



NEW YORK
CITY BAR

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Hon. John Boehner
Speaker of the House of Representatives
1101 Longworth HOB
Washington, D.C. 20515

Hon. Nancy Pelosi
Democratic Leader of the House of
Representatives
235 Cannon HOB
Washington, D.C. 20515

Dear Speaker Boehner and Democratic Leader Pelosi:

We write on behalf of the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York (“City Bar”) regarding Section 2107(d) of S.744, the Border Security, Economic Opportunity, and Immigration Modernization Act, as passed in the Hoeven-Corker Amendment to S. 744 (in short, “Section 2107(d”).¹ Although S. 744 would allow millions of unauthorized immigrants to legalize their status, Section 2107(d) would impose a new penalty on those legalizing—to deny Social Security credit for previously unauthorized work.

We oppose the inclusion of this provision in immigration reform. It violates basic notions of fairness to deny benefits to those who worked and paid into the system.² Moreover, it will likely dissuade immigrants from legalizing, further drive immigrants into poverty which shifts social costs onto states and cities, and negate positive economic benefits of comprehensive immigration reform.

¹ See § 2207(d), “Preclusion of Social Security Credits for Periods Without Work Authorization,” in S. 744, Border Security, Economic Opportunity, and Immigration Modernization Act, *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-113s744es/pdf/BILLS-113s744es.pdf> (starting at p. 228 of PDF version).

² The provision is currently not included in pending immigration reform legislation in the House.

Background

The Social Security program provides retirement, disability and survivor benefits to workers and their families. To qualify for benefits, workers must work in Social Security-covered jobs and pay Social Security taxes on their earnings. Workers then receive credits towards Social Security benefits. Generally, workers need 40 credits, earned over ten years, to become “insured” for benefits.

Noncitizens working in Social Security-covered jobs pay into the Social Security system like others, and are not exempt from Social Security’s payroll taxes (despite myths otherwise).³ Still, Congress has over time restricted noncitizens’ ability to access Social Security benefits to those “lawfully present” in the United States.⁴

Most relevant here, the Social Security Protection Act of 2004 further prevents a noncitizen, with a Social Security number assigned in 2004 or later, from receiving any benefits unless and until (s)he receives work authorization.⁵ Still, the 2004 Act explicitly made the policy choice to preserve benefits for hard-working immigrants who pay into the Social Security system and hope to one day acquire legal status. As such, once a noncitizen does receive work authorization, all covered earnings—from both authorized and unauthorized work—count towards Social Security benefits. Like anyone else, (s)he becomes “insured” and eligible for benefits after ten years of work.

Section 2107(d)

Section 2107(d), for the first time, would impose a new penalty even on noncitizens who legalize their immigration status—to forever deny Social Security credit for previously

³ Donald Kerwin, Executive Director, Center for Migration Studies, *Wage Theft and the Senate’s Border Security, Economic Opportunity and Immigration Modernization Act (S. 744)*, Huffington Post (July 16, 2013), available at http://www.huffingtonpost.com/donald-kerwin/wage-theft-and-the-senate_b_3591859.html.

⁴ See generally CRS Report for Congress, *Social Security Benefits for Noncitizens: Current Policy and Legislation* 8 (updated May 11, 2005), available at <http://fpc.state.gov/documents/organization/46681.pdf>. When the program began paying benefits in 1940, there were no restrictions on benefit payments. Then, through a series of amendments, aimed, in part, at combatting fraud and abuse, Congress restricted payments to alien *workers* living abroad, Social Security Amendments of 1956 (P.L. 84-880); alien *dependents and survivors* living abroad, Social Security Amendments of 1983 (P.L. 98-21); and aliens who are *not* “lawfully present” in the United States. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193).

In the case of an noncitizen worker living abroad, benefits are suspended after six months unless one of several exceptions is met. 42 U.S.C. § 402(t)(1). For example, the alien must be a citizen of a country that has a pension system that pays benefits to eligible U.S. citizens residing outside that country. 42 U.S.C. § 402(t)(2). In the case of an noncitizen dependent or survivor living abroad, the dependent or survivor must have lived in the United States, lawfully or unlawfully, for a period of five years under specific circumstances. 42 U.S.C. § 402(t)(11). For example, for a spouse, the spousal relationship to the worker must have existed when the spouse lived in the United States. 42 U.S.C. § 402(t)(11)(b). In the case of noncitizens lawfully present, “lawfully present” is defined to include legal permanent residents; refugees; asylum seekers; noncitizens paroled into the United States for a period of at least one year, with some exceptions; and certain others permitted to remain in the United States for humanitarian or public policy reasons (such as those with Temporary Protected Status). 42 U.S.C. § 402(y); 8 C.F.R. § 103.12.

⁵ Social Security Protection Act of 2004 (P.L. 108-203, H.R. 743).

unauthorized work, as they grow older. Under Section 2107(d), these workers would never receive credit for unauthorized work completed between 2004 and 2014.⁶ This would apply to those who obtain the newly-created “registered provisional immigrant” (“RPI”) status under S. 744, as well as those who overstayed a visa but legalize through other avenues.⁷ The exceptions provided would not change this result.⁸

Essentially, Section 2107(d) imposes a lifelong penalty for legalizing one’s status, with implications into one’s old age and for one’s family. The implications of Section 2107(d) can be best explained by detailing their personal impact.

Take for example “Bob,” a hypothetical 45-year old Honduran man and father of three U.S. citizen children, who entered the U.S. on a visitor’s visa in 2003 and overstayed. Since 2004, Bob has worked as a general laborer in the construction industry. Bob has used an Individual Tax Identification Number (ITIN) to report his earnings, in the hopes of acquiring legal status.⁹ In 2014, Bob became eligible for adjustment of status, received it, and has since been a legal U.S. resident. He has worked in the U.S. for a total of 10 years, between 2004 and 2013, with average earnings of \$30,000 per year and thus paid \$18,600 into Social Security.

