

**WHO GETS TO REAP WHAT THEY SOW?
ADDRESSING THE EXCLUSION OF UNDOCUMENTED
IMMIGRANTS FROM INCOME TAX BENEFITS AND
DESIGNING A SOLUTION**

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INTRODUCTION

Support for immigration into the United States and for advancing the ways that people can gain legal status in the United States is often undermined by the misconception that immigrants do not “contribute” to the economy.¹ However, the reality is that undocumented immigrants pay billions of dollars in taxes every year in the United States.² In fact, “the best evidence suggests that at least fifty percent of undocumented immigrant households currently file income tax returns using Individual Tax Identification Numbers (“ITINs”), and many who do not file income tax returns still have taxes deducted from their paychecks.”³ Currently, there are roughly 11.4 million undocumented immigrants in the United States.⁴ The Internal Revenue Service (“IRS”) estimates that as of 2010, about 3.1 million unauthorized⁵ immigrants were paying Social Security taxes.⁶ Thus, while undocumented immigrants cannot vote on any state, local, or federal tax laws, more than half of undocumented immigrants in the United States go out of their way to file annual federal and state income tax returns.⁷ Further, undocumented immigrants cannot claim the direct benefits of their tax contributions.⁸ Thus, despite the substantial amount of money that undocumented immigrants contribute by paying income taxes, they are ineligible to receive the Social Security benefits resulting from their contributions.⁹

In the interests of economic fairness and equal protection under the law, undocumented immigrants who contribute to federal and state income taxes should be eligible for benefits. The most efficient way of reforming this issue may lie in a more liberal work authorization policy that grants asylum applicants work

¹ See AM. IMMIGR. COUNCIL, *ADDING UP THE BILLIONS IN TAX DOLLARS PAID BY UNDOCUMENTED IMMIGRANTS* (2016) (available at: https://www.americanimmigrationcouncil.org/sites/default/files/research/adding_up_the_billions_in_tax_dollars_paid_by_undocumented_immigrants.pdf) [hereinafter *ADDING UP THE BILLIONS*].

² *Id.*

³ LISA CHRISTENSEN GEE, MATTHEW GARDNER & MEG WIEHE, *INST. ON TAX’N & ECON. POL’Y, UNDOCUMENTED IMMIGRANTS’ STATE & LOCAL TAX CONTRIBUTIONS* (2016) (available at: <https://itep.sfo2.digitaloceanspaces.com/immigration2016.pdf>).

⁴ *Profile of the Unauthorized Population: United States*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US> (last visited Mar. 19, 2024).

⁵ This Note uses the terms “unauthorized” and “undocumented” interchangeably to refer to individuals living in the United States without formal residency status.

⁶ STEPHEN GROSS, ALICE WADE, J. PATRICK SKIRVIN, MICHAEL MORRIS, K. MARK BYE & DANIELLE HUSTON, *SOC. SEC. ADMIN., EFFECTS OF UNAUTHORIZED IMMIGRATION ON THE ACTUARIAL STATUS OF THE SOCIAL SECURITY TRUST FUNDS* 3 (2013) (available at: https://www.ssa.gov/oact/NOTES/pdf_notes/note151.pdf).

⁷ Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1 (2006).

⁸ GROSS, WADE, SKIRVIN, MORRIS, BYE & HUSTON, *supra* note 6.

⁹ *Id.*

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authorization as soon as they enter the United States, rather than only reforming the tax scheme as a post hoc solution.¹⁰

In order to contextualize the impact of immigrant contributions to the American income scheme, Part II of this Note provides background on the U.S. income tax scheme and details immigrant contributions to federal and state income taxes. Part III introduces the problem of undocumented workers being disproportionately excluded from Social Security benefits, despite their positive contributions, leading to inequity in U.S. labor and taxation practices. Part IV details a legal analysis grounded in the Equal Protection Clause and explains why undocumented immigrants should be eligible for benefits on their income tax contributions. Part V explains this Note’s policy proposal, which proposes to include undocumented individuals in the Social Security Fund (“SSF”) without disruptions or amendments to the tax scheme as it exists today.¹¹ Lastly, Part VI provides an explanation regarding the benefits of including tax-paying undocumented immigrants in the U.S. Social Security benefits scheme while also illustrating the challenges and shortcomings of the proposed solution.

I. BACKGROUND

A. *A Brief History of Income Tax in the United States*

In the United States, taxes fund economic development by providing revenue for essential goods such as infrastructure, healthcare, education, and other government benefits necessary for a functional society.¹² Individual income tax is levied on wages, sales, and other income a person may earn throughout a given year.¹³ Today, federal income tax is imposed by the federal government and calculated based on an individual’s income and filing status—whether they are married, single, filing jointly with a spouse, or filing separately.¹⁴ Federal income

¹⁰ Proposals for legislation to shorten the waiting period for asylum seekers to be allowed to receive work authorizations have been introduced in both the House and Senate. See Rachel Ohm, *Sen. Collins Introduces Bill to Help Asylum Seekers Get Jobs Sooner*, PORTLAND PRESS HERALD, <https://www.pressherald.com/2022/02/17/sen-collins-introduces-bill-to-help-asylum-seekers-obtain-jobs-more-quickly> (last updated Feb. 18, 2022). Press Release, Chellie Pingree, Pingree Sponsors Bill to Speed Up Work Authorization for Asylum Seekers (Feb. 10, 2022), <https://pingree.house.gov/news/documentsingle.aspx?DocumentID=3976> [hereinafter Pingree Press Release].

¹¹ While a proposal grounded in liberalizing work permit awards seems to depart from the prior conversation of immigrants’ place within the income tax scheme, the justification for this proposal is based on the legal and moral need to reimburse immigrants for their earned income contributions.

¹² Christiana Sciaudone, *Why Do We Pay Taxes? Federal Income Tax is the Biggest Source of Government Funding*, BUS. INSIDER, <https://www.businessinsider.com/personal-finance/why-do-we-pay-taxes#why-do-we-pay-taxes> (last updated Feb. 28, 2023, 8:11 PM).

¹³ *Briefing Book: State and Local Tax Policies: How Do State and Local Individual Income Taxes Work?*, TAX POL’Y CTR. URBAN INST. & BROOKINGS INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-and-local-backgrounders/individual-income-taxes> (last visited Mar. 3, 2024).

