
LAW-ABIDING “ILLEGAL ALIENS”: PAYING TAXES FOR THE CHANCE OF LEGAL IMMIGRATION STATUS, OR NOT?

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I. INTRODUCTION

Some risk their lives crossing the borders of Mexico for a chance of a better life opportunity in the United States.¹ Others have the privilege to enter the United States through the “front door.”² Yet, once in the United States, they share a common ground: They have officially made it to the land of opportunity.³ Now, the question is: Should they live in the shadows or become law-abiding “illegal aliens”?⁴

Although there is a general misconception that unauthorized

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1. See Jana Winter, *Endless Wave of Illegal Immigrants Floods Rio Grande Valley*, FOX NEWS (July 14, 2014), <http://www.foxnews.com/us/2014/07/14/night-time-on-border-endless-wave-illegal-immigrants-floods-rio-grande-valley/> (stating that the Border Patrol vehicles are loaded with newly-arrived illegal immigrants, coming in throughout the evening and early morning hours of the day).

2. PHILIP MARTIN & ELIZABETH MIDGLEY, POPULATION REFERENCE BUREAU, IMMIGRATION: SHAPING AND RESHAPING AMERICA 5 (vol. 58, No. 2 June 2003), available at <http://www.prb.org/source/58.2immigrshapingamerica.pdf>; Philip Martin, *US Immigration Patterns and Policies*, COMPARATIVE IMMIGRATION AND INTEGRATION PROGRAM 1, 3 (Feb. 26, 2012), <http://migrationfiles.ucdavis.edu/uploads/rs/files/2012/ciip/martin-immigration-patterns-policies.pdf>. The reference to aliens who arrive in the United States “through the front door” means that they arrive through legal means. Martin, *supra*.

3. See Donald Lambro, *Pursuing the Immigrants’ Dream in the Land of Opportunity*, TOWNHALL.COM (July 18, 2014), <http://townhall.com/columnists/donaldlambro/2014/07/18/pursuing-the-immigrants-dream-in-the-land-of-opportunity-n1863244/page/full> (“Ronald Reagan said he once got a letter from a man who said ‘you can go live in Turkey, but you can’t become a Turk. You can go to Japan, but you cannot become Japanese – or Germany or France. . . . But he said anyone from any corner of the world can come to America and become an American.’”).

4. See discussion *infra* Part II.B; see also STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1169–70 (Robert C. Clark et al. eds., 6th ed. 2015) (discussing how the term “illegal aliens” has a negative connotation and yet, the word “alien” is a correct legal term).

immigrants⁵ do not pay taxes and take advantage of the United States welfare system, the United States collected an estimated total of \$10.6 billion in state and local taxes from unauthorized immigrants in 2010.⁶ The Center for American Progress suggests that immigration reform would add \$109 billion in combined government taxes over a ten-year period.⁷ Moreover, immigrants' gain of legal status is likely to increase the overall Social Security trust fund to approximately \$606 billion.⁸ The Center for American Progress further states that immigration reform would raise enough capital to fund retirement benefits of approximately 2.4 million native-born Americans.⁹

While the government, by means of Internal Revenue Service ("IRS") regulations, requires all citizens and noncitizens, including unauthorized immigrants to file tax returns, many immigrants are hesitant to announce their presence in the United States to federal agencies.¹⁰ Unauthorized immigrants fear their employers might find out they use false social security numbers ("SSNs"), or that the federal government would find their whereabouts in the United States.¹¹ However, it is important to note the IRS has records of each tax return filed with an Individual Taxpayer Identification Number¹² ("ITIN")—meaning that the taxpayer does not have a SSN, which places the IRS on notice the person filing the taxes is likely to be unauthorized to work.¹³

The tension between the IRS regulations requiring unauthorized

5. See LEGOMSKY & RODRIGUEZ, *supra* note 4, at 1170. The term unauthorized immigrants and undocumented immigrants (or workers) refer to the same group of non-U.S. citizens who are present in the United States without lawful immigration status. *Id.*

6. See INST. ON TAX'N AND ECON. POL'Y, UNDOCUMENTED IMMIGRANTS' STATE AND LOCAL TAX CONTRIBUTIONS 1 (July 2013), available at <http://www.itep.org/pdf/undocumentedtaxes.pdf> (stating that these statistics include \$1.2 billion in personal income taxes and \$1.2 billion in property taxes; and that sales and excise taxes account for 77 percent of tax contributions, a total of more than \$8 billion).

7. See Amy Grenier, *Undocumented Immigrants Contribute Billions in Taxes*, AM. IMMIGRATIONCOUNCIL (Apr. 15, 2014), available at <http://immigrationimpact.com/2014/04/15/undocumented-immigrants-contribute-billions-in-taxes/> (referring to the Institute on Taxation and Economic Policy to the statistics on undocumented immigrant tax contribution).

8. *See id.*

9. *See id.*

10. Daisy Hernández, *Tax Day Puts Illegal Immigrants in a Special Bind*, N.Y. TIMES, (Apr. 15 2003), <http://www.nytimes.com/2003/04/15/nyregion/tax-day-puts-illegal-immigrants-in-a-special-bind.html>.

11. *Id.*

12. *See* discussion *infra* Part V.

13. *See* Cynthia Blum, *Rethinking Tax Compliance of Unauthorized Workers After Immigration Reform*, 21 GEO. IMMIGR. L.J. 595, 598 (2007).

immigrants to file taxes, and the United States Department of Homeland Security ("DHS") prohibiting these same individuals from lawfully working in the United States, is an ongoing controversy in this country.¹⁴ The DHS, by means of its Immigration and Nationality Act ("INA") regulations, penalizes unauthorized immigrants who falsely claim to be United States citizens for purposes of obtaining employment, irrespective of whether the aliens filed and paid their taxes.¹⁵ This Comment will focus on the inconsistencies between the IRS and the DHS, and suggest a proposal for amending the INA.¹⁶

Part I of this Comment introduced the overall inconsistency amongst the government agencies.¹⁷ Part II focuses on the experiences of some unauthorized immigrants and the situations they face as unauthorized immigrants abiding by the law.¹⁸ Part III introduces relevant background information useful to the understanding of who the immigrants are, what it means to be an inadmissible "alien," and the type of waivers for which they may qualify.¹⁹ Part IV provides a brief description of the relevant immigration acts Congress enacted, and what misrepresentation on I-9 Employment Eligibility Verification Form ("Form I-9") means to the DHS and to immigrants.²⁰ Following this brief explanation on Form I-9, Part V introduces the ITIN, and the issues it raises.²¹ Part VI considers the undocumented workers' tax contributions to the United States Government.²² Part VII discusses recent proposals and their drawbacks.²³ Part VIII suggests a proposal to amend the INA and provide additional relief to certain undocumented workers who paid income taxes and are currently facing deportation.²⁴ Part IX concludes this Comment.²⁵

