, 2007.

[9] Unpublished estimate by SSA's Office of the Chief Actuary.

## 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.[10] 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;[11] 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);[12] 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 time an SSN is assigned, or at some later time, to gain insured status under the Social Security program (see Section 214(c) of the Social Security Act).[13] 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 Social 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).[14]

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 treatment of unauthorized earnings for Social Security purposes is an issue of current legislative interest. In June 2007, the Senate approved an amendment to the Comprehensive Immigration Reform Act of 2007 that would preclude earnings credits based on work performed without authorization in 2004 or later (with respect to individuals who are assigned an SSN in

[10] 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.

[11] 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).

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

[13] The 2004 law provides exceptions to the work authorization requirement for certain noncitizens (i.e., noncitizens who are admitted to the United States under a B visa (for business purposes) or D visa (for service as a crew member) at the time quarters of coverage are earned).

[14] 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.

2004 or later). For more information, see the section of the report titled "Legislation in the 110th Congress."

The following table summarizes the treatment of unauthorized earnings for Social Security purposes under current law.

**Treatment of Unauthorized Earnings for Social Security Purposes**

**Current Law**

- The treatment of unauthorized earnings for Social Security purposes differs, depending on when an individual is assigned a Social Security number (SSN). Individuals who were assigned an SSN before 2004 are not required to have authorization to work in the United States at any point to qualify for Social Security benefits. Individuals who are assigned an SSN in 2004 or later are required to have work authorization at some point to qualify for benefits.

**Individuals Assigned an SSN Before 2004**

- All Social Security-covered earnings are credited for purposes of qualifying for benefits, regardless of an individual's work authorization status (an individual is not required to have work authorization at any point to count all earnings for Social Security purposes).

**Individuals Assigned an SSN in 2004 or Later**

- With respect to benefit applications based on an SSN assigned on or after January 1, 2004, an individual must have work authorization when an SSN is assigned, or at any later time, to gain insured status under the Social Security program.

  If an individual has work authorization at some point, *all* of his/her Social Security-covered earnings count toward qualifying for benefits (all authorized and unauthorized earnings).

  If an individual never obtains work authorization, *none* of his/her Social Security-covered earnings count toward qualifying for benefits.

### *Assignment of Social Security Numbers to Noncitizens*

The treatment of unauthorized earnings for Social Security purposes differs, depending on whether an individual was assigned an SSN before 2004, or in 2004 or later. The policy with respect to SSN assignment for noncitizens was changed in late 2003. Noncitizens who are authorized to work in the United States by DHS can be assigned an SSN. Noncitizens who are not authorized to work can be assigned an SSN for a valid nonwork reason. Following a regulatory change that went into effect in late 2003, the only valid nonwork reason for assignment of an SSN would be if an individual needs an SSN to receive federal, state, or local government benefits to which he/she has otherwise established entitlement [see 20 C.F.R. 422.104]. Before the regulatory change, the policy for assignment of nonwork SSNs was less restrictive, and noncitizens could be assigned an SSN for a variety of nonwork purposes, such as to obtain a driver's license.[15]

## 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.[16] If a noncitizen is entitled to benefits, but does not meet the lawful

[15] The regulation is available on the SSA website at http://www.ssa.gov/OP_Home/cfr20/422/422-0104.htm, visited June 22, 2007.

[16] The definition of "lawfully present" is provided in **Appendix B**. The lawful presence requirement was added by the (continued...)

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 benefits are suspended if he/she remains outside the United States[17] for more than six consecutive months,[18] 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**).

### 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

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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 the section of the report titled "Legislative History of Payment Rules for Noncitizens."

[17] "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.

[18] 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.

- 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 January 2006) on the SSA website at http://www.ssa.gov/pubs/10137.html, visited June 22, 2007.

## 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 **Table 2** and **Table 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.[19] 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."[20]

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)[21] prohibited the payment of Social Security benefits to aliens in the United States who are not lawfully present, unless nonpayment would be contrary to a totalization agreement or Section 202(t) of the Social Security Act (the alien nonpayment provision).[22] This

[19] General Accounting Office, *Issues Concerning Social Security Benefits Paid to Aliens*, GAO/HRD-83-32, March 24, 1983, available at http://archive.gao.gov/d40t12/120895.pdf, visited June 22, 2007.