¹⁴ Andriy Blokhin, *State Income Tax vs. Federal Income Tax: What’s the Difference?*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/060515/what-difference-between-state->

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taxes fund programs administered by the federal government including military, emergency relief funds, Medicare, and Social Security.¹⁵ State income tax is collected by individual states where a taxpayer lives and/or earns income.¹⁶ State income tax-funded programs include public education, transportation, and corrections.¹⁷

1. Taxation in Colonial America

Before the establishment of the U.S. federal government, Americans were not subject to income tax.¹⁸ Colonists were subjects of the English crown, which imposed real estate taxes, a head tax, and taxes on tea and other imported goods.¹⁹ After the Revolutionary War, the power of taxation was allocated to Congress through the U.S. Constitution, giving Congress the power to determine whether and how taxes would be set and collected.²⁰ Article I, Section 8, Clause I of the Constitution gives Congress the “[p]ower To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States[.]”²¹ Most early taxes emerging from the Revolutionary War and the ratification of the Constitution were imposed on goods and services rather than taxes on individuals’ earned income.²²

2. The Revenue Act of 1861

The first income tax scheme emerged in 1861 from the Lincoln administration’s need for revenue to fund the U.S. Civil War.²³ Up to this point, tariffs²⁴ had generated “adequate revenue for a relatively small federal budget.”²⁵ However, the costs of the Civil War required the federal government to find

income-tax-and-federal-income-tax.asp#:~:text=What%20Is%20the%20Difference%20Between,taxpayer%20lives%20and%20earns%20income (last updated Jan. 30, 2023).

¹⁵ Sciaudone, *supra* note 12.

¹⁶ Blokhin, *supra* note 14.

¹⁷ Sciaudone, *supra* note 12.

¹⁸ Amy Fontinelle, *A Brief History of Taxes in the U.S.*, INVESTOPEDIA, <https://www.investopedia.com/articles/tax/10/history-taxes.asp> (last updated Aug. 27, 2023).

¹⁹ *Id.*

²⁰ *Id.*

²¹ U.S. CONST. art. I, § 8, cl. 1.

²² Fontinelle, *supra* note 18.

²³ *Abraham Lincoln Imposes First Federal Income Tax*, HISTORY, <https://www.history.com/this-day-in-history/lincoln-imposes-first-federal-income-tax> (last updated Aug. 3, 2020).

²⁴ Tariffs are taxes levied against foreign-made goods, paid by the businesses importing those goods to the government of the country receiving the imports. Andrew Chatzky & Anshu Siripurapu, *The Truth About Tariffs*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/backgrounder/truth-about-tariffs> (last updated Oct. 8, 2021, 3:28 PM).

²⁵ *The Civil War: The Senate’s Story: Featured Document: The Revenue Act of 1861*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/civil_war/RevenueAct_FeaturedDoc.htm (last visited Mar. 19, 2024).

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additional funding sources.²⁶ Much of the federal government's motivation for creating a broad income-tax scheme came from then-President Lincoln's concern over maintaining "federal authority over collecting revenue," specifically along the southeastern seaboard, home to many ports and vulnerable to control by the Confederacy.²⁷ The Revenue Act of 1861 ("Revenue Act"), drafted by William Pitt Fessenden, Chairman of the Senate Finance Committee, imposed a three percent tax on annual incomes over eight-hundred dollars.²⁸

Additionally, the Revenue Act led to the establishment of the Office of Commissioner of Internal Revenue, the predecessor to the modern IRS.²⁹ The language of the Revenue Act was broad in the sense that almost any financial gain an individual drew in would be considered taxable income.³⁰ The Revenue Act defined income as a gain "derived from any kind of property, or from any professional trade, employment, or vocation carried on in the United States or elsewhere or from any source whatsoever."³¹ The Revenue Act also imposed import and land taxes.³² While the Revenue Act imposed taxes on income, imports, and land, it did not provide a way to enforce payment and collection.³³ Congress repealed the Revenue Act in 1871, and the period that followed was marked by strife between the federal government and stakeholders in the agricultural economy of the South and West.³⁴

3. The Sixteenth Amendment

Whereas the industrial markets of the northern United States grew after the repeal of the Revenue Act, farmers in the South and West saw low prices for their farm products while paying high prices for manufactured goods.³⁵ Farmers formed political organizations throughout this time and advocated for tax reform measures, including introducing a graduated income tax.³⁶ Farmer-backed organizations, such as the Grange, pushed back against the monopolization of manufacturing industries, leading to relatively radical reform measures such as the Interstate Commerce Act.³⁷ By the early 1900s, tax reform became a creature of the progressive wings of the Democratic-Republican parties.³⁸ In 1909, a progressive Congress proposed an income tax provision, which conservatives attempted to quash by proposing a

²⁶ *Abraham Lincoln Imposes First Federal Income Tax*, *supra* note 23.

²⁷ *Id.*

²⁸ *The Civil War: The Senate's Story: Featured Document: The Revenue Act of 1861*, *supra* note 25.

²⁹ Fontinelle, *supra* note 18.

³⁰ *Abraham Lincoln Imposes First Federal Income Tax*, *supra* note 23.

³¹ *Id.*

³² *The Civil War: The Senate's Story: Featured Document: The Revenue Act of 1861*, *supra* note 25.

³³ *Id.*

³⁴ *16th Amendment to the U.S. Constitution: Federal Income Tax (1913)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/16th-amendment> (last visited Mar. 19, 2024).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

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constitutional amendment for such a provision.³⁹ However, the Sixteenth Amendment was ratified in 1913 and “established Congress’s right to impose a Federal income tax.”⁴⁰ The Sixteenth Amendment empowers Congress to “lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”⁴¹

B. The Internal Revenue Service

Congress created the Office of Commissioner of Internal Revenue in 1862 following the passage of the Revenue Act.⁴² The Office of Commissioner of Internal Revenue, now the IRS, lives under the Department of the Treasury.⁴³ The IRS derives its statutory authority from section 7801 of the Internal Revenue Code (“Code”), which provides for the appointment of a Commissioner of Internal Revenue to administer and supervise the execution and application of the internal revenue laws.⁴⁴ The IRS claims its role is to “help the large majority of compliant taxpayers with the tax law while ensuring that the minority who are unwilling to comply pay their fair share.”⁴⁵

C. The Social Security Trust Fund

While income tax was used to fund the federal government throughout early American history, the issue of providing economic security to individuals did not manifest until the start of the Industrial Revolution.⁴⁶ The industrialization of American society led to increased longevity of Americans as well as the erosion of social safety nets that provided for those who were unable to provide for themselves.⁴⁷ Individuals in preindustrial America typically lived and worked in agricultural communities where they could provide at least their own subsistence.⁴⁸ These individuals also tended to be self-employed tradespeople, living with extended families where working members provided economic security to the very young, the old, and others who could not work themselves.⁴⁹ The shift to industrial work, where individuals were less likely to be self-employed and living within supportive

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ U.S. CONST. amend. XVI.

⁴² *See Previous IRS Commissioners*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/previous-irs-commissioners> (last updated Feb. 23, 2024).

