

Who Said Your Immigrant Client Cannot Get Credit for Social Security Payments?

By Luz Arévalo, Esq, Michael Dunn, JD 2015 & Robert W. Alcorn, MBA, CPA

All employees pay 7.65% of their earned wages to the government in the form of a payroll tax.¹ Their employers are required to pay the same amount,² for a total of 15.3% of the person's income — an amount known as Federal Insurance Contribution Act (FICA), otherwise known as Social Security and Medicare taxes.³ However, a significant number of workers contribute payroll taxes for which, without help, they will receive no benefit. These immigrant workers are also employees⁴ working with unassigned social security numbers.⁵ These

workers may or may not file tax returns (many are afraid to file), but they are nonetheless paying taxes. Unfortunately, many immigration attorneys are unaware of federal provisions that allow the Social Security Administration (SSA) to correct these workers' accounts to show taxes paid once they are assigned a social security number. This article explains those provisions and encourages attorneys working with immigrant taxpayers to reconcile and show their clients how to monitor their social security records.

The Earnings Suspense File

FICA was enacted as part of the Social Security Act to provide benefits for retired workers, the disabled, and children of deceased workers.⁶ Taxpayers apply for social security benefits and are eligible to receive them if (a) they have an assigned social security number, and (b) they have contributed in the form of FICA payments into the program for forty calendar quarters. Only by meeting these requisites is the worker considered *insured* for Social Security purposes. Employers submit records of the employees' FICA payments by filing Forms W-2 and W-3⁷ with the SSA, which in turn submits the

¹ Social Security Administration, Social Security & Medicare Tax Rates, *available at* <http://www.ssa.gov/oact/progdata/taxRates.html> (last visited Sept. 18, 2014).

² *Id.*

³ This tax is imposed on the first \$117,000 earned for 2014. Social Security Administration, Contribution and Benefit Base, *available at* <http://www.ssa.gov/oact/cola/cbb.html> (last visited Sept. 18, 2014).

⁴ Although not legally allowed to work, roughly three million undocumented immigrants contributed an estimated \$12 billion in taxes in 2010 alone. *See* Adriana Kugler, Robert Lynch, & Patrick Oakford, *Improving Lives, Strengthening Finances: The Benefits of Immigration Reform to Social Security*, Center for American Progress (June 14, 2014), <http://www.americanprogress.org/issues/immigration/report/2013/06/14/66543/improving-lives-strengthening-finances-the-benefits-of-immigration-reform-to-social-security/>.

⁵ The Immigration Reform and Control Act of 1986 provides for penalties for employers who hire workers unauthorized to work legally in the U.S. *See* Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.). The Social Security Administration (SSA) will issue social security numbers only to U.S. citizens, lawfully residing residents, and other immigrants who produce proof of work authorization. *See* Treasury Inspector Gen. for Tax Admin., *Individuals Who Are Not Authorized to Work in*

the United States Were Paid \$4.2 Billion in Refundable Credits 1 (2011), *available at* <https://www.treasury.gov/tigta/auditreports/2011reports/201141061fr.pdf>.

⁶ *See* I.R.C. §§ 3101–3128.

⁷ An employer must mail out the Form W-2 to employees on or before January 31. This deadline gives these taxpayers about two months to prepare their returns before the April 15 income tax due date. The form is also used to report FICA taxes to the Social Security Administration. Employers must file Form W-2, along with Form W-3 with the Social Security Administration, generally by the end of February.

records to the Internal Revenue Service (IRS). Despite serious alarms regarding the financial health of this safety net, the program has provided financial support for millions of retired and/or disabled workers and children.

A key function of the SSA is to accurately maintain the record of those payments under the correct taxpayer's account. The Agency does so by recording FICA payments from the Forms W-2 into the workers' SSA accounts, under the workers' social security numbers. Those workers whose payments are made under unassigned social security numbers cannot be properly credited, because the SSA is unable to "match" the W-2 name and social security number to the name and number in the SSA database. Consequently, the workers' payments end up in a *limbo account*, waiting to be reconciled. During congressional hearings in 2006, the SSA reported that approximately 10% of all W-2's are flagged for a mismatch between a person's name and social security number.⁸ The SSA and the Internal Revenue Service (IRS) use routine auditing processes to reconcile these mismatches. The SSA estimates that approximately four percent of all W-2's are ultimately irreconcilable, and those earnings are then placed in the Earnings Suspense File (ESF);⁹ the *limbo account* mentioned earlier. As of 2013, the ESF contained \$1 trillion worth of unmatched contributions.¹⁰