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

[21] P.L. 104-193, § 401(b)(2).

[22] 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, September 28, (continued...)

provision became effective for applications filed on or after September 1, 1996. Subsequently, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[23] 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[24] 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.

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].[25]

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2000, pp. 58301-58302.

[23] P.L. 104-208, § 503(a).

[24] 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)].

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

## Totalization Agreements

As shown in **Table 1** and **Table 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.[26] 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.[27] 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 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.[28] 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

[26] 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."

[27] 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.

[28] 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).

relations of persons ... outside the legislative branch."[29] 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.[30] 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.[31]

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 part may be dropped if what is left is a fully operative law."[32] 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."[33] 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.[34]

Legislation has been introduced in the 110th Congress that would amend the congressional review process for totalization agreements specified in Section 233(e) of the Social Security Act. In January 2007, Senator Ensign introduced S. 43, the Social Security Totalization Agreement Reform Act of 2007, and Representative Cubin introduced a companion bill (H.R. 279). Among other provisions, the bills would require the President to notify each house of Congress of the intent to enter into an agreement at least 90 calendar days in advance and publish a notice of

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

[30] 462 U.S. at 951.

[31] 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 Rationale and Application*, by T. J. Halstead.

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

[33] 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."

[34] 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.

intent in the *Federal Register*. The measures would require the President to transmit the text of an agreement, and a report containing specified information, to each house of Congress. An agreement could go into effect only after a joint resolution approving the agreement is passed by both houses of Congress and signed into law. The measures would establish periodic evaluation and reporting requirements to assess the impact of a totalization agreement over time. The measures would apply to totalization agreements transmitted to Congress on or after January 1, 2007.

Senator Ensign offered an amendment (S.Amdt. 153) to H.R. 2, the Fair Minimum Wage Act of 2007, that is identical to S. 43. The amendment was withdrawn prior to Senate passage of H.R. 2 by a vote of 94-3 on February 1, 2007. On June 5, 2007, Senator Chambliss offered an amendment (S.Amdt. 1318) to the Comprehensive Immigration Reform Act of 2007 (S.Amdt. 1150 to S. 1348) that is identical to S. 43. No action was taken on the Chambliss amendment before the measure was withdrawn from Senate floor debate on June 7, 2007.

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 to the 21 totalization agreements currently in effect, the United States signed a totalization agreement with Mexico on June 29, 2004. After an agreement has been signed, SSA and its counterpart in the foreign country continue to address implementation issues and may amend the language. The agreement is then forwarded to the Secretary of State who reviews it in the context of other international agreements with the foreign country. Next, the agreement is sent to the President for review, and the President may then transmit the agreement to Congress for review. To date, the totalization agreement with Mexico has not been transmitted to Congress. Reportedly, as of May 2007, the agreement is under review at SSA (i.e., SSA has not yet forwarded the agreement to the Department of State). With respect to other countries, SSA reports that negotiations on agreements with the Czech Republic and Denmark have been completed, and that preparations are underway for the signing ceremonies. In addition, discussions are underway on a possible agreement with Poland.[35]

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 $20 million is paid each month to almost 113,000 recipients under U.S. totalization agreements.[36]

[35] Information on the status of agreements that are pending or under negotiation is available on the SSA website at http://www.ssa.gov/international/status.html, visited June 22, 2007.

[36] In December 2005, the average monthly benefit paid under U.S. totalization agreements was $209 for retired workers and $392 for disabled workers. SSA, *Social Security Bulletin, Annual Statistical Supplement 2006*, table 5.M1.

# 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.[37] To date, the totalization agreement with Mexico has not been transmitted to Congress for review.

On January 4, 2007, both Representative Goode and Representative King introduced resolutions of disapproval (H.Res. 18 and H.Res. 22, respectively) 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 "Totalization Agreements" section of the report.)[38]

In addition, Senator Ensign offered an amendment to H.R. 3043 (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 2008) that prohibits 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 would not otherwise be payable if there was not a totalization agreement. The Ensign amendment (S.Amdt. 3342) was agreed to by a vote of 91-3.[39] Although H.R. 3043 was vetoed by President Bush on

[37] The SSA press release and summary document are available on the SSA website at http://www.ssa.gov/pressoffice/pr/USandMexico-pr-alt.htm, visited June 22, 2007.