⁴³ *The Agency, Its Mission, and Statutory Authority*, INTERNAL REVENUE SERV., <https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority> (last updated Apr. 16, 2024).

⁴⁴ *Id.*

⁴⁵ This is a direct quote from the IRS webpage, under the heading, “The IRS Mission.” Looking at the plain language of this quote, the IRS’s mission seems to be to help direct those who want to pay taxes on how they should do so, and to enforce payment by those who are otherwise unwilling to comply with IRS regulations. *Id.*

⁴⁶ Larry DeWitt, *The Development of Social Security in America*, 70 SOC. SEC. BULL. (2010).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

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communities, led to the problem of not being able to provide individuals with economic security as they lived to older and older ages.⁵⁰ The first American program directed at providing insurance to its population emerged from Civil War pensions.⁵¹ The federal government paid benefits to Union soldiers and their families and, by 1893, “Civil War pensions accounted for 41.5 percent of the federal budget.”⁵² By the turn of the century, the Civil War pension program became the “de facto social insurance program” and paid recipients retirement, disability, and survivor benefits.⁵³ However, the Civil War pension program was limited to a rapidly dwindling section of American citizens—those who had served in the Union and their families.⁵⁴

Although Germany enacted Europe’s first Social Security system in 1889, American models of Social Security lagged far behind.⁵⁵ American university professors and economists who believed the United States should implement a social insurance program pushed for adopting European Social Security models.⁵⁶ States like Wisconsin developed early social insurance models, enacting a workers’ compensation program in 1911 and a state unemployment insurance program in 1934.⁵⁷ The “state old-age pension” movement was the most active predecessor of the current Social Security model, and advocates lobbied state legislatures to adopt provisions for the elderly.⁵⁸ However, robust economic support for the elderly did not gain traction until the Great Depression,⁵⁹ the most severe economic downturn ever experienced in Europe and the Americas.⁶⁰ The Great Depression spanned from 1929 to about 1939.⁶¹ During this time, most of the U.S. population had no form of insurance to rely on in the case of job loss, older workers were especially harmed by the huge surge of unemployment brought about by the economic crash, and “[t]he majority of the nonworking elderly lived in some form of economic dependency, lacking sufficient income to be self-supporting.”⁶² While the industrialization of modern society was the *cause* for having a national Social Security system, the Great Depression *triggered* the American public to endorse the adoption of such a plan.⁶³ The Social Security Act of 1935 emerged as an omnibus bill comprised of several different programs, including old age assistance, federal old-age benefits, unemployment insurance, aid to dependent children, state grants for maternal and

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Richard H. Pells & Christina D. Romer, *Great Depression*, BRITANNICA, <https://www.britannica.com/event/Great-Depression> (last updated Feb. 15, 2024).

⁶¹ DeWitt, *supra* note 46.

⁶² *Id.*

⁶³ *Id.*

child welfare, public health work, and aid to the blind.⁶⁴ The modern American Social Security program has since evolved considerably, slowly increasing coverage to larger sectors of workers within the United States.⁶⁵

D. *The Current Situation*

1. The Structure of Immigration Law

Since 2003, immigration enforcement has been primarily a function of the executive branch.⁶⁶ The Department of Homeland Security (“DHS”) is the administrative agency that oversees immigration matters.⁶⁷ DHS is divided into various departments, each governing a different area of immigration enforcement: U.S. Citizenship and Immigration Services (“USCIS”), U.S. Immigration and Customs Enforcement (“ICE”), and U.S. Customs and Border Patrol (“CBP”).⁶⁸ Under DHS, USCIS runs the administration of affirmative immigration relief⁶⁹ and citizenship benefits.⁷⁰ ICE serves an investigative and prosecutorial role in immigration enforcement.⁷¹ CBP enforces border protection and U.S. immigration drug laws at U.S. borders.⁷² DHS defines a noncitizen as a “[p]erson who is not a citizen or national of the United States.”⁷³

While much immigration *enforcement* is governed by DHS, the U.S. Department of Justice (“DOJ”) is tasked with ensuring due process of law in immigration proceedings.⁷⁴ The Executive Office of Immigration Review (“EOIR”) sits under the DOJ and adjudicates immigration cases.⁷⁵ Immigration cases can arise in a variety of ways. For example, DHS may charge a noncitizen for violating any established immigration law.⁷⁶ If DHS cannot administratively deport the

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Megan Davy, Deborah W. Meyers & Jeanne Batalova, *Who Does What in U.S. Immigration*, MIGRATION POL’Y INST. (Dec. 1, 2005), <https://www.migrationpolicy.org/article/who-does-what-us-immigration>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Affirmative immigration relief refers to a person who is not in removal proceedings applying proactively for some form of relief, such as asylum. *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process> (last updated Mar. 29, 2023).

⁷⁰ Davy, Meyers & Batalova, *supra* note 66.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Glossary*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/ohss/about-data/glossary#1> (last visited May 15, 2024).

⁷⁴ *Access to Counsel*, NAT’L IMMIGRANT JUST. CTR., <https://immigrantjustice.org/issues/access-counsel> (last visited Mar. 19, 2024).

⁷⁵ Davy, Meyers & Batalova, *supra* note 66.

⁷⁶ *Immigration Court Primer*, TRAC IMMIGR., https://trac.syr.edu/immigration/quickfacts/about_eoir.html#:~:text=Cases (last visited May 15, 2024).

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noncitizen, it brings the matter to EOIR where an immigration judge oversees the case in immigration court.⁷⁷

Importantly, immigration courts are not Article III courts as established by the Constitution.⁷⁸ Article III of the Constitution governs the appointment and tenure of U.S. District Court judges, Appellate Division judges, and Supreme Court judges.⁷⁹ Article III judges are appointed for life-long tenures, and their appointments are confirmed by the U.S. Senate.⁸⁰ Article III judges are meant to have the highest degree of “judicial independence” out of all U.S. judges,⁸¹ meaning their decisions are supposed to be insulated from political pressure by private parties, other branches of government, or individual government actors, such as the President or Attorney General (“AG”).⁸² Administrative law judges (“ALJs”), who adjudicate matters under the jurisdiction of agencies, are governed by congressional legislation, such as the Administrative Procedures Act of 1946.⁸³ ALJs have less judicial independence than Article III judges, but still enjoy some protection from interference.⁸⁴ For instance, ALJs can only be fired after “good cause” is established through an independent hearing outside of the agency in which they work.⁸⁵ Immigration court judges have even less judicial independence than ALJs.⁸⁶ Immigration court judges are appointed by the AG to act as the AG’s “delegates” in cases before immigration court.⁸⁷ Thus, immigration court judges are subject to the AG’s decision-making and political preferences when adjudicating immigration proceedings.⁸⁸

An immigration case may also begin with a noncitizen applying to USCIS for some benefit and being denied and placed in removal proceedings before the immigration court.⁸⁹ The Board of Immigration Appeals (“BIA”) then conducts appellate review of decisions from immigration judges and DHS directors.⁹⁰ Notably, “BIA decisions are binding on all DHS officers and Immigration Judges

⁷⁷ *Id.*

⁷⁸ *Judicial Oversight v. Judicial Independence*, TRAC IMMIGR., https://trac.syr.edu/immigration/reports/194/include/side_4.html#:~:text=Unlike (last visited May 10, 2024).