14. See discussion *infra* Part V.

15. See Immigration and Nationality Act § 212(a)(6)(C)(ii) (I), 8 U.S.C. § 1182(a)(6)(C)(ii)(I) (2012).

16. See discussion *infra* Part VIII.

17. See discussion *supra* Part I.

18. See discussion *infra* Part II.

19. See discussion *infra* Part III.

20. See discussion *infra* Part IV.

21. See discussion *infra* Part V.

22. See discussion *infra* Part VI.

23. See discussion *infra* Part VII.

24. See discussion *infra* Part VIII.

25. See discussion *infra* Part IX.

II. IMMIGRANT LIFE IN THE UNITED STATES

A. IN THROUGH THE “FRONT DOOR”

On January 22, 1996, Mr. Ferrans, a citizen of Colombia, entered the United States through the “front door.”²⁶ Mr. Ferrans remained in the United States beyond the expiration of his visa, which placed him in unlawful status as of July 22, 1996.²⁷ While he remained in the United States past his visa expiration, Mr. Ferrans applied for a job at Jiffy Lube.²⁸ Because Mr. Ferrans did not have a valid SSN or work authorization, he was unable to truthfully complete the required Form I-9.²⁹ As a result, Mr. Ferrans completed the form indicating he was a “citizen or national of the United States,” thus making a false representation of United States citizenship.³⁰

Approximately two years after Mr. Ferrans applied for the job, he petitioned for adjustment of status to that of a permanent resident.³¹ During Mr. Ferrans’ interview with the United States Citizenship and Immigration Services (“USCIS”),³² he testified that he had falsely claimed to be a

26. See *Ferrans v. Holder*, 612 F.3d 528, 530 (6th Cir. 2010) (establishing that Mr. Ferrans entered the United States holding a B-2 visitor visa via the Miami port of entry); see also MARTIN & MIDGLEY, *supra* note 2, at 5 (stating that in 2001, “just over 1 million immigrants were admitted legally ‘through the front door,’ and more than one-half were already living in the United States when they gained legal immigrant status”).

27. *Ferrans*, 612 F.3d at 530; see 8 C.F.R. § 214.1(e) (2014) (“A nonimmigrant in the United States in a class defined in section 101(a)(15)(B) of the Act as a temporary visitor for pleasure . . . may not engage in any employment.”). Although Mr. Ferrans entered the United States legally holding a B-2 visitor visa and remained legally in the United States during the initial six months period, he did not have permission to obtain employment in the United States *at any time*. *Ferrans*, 612 F.3d at 530–32.

28. *Ferrans*, 612 F.3d at 531.

29. *Id.* at 530; see U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SEC., FORM I-9: INSTRUCTIONS FOR EMPLOYMENT ELIGIBILITY VERIFICATION 1 [hereinafter FORM I-9], available at <http://www.uscis.gov/files/form/I-9.pdf> (last updated Mar. 8, 2013). The purpose of Form I-9 is for employers “to document verification of the identity and employment authorization of each new employee (both citizen or noncitizen) . . . to work in the United States.” FORM I-9, *supra*.

30. See *Ferrans*, 612 F.3d at 530–32.

31. *Id.* at 530; see also U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., ADJUSTMENT OF STATUS, <http://www.uscis.gov/green-card/green-card-processes-and-procedures/adjustment-status> (last updated July 14, 2015) [hereinafter ADJUSTMENT OF STATUS] (describing the different ways in which one can qualify and apply for adjustment of status in the United States).

32. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., OUR HISTORY, <http://www.uscis.gov/about-us/our-history> (last updated May 25, 2011) [hereinafter USCIS: OUR HISTORY] (indicating that the Homeland Security Act of 2002 “dismantled” the former Immigration and Naturalization Service (“INS”) and formed the DHS with three agencies:

United States citizen when he completed Form I-9 in connection with the employment application.³³ On March 22, 2006, USCIS denied Mr. Ferrans' petition for adjustment of status, finding Mr. Ferrans inadmissible to the United States and ineligible for adjustment of status pursuant to violation of section 212(a)(6)(C)(ii) of the INA.³⁴

B. THE HARSH REALITY

Although Mr. Ferrans entered the country through the "front door," he endured the life of an unauthorized worker for several years.³⁵ Nonetheless, Mr. Ferrans is among the large number of unauthorized immigrants in the United States who must comply with federal tax law and file their tax returns.³⁶ Oscar and Marcella,³⁷ a couple from Mexico, filed their tax returns for three years while living illegally in the United States.³⁸ Oscar works as a busboy at a Manhattan local restaurant, and Marcella stays at home and raises their two children.³⁹ Although Oscar receives a W-2 from his employer, he does not have a SSN.⁴⁰ Oscar used a false SSN when he applied for his job, and he uses an ITIN for purposes of filing tax returns.⁴¹

One would wonder, why abide by the rules when you are an unauthorized immigrant and could get "caught" by ICE at any time?⁴²

USCIS, Immigration and Customs Enforcement ("ICE"), and Customs and Border Protection ("CBP"); *see also* U.S. DEP'T OF HOMELAND SEC., CREATION OF THE DEPARTMENT OF HOMELAND SECURITY, <http://www.dhs.gov/creation-department-homeland-security> (last updated July 13, 2015).

33. *See Ferrans*, 612 F.3d at 530.

34. *Id.* Mr. Ferrans received a notice stating that he was removable from the United States pursuant to § 237(a)(3)(D) of the INA because he had "falsely represented [himself] to be a citizen of the United States . . ." *Id.*

35. *See id.*

36. *See* Aurora Almendral, *Undocumented Immigrants Work to Come Out of the Fiscal Shadows, Pay Taxes*, PUBLIC RADIO INT'L (Mar. 25, 2013, 12:00 PM), <http://www.pri.org/stories/2013-03-25/undocumented-immigrants-work-come-out-fiscal-shadows-pay-taxes> (discussing the ample and growing number of undocumented workers who resort to the ITIN to file their taxes, and highlighting the story of a Mexican couple who used ITIN to file their taxes, but had used false SSNs on their IRS forms).

37. *See id.* The couple did not disclose their last names because they remain undocumented immigrants. *Id.*

38. *See id.*

39. *Id.*

40. *See id.*

41. *See id.* *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, SUPPLEMENTAL SECURITY INCOME: WAGES REPORTED FOR RECIPIENTS SHOW INDICATIONS OF POSSIBLE SSN MISUSE 5 (2014) (noting that when an unauthorized worker uses another person's name and SSN, the wages reported for that individual are posted to the true SSN holder's account).

42. *See generally* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, WHAT WE DO,

Similar to Oscar, a number of unauthorized immigrants are faced with this same question.⁴³ Oscar and Marcella pay their taxes in hope that one day it will help them earn legal immigration status in the United States.⁴⁴ Moreover, the couple is raising two children in this country and see that “Americans take taxes seriously,” and for that reason they should abide by the law.⁴⁵

Other unauthorized immigrants choose not to use false SSNs; rather, they use ITINs to file their taxes.⁴⁶ These workers are typically cash earners who work “under the table,” and yet, they estimate their income and pay taxes.⁴⁷ Unfortunately for these cash earners, the IRS charges them self-employment tax, which is typically higher than the standard wage earners tax.⁴⁸ German Tejada, a tax preparer, explains these immigrants work for the local grocery stores, or restaurants, holding job positions as dishwashers, delivery drivers, domestic workers, and flower sellers.⁴⁹ Nevertheless, while these workers are not technically self-employed, they must pay self-employment tax rates.⁵⁰

III. BACKGROUND AND APPLICABLE LAW

A. WHO ARE THE ALIENS?

An “alien” is “[s]omeone who resides within the borders of a country but is not a citizen or subject of that country.”⁵¹ A person “who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections[,]” is a citizen of that nation.⁵² Further, the Constitution provides, “[a]ll persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside.”⁵³ As a citizen of the United States, a person has privileges and immunities of the

<http://www.ice.gov/overview> (last visited Nov. 22, 2014) (providing an overview of ICE’s role as an immigration enforcement agency).

