PROTECTING ASSETS & CHILD CUSTODY IN THE FACE OF DEPORTATION

A GUIDE FOR PRACTITIONERS ASSISTING IMMIGRANT FAMILIES

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FOREWORD

Dear Friends,

Can you imagine being abruptly ejected from the United States — and leaving behind your home, your children, your job, your bank account, and everything else you’ve spent years to build? Can you imagine what your children would feel when they arrived home and you’re gone?

Deportation can be a cataclysm for families and communities, destroying decades of hard-earned assets and rupturing family development. But with advanced planning, immigrant families can prevent an enormous amount of this damage.

That’s why Appleseed is proud to present an updated version of its 2012 Manual, “Protecting Assets and Child Custody in the Face of Deportation.” This one-of-a-kind resource is designed for immigrants and those who work with them; the host of attorneys, nurses, social workers, religious workers who are stepping up in challenging times.

Appleseed’s Manual will help families develop plans in advance to deal with critical financial and family issues in the event of deportation, arrest, and other family emergencies. It will help immigrant families deal with child custody and related children’s issues, personal finances, assets and personal property, remittance payments, wages and benefits, business issues, and taxes. And it includes special guidance for family and children’s issues, including professional advice for parents to help their families deal with painful psychological issues, and for immigrant survivors of domestic violence and sexual assault.

Make no mistake: for vulnerable immigrant families, advance planning can make all the difference. Once an immigrant is detained or deported from the United States, navigating a legal proceeding or managing assets is much more difficult, or even impossible, especially since immigration laws bar immigrants from reentering the United States after deportation for several years.

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Immigrants come to the United States to build a better future and to unite with family members. Most have lived in the United States for many years, paying taxes and joining the daily life of their communities. Over time, immigrants buy homes, start businesses and build personal assets. When they build better lives, they make our country stronger.

That’s why this Manual is a labor of love for all who worked on it. We are committed to fairness and compassion for the millions of immigrants living in our country. Our hope is that you can use this resource to help them build better lives.

Sincerely,

Annette LoVoi, Director, Financial Access and Asset Building, Appleseed
Disclaimers

Each Chapter is intended to provide generalized information on a particular topic. In many cases, laws may differ from state to state. Therefore, this information is not intended to replace state-specific legal assistance. Nothing in this manual is intended to create an attorney-client or fiduciary relationship.

Appleseed recognizes and understands the legal term “alien,” used to describe any person born in another country to parents who are not American and who has not become a naturalized citizen, but is living or staying in the United States. However, throughout this Manual, we will primarily use the term “immigrant” in place of the term “alien” based on AP Stylebook guidance and the recommendations of our partners. The exception will be when citing laws, codes, or regulations that specifically use the term “alien.”
22. Tax Filing Issues

Filing taxes and receiving a tax refund (if an immigrant has overpaid taxes) is a necessary part of earning income in the United States. Under the “substantial presence” test, most immigrants are classified as residents for tax purposes and must file the standard form 1040. This chapter addresses the following issues:

- Are You a Resident or Non-resident Immigrant for Tax Filing Purposes?
- Are You Required to File a Tax Return? Should You Anyway?
- What If Your Spouse Is Deported and You Remain in the Country?
- When Do You Receive Your Tax Refund if One is Owed to You?
- What Are the Penalties for Failure to File Tax Returns?
- Where Can You Obtain the Necessary Forms to File Taxes?

Are You a Resident or Non-resident Immigrant for Tax Filing Purposes?

An immigrant must first determine whether he is a resident or non-resident immigrant for tax purposes in order to determine which forms to use and what income should be taxed. Resident immigrants generally are taxed on their worldwide income, the same as U.S. citizens. Non-resident immigrants are taxed only on their income from sources within the United States and on certain income connected with the conduct of a trade or business in the United States.

An immigrant that is not a lawful permanent resident for immigration law purposes may, and probably often will be, a resident immigrant for tax purposes. Section 7701(b) of the IRC includes as a resident immigrant anyone who maintains a “substantial presence” in the United States, which requires (i) 31 days of presence during the year in question and (ii) the sum of the number of days of presence during the year in question plus the 2 proceeding years is at least 183 after weighting. To meet the second prong, days from the present year are multiplied by one, days from the prior year are multiplied by one-third, and days from the second preceding year are multiplied by one-sixth, then the resulting numbers are added. Thus, immigrants living in the United States full time are probably considered resident immigrants for tax purposes. Resident immigrants are required to file Form 1040 while they are in the United States, and when back in their
home country, may continue to be treated as resident immigrants as long as the substantial presence test is satisfied.

Are You Required to File a Tax Return? Should You Anyway?