⁷⁹ *About Federal Judges: Article III Judges*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/about-federal-judges> (last visited Mar. 19, 2024).

⁸⁰ *Judicial Oversight v. Judicial Independence*, *supra* note 78.

⁸¹ *Id.*

⁸² David S. Law, *Judicial Independence*, BRITANNICA, <https://www.britannica.com/topic/judicial-independence> (last visited Apr. 5, 2024).

⁸³ *Judicial Oversight v. Judicial Independence*, *supra* note 78.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Ilona Bray, *Options When Adjustment of Status (to Permanent Resident) is Denied*, ALLLAW, <https://www.alllaw.com/articles/nolo/us-immigration/options-adjustment-status-to-permanent-resident-denied.html> (last visited Mar. 11, 2024).

⁹⁰ *Immigration Law Research Guide: Administrative Structure*, RUTGERS L. SCH., <https://libguides.law.rutgers.edu/c.php?g=858689&p=6152301> (last visited Apr. 23, 2024).

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unless modified or overruled by the [AG] or a federal court,” and “are subject to the judicial review in the federal courts.”⁹¹ Being subject to the judicial review of federal courts means both the government and individuals can appeal BIA decisions to the federal court.⁹²

Individuals who come to the United States fleeing violence and persecution are among the most vulnerable immigrants.⁹³ Congress has recognized a responsibility to protect this vulnerable population through its enactment of the 1980 Refugee Act, which adopted definitions from the United Nations’ 1951 Convention and 1967 Protocol.⁹⁴ Under the Refugee Act, a refugee is:

A person who is unable or unwilling to return to his or her home country, and cannot obtain protection in that country, due to past persecution or a well-founded fear of being persecuted in the future on account of race, religion, nationality, membership in a particular social group, or political opinion.⁹⁵

A person granted asylum in the United States receives work authorization as well as protection from being returned to their home country.⁹⁶

E. Interactions Between the U.S. Immigration System and the U.S. Tax Structure

1. The Effects of Undocumented Noncitizens on U.S. Tax Programs

The Office of the Chief Actuary (“OCACT”)⁹⁷ predicts the numbers of undocumented immigrants living in the United States, their earnings, and the effects of their earnings on the SSF.⁹⁸ OCACT predicts that, while undocumented

⁹¹ *Board of Immigration Appeals*, EXEC. OFF. FOR IMMIGR. REVIEW: U.S. DEP’T JUST., <https://www.justice.gov/eoir/board-of-immigration-appeals#:~:text=BIA%20decisions%20are%20binding%20on,review%20in%20the%20federal%20courts> (last updated Apr. 16, 2024).

⁹² *Judicial Review*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/judicial_review#:~:text=Judicial%20review%20is%20the%20idea,possible%20invalidation%20by%20the%20judiciary (last visited Apr. 23, 2024).

⁹³ ASYLUM IN THE UNITED STATES, AM. IMMIGR. COUNCIL 5 (2024) (available at: https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_united_states_update_jan_2024.pdf).

⁹⁴ Final Act of the United Nations Conference on Plenipotentiaries of the Status of Refugees and Stateless Persons, U.N. Doc. A/CONF.2/108/Rev/1, ch. 1, art. 1 (July 25, 1951); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, ch. 1, art. 1.

⁹⁵ 8 U.S.C. § 1101(a)(42).

⁹⁶ ASYLUM IN THE UNITED STATES, *supra* note 93, at 1.

⁹⁷ *Organization of the Office of Chief Actuary*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/actuaries/index.html#:~:text=The> (last visited Mar. 11, 2024).

⁹⁸ GROSS, WADE, SKIRVIN, MORRIS, BYE & HUSTON, *supra* note 6, at 2. “The Social Security trust funds are financial accounts in the U.S. Treasury. There are two separate Social Security trust funds, the Old-Age and Survivors Insurance (OASI) Trust Fund pays retirement and survivors benefits, and the Disability Insurance (DI) Trust Fund pays disability benefits.” *What are Trust Funds?*, SOC. SEC. ADMIN.,

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immigrants work at the same rate as the rest of the U.S. population by age and sex, the earnings of undocumented immigrants are less likely to be credited for benefit entitlements than the earnings from the rest of the U.S. population.⁹⁹ Benefit entitlements are programs offered by the Social Security Administration (“SSA”) which workers, employers, and the self-employed pay into through their Social Security taxes.¹⁰⁰ These taxes are collected and placed into trust funds.¹⁰¹ Individuals qualify for pay-outs, or benefits, from these trust funds based on their work history and the earnings they have contributed to the fund.¹⁰² Furthermore, “undocumented immigrants are barred from almost all government benefits, including food stamps, Temporary Assistance for Needy Families, Medicaid, federal housing programs, Supplemental Security Income, Unemployment Insurance, Social Security, Medicare, and the Earned Income Tax Credit (“EITC”).”¹⁰³ Because undocumented immigrants are ineligible for most federal benefits, and because their earned income is less likely to be credited towards Social Security entitlements, OCACT has projected that undocumented immigrants are net contributors to Social Security programs, meaning that they contribute more to Social Security programs than they draw out in benefits.¹⁰⁴

Undocumented immigrants contributed \$20.1 billion in federal taxes in 2018.¹⁰⁵ They generated around \$35.1 billion in Medicare surplus between 2000 and 2011.¹⁰⁶ Undocumented immigrants paid \$11.6 billion in state and local taxes in 2013.¹⁰⁷ While unauthorized immigrants worked and contributed as much as \$13 billion in payroll taxes to Social Security’s Old-Age, Survivors, and Disability Insurance (“OASDI”) program in 2010, they only drew out about \$1 billion in payments from the fund that same year.¹⁰⁸ In 2013, the average effective state and local tax rate of undocumented immigrants—that is, the share of their total income which they paid in taxes—was eight percent, compared to 5.4 percent for the top one percent of all taxpayers.¹⁰⁹ Thus, not only do undocumented workers contribute

<https://www.ssa.gov/news/press/factsheets/WhatAreTheTrust.htm> (last visited Apr. 23, 2024). Social Security taxes and other income are deposited in these accounts, and Social Security benefits are paid from them. The only purposes for which these trust funds can be used are to pay benefits and program administrative costs. *See id.*

⁹⁹ GROSS, WADE, SKIRVIN, MORRIS, BYE & HUSTON, *supra* note 6, at 2.

