

# Foreign Agricultural Workers & U.S. Tax Law



**LITC**

**LOW INCOME  
TAXPAYER CLINICS**

## PRESENTER

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## A LITTLE HISTORY

- Foreign workers have come to work in agriculture since the Bracero Program (1942) was set up in 1942 by Executive Order
- Bracero Program enacted into law in 1956
  - Peak year was 1956, 445,197 Braceros entered U.S.
  - The number of illegal's who entered the U.S. during the tenure of the Bracero program was equal to or surpassed the number of braceros.
- Workers have been exempt from FICA (Social Security and Medicare tax) by statute and from Federal income tax withholding (FITW) by Treasury Regulations, derived from Statute.
- Workers have never been exempt from income taxes, BUT IRS Publications obscured this fact.

3

Most temporary foreign workers are subject to the same tax laws as other workers in the U.S. H-2A workers are unique, however, in that even though they are common law employees, their compensation for agricultural labor is not subject to any type of withholding. That is, an employer does not need to withhold income tax (unless as part of a voluntary agreement, which Stuart will discuss later), Social Security tax, Medicare tax, or Federal

Unemployment tax. This is because their compensation is not considered wages within the meaning of section 3121 (dealing with FICA withholding) or section 3401 (dealing with income tax withholding), although it is wages in the general sense of the word, i.e. compensation to an employee from his employer for service performed.

Code Section 3401 defines wages in terms of remuneration for services performed by an employee for his employer. However, Section 3121(b)(1) states that for purposes of this chapter, the tem employment does not apply to foreign agricultural workers lawfully admitted on a temporary basis to perform agricultural labor. This code section exempts the H-2A workers from Social Security & Medicare taxes.

Section 3402(p)(3) Authority for other voluntary withholdingThe Secretary is authorized by regulations to provide for withholding—

(A) from remuneration for services performed by an employee for the employee's employer which (without regard to this paragraph) does not constitute wages, and

(B) from any other type of payment with respect to which the Secretary finds that withholding would be appropriate under the provisions of this chapter,

if the employer and employee, or the person making and the person receiving such other type of payment, agree to such withholding. Such agreement shall be in such form and manner as the Secretary may by regulations prescribe. For purposes of this chapter (and so much of subtitle F as relates to this chapter), remuneration or other payments with respect to which such agreement is made shall be treated as if they were wages paid by an employer to an employee to the extent that such remuneration is paid or other payments are made during the period for which the agreement is in effect.

# TAX LAW & H2A WORKERS

## Did You Know ...

- Employers may be exempt from withholding of federal taxes, but not exempt from reporting of wages paid to foreign agricultural employees on H-2A visas.
- H-2A workers must have a U. S. Social Security Number (SSN).



## Do I need a Social Security number before I start working?



We do not require you to have a Social Security number before you start work. However, the Internal Revenue Service requires employers to report wages using a Social Security number. While you wait for your Social Security number, your employer can use a letter from us stating that you applied for a number.



## Delayed Issuance of the SS Card

- A worker can work while waiting for a card & number.
  - If you are withholding, use the regular withholding rules.
  - Backup withholding is not appropriate.
- See **26 CFR § 31.6011(b)-2 - Employees' account numbers**
  - For information about the documents you need to have on file when the SSN has not yet been issued prior to work start, or
  - When the SSN has not been issued prior to having to file a W-2.

## BACKUP WITHHOLDING

- Required under the **BWH-B** program for workers who fail to provide a correct taxpayer identification number (TIN) to the payer for reporting on the required information return.
  - A TIN can be either your social security number (SSN), employer identification number (EIN), or individual taxpayer identification number (ITIN).
  - Backup withholding would only be required of an H-2A worker who refused to obtain an SSN.
- If you have someone in your employ working with an invalid SSN, you may be directed to do backup withholding (24%) on that individual's wages unless a valid TIN is provided. As shown above, that TIN could be an ITIN.

## SSA Guidance on SSNs

- Employer Responsibilities When Hiring Foreign Workers  
(<http://www.socialsecurity.gov/employer/hiring.htm>)
- Advise workers to apply for a Social Security number.
- The ten day rule
  - Wait ten days after worker enters the U.S. to apply for an SSN.
  - Delay needed to ensure that SSA can verify documents with DHS
- The fourteen day rule
  - SSA will not accept an application if worker has less than 14 days of authorized U.S. presence remaining on the visa.
  - SSA may reject application if, when application is processed, worker has less than 14 days of authorized U.S. presence remaining on the visa.