A resident immigrant must file a tax return if their income is above a certain level. The amount varies depending on filing status, age, and the type of income earned. For example, for 2016, a married couple both under age 65 generally was not required to file unless their joint income exceeded $20,700. However, self-employed individuals generally must file a tax return if their net income from self-employment was at least $400. Tax issues are covered by the Internal Revenue Code (the “IRC”) and regulations.

A non-resident immigrant must file a tax return unless his only income connected to the United States is wages less than the amount of the personal exemption, currently $4,050.

There are no special laws or regulations for immigrants facing deportation.

Even if an individual is not required to file taxes, they may choose to file in order to receive a refund of any overpaid taxes or to receive tax credits such as the Earned Income Tax Credit.

What If Your Spouse is Deported and You Remain in the Country?

Once the deported spouse fails the “substantial presence” test and is considered a non-resident immigrant for tax purposes, the resident spouse may still file a joint return if the deported spouse chooses to be treated as a resident immigrant for tax purposes. In other words, even though your spouse is out of the country and no longer a resident of the United States, the spouse who remains in the country may choose to file as married filing jointly with the deported spouse. This may be beneficial to the resident because of the favorable tax treatment of a couple filing jointly.

If a joint return is filed, however, the non-resident immigrant spouse must declare their worldwide income on the U.S. tax return.

When Do You Receive Your Tax Refund If One is Owed to You?

Refunds will not be paid at the time of an immigrant’s departure. Immigrants classified as resident immigrants for tax purposes must complete Form 1040, 1040A, or 1040-EZ and will receive a refund if one is
owed. If non-resident immigrants are owed tax refunds, they must complete Form 1040NR or 1040NR-EZ at the end of the tax year to receive their refunds. A claim for refund must be made within three years of the due date of the return, or you lose your right to that refund. Once a tax return is submitted to the IRS reflecting that a refund is owed, the amount due is ordinarily paid within approximately 21 days, however payments sometimes take longer.

**What Are the Penalties for Failure to File Tax Returns?**

If an immigrant fails to file tax returns, the immigrant may be subject to civil and criminal penalties. While criminal penalties may not be enforceable on the immigrant once they have left the United States, civil penalties could potentially be enforceable on property owned by the immigrant that is left behind in the United States. There are different civil penalties for filing late, fraud, paying the tax late, and accuracy problems. The civil penalty for filing late is based on the tax not paid by the due date. The penalty is usually 5% for each month or part of a month that a return is late, but not more than 25%. In addition, if the immigrant owes income tax, the IRS has ten years from the date the tax is assessed to collect the tax. But if the immigrant fails to file a tax return, the ten-year period for collection does not start running. In this case, the IRS has an indefinite time to collect the owed taxes. Failing to file tax returns also may have negative consequences should the immigrant seek to immigrate to the United States again in the future.

**Where Can You Find the Necessary Forms to File Taxes?**

All necessary forms are available on the IRS website at [www.irs.gov](http://www.irs.gov) (Spanish language version: [www.irs.gov/spanish](http://www.irs.gov/spanish)) for downloading and printing. Alternatively, one can request copies of forms by phone (1-800-829-1040). The IRS provides International Services by phone at (1-267-941-1000, not toll-free) or by mail at:

Internal Revenue Service
International Accounts
Philadelphia, PA 19255-0725

One can also contact the Taxpayer Advocate assigned to international taxpayers for help with tax problems.

**By mail:**

IRS Taxpayer Advocate Service
PO Box 11996
San Juan, PR 00922
In person:
City View Plaza
48 Carr 165, 5th Floor
Guaynabo, PR 00968-8000

By phone:
1-877-777-4778 (Toll-free)
1-787-522-8600 (Spanish)
1-787-522-8601 (English)

CHECKLIST: FILING TAXES

☐ Even if you are not a lawful permanent resident for immigration law purposes, you may be — and if you have lived in the U.S. for a long time, you probably are — a resident immigrant for tax law purposes.

☐ If you are a resident immigrant for tax law purposes, you should complete the Form 1040 at the end of the tax year as you would have if you were in the United States.

☐ If you are a nonresident immigrant for tax purposes, you should complete Form 1040NR or Form 1040NR-EZ at the end of the tax year in order to receive any refund for the year.

☐ A resident spouse can file their tax returns jointly with a deported spouse if the deported spouse chooses to be treated as a resident immigrant for tax purposes. In that case, the deported spouse must declare their worldwide income on the return.

☐ If you fail to file your appropriate tax forms, you may be subject to civil and criminal penalties. This may make it impossible for you to ever immigrate to the United States again.


KEY TAKEAWAY
If you are deported, you may still have to, or may wish to, file a Form 1040 or 1040 NR, as appropriate, at the end of the tax year. Filing a tax return will allow you to receive any overpaid taxes and any tax credits — such as the Earned Income Tax Credit — that you are owed.