¹⁰⁰ FACT SHEET: SOCIAL SECURITY AND SUPPLEMENTAL SECURITY INCOME (SSI): WHAT’S THE DIFFERENCE?, SOC. SEC. ADMIN. (2009) (available at: <https://www.ssa.gov/sf/FactSheets/aianssavssisfinalrev.pdf>).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Lipman, *supra* note 7, at 5-6.

¹⁰⁴ GROSS, WADE, SKIRVIN, MORRIS, BYE & HUSTON, *supra* note 6; Lipman, *supra* note 7.

¹⁰⁵ *Undocumented Immigrants, NEW AM. ECON.*, <https://www.newamericaneconomy.org/issues/undocumented-immigrants> (last visited Feb. 28, 2024).

¹⁰⁶ *Id.*

¹⁰⁷ GEE, GARDNER, HILL & WIEHE, *supra* note 3.

¹⁰⁸ GROSS, WADE, SKIRVIN, MORRIS, BYE & HUSTON, *supra* note 6.

¹⁰⁹ GEE, GARDNER, HILL & WIEHE, *supra* note 3.

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more to Social Security programs than they draw out, they also contribute a greater share of their income than the top one percent of all taxpayers.¹¹⁰

2. Federal Income Tax and Undocumented Noncitizens

While the federal government taxes U.S. citizens based on their income level, non-U.S. citizens are also subject to taxes based on whether, according to the Code, they qualify as a “resident of the United States.”¹¹¹ The Code differentiates between “resident aliens”¹¹² who are subject to the same income tax laws as U.S. citizens and “nonresident aliens” who are subject to federal income tax only on income earned within the United States.¹¹³ There are two tests used to determine who qualifies as a “resident alien” for federal income tax purposes:¹¹⁴ (1) any noncitizen with lawful permanent status (i.e., a green card holder) qualifies;¹¹⁵ and (2) the “substantial presence test,” which is used to determine whether a noncitizen has resided in the United States for enough time to qualify as a “resident alien.”¹¹⁶ If a noncitizen is physically present in the United States “for at least 31 days during the current year, and at least 183 days during the current year and prior two years” they will be considered a “resident alien.”¹¹⁷

Under the Code, both individuals classified as “resident aliens” and U.S. citizens are required to have a TIN.¹¹⁸ A TIN is a permanent identification number that is unique to an individual¹¹⁹ and is used by the IRS in the administration of tax laws.¹²⁰ A TIN must be furnished on all tax related documents, including tax return filings and claims for benefits, making TINs crucial to those who wish to comply with U.S. tax law.¹²¹ There are five types of TINs an individual can use to identify themselves to the IRS when they file their taxes: (1) Social Security Numbers (“SSN”), (2) Employment Identification Numbers (“EIN”), (3) Taxpayer Identification Numbers for Pending Adoptions (“ATIN”), (4) Preparer Taxpayer Identification Numbers (“PTIN”), and (5) ITINs.¹²² SSNs are issued by the SSA and

¹¹⁰ *Id.*

¹¹¹ Lipman, *supra* note 7, at 18; *see also* 26 U.S.C. § 7701(b).

¹¹² Note that the term “alien(s)” shall only appear in quoted language, as it dehumanizes and further marginalizes noncitizens residing in the United States. *See* LIBRARY OF CONGRESS TO CANCEL THE SUBJECT HEADING “ILLEGAL ALIENS”, LIB. CONG. (2016) (available at: <https://www.loc.gov/catdir/cpsd/illegal-aliens-decision.pdf>) (“the phrase illegal aliens has become pejorative”).

¹¹³ Lipman, *supra* note 7.

¹¹⁴ *Id.* at 19.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 20.

¹¹⁹ *Id.*

¹²⁰ *Taxpayer Identification Numbers (TIN)*, INTERNAL REVENUE SERV., <https://www.irs.gov/individuals/international-taxpayers/taxpayer-identification-numbers-tin> (last updated Mar. 15, 2024).

¹²¹ *Id.*

¹²² *See id.*

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are assigned to U.S. citizens and residents.¹²³ Applicants for SSN cards must submit evidence of their identity, age, and either U.S. citizenship or lawful resident status.¹²⁴ EINs are issued by the IRS and are used by business entities, estates, and trusts that have a reportable income.¹²⁵ An ATIN is a temporary identification number issued by the IRS to individuals who legally adopt a U.S. citizen child and who do not have a SSN for that child in time to file the adoptive parent's tax return.¹²⁶ PTINs are issued by the IRS and are used by tax preparers on the tax returns they prepare.¹²⁷ ITINs are issued by the IRS and are only available to certain nonresident and resident noncitizens and their spouses and dependents who do not qualify for SSNs.¹²⁸

From the inception of federal income tax until 1942, taxpayers were not required to list any identification number on their income tax return forms ("Form 1040").¹²⁹ It is unclear what the rationale was for the IRS to begin to require identification numbers along with returns.¹³⁰ In 1961, Congress passed Public Law 87-397, which granted the IRS the authority to require that taxpayers include their SSNs or "such identifying number as may be prescribed for securing his proper identification."¹³¹ Up until the early 1980s, all workers, documented and undocumented alike, could receive and use a SSN to use as their TIN.¹³² However, by 1984, congressional pressure to curb undocumented labor led to the government practice of issuing social security cards marked with "Not Valid For Employment" to undocumented workers, preventing these workers from using their SSNs as their TIN in order to file tax returns.¹³³ SSN cards marked with "Not Valid For Employment" can be used by certain noncitizens who legally reside in the United States to qualify for federal benefits such as Temporary Assistance for Needy Families, Supplemental Security Income, Social Security Survivor benefits, Medicaid, and Food Stamps.¹³⁴ By 1986, the passage of the Immigration Reform and Control Act ("IRCA") severely limited the ability of undocumented workers to find authorized employment by requiring that employers have all new employees verify their work authorization status.¹³⁵ By listing Social Security cards as

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Marquise Riley, Brendan Brown, John McKinley & Eric Lewis, *A Research Note on the History of ITIN's Implementation and Adaptation in United States Tax Administration*, 9 BRC ACAD. J. BUS. 68 (2019) (available at: <http://www.cambriainstitute.com/journals/j.brcacadjb.2019.09.01.ja07.pdf>).

¹³⁰ *Id.* at 68.

