Ability of Unauthorized Aliens to Claim Refundable Tax Credits

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July 26, 2012

Congressional Research Service
7-....
www.crs.gov
R42628

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

In 2011, the Treasury Inspector General for Tax Administration (TIGTA) reported that individuals who were not authorized to work in the United States received $4.2 billion by claiming the refundable portion of the child tax credit—the additional child tax credit (ACTC). The ACTC is available to working families with children under age 17. The report sparked considerable concern that unauthorized aliens were obtaining refundable tax credits. The TIGTA audit was based upon an analysis of tax returns filed by persons with Individual Taxpayer Identification Numbers (ITINs). The Internal Revenue Service (IRS) issues ITINs to individuals who are required to have a taxpayer identification number for tax purposes but are not eligible to obtain a Social Security number (SSN) because they are not authorized to work in the United States. All aliens, including those who are in the country illegally, are generally subject to federal taxes under the Internal Revenue Code (IRC), and even income illegally obtained is subject to taxation.

A refundable tax credit is one where the taxpayer may receive a payment from the IRS that exceeds his or her tax liability. Examples include the earned income tax credit (EITC), the additional child tax credit, the American opportunity tax credit, and the health coverage tax credit. While the EITC requires SSNs of all recipients, the other existing credits, including the ACTC, do not. Similarly, several now-expired credits included an SSN requirement, while others did not. Apart from any SSN requirement, the IRC also expressly prohibits nonresident aliens from claiming some refundable credits.

In addition to the specific provisions of the IRC, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 (P.L. 104-193) bars unauthorized aliens from any federal public benefit except certain emergency services and programs. So defined, this bar covers many programs whose enabling statutes do not individually make citizenship or immigration status a criterion for participation. The legal question arises as to whether any refundable tax credits are federal public benefits, which under PRWORA unauthorized aliens should be barred from receiving. There is no indication that the IRS considers any refundable tax credits to be subject to PRWORA Section 401. Looking to the statutory text, it is arguably unclear whether refundable credits should be treated as federal public benefits, although there is a strong argument that at least some should not (e.g., the credit for taxes withheld). It does not appear that any court has examined this issue or that the IRS has issued guidance on it.

The EITC and ACTC are the largest refundable tax credits—in 2009 taxpayers claimed $53.0 billion and $27.5 billion of each credit, respectively—and primarily benefit working families with children. Estimates derived from the March Supplement of the U.S. Census Bureau's Current Population Survey (CPS) indicate that the unauthorized resident alien population was 11.2 million in 2010. The Pew Hispanic Center reported that two-thirds of the unauthorized resident alien population have resided in the United States for 10 or more years. The report also found that the proportion of unauthorized aliens who have been in the country at least 15 years has more than doubled since 2000. Pew researchers have also found that unauthorized aliens tend to be younger than the U.S. population overall and more likely to be in the child-bearing and child-rearing years. As a consequence, an estimated 46% of unauthorized adults are parents of minor children.

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The ability of unauthorized aliens to claim federal refundable tax credits has received considerable scrutiny.[1] In a July 2011 study, the Treasury Inspector General for Tax Administration (TIGTA) reported that individuals who were not authorized to work in the United States received $4.2 billion by claiming the refundable portion of the child tax credit—the additional child tax credit (ACTC).[2] The ACTC is available to working families with children under age 17. This issue is complicated by the differences in legal classifications of foreign nationals/aliens (e.g., "employment-authorized alien," "legal permanent resident," "resident alien," and "qualified alien") across the federal immigration, tax, and welfare laws.[3]

The TIGTA audit was based upon analysis of tax returns filed by persons with Individual Taxpayer Identification Numbers (ITINs). The Internal Revenue Service (IRS) issues ITINs to individuals who are required to have a taxpayer identification number for tax purposes but are not eligible to obtain a Social Security number (SSN) because they are not authorized to work in the United States. The number of tax forms filed with ITINs has increased from 1.55 million in 2005 to 3.02 million in 2010.[4] It is unclear how many of these individuals who filed with ITINs were unauthorized aliens or part of mixed-status families that included U.S. citizens or legally present aliens as well as unauthorized aliens.[5]

This report opens with an explanation of refundable tax credits and follows with an overview of unauthorized resident aliens. The report proceeds to analyze the federal tax status of unauthorized aliens and their eligibility for refundable tax credits, including a legal analysis of whether refundable tax credits are "federal public benefits" under Section 401 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). The report concludes with a discussion of selected policy options.

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[1] For example, the House has passed two bills in the 112th Congress that would require taxpayers claiming the additional child tax credit to provide Social Security Numbers, thus intending to deny the credit to unauthorized aliens. *See* H.R. 3630, Tit. V, Sub. C, §5201 (Middle Class Tax Relief and Job Creation Act of 2011, as passed by the House); H.R. 5652, Tit. VI, Sub. B, §611 (Sequester Replacement Reconciliation Act of 2012, as passed by the House). H.R. 3630 was enacted into law (P.L. 112-96) without the provision. There were also widespread media reports that provisions similar to these bills were considered—but not included—during the negotiations on legislation to temporarily reduce the payroll tax (H.R. 3765, P.L. 112-78).

[2] According to TIGTA, the total amount of such claims increased from $924 million in 2005. Michael E. McKenney, Kyle R. Andersen, and Larry Madsen, et al., *Individuals Who Are Not Authorized to Work in the United States Were Paid $4.2 Billion in Refundable Credits*, Treasury Inspector General for Tax Administration, 2011-41-061, Washington , DC, July 7, 2011, http://www.treasury.gov/tigta/auditreports/2011reports/201141061fr.html#background. (Hereinafter *Individuals Who Are Not Authorized to Work in the United States*, TIGTA, 2011-41-061, 2011.)

[3] An "employment-authorized alien" is any foreign national permitted by the Immigration and Nationality Act (INA) to work in the United States; a "legal permanent resident" is a foreign national who has been admitted or adjusted to permanently live in the United States under the INA; a "resident alien" is a foreign national who meets the substantial presence test under the Internal Revenue Code; and, a "qualified alien" is a foreign national who meets the eligibility requirements under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act (P.L. 104-193).

[4] *Individuals Who Are Not Authorized to Work in the United States*, TIGTA, 2011-41-061, 2011.

[5] Mixed-status families are households headed by unauthorized aliens who have U.S. citizen children, as well as other family members who may be legal permanent residents (LPRs). Children born in the United States to parents who are unlawfully present in the United States are U.S. citizens. CRS Report RL34500, *Unauthorized Aliens' Access to Federal Benefits: Policy and Issues*, by (name redacted).

Refundable Tax Credits

Tax credits allow taxpayers to reduce their tax liability dollar-for-dollar up to the value of the credit. Credits are either nonrefundable or refundable. By definition, the value of nonrefundable tax credits cannot exceed a taxpayer's income tax liability. In contrast, refundable tax credits can be larger than a taxpayer's income tax liability, with the taxpayer receiving the difference (or part of the difference in the case of *partially* refundable tax credits) as a cash payment from the IRS. As a result of this distinction, refundable tax credits can be claimed by taxpayers with little or no income tax liability, which includes many low-income tax filers.

The existing refundable tax credits include

- the earned income tax credit (EITC);[6]
- the additional child tax credit (ACTC), which is the refundable portion of the child tax credit;[7]
- the American opportunity tax credit, which is a partially refundable credit for tuition and related expenses;[8]
- the health coverage tax credit, which provides a credit for health insurance costs of qualifying individuals who receive trade adjustment assistance (TAA) or pension benefits under a plan taken over by the Pension Benefit Guaranty Corporation (PBGC);[9]
- the credit for tax withheld on wages;[10]
- the credit for tax withheld at source for nonresident aliens and foreign corporations;[11]
- the credit for fuel excise taxes paid on fuel used for nontaxable uses; and[12]
- the credit for overpayment of tax.[13]

Additionally, a premium assistance credit, provided under the Patient Protection and Affordable Care Act (P.L. 111-148), will go into effect in 2014.[14] There are also several refundable credits that have recently expired. These are the first-time homebuyer credit,[15] the "recovery rebate" credit in the Economic Stimulus Act of 2008 (2008 stimulus credit),[16] the Making Work Pay

[6] I.R.C. §32; *see also* CRS Report RL31768, *The Earned Income Tax Credit (EITC): An Overview*, by (name redacted).

[7] I.R.C. §24; *see also* CRS Report R41873, *The Child Tax Credit: Current Law and Legislative History* , by (name reda cted).

[8] I.R.C. §25A; *see also* CRS Report R41967, *Higher Education Tax Benefits: Brief Overview and Budgetary Effects*, by (name redacted).

[9] I.R.C. §35; *see also* CRS Report RL32620, *Health Coverage Tax Credit*, by (name redacted).

[10] I.R.C. §31.

[11] I.R.C. §33.

[12] I.R.C. §34.

[13] I.R.C. §37.

[14] I.R.C. §36B.

[15] I.R.C. §36, *see also* CRS Report RL34664, *The First-Time Homebuyer Tax Credit*, by (name redacted).

[16] I.R.C. §6428.

credit available in 2009 and 2010,[17] and the adoption expenses credit, which was refundable for 2010 and 2011.[18] Selected credits are summarized in **Appendix A**.

The credits listed in the last four bulleted points above are essentially methods by which taxpayers receive refunds for overpayment of taxes. The other refundable credits can be broadly categorized into those whose value depends on the taxpayer's earnings and those whose value is based on the taxpayer's expenditures for a particular action or good, such as higher education or homeownership. Currently, the two largest refundable tax credits—the EITC and ACTC—fall into the former category and comprise an estimated 95% of the total amount of refundable credits claimed in 2009. These credits effectively subsidize low-wage work, providing additional money for each dollar of wages. In addition, both credits help mitigate the federal taxes that low-income workers pay. In many cases, these workers may not have sufficient income to incur an income tax liability, but they do pay payroll taxes (i.e., the taxes on wages that fund Social Security benefits under the Old-Age, Survivors, and Disability Insurance (OASDI) program and the Medicare hospital insurance (HI) program). For extremely low-wage workers, these credits may result in a net increase in income.

For example, in 2011 (when the two-percentage point payroll tax reduction was in effect),[19] taxpayers were directly subject to a payroll tax rate of 5.65%.[20] If a taxpayer had $20,000 of earnings and one child,[21] the taxpayer would owe $1,130 of payroll taxes and $410 of federal income taxes, for a total federal tax liability of $1,540, as illustrated in **Figure 1**. This same taxpayer would be eligible for a $1,000 refund from the ACTC and a $2,565 refund from the EITC. Hence, in this example, the taxpayer would receive $2,025 as a refund. **Figure 1** also highlights that while taxpayers begin paying payroll taxes on the first dollar they earn, the total amount of refundable credits they receive is greater than their total federal tax liability (net the *non-refundable* portion of the child tax credit)[22] until taxpayers earn approximately $26,000. Hence, in this example, taxpayers making under approximately $26,000 actually see a net increase in their income as a result of these credits. For reference, in 2011 the poverty level for an adult under 65 with one child was $15,504.