The process to claim these FICA credits by "correcting" the worker's account is important for immigrant workers who have an employment history within the United States under unassigned social security number(s),¹¹ but who have

⁸ See Statement of James B. Lockhart III, Deputy Comm'r of Social Security, Strengthening Employer Wage Reporting: Hearing before the H. Comm. On Ways And Means, 109th Cong. 2 (2006), available at http://www.ssa.gov/legislation/testimony_021606.html.

⁹ See *id.*

¹⁰ Kugler, Lynch, & Oakford, *supra* note 4. Further, this report makes a strong case that legalizing the estimated eleven million undocumented workers who pay taxes will bring relief to the Social Security insolvency problem.

¹¹ Some immigrant workers may have been paid wages without withholding of FICA taxes. These workers would file a tax return with a substitute Form W-2 and an attached Form 8819 to calculate their portion of FICA. They too can amend those returns once they have a social security number assigned to them.

adjusted their immigration status so that they have received work authorization and were issued a social security number by the SSA.¹²

The Reconciliation Process

The SSA notes that the need to reconcile earnings begins when the SSA cannot correctly credit the appropriate account.¹³ Once the SSA determines that it cannot reconcile the mismatched social security number with the correct taxpayer, the SSA sends a notice of mismatch to the employer. The employer is required to take several steps after receiving a mismatch letter from the SSA to ensure that data entries are correct. Once the employer has verified that its entries are free from error, it may require the employee to contact the SSA and attempt to resolve the mismatch and correctly credit the employee's account.

The SSA is required to provide a detailed earning record without charge to the individual.¹⁴ In most cases, simply bringing the mismatch letter to the SSA will allow the agency to correctly credit the individual's account; however, should a worker seek to reconcile her account over multiple years, she should request a copy of her earning records through form SSA-7004. Once the worker receives the earning record, she should compare the earning records against her own income records to discover any discrepancies between the two. If there are discrepancies, the worker should attempt to reconcile them with the SSA. A worker who has just been issued her assigned social

¹² In a good percentage of cases involving clients who worked under unassigned social security numbers, it is possible that the client used someone else's social security number. The Inspector General who oversees Social Security will investigate suspected Social Security fraud and, depending on the case, refer it for prosecution to the U.S. Attorney's Office. Practitioners must alert the client about this risk of potential criminal prosecution if the government has evidence of fraud. Inevitably, in all these cases, the client is admitting to having used an unassigned number to work. Whether that constitutes criminal fraud is a question for a criminal attorney. This scenario is known to the SSA. In its Program Operations Manual (POM), under the sections concerning "alien workers" the SSA uses the term "scrambled earnings" when discussing cases of individuals working under another person's social security number. See Social Security Administration, Program Operations Manual System RS 00301.102 (2013) [hereinafter POMS], available at <https://secure.ssa.gov/poms.nsf/lnx/0300301102>.

¹³ Social Security Administration, Social Security Number Verification Service Handbook 27-28 (2013), available at https://www.socialsecurity.gov/employer/ssnvs_handbk.htm.

¹⁴ See 20 C.F.R. § 404.811 (2014); see also 20 C.F.R. § 402.170 (2014).

security number but has not yet used it to work will have a blank record with the SSA. This record is still needed as part of the evidence to correct the account. If the worker has filed income tax returns the process is easier, as explained below.

There is No Statute of Limitations to Correct Errors

The first stated time limit to correct earnings accounts with the SSA is three years, three months, and fifteen days after any year in which the worker received earnings.¹⁵ If the statute of limitations has run, the worker may *still* request review if she fits one of the nine categories under 42 U.S.C. § 405(c)(5)(A)–(J) (2010), further clarified under 20 C.F.R. § 404.822(b)–(e) (2014). Section 405 enumerates several exceptions to this statute, including the comprehensive provisions in subsection 405(c)(5)(G) and (H), which allow the SSA:

G. to correct errors made in the allocation, to individuals or periods, of wages or self-employment income entered in the records of the Commissioner of Social Security.