[38] In the 109th Congress, Rep. Goode introduced a concurrent resolution (H.Con.Res. 50) expressing disapproval by the Congress of the totalization agreement with Mexico.

[39] Record vote number 347.

November 13, 2007, and the House failed to override the veto,[40] the provision was included as §526 of P.L. 110-161, The Consolidated Appropriations Act, 2008.[41]

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.[42] Among the approximately 7.2 million Mexican-born workers in the U.S. labor force in 2006, approximately 5.6 million (80%) were noncitizens[43] and 1.5 million (20%) were naturalized citizens.[44] The effects of the totalization agreement with Mexico depend on the specific terms and language of the agreement, which have not been finalized. The following discussion pertains to the version of the agreement that SSA released on January 4, 2007, in response to the Freedom of Information Act (FOIA) request from the TREA Senior Citizens League.[45]

As in most totalization agreements, 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 **Table 2** and **Table 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. The 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.

As discussed above, Section 202(y) of the Social Security Act prohibits the payment of benefits to aliens in the United States who are not lawfully present. Although some observers have expressed concern that a totalization agreement with Mexico could allow unauthorized aliens to receive payments in the United States, the version of the agreement signed in June 2004 does not waive this requirement.[46] Similarly, another concern has been that the totalization agreement would waive the provision of law that requires an alien whose application for benefits is based on an SSN assigned in 2004 or later to have work authorization at the time an SSN is assigned, or at any later time, to gain insured status under the Social Security program (i.e., the alien must have work authorization at some point to count work credits for insured status purposes). Reportedly, in 2006, SSA sent a diplomatic note to the Mexican government clarifying that the agreement would not waive the "work authorization" requirement. SSA has not received a response from the Mexican government. Still others express concern that a totalization agreement with Mexico

[40] Roll call vote 1122. The vote was 277 to 141.

[41] Signed into law on December 26, 2007.

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

[43] As discussed above, "noncitizens" 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.

[44] Calculations performed by CRS using the average of the monthly CPSs for 2006.

[45] The text of the U.S.-Mexico totalization agreement is available on the TREA Senior Citizens League website (in pdf format) at http://www.tscl.org/NewContent/102697.asp, visited June 22, 2007. The agreement is also available on the SSA website (in html format) at http://www.ssa.gov/international/Agreement_Texts/mexico.html, visited June 22, 2007.

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

could provide an incentive for unauthorized workers from Mexico to come to the United States. In addition, given the Social Security system's projected long-range funding shortfall, some question the feasibility of adding a potentially large number of recipients to the rolls in the absence of structural Social Security reform.

Others argue that an agreement (that precludes payments to unauthorized aliens in the United States) could be beneficial to the United States and that the cost could be reasonable.[47] 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)[48] 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)[49] 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.

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?*[50] and shortly afterward released its report to Congress—*Social Security: Proposed Totalization Agreement with Mexico Presents Unique Challenges*.[51] 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

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

[48] 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.

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

[50] The September 11, 2003 hearing document (Serial No. 47) may be accessed online at http://judiciary.house.gov/media/pdfs/printers/108th/89298.PDF, visited June 22, 2007.

[51] The September 11, 2003 testimony (GAO-03-1035T) may be accessed online at http://www.gao.gov/new.items/d031035t.pdf, visited June 22, 2007. The September 30, 2003 GAO report (GAO-03-993) may be accessed online at http://www.gao.gov/new.items/d03993.pdf, visited June 22, 2007.

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."[52] 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 totalization agreement with Mexico would have a negligible effect on the long-range actuarial balance of the Social Security trust funds.[53]

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."[54] 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

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

[53] SSA's March 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.

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

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 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."[55]

## 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.[56] 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."[57] 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.