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[17] I.R.C. §36A; *see also* CRS Report R40969, *Withholding of Income Taxes and the Making Work Pay Tax Credit*, by (name redacted).

[18] Former I.R.C. §36C; *see also* CRS Report RL33633, *Tax Benefits for Families: Adoption*, by (name redacted).

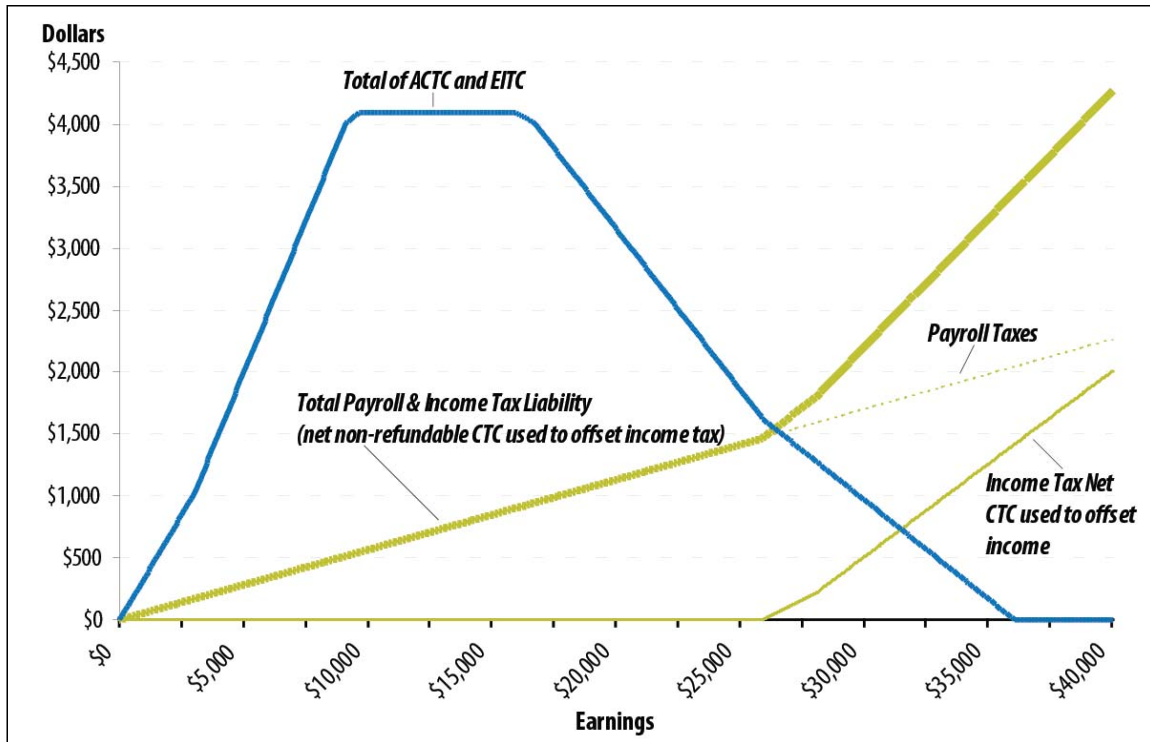
[19] For more information on the payroll tax reduction, see CRS Report R41648, *Social Security: Temporary Payroll Tax Reduction*, by (name redacted).

[20] Generally payroll taxes are assessed equally on both the employer and the employee. Employers are statutorily required to pay a 7.65% tax on their employees' wages and employees are required to pay a 7.65% tax on their wages (6.2% of each funds the OASDI program and 1.45% of each funds the Medicare HI program). In 2011 and 2012, the employee's share of payroll taxes was reduced by two percentage points, so that the employee paid at a rate of 5.65%. while employers paid at a rate of 7.65%. While the legal incidence of the employer's share of payroll taxes falls on the employer, many economists have concluded that employees bear both the employee and employer's share of the taxes. Specifically, the employer's share of payroll taxes is "paid" by the employee in terms of reduced wages. Hence, economically the marginal payroll tax rates in 2011 (the example year) would be 13.3% (7.65% + 5.65%). However, this analysis reflects exclusively the employee's share of payroll taxes.

[21] This example assumes the taxpayer files as head of household, has no other income, takes no deductions except for the standard deduction and two personal exemptions, and claims only two credits (EITC and ACTC).

[22] This represents the taxpayer's total tax liability prior to claiming any refundable tax credits. Hence, it is the taxpayer's liability minus the total non-refundable credits, which in this case is limited to the child tax credit.

Figure 1. EITC and ACTC Credits Compared to Tax Liability by Earnings, 2011



Source: Congressional Research Service.

Notes: The "Income Tax Net CTC used to offset income" represents the taxpayer's total tax liability *prior to claiming* refundable tax credits. Hence it is their liability minus the total of their non-refundable credits, which in this example is limited to the child tax credit. "Payroll Taxes" reflects only the employees' share of OASDI taxes and Medicare HI taxes.

Immigration Law: Unauthorized Aliens

The migration and family patterns of unauthorized aliens residing in the United States are central to the question of their ability to claim refundable tax credits. Through the Immigration and Nationality Act (INA), foreign nationals enter the United States in two main categories: as legal permanent residents (LPRs) and temporary nonimmigrants.[23] Unauthorized resident aliens are foreign nationals who overstay their nonimmigrant visas, foreign nationals who enter the country surreptitiously, or foreign nationals who are admitted on the basis of fraudulent documents. In all three instances, these unauthorized aliens are in violation of the INA and subject to removal. The actual number of unauthorized aliens in the United States is not known, as locating and enumerating people who are residing in the United States without permission poses many methodological problems. Estimates derived from the March Supplement of the U.S. Census Bureau's Current Population Survey (CPS) indicate that the unauthorized resident alien population was 11.2 million in 2010.[24]

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[23] CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by (name redacted); and CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by (name redacted).

[24] More recent estimates of unauthorized resident aliens are available but not broken down into the family characteristics used in this report. CRS Report R41207, *Unauthorized Aliens in the United States*, by (name redacted); (continued...)

The Pew Hispanic Center reported that 35% of unauthorized adults have resided in the United States for 15 years or more and that 28% have resided for 10 to 14 years. The report also found that the proportion of unauthorized aliens who have been in the country at least 15 years has more than doubled since 2000. Pew researchers have also found that unauthorized aliens tend to be younger than the U.S. population overall and more likely to be in the child-bearing and child-rearing years. As a consequence, nearly half—an estimated 46%—of unauthorized adults are parents of minor children.[25]

"Mixed" Immigration Status Households

A significant portion of the households headed by unauthorized aliens may have U.S. citizen children, as well as spouses who may be legal permanent residents (LPRs). Researchers at the Pew Hispanic Center estimated that at least 9 million people were in "mixed-status" families that included at least one unauthorized adult alien and at least one U.S.-born child in 2010. Along with the approximately 1 million unauthorized aliens who are minor children, Pew researchers estimated that 4.5 million minor children were born in the United States to a family in which at least one parent was an unauthorized alien. As **Figure 2** shows, the number of U.S.-citizen children with at least one unauthorized parent has more than doubled since 2000.[26]

(...continued)

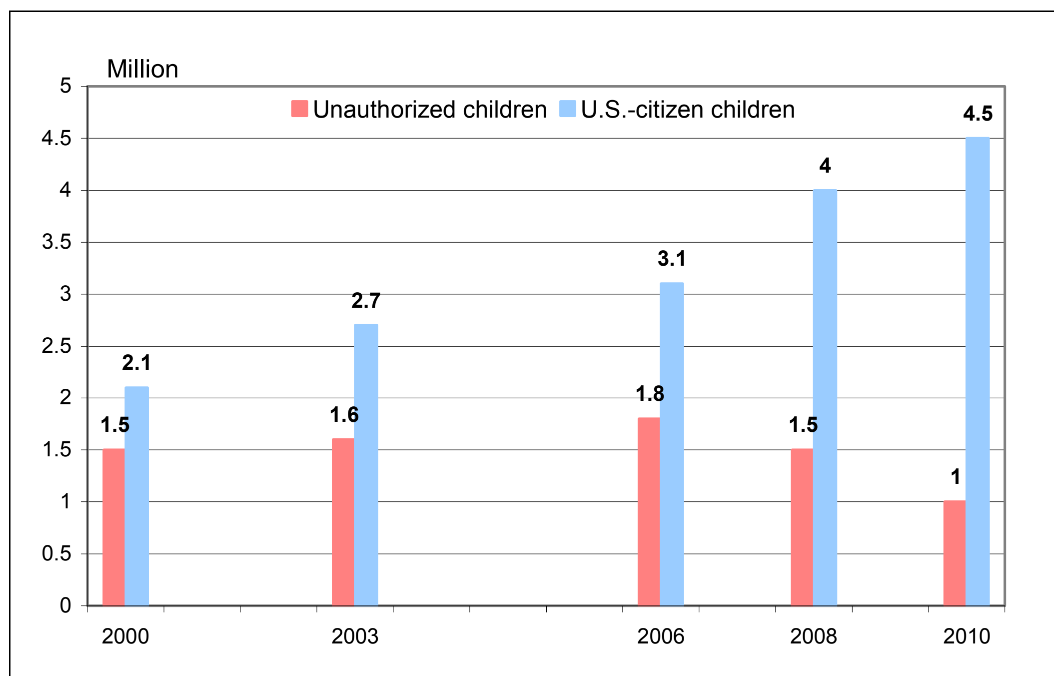
and CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by (name redac ted).

[25] Paul Taylor, Mark Hugo Lopez, and Jeffrey Passel, et al., *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood* , Pew Hispanic Center, December 1, 2011, http://www.pewhispanic.org/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood/.

[26] Jeffrey Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010* , Pew Hispanic Center, February 1, 2011, http://www.pewhispanic.org/2011/02/01/iii-births-and-children/; and, Paul Taylor, Mark Hugo Lopez, and Jeffrey Passel, et al., *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood* , Pew Hispanic Center, December 1, 2011, http://www.pewhispanic.org/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood/.

Figure 2. Children Under 18 with at Least One Unauthorized Alien Parent

Selected years, 2000-2010



Source: CRS presentation of data from *Unauthorized Immigrant Population: National and State Trends, 2010* , Pew Hispanic Center, February 1, 2011.

