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Treatment of Noncitizens Under the Affordable Care Act

Updated October 27, 2016

Congressional Research Service
https://crsreports.congress.gov
R43561

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The degree to which foreign nationals (noncitizens/aliens) should be accorded access to certain benefits as a result of their presence in the United States, as well as the responsibilities of such persons given their legal status (e.g., immigrants, nonimmigrants, unauthorized aliens), often figures into policy discussions in Congress. These issues become particularly salient when Congress considers legislation to establish new immigration statuses or to create or modify benefit or entitlement programs.

The 111th Congress enacted the Patient Protection and Affordable Care Act (P.L. 111-148), which has been amended by the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152) and several other bills. (ACA refers to P.L. 111-148 as amended by P.L. 111-152 and the other legislation.) The ACA created new responsibilities (e.g., the requirement that most people in the United States obtain health insurance) and new benefits (e.g., tax credits to help certain people purchase health insurance), and it addressed the eligibility and responsibility of foreign nationals for these provisions. One issue that has arisen during some debates to amend provisions in the ACA and during discussions of immigration reform is the eligibility of foreign nationals for some of the ACA's key provisions.

At the center of noncitizen eligibility for provisions under the ACA is the term "lawfully present." Aliens who are "lawfully present in the United States" are generally subject to the health insurance mandate and are eligible, if otherwise qualified, to participate in the exchanges (the health insurance marketplace) and for the premium tax credit and cost-sharing subsidies available to certain individuals who purchase insurance through an exchange. For purposes of the ACA, "lawfully present" has been defined in regulation and includes lawful permanent residents (LPRs), asylees, refugees, foreign nationals admitted under any nonimmigrant visa who are in status, and certain other classifications under the Immigration and Nationality Act (INA).

To purchase insurance through an exchange, a noncitizen must be expected to be lawfully present for the entire period of coverage. Although the minimum period of coverage was established by regulation as 12 months, the exchanges will decide on an enrollment period based on the length of time the alien is authorized to be in the country. The ACA bars foreign nationals who are not lawfully present from purchasing insurance through a health insurance exchange.

In addition, certain individuals who purchase insurance through an exchange may be eligible for the premium tax credit and cost-sharing subsidies to help defray the cost of the insurance. To be eligible, an applicant must meet income requirements based on family size and the federal poverty level, and must also file a tax return in order to claim the credit. Noncitizens who are not lawfully present are ineligible for the premium credit and cost-sharing subsidies because they are barred from purchasing insurance through an exchange.

To enforce the noncitizen eligibility requirements under the ACA, the act required the Secretary of Health and Human Services to establish a program to determine whether an individual who is to be covered in the individual market by a qualified health plan offered through an exchange or who is claiming a premium tax credit or cost-sharing subsidy is a citizen or national of the United States or an alien lawfully present in the United States. This system first checks the Social Security Administration (SSA) records. If SSA can confirm that the person is a citizen, then the check stops at that point. If the person is a "noncitizen" in SSA records, the system checks against Department of Homeland Security (DHS) records to confirm lawful presence. The Departments of Health and Human Services and Homeland Security have stated that no information collected as part of enrollment in an exchange plan will be used for any civil immigration enforcement actions.

Contents

Introduction 1
Treatment of Noncitizens Under the Patient Protection and Affordable Care Act (ACA) 2
Definition of Lawfully Present 2
Health Insurance Mandate 3
Tax Treatment of Noncitizens 4
Exchanges 5
Premium Tax Credit and Cost-Sharing Subsidies 6
ACA Changes to Medicaid 7
Interaction Between Alien Eligibility for Premium Credits/Subsidies and Medicaid Eligibility 9
Verification of Alien Status Under the ACA 10
Immigration Enforcement and Verification for Exchange Plans 12

Appendixes

Appendix A. Definition of Lawfully Present Under the ACA 13
Appendix B. The Estimated Size of the Noncitizen Population in the United States 15

Contacts

Author Information 16

Introduction

The degree to which foreign nationals (noncitizens/aliens)[1] should be accorded access to certain benefits as a result of their presence in the United States, as well as the responsibilities of such persons given their legal status (e.g., immigrants, nonimmigrants, unauthorized aliens), often figures into policy discussions in Congress. These issues become particularly salient when Congress considers legislation to establish new immigration statuses or to create or modify benefit and entitlement programs.

The 111th Congress enacted the Patient Protection and Affordable Care Act (P.L. 111-148), which has been amended by the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152) and several other bills. (ACA refers to P.L. 111-148 as amended by P.L. 111-152 and the other legislation.)[2] The ACA created new responsibilities (e.g., the requirement that most people in the United States obtain health insurance) and new benefits (e.g., tax credits to help certain people purchase health insurance), and it addressed the eligibility and responsibility of foreign nationals for these provisions. One issue that has arisen during debates to amend provisions in the ACA and during discussions of immigration reform is the eligibility of foreign nationals for some of the ACA's key provisions.

This report opens with a discussion of several different statutory and regulatory definitions of lawfully present. On the surface, alien eligibility for provisions under the ACA appears straightforward. In general, those who are lawfully present are eligible, and those who are not lawfully present are not eligible. However, due to differing definitions of "lawfully present" and the interaction between the treatment of noncitizens under tax law, the Immigration and Nationality Act, and the ACA, the eligibility of individuals with certain immigration statuses for these provisions can become more complicated.

This report then analyzes the eligibility of foreign nationals for key provisions in the ACA that have restrictions based on immigration status: the requirement to maintain health insurance, the ability to purchase insurance through an exchange, and eligibility for the premium tax credit and cost-sharing subsidies.[3] It includes consideration of the implementing regulations and the impact of the Supreme Court's ruling in *National Federation of Independent Business v. Sebelius*.[4] This report concludes with information on the alien-status verification process.

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[1] A noncitizen is anyone who is not a citizen or national of the United States—this term is synonymous with the terms alien and foreign national. The noncitizen may be in the United States temporarily or permanently and be either lawfully present or present without authorization.

[2] The ACA was signed into law on March 23, 2010. On March 30, 2010, the ACA was amended by P.L. 111-152, the Health Care and Education Reconciliation Act of 2010. Since then, Congress has passed more than 10 laws that amend the ACA. None of the legislation enacted after P.L. 111-148 changed the eligibility of noncitizens for the key provisions of the ACA discussed in this report. For a discussion of the legislation to amend the ACA, see CRS Report R43289, *Legislative Actions to Repeal, Defund, or Delay the Affordable Care Act*, by C. Stephen Redhead and Janet Kinzer.

[3] For more information on these provisions, see CRS Report R41331, *Individual Mandate Under the ACA*, by Annie L. Mach; CRS Report R43233, *Private Health Plans Under the ACA: In Brief*, by Bernadette Fernandez and Annie L. Mach; CRS Report R42663, *Health Insurance Exchanges Under the Patient Protection and Affordable Care Act (ACA)*, by Bernadette Fernandez and Annie L. Mach; and CRS Report R41137, *Health Insurance Premium Credits in the Patient Protection and Affordable Care Act (ACA) in 2014*, by Bernadette Fernandez.