H. to include wages paid during any period in such year to an individual by an employer.

Consistently, SSA regulations state “[w]e may correct errors in SSA records resulting from earnings being entered for the wrong person or period.” 20 C.F.R. § 404.822(e)(4) (2014). Neither of the two provisions listed above contain time limits on the “periods” to be corrected. Further, subsection (e)(5) of the same regulation reads “[w]e may enter wages paid to you by an employer for a period if no part of those wages or less than the correct amount of those wages is entered on SSA records.” For sections 405(c)(5)(G) and 404.822(e)(4) and (5) to apply, the wage must have been reported but allocated incorrectly to an individual’s account.¹⁶ Thus, the worker is able to reconcile her SSA account as far back as necessary to correct her earnings account.¹⁷

A second “timing” consideration is whether the worker is required to provide proof of work

¹⁵ 42 U.S.C. § 405 (2010); 20 C.F.R. § 404.802 (2014). If the claimant is an active member of the armed forces, the statute is tolled until discharge from active service or death, whichever is comes first.

¹⁶ See *Pleasant v. Richardson*, 450 F.2d 749, 752 (5th Cir. 1971) (holding that section 405(c)(5)(G) was inapplicable as the wages were never reported by the employer).

¹⁷ See 42 U.S.C. § 405(c) (2010); see also Dawn Nuschler & Alison Siskin, Congressional Research Service, *Social Security Benefits for Non-Citizens* 3 (2010).

authorization under the Social Security Protection Act of 2004 (SSPA).¹⁸ The SSPA applies only to a worker whose social security number was assigned after January 1, 2004, and requires such a worker to have had a social security number valid for work purposes *at any time* on or after January 1, 2004.¹⁹ If the worker proves that she had work authorization, *even if not currently authorized*, she will meet the additional requirement under this Act. This additional requirement will obviously be met by any current client wishing to reconcile her account under her newly-assigned social security number.

Reconciliation by Filing Amended Income Tax Returns – Go this Route First, if Possible

The most efficient route to correcting or reconciling workers’ records is through their tax returns. The SSA relies on tax records to update its own records and it is required to “conform [its] records to tax returns or portions thereof . . . filed with the Commissioner . . .”²⁰ The corresponding regulation provides, “[w]e will correct SSA records to agree with a tax return of wages or self-employment income to the extent that the amount of earnings shown in the return is correct.”²¹

The SSA will, on its own, credit those accounts where the taxpayer, after filing a return or several returns with an Individual Tax Identification Number (ITIN),²² amends those returns to list his or her assigned social security number. The amended return, Form 1040X, allows the taxpayer to explain that she had reported earnings under an ITIN and that, having been assigned a social security number, she wishes to record those earnings under the recognized Tax Identification Number for social security purposes. The IRS shares the FICA information reported by the worker with the SSA, and the SSA will then credit the worker’s account. The SSA will do this because it now has a name and number that match its database of names and social security numbers issued by the agency.

The process outlined above is available to those workers who, after receiving their social security

¹⁸ See Social Security Protection Act, Pub. L. No. 108-203 § 211, 118 Stat. 493 (codified in scattered sections of 42 U.S.C.).

¹⁹ See *id.*

²⁰ 42 U.S.C. § 405(c)(5)(F) (2010).

²¹ 20 C.F.R. § 404.822(b) (2014).

²² Taxpayers with filing requirements but ineligible for social security numbers must file tax returns with Individual Tax Identification Numbers. See 26 C.F.R. § 301.6109–1(d)(3) (2013).

number, have access to a tax preparer willing to prepare and file the amended returns. Tax practitioners will often agree to amend returns for the most recent three years, particularly if there are refunds due to the worker who can now show a valid social security number on the return.²³ Many practitioners will be reluctant to amend beyond three years given the labor involved. If the taxpayer is a younger worker (in her 30s or 40s) with a long work history ahead of her, the practitioner might reason that the worker will likely make the minimum required FICA payments during future years and, in that way, earn her pension and health insurance credits. In such a case, why bother to amend old years?