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

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

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

- 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 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 1994, 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 more than 10 employees had discrepancies and the number of employees with mismatches equaled more than 10% of the employer's workforce.[58]

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,[59] SSA sent out approximately 110,000 no-match letters[60] compared to approximately 950,000 for tax year 2001.[61] 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.[62] Additionally, the Internal Revenue Service can penalize employers for providing incorrect information on wage forms (W-2's).[63]

SSA maintained that the letters were sent to employers to ensure that workers are properly credited with their earnings. Because of the controversy surrounding the increase in the number of no-match letters, SSA currently sends a no-match letter to an employer only if more than 10 employees have discrepancies and the number of employees affected equals more than 0.5% of the employer's workforce. In 2005, SSA sent 127,652 no-match letters for tax year 2004.[64]

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

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

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

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

[61] 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.

[62] INA § 274A.

[63] 26 U.S.C. § 6647.

[64] Unpublished data from SSA.

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

## No-Match Regulation

On August 15, 2007, the Department of Homeland Security published a final rule that amends the regulations relating to the unlawful hiring or continued employment of aliens who lack work authorization.[66] The regulation creates "safe-harbor" procedures for employers who receive a no-match letter to follow, to ensure that DHS would not find the employer guilty of knowingly hiring or continuing to employ an alien who lacks work authorization (i.e., that the employer had violated §274A of the Immigration and Nationality Act). Under the rule, the employer has to take reasonable steps, within 93 days of receipt of the no-match letter, to resolve the discrepancy. These steps include checking records for clerical errors and, if such errors are found, informing SSA of the correct information; or asking the employee to confirm the name and SSN, and if they are correct, requesting that the employee resolve the discrepancy with SSA.[67]

Although the regulation was to become effective on September 14, 2007, it is not yet in effect. In a lawsuit filed on August 29, 2007, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the American Civil Liberties Union (ACLU), and other groups sought a temporary restraining order (TRO). The plaintiffs allege that inaccuracies in SSA's database coupled with the rule will threaten the jobs of those working legally in the United States. On August 31, 2007, the judge in the U.S. District Court of Northern California set a hearing for October 1, 2007, and issued a TRO prohibiting SSA from mailing any no-match letters and prohibiting the rule from becoming effective.[68] On October 10, 2007, the judge granted a preliminary injunction stopping the DHS from implementing the regulation, including mailing or otherwise sending employers SSA no-match letters that were to include DHS guidance letters explaining the regulation.[69] On December 5, 2007, the Department of Justice on behalf of DHS filed an appeal of the injunction; however, the injunction is currently still in effect. DHS has interpreted the injunction as applying nationwide, and, thus, the regulation has not been implemented.[70] In addition, SSA has decided not to mail no-match letters for tax year 2006, maintaining that it is too late for those letter to aid in the correction of wage reports.[71]

## Legislation in the 110th Congress Related to No-Match Letters

On January 4, 2007, Representative Gallegly introduced H.R. 138, the Employment Eligibility Verification and Anti-Identity Theft Act. H.R. 138 would require SSA to send a no-match letter to any employer who submits a combination of a name and SSN that does not match SSA records. The bill would also mandate that the Secretary of Homeland Security, in consultation with the Commissioner of SSA, establish a verification system through which employers who receive no-

[66] Department of Homeland Security, "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter," 72 *Federal Register* 45611, August 15, 2007. Also see, U.S. Immigration and Customs Enforcement, *Partners: Safe Harbor*, available at http://www.ice.gov/partners/safeharbor/index.htm?searchstring=safe-harbor%20AND%20regulation, visited October 22, 2007.

[67] For more information on the regulation, see CRS Congressional Distribution Memorandum, "No-Match Letters and the 'Safe Harbor' Procedures," by Alison Siskin, available from the author.

[68] *American Federation of Labor and Congress of Industrial Organizations et al. v. Chertoff et al*, NO. 3:07cv04472, slip op. (N.D.Cal. August 31, 2007).

[69] *American Federation of Labor, et al. v. Chertoff, et al*., 2007 WL 2972952 (N.D. Cal., October 10, 2007).

[70] Personal Correspondence with Tiffany Kebodeaux, DHS Congressional Relations, October 24, 2007.