[4] *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). For more information, see CRS Legal Sidebar WSLG108, *A Line in Shifting Sand?: Failure to Implement "New" Medicaid Requirements Under the ACA Cannot Result in Loss of Existing Funds*, by Kenneth R. Thomas; CRS Report R42367, *Medicaid and Federal Grant Conditions After NFIB v. Sebelius: Constitutional Issues and Analysis*, by Kenneth R. Thomas.

Treatment of Noncitizens Under the Patient Protection and Affordable Care Act (ACA)

The following section discusses alien eligibility for the following provisions under the ACA: the health insurance mandate, the exchanges (the Marketplace), and premium tax credits and cost-sharing subsidies. In general, aliens are separated into two groups for eligibility purposes under the ACA: aliens who are "lawfully present in the United States" are eligible for these provisions, while aliens who are not "lawfully present in the United States" are ineligible.

For purposes of this report, the term "not-lawfully present aliens" will refer to noncitizens who do not meet the definition of "lawfully present" under regulations for the ACA.

Definition of Lawfully Present

One of the complexities of alien eligibility for the ACA stems from the difficulty of defining who is considered lawfully present. The regulations implementing the ACA define lawfully present to include immigrants, asylees/refugees, nonimmigrants, and most other noncitizens who are known to the U.S. government and have been given some type of permission to remain temporarily in the United States. (For the full list, see **Appendix A**.) "Lawfully present" was first defined by regulation in this context for the purposes of eligibility for the high risk pools for uninsured people with pre-existing conditions.[5] Since then, all regulations regarding the ACA have referenced that definition for the health insurance mandate, the exchanges, and the premium credit and cost-sharing subsidies.[6] The definition of lawfully present for the ACA is identical to the Center for Medicaid and Medicare Services (CMS) policy definition of "lawfully residing" for Medicaid and CHIP eligibility[7] and is similar to the definition of "lawfully present" for Social Security eligibility.[8]

Nonetheless, "lawfully present" is not a term that is widely used within the Immigration and Nationality Act (INA). The INA divides foreign nationals into two general types of legal statuses for admission to the United States: immigrants and nonimmigrants. Under the INA, other aliens may have permission to be in the United States, but they do not have an immigration status. The term "lawfully present" in the INA is only defined in regards to noncitizen eligibility for Social Security.[9] The INA also defines the term "unlawfully present" specifically for purposes of

[5] 45 C.F.R. §152.2; 75 *Federal Register* 45029, July 30, 2010, as amended by 77 *Federal Register* 52616, August 30, 2012.

[6] 26 C.F.R. §§1.36B-1(g), 1.5000A-3(c)(2)(ii)(B); 45 C.F.R. §155.20. See also 42 C.F.R. §600.5 (using the same definition for the basic health program).

[7] Center for Medicare and Medicaid Services, Re: Medicaid and CHIP Coverage of "Lawfully Residing" Children and Pregnant Women, SHO # 10-006, CHIPRA #1 7, Baltimore, MD, July 1, 2010.

[8] 8 C.F.R. §103.12. For a discussion of noncitizen eligibility for Social Security, see CRS Report RL32004, *Social Security Benefits for Noncitizens*, by Dawn Nuschler and Alison Siskin.

[9] P.L. 104-208 (The Illegal Immigration Reform and Immigrant Responsibility Act of 1996) amended the INA to state that only lawfully present noncitizens are eligible to receive Social Security benefits in the United States. Lawfully present for Social Security eligibility is defined in regulation (8 C.F.R. §103.12). The definition is similar to the definition of lawfully present under the ACA. In addition, P.L. 104-193, (The Personal Responsibility and Welfare Reform Act of 1996), also contains a provision that requires states to pass a law if they want to provide state or local public benefits to aliens who are not lawfully present (§411(d)). Nonetheless, there is not a definition associated with

determining inadmissibility, but that definition is not equivalent to the definition of "lawfully present" for purposes of the ACA.[10]

There are noncitizens who have temporary permission to remain in the Unites States under narrowly defined circumstances such as those with temporary protected status (TPS),[11] withholding of removal,[12] Deferred Enforced Departure,[13] and parole[14]—often referred to as the "quasi-legal population." This "quasi-legal" population is counted by researchers at the Department of Homeland Security (DHS) and at the Pew Research Center's Hispanic Trends Project—the two main entities that estimate the unauthorized alien population—as part of the unauthorized (illegal) population. Although these "quasi-legal" migrants comprise a small percentage of the total noncitizen population, most are considered "lawfully present" for the purposes of the ACA.[15] (For a discussion of these estimates, see **Appendix B**, "Estimates of the Noncitizen Population in the United States.")

Health Insurance Mandate

The ACA includes the "individual mandate," which generally requires individuals to have a minimum level of health insurance beginning in 2014 and imposes penalties for noncompliance.[16] In other words, most individuals who do not maintain a minimum level of health insurance coverage for themselves and their dependents will be required to pay a penalty, which is administered and collected through the Internal Revenue Code (IRC). The ACA and its implementing regulations identify some exemptions from the mandate.[17]

"not lawfully present" for this purpose. For information on noncitizen eligibility for Social Security, see CRS Report RL32004, *Social Security Benefits for Noncitizens*, by Dawn Nuschler and Alison Siskin.

[10] Unlawfully present is defined in the INA in a very specific manner in §212 (a)(9)(B)(ii) for purposes of that section as: "an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled." 8 U.S.C. §1182(a)(9)(B)(ii).

[11] Temporary Protected Status (TPS) is blanket relief that may be granted under the following conditions: there is ongoing armed conflict posing serious threat to personal safety; a foreign state requests TPS because it temporarily cannot handle the return of nationals due to environmental disaster; or there are extraordinary and temporary conditions in a foreign state that prevent aliens from returning, provided that granting TPS is consistent with U.S. national interests. INA §244(h); 8 U.S.C. §1254a. For more on TPS, see CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Carla N. Argueta and Ruth Ellen Wasem.

[12] Withholding of removal is a temporary form of relief from removal to a country where the U.S. government has determined that the alien's life would be threatened because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. INA §214(b)(3), 8 U.S.C. §1231(b)(3). For more on withholding of removal, see CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia.

[13] Deferred Enforced Departure (DED) is not and does not confer an immigration status. The granting of DED is not based upon any specific statutory authority, but instead typically premised upon the Executive's independent constitutional authority to provide temporary relief from removal based on foreign policy, humanitarian, and immigration concerns.

[14] "Parole" is a term in the INA which means that the alien has been granted temporary permission to enter and be present in the United States. Parole does not constitute formal admission to the United States and parolees are required to leave when the parole expires, or if eligible, to be admitted in a lawful status. See 8 U.S.C. §1182(d)(5)(A) and 8 C.F.R. §212.5.

[15] See **Appendix A**, "Definition of Lawfully Present For Purposes of the ACA."

[16] ACA §1501(b) (codified at 26 U.S.C. §5000A). For more information on the health insurance mandate, see CRS Report R41331, *Individual Mandate Under the ACA*, by Annie L. Mach.

