

NOTES PERTAINING TO FAILURE TO FILE 1099 FOR IMMIGRANT WORKERS.

Residency

The taxation of aliens by the United States is significantly affected by the residency status of such aliens.

Although the [immigration laws](#) of the United States refer to aliens as immigrants, nonimmigrants, and undocumented (illegal) aliens, the tax laws of the United States refer only to **RESIDENT and NONRESIDENT ALIENS.**

In general, the controlling principle is that resident aliens are taxed in the same manner as U.S. citizens on their worldwide income, and nonresident aliens are taxed according to special rules contained in certain parts of the Internal Revenue Code (hereinafter referred to as I.R.C. or the Code). A major distinguishing feature of this special tax regime concerns the source of income: a nonresident alien (with certain narrowly defined exceptions) is subject to federal income tax only on income which is derived from sources within the United States and/or income that is effectively connected with a U.S. trade or business.

The residency rules for tax purposes are found in I.R.C. § 7701(b). Although the tax residency rules are based on the immigration laws concerning immigrants and nonimmigrants, the rules define residency for tax purposes in a way that is very different from the immigration laws. **If you are an alien (not a U.S. citizen), you are considered a nonresident alien, unless you meet one of two tests for the calendar year (January 1 – December 31).**

1. You are admitted to the United States as, or change your status to, a Lawful Permanent Resident under the immigration laws (the [Green Card Test](#));
2. You pass the [Substantial Presence Test](#) (which is a numerical formula which measures days of presence in the United States);

In some cases aliens are allowed to make elections which override the Green Card Test and the Substantial Presence Test, as follows:

1. They make what is called the "First-Year Choice" (a numerical formula under which an alien may pass the Substantial Presence Test one year earlier than under the normal rules). Refer to the discussion of "First-Year Choice" in Chapter 1 of [Publication 519, U.S. Tax Guide for Aliens](#);
2. They elect with their resident alien or U.S. citizen spouse to be [treated as a resident](#);
3. They claim a [closer connection to a foreign country](#); or
4. They take advantage of the [effect of tax treaties](#) for the definition of tax residence.

Under these rules, even an undocumented (illegal) alien under the immigration laws who passes the Substantial Presence Test will be treated for tax purposes as a resident alien.

TCJA PROVISIONS

- Taxpayers may be surprised to know that, prior to the enactment of the Tax Cut and Jobs Act of 2017 (TCJA), under certain conditions illegal aliens or undocumented immigrants could be claimed as a dependent on individual tax returns, which also allowed the taxpayers to claim various tax credits. Section 10 of the TCJA has repealed the old law, making it now impossible to claim this dependency deduction
- The TCJA significantly curtailed taxpayers' ability to claim deductions and credits related to undocumented aliens, but the surviving credits and deductions can still be significant.

ALIEN

- An "alien" is an individual who does not have U.S. citizenship and is not a U.S. national [8 USC 1101(a)(3)]. U.S. tax laws take the view that one is either a resident alien or a nonresident alien. A resident alien will be treated as a U.S. citizen for tax purposes, while a nonresident alien is neither a citizen of the United States nor a resident alien. Immigration officials use other terms to describe non-residents, such as "aliens," "illegal aliens," or "undocumented non-citizen (aliens)."

ITIN INFORMATION

- Thus, many use the Individual Taxpayer Identification Number, or ITIN, which allows immigrants without Social Security numbers to legally file tax returns and claim the income reported on their W-2's to the IRS.
- **The IRS requires that workers ineligible for Social Security Numbers file form W-7 to request an Individual Taxpayer Identification Number (ITIN) when the worker files his/her first tax return.** (Unfortunately this means the employer will not be able to include tax identification on the first Form W-2 that is issued.) **This number will be used on all tax reports and returns going forward, including Form W-2.** The IRS is currently prohibited from sharing this information with Immigration and Customs Enforcement [ICE] (formerly Immigration and Naturalization Service [INS]) by law – see THE PRIVACY ACT OF 1974 5 U.S.C. § 552a). It is this explicit promise of confidentiality that allows non-documented nannies to file their taxes without fear of being deported.
- **An ITIN is a tax processing number for certain nonresident and resident aliens, their spouses and dependents. The ITIN is only available for individuals who cannot receive a Social Security Number (SSN) and is utilized for tax purposes ONLY.** The Internal Revenue Service, not the Social Security Administration, assigns a tax identification number. It is issued to certain nonresident and resident aliens, their spouse, and dependents. Taxpayers need to file Form W-7, Application for IRS Individual Taxpayer Identification Number, with the IRS to obtain an ITIN. For detailed information, see www.irs.gov/pub/irs-fill/fw7.pdf.

- IRS issues ITINs to help individuals comply with the U.S. tax laws, and to provide a means to efficiently process and account for tax returns and payments for those not eligible for Social Security numbers. They are issued regardless of immigration status, because both resident and nonresident aliens may have a U.S. filing or reporting requirement under the Internal Revenue Code. ITINs do not serve any purpose other than federal tax reporting.’

RS individual taxpayer identification numbers (ITINs) for aliens.

Don't accept an ITIN in place of an SSN for employee identification or for work. An ITIN is only available to resident and nonresident aliens who aren't eligible for U.S. employment and need identification for other tax purposes. You can identify an ITIN because it is a nine-digit number, formatted like an SSN, that starts with the number "9" and has a range of numbers from "50–65," "70–88," "90–92," and "94–99" for the fourth and fifth digits (for example, 9NN-7N-NNNN).

1099 Form instructions pertaining to employees with a ITIN

Recipient's TIN

Enter the recipient's TIN using hyphens in the proper format. SSNs, ITINs, and ATINs should be in the XXX-XX-XXXX format. EINs should be in the XX-XXXXXXX format. You should make every effort to ensure that you have the correct type of number reported in the correct form

Foreign agricultural workers.

Report in box 3

compensation of \$600 or more paid in a calendar year to an H-2A visa agricultural worker who did not give you a valid TIN. You must also withhold federal income tax under the backup withholding rules. For more information, go to IRS.gov and enter "foreign agricultural workers" in the search box.