¹³¹ *Id.* at 69, 71 (discussing Pub. L. 87-397, 75 Stat. 828).

¹³² Lipman, *supra* note 7, at 20.

¹³³ *Id.* at 21.

¹³⁴ U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-253T, SOCIAL SECURITY ADMINISTRATION: PROCEDURES FOR ISSUING NUMBERS AND BENEFITS TO THE FOREIGN-BORN (2005).

¹³⁵ Lipman, *supra* note 7, at 21.

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acceptable proof of work authorization, IRCA has led to the widespread use of counterfeit Social Security cards by undocumented workers.¹³⁶

In 1996, the IRS created the ITIN to collect taxes from foreign nationals and individuals who did not qualify for a SSN.¹³⁷ ITINs are available to individuals who reside in the United States without lawful immigration status.¹³⁸ As of 2015, around four million annual tax returns were being filed per year with the IRS using ITINs.¹³⁹ Paradoxically, while ITINs were created to be used by undocumented nonresidents when filing tax returns, ITINs *do not authorize* work in the United States.¹⁴⁰ Employers are required to pay employment taxes and provide employee SSNs to the IRS and the SSA for wages paid, but undocumented workers are not eligible to receive SSNs.¹⁴¹ This combination of documentation requirements essentially locks undocumented workers out of the ability to file taxes in an authorized manner.¹⁴² This puts undocumented workers in the difficult position of either filing taxes using an ITIN without providing a SSN, or violating U.S. tax law by filing taxes with a fraudulent SSN.¹⁴³

The use of invalid SSNs by undocumented workers is costly for the government.¹⁴⁴ When a taxpayer files using an ITIN and an invalid SSN, the IRS processes the return under the ITIN, and the taxpayer must then file a corrected W-2 Form¹⁴⁵ with a valid SSN.¹⁴⁶ Tax returns with mismatched identification numbers must be filed by hand rather than electronically.¹⁴⁷ This is a more time-consuming, costly, and laborious process for the IRS and the SSA.¹⁴⁸ Notably, “the SSA’s administrative cost of these mismatches is more than \$5 billion each year.”¹⁴⁹

¹³⁶ *Id.*

¹³⁷ FACT SHEET: THE FACTS ABOUT THE INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER (ITIN), AM. IMMIGR. COUNCIL (2022) (available at: https://www.americanimmigrationcouncil.org/sites/default/files/research/the_facts_about_the_individual_tax_identification_number_0.pdf).

¹³⁸ *Id.*

¹³⁹ Riley, Brown, McKinley & Lewis, *supra* note 129, at 67.

¹⁴⁰ Lipman, *supra* note 7, at 23.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See generally *About Form W-2, Wage and Tax Statement*, INTERNAL REVENUE SERV., <https://www.irs.gov/forms-pubs/about-form-w-2> (last visited May 17, 2024).

¹⁴⁶ Lipman, *supra* note 7, at 23.

¹⁴⁷ *Id.* at 24.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

II. PROBLEM AND LEGAL ANALYSIS

While undocumented workers contribute to the SSF, they are disproportionately excluded from its benefits,¹⁵⁰ leading to inequity in U.S. labor and taxation practices. Further, not being able to work legally in the United States can lead to higher crime rates by lowering a noncitizen's opportunity-cost of committing a crime.¹⁵¹ For example, data on the criminal justice involvement of undocumented immigrants in San Antonio, Texas, has revealed that this demographic was more likely to be arrested for felony property crimes after the enactment of IRCA.¹⁵² While IRCA granted legal resident status to many immigrants living in the United States without authorization, it also made it illegal to employ unauthorized noncitizens for the first time in U.S. history.¹⁵³ Undocumented immigrants who did not qualify for permanent residence under IRCA then faced new legal barriers to employment and, as a result, were more likely to commit property crimes.¹⁵⁴

By excluding undocumented workers from their contribution-based Social Security benefits, the U.S. government contravenes the Equal Protection Clause of the Fourteenth Amendment by discriminating against individuals who can receive their earned Social Security benefits on the basis of citizenship.¹⁵⁵

A. *Common Law Basis for Argument*

Under the Equal Protection Clause of the Fourteenth Amendment, states may not condition receipt of welfare benefits on the beneficiary having U.S. citizenship or residing in the U.S. for a specified number of years.¹⁵⁶ This application of the Equal Protection Clause to the receipt of welfare benefits was adopted by the Supreme Court in the landmark case *Graham v. Richardson*.¹⁵⁷ In that case, Arizona and Pennsylvania had welfare statutes under which individuals were required to demonstrate proof of citizenship or, if they were noncitizens, proof of their residency in the United States for a specified number of years.¹⁵⁸ The Arizona statute originated from the Social Security Act, was partially funded by federal grants, and was administered by the state under federal guidelines.¹⁵⁹ The Pennsylvania statute, on the other hand, was not federally supported and was fully funded and administered

¹⁵⁰ *Undocumented Immigrants*, NEW AM. ECON., <https://www.newamericaneconomy.org/issues/undocumented-immigrants> (last visited Feb. 28, 2024).

¹⁵¹ Alex Nowrasteh, *Delaying Work Permits for Asylum Seekers Could Increase Crime*, CATO INST. (June 24, 2020, 2:41 PM), <https://www.cato.org/blog/delaying-work-permits-asylum-seekers-could-increase-crime>.

¹⁵² Matthew Freedman, Emily Owens & Sarah Bohn, *Immigration, Employment Opportunities, and Criminal Behavior*, 10 AM. ECON. J.: ECON. POL'Y 117 (2018).

¹⁵³ Nowrasteh, *supra* note 151; Freedman, Owens & Bohn, *supra* note 152.

¹⁵⁴ Nowrasteh, *supra* note 151; Freedman, Owens & Bohn, *supra* note 152.

¹⁵⁵ Jason H. Lee, *Unlawful Status as a "Constitutional Irrelevancy"?: The Equal Protection Rights of Illegal Immigrants*, 39 GOLDEN GATE U. L. REV. 1 (2008).

¹⁵⁶ *Graham v. Richardson*, 403 U.S. 365, 376 (1971).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 366-67.