[17] For more information, see CRS Report R41331, *Individual Mandate Under the ACA*, by Annie L. Mach.

For those who do not maintain coverage and do not qualify for an exemption, the penalties are assessed through the federal tax filing process. If an individual fails to pay the penalty, the Internal Revenue Service (IRS) can collect any penalties owed by reducing the amount of an individual's tax refund, but is prohibited from using other common methods of collection (e.g., garnishing the individual's wages).[18]

Aliens are expressly exempted from the individual mandate for any month they are not lawfully present in the United States.[19] Additionally, a noncitizen who is a nonresident alien (which is a term used in tax law and is defined below in "Tax Treatment of Noncitizens") is also exempt from the individual mandate.[20] Nonresident aliens include both lawfully and non-lawfully present individuals.

All other aliens who are lawfully present and are not nonresident aliens are covered by the requirement to maintain health insurance, provided they do not qualify for an exemption.[21]

Tax Treatment of Noncitizens

For purposes of the ACA, understanding the U.S. income tax treatment of noncitizens may be important for several reasons, including that any noncitizen who is a nonresident alien—which is a tax law term—is not subject to the individual mandate.[22] Also, some might be interested in understanding the tax liability of noncitizens in light of the fact that the IRS may face difficulty in enforcing the mandate against any taxpayer (citizen or resident alien) who does not receive a tax refund.

For federal tax purposes, foreign nationals are classified as resident or nonresident aliens.[23] These terms are used in the Internal Revenue Code (IRC) but do not exist in the Immigration and Nationality Act (INA).[24] As a result, the specific immigration statuses under the INA do not align directly with the terms resident and nonresident alien.[25]

In general, an individual is a nonresident alien unless he or she meets the qualifications under either residency test:

- Green card test: the individual is a lawful permanent resident of the United States at any time during the current year, or
- Substantial presence test: the individual is present in the United States for at least 31 days during the current year and at least 183 days during the current year and

[18] ACA §1501(b) (codified at 26 U.S.C. §5000A(g)); 26 C.F.R. §1.5000A-5; Dep't of Treasury, IRS, "Shared Responsibility Payment for Not Maintaining Minimal Essential Coverage," 78 *Federal Register* 53655 (August 30, 2013) (noting that the accuracy-related penalty for underpayment of tax does not apply to the individual mandate penalty).

[19] ACA §1501(b) (codified at 26 U.S.C. §5000A(d)(3)).

[20] 26 C.F.R. §1.5000A-3(c)(2)(ii)(A).

[21] ACA §1501(b) (codified at 26 U.S.C. §5000A(d)). The requirement only applies to the months that the individual is lawfully present for the entire month. ACA §1501(b) (codified at 26 U.S.C. §5000A(a)).

[22] 26 C.F.R. §1.5000A-3(c)(2)(ii)(A).

[23] It is possible for an individual to be a resident alien and a nonresident alien during the same year. For an explanation of the rules on determining residency starting and ending dates and dual-status filing, see *IRS Publication 519: U.S. Tax Guide for Aliens*, which is available at http://www.irs.gov.

[24] 8 U.S.C. §§1101 *et seq*.

[25] For example, based on time in the United States and treaty obligations, some foreign agricultural workers (H-2A visa holders) would be considered resident aliens while others would be considered nonresident aliens for tax purposes.

previous two years (counting all the qualifying days in the current year, one-third of the days in the prior year, and one-sixth of the days in the earliest year).[26]

There are several situations in which an individual may be classified as a nonresident alien even though he or she meets the substantial presence test. For example, an individual will generally be treated as a nonresident alien if he or she has a closer connection to a foreign country than to the United States, maintains a "tax home" in the foreign country, and is in the United States for fewer than 183 days during the year.[27] Another example is that an individual in the United States under an F-, J-, M-, or Q-visa—students, teachers, trainees, and cultural exchange visitors—may be treated as a nonresident alien if he or she has substantially complied with visa requirements.[28] This treatment generally applies to foreign students (most foreign students are on F visas) for their first five years in the United States and to teachers and trainees for the first two years.[29]

Additional examples of individuals who may be treated as nonresident aliens even if they would otherwise meet the substantial presence test include regular commuters from Canada or Mexico, among others.[30] Furthermore, depending on where the individual is from, there may be an income tax treaty between that country and the United States with provisions for determining residency status.[31]

Resident aliens are subject to the same tax treatment as U.S. citizens, which includes being subject to tax on income from both U.S. and foreign sources. They are subject to the same rules as U.S. citizens regarding income tax withholding and making estimated tax payments throughout the year. To the extent such withholding or payments exceed an individual's income tax liability, he or she may receive a tax refund from the IRS, which could be reduced to collect the penalty for failure to comply with the individual mandate.

Nonresident aliens are subject to different treatment.[32] For example, some income earned by nonresident aliens is excluded from gross income and thus U.S. taxation, including foreign-source income, compensation paid by a foreign employer to a nonresident alien with a F, J, or Q-visa, compensation of employees of foreign governments and international organizations, and income exempt under an income tax treaty or other agreement.[33] Since nonresident aliens are not subject to the individual mandate and therefore would not owe the penalty, their withholding and refund rules do not appear to be relevant.

Exchanges

The ACA allows certain individuals and small businesses to buy health insurance through state exchanges. (The exchanges are also called health insurance marketplaces.) The exchanges are not

[26] 26 U.S.C. §§7701(b)(1)(A) and (b)(3). A nonresident alien may elect, under certain circumstances, to be treated as a resident alien if the substantial presence test is met in the year following the election. 26 U.S.C. §7701(b)(4). A dual-status or nonresident alien married to a U.S. citizen or resident may qualify to be treated as a resident alien for the entire year. 26 U.S.C. §§6013(g) and (h).

[27] 26 U.S.C. §7701(b)(3)(B).

[28] 26 U.S.C. §7701(b)(5).

[29] 26 U.S.C. §7701(b)(5)(E).

[30] 26 U.S.C. §§7701(b)(3)(D), (b)(5), and (b)(7).

[31] See 26 C.F.R. §301.7701(b)-7.

[32] 26 U.S.C. §872(a).

[33] See, for example, 26 U.S.C. §§892 and 893; Vienna Convention on Consular Relations (April 22, 1963); International Bank For Reconstruction and Development, Articles of Agreement (as amended, effective June 27, 2012).

themselves insurers, but rather are special marketplaces where insurance firms may sell health insurance policies that meet federally established guidelines to eligible individuals and small businesses.[34] Under the ACA, the open enrollment period for exchanges began October 1, 2013. The law allows all lawfully present noncitizens to purchase insurance through an exchange, but specifies that a person is only considered lawfully present if the person is, and is reasonably expected to be for the entire period of enrollment, a U.S. citizen or national or an alien who is lawfully present in the United States.[35]

Although the shortest period of enrollment has been established by regulation as 12 months,[36] the Department of Health and Human Services (HHS) has indicated that an exchange will determine an individual's eligibility for the period of time for which the individual's lawful presence has been verified. HHS also stated that it may issue additional guidance on this topic.[37] As of the date of this report, CRS is not aware of such guidance. In other words, it appears that all lawfully present noncitizens, regardless of the length of admittance to the United States, are able to purchase insurance through an exchange.