# Be Careful With Names

## SOCIAL SECURITY ADMINISTRATION Application for a Social Security Card

Form Approved  
OMB No. 0960-0066

<b>1</b>	<b>NAME</b> TO BE SHOWN ON CARD	First	Full Middle Name	Last
	<b>FULL NAME AT BIRTH</b> IF OTHER THAN ABOVE	First	Full Middle Name	Last
	OTHER NAMES USED			
<b>2</b>	Social Security number previously assigned to the person listed in item 1		<div style="border: 1px solid black; width: 100px; height: 20px; display: flex; align-items: center; justify-content: space-around;"> <span style="border: 1px solid black; width: 20px; height: 20px;"></span> <span style="border: 1px solid black; width: 20px; height: 20px;"></span> <span style="border: 1px solid black; width: 20px; height: 20px;"></span> <span style="border: 1px solid black; width: 20px; height: 20px;"></span> <span style="border: 1px solid black; width: 20px; height: 20px;"></span> <span style="border: 1px solid black; width: 20px; height: 20px;"></span> <span style="border: 1px solid black; width: 20px; height: 20px;"></span> <span style="border: 1px solid black; width: 20px; height: 20px;"></span> </div>	
<b>3</b>	<b>PLACE OF BIRTH</b> (Do Not Abbreviate) City State or Foreign Country	Office Use Only FCI	<b>4</b> <b>DATE OF BIRTH</b>	MM/DD/YYYY
<b>5</b>	<b>CITIZENSHIP</b> (Check One)	<input type="checkbox"/> U.S. Citizen <input type="checkbox"/> Legal Alien Allowed To Work <input type="checkbox"/> Legal Alien Not Allowed To Work (See Instructions On Page 3) <input type="checkbox"/> Other (See Instructions On Page 3)		
<b>6</b>	<b>ETHNICITY</b> Are You Hispanic or Latino? (Your Response is Voluntary) <input type="checkbox"/> Yes <input type="checkbox"/> No	<b>7</b> <b>RACE</b> Select One or More (Your Response is Voluntary)	<input type="checkbox"/> Native Hawaiian <input type="checkbox"/> American Indian <input type="checkbox"/> Other Pacific Islander <input type="checkbox"/> Alaska Native <input type="checkbox"/> Black/African American <input type="checkbox"/> White <input type="checkbox"/> Asian	
<b>8</b>	<b>SEX</b>	<input type="checkbox"/> Male <input type="checkbox"/> Female		



## Information Return Reporting

- Payments of compensation to H-2A & H-2B workers must be reported on Form W-2
- **If the worker has applied, but doesn't have a Social Security number when wage reports (Forms W-2) are due**
  - Paper filers, enter "Applied For" in Box a.
  - Electronic Filers, enter all zeros in the SSN field.
  - Submit Form W-2c when you receive the worker's SSN
- **If worker has not yet applied, see 26 CFR 31.6011(b)-2 - Employees' account numbers.** Internet search easily finds this reference on Cornell University's Law School Web site.

9

Payments to H-2A workers are not "wages" within the meaning of section 3121 or section 3401. Therefore, these payments are not reportable under section 6051, the section that traditionally calls for Form W-2 reporting. Nevertheless, these payments should be reported in Box 2 of the Form W-2 as other compensation. Because these payments are not wages for FICA or income tax withholding purposes, Boxes 3 and 5 should remain blank. Although there is no traditional income tax withholding, Box 2 may be filled if the employee elects voluntary income tax withholding, which will be discussed a little later in the presentation.

(iv) *Employee who is unable to furnish number or receipt.* If an employee is unable to comply with the requirement of paragraph (b)(1)(i), (ii), or (iii) of this section, the employee shall furnish to the employer a statement in writing, signed by the employee, setting forth the date of the statement, the employee's full name, present address, date and place of birth, father's full name, mother's full name before marriage, and the employee's sex, including a statement as to whether the employee has previously filed an application on Form SS-5 and, if so, the date and place of such filing. The information required by this subdivision shall be furnished on Form SS-5, if a copy of Form SS-5 is available. The furnishing of such a Form SS-5 or other statement by the employee to the employer does not relieve the employee of his obligation to make an application on Form SS-5 and file it with a district office of the Social Security Administration as required by paragraph (a) of this section. The foregoing provisions of this subdivision are not applicable to an employee engaged exclusively in the performance of domestic service in a private

home of his employer not on a farm operated for profit, or in the performance of agricultural labor, if the services are performed for an employer other than an employer required to file returns of the taxes imposed by the Federal Insurance Contributions Act with the office of the United States Internal Revenue Service in Puerto Rico. However, such employee shall advise the employer of his full name and present address.

For provisions relating to the duties of an employer when furnished the information required by paragraph (b)(1) (i), (ii), (iii), or (iv) of this section, see paragraph (c) of this section.