The implications of these demographics for the refundable tax credits heighten the complexity of the debate to restrict such tax credits to those persons legally authorized to work in the United States. In a widely cited 2002 study of federal benefits that may have gone to households headed by unauthorized aliens, Steven Camarota concluded, "[M]any of the costs associated with illegals are due to their American-born children, who are awarded U.S. citizenship at birth ... greater efforts at barring illegals from federal programs will not reduce costs because their citizen children can continue to access them."[27] Whether an unauthorized alien who is head of household is permitted to be the payee of a federal benefit for U.S. citizen children varies across programs.

Another group of foreign nationals that adds a level of complexity are the "quasi-legal" migrants. More precisely, not all unauthorized aliens lack legal documents giving them permission to work in the United States, which leads many observers to characterize these *documented* aliens as "quasi-legal" migrants. There are certain circumstances in which the Department of Homeland Security issues temporary employment authorization documents (EADs) to aliens who are not otherwise considered authorized to reside in the United States. Foreign nationals with EADs, in turn, may legally obtain Social Security cards.[28] These "quasi-legal" unauthorized aliens fall in several categories:

[27] Steven A. Camarota, *The High Cost of Cheap Labor: Illegal Immigration and the Federal Budget* (Washington, D.C.: Center for Immigration Studies, August 2004).

[28] For further background, see CRS Report RL32004, *Social Security Benefits for Noncitizens*, by (name redacted) and (name redacted).

- The government has given them temporary humanitarian relief from removal, such as Temporary Protected Status (TPS).[29]
- They have sought asylum in the United States and their cases have been pending for at least 180 days.[30]
- They are immediate family or fiancées of legal permanent residents (LPRs) who are awaiting in the United States for their legal permanent residency cases to be processed.[31]
- They have overstayed their nonimmigrant visas and have petitions pending to adjust status as employment-based LPRs.[32]

None of the aliens described above have been formally approved to remain in the United States permanently, and are not necessarily considered lawfully present. Many with pending cases who are ultimately denied LPR status may have legally obtained SSNs for the temporary periods they were permitted to work in the United States. In addition, some may also be part of mixed-status families who include persons with ITINs.

Federal Tax Status of Unauthorized Aliens

The Internal Revenue Code (IRC) does not have a special classification for individuals who are not lawfully present in the United States. An unauthorized alien is, like all other foreign nationals, classified for tax purposes as a resident or nonresident alien. Resident and nonresident aliens are both subject to U.S. taxes—resident aliens are generally taxed in the same manner as U.S. citizens,[33] while nonresident aliens are subject to special rules.[34]

In general, an individual is a nonresident alien unless he or she is a lawful permanent resident or is present in the United States for a sufficient number of days during the current and previous two years ("substantial presence test").[35] Thus, an unauthorized alien who has been in the United States long enough to meet the substantial presence test is classified as a resident alien; otherwise, he or she is generally classified as a nonresident alien. This classification is for tax purposes only and does not affect the individual's immigration status. For further information on classes of

[29] For further background, see CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by (name redacted) and (name redacted).

[30] For further background, see CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*, by (name redac ted).

[31] For further background, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by (name redacted).

[32] The extent that some nonimmigrants (e.g., temporary workers, tourists, or foreign students) overstay their temporary visas and become "quasi-legal" aliens with petitions pending to adjust to legal status is discussed in CRS Report RS22446, *Nonimmigrant Overstays: Brief Synthesis of the Issue*, by (name redacted).

[33] *See* Treas. Reg. §1.1-1(a).

[34] For example, nonresident aliens are generally taxed only on income from U.S. sources, while U.S. citizens and resident aliens are subject to tax on all income, whatever its source. For more information, CRS Report RS21732, *Federal Taxation of Aliens Working in the United States*, by (name redacted).

[35] Under certain circumstances, an alien who fails to meet the substantial presence test may elect to be treated as a resident alien. *See* I.R.C. §§6013(g), (h), and 7701(b)(4).

noncitizens eligible to work and possibly qualify as a resident alien, see **Appendix B** and **Appendix C**.

Taxpayer Identification Numbers and Social Security Numbers

Since aliens, including unauthorized aliens, are subject to federal taxes, they need a taxpayer identification number. A taxpayer identification number is a unique number that identifies an individual for tax administration purposes. For most individuals, their taxpayer identification number is their Social Security number (SSN). Under current law, SSNs may be issued to lawful permanent residents, aliens who are authorized to work in the United States, and other aliens who are required by federal or state law to have an SSN in order to receive certain public benefits.[36] In FY2011, the Social Security Administration (SSA) issued 5.4 million new SSNs. Of those, 1.3 million were issued to noncitizens allowed to work in the United States and 28,622 were issued to legally present aliens who were not authorized to work.[37]

Prior to 1996, unauthorized aliens generally obtained SSNs for nonwork (tax administration) purposes from the SSA or were assigned temporary taxpayer identification numbers by the IRS.[38] In 1996, due to inefficiencies with the temporary numbers and plans by the SSA to tighten the rules under which aliens could obtain nonwork SSNs, the IRS began issuing permanent individual taxpayer identification numbers (ITINs) to alien taxpayers who are not legally able to obtain SSNs.[39] Thus, individuals who are ineligible for SSNs are supposed to file their federal tax returns using ITINs as their identifying numbers. For a discussion of trend data on SSNs issued to noncitizens, see **Appendix D**.

As **Figure 3** shows, the number of taxpayers filing with ITINs has increased over the past decade. A 2009 TIGTA audit reported, "(T)here has been a significant increase in the use of ITINs since the IRS began issuing them in Tax Year 1996." This audit specifically found a 246% increase from 530,000 in 2001 to more than 1.8 million in 2007.[40] The 2011 TIGTA audit reported further increases in tax returns filed with ITINs.[41] The initial rise in ITIN filings coincides with provisions in the various comprehensive immigration reform bills of the 2000s that would have required unauthorized aliens to demonstrate that they had paid taxes if they sought earned legalization or "amnesty."

[36] See 20 C.F.R. §422.104.

[37] Unpublished data from the Social Security Administration. For a fuller discussion on the number of SSNs issued to noncitizens, see **Appendix D**.

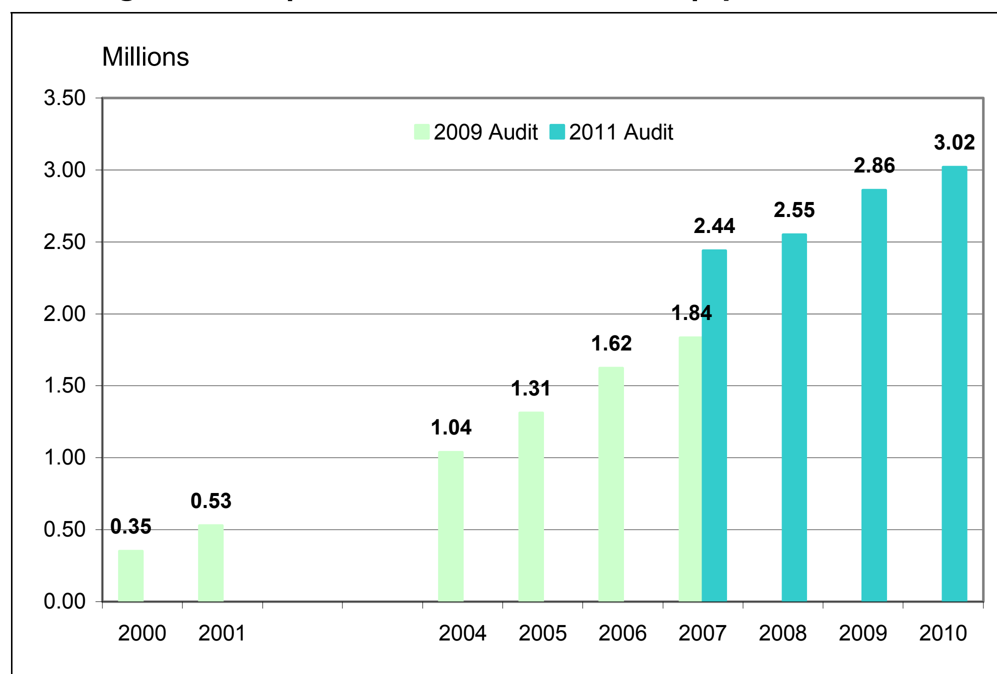
[38] *See* 68 Fed. Reg. 14563-14564 (SSA notice of proposed rulemaking to restrict the issuance of SSNs for nonwork purposes, which discusses the various nonwork purposes for which SSNs had historically been issued).

[39] *See id.*

[40] This audit also found that ITINs were improperly used for employment. "Employers are reporting wage income under an ITIN. The law establishing the ITIN specifically states that it is not an SSN or an account number for use in employment for wages." Michael R. Phillips, Michael E. McKenney, Russell P. Martin, and Gary L. Young, et al., *Actions Are Needed to Ensure Proper Use of Individual Taxpayer Identification Numbers and to Verify or Limit Refundable Credit Claims*, Treasury Inspector General for Tax Administration , 2009-40-057, March 31, 2009.

[41] *Individuals Who Are Not Authorized to Work in the United States*, TIGTA, 2011-41-061, 2011.

Figure 3. Comparative Statistics of ITIN Taxpayers, 2000-2010



Source: CRS presentation of data from the Treasury Inspector General for Tax Administration (TIGTA).

Notes: The 2009 TIGTA audit presented total ITIN tax reports filed; the 2011 TIGTA audit included statistics from 2010 on ITIN tax reports filed for multiple years.

As **Figure 3** shows, the 2011 audit captured a larger number of ITIN filers for 2007 than the 2009 audit did for 2007. The TIGTA offered this explanation that may account, in part, for the difference:

> Another reason for the increase is that a significant number of individuals are filing multiple claims to obtain the ACTC [Additional Child Tax Credit] for prior year tax returns (e.g., filing Tax Years 2007, 2008, and 2009 returns at the same time). In Processing Year 2010, approximately 238,000 ITIN filers submitted more than 608,000 tax returns for multiple years at the same time and claimed just more than a billion dollars in ACTCs on those returns. The ACTC claims for these individuals for the combined tax periods can be substantial. However, not all of these claims were refunded because of the statute of limitations rules that apply.[42]

These figures may not capture all tax payments by unauthorized aliens. Notably, unauthorized aliens who entered the country legally and had work authorization but who overstayed the terms of their admittance may have a valid SSN that was assigned to them. In addition, the Social Security Actuary estimates that 75% of unauthorized aliens who are working are paying the Federal Insurance Contributions Act (FICA) tax, and thus are using—either their own, someone else's, or a fraudulent—SSN.[43] As a result, some unauthorized aliens appear to be paying federal income taxes using an SSN rather than an ITIN.[44]

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[42] *Individuals Who Are Not Authorized to Work in the United States*, TIGTA, 2011-41-061, 2011.