Aliens who are not lawfully present are barred from obtaining insurance through an exchange.[38]

Premium Tax Credit and Cost-Sharing Subsidies

Based on their income, certain individuals may qualify for a tax credit toward their premium costs and a subsidy for their cost-sharing for insurance purchased through an exchange.[39] The tax credit is both (1) refundable, meaning it can exceed a taxpayer's income tax liability, with the taxpayer receiving the difference as a cash payment from the IRS in the form of a tax refund (and therefore it can be claimed by taxpayers with little or no U.S. income tax liability) and (2) advanceable, meaning the taxpayer can claim it when he or she files an income tax return at the end of the year or claim advance payment of it, in which case the credit will go directly to the insurer.[40] The subsidies go toward cost-sharing expenses, such as coinsurance and co-payments, and are paid to the insurance company and not directly to the enrollee.[41]

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[34] CRS Report R43243, *Health Insurance Exchanges: Health Insurance "Navigators" and In-Person Assistance*, by Suzanne M. Kirchhoff .

[35] ACA §1312(f)(3) (codified at 42 U.S.C. §18032(f)(3)).

[36] Dep't of Health and Human Services, "Final Rule on Establishment of Exchanges and Qualified Health Plans, and Exchange Standards for Employers, Effective May 29, 2012," 77 *Federal Register* 18310, March 27, 2012.

[37] In the comment section for the final regulations regarding eligibility for exchanges, HHS states "The final rule maintains the 'reasonably expected' standard in accordance with section 1312(f)(3) of the Affordable Care Act. We do not interpret this provision to mean that an applicant must be lawfully present for an entire coverage year; rather, we anticipate that the verification process will address whether an applicant's lawful presence is time-limited, and if so, the Exchange will determine his or her eligibility for the period of time for which his or her lawful presence has been verified. We anticipate providing future guidance on this topic, with a focus on minimizing administrative complexity and burden." *Ibid*, p. 18350.

[38] ACA §1312(f)(3) (codified at 42 U.S.C. §18032(f)(3)).

[39] ACA §1401(a) (codified at 26 U.S.C. §36B); ACA §1402 (codified at 42 U.S.C. §18071). The credit and subsidies became available in 2014. For more information, see CRS Report R41137, *Health Insurance Premium Credits in the Patient Protection and Affordable Care Act (ACA) in 2014*, by Bernadette Fernandez.

[40] For more information, see CRS Report R41137, *Health Insurance Premium Credits in the Patient Protection and Affordable Care Act (ACA) in 2014*, by Bernadette Fernandez.

[41] To be eligible, individuals must be eligible for the premium tax credits and enrolled in a silver plan through an exchange. For more information, see CRS Report R43048, *2013 Overview of Private Health Insurance Provisions in the Patient Protection and Affordable Care Act (ACA)*, by Annie L. Mach (out of print; available to congressional clients upon request). See also ACA §1412(a)(3), (b) (codified at 42 U.S.C. 18082(a)(3), (b)).

In order to claim the credit or subsidy, an individual's household income generally must be at least 100% but no more than 400% of the applicable federal poverty level (FPL). Household income is the family's adjusted gross income plus any excluded foreign income/housing costs, tax-exempt interest, and non-taxable Social Security benefits.[42] Additionally, the individual must not have access to affordable coverage from alternate sources, such as Medicaid or employer provided coverage.[43]

All lawfully present aliens who meet specified criteria are eligible for the premium tax credit and cost-sharing subsidies.[44] Further, there is a special rule for them—household income that is less than 100% of FPL will be deemed to be 100% if the individual or a member of his/her family is a lawfully present alien and is not eligible for Medicaid due to alien status (discussed further below in " Medicaid").[45]

Aliens who are not lawfully present are ineligible for the tax credit and subsidies. This is because the credit and subsidy are only available for months during which a person purchases health insurance through the exchanges and aliens who are not lawfully present are prohibited from buying insurance through an exchange. However, an individual who is not lawfully present may claim the credit or subsidy for an eligible family member.[46] Thus, for example, a not-lawfully present parent may file a tax return claiming the premium credit if he or she has children who meet the credit's qualifications.

In addition, the law provides specific rules for calculating the credits and subsidies for mixed-status families—families where at least one member is an unlawfully present alien and at least one member is lawfully present or a U.S. citizen.[47] For these families, the premiums used to compute the value of the credit and subsidies are reduced by any amount attributable to the non-lawfully present individual(s). Additionally, for determining whether the family meets the income/FPL criteria, family size and household income are reduced to account for the excluded family member(s).[48] For example, if a family of three has one member who is not lawfully present, the household income eligibility will be based on the FPL for a family of two and the family's household income will be adjusted to account for the not-lawfully present member.

ACA Changes to Medicaid

Prior to the ACA, federal law generally required state Medicaid plans to cover certain low income individuals, such as the aged, blind, disabled, or members of families with dependent children. The ACA, as enacted, required state Medicaid programs to expand coverage to all eligible non-pregnant, non-elderly legal residents with incomes effectively up to 138% of the federal poverty level (FPL), or risk losing their federal Medicaid matching funds. However, in *National*

[42] ACA §§1401(a) and 1412(f)(1) (codified at 26 U.S.C. §36B(d)(2) and 42 U.S.C. 18071(f)(1)).

[43] ACA §1401(a) (codified at 26 U.S.C. §32B(c)(2)(B).

[44] ACA §1401(a) and §1402(f) (codified at 26 U.S.C.. §36B(a) and 42 U.S.C. §18032(f)).

[45] ACA §§1401(a) and 1402(b) (codified at 26 U.S.C. §36B(c)(1)(B) and 42 U.S.C. 18071(b)); 26 C.F.R. §1.36B-2(b)(5).

[46] 26 C.F.R. §§1.36B-2(b)(4).

[47] ACA §§1401(a) and 1402(e)(1)(B) (codified at 26 U.S.C. §36B(e) and 42 U.S.C. §18071(e)); 26 C.F.R. §1.36B-3.

[48] Specifically, family size is reduced by any non-lawfully present individuals and household income is computed by multiplying household income by the ratio of FPL for the adjusted family size to the FPL for the actual family size. The statute and regulations also provide that the IRS may provide for a "comparable method" for determining the credit for mixed-status families, although the agency has not yet done so. ACA §§1401(a) and 1402(e)(1)(B)(ii) (codified at 26 U.S.C. §36B(e)(1)(B)(ii) and 42 U.S.C. §18071(e)(1)(B)(ii)); 26 C.F.R. §1.36B-3.

Federation of Independent Business v. Sebelius,[49] the Supreme Court held that the withdrawal of all Medicaid funds from the states for failure to comply with the expansion of the program violated the Tenth Amendment (but also found that the withholding of just the funds associated with that expansion raised no significant constitutional concerns).