*Employee who has not applied for account number.* If the employee has not been assigned an account number and has not made application therefor with a district office of the Social Security Administration, the employer shall inform the employee of his duties under this section.

*Employee who has receipt for application.* If the employee shows the employer, as provided in paragraph (b)(1)(iii) of this section, a receipt issued to him by an office of the Social Security Administration acknowledging that an application for an account number has been received from the employee, the employer shall enter in his records with respect to such employee the name and address of the employee exactly as shown on the receipt, the expiration date of the receipt, and the address of the issuing office. The receipt shall be retained by the employee.

If the employee advises the employer of his full name and present address in accordance with those provisions of paragraph (b)(1)(iv) of this section which are applicable in the case of employees engaged exclusively in the performance of domestic service in a private home of the employer not on a farm operated for profit, or agricultural labor, the employer shall enter such name and address in his records.

## Employer Tax Responsibilities for H-2A Workers

- Ensure that workers have or apply for a Social Security number. (<http://www.socialsecurity.gov/employer/hiring.htm>)
- Issue W-2s to all H-2A workers paid \$600 or more.
- Know and comply with Information Return Reporting Requirements
  - Form 943 Employer's Annual Federal Tax Return for Agricultural Employees and Instructions
  - Publication 51 (Circular A), Agricultural Employer's Tax Guide
- If agreeing to withhold income taxes, know how to estimate correct amount of tax to withhold
- If a large employer, provide health insurance

190

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## Failure to File Penalties

- Any person who fails file an information return (W-2/1099) on or before the prescribed due date is subject to a penalty.
  - \$50 per return if filed within 30 days of due date
  - \$100 per return if filed on/before August 31
  - \$250 per return if filed after August 1
  - \$500 per return if due to intentional disregard.
- Similar penalties for failure to provide a timely payee statement

Old penalties were

\$30

\$60

\$100

\$250



## Where to Send the W-2

- To the taxpayer's permanent (foreign) address
  - It will likely never get there.
  - It is the address the IRS says you should be using.
  - It greatly decreases IRS tax compliance enforcement action against the worker.
- To an address the worker uses while in the U.S.
  - Be sure the mail will be delivered to the worker at that address,
  - That someone will hold it or forward it to the worker, and
  - Have a signed written request from the worker to use that address
- Hold it until the worker returns
  - Have a signed written request from the worker to do so in your files.

## Health Insurance for H-2A Workers

- Applicable Large Employers probably have to provide health insurance for H-2A workers
  - If this is the case, make sure that you include this benefit when you advertise the position to U.S. workers.
  - Failure to do so may subject you to fines from the Department of Labor during an H-2A program compliance visit.
- If not an ALE, but you offer health insurance to other employees, the terms of your program will determine if H-2A worker should be offered the insurance.
- If you don't offer health insurance, H-2A workers who are tax residents are eligible for subsidized, sometimes free health insurance under the Affordable Care Act.

## Retirement Plans

- If you offer retirement benefits, the terms of your retirement plan determines whether or not you **must** offer the benefit to your H-2A employees.
- Failure to comply with the terms of your plan, jeopardizes the tax-exempt status of the plan.
- If the plan includes H-2A workers, you must include the retirement plan benefit when advertising for U.S. workers.
- Failure to do so may subject you to fines from the Department of Labor during an H-2A program compliance visit.
- Dr. Adam Kantrovich, Clemson University is the expert on both the Affordable Care Act and retirement plan compliance.

## What The Law Requires of Workers

- **IRC § 6012** requires a tax return of every individual having gross income which equals or exceeds the exemption amount plus other statutory deductions & exemptions based on filing status.
  - Non-resident and dual status workers must file if wages exceed \$5
  - Resident workers may claim the standard deduction and exemption(s) that raise their filing threshold

## Most H-2A Workers are Required to File Income Tax Returns

- Not the employer's responsibility
- The government expects all U.S. workers with a filing requirement to file and pay taxes!
- **BUT—No government agency provides outreach to H-2A workers about their tax obligations.**
- When visas are issued, H-2A visa holders
  - Are told that they are exempt from Social Security and Medicare taxes.
  - Are told nothing about U.S. income taxes

Circa 2007, obscure IRS web page directed employers to report H-2A wages on Form 1099-MISC

2009, web page modified to inform employers that workers had filing requirement and should make estimated tax payments

**September 2011**, revised web page

Report H-2A wages on Form W-2

FITW permitted if worker requests it and employer agrees

Instructions for Form 943 included H-2A wage reporting

2012 Pub 51 (Circular A) added guidance for W-2 reporting.



## Not Complying With Tax Law

- May result in IRS tax assessments (substitute returns) and enforced collections (wage and bank levies).
- Will jeopardize any chance of legal permanent residency via immigration reform.
- Will not automatically prevent the issuance of future visas.
  - The law does not allow immigration officials access to individual tax records, but
  - May jeopardize issuance of future work visas, if the subject comes up during a visa interview at the Consulate, and the worker's answer does not satisfy the interviewer.