[71] Personal Correspondence with Kitty Chilcoat, SSA Office of Legislation and Congressional Affairs, November 14, 2007.

match letters can verify an individual's identity and employment authorization. Beginning six months after enactment, employers would be required to verify an individual's identity and employment authorization through the newly created verification system within three business days of receiving a no-match letter. If the employer receives a nonconfirmation of the employee's identity and employment authorization, the employer would be required to notify the employee in writing within one day, and the burden would be on the employee to resolve any error in the verification mechanism within 30 days. After 30 days, the employer would be required to attempt to verify the employee's information, and if the employer receives another nonconfirmation, terminate the employee's employment.

On March 21, 2007, Representative Myrick introduced H.R. 1627, the Social Security Number Fraudulent Use Notification Act of 2007. H.R. 1627 would require the Commissioner of Social Security to notify an individual in writing in cases in which an individual's Social Security number is associated with a wage record provided to SSA by an employer (on behalf of an employee) and the information does not match relevant records maintained by SSA. The Commissioner would also be required to provide written notification in cases in which an individual's Social Security number is otherwise used in a fraudulent manner.

# Legislation in the 110th Congress

This section includes legislation that would directly alter the treatment of a noncitizen's earnings for Social Security eligibility and benefit computation purposes.[72] Legislation that may indirectly affect a noncitizen's eligibility for Social Security benefits (such as comprehensive immigration reform legislation or, for example, legislation that would establish enhanced Social Security cards or new employment eligibility verification systems) is addressed in other CRS reports.

## P.L. 110-161/S.Amdt. 3352 to H.R. 3043

Section 527 of The Consolidated Appropriations Act, 2008 (P.L. 110-161),[73] specifies that none of the appropriated funds can be used to process claims for credit for quarters of coverage based on work performed under a SSN that is not the claimant's number which is an offense prohibited under §208 of the Social Security Act.[74] Senator Ensign offered this provision as an amendment (S.Amdt. 3352) to H.R. 3043 (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 2008). The Ensign amendment was agreed to by a vote of 92-2.[75] Although H.R. 3043 was vetoed by President Bush on November 13, 2007, and the House failed to override the veto,[76] the provision was included in P.L. 110-161.

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

[73] Signed into law on December 26, 2007.

[74] §208 of the Social Security Act specifies penalties for offenses including making false statements or representations to gain a benefit for which a person is not entitled; with intent to deceive furnishing false information to the Commissioner of SSA; and using a SSN which is not the individual's to receive a benefit to which the individual is not entitled.

[75] Record vote number 338.

[76] Roll call vote 1122. The vote was 277 to 141.

## H.R. 190

Under H.R. 190, introduced by Representative Paul on January 4, 2007, Social Security-covered earnings paid to noncitizens after December 31, 2007, would not be counted for Social Security purposes.[77] 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 future Social Security benefits unless they have insured status as of December 31, 2007, or they obtain U.S. citizenship and subsequently gain additional earnings credits under Social Security.

In addition, H.R. 190 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 2008, as specified in the legislation.

H.R. 190 could have important 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. 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.

## H.R. 332

H.R. 332, introduced by Representative Carter on January 9, 2007,[78] would exclude the earnings of noncitizens who are not authorized to work in the United States from being counted for Social Security purposes.[79] 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 (adjustments in benefit payments would apply on a prospective basis).

Because H.R. 332 would prevent aliens from being paid Social Security benefits based on unauthorized earnings in the United States, it could be argued that the bill would prevent individuals who violated immigration law from being "rewarded" for their improper behavior, noting that potential eligibility for Social Security benefits (for themselves and their family members) may make illegal migration more attractive.[80] Others contend that, because Social

[77] Rep. Paul introduced similar legislation in the 108th Congress (H.R. 489) and the 109th Congress (H.R. 858). This bill is also similar to H.R. 5211 introduced by Rep. Paul in the 109th Congress.

[78] This legislation is similar to H.R. 1438 ( introduced by Rep. Rohrabacher) and H.R. 4313 (introduced by Rep. Hunter) in the 109th Congress. Likewise, S. 2117, introduced by Senator Inhofe in the 109th Congress, included a provision that would have required 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 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 have applied to noncitizens who file an application for benefits based on a Social Security number assigned on or after January 1, 2004.

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

[80] Testimony of Matthew James Reindl, Stylecraft Interiors Inc., before the Subcommittee on Immigration, Border (continued...)