Reportedly, 31 states and the District of Columbia have expanded Medicaid coverage, and another two states are considering expanding coverage, as of January 13, 2016.[50] Several states have indicated that they will not expand Medicaid coverage.[51] Thus, in 31 states and the District of Columbia, all non-elderly U.S. *citizens* and certain noncitizens with income effectively up to 138% FPL are eligible for Medicaid.[52] This reform not only expanded eligibility to a group that was not historically eligible for Medicaid (low-income childless adults), but it also raised Medicaid's mandatory income eligibility level for certain existing groups (e.g., individuals with disabilities and children age 6 through 18) to 133% of the FPL (effectively 138% of FPL) and is considered by some to be the most significant expansion of Medicaid eligibility in many years.[53] Nonetheless, neither the ACA nor the *NFIB v. Sebelius* decision amended the current immigration status-based restrictions (i.e., alien eligibility requirements) on receiving Medicaid.

Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),[54] as amended, noncitizens' eligibility for Medicaid largely depends on their *immigration status*, whether they arrived in the United States (or were on a program's rolls) before *August 22, 1996*,[55] and how long they have lived and worked in the United States. Notably, to be eligible for Medicaid, aliens must also meet the program's financial and categorical eligibility requirements.[56] Most legal permanent residents (LPRs) entering the United States after August 22, 1996, are barred from Medicaid for five years, after which time they are eligible at the state's option. However, states may also choose to use state and federal Medicaid funds to cover pregnant women and children who are "lawfully residing" in the United States.[57] In addition,

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[49] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012). For more information, see CRS Report R42367, *Medicaid and Federal Grant Conditions After NFIB v. Sebelius: Constitutional Issues and Analysis*, by Kenneth R. Thomas.

[50] "Where the States Stand on Medicaid Expansion," *The Daily Briefing*, January 13, 2016, http://www.advisory.com/Daily-Briefing/Resources/Primers/MedicaidMap. For more information on Medicaid, see CRS Report R43357, *Medicaid: An Overview*, coordinated by Alison Mitchell.

[51] Ibid.

[52] The income limit set in law is 133% of FPL; however, it is effectively 138% of the FPL because §1004(e) of P.L. 111-152 requires income equivalent to 5% of the FPL to be disregarded from household income if individuals are at the highest income limits for coverage. 42 C.F.R. §435.603(d)(4).

[53] CRS Report R41210, *Medicaid and the State Children's Health Insurance Program (CHIP) Provisions in ACA: Summary and Timeline*, by Evelyne P. Baumrucker et al.; Medicaid in a Historic Time of Transformation: Results from a 50-State Medicaid Budget Survey for State Fiscal Years 2013 and 2014, The Kaiser Commission on Medicaid and the Uninsured, Washington, DC, October 2013, p. 1.

[54] P.L. 104-193, also called the Welfare Reform Act.

[55] The enactment date of PRWORA.

[56] Medicaid is a means-tested entitlement program operated by states within broad federal guidelines. To qualify, an individual must meet both categorical and financial eligibility requirements. Current categorical eligibility requirements relate to the age or other characteristics of an individual. People aged 65 and over, certain persons with disabilities, children and their parents, and pregnant women are among the categories of individuals who may currently qualify. For more on Medicaid eligibility, see CRS Report R43357, *Medicaid: An Overview*, coordinated by Alison Mitchell.

[57] This term has been defined broadly by the Centers for Medicare and Medicaid Services (CMS) and includes qualified aliens as defined in 8 U.S.C. §1641 (i.e., those eligible for federal public benefits, such as LPRs, asylees, and refugees) and aliens in valid nonimmigrant statuses, provided they are residents of the state in which they are applying in order to qualify for Medicaid. For a full list of the immigration categories included in the definition of "lawfully residing in the United States," see Centers for Medicare and Medicaid Services: Center for Medicaid, CHIP and Survey &

states have the option to use state-only funds to provide medical coverage for LPRs within five years of their arrival in the United States.[58]

Refugees and asylees[59] are eligible for Medicaid for seven years after arrival. After this period, they may be eligible for Medicaid at the state's option.[60] Qualified aliens with a substantial (10-year) U.S. work history or a military connection are eligible for Medicaid without regard to the five-year bar. Similarly, qualified aliens receiving Supplemental Security Income (SSI) on or after August 22, 1996, are eligible for Medicaid.[61] Nonimmigrants, "quasi-legal" migrants,[62] and aliens present without authorization are barred from Medicaid.[63] However, states may choose to cover these individuals using state-only funds.[64]

Interaction Between Alien Eligibility for Premium Credits/Subsidies and Medicaid Eligibility

Some have raised concerns that the ACA created an inequality between U.S. citizens and some noncitizens with incomes at or below 138% of the federal poverty level (FPL) with respect to eligibility to participate in an exchange and receive premium tax credits or cost-sharing subsidies.[65] The following section explores the possible differences in treatment between Medicaid-eligible U.S. citizens and noncitizens as compared to Medicaid-ineligible noncitizens.

As discussed, qualifying individuals may receive refundable tax credits and cost-sharing subsidies toward the purchase of an exchange plan. To be eligible for the premium credits and subsidies, a taxpayer must have a household income that is above 100% of the FPL but does not exceed 400% of the FPL, and must not have access to affordable coverage outside of an exchange.[66] In addition, lawfully present noncitizens who have household incomes that do not exceed 100% of the FPL and who are ineligible for Medicaid due to their alien status will be deemed to have income at 100% of the FPL and therefore will be *eligible* for premium credits and subsidies. Notably, if a person who applies for premium credits in an exchange is determined to be eligible for Medicaid, the exchange will have that person enrolled in Medicaid.[67]

Under the ACA, lawfully present noncitizens (including some LPRs within five years of entry) who are ineligible for Medicaid due to their alien status are eligible to participate in an exchange

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Certification, *Re: Medicaid and CHIP Coverage of "Lawfully Residing" Children and Pregnant Women*, Department of Health and Human Services, Letter to State Health Officials (SHO # 10-006, CHIPRA # 17), July 1, 2010.

[58] For a detailed discussion of noncitizen eligibility for Medicaid, see pp. 5-7 in CRS Report R40772, *Noncitizen Health Insurance Coverage and Use of Select Safety-Net Providers*, by Alison Siskin.

[59] Refugee and asylee statuses require a finding of persecution or a well-founded fear of persecution in situations of "special humanitarian concern" to the United States. Refugees are admitted from abroad.

[60] 8 U.S.C. §1612(b)(1), (2)(A)(i).

[61] 8 U.S.C. §1612(b)(2)(F).

[62] For a discussion of these noncitizens, see the section entitled ""Quasi-legal" Migrants."

[63] Those with T-visas status (i.e., trafficking victims) are nonimmigrants but are Medicaid eligible.

[64] 8 U.S.C. §1621(d).

[65] For example see John Goodman, "How Do Illegal Immigrants Fare Under ObamaCare?" *National Center for Policy Analysis, John Goodman's Health Policy Blog*, August 10, 2010, http://healthblog.ncpa.org/how-do-illegal-immigrants-fare-under-obamacare/; and Senator Tom Coburn and Senator John Barrasso, *Bad Medicine: A Check-up on the New Federal Health Law*, Washington, DC, July 2010, p. 27, http://coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=722faf8b-a5be-40fd-a52b-9a98826c1592.