## What Do H-2A Workers Know?

- Knowledge of tax ranges from limited or no knowledge of U.S. tax law to being badly misinformed
  - When visas are issued, they are told that they are exempt from Social Security and Medicare taxes.
  - Are told nothing about U.S. income taxes
  - Many believe they are exempt from all U.S. taxes
    - Many know others who worked in the U.S. for generations and never filed tax returns
    - For generations, many did not receive W-2s or 1099s
  - Some believe they are entitled to refundable credits such as CTC/ACTC
  - Many have learned that those who filed in recent years received Stimulus Payments in 2020 and 2021.

## What H-2A Workers Need to Know

- They are required to comply with federal and state tax laws.
- The filing requirement is real and won't go away. Failing to file is a mistake.
- Employers must report their wages to the government—eventually the IRS will enforce the law.
- Failure to File and not withholding or making estimated payments will add costly penalties to the tax due.
- Although the law is complex, workers have options and benefits which reduce and sometimes eliminate tax liabilities.

What The Law Requires

**IRC § 6012** requires a tax return of every individual having gross income which equals or exceeds the exemption amount plus other statutory deductions & exemptions based on filing

status.

Non-resident and dual status workers must file if wages exceed the exemption amount

Resident workers may claim statutory deductions and exemptions that raise their filing threshold

Obtain health insurance if not covered by an employer policy.

## Need to Know – Slide 2

- Federal tax law enforcement is inconsistent
  - The IRS is underfunded and understaffed, **but**
  - Additional staff is being hired to attack the tax gap by going after nonfilers
- Failure to file results in steep penalties to those who owe tax – up to 50% of the tax owed plus interest.
- For those interested in becoming a lawful permanent resident, filing compliance is required.

What The Law Requires

**IRC § 6012** requires a tax return of every individual having gross income which equals or exceeds the exemption amount plus other statutory deductions & exemptions based on filing



status.

Non-resident and dual status workers must file if wages exceed the exemption amount

Resident workers may claim statutory deductions and exemptions that raise their filing threshold

Obtain health insurance if not covered by an employer policy.

## More About Enforcement

- Upon receipt of a W-2 with taxable income, but no withholding, the IRS may direct an employer to commence withholding at the Single rate with no dependents or other adjustments
  - Respond to the IRS notice with a letter stating that you are not allowed to withhold. Include a copy of Pub 5144 with your reply and cite Publication 51, Agricultural Employer's Tax Guide, Table 12 (page 26).
  - Inform the employee about the notice and encourage the employee to comply with his/her filing requirement **and** commence voluntary withholding. (**NOT REQUIRED**)

## Substitute for a Return

- The IRS or a state tax agency, upon receipt of a W-2, but no tax return from the worker, may create a Substitute for Return (SFR), assess tax and commence collections.
- Collection actions may eventually include a wage levy. If received, you must comply with the levy.
  - The worker can contact the IRS to make an alternative arrangement to get the levy released.
  - It is almost never too late to file an actual return, especially if the actual return produces a lower tax.

# Withholding

- H-2A employees are **EXEMPT from**
  - Social Security & Medicare Taxes
  - Federal Income Tax Withholding, and
  - Federal Unemployment Taxes
- They may volunteer for federal income tax withholding.
- They are not eligible to Social Security or Medicare Coverage and may not voluntarily pay into these programs.
- A few states such as Idaho conform to federal rules on income tax withholding and unemployment taxes, but **MOST STATES DO NOT!**
- Several states have additional requirements such as SDI in California and a transit tax in Oregon.

## To Withhold or Not to Withhold

- Federal Income Tax Withholding (FITW) is voluntary, but pay as you go is not!
  - Worker must ask for FITW.
  - Employer must agree (Does not have to agree)
  - If worker does not withhold, IRS expects estimated quarterly payments.
- Encourage Estimated Payments in first year or two of employment.
  - IRS fraud programs work against guest workers who ask for withholding
  - Estimated payments force the IRS to create a taxpayer account in its Individual Master File
- In many states, state income tax withholding is required.

### IRS records

Tax return information in its Individual Master File (IMF)

Information return information in an Information Return Master File (IRMF)

It does not establish these accounts until it receives tax return information from a taxpayer

An Estimated Payment (Form 1040-ES or 1040NR-ES forces the IRS to establish an account for the worker in its IMF. The payment is posted to the taxpayer's account.