[43] Personal Conversation with Social Security Actuary, Steve Goss, September 27, 2011.

[44] In tax year 2006, 3.8% of the W-2 forms received had a name and/or identifying number that did not match SSA (continued...)

Eligibility of Unauthorized Aliens to Claim Refundable Credits

In determining whether unauthorized aliens may claim the refundable tax credits, two questions arise. The first is whether these individuals are able to claim the credits under the federal tax laws found in the Internal Revenue Code (IRC). The second is whether any refundable tax credits are "Federal public benefits" under Section 401 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).[45] If so, it could then be argued that the credit should be disallowed to any unauthorized alien even if the IRC does not contain any restriction.[46]

Eligibility Under the Internal Revenue Code

As illustrated in **Table 1**, there are two ways in which the Internal Revenue Code restricts the eligibility of aliens to claim certain refundable tax credits. First, for some credits, Congress has expressly provided in the applicable IRC statute that nonresident aliens are prohibited from claiming that particular credit.

Second, Congress has included express statutory requirements in the IRC that taxpayers provide their SSNs when claiming certain credits. For these credits, any alien—whether resident or nonresident—without an SSN would be ineligible to claim the credit. As shown in **Table 1**, only the EITC currently requires that taxpayers provide their SSNs, along with those of their spouses (if filing a joint return), and any qualifying children.[47] The SSNs must have been issued for work purposes. The 2008 stimulus credit and the Making Work Pay credit, both of which have now expired, contained a similar requirement, although they did not specify that the SSN be issued for work purposes.[48]

As discussed above, individuals who enter the United States illegally may not lawfully obtain SSNs, and therefore they would not be able to claim a credit with an SSN requirement. However, some resident aliens who are currently in the country without proper immigration documents

(...continued)

records. 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. For more on W-2 forms with earnings that do not match SSA's records, see CRS Report RL32004, *Social Security Benefits for Noncitizens*, by (name redacted) and (name redacted). Treasury Inspector General for Tax Administration, *Actions Are Needed to Ensure Proper Use of Individual Taxpayer Identification Numbers and to Verify or Limit Refundable Credit Claims*, Washington, DC, March 31, 2009, pp. 4-5.

[45] *Codified at* 8 U.S.C. §1611. Such benefits are only permitted to "qualified aliens." *See* 8 U.S.C. §1641 and P.L. 106-386, §107(b)(1) (Trafficking Victims Protection Act of 2000).

[46] *See* PRWORA §401(a), *codified at* 8 U.SC. §1611(a) ("*Notwithstanding any other provision of law* ... , an alien who is not a qualified alien ... is not eligible for any Federal public benefit ... ") (emphasis added). *But see* CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by (name redacted) at 37-38 (noting the "preclusive scope of [the phrase 'notwithstanding any other provision of law'] often is unclear").

[47] I.R.C. §32(c)(1)(D), (m).

[48] I.R.C. §§36A(d)(1)(B), 6428(e)(3)(A)&(h). For the 2008 stimulus credit, the SSN requirement did not apply to a joint return if at least one spouse was a member of the Armed Forces during the taxable year. I.R.C. §6428(h)(3).

were once lawfully admitted, but have overstayed their visas.[49] These individuals may have lawfully received SSNs while they were authorized to be in the country, and could attempt to use the SSN to claim a credit. The statutes for the EITC, 2008 stimulus credit, and Making Work Pay credit do not make explicit reference to the SSN's current validity, although it appears Congress intended to restrict the credits to taxpayers with valid SSNs.[50] Regardless, at this point in time, the IRS does not determine an individual's immigration status or whether a taxpayer with a facially valid SSN has overstayed his or her visa.[51]

Table 1. Eligibility of Unauthorized Aliens to Claim Refundable Credits Under the Internal Revenue Code

	Unauthorized Aliens Who Are "Nonresident Aliens"	Unauthorized Aliens Who Are "Resident Aliens"
	Credits Available Under Current Law	
Earned Income Tax Credit	Generally ineligible. IRC §32(c)(1)(D).	Ineligible because taxpayer must provide SSN valid for work purposes for him/herself, spouse, and children. IRC §32(c)(1), (m).
Additional Child Tax Credit	No provision barring eligibility (but note that child must be a U.S. citizen, U.S. national, or resident alien). IRC §24.	No provision barring eligibility (but note that child must be a U.S. citizen, U.S. national, or resident alien). IRC §24(c)(2).
American Opportunity Tax Credit	Generally ineligible. IRC §25A(g)(7).	No provision barring eligibility. IRC §25A(g)(1).
Health Coverage Tax Credit	No provision barring eligibility (but note that individual must receive TAA or PBGC-provided pension). IRC §35.	No provision barring eligibility (but note that individual must receive TAA or PBGC-provided pension). IRC §35.
Premium Assistance Credit (PPACA) (effective Jan. 1, 2014)	Special rules for computing credit. IRC §36B(e).	Special rules for computing credit. IRC §36B(e).
Credit for Tax Withheld on Wages	No provision barring eligibility. IRC §31.	No provision barring eligibility. IRC §31.
Credit for Tax Withheld at Source on Nonresident Aliens and Foreign Corporations	No provision barring eligibility. IRC §33.	Not applicable. IRC §33.
Credit for Fuel Excise Taxes paid on fuel used for Nontaxable Uses	No provision barring eligibility. IRC §34.	No provision barring eligibility. IRC §34.
Credit for Overpayment of Tax	No provision barring eligibility. IRC §§37, 6401.	No provision barring eligibility. IRC §§37, 6401.

[49] *See* CRS Report RS22446, *Nonimmigrant Overstays: Brief Synthesis of the Issue*, by (name redacted).

[50] *See, e.g.,* P.L. 104-193, §451 (header reads "Earned income credit denied to individuals not authorized to be employed in the United States"); H.Rept. 104-651, at 1457 ("The Committee does not believe that individuals who are not authorized to work in the United States should be able to claim the [EITC]"); Staff of J. Comm. On Taxation, DESCRIPTION OF THE CHAIRMAN'S MODIFICATION TO THE PROVISIONS OF THE "ECONOMIC STIMULUS ACT OF 2008," JCX-11-08 (2008) (descriptive header to the explanation of the SSN requirement for the 2008 stimulus credit reads "Deny the basic credit and the qualifying child credit to illegal immigrants").

[51] The Systematic Alien Verification for Entitlements (SAVE) system provides federal, state, and local government agencies access to data on immigration status that are necessary to determine noncitizen eligibility for public benefits. The IRS is not one of the federal agencies required to use SAVE. §1137(b) of the Social Security Act.

	Unauthorized Aliens Who Are "Nonresident Aliens"	**Unauthorized Aliens Who Are "Resident Aliens"**
	Recently Expired Credits	
Adoption Expenses Credit	No provision barring eligibility. Former IRC §36C.	No provision barring eligibility. Former IRC §36C.
First-Time Homebuyer Credit	Credit is not allowed for purchase of residence by a nonresident alien. IRC §36(d).	No provision barring eligibility. IRC §36.
Making Work Pay Credit	Ineligible. IRC §36A(d)(1)(A)(i).	Ineligible because taxpayer must provide SSN for him/herself, unless filing jointly and spouse has SSN. IRC §36A(d)(1)(B).
2008 Stimulus Credit	Ineligible. IRC §6428(e)(3)(A).	Ineligible because taxpayer must provide SSN for him/herself, spouse, and qualifying children. IRC §6428(h).

Source: Congressional Research Service.

Eligibility Under the Personal Responsibility and Work Opportunity Reconciliation Act

The extent to which residents of the United States who are not U.S. citizens should be eligible for federally funded public aid has been a contentious issue since the 1990s.[52] Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 (P.L. 104-193) established comprehensive restrictions on the eligibility of all noncitizens for means-tested public assistance, with exceptions for legal permanent residents (LPRs) with a substantial U.S. work history or military connection.[53]

The 1996 welfare law divided noncitizens into two general categories for purposes of benefit eligibility. The least restrictive category is that of *qualified aliens*, legal permanent residents, refugees, aliens paroled into the United States for at least one year, and aliens granted asylum or related relief. The 1996 immigration law added certain abused spouses and children as another class, and P.L. 105-33 added Cuban-Haitian entrants.[54] The other, more restrictive, category is that of *non-qualified aliens*. It consists of other noncitizens, including unauthorized aliens, nonimmigrants (i.e., aliens admitted for a temporary purpose, such as education or employment), short-term parolees, asylum applicants, and various classes of aliens granted temporary permission to remain. Regarding unauthorized aliens in particular, Section 401 of PRWORA barred them from any federal public benefit except the emergency services and programs expressly listed in Section 401(b).

[52] Prior to the major amendments made in 1996, there was no uniform rule governing which categories of noncitizens were eligible for which government-provided benefits and services, and there was no single statute where the rules were described. Alien eligibility requirements, if any, were set forth in the laws and regulations governing the individual federal assistance programs.

[53] CRS Report RL33809, *Noncitizen Eligibility for Federal Public Assistance: Policy Overview and Trends*, by (name redacted).

[54] P.L. 106-586 made victims of human trafficking eligible in the same manner as qualified aliens.

This overarching bar to unauthorized aliens hinges on how broadly the phrase "federal public benefit" is construed. The law defines this phrase to be

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.[55]

So defined, this bar covers many programs whose enabling statutes do not individually make citizenship or immigration status a criterion for participation. Thus, unauthorized aliens are statutorily barred from receiving benefits that previously were not individually restricted—Social Services Block Grants and migrant health center services, for example—unless they fall within the 1996 welfare act's limited exceptions.

PRWORA also amended the IRC to impose an SSN requirement for claiming the EITC. The provision is aimed at preventing unauthorized aliens from claiming the credit by requiring EITC recipients (and spouses) to file their taxes with SSNs that are valid for employment in the United States.[56]

Are Refundable Tax Credits "Federal Public Benefits" for Purposes of PRWORA Section 401?

The question has been raised whether any of the refundable tax credits are federal public benefits under PRWORA Section 401. If so, then the argument could be made that unauthorized aliens should be ineligible to receive them, regardless of whether the Internal Revenue Code restricts their eligibility.[57]

There is no indication that the IRS considers any refundable tax credits to be subject to PRWORA Section 401. It does not appear the agency has issued any regulations, rulings, or other guidance on this issue. If the IRS were to permit unauthorized aliens to claim any refundable credit that does not include a statutory SSN requirement, as appears to be the case currently, then there is a serious question as to whether that position could be challenged in court. Judicial review of such interpretation would be possible only if challenged by a person with sufficient standing.[58] So long as no taxpayer is denied a credit, it seems unlikely anyone would have standing to sue since it appears doubtful that anyone would be personally injured (a necessary prerequisite for standing) by the IRS's decision to allow the credit. Further, taxpayers generally do not have standing to bring suit by alleging that they, as taxpayers, were harmed by the government's payment of funds

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[55] PRWORA §401(c), *codified at* 8 U.S.C. §1611.