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by the state.¹⁶⁰ The Supreme Court affirmed the district courts' judgments in each case that a state statute that denied welfare benefits to resident noncitizens based on citizenship status or length of residency violated the Equal Protection Clause because within its provision that "[n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," the term "person" included both citizens and lawfully admitted noncitizen residents.¹⁶¹ The Court further held that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."¹⁶² The Supreme Court then went on to affirm the application of strict scrutiny for restrictions based on "alienage" in *Gregory v. Ashcroft*.¹⁶³ Given the strict scrutiny standard introduced in *Graham* and affirmed in *Ashcroft*, equal protection concerns should apply equally to the taxation of noncitizens as it does to eligibility for state welfare benefits.¹⁶⁴

However, the noncitizens who brought the constitutional challenge in *Graham* were all lawfully admitted resident noncitizens.¹⁶⁵ Unfortunately, there is already Supreme Court precedent that counsels against applying strict scrutiny to state classifications of undocumented immigrants under the Equal Protection Clause.¹⁶⁶ In *Plyer v. Doe*, petitioners challenged a revision of section 21.031 of the Texas Education Code, which allowed school districts in Texas to deny enrollment in public schools to undocumented children.¹⁶⁷ While the Supreme Court held that this revision of the Texas Education Code did violate the Equal Protection Clause, it rejected the argument that undocumented immigrants were a "suspect class" which should be afforded strict scrutiny.¹⁶⁸ This holding is inconsistent with the text of the Equal Protection Clause, which states: "Nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws."¹⁶⁹ By refusing to recognize undocumented immigrants as falling under the definition of "persons" under the Equal Protection Clause, the Supreme Court relegates them to a "nonperson" class, outside the scope of the legal system.¹⁷⁰

¹⁶⁰ *Id.* at 368.

¹⁶¹ *Id.* at 371 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that the Equal Protection Clause protects noncitizens from discriminatory enforcement of city ordinances on laundry businesses)).

¹⁶² *Id.* at 372.

¹⁶³ *Gregory v. Ashcroft*, 501 U.S. 452, 476 (1991).

¹⁶⁴ *See Graham*, 403 U.S. at 372; *see also Gregory*, 501 U.S. 452.

¹⁶⁵ *See Graham*, 403 U.S. at 367-70.

¹⁶⁶ *See Lee*, *supra* note 155; *see Plyler v. Doe*, 457 U.S. 202 (1982).

¹⁶⁷ *See Plyler*, 457 U.S. 202; TEX. EDUC. CODE ANN. § 21.031 (West 2016).

¹⁶⁸ *See Plyler*, 457 U.S. 202.

¹⁶⁹ *See Lee*, *supra* note 155; U.S. CONST. amend. XIV, § 1 (emphasis added).

¹⁷⁰ *Lee*, *supra* note 155, at 13.

B. Public Policy/Practical Basis for Argument

Undocumented immigrants would earn significantly more money, and consequently pay much more in taxes, if they had some sort of work authorization, be it permanent or temporary.¹⁷¹ A 2016 study by the Institute of Taxation and Economic Policy, estimating the tax contributions of the eleven million undocumented immigrants living in the United States as of 2013, found that allowing undocumented immigrants to work legally in the United States would boost their state and local tax contributions by more than \$2.1 billion per year.¹⁷² In fact, nearly all immigrants with some form of legal status pay taxes.¹⁷³ By providing undocumented immigrants with some form of work authorization, the U.S. government would create an avenue for those working in the United States to come forward and pay taxes.¹⁷⁴ Thus, granting undocumented immigrants authorization to work in the United States would result in more total tax contributions.¹⁷⁵

III. PROPOSAL

A. Temporary Work Authorization for the Most Vulnerable

In order to remedy the financial damage done to undocumented taxpayers through their exclusion from Social Security benefits, the U.S. government must grant automatic work authorization to individuals who pass a credible fear interview after crossing a U.S. border.

When an immigrant attempts to enter the United States without adequate documentation, whether through a port of entry or in between ports of entry, they are typically subject to expedited removal.¹⁷⁶ Expedited removal is a process that allows low-level immigration officers working for CBP to rapidly deport noncitizens back to their home country without affording them full due process considerations, such as a hearing before an immigration judge.¹⁷⁷ If an immigration officer apprehends an individual who illegally crossed the border within fourteen days of their arrival to the United States and within one hundred miles of the U.S.-Canada or U.S.-Mexico border, that individual may be subject to expedited removal.¹⁷⁸ This process grants immigration officers broad authority to determine whether an individual should be removed, and imposes very little oversight.¹⁷⁹ Individuals subject to expedited removal are detained by DHS until they are deported, and may not appeal the

¹⁷¹ ADDING UP THE BILLIONS, *supra* note 1.

¹⁷² *See generally* GEE, GARDNER, HILL & WIEHE, *supra* note 3.

¹⁷³ *See generally id.*

¹⁷⁴ PATRICK OAKFORD, CTR. FOR AM. PROGRESS, ADMINISTRATIVE ACTION ON IMMIGRATION REFORM (2014) (available at: <https://www.americanprogress.org/article/administrative-action-on-immigration-reform>).

¹⁷⁵ *See generally* ADDING UP THE BILLIONS, *supra* note 1; OAKFORD, *supra* note 174.

¹⁷⁶ ASYLUM IN THE UNITED STATES, *supra* note 93, at 3.

¹⁷⁷ FACT SHEET: A PRIMER ON EXPEDITED REMOVAL, AM. IMMIGR. COUNCIL (2023).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

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decision of the immigration officer.¹⁸⁰ The expedited removal process has existed since 1996, but in 2017, the Trump administration dramatically expanded the use of expedited removal along the U.S.-Mexico border.¹⁸¹ However, as of 2022, a noncitizen taken into custody within fourteen days of entering the United States who is placed into “expedited removal” proceedings may be put through a new process that allows a USCIS asylum officer to review and adjudicate their asylum claim before they are placed into formal removal proceedings.¹⁸² This new process is called “expedited asylum.”¹⁸³

Whether the United States subjects an individual to an “expedited” process or not, to ensure that the United States does not return individuals whose lives and liberty may be at risk, asylum seekers are subject to a credible fear screening process.¹⁸⁴ This process is used by CBP to quickly determine whether an individual placed in expedited removal has a “significant possibility” of establishing a winning asylum claim by performing a credible fear interview.¹⁸⁵ If the individual passes this interview, they will be referred to the immigration court to proceed with a defensive asylum process.¹⁸⁶ Once in immigration court, the noncitizen may either be detained by DHS in immigration detention or they may be released on bond and allowed to live in the interior of the United States.¹⁸⁷

If an individual is non-detained, they are responsible for their own necessities, such as food and housing.¹⁸⁸ Because prospective asylum applicants are neither citizens nor permanent residents, they would need to show potential employers they are eligible to work by presenting an Employment Authorization Document (“EAD”).¹⁸⁹ To be eligible to apply for an EAD, an applicant must have a completed asylum application filed with either USCIS or the immigration court.¹⁹⁰

¹⁸⁰ *Id.*

¹⁸¹ *See id.*

¹⁸² ASYLUM IN THE UNITED STATES, *supra* note 93, at 3.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 4.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ A SOBER ASSESSMENT OF THE GROWING U.S. ASYLUM BACKLOG, TRAC IMMIGR. (2022) (available at: <https://trac.syr.edu/reports/705>).