The analysis must be made on a case-by-case basis, as there may be cases where the earlier withholdings were more substantial than the current withholdings, as, for example, in the case of union workers who no longer belong to unions. Having the earlier credits will bolster the overall SSA account. In all cases, the practitioner needs to consider that the given worker has made hard-earned payments into a system that will give the worker credit for the payment *only* if the worker claims it.

The incentive to correct those records and claim those payments is more evident with an older or injured worker who made her FICA withholdings and may not have filed income tax returns, in which case there is no IRS record to amend. The SSA is also under pressure to reduce the size of the limbo account, the ESF. For that reason, the SSA has promulgated regulations and policies, creating a "reconciliation process" to correctly credit the workers' accounts.²⁴

Reconciliation Directly with the SSA

To initiate the process, the worker must provide a written request for reconciliation, either by completing form SSA-7008 (Request for Correction of Earnings) or by letter,²⁵ so long as the letter (1) includes a

²³ Additionally, clients who were prevented from claiming the Earned Income Tax Credit in the past because they filed returns with ITINs may claim the credit by filing the amended returns with the newly assigned social security number. See I.R.C. § 6511 (2008).

²⁴ See, e.g., 20 C.F.R. §§ 404.801–404.831 (2014). A good starting place for additional reconciliation advice is the Social Security Administration's web page on the reconciliation process. See *Employer Reconciliation Process*, Social Security Administration, <http://www.ssa.gov/employer/recon/recon.htm> (last visited Sept. 24, 2014).

²⁵ The SSA created the form 7008 precisely for this purpose, but it will entertain other documented requests in writing so long as they contain the same information. See POMS RM 03870.010(A)(1).

statement that the earning record is incorrect; (2) states the time period that is incorrect; (3) is signed by the worker or their survivor, or representative; and (4) includes all evidence to show that the records are incorrect.²⁶ It is best to use the Form 7008, as this form allows the practitioner to list all earnings under all social security numbers used by the worker. The written request can be mailed, or hand delivered to an SSA field office.²⁷ A request is considered to be received by the SSA upon receipt, not upon mailing; therefore, if the statute of limitations is close to expiration, it is best to hand-deliver the request to a field office.²⁸

As part of the initial request, the SSA will generally require the worker to provide her social security number, the name of the employer or Federal Employer Identification Number, the period of disagreement, and evidence of earnings for the alleged period.²⁹ The best evidence to provide to the SSA is: (1) a Form W-2 (Withholding Tax Statement) or W-2C (Statement of Corrected Income and Tax amounts); (2) any other statement signed by the employer or signed by the custodian of the employer's records; (3) in cases of alleged self-employment income, a copy of Form 1040, Schedules C, F and SE, and proof that the return was filed within three years, three months and fifteen days of the end of the taxable year at issue.³⁰ Though not specifically mentioned, a copy of a filed amended tax returns is also evidence that would be considered by the SSA. This should be needed only in those unusual cases in which the amended return was processed but the social security account was not corrected. The worker now has in hand proof of the change she wishes to make and can bring it directly to the SSA office.

If, despite best efforts, the representative is unable to acquire these documents, the SSA will accept other circumstantial evidence: (4) pay envelopes, vouchers, and similar unsigned employer wage statements to the individual, a state agency, or federal agency; (5) award letters or other notices provided the worker by a State Unemployment Compensation Agency based on information provided the Agency other than an employer's records; (6) union record of dues and wages paid the individual; (7) an individual's copy of federal, state, or local income tax returns; (8) signed statements of co-workers or persons having firsthand

²⁶ 20 C.F.R. 404.820(b) (2014).

²⁷ 20 C.F.R. § 404.820(c).

²⁸ *Id.* At .§ 404.820(d).

²⁹ See POMS RM 03812.002.