[56] PRWORA §451, *codified at* I.R.C. §32(c)(1), (m).

[57] *See* PRWORA §401(a), *codified at* 8 U.SC. §1611(a) ("*Notwithstanding any other provision of law* ... , an alien who is not a qualified alien ... is not eligible for any Federal public benefit ... ") (emphasis added). *But see* CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by (name redacted) at 37 (noting the "preclusive scope of [the phrase 'notwithstanding any other provision of law'] often is unclear").

[58] *See* Allen v. Wright, 468 U.S. 737, 751 (1984) (to have constitutional standing, a party must establish personal injury by allegedly unlawful conduct fairly traceable to the defendant and that the injury is redressable in court).

from the public fisc in violation of law.[59] Therefore, if the IRS does not interpret Section 401 to apply to refundable tax credits, it is unlikely that this interpretation could be challenged in court.

If, however, the IRS were to deny a refundable tax credit to an unauthorized alien due to PRWORA Section 401, then that individual would theoretically have standing to challenge the denial in court. Assuming an unauthorized alien were willing to challenge the denial, a key question would likely be whether the IRS took such a position through a regulation promulgated through notice-and-comment rulemaking or by some other method (e.g., through issuance of a revenue ruling or internal agency memorandum). This is important because courts grant varying levels of deference to agency interpretations of statutes when examining questions such as whether an agency's rulemaking is in excess of its delegated statutory authority[60] or whether the agency interpreted a statute correctly when promulgating a rule.[61] When a statute is open to differing interpretations, as some may argue is the case with PRWORA Section 401 (as discussed below), the level of deference given to the agency's interpretation often plays a pivotal role in determining whether a reviewing court upholds it.

The highest level of deference that a court may afford to an agency interpretation is known as *Chevron* deference, after the case in which the Supreme Court first articulated the standard.[62] It applies when an agency's interpretation is the product of a formal agency process, such as notice-and-comment rulemaking, through which Congress has authorized the agency "to speak with the force of law."[63] A court conducting a *Chevron* analysis first looks at whether Congress has "directly spoken to the precise question at issue."[64] If the court determines that Congress has done so, then that is the end of the matter because the "law must be given effect."[65] But if the statute does not directly address the issue, then "the court does not simply impose its own construction of the statute," but rather determines whether the agency interpretation is a permissible construction of the statute.[66] If so, the court will generally defer to the agency's position,[67] regardless of whether "it is the only possible interpretation or even the one a court might think best."[68]

A court would likely give a lower level of deference to an IRS interpretation of PRWORA's applicability to refundable tax credits if done through some other means, such as issuance of a revenue ruling or other guidance. Courts generally give a lower level of deference to less formal

[59] *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 344-45 (2006) (individuals generally do not have standing in their status as taxpayers to bring suit for allegedly unlawful taxation because any injury is too generalized and remote).

[60] The IRS has general rulemaking authority pursuant to IRC §7805(a), which provides the Treasury Secretary with the authority to "prescribe all needful rules and regulations for the enforcement" of the IRC. Additionally, the Secretary is sometimes provided authority to prescribe regulations necessary for carrying out certain provisions. *See, e.g.,* IRC §35(g)(11) (providing authority to prescribe regulations to carry out the health coverage tax credit).

[61] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

[62] *See* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984); Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713 (2011) ("The principles underlying our decision in *Chevron* apply with full force in the tax context.").

[63] United States v. Mead Corp., 533 U.S. 218, 229 (2001); *see also* Christensen v. Harris County, 529 U.S. 576 (2000).

[64] *Chevron*, 467 U.S. at 842.

[65] *Id*. at 843.

[66] *Id*.

[67] *See, e.g.,* Astrue v. Capato, 132 S. Ct. 2021 (2012) (deferring to the Social Security Administration's longstanding interpretation in regulations, finding the regulations "warrant the Court's approbation" as they were "neither arbitrary or capricious in substance, [n]or manifestly contrary to statute" (internal quotations omitted)).

[68] Holder v. Gutierrez, 132 S. Ct. 2011, 2017 (citing *Chevron*, 467 U.S. at 843-44).

agency interpretations,[69] largely because they are typically not subject to a notice-and-comment period.[70] The level of deference given agency interpretations such as revenue rulings varies, depending on such things as "the degree of the agency's care, its consistency, formality, and relative expertness, and … the persuasiveness of [its] position."[71] Looking at these factors, revenue rulings, which are official interpretations of the tax law by the IRS,[72] are generally provided some deference.[73] However, a court that found a ruling's reasoning unpersuasive would not be bound by it.[74] An IRS position expressed in other types of documents might receive even less deference.[75]

Legal Analysis

A court faced with the issue of whether refundable tax credits are federal public benefits under PRWORA Section 401 would likely begin by examining the statutory language at issue. The Supreme Court often recites the "plain meaning rule," that, if the language of the statute is clear, there is no need to look outside the statute to its legislative history in order to ascertain the statute's meaning.[76] Generally, statutory text is the ending point as well as the starting point for interpretation.

Looking at the statutory language of Section 401, the definition of "federal public benefit" lists several types of payments or benefits (e.g., grants, contracts, and loans), but does not expressly include any refundable tax credits or other tax benefits. Thus, the question here seems to be

[69] *But see* Barnhart v. Walton, 525 U.S. 212, 221-22 (2002) (where the Court focused on the longstanding nature of the agency's interpretation and found that Chevron deference may apply to agency interpretations reached "through means less formal than 'notice-and-comment' rulemaking").

[70] *See, e.g.,* Kornman & Assocs. v. United States, 527 F.3d 443, 453 (5th Cir. 2008)("we conclude that revenue rulings are not entitled to *Chevron* deference"); U.S. Freightways Corp. v. Comm'r, 270 F.3d 1137, 1142 (7th Cir. 2001) (noting that revenue rulings are not entitled to the same level of deference as a statute or regulation); Omohundro v. United States, 300 F.3d 1065, 1067-68 (9th Cir. 2002)(examining revenue ruling under the standard articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which bases deference on the agency's interpretation power to persuade); Del Commercial Props., Inc. v. Comm'r, 251 F.3d 210, 214 (D.C. Cir. 2001)(same); *but see* Tualatin Valley Builders Supply, Inc. v. United States, 522 F.3d 937, 946-48 (9th Cir. 2008) (O'Scannlain, J., concurring) (arguing the revenue ruling at issue in that case deserved *Chevron* deference).

[71] United States v. Mead Corp., 533 U.S. 218, 228 (2001); *see also* Skidmore v. Swift & Co., 323 U.S. 134 (1944)(the weight afforded to agency's interpretation of a statute depends on "all those factors which give it power to persuade," including "the validity of its reasoning").

[72] Treas. Reg. §601.201(a)(6).

[73] *See* U.S. Freightways Corp. v. Comm'r, 270 F.3d 1137, 1142 (7th Cir. 2001)(noting revenue rulings, which have some precedential value and are official IRS interpretations of the tax code, are due deference according to their power to persuade, and therefore the lower court (the U.S. Tax Court) erred "[b]y noting only that revenue rulings 'are not entitled to the deference accorded a statute or a Treasury Regulation,' without explicitly acknowledging that some deference to revenue rulings is proper...."); McDaniel v. Chevron Corp., 203 F.3d 1099, 1112 (9th Cir. 2000)("Though revenue rulings do not have the force of law, they do constitute a body of experience and informed judgment to which we may look for guidance."); Omohundro v. United States, 300 F.3d 1065, 1067-68 (9th Cir. 2002)(giving *Skidmore* deference to a revenue ruling); Del Commercial Props., Inc. v. Comm'r, 251 F.3d 210, 214 (D.C. Cir. 2001)(same).

[74] *See, e.g.,* Freeman v. Quicken Loans, Inc., 626 F.3d 799 (5th Cir. 2010)(giving no deference to a revenue ruling when its reasoning was unpersuasive).

[75] *See, e.g.,* Miller v. Comm'r, 114 T.C. 184, 195 (2000)("Administrative guidance contained in IRS publications [e.g., instructions for tax return filing] is not binding on the Government, nor can it change the plain meaning of tax statutes.").

[76] *See* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002); Williams v. Taylor, 529 U.S. 420, 431 (2000)("We start, as always, with the language of the statute.").

whether refundable tax credits are included in any of the items expressly listed—specifically, whether they would be considered to be a "grant" provided by a federal agency under Section 401(c)(1)(A) or a "benefit" that is "provided to an individual, household, or family eligibility unit" by a federal agency under Section 401(c)(1)(B).

When the meaning of specific statutory language is at issue, courts often need to consider the meaning of particular words or phrases. If the word or phrase is defined in the statute or elsewhere in the U.S. Code, then that definition governs if applicable in the context used.[77] If not, courts typically look to see if the term has an accepted meaning in the area of law addressed by the statute,[78] was borrowed from another statute where it had an accepted meaning,[79] or had an accepted and specialized meaning at common law.[80] In each of these situations, the accepted meaning governs and the word or phrase is considered a technical term or "term of art."[81] Here, there appears to be no statutory definition applicable to the law's use of "grant" described in Section 401(c)(1)(A) or "benefit" described in Section 401(c)(1)(B). None of the key terms are defined in PRWORA, and they do not appear to be terms of art. Furthermore, while language similar to Section 401 is found in several other statutes,[82] it does not appear any court has examined whether those statutes apply to refundable tax credits.

Under the principles of statutory interpretation, words and phrases that are not terms of art or defined by statute are customarily given their ordinary meanings, often derived from the dictionary.[83] Assuming that a court does not find "grant" or "benefit" to be terms of art, the court may be inclined to give them their ordinary and customary definitions. The Oxford Dictionaries, for example, define the term "grant" as "a sum of money given by an organization, especially a government, for a particular purpose."[84] The language used in Section 401(c)(1)(B) is similarly defined (e.g., the Oxford Dictionaries define "benefit" as "a payment made by the state or an insurance scheme to someone entitled to receive it" and "assistance" as "the provision of money, resources, or information to help someone").[85]

Looking at these definitions, it seems likely a court would find that at least some of the refundable tax credits would not be treated as federal public benefits. To the extent that the

[77] *See, e.g.,* Colautti v. Franklin, 439 U.S. 379, 392 (1979).

[78] *See, e.g.,* Sullivan v. Stroop, 496 U.S. 478, 483 (1990).