43. See Almendral, *supra* note 36.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. See Almendral, *supra* note 36.

50. See *id.* According to Mr. Tejada, the cash earners who file taxes using ITINs do not get refunds. *Id.* “[They] are paying into taxes. They’re not only paying, they’re paying double.” *Id.*

51. BLACK’S LAW DICTIONARY 87 (10th ed. 2014).

52. *Id.* at 298.

53. U.S. CONST. amend. XIV, § 1.

laws of the country, and the right to vote and receive government benefits.⁵⁴ However, as an alien, regardless of whether the person is here legally as a lawful permanent resident⁵⁵ or not, he or she may be subject to deportation.⁵⁶

Some permanent resident aliens may qualify to apply for United States citizenship.⁵⁷ To qualify for citizenship, resident aliens must meet a required period of physical presence in the United States, must demonstrate good moral character, and must have lived in the United States for at least five years as permanent resident aliens or three years if married to a United States citizen.⁵⁸ It is in the resident aliens' best interest to apply to become United States citizens as soon as they become eligible, as they are subject to removability at any time if any of the grounds for removal are met.⁵⁹

There are a number of inadmissibility and deportability grounds that can subject a resident or nonresident alien to be removed from the United States.⁶⁰ An alien may be placed in removal proceedings when he or she is present in the United States or seeks admission to the United States.⁶¹ An example of an alien currently present in the United States who may be placed in removal proceedings is an individual who is admitted into the United States on a visa, such as a tourist or student visa⁶² and overstays that

54. *Id.*

55. See 8 C.F.R. § 245a.10 (2014). "Lawful Permanent Resident (LPR) means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." *Id.*

56. Alison Leal Parker, *In Through the Out Door? Retaining Judicial Review for Deported Lawful Permanent Resident Aliens*, 101 COLUM. L. REV. 605, 615 (2001).

57. See 8 U.S.C. § 1427(a) (2012).

58. See *id.* §§ 1101(f) (defining how a determination of lack of good moral character is made), 1427(a), 1430(a); 8 C.F.R. § 316.10(b) (2014) (listing offenses that show a lack of good moral character). Good moral character is a broad category that precludes a number of different offenses in which the Department of Homeland Security or the court considers when determining eligibility for naturalization or residency. 8 U.S.C. § 1101(f); 8 C.F.R. § 316.10(b).

59. See 8 U.S.C. §§ 1227 (illustrating several reasons for an alien to be deported), 1427(a), 1451 (stating that naturalization can be revoked for an alien who is found to have concealed material evidence in his or her naturalization process); see also *United States v. Salama*, 891 F. Supp. 2d 1132, 1148 (2012). There is a five-year period in which the Department of Homeland Security reviews a person's good moral character preceding the filling of his naturalization certificate. 8 U.S.C. § 1427(a). Mr. Salama was placed in immigration proceedings to revoke his naturalization certificate because of lack of good moral character when he was convicted of four counts of insurance fraud committed during the five year statutory period preceding his application for naturalization. *Salama*, 891 F. Supp. 2d at 1135–37.

60. See 8 U.S.C. § 1227(a) (describing who is a deportable alien and reasons for deportation); see also *id.* § 1182(a) (2012) (illustrating grounds for denying admissibility to the United States).

61. See *id.* §§ 1182, 1227.

62. See *id.* § 1101(a)(15)(B).

visa.⁶³ For purposes of the INA, when an alien currently present in the United States applies to “adjust” his or her status to that of a lawful permanent resident, he or she is seeking admission to the United States, even though he or she is already present in the country.⁶⁴ Thus, if an alien is inadmissible, he or she may be ineligible from adjusting his or her status to that of a permanent resident.⁶⁵

B. INADMISSIBLE ALIENS

Out of concern for increased fraudulent activity and lenient access to various federal benefits, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”).⁶⁶ As part of the IIRIRA enactment, Congress added new grounds of inadmissibility to section 212 of the INA.⁶⁷ One of the established grounds of inadmissibility refers to aliens who make false representations of United States citizenship.⁶⁸ While the Attorney General may have discretion to waive certain grounds of inadmissibility, a waiver for an alien found to be inadmissible for false representation as a United States citizen is not available.⁶⁹

Under Title 8 of the United States Code, § 1182(a)(6)(C)(ii)(I), an alien who falsely represents himself or herself to be a United States citizen for any purpose or benefit is inadmissible to the United States.⁷⁰ The terms

63. See, e.g., *State v. Sinclair*, 995 So. 2d 621 (Fla. Dist. Ct. App. 2008). Defendant was admitted into the United States from Nicaragua on a student visa and overstayed the visa, meaning that he remained in the United States past his visa expiration date. *Id.* at 622. In addition to overstaying his visa, defendant was charged with burglary with assault and sexual battery. *Id.*

64. See ADJUSTMENT OF STATUS, *supra* note 31.

65. 8 U.S.C. § 1182(a); see Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 556 (2011) (stating potential relief from deportation is limited once deportability grounds have been established).

66. See Lonnie E. Griffith, Jr., Annotation, *Application of Inadmissibility Provision Relating to False Claims of United States Citizenship*, 8 U.S.C.A. § 1182(a)(6)(C)(ii), 77 A.L.R. FED. 2D 131, 2 (2014). See generally Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1324a (2006)).

67. See Visas: Grounds of Ineligibility 62 Fed. Reg. 248, 67564 (Dec. 29, 1997) (codified at 22 C.F.R. § 40).

68. 8 U.S.C. § 1182(a)(6)(C)(ii)(I).

69. *Alfaro v. Att’y Gen. U.S.*, 523 Fed. App’x. 908, 910 (3d Cir. 2013).

70. Immigration and Nationality Act § 212(a)(6)(C)(ii)(I), 8 U.S.C. § 1182(a)(6)(C)(ii)(I); see U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., IMMIGRATION AND NATIONALITY ACT, <http://www.uscis.gov/laws/immigration-and-nationality-act> (last updated Sept. 10, 2013) [hereinafter INA AND IMMIGRATION SERVICES]. Title 8 of the United States Code (“U.S.C.”) deals with “Aliens and Nationality.” INA AND IMMIGRATION SERVICES, *supra*. In 1952, the McCarran-Walter Act developed the INA. *Id.* The INA is

“purpose or benefit” include an individual’s application for private employment.⁷¹ With respect to application for private employment, the USCIS requires that employers complete and retain a Form I-9 for each employee hired to work in the United States.⁷² An alien who falsely claims to be a citizen of the United States when completing Form I-9 for purposes of obtaining private employment⁷³ is considered to have violated § 1182(a)(6)(C)(ii)(I).⁷⁴

Does checking “citizen or national” of the United States on Form I-9 constitute a false representation of United States citizenship?⁷⁵ The court in *Crocock v. Holder* certainly believed so.⁷⁶ Mr. Crocock, a native and citizen of Ireland, believed he was a “national” when he checked the “citizen or national” box on the Form I-9 he completed in connection with an application for employment.⁷⁷ During immigration proceedings, Mr. Crocock admitted he had claimed to be a United States citizen to obtain his “dream job.”⁷⁸ Because Mr. Crocock did not meet his burden of demonstrating that he did not represent himself as a United States citizen, the court denied his petition for review.⁷⁹ Regrettably, Mr. Crocock, like

comprised of a combined and reorganized structure of the immigration law that is located separately from the United States Code but encompasses the same information. *Id.* For example, Title 8, Section 1182(a)(6)(C)(ii)(I), is also contained in INA Section 212(a)(6)(C)(ii)(I). Immigration and Nationality Act § 212(a)(6)(C)(ii)(I), 8 U.S.C. § 1182(a)(6)(C)(ii)(I).