[66] ACA §1401(a) (codified at 26 U.S.C. §32B(c)(2)(B)).

[67] ACA §1311(d)(4)(F) and §1413(a) (codified at 42 U.S.C. §18031(d)(4)(F) and 42 U.S.C. §18083(a)).

and receive premium credits and cost-sharing subsidies.[68] Similarly situated U.S. citizens and lawfully present noncitizens who are eligible for Medicaid could technically participate in an exchange, but they would be ineligible for the premium credits and cost-sharing subsidies.[69]

Verification of Alien Status Under the ACA

To enforce the alien eligibility requirements under the act, Section 1411 of the ACA requires the Secretary of Health and Human Services (HHS) to establish a program to determine whether an individual who is to be covered through an exchange plan or who is claiming a premium tax credit or reduced cost-sharing is a citizen or national of the United States or an alien lawfully present in the United States.[70] This requirement is similar to and compatible with the Department of Homeland Security (DHS) Systematic Alien Verification for Entitlements (SAVE) system established by Section 1137(d) of the Social Security Act.[71]

The verification system created under the ACA uses three pieces of personal data to verify citizenship and immigration status.[72] The Social Security Administration (SSA) verifies the name, social security number, and date of birth of the individual. For those attesting to be U.S. citizens, the attestation is considered substantiated if it is consistent with SSA data. For individuals who do not claim to be U.S. citizens but attest to be lawfully present in the United States, the attestation is considered substantiated if it is consistent with DHS data.[73] The ACA requires such verification of

[68] ACA §§1401(a) and 1402(b) (codified at 26 U.S.C. §36B(c)(1)(B) and 42 U.S.C. 18071(b)); 26 C.F.R. §1.36B-2(b)(5).

[69] Technically, someone who is Medicaid eligible would be able to decline Medicaid coverage and participate in an exchange. However, they would not be eligible for premium credits or cost-sharing subsidies. Thus, it seems unlikely that a Medicaid-eligible person would choose to or would be able to decline Medicaid coverage and pay for insurance through an exchange.

[70] Codified at 42 U.S.C. §18081.

[71] Codified at 42 U.S.C. §1320b–7. The SAVE system provides federal, state, and local government agencies access to data on immigration status that are necessary to determine noncitizen eligibility for public benefits. DHS does not determine benefit eligibility; rather, SAVE enables the specific program administrators to ensure that only those noncitizens and naturalized citizens who meet their program's eligibility rules actually receive public benefits. The SAVE system does not require a Social Security number (SSN). The key to SAVE is the immigration document number (e.g., number from the individual's permanent resident card, employment authorization document, or I-94 document) and the person's name, date of birth, and nationality. The SAVE system is also the basis for the E-Verify electronic employment eligibility verification system. For more on the SAVE System, see CRS Report R40889, *Noncitizen Eligibility and Verification Issues in the Health Care Reform Legislation*, by Ruth Ellen Wasem. See also, U.S. Citizenship and Immigration Services, "SAVE Governing Laws," June 15, 2016, https://www.uscis.gov/save/about-save/governing-laws.

[72] The system is also required to verify income for those individuals claiming the tax credit or cost-sharing subsidies. For individuals who have been issued an SSN, it must be provided to the exchange and is then used by the IRS to verify income in order to determine eligibility and the amount of the credit or subsidy. See, for example, 45 C.F.R. §155.320(c). Noncitizens who are ineligible for SSNs file their taxes using an Individual Taxpayer ID Number (ITIN) and they will generally have to provide other proof of income to enroll in an exchange plan. In addition, if a member of a mixed status family is eligible for a tax credit, the household must file a tax return (either using an SSN or ITIN depending on the circumstances) for the year the person has coverage. 26 U.S.C. §§6011 6012; 26 C.F.R. §1.6011-8; 45 C.F.R. §155.305(f)(4). Also see discussion at 77 *Federal Register* 18355 (March 27, 2012). For more on ITINs, see CRS Report R42628, *Ability of Unauthorized Aliens to Claim Refundable Tax Credits*, by Erika K. Lunder et al.. See also 45 C.F.R. §155.310(a)(3) (providing that individuals who are not applying for themselves (nonapplicants), but are applying for someone else (e.g., parents who are not lawfully present applying for their U.S. citizen child) are only required to provide an SSN to an exchange under certain circumstances).

[73] CRS Report R40889, *Noncitizen Eligibility and Verification Issues in the Health Care Reform Legislation*, by Ruth Ellen Wasem.

all individuals seeking exchange coverage regardless of whether they would be federally subsidized or would pay premiums entirely on their own.

Some argue that because the verification system does not include a biometric identifier,[74] it could lead to identity theft; however, requiring applicants to provide documents with biometric identifiers could lead to the inappropriate denial of credits and subsidies to eligible persons.[75] The system only verifies that the name, SSN, and date of birth match the SSA's records and that immigration documents match DHS records; as a result, a person (e.g., a U.S. citizen, a not-lawfully present alien) who is using the documents of an eligible person would not necessarily be denied access to an exchange or disallowed the premium credit and cost-sharing subsidies.[76] Nonetheless, while all lawfully present noncitizens have documents with biometric identifiers,[77] U.S. citizens do not necessarily have such documents,[78] and, as a result, requiring such biometric identifiers could make it more difficult for some eligible U.S. citizens to gain access to an exchange and to claim the premium credits and cost-sharing subsidies.[79]

In an evaluation of the E-Verify system for employment, a system that is often compared to the system under the ACA because it electronically verifies both U.S. citizens and noncitizens, researchers estimated that 6.2% of all queries relate to unauthorized aliens, and that in about half (54%) of these queries the unauthorized aliens receive an inaccurate finding of being work-authorized, primarily due to identity theft. Thus, the researchers estimated that about 3.3% of all queries receive a false positive verification. In other words, it is estimated that of the unauthorized aliens that are run through the system, approximately 54% who are using false documents are not identified by the system.[80] In an effort to better detect and deter identity fraud,

[74] Examples of biometric identifiers include digitized photographs, finger prints, and iris scans. The biometric identifier included in U.S. passports is a digitized photograph.

[75] For a full discussion of these issues, see CRS Report RL33973, *Unauthorized Employment in the United States: Issues, Options, and Legislation*, by Andorra Bruno, and CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

[76] For a full discussion of issues related to verification, see CRS Report R40889, *Noncitizen Eligibility and Verification Issues in the Health Care Reform Legislation*, by Ruth Ellen Wasem; and CRS Report RL33973, *Unauthorized Employment in the United States: Issues, Options, and Legislation*, by Andorra Bruno.

[77] For a full discussion of these documents, see CRS Report R40889, *Noncitizen Eligibility and Verification Issues in the Health Care Reform Legislation*, by Ruth Ellen Wasem.