¹⁸⁸ Asylum seekers can receive unemployment benefits only if they are otherwise eligible to work in the United States. *See* Trixie Torres, *Can Asylum Seekers Apply for Unemployment in 2023?*, SHORELINE IMMIGR. (Oct. 27, 2022), <https://shorelineimmigration.com/asylum/can-asylum-seekers-apply-for-unemployment>. Asylees may qualify for federal benefits such as cash assistance, but only if they can show proof of having been granted asylum, thereby excluding those awaiting their asylum determinations from getting benefits and assistance. *See* BENEFITS AND SERVICES AVAILABLE FOR ASYLEES THROUGH HHS’S OFFICE OF REFUGEE RESETTLEMENT (ORR), ADMIN. FOR CHILD. & FAMS., OFF. REFUGEE RESETTLEMENT (2022) (available at: https://www.acf.hhs.gov/sites/default/files/documents/orr/orr_asylee_fact_sheet.pdf).

¹⁸⁹ *Employment Authorization*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/employer-information/employment-authorization> (last updated Sept. 6, 2023).

¹⁹⁰ Breanna Cary, *When Can Asylum Applicants Get a Work Permit (EAD Card)?*, NOLO, <https://www.nolo.com/legal-encyclopedia/asylum-applicants-work-permit-timing-32297.html> (last visited Feb. 28, 2024).

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An applicant must be waiting for a decision on their filed application for one-hundred fifty days or more before they are permitted to apply for an EAD.¹⁹¹ Someone applying for asylum with USCIS affirmatively would submit their application by mail, and once USCIS replies with a receipt notice, the one-hundred fifty day countdown begins.¹⁹² Those applying for asylum defensively after being placed in removal proceedings would file a complete asylum application with the immigration court, which would stamp that application once it is received, thereby starting the “clock” for when they can file an application for an EAD.¹⁹³

In June 2020, during the Trump administration, DHS issued two rules which further limited asylum applicants’ ability to qualify for EADs.¹⁹⁴ The first rule, known as the “Timeline Repeal Rule,” removed a regulatory provision giving USCIS only thirty days to adjudicate affirmative asylum applicants’ applications for work authorization.¹⁹⁵ The second rule, the “EAD Bar Rule,” imposed additional restrictions on eligibility for EADs.¹⁹⁶ Notably, the EAD Bar Rule increased the time asylum applicants had to wait to apply for work permits after filing for asylum from one-hundred fifty days to one year.¹⁹⁷ Affected asylum applicants and non-profit organizations successfully challenged these rules before the District of Columbia in *AsylumWorks v. Mayorkas*.¹⁹⁸ Following that decision, DHS issued a final rule implementing the district court’s vacatur.¹⁹⁹

This Note argues that individuals who pass a credible fear interview should be provided work authorization the moment they enter the United States, even before submitting their completed asylum application, in order to ease the burden they face when having to proceed with their asylum case without being able to legally earn an income.²⁰⁰ First, individuals who fail to submit asylum applications within one year of entering the United States are barred from applying for asylum with very few

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See generally *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11 (D.D.C. 2022).

¹⁹⁵ *USCIS Stopped Applying June 2020 Rules Pursuant to Court Order in Asylumworks v. Mayorkas*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/archive/uscis-stopped-applying-june-2020-rules-pursuant-to-court-order-in-asylumworks-v-mayorkas#:~:text=21%2C%202022%2C%20DHS%20announced%20publication,on%20a%20pending%20asylum%20application> (last updated Sept. 21, 2022); *Asylum Application, and Employment Authorization for Applicants; Implementation of Vacatur*, 87 Fed. Reg. 183 (Sept. 22, 2022) (to be codified at 8 C.F.R. § 208, 274a).

¹⁹⁶ *Asylum Application, and Employment Authorization for Applicants; Implementation of Vacatur*, 87 Fed. Reg. 183.

¹⁹⁷ *Id.*

¹⁹⁸ *Asylumworks*, 590 F. Supp. 3d 11.

¹⁹⁹ This final rule implements the vacatur by removing certain regulatory text governing asylum applications, interviews, and eligibility for employment authorization and an employment authorization document based on a pending asylum application. It also reinserts various regulatory provisions as they appeared prior to the effective dates of the two final rules issued in June 2020. See *Asylum Application, and Employment Authorization for Applicants; Implementation of Vacatur*, 87 Fed. Reg. 183.

²⁰⁰ See Ohm, *supra* note 10; see Pingree Press Release, *supra* note 10.

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exceptions.²⁰¹ By granting these individuals work authorization after completion of a credible fear interview, the government would facilitate their employment, thereby making it easier for them to support their basic needs while they adjust to life in the United States and prepare to meet filing deadlines.²⁰² Further, the asylum process can take years to conclude, and existing backlogs have only worsened since the COVID-19 pandemic.²⁰³ These backlogs effectively force asylum applicants into a limbo state where they must live in the United States without proper documentation.²⁰⁴ Providing undocumented immigrants with work authorization until their asylum case is adjudicated will encourage employment and allow them to pay into the SSF *and* draw the benefits they have rightfully earned.²⁰⁵

CONCLUSION

A liberal work authorization policy would enable immigrants to get higher earning jobs and earn higher incomes, which increases the amount they pay in taxes.²⁰⁶ Moreover, virtually all immigrants authorized to work or have legal status pay into the tax system, compared to about roughly half of the undocumented.²⁰⁷ The end result is more tax revenue at all levels of government.²⁰⁸

²⁰¹ ASYLUM IN THE UNITED STATES, *supra* note 93, at 2.

²⁰² See Ohm, *supra* note 10; see Pingree Press Release, *supra* note 10.

²⁰³ ASYLUM IN THE UNITED STATES, *supra* note 93, at 8.

²⁰⁴ See generally A SOBER ASSESSMENT OF THE GROWING U.S. ASYLUM BACKLOG, *supra* note 187.

²⁰⁵ See Ohm, *supra* note 10; see Pingree Press Release, *supra* note 10. See also Chair Cecilia Rouse, Lisa Barrow, Kevin Rinz & Evan Soltas, *The Economic Benefits of Extending Permanent Legal Status to Unauthorized Immigrants*, WHITE HOUSE BLOG (Sept. 17, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/09/17/the-economic-benefits-of-extending-permanent-legal-status-to-unauthorized-immigrants>.

²⁰⁶ See *Undocumented Immigrants*, *supra* note 105.

²⁰⁷ *Id.* at 6.

²⁰⁸ *Id.*