Security is an earned entitlement, workers who pay into the system should receive benefits regardless of their immigration status. Like H.R. 190 (discussed above), H.R. 332 could have an important impact on the financial status of the Social Security system and on current and future recipients. Much of the effect would depend on details that are not specified in the legislation.

## S.Amdt. 152 to H.R. 2 (Fair Minimum Wage Act of 2007)

On January 23, 2007, Senator Ensign offered an amendment to H.R. 2, the Fair Minimum Wage Act of 2007, that would tighten restrictions on the use of unauthorized earnings for purposes of qualifying for Social Security benefits. Under the amendment, all individuals (citizens and noncitizens) who are assigned a valid Social Security number on or after the date of enactment of H.R. 2 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).[81] The amendment was withdrawn prior to Senate passage of H.R. 2 by a vote of 94-3 on February 1, 2007.

## H.R. 709

H.R. 709, introduced by Representative Gallegly on January 29, 2007, would exclude the earnings of noncitizens who are not authorized to work in the United States from being counted for Social Security purposes, among other provisions. Like H.R. 332 (discussed above), 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 (adjustments in benefit payments would apply on a prospective basis).

## H.R. 2954

Representative Peter King introduced H.R. 2954 on September 11, 2007. H.R. 2954 would specify that when determining quarters of coverage for a Social Security benefit that individuals would not be credited with any wages paid for services performed in the United States, or any self-employment income earned, while the individual (1) was not a citizen or national of the United States, (2) was not lawfully admitted for permanent residence in the United States, and (3) was not authorized to be employed in the United States.

(...continued)

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 Cong., 2nd sess. (May 4, 2005), at http://judiciary.house.gov/media/pdfs/reindl050405.pdf, visited June 22, 2007.

[81] This amendment is similar to S.Amdt. 3985 to S. 2611, the Comprehensive Immigration Reform Act of 2006, in the 109th Congress. Following floor debate, the Senate approved a motion to table the amendment by a vote of 50-49, preventing a direct vote on the substance of the measure. S. 2611 was passed by the Senate on May 25, 2006. No further action was taken on the bill.

## H.R. 4037

Introduced by Representative Carter on November 5, 2007, H.R. 4037 would specify that for the computation of a Social Security benefit, an individual should not be credited with any work performed while the individual was not a U.S. citizen or national and was illegally in the United States. The provision would apply to apply to all wages and self-employment income earned *before, on, or after* the date of enactment.

## H.R. 4192/S. 1269

S. 1269 was introduced by Senator Inhofe on May 2, 2007. H.R. 4192 was introduced by Representative Tancredo on November 15, 2007. Similar to several other bills in the 110th Congress, S. 1269 and H.R. 4192 would exclude the earnings of noncitizens who are not authorized to work in the United States from being counted for Social Security purposes.

# Social Security Provisions in the Comprehensive Immigration Reform Bills in the Senate

S.Amdt. 1150, the bipartisan compromise proposal for immigration reform, was proposed by Senator Kennedy as an amendment in the nature of a substitute to the Comprehensive Immigration Reform Act of 2007 (S. 1348). S. 1348, which was introduced by Senate Majority Leader Reid as the marker for Senate debate on comprehensive immigration reform, is based on S. 2611, as passed by the Senate in the 109th Congress. The Senate began consideration of S.Amdt. 1150 to S. 1348 in late May 2007. After several failed cloture votes, the measure was withdrawn from Senate floor debate on June 7, 2007.

S. 1639, introduced by Senator Kennedy on June 18, 2007, was placed on the Senate calendar on June 19, 2007. It was debated on the Senate floor, and pulled on June 28, 2007, when cloture was not invoked.[82]

### S. 1639 and S.Amdt. 1415 to the Comprehensive Immigration Reform Act of 2007 (S.Amdt. 1150 to S. 1348)

On June 6, 2007, Senator Hutchison offered an amendment (S.Amdt. 1415) to the Comprehensive Immigration Reform Act of 2007 (S.Amdt. 1150 to S. 1348) that would restrict earnings credits based on work performed without authorization in 2004 or later, with respect to individuals who are assigned an SSN in 2004 or later. The Senate agreed to the Hutchison amendment by a voice vote, on June 6, 2007. The same language is included in S. 1639, as introduced.