[78] The United States does not require its citizens to have legal documents that verify their citizenship and identity (i.e., national identification cards). U.S. passports contain biometric identifiers (i.e., digitized photographs), as do some states' drivers licenses.

[79] For example, the Deficit Reduction Act of 2005 (P.L. 109-171), as amended, requires states to obtain satisfactory documentation of citizenship to determine eligibility for Medicaid. In a 2007 survey by the U.S. Government Accountability Office (GAO) assessing the impact of this requirement, 22 of 44 states that responded reported declines in enrollment due to the new citizenship documentation requirement. Of the 22 states reporting enrollment declines to GAO, a majority (16 states) attributed them to Medicaid coverage delays or losses of Medicaid coverage for individuals who appeared to be U.S. citizens. The extent to which the citizenship requirement is deterring ineligible noncitizens from applying for Medicaid is unknown. GAO, *States Reported That Citizenship Documentation Requirement Resulted in Enrollment Declines for Eligible Citizens and Posed Administrative Burdens*, GAO-07-889, June 2007. For a more detailed discussion of the Medicaid citizenship documentation requirements and the effects on enrollment, see CRS Report RS22629, *Medicaid Citizenship Documentation*, by Ruth Ellen Wasem.

[80] Westat, *Findings of the E-Verify Program Evaluation*, Report Prepared for the Department of Homeland Security, Rockville, MS, December 2009, p. xxxi, http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf. For a detailed discussion of these findings, see CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

DHS (which administers E-Verify) is taking steps that include adding more photographs to the system and developing methods to prevent stolen identities from being used in the system.[81]

Immigration Enforcement and Verification for Exchange Plans

One concern that has been raised is that noncitizens who are part of mixed-status families, (i.e., families where at least one member of the family is not authorized to be in the United States) may not apply for coverage through an exchange or for the credits and subsidies because they are worried that their application may trigger an immigration enforcement action.[82] DHS has stated that it will not use information obtained for determining eligibility as the basis for "pursuing a civil immigration enforcement action against such individuals or members of their household."[83] In addition, under regulation, exchange plan applications "may not request information regarding citizenship, status as a national, or immigration status for an individual who is not seeking coverage for himself or herself on any application or supplemental form."[84]

In addition, some immigrant advocates have expressed concerns that noncitizens may be hesitant to enroll in an exchange plan and apply for premium credits and cost-sharing subsidies because it may trigger the "public charge" ground of inadmissibility and deportability.[85] An FAQ released by the Obama Administration states:

> Applying for Medicaid or CHIP, or getting help with health insurance costs in the Marketplace [through an exchange], does not make someone a "public charge." It will not affect someone's chances of becoming a Lawful Permanent Resident or U.S. citizen. The one exception is for people receiving long-term care in an institution at government expense. These people may face barriers [obtaining LPR status].[86]

[81] U.S. Citizenship and Immigration Services, *Westat Evaluation of the E-Verify Program: USCIS Synopsis of Key Findings and Program Implications*, Washington, DC, January 28, 2010, http://www.uscis.gov/USCIS/Native%20Docs/Westat%20Evaluation%20of%20the%20E-Verify%20Program.pdf.

[82] For an example of this concern, see Dinah Wiley, "The Administration's New Welcome Mat for Immigrants: 'It's Safe to Apply,'" *A Children's Health Policy Blog,* Georgetown University Health Policy Institute, Center for Children and Families, October 29, 2013, http://ccf.georgetown.edu/all/the-administrations-new-welcome-mat-for-immigrants-its-safe-to-apply/.

[83] It does not matter whether the information is provided to DHS to verify immigration status or if it is provided by another source (e.g., application assistors). Immigration and Customs Enforcement, *Clarification of Existing Practices Related to Certain Health Care Information*, Washington, DC, October 25, 2013, http://www.ice.gov/doclib/ero-outreach/pdf/ice-aca-memo.pdf.

[84] 45 C.F.R. §155.310(a)(2).

[85] Under the Immigration and Nationality Act (INA), aliens may be denied admission to the United States or adjustment of status if they are deemed "likely at any time to become a public charge." 8 U.S.C. §1182(a)(4)(A). In addition, any alien who, within five years after the date of entry, has become a public charge from causes that pre-existed prior to entry may be removed. For a discussion of this issue, see CRS Report R41104, *Immigration Visa Issuances and Grounds for Exclusion: Policy and Trends*, by Ruth Ellen Wasem, and CRS Report R43220, *Public Charge Grounds of Inadmissibility and Deportability: Legal Overview*, by Kate M. Manuel.

[86] Center for Medicare and Medicaid Services, *What do immigrant families need to know about the Marketplace?*, Baltimore, MD, https://www.healthcare.gov/what-do-immigrant-families-need-to-know/.

Appendix A. Definition of Lawfully Present Under the ACA

"Lawfully present" was first defined for the purposes of eligibility for the high risk pools for uninsured people with pre-existing conditions.[87] Since then, all regulations regarding the ACA have referenced that definition.[88]

For the provisions of the ACA, "lawfully present" means

1. A qualified alien as defined in Section 431 of the Personal Responsibility and Work Opportunity Act (PRWORA);[89]
2. An alien in nonimmigrant status[90] who has not violated the terms of the status under which he or she was admitted or to which he or she has changed after admission;
3. An alien who has been paroled into the United States under INA Section 212(d)(5)[91] for less than one year, except for an alien paroled for prosecution, for deferred inspection or pending removal proceedings;
4. An alien who belongs to one of the following classes:

   Aliens currently in temporary resident status pursuant to INA §210 or 245A;[92]

   Aliens currently under Temporary Protected Status (TPS),[93] and pending applicants for TPS who have been granted employment authorization;

   Aliens who have been granted employment authorization under 8 CFR 274a.12(c)(9), (10), (16), (18), (20), (22), or (24);

   Family Unity beneficiaries pursuant to Section 301 of P.L. 101-649 as amended;

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[87] 45 C.F.R. §152.2; 75 *Federal Register* 45029, July 30, 2010, as amended by 77 *Federal Register* 52616, August 30, 2012.

[88] 26 C.F.R. §§1.36B-1(g) (premium tax credit), 1.5000A-3(c)(2)(ii)(B) (individual mandate); 42 C.F.R. §600.5 (basic health program); 45 C.F.R. §155.20 (exchanges).

[89] PRWORA (P.L. 104-193) created the term "qualified alien," to encompass the different categories of noncitizens who were not prohibited by PRWORA from receiving federal public benefits. Qualified aliens (noted in P.L. 104-193 §431; 8 U.S.C. §1641) are defined as:

1. Legal Permanent Residents (LPRs);
2. refugees (an alien who is admitted to the United States under §207 of the Immigration and Nationality Act (INA));
3. asylees (an alien who is granted asylum under INA §208);
4. an alien who is paroled into the United States (under INA §212(d)(5)) for a period of at least one year;
5. an alien whose deportation is being withheld on the basis of prospective persecution (under INA §243(h) or §241(b)(3));
6. an alien granted conditional entry pursuant to INA §203(a)(7) as in effect prior to April 1, 1980; and
7. Cuban/Haitian entrants (as defined by P.L. 96-422).