A W-2 submitted by an employer has nowhere to post before a tax return is filed.

When the tax return is filed, the IRS will not be able to match the W-2 withholding on the tax return to the employer submitted W-2



## For State Law Information

- Contact your State's labor agency for information about state unemployment taxes.
- Contact your State's income tax agency for information about state income tax and other required wage withholdings
- RECOMMENDATION:
  - Inform the service rep you are dealing with that your employee is a temporary foreign worker exempt from federal income tax withholding or unemployment tax, as appropriate.
  - Ask if that means that they are also exempt from the same state taxes.
  - The representative you are dealing with may not know anything about the H-2A program.
  - If the state does not conform to federal law, the H-2A worker will likely be subject to the same state rules as any other agricultural employee.

## Required Forms

- Each new employee must complete and sign form I-9 to verify eligibility for employment.
- Almost all other workers must complete a Form W-4 to establish an appropriate withholding rate based on their marital status, number of jobs held, and dependents claimed. Most states have a similar form.
  - H-2A workers are exempt from federal withholding; thus, they are not required to complete the federal Form W-4.
  - They will likely be required to complete your state's W-4.
- The employment orientation during which these forms are completed gives you an excellent opportunity to inform your workers about their federal and state income tax filing obligations.
- You can encourage them to volunteer for federal income tax withholding.

# Federal Tax Law

*What H-2A Workers  
& their employers  
need to know!!*



## Resident or Nonresident

- All are nonresidents under immigration law,  
**BUT**
- Many are residents under tax law
  - The Substantial Presence Test governs tax residency
  - In any given year, H-2A worker may be classified as
    - A Nonresident who files Form 1040NR
    - A Resident who files Form 1040
    - A Dual Status taxpayer

# Tax Law Residency Definitions

- **Resident Alien**
  - Permanent resident/green card holder
  - **Substantial Presence Test** aliens
    - Nonimmigrant visas (Asylees, Refugees, Guest Workers, et.al. )
    - Aliens in the U.S. illegally (without authorization to be in the U.S.)
- **Nonresident Alien**
  - All aliens living outside the United States
  - Aliens in the U.S. who do not have **Substantial Presence**
  - Aliens who are exempt from the **Substantial Presence** rule by law or treaty
- **Dual Status Alien**—someone who is a nonresident alien part of the tax year and a resident alien the rest of the year.

HO-4 Determining Alien Tax Status

29

## Lawful Presence in the United States

Immigrant (Permanent Resident/Green Card)

Asylee, Refugee, Temporary Protected Status

Non-immigrant—H-2A or any other visa

## Nonresident Aliens

Generally, live outside the United States

May be in the U.S. for short periods for employment, visits, etc.

May be temporarily present in the United States, but are “exempt individuals” and thus retain NRA status.

You will not be an exempt individual as a teacher or trainee in 2010 if you were exempt as a teacher, trainee, or student for any part of 2 of the 6 preceding calendar years.

However, you will be an exempt individual if all of the following conditions are met. You were exempt as a teacher, trainee, or student for any part of 3 (or fewer) of the

6 preceding calendar years,

A foreign employer paid all of your compensation during 2010, and

A foreign employer paid all of your compensation during each of the preceding 6 years you were present in the United States as a teacher or trainee.

A foreign employer includes an office or place of business of an American entity in a foreign country or a U.S. possession.

If you qualify to exclude days of presence as a teacher or trainee, you must file a fully completed Form 8843 with the IRS. See [Form 8843](#), later.

#### Exempt Individuals

Foreign government related individuals, including international organizations (by Executive Order) “A” or “G” visa

Teachers or trainees under a “J” or “Q” visa

Students under a “F”, “J”, “M” or “Q” visa

Professional athletes competing in charitable events

Immediate family members of those above

Others based on facts and circumstances (see Pub 519)



## What is Substantial Presence?

- 183 days present in the U.S. during any given year.
- 183 days during a three-year period
  - At least 31 days in the tax year, **and counting days present**
    - In the tax year,
    - 1/3 of the days in the year preceding the tax year, and
    - 1/6 of the days two years before the tax year.
- Any time in the U.S. during any day is a day of presence
- Some days don't count— for example, commuting days, when in a hospital, more—see Pub 519 for details

HO-5 Substantial Presence Test



## Effect of Tax Treaties

- The rules given here to determine if you are a U.S. resident do not override tax treaty definitions of residency.
- The income tax treaty between the two countries must contain a provision that provides for resolution of conflicting claims of residence (tie-breaker rule).
- If you are treated as a resident of a foreign country under a tax treaty, you are treated as a nonresident alien in figuring your U.S. income tax.
- Some countries may have treaties that exempt some U.S. income from tax
  - Generally, only applies to taxpayers filing nonresident returns.