³⁰ *Id.*

knowledge about wages paid or self-employment income received; (9) individual's personal records or account books made during the period(s) of her work; or (10) other comparable evidence.³¹

The SSA classifies all requests as either (1) meeting the informational requirement, or (2) not meeting the informational requirement.³² The decision is based on the evidence the practitioner provides.³³ If the SSA agrees that the worker has met her burden of showing a discrepancy in the records, the SSA will process the request; this prioritizes the case for closure, which can involve a limited investigation conducted at the discretion of the SSA case handler.³⁴ During its investigation the SSA might contact the worker's employer or former employer to help resolve the earning discrepancy.³⁵

Alternatively, the SSA may classify the request as failing to meet the informational requirement if the worker has thus far failed to meet her burden of proof and more evidence is required. In that case, the SSA will prepare requests for information still needed and send the requests to the worker.³⁶ The worker has thirty days from the *mailing* of this discovery request to provide the requested documentation, and the SSA may also grant a thirty day extension on the request, if such an extension would likely lead to relevant evidence.³⁷ Another option, where the worker is unable to obtain the requested evidence within the time limit, is to request assistance from the SSA itself.³⁸ Generally, the SSA will assist in gathering evidence for the reconciliation process if it believes good cause exists for the inability to obtain relevant evidence and that its assistance will likely lead to the relevant evidence.³⁹

Once the SSA has completed the investigation, the worker will receive notification of one of four possible outcomes: (1) granting the request to reconcile; (2)

denying the request to reconcile; (3) withdrawal of request; or (4) adverse adjustment.⁴⁰ A withdrawal of request means that the worker has requested to withdraw her motion to reconcile; the SSA cannot withdraw a request on its own motion. The SSA may deny the withdrawal request if it believes it has enough information to make an initial determination.⁴¹ The SSA must make an initial determination within three years and three months of the filing of the request to reconcile.⁴²

Denial, Unsatisfactory Judgment, and Appeal Rights

If the SSA has denied the reconciliation, denied part of the reconciliation, or, in rare circumstances, issued an adverse adjustment to the account,⁴³ the worker has various appeal rights.⁴⁴ After receiving an initial unsatisfactory decision, the worker has sixty days to request reconsideration by filing Form SSA-561-U2.⁴⁵ This form permits the worker to choose the type of review process that she will undergo: a case review, an informal hearing, or a formal hearing.⁴⁶

Once the case handler reviews the file, a written decision is issued. Enclosed with the decision will be instructions for further appeal before an Administrative Law Judge.⁴⁷ If the worker wants to appeal the reconsideration, she must file with the Administrative Law Judge pursuant to the instructions enclosed in the reconsideration. If the worker is still dissatisfied after the Administrative Law Judge's ruling, she has the right to appeal to the United States District Court.⁴⁸

Conclusion

³¹ *id.*

³² *id.*; RM 03812.003; RM 03812.005.

³³ POMS RM 03812.002.

³⁴ POMS RM 03812.005.

³⁵ POMS RM 03812.005. Some employers might be reluctant to provide information to reconcile discrepancies for fear of immigration law violations and penalties. The advocate's job here is to obtain the records and explain that the purpose is not related to any immigration investigation, but to correct an individual's account with the SSA.

³⁶ POMS RM 03812.003.

³⁷ *Id.* at (A).

³⁸ *Id.* at (B).

³⁹ *Id.* at (B)(2).

⁴⁰ 20 C.F.R. § 404.820 (2014); 20 C.F.R. § 404.640 (2010).

⁴¹ *See* 20 C.F.R. § 404.640 (2010).

⁴² POMS RM 03870.001(C)(3).

⁴³ In rare circumstances, the SSA can determine that a person's account received too much credit and will remove the additional credit. *See* 20 C.F.R. § 422.125(f) (2014). This appears to occur most frequently with self-employed individuals.

⁴⁴ *See* 20 C.F.R. § 422.140 (2011).

⁴⁵ *See* POMS GN 03102.100; *see also* 20 C.F.R. § 422.140 (2011).

⁴⁶ *See* Form SSA-561-U2, *available at* <http://www.socialsecurity.gov/forms/ssa-561.pdf>.

⁴⁷ *See* 20 C.F.R. § 422.201 (2011).

⁴⁸ *See* 42 U.S.C.A. § 405(c)(9) (West 2010).

There seems to be a misconception among immigration attorneys across the United States that it is not possible for an immigrant worker who has recently adjusted her immigration status to correct her Social Security records for periods prior to the attainment of legal status. This article shows that not only is this process available, but it is fairly straightforward. Practitioners are encouraged to advise or assist clients to claim what they have earned.

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This article is dedicated to the memory of Timothy Shorey, Michael Dunn's father, who died unexpectedly at the time Michael was writing it.

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