Additionally, victims of trafficking (T-visa holders) are treated as refugees for the purpose of receiving benefits.

[90] Nonimmigrant status are defined in INA §101(a)(15), 8 U.S.C. §1101(a)(15).

[91] 8 U.S.C.§1182(d)(5).

[92] 8 U.S.C. §1160 or 1255a.

[93] INA §244, 8 U.S.C. §1254a.

Aliens currently under Deferred Enforced Departure (DED);

Aliens currently in deferred action status except an individual with deferred action under the DHS's deferred action for childhood arrivals process, as described in the Secretary of Homeland Security's June 15, 2012, memorandum, shall not be considered to be lawfully present;

Aliens whose visa petitions have been approved and who have a pending application for adjustment of status;

5. A pending applicant for asylum under INA Section 208(a)[94] or for withholding of removal under INA Section 241(b)(3)[95]or under the Convention Against Torture who has been granted employment authorization, and such an applicant under the age of 14 who has had an application pending for at least 180 days;
6. An alien who has been granted withholding of removal under the Convention Against Torture; or
7. A child who has a pending application for Special Immigrant Juvenile status.[96]

[94] 8 U.S.C. §1158.

[95] 8 U.S.C. §1231.

[96] INA §101(a)(27)(J), 8 U.S.C. §1101(a)(27)(J).

Appendix B. The Estimated Size of the Noncitizen Population in the United States

Using the 2015 American Community Survey 1-Year Estimates,[97] in July 2015, there were approximately 43.3 million foreign-born persons residing in the United States, approximately 13.5% of the total U.S. population.[98] The foreign-born population was comprised of approximately 20.7 million naturalized U.S. citizens[99] and 22.6 million noncitizens.

CRS does not estimate the unauthorized (illegal) alien population; however, the Pew Research Center's Hispanic Trends Project[100] produces estimates of the number of unauthorized aliens[101] in the United States. Researchers at the Pew Hispanic Trends Project assigned a specific immigration status (e.g., legal permanent resident, unauthorized alien) to each foreign-born survey respondent and used a methodology to estimate the illegally present population.[102] The Pew Hispanic Trends Project estimated that in March 2014 there were approximately 43.6 million foreign-born persons in the United States, and of the noncitizen population, approximately 32.5 million were legal permanent residents (LPRs) and naturalized citizens, 1.7 million were temporarily in the United States (i.e., nonimmigrants), and 11.1 million (25.5%) were estimated to be unauthorized (illegal) aliens.[103]

"Quasi-legal" Migrants

Not all unauthorized aliens lack legal documents, leading many observers to characterize these *documented* aliens as "quasi-legal" migrants.[104] According to the researchers at PEW, data on this population are very limited, but this "quasi-legal" group could account for as much as 10% of the unauthorized population.[105] Specifically, there are certain circumstances in which the Department

[97] Data are available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_S0501&prodType=table.

[98] A foreign-born person is anyone in the United States who was born in another country and did not automatically acquire U.S. citizenship at birth. For a discussion of the methodology, see CRS Report R41592, *The U.S. Foreign-Born Population: Trends and Selected Characteristics*, by William A. Kandel.

[99] Under U.S. immigration law, all legal permanent residents are potential citizens and may become so through a process known as *naturalization*. With very limited exceptions, under the law, naturalized U.S. citizens are treated the same as natural-born U.S. citizens.

[100] This was formerly known as the Pew Hispanic Center.

[101] The only usage of the term "unauthorized alien" in the Immigration and Nationality Act (INA) refers to noncitizens who are not authorized to work in the United States (see INA §274A). Colloquially, this term is generally used to refer to noncitizens who lack legal authorization to be present in the United States. Unauthorized aliens may have entered the United States between ports of entry, entered with false documents, or overstayed or violated the terms of their visas. This terminology is discussed in more details in the section below entitled "Definition of Lawfully Present."

[102] Jeffrey S. Passel and D'Vera Cohn, *Overall Number of U.S. Unauthorized Immigrants Holds Steady since 2009*, Pew Hispanic Center, Washington, DC, September 20, 2016 http://www.pewhispanic.org/2016/09/20/overall-number-of-u-s-unauthorized-immigrants-holds-steady-since-2009/. (Hereinafter, Passel and Cohn, *Overall Number of U.S. Unauthorized Immigrants Holds Steady since 2009*.)

[103] For a discussion of the differences in the methodologies of the estimates, see CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by Ruth Ellen Wasem.

[104] For example see, Alan Lee, *Administration Giving Quasi Legal Status to DREAMERS with Work Authorization and Possible Travel Permission*, Immigration Daily, June 15, 2012, http://www.ilw.com/articles/2012,0615-Lee.shtm; and Dean H. Judson and David A. Swanson, *Estimating Characteristics of the Foreign Born by Legal Status*, SpringerBriefs in Population Studies, 2, 2011.

[105] Passel and Cohn, *Overall Number of U.S. Unauthorized Immigrants Holds Steady since 2009*.

of Homeland Security issues temporary employment authorization documents (EADs) to aliens who are not otherwise considered authorized to reside in the United States. Aliens with EADs, in turn, may legally obtain social security cards.[106] These "quasi-legal" unauthorized aliens fall in several categories:

- The government has given them temporary humanitarian relief from removal, such as Temporary Protected Status (TPS).[107]
- They have sought asylum in the United States and their cases have been pending for at least 180 days.[108]
- They are immediate family or fiancées of legal permanent residents (LPRs) who are awaiting in the United States their legal permanent residency cases to be processed.[109]
- They have overstayed their nonimmigrant visas and have petitions pending to adjust status as employment-based LPRs.[110]

None of the aliens described above have been formally approved to remain in the United States permanently, and many with pending cases may ultimately be denied LPR status. Only about 25% of asylum seekers, for example, ultimately gain asylum.[111] Approximately 80% to 85% of LPR petitions reportedly are approved.[112]

Importantly for the discussion of the ACA, some of the noncitizens included in the estimates of "unauthorized aliens" are considered lawfully present under the ACA regulations (see the discussion entitled "Definition of Lawfully Present").

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[106] For further background, see CRS Report RL32004, *Social Security Benefits for Noncitizens*, by Dawn Nuschler and Alison Siskin.

[107] For further background, see CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Carla N. Argueta and Ruth Ellen Wasem.

[108] For further background, see CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*, by Ruth Ellen Wasem.

[109] For further background, see CRS Report RL32235, *U.S. Immigration Policy on Permanent Admissions*, by Ruth Ellen Wasem.

[110] The extent that some nonimmigrant (e.g., temporary workers, tourists, or foreign students) overstay their temporary visas and become "quasi-legal" aliens with petitions pending to adjust to legal status is discussed in CRS Report RS22446, *Nonimmigrant Overstays: Brief Synthesis of the Issue*, by Alison Siskin.

[111] For further background, see CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*, by Ruth Ellen Wasem.

[112] For a full analysis of this issue, see Citizenship and Immigration Services Ombudsman, *2007 Annual Report to Congress*, June 11, 2007.

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