[79] *See, e.g.,* Carolene Products Co. v. United States, 323 U.S. 18, 26 (1944) (noting that courts, in appropriate circumstances, will assume that "adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording," although finding that circumstances were inappropriate for reliance on the principle in that case).

[80] *See, e.g.,* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992); Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444 (2003).

[81] *See* Morissette v. United States, 342 U.S. 246, 263 (1952); Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990).

[82] *See* 18 U.S.C. §506 (increasing the penalty for crimes related to forged, counterfeit, mutilated, or altered seals of federal departments and agencies if done to facilitate an alien's application for or receipt of a federal benefit to which the alien was not entitled); 21 U.S.C. §862 (denying certain federal benefits to drug traffickers and possessors); 18 U.S.C. Appx. §5F1.6 (permitting courts to deny certain federal benefits to individuals convicted of distributing or possessing a controlled substance); *see also* 8 U.S.C. §1621 (denying state and local public benefits to unauthorized aliens).

[83] *See* Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.").

[84] Oxford Dictionaries, available at http://oxforddictionaries.com/definition/grant?region=us&q=grant.

[85] Oxford Dictionaries, available at http://oxforddictionaries.com/definition/benefit?q=benefit; http://oxforddictionaries.com/definition/assistance?q=assistance.

definitions of the key terms in PRWORA Section 401 evoke the concept of the government providing some type of assistance, it seems unlikely they would be interpreted to include the refundable credits in IRC Sections 31, 33, 34, and 37. This is because the taxpayers claiming these credits have essentially paid more tax than required, and the credits are merely the means by which the government gives the taxpayer his or her money back. Thus, they seem fundamentally different from the types of payments or benefits listed in Section 401, and it seems unlikely they would be treated as "grants" or "benefits." Furthermore, the government's refusal to pay over the refunds might be challenged as a violation of the Fifth Amendment of the U.S. Constitution,[86] which could also influence a court's reading of Section 401 since courts generally try to interpret statutes to avoid constitutional issues.[87]

For the other refundable tax credits, it might be argued that their refundable nature could justify their falling within the plain language meaning of "grant" or "benefit."[88] In such case, it seems that a court, having concluded that a refundable credit is a "grant" under Section 401(c)(1)(A), could then determine that the provision's other criteria are met (i.e., that the payment was "provided by" a federal agency since it came from the Treasury Department). Similarly, a court concluding that a refundable credit is a "benefit" under Section 401(c)(1)(B) might find that the provision's other criteria are met, including that it be "provided to an individual, household, or family eligibility unit by" a federal agency. Furthermore, it seems possible that a court could find that at least some refundable credits could be classified as a type of listed benefit (e.g., welfare, health, or postsecondary education). A court might find support for such a conclusion in case law where courts have looked at whether refundable tax credits are welfare-type benefits for purposes of other laws. For example, some courts have found the EITC to be public assistance for purposes of state law because of its refundable nature and purpose of assisting low-income families.[89] However, other courts have held that the child tax credit is not such a benefit since, unlike the EITC, it is not limited to assisting low-income families.[90] As these cases illustrate, a court might

[86] U.S. CONST. Amend. V ("No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

[87] *See, e.g.,* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

[88] *See* In the Matter of Longstreet, 246 B.R. 611, 614-15 (Bankr. S.D. Iowa 2000) (stating that the EITC, because of its refundability, "goes beyond mere tax relief to become, in essence, a grant" and holding that the credit was a public assistance benefit for purposes of Iowa bankruptcy law because its refundable nature meant it could "be construed as a government aid payment" and such payments fall within the plain meaning of the term "public assistance benefit").

[89] *See, e.g.,* Riggs v. Riggs, 622 N.W. 2d 861, 867 (Neb. 2001) (holding EITC was a "means-tested public assistance benefit" for purposes of state child support guidelines, explaining that "though it is given effect through the tax laws, the earned income credit is in substance an item of social welfare legislation, intended to provide low income families with the very means by which to live) (internal citations omitted); *In the Matter of Longstreet*, 246 B.R. at 614-15 (holding the EITC was a public assistance benefit for purposes of Iowa bankruptcy law because its refundable nature meant it could "be construed as a government aid payment" and such payments fall within the plain meaning of the term "public assistance benefit"); In re Jones, 107 B.R. 751, 752 (Bankr. Id. 1989) (holding the EITC was federal public assistance for purposes of Idaho bankruptcy law "due to its nature as social welfare relief").

[90] *See, e.g., In Re*: Beltz, 263 B.R. 525, 529 (Bankr. W.D. Ky. 2001) (rejecting debtors' claim that the child tax credit was a public assistance benefit under Kentucky bankruptcy law because the credit's "primary purpose is not to provide tax relief to low income families. Rather, the intent of the credit, as evidenced by legislative history, is primarily to benefit middle class Americans" and it seemed unlikely that low-income families could claim the refundable part of the credit due to the way it was calculated); *In re* Steinmetz, 261 B.R. 32, 34 (Bankr. Id. 2001) (holding that the additional child tax credit was not public assistance because "the high income threshold adopted by Congress before the credit starts to phase out clearly indicates the credit was not intended as a form of public assistance legislation").

not reach the same conclusion with respect to each credit, finding that some would meet the criteria while others would not.

On the other hand, it is possible a court could determine that no refundable tax credits are federal public benefits under Section 401 based on the fact that the provision does not explicitly include refundable tax credits, and, as discussed below, there is no clear evidence in the legislative history that Congress intended such credits to be treated as federal public benefits. This could lead a court to conclude that Congress did not include them in the list of named federal public benefits because it understood them to be excluded (i.e., that the express inclusion of specific types of benefits or payments on the list means Congress intended to exclude anything not listed).[91] Furthermore, one could argue that refundable tax credits are not federal public benefits because tax benefits are not traditionally thought of as the types of "grants" or qualifying "benefits" referred to in Section 401. Additional support for the argument that the credits are not federal public benefits could be found in PRWORA Section 432(a), which directs the Attorney General to consult with the Secretary of Health and Human Services when promulgating regulations for verifying the immigration status of applicants for federal benefits.[92] Because the section does not require consultation with the Treasury Department, it could be evidence that Congress did not intend any tax provisions to be considered federal public benefits. Finally, additional support might be found in other congressional action, specifically the fact that Congress included in PRWORA an SSN requirement for the ETIC and subsequently enacted legislation to impose an SSN requirement for the 2008 stimulus credit and Making Work Pay credit. It might be argued that these actions would be unnecessary had Congress believed that the PRWORA Section 401 applied to refundable tax credits.[93] To the extent that a court reaches the conclusion that any refundable tax credits are not federal public benefits under PRWORA Section 401, then it would appear that unauthorized aliens would be able to claim such credits absent a provision in the Internal Revenue Code explicitly requiring an SSN or disallowing the credit to those individuals (e.g., the IRC expressly disallows some credits to nonresident aliens).

Legislative History

In light of the statutory silence, it is possible, although not guaranteed, that a court might look to the provision's legislative history for evidence of congressional intent.[94] PRWORA's legislative

[91] This is a fundamental principle of statutory interpretation known as *expressio unius est exclusio alterius* (the inclusion of one is the exclusion of others). *See, e.g.,* Iselin v. United States, 270 U.S. 245, 250 (1926) (holding that where Congress subjected specific categories of ticket sales to taxation but failed to cover another category, either by specific or by general language, the Court was not to extend coverage because to do so, given the "particularization and detail" with which Congress had set out the categories, would amount to "enlargement" of the statute rather than "construction" of it); Andrus v. Glover Const. Co., 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent."). *But see* NationsBank v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995) (a statutory listing may be "exemplary, not exclusive").

[92] *Codified at* 8 U.S.C. §1642(a).

[93] *But see* discussion *infra* note 94 and accompany text (discussing possible alternative reading of the EITC provision); United States v. Price, 361 U.S. 304, 313 (U.S. 1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

[94] *See, e.g.,* United States v. Great Northern Ry., 287 U.S. 144, 154 (1932)("In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress."). 389 U.S. 463, 468 (1968); Wirtz v. Bottle Blowers Ass'n, 389 U.S. 463, 468 (1968) (a "proper construction [of labor legislation] frequently requires consideration of [a statute's] wording against the background of its legislative history and in the light of the general objectives Congress (continued...)

history does not clarify whether refundable credits are federal public benefits. The report language describing the law as it existed prior to PRWORA refers to one refundable credit—the EITC:

> Current law limits alien eligibility for most major Federal assistance programs, including restrictions on, among other programs, Supplemental Security Income, Aid to Families with Dependent Children, housing assistance, and Food Stamps programs. Current law is silent on alienage under, among other programs, school lunch and nutrition, the Special Supplemental Food Program for Women, Infants, and Children (WIC), Head Start, migrant health centers, and the *earned income credit* [emphasis added].[95]

This statement shows that Congress was aware of the EITC's existence, but does not offer solid evidence of congressional intent to treat it as a federal public benefit, particularly since the statute has been interpreted not to include some of the other programs listed (e.g., Head Start) as benefits under Section 401.[96] It does not appear that there are any other references to the EITC in the legislative history of Section 401.

Section 451 of PRWORA intends to disallow the credit to unauthorized resident aliens by amending the IRC to require that EITC claimants provide the SSNs of themselves, their spouse (if filing a joint return), and qualifying children.[97] Thus, Section 451 explicitly addresses the issue seemingly raised by the above report language concerning the eligibility of unauthorized aliens to claim the EITC. This is arguably not responsive to the question of whether the EITC is a federal public benefit under Section 401. On the one hand, it may be unclear why Congress would have felt the need to include Section 451 if Section 401 had already precluded receipt of the EITC by unauthorized aliens. On the other hand, it is possible to interpret Section 451 as an enforcement mechanism—that is, Congress intended for Section 401 to cover the EITC and enacted Section 451 as a way to prevent unauthorized aliens from claiming the credit. The legislative history is silent on this matter.

In light of the legislative history's silence, it is uncertain the extent to which a court would find the history to be useful in addressing the issue at hand. This might be especially true in light of the modern view of statutory interpretation that focuses on the language of the statute itself, which would appear to marginalize whatever insight legislative history or other extrinsic aids might provide.[98] Thus, a court might be hesitant to place any significance on the statute's minimal

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(...continued)

sought to achieve").

[95] H.Rept. 104-525, at 379 (1996); H.Rept. 104-651, at 1443-44 (1996).

[96] *See* HHS, Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of 'Federal Public Benefit,' 63 Fed. Reg. 41,658, 41,659 (Aug. 4, 1998) ("Although the litany of categories in 401(c)(1)(B) is broad, it is not comprehensive and clearly excludes certain categories from the definition. For example, by explicitly identifying 'postsecondary education' the statute excludes non-postsecondary education programs, such as Head Start and elementary and secondary education.").