71. *See* Ferrans v. Holder, 612 F.3d 528, 533 (6th Cir. 2010) (holding that a false representation of citizenship for the purpose of obtaining private employment falls within the meaning of “purpose or benefit” under section 212(a)(6)(C)(ii)(I) of the INA).

72. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., EMPLOYERS MUST USE REVISED FORM I-9, EMPLOYMENT ELIGIBILITY VERIFICATION, <http://www.uscis.gov/news/public-releases-topic/employment-verification/employers-must-use-revised-form-i-9-employment-eligibility-verification> (last updated May 7, 2013).

73. *See, e.g.,* Griffith, *supra* note 66, at 18. Other false claims of United States citizenship for purposes of inadmissibility under INA § 212(a)(6)(C)(ii)(I) include: false statements or information provided to gain entry into the United States, or provided to immigration, border, or custom officers or inspectors; the presentation of a false passport or statements or information provided on a customs declaration form; false statement as to birthplace; false claims of citizenship in passport applications or documentation supporting passport applications; false statements of citizenship related to the acquisition or use of a birth certificate, Social Security card, or driver’s license; false citizenship statement on a voting registration form; false statement in connection with a loan application under the Small Business Administration Act; and false statement in application for admission to a private university. *Id.* at 2.

74. *Fernandez Diaz v. Holder*, 523 F. App’x 372, 376 (6th Cir. 2013).

75. *See* 8 U.S.C. § 1182(a)(6)(C)(ii).

76. *Crocock v. Holder*, 670 F.3d 400, 403–04 (2d Cir. 2012).

77. *See id.* at 402–03. Mr. Crocock entered the United States in January 2004 on a non-immigrant student visa to complete a paramedic certification program and applied for a position with the fire department after his student visa and work authorization had expired. *Id.* at 401–02.

78. *Id.* at 403.

79. *Id.*

Mr. Ferrans, is one of several unauthorized immigrants who was found to have claimed to be a citizen of the United States to obtain the benefit of employment.⁸⁰

C. WAIVERS

Even if a permanent resident alien or a non-resident alien is faced with inadmissibility or removal proceedings, he or she may apply for relief in form of a waiver.⁸¹ There are two types of waivers: waiver for inadmissibility and waiver for deportability.⁸² For example, an alien, who is deemed inadmissible or deportable for misrepresentation, may be granted a waiver under section 212(i) of the INA for a charge of inadmissibility and section 237(a)(1)(H) of the INA for a charge of deportation.⁸³ An inadmissibility charge may be applicable when the alien arrives at a port of entry in the United States at the immigration inspection or during an adjustment of status application.⁸⁴ Alternatively, an alien may be charged with deportation when the Department of Homeland Security discovers fraud after the alien acquired status in the United States.⁸⁵

There are certain limitations regarding waivers with certain grounds of inadmissibility or deportability.⁸⁶ Some of these limitations include conviction for an aggravated felony,⁸⁷ as defined in section 101(a)(43) of

80. See *Rodriguez v. Mukasey*, 519 F.3d 773, 777 (8th Cir. 2008) (providing another example of an immigrant claiming to be a United States citizen for the benefit of employment); see also discussion, *supra* Part II.A. (discussing Mr. Ferrans' story).

81. See 8 U.S.C. § 1182 (2012) (establishing different grounds that renders an alien inadmissible and when he or she is eligible for a waiver on those grounds).

82. See, e.g., *id.* §§ 1182 (providing when a waiver is authorized for inadmissible aliens), 1227(a)(1)(H) (2012) (authorizing a waiver for certain misrepresentations for deportable aliens).

83. Immigration and Nationality Act § 212(i), 8 U.S.C. § 1182(i) (2012); Immigration and Nationality Act § 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H) (2012). Section 212(i) and section 237(a)(1)(H) of the INA do not apply to false claims of citizenship. See Immigration and Nationality Act §§ 212(a)(6)(C)(ii), 237(a)(1)(H).

84. See 8 U.S.C. § 1227; Charles Medina, *INA 237(a)(1)(H) Waiver for Misrepresentation*, ASIAN JOURNAL, June 12, 2014, available at <http://asianjournal.com/immigration/ina-237a1h-waiver-for-misrepresentation/>.

85. See 8 U.S.C. § 1227; Charles Medina, *supra* note 84.

86. See 8 U.S.C. §§ 1182(h)(2), 1227(c).

87. See *id.* § 1182(h)(2) (stating no waiver shall be provided in the case of an alien who has been convicted of murder or certain other criminal acts); see also *id.* §§ 1182(a)(3) (showing that there are also non-criminal related grounds of inadmissibility or deportation where no waivers exist); 1182(a)(6)(c)(ii); U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., USCIS POLICY MANUAL, available at <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume9-PartG-Chapter1.html#S-B> (last updated July 21, 2015). Falsely claiming U.S. citizenship on or after September 30, 1996, for any purpose or benefit under the INA or any other federal or state law is a non-criminal related grounds of inadmissibility or deportation where no waivers exist. 8 U.S.C. §

the INA, trafficking in a controlled substance, and deportation based on certain firearm offenses by a previously convicted felon.⁸⁸ To be eligible for a waiver, an alien may be required to have a qualifying relative where he or she can establish a degree of hardship to the relative, and to show physical presence in the United States for a defined period of time.⁸⁹ Although there are a number of different waivers that may apply to different circumstances, a false claim of United States citizenship has a very narrow exception and a discretionary waiver.⁹⁰

In addition to certain waivers, an alien may be eligible to apply for cancellation of removal if faced with removal proceedings and the criteria for a waiver is not met.⁹¹ Section 240A(a)⁹² of the INA provides that:

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien[:] (1) has been an alien lawfully admitted for permanent residence for not less than [five] years, (2) has resided in the United States continuously for [seven] years after having been admitted in any status, and (3) has not been convicted of any aggravated felony.⁹³

Section 240A of the INA, subsection (b)(1), also focuses on the cancellation of removal and adjustment of status for certain nonpermanent residents.⁹⁴ An alien who is lawfully admitted for permanent residence, but is inadmissible or deportable from the United States, may qualify for cancellation of removal if the alien:

(A) has been physically present in the United States for a

1182(a)(6)(c)(ii); USCIS POLICY MANUAL, *supra*.

88. See Immigration and Nationality Act § 101(a)(43), 8 U.S.C. § 1101 (2012) (enumerating offenses that qualify as an aggravated felony); 8 U.S.C. § 1182(a)(9)(A)(i) (providing that an individual convicted of an aggravated felony may reapply for admission twenty years after removal or if he has consent from the Attorney General).