For purposes other than figuring your tax, you will be treated as a U.S. resident. For example, the rules discussed here do not affect your residency time periods as discussed later under [Dual-Status Aliens](#).

U.S.-Mexico Tax Treaty does not conflict with the Substantial Presence Test. Mexican residents are only taxed on income earned in Mexico or earned outside Mexico while employed by an enterprise with Mexican presence.

## Residency Matters

- Nonresidents file Form 1040NR
  - Must file as single or married filing separate
  - There is no standard deduction. Limited itemized deductions are allowed.
- Residents file Form 1040 and are treated like all other U.S. citizens and lawful immigrants.
  - All filing statuses are possible.
  - Eligible to claim standard deduction.
  - May elect to file jointly with nonresident spouse.
  - Taxed on world-wide income for entire year
- Dual Status residents
  - Form 1040 if resident at year-end, else Form 1040NR
  - No standard deduction

## Benefits Available to H-2A Workers

- Nonresident H-2A workers may be able claim dependent exemptions for a spouse and for other dependents, but this has been suspended for tax years 2018-2025 (exemption amount = \$0.00).
  - Spouse and dependents, and must live in U.S., Mexico or Canada
  - Spouse/dependents cannot have income exceeding the exemption amount
  - Spouse and other dependents must have a tax identification number (SSN or ITIN)
- Resident H-2A workers
  - Have the same benefits available to U.S. citizens
  - May file a joint return with a nonresident spouse, provided both agree to be treated as U.S. residents in the year of the election and all subsequent filings.
  - It's almost always a great deal, but both worker and spouse must report their full year world-wide income.

## Maximizing Tax Benefits

- First Year Choice
  - Gives the benefits of filing as a U.S. resident one year sooner
  - Makes Standard Deduction Available Sooner
- Election to file a joint return with nonresident spouse
  - Provides the MFJ standard deduction
  - Provides an exemption for a spouse regardless of country of residence.
  - Subjects any spousal income to U.S. taxes

## The FIRST YEAR CHOICE

- Worker was not in U.S. in year prior to the tax year.
- Worker has 31 consecutive days in the U.S. during the tax year, but does not have the 183 days needed for residency.
  - The worker may be eligible to elect residency for the tax year, if
  - He/she was in the U.S. 75% of the time from arrival until the end of the tax year.
- Gives the worker all tax benefits of residency in the tax year, except all filing status and the standard deduction.



## Why is First Year Choice Valuable?

- A worker who is a resident under the substantial presence test in any given year, generally retains resident status through the end of the year (12/31), regardless of when he leaves the country.
- That means, a returning worker's residency continues into the next year.
- When the substantial presence test is met in the second year, the worker
  - is a resident for the entire second year,
  - May claim the standard deduction,
  - May elect any appropriate filing status and
  - May claim all other benefits available to residents.

## EXAMPLE

- 2021 was Jose's first year in the U.S. He arrived May 1 and left December 1. He meets the test to be a U.S. resident for tax purposes in 2021.
  - His first day of residency is May 1. Prior to May 1, he was a nonresident alien.
  - His residency does not end when he leaves—It continues through the end of the year.
  - In 2021, Jose files a Dual Status resident return (Form 1040).
  - He cannot claim the standard deduction.
- In 2022, Jose returns on April 10<sup>th</sup> and he stays long enough to again meet the SPT to be a resident in 2022.
  - His residency for 2022 starts on January 1 and ends on December 31.
  - He can claim the standard deduction in 2022.

## Let's Change Jose's 2021 Entry Date

- Jose's visa was delayed. He arrives July 1, 2021 and departs December 1. He is only in the U.S. 154 days.
  - He is short of the 183 days required for resident tax status.
  - There are 184 days from July 1 through December 31.
  - $154/184 = 83.7\%$ . That is more than the 75% threshold needed for FIRST YEAR CHOICE.
  - Jose must wait until he meets the 183 day test for 2022. On/after that date, he can file a Dual Status resident tax return for 2021, and he will be a full year resident when he files in 2022 and will get the standard deduction in 2022.
  - Without the first-year choice, he must file a nonresident 2021 return. He will file as a Dual Status resident in 2022 and will not get the standard deduction.
- Electing the first-year choice in 2021 will save Jose more than \$1,200 in federal income tax on his 2022 tax return.