[97] Prior to PRWORA, nonresident aliens were ineligible for the EITC, but resident aliens could claim it by providing temporary TINs or ITINs for themselves and their children. PRWORA §451 attempts to disallow the credit to unauthorized resident aliens by requiring taxpayers to provide SSNs as their TIN. *See* H.Rept. 104-651, at 1457 ("The Committee does not believe that individuals who are not authorized to work in the United States should be able to claim the credit.").

[98] *See, e.g.,* CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by (name redacted), at 3 ("The strictures of a text-based 'plain meaning rule' were once thought honored more in the breach than in the observance. However, this perception has changed: More often than before, statutory text is thought to be the ending point as well as the starting point for interpretation") (citing to James J. Brudney & Corey Ditslear, *The Warp and Woof*

(continued...)

and ambiguous legislative history, particularly since it does not clearly evidence congressional intent one way or the other.

Summary of Legal Analysis

In conclusion, until the IRS or a court addresses this issue, it is not possible to say whether any refundable tax credits are federal public benefits under PRWORA Section 401. Thus, at this time, the only clear restriction on the ability of unauthorized *resident* aliens to claim any refundable credits is the one provided in the IRC for the EITC since it includes a SSN requirement (the now-expired Making Work Pay and 2008 stimulus credits contained a similar requirement). Unauthorized *nonresident* aliens, meanwhile, are also expressly prohibited in the IRC from claiming those three credits, as well as several others (e.g., the American opportunity tax credit).

Selected Policy Options

If there are concerns with the implementation of current law, there are a variety of policy options that could address them. These options could range from clarifying that unauthorized aliens are permitted to claim refundable tax credits to enacting a categorical bar preventing unauthorized aliens from obtaining refundable tax credits. Potential policy options include the following:

- Amending the IRC to require SSNs of all filers claiming refundable tax credits.[99] A related option would be to amend the IRC to require SSNs of all filers claiming tax credits, not just those that are refundable.[100] This may be particularly relevant to tax credits, like the child tax credit and the American Opportunity Tax Credit, that have both refundable and non-refundable components. In either case, the scope of the SSN requirement (i.e., who would be required to provide the SSN—the taxpayer, the spouse if married filing jointly, and/or the qualifying dependents, if applicable) could impact the ability of some families—especially mixed status families where certain members have SSNs and others do not—to claim the credits.
- Amending the IRC to absolutely bar unauthorized aliens from claiming refundable credits (similar to the existing IRC provisions that deny eligibility for certain refundable tax credits to nonresident aliens).

(...continued)

of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law, 58 DUKE L.J. 1231, 1258 (2009) for an example of an empirical study finding decreased reliance on legislative history by the Supreme Court from 1969 to 2008).

[99] *See, e.g.,* H.R. 1956, §2 (Refundable Child Tax Credit Eligibility Verification Reform Act) (would deny the ACTC to taxpayers who did not provide an SSN; in the case of joint returns, either spouse would need to provide an SSN); H.R. 5652, Tit. VI, Sub. B, §611 (Sequester Replacement Reconciliation Act of 2012, as passed by the House) (would deny the ACTC to taxpayers who did not provide an SSN; in the case of joint returns, either spouse would need to provide an SSN); H.R. 3275, §1 (would disallow the ACTC to taxpayers using ITINs).

[100] *See, e.g.,* H.R. 1196, §503 (Loophole Elimination and Verification Enforcement Act or LEAVE Act) (would generally require that all taxpayers who claim refunds or tax credits provide an SSN); H.R. 4372, §1 (would deny the American Opportunity tax credit if SSNs were not provided for eligible students); H.R. 3444, §2 and S. 577, §2 (Child Tax Credit Integrity Preservation Act of 2011) (would require taxpayers who claim the child tax credit (not just the ACTC) to provide SSNs).

- Amending the IRC to enable mixed immigration status families to obtain a partial amount of refundable tax credits for those members of the filing household who are legally authorized to reside and work in the United States. For example, the value of the credit could be prorated for the proportion of taxpayers who meet the specified criteria (e.g., if three of the four individuals claimed on a tax return have SSNs, the taxpayers would be eligible for 75% of the total value of the credit).
- Amending Section 401 of PRWORA to clarify that refundable tax credits are not "federal public benefits" and therefore the only bar to unauthorized aliens claiming such credits would be those found in the IRC.
- Amending Section 401 of PRWORA to expressly include refundable tax credits among the listed "federal public benefits" so that unauthorized aliens would be ineligible to claim the credits even if the IRC were silent on the matter.
- Authorizing and appropriating funds to the IRS and DHS to facilitate the cross-checking of data on immigration status and tax returns to identify unauthorized aliens claiming credits for which they may not be eligible.

When considering these policy options, it should be noted that the existing refundable tax credits are not monolithic and serve different purposes. There may be policy or other reasons to distinguish among them with respect to the eligibility of unauthorized aliens to claim them. In particular, the refundable credits which are effectively refunds of overpayment of taxes would probably have to be treated differently than the others since denying them could raise constitutional concerns.

Appendix A. Overview of Selected Refundable Tax Credits

Table A-1. Overview of Selected Refundable Tax Credits

Credit	Description	Scheduled Expiration of Credit or Provisions of Credit	Amount of Refundable Credits Claimed on 2009 Tax returns (billions)
Earned income tax credit (EITC) IRC §32	EITC is calculated based on a taxpayer's earnings. The credit phases in over a range of earnings at a given rate, dependent on the taxpayer's number of eligible children. Credit then plateaus and remains constant over a subsequent range of earnings before phasing out at a given phase-out rate to zero which depends on the number of eligible children a taxpayer has and their filing status. For example, in 2012, a taxpayer with one child who files as head of household will have their EITC phase in at 34 cents for every dollar of earnings (34%) between $0 and $9,320. The credit amount will remain constant at $3,169 for earnings between $9,320 and $17,090. For every dollar of earnings above $17,090, the credit phases out at a rate of 15.98%. The credit will fully phase out when earnings reach $36,920.	Expanded EITC for families with at least 3 children and "marriage penalty" reduction are scheduled to expire at the end of 2012.	$53.99
Additional child tax credit (ACTC) IRC §24(d)	For 2009-2012, ACTC is calculated as 15% of earnings in excess of $3,000 up to the maximum credit of $1,000 per child. The child tax credit overall (i.e., the combination of the refundable and non-refundable components) phases out by $50 for every $1,000 a taxpayer's income exceeds $75,000 ($110,000 for married joint returns).	Beginning in 2013, ACTC only available to families with at least 3 children using an alternative formula.[a] The maximum credit value will also decrease to $500 per child.	$27.50
Refundable portion of the American opportunity tax credit (AOTC) IRC §25A	For 2009-2012, the refundable portion is equal to 40% of the value of the AOTC. The value of the AOTC depends on the amount of qualifying education expenses, and the maximum value is equal to $2,500. Hence, the maximum value of the refundable portion of the AOTC is $1,000 (40% of $2,500). The AOTC overall (i.e., the combination of the refundable and non-refundable components) phases out for taxpayers with income between $80,000-$90,000 ($160,000-$180,000 for married joint filers).	Scheduled to expire at the end of 2012.	$3.89
Health coverage tax credit (HCTC) IRC §35	HCTC pays 72.5% of monthly health insurance premiums for certain trade-affected workers, Pension Benefit Guarantee Corporation payees, and their families.	Scheduled to expire at the end of 2013.	$0.36

Credit	Description	Scheduled Expiration of Credit or Provisions of Credit	Amount of Refundable Credits Claimed on 2009 Tax returns (billions)
Health insurance premium assistance credit (effective 2014) IRC §36B	Beginning in 2014, certain individuals who purchase health insurance on exchanges will be eligible for a premium assistance credit, the amount of which will depend on the cost of the respective health insurance plan purchased on the exchange and the taxpayer's income.[c]	NA	NA
First-time homebuyer credit IRC §36 Expired	Eligible taxpayers could receive a tax credit of 10% of their home's purchase price. The credit was limited to $8,000 for most qualifying purchases after December 31, 2008. (The credit was limited to $6,500 for long-time residents who qualified for the credit.) The credit phased out for taxpayers with income between $125,000-$145,000 ($225,000-$245,000 for married joint filers).	NA	$4.66
Adoption tax credit (expired) Former IRC §36C	In 2010 and 2011, the adoption tax credit was refundable In 2011,[d] taxpayers could claim a credit based on their adoption expenses of up to $13,360. The credit phased out for taxpayers with income between $185,210-$225,210 in 2011.	NA	NA
Making work pay (MWP) credit (expired) IRC §36A	The Making Work Pay (MWP) credit was a temporary refundable tax credit available to eligible workers in 2009 and 2010. The credit was calculated as 6.2% of a taxpayer's earnings, up to $400 for individuals and $800 for married couples filing jointly. The credit phased out for taxpayers with income between $75,000-$95,000 ($150,000-$190,000 for married couples filing jointly).	NA	$12.82
Recovery rebate credit (2008 stimulus credit) (expired) IRC §6428	For 2008, taxpayers were eligible for a credit for their income tax liability up to $600 ($1,200 for married joint filers), with an additional $300 per qualifying child. The credit was reduced by 5% of the amount income exceeded certain thresholds—specifically $75,000 ($150,000 for married joint filers).	NA	$11.79[e]

Source: IRS Statistics of Information (SOI), Table 3.3, http://www.irs.gov/taxstats/indtaxstats/article/0,,id=96981,00.html

Notes: Data concerning the amount of refundable credits claimed in 2009 refers to the refundable portion of tax credits. Refundable tax credits used to offset tax liability are not included in this table.

a. For more information, see CRS Report R41873, *The Child Tax Credit: Current Law and Legislative History*, by (name redacted).

b. For more information, see CRS Report RL32620, *Health Coverage Tax Credit*, by (name redacted).

c. For more information on calculating the credit, see CRS Report R41137, *Health Insurance Premium Credits in the Patient Protection and Affordable Care Act (ACA)*, by (name redacted) and (name redacted).

d. The Patient Protection and Affordable Care Act (P.L. 111-148) increased the maximum amount of the credit to $13,170 for tax year 2010, with this amount indexed for inflation for 2011, and made the adoption credit refundable for 2010 and 2011. For more information, see CRS Report RL33633, *Tax Benefits for Families: Adoption*, by (name redacted).

e. This figure is for 2008.