89. See 8 U.S.C. § 1182(h)(1).

90. See *id.* § 1182(a)(6)(C)(ii)(II).

91. See, e.g., *Toro v. U.S. Att'y Gen.*, 518 F. App'x 694, 695 (11th Cir. 2013). Petitioners, who are natives and citizens of Colombia, entered the United States in 1994 without admission or parole. *Id.* Many years later, petitioners received a notice to appear charging them with removability pursuant to section 212(a)(6)(A)(i) of the INA. *Id.* Initially, petitioners filed applications for asylum, withholding of removal, and relief under the U.N. Convention Against Torture. *Id.* Later, they withdrew their applications, and instead, filed applications for cancellation of removal, indicating extreme hardship to their two United States citizen children. *Id.*

92. See generally Immigration and Nationality Act § 240A(a), 8 U.S.C. § 1229b (2012) (describing cancellation of removal for certain permanent residents).

93. *Id.*

94. *Id.*

continuous period of not less than [ten] years immediately preceding the date of such application; (B) has been a person of good moral character during such period; (C) has not been convicted of . . . [certain criminal offenses]; and (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.⁹⁵

The alien seeking cancellation of removal bears the burden of establishing that he or she met the criteria for the relief.⁹⁶ A number of inadmissible aliens, such as Mr. Ferrans and Mr. Crocock, are faced with grounds of deportation as a result of falsely claiming United States citizenship on employment Form I-9.⁹⁷

IV. MISREPRESENTATION ON FORM I-9

In 1986, Congress passed the Immigration Reform and Control Act, which requires employers to verify the work eligibility of new employees and to hire only applicants who are legally authorized to work.⁹⁸ Following this Act, Congress enacted the IIRIRA to assist in enforcing these regulations previously put in place.⁹⁹ As a result, IIRIRA led to the development of the E-Verify program.¹⁰⁰ The E-Verify program is a database that is electronically linked with the Social Security Administration ("SSA") and is designed to compare information contained in an employee's Form I-9 with information stored in DHS databases.¹⁰¹

When completing Form I-9, a prospective employee must input his SSN under Section 1: "Employee Information and Attestation."¹⁰² The

95. *Id.*

96. *See* 8 C.F.R. § 1240.8(d) (2014).

97. *See* Crocock v. Holder, 670 F.3d 400, 401 (2d Cir. 2012); Ferrans v. Holder, 612 F.3d 528, 530 (6th Cir. 2010).

98. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as 8 U.S.C. 1324a).

99. *See* Khari Taustin, *Still in 'The Jungle': Labor, Immigration, and the Search for a New Common Ground in the Wake of Iowa's Meatpacking Raids*, 18 U. MIAMI BUS. L. REV. 283, 290-91 (2010).

100. U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., E-VERIFY: ABOUT THE PROGRAM, <http://www.uscis.gov/e-verify/about-program> (last updated Feb. 11, 2014) [hereinafter E-VERIFY: ABOUT THE PROGRAM].

101. *See* E-VERIFY: ABOUT THE PROGRAM, *supra* note 100; WESTAT, FINDINGS OF THE E-VERIFY PROGRAM EVALUATION *xxv (2009), available at http://www.uscis.gov/sites/default/files/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf.

102. *See* FORM I-9, *supra* note 29, at 7.

problem arises when the individual does not have a valid SSN to enter on the form.¹⁰³ Numerous unauthorized immigrants resort to the IRS to assign an ITIN so they can enter it on Form I-9 and file tax returns.¹⁰⁴ While those unauthorized immigrants use valid ITINs assigned by the IRS to file tax returns, their Form W-2 or Form 1099 may reflect invalid SSNs.¹⁰⁵

V. WHAT IS AN ITIN?

In order to file a tax return, a taxpayer is required to include an identification number.¹⁰⁶ Because undocumented immigrants do not have SSNs issued by the SSA and cannot properly complete IRS Form 1040, the IRS has established the ITIN to be filed in place of a SSN.¹⁰⁷ Anyone who is not eligible to receive a SSN can obtain an ITIN by filing Form W-7 with his or her tax return.¹⁰⁸ The IRS often receives tax returns with SSNs on Form W-2 that do not match the SSNs on IRS Form 1040.¹⁰⁹ It is likely that the IRS agent who reviews those tax returns reasonably concludes those taxpayers are unauthorized immigrants.¹¹⁰

The IRS issues ITIN to foreign nationals and others (including non-resident aliens who are not eligible for a social security number) for purposes of filing tax returns.¹¹¹ In essence, this means the IRS has record *and* knowledge of all individuals who are non-resident aliens present in the United States and file tax returns.¹¹² In addition to issuing ITIN to non-

103. See, e.g., Katharine Madison Burnett, *Illegal Immigration, Social Security Numbers, and the Federal Privacy Act: A Suggested Avenue of Litigation*, 25 GA. ST. U.L. REV. 503, 512 (2008). When the SSN does not match Form I-9 and SSA's records, the worker's earnings are posted to the SSA's Earnings Suspense File and a letter is sent to the employer notifying of the mismatched SSNs. *Id.* at 512-13. The employer could be subjected to liability if the discrepancy is not resolved within ninety days. *Id.* at 513.

104. See discussion *infra* Part V (discussing ITINs).

105. See Almendral, *supra* note 36.

106. 26 U.S.C. § 6109(a)(1) (2012).

107. See *id.* § 6109(d); INTERNAL REVENUE SERV., IRS ANNOUNCES REVISIONS TO ITIN APPLICATIONS (Dec. 17, 2003), <http://www.irs.gov/uac/IRS-Announces-Revisions-to-ITIN-Applications>.

108. See IRS ANNOUNCES REVISIONS TO ITIN APPLICATIONS, *supra* note 107.

109. See Blum, *supra* note 13, at 600.

110. See *id.* at 598.

111. See 1 DEBRA HOLLAND, NAT'L TAXPAYER ADVOCATE SERV., INDIVIDUAL TAXPAYER IDENTIFICATION NUMBERS: ITIN APPLICATION PROCEDURES BURDEN TAXPAYERS AND CREATE A BARRIER TO RETURN FILING 214, 217 (2013), available at <http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Volume-1.pdf> (establishing that from January through October 2013, the IRS projected receipts of over 1.8 million ITIN applications, and it received over one million applications); INTERNAL REVENUE SERV., GEN. ITIN INFO., <http://www.irs.gov/Individuals/General-ITIN-Information> (last updated Aug. 18, 2015).

112. See Blum, *supra* note 13, at 598; see also INTERNAL REVENUE SERV., PAY FOR PERS.

resident aliens, IRS has devoted a subsection of its website to defining “illegal aliens.”¹¹³ According to the IRS, an “illegal” or “undocumented alien” is one “who has entered the United States illegally and is deportable if apprehended, or an alien who entered the United States legally but who has fallen ‘out of status’ and is deportable.”¹¹⁴

The United States Government, by means of issuing ITINs, collects taxes from unauthorized immigrants.¹¹⁵ If USCIS or ICE has evidence of an alien who “falsely claimed” to be a United States citizen on a Form I-9 for purposes of employment, the alien is permanently inadmissible under the INA.¹¹⁶ However, the alien is not deemed inadmissible:

[I]f each natural parent of the alien . . . is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of [sixteen], and the alien reasonably believed at the time of making such representation that he or she was a citizen[.]¹¹⁷

Notwithstanding the manner in which unauthorized immigrants pay taxes, they are great contributors to the United States tax revenue.¹¹⁸

VI. UNDOCUMENTED WORKERS AND THEIR TAX CONTRIBUTIONS

The current government administration recognizes that immigrants are tax contributors.¹¹⁹ In fact, the administration acknowledges that

SERVS. PERFORMED, <http://www.irs.gov/Individuals/International-Taxpayers/Pay-for-Personal-Services-Performed> (last updated Feb. 19, 2015). The IRS further explains that “illegal aliens,” also referred to as “undocumented aliens,” are subject to income taxes regardless of their immigration status in the United States. *Id.* The IRS also acknowledges that employers who hire illegal aliens may be subject to fines and sanctions “imposed by the U.S. Department of Homeland Security.” *Id.* However, “[i]f such employers or payers choose to hire illegal aliens (undocumented aliens), the payments made to those aliens are subject to the same tax withholding and reporting obligations that apply to other classes of aliens.” *Id.* Moreover, the IRS advises that income from personal services is subject to the same withholding obligations that apply to U.S. citizens. *Id.*

113. See INTERNAL REVENUE SERV., IMMIGRATION TERMS AND DEFINITIONS INVOLVING ALIENS, <http://www.irs.gov/Individuals/International-Taxpayers/Immigration-Terms-and-Definitions-Involving-Aliens> (last updated Dec. 13, 2014).