#### *Individuals Assigned an SSN in 2004 or Later*

Under S. 1639, with respect to an individual who is not a natural-born United States citizen, no quarter of coverage would be credited for 2004 or later (for insured status and benefit computation purposes) unless the individual was authorized to work in the United States at the

[82] The Senate voted 46 to 53 not to invoke cloture. (Record vote number 235.)

time, as determined by the Social Security Administration (SSA) based on information provided by the Department of Homeland Security (DHS). S. 1639 would not restrict earnings credits for unauthorized work performed before 2004.

### *Individuals Assigned an SSN Before 2004*

S. 1639 would maintain the current-law treatment of unauthorized earnings with respect to individuals who were assigned an SSN before 2004.[83] Individuals who were assigned an SSN before 2004 would not be required to have work authorization at any point to qualify for Social Security benefits. All Social Security-covered earnings would be credited for purposes of gaining insured status under the program and computing benefits, regardless of an individual's work authorization status.

### *Determining Creditable Quarters of Social Security Coverage*

Under S. 1639, DHS would be required to provide information regarding an individual's work authorization status during periods of Social Security-covered employment to SSA for purposes of determining an individual's creditable quarters of coverage. DHS and SSA would be required to enter into an agreement for this purpose no later than 180 days after enactment.

### *Effective Date*

The new rules for individuals assigned an SSN in 2004 or later would be effective with respect to benefit applications filed on or after 180 days after enactment of S. 1639.

## S.Amdt. 1195 to the Comprehensive Immigration Reform Act of 2007 (S.Amdt 1150 to S. 1348)

On May 24, 2007, Senator Ensign offered an amendment (S.Amdt. 1195) to the Comprehensive Immigration Reform Act of 2007 (S.Amdt. 1150 to S. 1348) that would tighten restrictions on the use of unauthorized earnings for purposes of qualifying for Social Security benefits. The amendment is substantively the same as the amendment offered by Senator Ensign to the Fair Minimum Wage Act of 2007 (S.Amdt. 152 to H.R. 2) described above. Senator Ensign offered a number of other Social Security-related amendments to the Comprehensive Immigration Reform Act of 2007 that would restrict earnings credits based on work performed before an individual is assigned a valid SSN or work performed during any period without authorization. No action was taken on the amendments before the measure was withdrawn from floor debate on June 7, 2007.

## S.Amdt. 1847 to S. 1639

On June 21, 2007, Senator Ensign offered an amendment (S.Amdt. 1847) to S. 1639 that would tighten restrictions on the use of unauthorized earnings for purposes of qualifying for Social Security benefits. S.Amdt. 1847 would specify that all individuals (citizens and noncitizens) who are assigned a valid Social Security number on or after the date of enactment of S. 1639 would be

[83] For information on the treatment of unauthorized earnings for Social Security purposes under current law, see the report section titled "Social Security Protection Act of 2004."

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).[84] In addition, with respect to an individual who is not a natural-born U.S. citizen, no quarter of coverage would be counted toward qualifying for a benefit unless the Social Security Commissioner, based on information provided by the Secretary of Homeland Security, determines that the individual had work authorization during that quarter. S.Amdt. 1847 would require the Secretary of Homeland Security to enter into an agreement with the Social Security Commissioner, within 180 days after enactment of S. 1639, to provide the information needed to administer this provision. The amendment would be effective upon enactment of S. 1639.

[84] This provision is similar to S.Amdt. 3985 to S. 2611, the Comprehensive Immigration Reform Act of 2006, in the 109th Congress. Following floor debate, the Senate approved a motion to table the amendment by a vote of 50-49, preventing a direct vote on the substance of the measure. S. 2611 was passed by the Senate on May 25, 2006. No further action was taken on the bill.

# 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 |

| | |
|---|---|
| Australia | October 1, 2002 |
| 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[a] |

a. 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, visited June 22, 2007.

# 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);[85]

(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[86] 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 pursuant to Section 210 or 245A of the INA; (ii) Aliens currently under Temporary Protected Status (TPS);[87] (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

[85] 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.

[86] "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.

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

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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