Appendix B. Classes of Noncitizens and Their Eligibility to Obtain Social Security Numbers and to Qualify as a Resident Alien

Table B-1. Classes of Noncitizens and Their Eligibility to Obtain SSNs and to Qualify as a Resident Alien

Class of Alien	Social Security Numbers	Resident Alien for Tax Purposes
Legal permanent residents (LPRs): —during first five years	Eligible.	Yes
—after five years	Eligible.	Yes
—without a substantial (generally 10-year) work history[a]	Eligible.	Yes
—with a substantial (generally 10-year) work history[a]	Eligible.	Yes
Military connection: aliens with a military connection (active duty military personnel, honorably discharged veterans, and their immediate families).	Eligible.[b]	Yes
Humanitarian cases: —asylees, refugees, Cuban/Haitian entrants, Iraqi and Afghan special immigrants, certain aliens whose deportation/removal is being withheld for humanitarian reasons, and Vietnam-born Amerasians fathered by U.S. citizens[c]	Eligible.	Yes, if they are LPRs or they meet the substantial presence test. [d]
Special Cases: —noncitizen "cross-border" American Indians[e]	Eligible.	Yes, if they are LPRs or they meet the substantial presence test.
—Hmong/Highland Laotians[f]	Eligible.	Yes, if they are LPRs or they meet the substantial presence test.
—parolees and conditional entrants[g]	Eligible.	Yes, if they meet the substantial presence test.
—cases of abuse (battery or extreme cruelty)[h]	Eligible.	Yes, if they are LPRs or they

Class of Alien	Social Security Numbers	Resident Alien for Tax Purposes
		meet the substantial presence test.
—victims of trafficking in persons[i]	Eligible.	Yes, if they meet the substantial presence test.
—aliens in temporary protected status, in extended voluntary departure (EVD) status, or deferred enforced departure (DED) status	Eligible.	Yes, if they meet the substantial presence test.
Nonimmigrants[j]	Ineligible, except if nonimmigrant visa expressly permits the alien to work in the United States.	Yes, if they meet the substantial presence test.[k]
Unauthorized aliens[l]	Ineligible.	Yes, if they meet the substantial presence test.

Source: Congressional Research Service.

a. A substantial work history consists of 40 "qualifying quarters" of work (credits) calculated as they would be for Social Security eligibility purposes—including work not covered by Social Security and work credited from parents and spouses, but not including work performed after 1996 while receiving federal means-tested benefits like TANF, food stamps, or Medicaid. A qualifying quarter is a three-month period of full or part-time work with sufficient income to qualify the earner for credit toward eligibility for Social Security benefits. The qualifying quarter income amount is increased annually; no more than four credit quarters can be earned in any one year. The qualifying quarter test takes into account work by an alien's parent before the alien became 18 (including work before the alien was born/adopted) and by the alien's spouse (provided the alien remains married to the spouse or the spouse is deceased).

b. Eligible military personnel, veterans, and immediate family members also must be a legal permanent resident, or an asylee, refugee, Cuban/Haitian entrant, alien whose deportation/removal is being withheld, parolee, or conditional entrant.

c. Includes Amerasians admitted as immigrants who were born in Vietnam during the Vietnam era and fathered by a U.S. citizen—as well as their spouses, children, and certain other immediate family members.

d. Substantial presence test is met when the individual is present in the United States for at least 31 days during the current year and at least 183 days during the current year and previous two years. For computing the 183 days, a formula is used that counts all the qualifying days in the current year, one-third of the qualifying days in the immediate preceding year, and one-sixth of the qualifying days in the second preceding year. I.R.C. §§7701(b)(1)(A) and (b)(3). A nonresident alien may elect, under certain circumstances, to be treated as a resident alien if the substantial presence test is met in the year following the election. I.R.C. §7701(b)(4). A dual-status or nonresident alien married to a U.S. citizen or resident may qualify to be treated as a resident alien for the entire year. I.R.C. §§6013(g) and (h).

e. Noncitizen "cross-border" American Indians (from Canada or Mexico) are noncitizens who belong to a federally recognized tribe or who were born in Canada and have the right to cross the Canadian-U.S. border unhindered (so-called "Jay Treaty" Indians).

f. Members of a Hmong or Highland Laotian tribe when the tribe assisted U.S. personnel by taking part in military/rescue missions during the Vietnam era—including spouses and unmarried dependent children.

g. Eligible parolees must be paroled for at least one year.

h. Eligibility in abuse cases is limited to aliens who have been abused (subject to battery or extreme cruelty) in the U.S. by a spouse or other family/household member, aliens whose children have been abused, and alien children whose parent has been abused—where the alien has been approved for, or has pending an application/petition with a prima facie case for, immigration preference as a spouse or child or cancellation of removal. The alien cannot be residing with the individual responsible for the abuse, and the agency providing benefits must determine that there is a substantial connection between the abuse and the need for benefits.

i. Eligible for treatment as refugees under the provisions of Section 107 of the Victims of Trafficking and Violence Protection Act of 2000 (P.L. 106-386). Eligible victims of trafficking in persons are those subjected to (1) sex trafficking where the act is induced by force, fraud, or coercion, or the person induced to

perform the act is under age 18, or (2) involuntary servitude. If age 18 or older, they must be "certified" as willing to assist in the investigation and prosecution of the trafficker(s) and have made an application for a nonimmigrant "T" visa (or be in the U.S. to ensure the effective prosecution of the trafficker[s]).

j. Nonimmigrants are those admitted temporarily for a limited purpose (e.g., students, visitors, or temporary workers).

k. Most nonimmigrants enter as visitors for business or tourism and thus would not meet the substantial presence test, which is described above in table note d. Many of the nonimmigrants who enter as temporary workers of intracompany transfers would meet the substantial presence test. Resident aliens who are employees of foreign governments and international organizations may qualify to exempt their compensation from taxation. I.R.C. §893.

l. Unauthorized ("illegal") aliens are those in the U.S. in violation of immigration law for whom no legal relief or recognition has been extended.

Appendix C. Selected Categories of Nonimmigrants Who Are Permitted to Work

There are categories of foreign nationals who are not LPRs but who may be working and residing in the United States for periods of time sufficient to qualify under the Internal Revenue Code's "substantial presence" test (and thus are classified for tax purposes as *resident aliens*, unless there are specific treaty agreements between the United States and their country of citizenship).

The classes of nonimmigrants who are expressly permitted to work in the United States include the following:

- E treaty traders and investors;
- H temporary workers;
- NAFTA temporary workers;
- Certain F foreign students who have obtained permission;
- J and Q cultural exchange visitors;
- L intracompany transfers;
- K fiancés of U.S. citizens;
- O and P extraordinary athletes, entertainers, and performers;
- R religious workers;
- T trafficking victims;
- U crime victims; and
- V family members waiting for more than three years.[101]

Spouses and minor children of the qualifying nonimmigrant may accompany the alien on a related visa, but in most instances are not given permission to work.

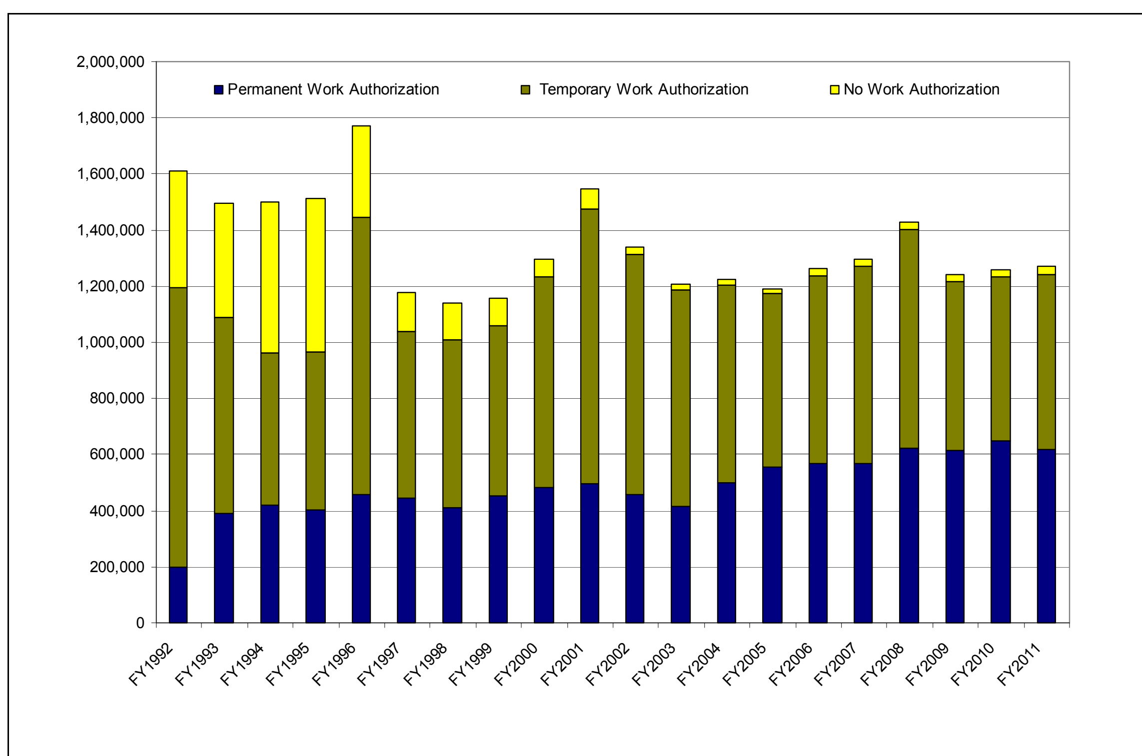
[101] For a complete listing of nonimmigrants who may work in the United States, see Table 2 in CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by (name redacted).

Appendix D. Social Security Numbers (SSNs) Issued to Noncitizens

As **Figure D-1** shows, in FY2011 there were 1.3 million original SSNs issued to noncitizens. The total number of original SSNs issued to noncitizens peaked at 1.8 million in FY1996. In the previous decade, the number of SSNs issued to noncitizens ranged from a peak of 1.5 million in FY2001 to a low of slightly less than 1.2 million in FY2005.

Figure D-1. Original SSNs Issued to Legally Present Noncitizens by Work Authorization Status

FY1992-FY2011



Source: CRS presentation of unpublished data from the Social Security Administration.

Over time, there has been a substantial change in composition of the noncitizen population receiving SSNs. For example, in FY1992, SSA issued SSNs to 200,136 aliens who had permanent work authorization (e.g., LPRs) comprising 12% of the total number of SSNs issued to noncitizens. In FY2011, there were 619,577 aliens with permanent work authorization who received SSNs, which accounted for 49% of all SSNs issued to noncitizens. In addition, as discussed previously, in FY1996 and FY2001, SSA tightened the rules under which aliens could obtain nonwork SSNs. Corresponding with these changes, large declines in the number of nonwork SSNs issued can be seen between FY1996 and FY1997 (325,629 to 141,472), and between FY2001 and FY2002 (72,224 to 25,169). In FY2011, SSA issued 28,622 nonwork SSNs.

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Acknowledgments

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