114. *Id.*

115. See Blum, *supra* note 13, at 598; see also *Immigration Terms and Definitions Involving Aliens*, *supra* note 113.

116. 8 U.S.C. § 1182(a)(6)(C)(ii)(I) (2012).

117. *Id.* § 1182(a)(6)(C)(ii)(II).

118. See discussion *infra* Part VI.

119. See THE WHITE HOUSE, BUILDING A 21ST CENTURY IMMIGRATION SYS., 12 (May 2011), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf (discussing the President’s proposal for immigration reform).

immigrants pay more in taxes than they use in services.¹²⁰ Undocumented workers pay an estimated \$15 billion a year into Social Security, and yet, they are likely to never collect these benefits.¹²¹ Moreover, the IRS estimates that undocumented immigrants who filed taxes with ITINs from 1996 to 2003 paid nearly \$50 billion in federal taxes.¹²²

In 2005, the total of ITINs tax returns filed were approximately \$2.5 million. Furthermore, between 1996 and 2003, the total "income tax liability [among] ITINs filers totaled approximately \$50 billion."¹²³ Despite the billions of dollars illegal immigrants pay in federal taxes, there is a large population of undocumented immigrants who currently work off the books and do not pay taxes.¹²⁴ Some of these immigrants use government federal and state benefits.¹²⁵ For example, in some states children may attend public schools without immigration papers, and may even qualify for in-state tuition at the university level.¹²⁶ In other states, different types of healthcare assistance, including emergency and prenatal care, are available to undocumented immigrants.¹²⁷

120. *Id.*

121. See Maria Santana, *5 Immigration Myths Debunked*, CNN MONEY (Nov. 20, 2014, 7:12 PM), <http://money.cnn.com/2014/11/20/news/economy/immigration-myths/> (noting that Stephen Goss, chief actuary of the SSA, told CNN Money that the estimated \$3.1 million that undocumented immigrants paid into the system helped the SSA avoid a persistent shortfall of tax revenue).

122. See *Fiscal Impact of Border Security & Immigration Reform*, C-SPAN (July 26, 2006), <http://www.c-span.org/video/?193587-1/fiscal-impact-border-security-immigration-reform> (transcribing The Ways and Means Committee's hearing discussing the effect on tax revenues and compliance).

123. *Id.*

124. See Edward Bethea, *Illegal Immigrants Paid \$11.2B in State, Local taxes in 2010*, THE DAILY JOURNAL (March 31, 2015, 10:21PM), <http://www.thedailyjournal.com/story/opinion/2015/03/31/illegal-immigrants-paid-state-local-taxes/70754084/>.

125. See *Benefits for Undocumented Immigrants*, CHILDREN'S AID SOCIETY, available at http://www.childrensaidsociety.org/files/upload-docs/11-Benefits_for_Immigrants-1.pdf (last visited Nov. 22, 2014) (discussing New York benefits for undocumented immigrants).

126. See *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that states cannot deny children of free public education based on their immigration status); *CUNY In-State Tuition*, THE CITY UNIVERSITY OF NEW YORK, <http://www.cuny.edu/about/administration/offices/sa/specialprograms/CunyDREAMERS/FAQ.html> (last visited Nov. 21, 2014) (explaining that undocumented students who attended a New York State high school for two or more years, graduated, and applied to any The City University of New York ("CUNY") institutions within five years of receiving a New York State diploma qualify for in-state tuition).

127. See *Benefits for Undocumented Immigrants*, *supra* note 125; see also Rachel Fabi, *Undocumented Immigrants in the United States: Access to Prenatal Care*, UNDOCUMENTED PATIENTS, <http://www.undocumentedpatients.org/issuebrief/undocumented-immigrants-in-the-united-states-access-to-prenatal-care/> (last updated Sept. 29, 2014) (noting that some states, including New York, New Jersey, and Massachusetts, offer different types of healthcare

In addition to paying income taxes, unauthorized immigrants also pay other types of taxes.¹²⁸ Because unauthorized immigrants are living in the same communities as everyone else, they often help contribute to the state and local consumer taxes.¹²⁹ For instance, if an immigrant owns property, he pays property taxes.¹³⁰ If he rents, then his rent payment indirectly helps the homeowner pay his property taxes.¹³¹ As consumers, these immigrants help boost the state and local economies every time they make a purchase, regardless if the purchase is for basic needs, such as food or gas, or for more expensive items, such as automobiles.¹³² Therefore, while living here, the immigrants directly and indirectly pay taxes.¹³³

A large sum of the IRS's revenue received from undocumented workers help fund government benefits these workers are not legally eligible to receive.¹³⁴ Some of these benefits include Social Security, Medicare, and unemployment insurance programs.¹³⁵ The Social Security Protection Act of 2004 prohibits the payment of benefits to aliens who reside and work in the United States unlawfully.¹³⁶ When the SSA receives W-2 forms from the IRS, it credits the Social Security earnings to the workers.¹³⁷ However, if there is a mismatch¹³⁸ between the worker's name and SSN from SSA's records, the earnings received go into an earnings suspense file.¹³⁹

The SSA's earnings suspense file is a system that keeps track of the amount of taxes received but not credited to a specific worker.¹⁴⁰ Although

assistance to undocumented immigrants, including insurance for low-income pregnant women during the pregnancy term and two months after delivery).

128. See Francine J. Lipman, *The "Illegal" Tax*, 11 CONN. PUB. INT. L.J. 93, 98 (2011).

129. See *id.* at 96.

130. *Id.* at 98.

131. *Id.* at 98–99.

132. *Id.* at 98.

133. See *id.* at 130.

134. See Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 5 (2006).

135. See *id.*

136. See DAWN NUSCHLER & ALISON SISKIN, CONG. RESEARCH SERV., RL32004, SOCIAL SEC. BENEFITS FOR NONCITIZENS: CURRENT POLICY AND LEGISLATION 3 (2005), available at <http://fpc.state.gov/documents/organization/46681.pdf>.

137. See ANYA OLSEN & RUSSELL HUDSON, SOCIAL SEC. ADMIN.'S MASTER EARNINGS FILE: BACKGROUND INFORMATION, 69 SOCIAL SEC. BULLETIN 29, 37 (2009), available at <http://www.ssa.gov/policy/docs/ssb/v69n3/ssb-v69n3.pdf>.