## Help Your Workers

- Suppose Jose had not arrived until August 1, 2021 and departed on Nov 15<sup>th</sup>. He has 107 days present. From August 1 through December 31 there are 153 days.
- $107/153 = 69.9\%$ . Jose is not eligible for the First-Year Choice.
- If he delays his departure by 8 days, he will be eligible for the First-Year Choice.
- Workers are given ten days after the last day of the visa period to leave the U.S..
- The workers don't know these rules, but you can help them.
- They don't have to work on the extended days, and you don't have to pay them to stay.

## Suppose Jose Is Married

- In any year that Jose is a resident as of the last day of the year, Jose and his wife may jointly elect to be treated as U.S. residents for the entire year.
  - They will receive the MFJ standard deduction for the entire year.
  - This can be combined with the First-Year Choice.
  - They will have to report all their income, not just what was earned in the U.S.
    - Jose has to do this anyway
    - The first \$100,000+ of his wife's income, if earned, is exempt from U.S. tax by filing form 2555 with the return.
- Jose's wife should apply for an Individual Tax Identification Number (ITIN) from the IRS.
  - She applies when they file their first tax return.
  - Once they make this election, it applies to every future tax return they file.
  - It is a once in a lifetime deal.

# FILING STATUS OPTIONS

## Resident Alien Taxpayer

- Single
- Married Filing Joint
  - Tax ID # not required
- Married Filing Separately
- Head of Household
- Widow(er) with Qualifying Child

## Dual Status or Non-resident Alien Taxpayer

- **Single**
- ~~• Married Filing Joint~~
- **Married Filing Separately**
- ~~• Head of Household~~
- ~~• Widow(er) with Qualifying Child~~



# DEDUCTIONS

## Resident Alien Taxpayer

- May claim the standard deduction for the filing status used
- May take all itemized deductions available to U.S. Citizens

## Nonresident Alien Taxpayer

- Not eligible for the standard deduction
- This is also true for Dual Status Aliens
- Itemized Deductions are limited
  - State & Local Taxes Paid
  - Contributions to U.S. charities
  - Uninsured Casualty losses
  - Gambling losses up to amount of gambling winnings

## H2A Workers Claiming Dependents

- Dependents must meet regular tests for a qualifying child or other qualifying relative
- You can only claim a person as a dependent if that person is a U.S. citizen, U.S. resident alien, U.S. national, or a resident of Canada or Mexico, for some part of the year. (Substantial presence test applies.)
- For tax years 2018 – 2025, there are no tax benefits for non-U.S. citizen dependents residing in Canada or Mexico.
- H-2A workers with children in other countries- Peru, Guatemala, Honduras, El Salvador, Jamaica, South African, et. al. cannot claim them as dependents.
- Each dependent must have a TIN



NRA's filing Form 1040 may claim dependents if they are residents of Mexico, Canada or U.S. Nationals using same rules as U.S. Citizens. Residents of South Korea may claim dependents under tax treaty provided the spouse/children lived with taxpayer in the U.S. for some part of the tax year. Exemption amount is that proportion of the exemption that relates to U.S. source income vs. total income.

A non-resident alien spouse who has chosen to be treated as a resident alien, may in subsequent years be claimed for an exemption on an MFS return, provided the spouse has no world-wide income.

## Credit Issues

- H2A workers rarely qualify for **EITC**.
  - Taxpayer must be a resident for the entire year and be physically present in the U.S. for more than six months.
  - Cannot file MFS or MJF with a spouse who has an ITIN.
  - Single taxpayers filing as Single/Head of Household with incomes below \$21,430 in 2021 were eligible for **EITC**.
  - Married taxpayers with nonresident alien spouses, if eligible to use the head of household filing status, may be eligible for **EITC**.
  - If children are claimed for **EITC**, they must have valid SSNs and reside in the U.S. for more than six months during the tax year.
- Children living outside the U.S. are not qualifying children for **CTC** unless they are U.S. citizens
- H-2A workers may claim recovery rebate credits (COVID stimulus payments) when filing 2020 and 2021 resident returns, if they did not receive the stimulus payments when issued.

## File on Time or File an Extension

- If taxpayer not in the U.S. before April 15, he/she has an automatic two month extension.
  - A statement claiming the extended filing deadline must be attached to the return to avoid late filing or payment penalties.
  - If efiled, statement will be ignored, penalty assessed anyway.
  - Have someone file extension before April 15.
    - IRS Form 4868
    - File state extension also.
    - Saves late filing penalties, not late payment penalties.
- Adequate withholding or Estimated Payments we prevent late payment penalties.