138. *Id.* While the SSA attempts to reconcile discrepancies between names and SSNs on W-2 forms, SSN misuse causes errors in wage reporting. *Id.*

139. *Id.* "The ESF retains unposted items until they can be correctly assigned and placed in the MEF with a valid name and SSN." *Id.*

140. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 41, at 6; OLSEN & HUDSON, *supra* note 137.

the SSA performs routine computer matches, there are number of SSN and name discrepancies that cannot be credited to the workers.¹⁴¹ The SSA acknowledges that the main cause of mismatched W-2s is related to unauthorized work done by unauthorized immigrants.¹⁴² Although workers can submit a signed statement rejecting wages in the event there are earnings identified to a different SSN number, the number of W-2 forms and earnings that remain in the suspense file is significant.¹⁴³ During the 2003 tax year, approximately 8.8 million W-2 forms, or 3.7 percent of the total W-2s, remained in the suspense file.¹⁴⁴ The unclaimed dollars that remain in the IRS suspense file is a strong indication of a necessary change in immigration policy.¹⁴⁵

VII. SOME PROGRESS, BUT THE PROBLEM REMAINS

On November 20, 2014, President Barack Obama announced an executive order on illegal immigration.¹⁴⁶ The order gives temporary relief from deportation to nearly five million illegal immigrants.¹⁴⁷ These executive actions focus on increasing border patrol security, prioritizing deportation of felons, and allowing parents of United States citizens and lawful permanent residents to request deferred action if they meet certain criteria.¹⁴⁸ Although this deferred action may reduce the number of

141. *Id.*

142. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 41; see also Elizabeth Harrington, *IRS Commissioner: Paying Taxes Is Pathway to Citizenship for Illegal Aliens*, CNSNEWS.COM (Apr. 5, 2012), <http://www.cnsnews.com/news/article/irs-commissioner-paying-taxes-pathway-citizenship-illegal-aliens> (captioning IRS Commissioner, Douglas Shulman's interview discussing how the agency collects taxes from illegal aliens).

143. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 41, at 6. In order for the earnings on the wage reports to be posted to the MEF, the combination of the name and SSN on Form W-2 must be matched. *Id.* at 4.

144. See Elizabeth Harrington, *IRS Commissioner: Paying Taxes is Pathway to Citizenship for Illegal Aliens*, CNSNEWS.COM (Apr. 5, 2012, 8:31 PM), <http://cnsnews.com/news/article/irs-commissioner-paying-taxes-pathway-citizenship-illegal-aliens>.

145. See discussion *infra* Part VII; Mary Johnson, *Growth of the Social Security Earnings Suspense File Points to the Rising Potential Cost of Unauthorized Work To Social Security*, The Senior Citizens League (Feb. 21, 2013), <http://seniorsleague.org/2013/growth-of-the-social-security-earnings-suspense-file-points-to-the-rising-potential-cost-of-unauthorized-work-to-social-security-2/>.

146. See generally President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> (providing President Obama's address to the nation in written form).

147. See Press Release, Office of the Press Secretary, Fact Sheet: Immigration Accountability Exec. (Nov. 20, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>.

148. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., EXEC. ACTIONS ON IMMIGRATION, <http://www.uscis.gov/immigrationaction> (last updated Apr.

undocumented workers currently living in the United States, the issue remains.¹⁴⁹ There are more than five million illegal immigrants who will continue to live in the shadows and will continue to work illegally.¹⁵⁰

In order to hire an employee to work in the United States, employers are required, by law, to comply with IRS requirements.¹⁵¹ The IRS explicitly lists the requirements businesses must comply with when hiring new employees.¹⁵² If an employer is to conduct an online Web search with the inquiry, “forms needed for new hires,” the first search result is the IRS website.¹⁵³ The website takes the person directly to the section: “Hiring Employees.”¹⁵⁴ Under the “Hiring Employees” section, the first item on the page listed in bold and red letters is “Eligibility to Work in the United States,” which provides that employers must verify that all new employees are legally eligible to work in the United States.¹⁵⁵ Given such unambiguous instructions, employers have no choice but to comply with this regulation by requiring employees to fill out the I-9 form.¹⁵⁶

Unauthorized immigrants who earn income based on wages must complete a Form I-9.¹⁵⁷ The problem arises when the DHS physically receives an inaccurate form—most likely due to an error by the uninformed immigrant who submits the form to the DHS.¹⁵⁸ If either USCIS or ICE receives an immigrant’s Form I-9, it may use the form as evidence in immigration proceedings.¹⁵⁹ Consequently, those who submit the form falsely claiming to be United States citizens, either intentionally or not, are punished.¹⁶⁰

Despite the DHS’s stringent regulations against the employment of

15, 2015) (explaining the new Deferred Action for Parents of U.S. citizens and Lawful Permanent Residents and noting that because these initiatives have not yet been implemented, USCIS is not accepting any requests or applications).

149. See President Barack Obama, *supra* note 146.

150. See Almendral, *supra* note 36 (providing examples of illegal aliens currently living in the shadows).

151. See INTERNAL REVENUE SERV., HIRING EMPLOYEES, <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Hiring-Employees> (last updated May 1, 2015) (indicating the records IRS requires for hiring an employee).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*; see FORM I-9, *supra* note 29. Following this information is a link to Form I-9, hosted by the USCIS website. *Hiring Employees, supra*; see FORM I-9, *supra* note 29.

156. See Immigration Reform and Control Act of 1986 § 274A(b), Pub. L. No. 99-603, 100 Stat. 3359, 3361 (codified as amended at 8 U.S.C. § 1324a(b) (2006)).

157. See FORM I-9, *supra* note 29, at 1.

158. See *United States v. Garcia-Ochoa*, 607 F.3d 371, 376 (4th Cir. 2010).

159. See *id.* at 375.

160. See *Crocock v. Holder*, 670 F.3d 400, 403 (2d Cir. 2012).

unauthorized workers, the DHS is far from oblivious that these workers continued to get hired.¹⁶¹ In fact, the DHS recognizes this issue but continues to make efforts to keep its “eyes” closed.¹⁶² Form I-9 states—in three different sections—that employers are *not* to mail completed Form I-9’s to ICE or USCIS.¹⁶³ In contrast, the IRS makes it feasible and encourages unauthorized workers to apply for ITINs so they can file tax returns.¹⁶⁴ Consequently, there is a direct disagreement between these government agencies.¹⁶⁵

Unfortunately, at the end of the day, the illegal immigrants are the ones paying the higher price.¹⁶⁶ While they live in the United States, contributing to their communities, investing in the country by acting as consumers and paying taxes, they still may face deportation or grounds of inadmissibility for inaccurately completing an employment form.¹⁶⁷ In the interim, the IRS collects billions of dollars from income generated by undocumented workers.¹⁶⁸ Because of the conflict between the government agencies, the INA Waiver provision should be amended as proposed in Part VIII of this Article.¹⁶⁹

VIII. PROPOSED AMENDMENT

The government encourages immigrants to pay taxes.¹⁷⁰ In fact, one of the factors the DHS considers when determining whether to grant prosecutorial discretion is whether the alien has paid taxes while living here illegally.¹⁷¹ To inquire whether an immigrant paid taxes is to ask if the

161. See BUILDING A 21ST CENTURY IMMIGRATION SYS., *supra* note 119, at 28.

162. See *id.*

163. See FORM I-9, *supra* note 29, at 1, 3, 5.

164. See GEN. ITIN INFO., *supra* note 111.

165. See *id.*; FORM I-9, *supra* note 29, at 1, 3, 5; see also discussion *infra* Part VIII.

166. See PAY FOR PERS. SERVS. PERFORMED, *supra* note 112.

167. See Immigration and Nationality Act § 212(a)(6)(C)(ii) (I), 8 U.S.C. § 1182(a)(6)(C)(ii)(I) (2012).

168. See Harrington, *supra* note 144; Travis Loller, *Many illegal immigrants pay up at tax time*, USA TODAY, Apr. 11, 2008, http://usatoday30.usatoday.com/money/perfi/taxes/2008-04-10-immigrantstaxes_N.htm (discussing how illegal immigrants file their federal taxes and contribute billions of dollars in federal income, etc.).

169. See discussion *infra* Part VIII (discussing the proposal of amending the INA Waiver Provision).

170. See GEN. ITIN INFO., *supra* note 111 (providing ITINs for undocumented workers for purposes of filing tax returns).

171. See IMMIGRATION POLICY CTR., UNDERSTANDING PROSECUTORIAL DISCRETION IN IMMIGRATION LAW, 2–3 (Sept. 2011), http://www.immigrationpolicy.org/sites/default/files/docs/IPC_Prosecutorial_Discretion_090911_FINAL.pdf (defining “prosecutorial discretion” as the authority of an agency to decide what charges to bring against an alien and how to pursue the case).

immigrant worked illegally while living in the United States.¹⁷² It is well established that to work illegally is against the law, and to falsely claim to be a United States citizen for purposes of employment renders the immigrant inadmissible.¹⁷³ Yet, to file taxes with an ITIN because the person does not have a SSN is not.¹⁷⁴ To say that unauthorized immigrants *can* and *should* pay taxes is to accept and ignore the fact that these unauthorized immigrants violated the law when they worked illegally.¹⁷⁵

There is an ongoing conflict between immigration and tax laws.¹⁷⁶ On one side, the IRS makes it feasible for unauthorized immigrants to abide by the IRS code and file tax returns.¹⁷⁷ On the other side, the DHS punishes individuals who falsely claim to be United States citizens on Form I-9 to obtain employment.¹⁷⁸ Where is the missing link?¹⁷⁹ The INA Waiver provision should be modified to “relieve” non-resident aliens who falsely claimed to be United States citizens for purposes of private employment.¹⁸⁰

However, this “amended provision” should only apply to aliens who falsely claimed to be United States citizens on Form I-9 and have complied with filing and paying income taxes in compliance with IRS regulations.¹⁸¹ To qualify for the waiver, the alien should be required to: (1) amend the improper Form I-9; (2) pay a fine for providing false information; and (3) provide evidence of filing and paying income taxes during all the years he or she was present in the United States.¹⁸² If the alien falsely claimed to be a United States citizen and did not file tax returns while working illegally in the United States, then he or she would be required to file tax returns for all the prior years he or she worked in the United States, and pay back taxes subject to the IRS’s interests and penalties for late filings.¹⁸³ In doing so,

172. See, e.g., Almendral, *supra* note 36.

173. See Immigration and Nationality Act § 212(a)(6)(C)(ii), 8 U.S.C. § 1182(a)(6)(C)(ii)(I) (2012).

174. See GEN. ITIN INFO., *supra* note 111; PAY FOR PERS. SERVS. PERFORMED, *supra* note 112.

175. PAY FOR PERS. SERVS. PERFORMED, *supra* note 166.

176. See Harrington, *supra* note 142. IRS’s Commissioner Douglas Shulman stated that, “our job is to make sure[] if you work in this country and you have a tax obligation, that you file a tax return.” *Id.* He further stated, “that’s what we try to do . . . [w]e’re not responsible for the other pieces of immigration law, immigration policy.” *Id.*

177. See GEN. ITIN INFO., *supra* note 111 (indicating that non-resident aliens can apply for ITIN to file individual tax returns).

178. Immigration and Nationality Act § 212(a)(6)(C)(ii) (I), 8 U.S.C. § 1182(a)(6)(C)(ii)(I).

179. See discussion *infra* Part VIII (proposing an amendment to the INA Waiver Provision in attempt to find the “missing link”).

180. *Id.*

181. See discussion *supra* Part II..

182. *Id.*

183. *Id.*

the DHS would allow those aliens to apply for a waiver, and the aliens who have abided by the federal tax regulations would be forgiven for providing false information.¹⁸⁴

IX. CONCLUSION

To find law-abiding unauthorized immigrants inadmissible to the United States because they falsely claim to be United States citizens for purposes of seeking employment is simply unjust.¹⁸⁵ Unauthorized immigrants who work and pay their income taxes are often caught between a rock and a hard place.¹⁸⁶ While these aliens may violate this law, they comply with the federal tax law adding to the government's total tax revenue.¹⁸⁷ For this reason, the INA Waiver provision should be amended to allow immigrants who falsely claimed to be United States citizens the opportunity to remain in the country if they meet certain criteria.¹⁸⁸ Nevertheless, the amended provision should be specific to aliens who had falsely claimed to be United States citizens on Form I-9 only, but have complied with filing and paying tax returns in compliance with IRS regulations.¹⁸⁹

If the INA Waiver remains as is, a number of immigrants who have legitimately contributed to this country's economy will continue to face deportation or inadmissibility.¹⁹⁰ There must be a better system in place in which the DHS, IRS, and SSA, can freely communicate amongst each other to enforce their regulations and promote security.¹⁹¹ Moreover, if the undocumented workers who work off the books were eligible to work legally, the IRS would have access to additional taxes from such workers and their employers; as a result, the overall federal tax revenue would increase.¹⁹²

In the meantime, while some undocumented workers continue to falsely claim to be United States citizens for purposes of employment, the

184. *Id.*

185. *See, e.g.,* Crocock v. Holder, 670 F.3d 400, 401, 403 (2d Cir. 2012). The Court in *Crocock* found Mr. Crocock inadmissible to the United States because he falsely "characterized himself as a United States citizen in order to obtain his dream job." *Id.*

186. *See* discussion *supra* Part II.

187. *See, e.g.,* Almendral, *supra* note 36 (telling the story of Oscar and Marcella, illegal aliens who choose to abide by the law by filing their taxes).

188. *See* discussion *supra* Part VIII.

189. *Id.*

190. *See* Almendral, *supra* note 36.

191. *See* discussion *supra* Part VIII.

192. *See* Lipman, *supra* note 128, at 127.

proposed INA Waiver amendment remains the appropriate solution.¹⁹³ If such amendment were in place, immigrants like Mr. Ferrans and Mr. Crocock would have had the opportunity to pay their dues, and a chance to stay in the country.¹⁹⁴ Similar to these two cases, an enormous number of other immigrants are faced with this issue and currently live in the shadows.¹⁹⁵

193. See discussion *supra* Part VIII.

194. See *Ferrans v. Holder*, 612 F.3d 528, 530 (6th Cir. 2010); *Crocock v. Holder*, 670 F.3d 400, 401 (2d Cir. 2012).

195. See Almendral, *supra* note 36; see Gretchen Gavett, "Growing Up in the Shadows" of *Illegal Immigration*, PUBLIC BROADCASTING SERV. (Sept. 21, 2011, 2:49 PM), <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/growing-up-in-the-shadows-of-illegal-immigration/>.