## **Increased IRS Enforcement & Fraud Prevention Programs**

## IRS Safeguards Against Refund Fraud Impact Innocent H-2A Workers

- Taxpayer Protection Program (TPP) & Integrity & Verification Operation (IVO) hurt
  - First time filers claiming refunds
  - No tax due filers claiming refunds
- The IRS is looking for fraudulent refund claims.
- The screening filters it uses to detect fraud are preventing the Service from issuing legitimate refunds to H-2A filers.
- Refunds may take up to six months, and some may be “frozen” and never sent unless the taxpayer complains and provides proof
  - that the W-2 wages were really his, and
  - that he is a bonafide taxpayer.



## Confusing Letters From SSA

- Our records show that you have been employed in work in which you did not pay Social Security taxes
- In the future, you may qualify for Social Security benefits if:
  - You work in a job in which you do pay Social Security taxes; or
  - You become eligible as a current or former spouse, widow or widower of a worker who paid Social Security taxes.
- Neither SSA nor IRS know the W-2 was issued to a guest worker.

If our records are incomplete, let us know right away by calling 1-800-772-1213 (TTY 1-800-325-0778) from 7 a.m. to 7 p.m. your local time. If you live outside the U.S., contact your nearest U.S. Embassy or consulate or write to Social Security Administration, Office of International Operations, P.O. Box 17769, Baltimore, MD 21235-7769, USA.

## ITINs and Credits

- All ITINs issued before Jan. 1, 2013 have expire and must go through a new application process.
- **EITC will be denied** to anyone, regardless of status, whose SSN was issued after the due date of the tax return claiming EITC.
- **CTC, ACTC other dependent credits will be denied** for any year the tax filer did not have an ITIN before the due date of the return, or if the child/dependent did not have a tax ID number before the due date.

## Knowledgeable Preparers are RARE

- File as single with no dependents, even if married with eligible dependents
- File as non-residents with no standard deduction allowed, when correct filing would be as a resident with the standard deduction
- Create potential problems for workers by fraudulently claiming child tax credit for children in Mexico
- Not knowing if/when H-2A may be eligible to claim the Earned Income Tax Credit (without children)

## Tax Compliance Challenges

- Obtaining Tax Identification Numbers (ITINs)
  - IRS is very nit picky & detail oriented, leading to rejected applications
  - Requirement to send original documents to the IRS—e.g., passports, voter ID cards, etc.
- Not having a year-round mailing address to receive and react to IRS correspondence
- U.S. legal and cultural expectations do not match taxpayer's experience in home country
- Unreliable & time consuming ways of corresponding between work place and home.

## Receiving Mail Is A Problem

- IRS and State agencies will send mail to the address on the most recent tax return
  - If this is a U.S. address,
    - Ensure that the mail is forwarded, or
    - Worker has authorized someone trusted to open mail and call with important information.
  - If this is a foreign address,
    - Does worker's employer and tax preparer have a valid mailing address on the W-2 and tax return?
    - Is mail delivery to that address reliable?
    - Will tax authorities make unwarranted assumptions about the tax return because of the taxpayer's main home address?
- If practical, consider filing a change of address with IRS and State Tax agency when leaving the U.S. and upon return.

## Late Filing Penalties are Common

- Adequate withholding or Estimated Payments will prevent late payment penalties.
- If taxpayer not in the U.S. on April 15, the return is not due until June 15<sup>th</sup>, **BUT**
  - A statement claiming the extended filing deadline must be attached to the return.
  - If efiled, statement will be ignored, penalty assessed anyway.
- Best Practice: Have someone file extension before April 15.
  - IRS Form 4868
  - Many States require a separate extension request.
  - Saves late filing penalties, not late payment penalties.



## Worker Compliance Challenges

- Worker beliefs and behaviors.
- Tax professionals who know the law are rare.
- Incompetent, ignorant and fraudulent tax preparers are prevalent.
- Tax law is exceedingly complex.
- Insurance exchange employees generally do not understand the guest worker program.

54

Bullet 1: What kind of tax returns should they file? 1040 or 1040NR?  
Can they claim spouses and dependents?  
What other special rules apply?

**Bullet 2: Very few tax preparers know anything about the taxation of guest workers.**

**Confuse immigration status with tax residency and prepare wrong types of returns.**

Don't know how tax law applies to guest workers.

Don't know how to deal with spouses and dependents who don't have SSNs.

Obtaining tax ID numbers (ITINs) from the IRS for spouses and dependents is difficult.

Insurance exchange employees generally do not understand what a guest worker is.

## Is This The Employers Problem?

- You decide....
  - How do tax issues impact worker job satisfaction and performance?
  - How much time is spent away from the job to resolve tax issues?
  - What is the risk that noncompliance will impact future visas?

Foreign Worker Tax Issues

*Questions???*