If Bob works another 10 years, at the same rate, he would receive \$686/month in Social Security benefits (based upon his earliest retirement date at age 62).¹⁰ But if S. 744 passes, he would only receive \$497/month, since he would only be credited for the years that he worked *after* becoming a legal resident.

The consequences are more dire if Bob became permanently disabled or died. S. 744 would prevent him from receiving disability benefits, and his dependents from receiving survivor’s benefits. Under current law, for example, if Bob suffered a work-related injury in

⁶ S. 744, § 2107(d)(1). The provision achieves this by amending Section 214 of the Social Security Act (42 U.S.C. § 414) to add a new Section 214(d) (which would become 42 U.S.C. § 414(d)). See 42 U.S.C. § 414, at <http://www.law.cornell.edu/uscode/text/42/414/>.

⁷ See S. 744, §§ 2101-02. The new Section 214(d)(1) would provide that no Social Security credit shall be granted to an “individual who has been granted registered provisional immigrant status,” or an individual “present under an expired nonimmigrant visa” (i.e. a visa overstay). See new Section 214(d)(1)(A)-(B), in S. 744, § 2107(d)(1). The provision also amends benefits calculation provisions regarding both Social Security and Social Security disability payments, to exclude credit for these periods. See S. 744, § 2107(d)(2), (3), amending Section 215(e) of the Social Security Act (42 U.S.C. § 415(e)) (Social Security benefits computation), at <http://www.law.cornell.edu/uscode/text/42/415>, and Section 223(c)(1) of the Social Security Act (42 U.S.C. § 423(c)(1)) (Social Security disability benefits computation), at <http://www.law.cornell.edu/uscode/text/42/423>.

⁸ Exceptions are provided for those who can prove either that they were assigned a social security number before 2004 or that they were authorized to work at the same time as their earnings. See new Section 214(d)(2)-(3), in S. 744, § 2107(d)(1).

⁹ The hypothetical would be the same for those using an invalid Social Security number. For many undocumented workers, this is a “necessary reality” to make subsistence income. Jonathan Blazer and Josh Bernstein, National Immigration Law Center, *Confiscating Contributions* (May 1, 2007) available at <http://www.nilc.org/07confiscontributions.html>.

¹⁰ See Social Security Administration, Quick Calculator Benefit Estimates, available at <http://www.socialsecurity.gov/cgi-bin/benefit6.cgi>; Social Security Administration, Calculators: Online Calculator, available at <http://www.ssa.gov/retire2/AnyApplet.html>.

2014 and became permanently disabled, he would receive \$910 in disability benefits, as well as eventually, \$541 in retirement benefits. But if S.744 passes, Bob would receive nothing. His prior work would not make him insured for either Social Security or disability benefits.¹¹ Moreover, if Bob sadly died, under current law Bob's family would receive \$1,411/ month total survivor's benefits. But if S. 744 passes, Bob's children and dependents would receive nothing.¹²

City Bar's Position

Accordingly, we oppose Section 2107(d) for several reasons. First, Section 2107(d) "would condition 'earned' legalization on denying a benefit already 'earned'."¹³ It is simply unfair to deny immigrants a measure of long-term security when they contribute to Social Security and pay taxes as the law requires (despite myths otherwise).¹⁴

Second, this provision will likely dissuade immigrants from legalizing, which would be the point of immigration reform. To deny benefits to those who earned them would only "deter people from coming out of the shadows,"¹⁵ leaving many to continue to labor for low wages and often unscrupulous employers.

Third, Section 2107(d) would deny an important resource to fight off poverty to the growing number of immigrant workers that constitute the low-wage workforce. The proposed "measure would impoverish persons on the path to citizenship as they reach retirement age [or become disabled] and can no longer work."¹⁶ Most likely too, these social costs of poverty would simply be shifted onto states and cities.¹⁷

Lastly, Section 2107(d) will negate positive economic benefits of comprehensive immigration reform. To the extent it dis-incentivizes immigrant workers from taking the long journey to citizenship, some of the tremendous economic boost from immigration reform will never be realized.¹⁸ Moreover, Social Security benefits paid out to workers have economic impacts as well.¹⁹

¹¹ *Id.*

¹² *Id.*

¹³ Kerwin, *supra* note 3.

¹⁴ "Contrary to common perceptions, the majority of undocumented noncitizen workers actually work 'on the books' for employers who require that their employees have a Social Security number..." Blazer and Bernstein, *Confiscating Contributions*, *supra* note 9. Indeed, estimates are that unauthorized immigrant workers have injected hundreds of billions of dollars into Social Security. See Kerwin, *supra* note 3 (a majority of Social Security's earnings suspense file, which contained \$661 billion in 2007 and likely more now, may be comprised of earnings by out-of-status workers, particularly in the agricultural, food, and beverage industries).

¹⁵ Professor Lauren Gilbert, St. Thomas University Law School, *Immigrant workers face social insecurity*, Miami Herald (Sept. 10, 2013) (quoting Senator Patrick Leahy (D-VT)), available at <http://www.miamiherald.com/2013/09/10/3617782/immigrant-workers-face-social.html>.

¹⁶ See Kerwin, *supra* note 3.

¹⁷ Blazer and Bernstein, *Confiscating Contributions*, *supra* note 9.

¹⁸ See e.g., Dr. Raúl Hinojosa-Ojeda, *Raising the Floor for American Workers: The Economic Benefits of Comprehensive Immigration Reform*, Immigration Policy Center (Jan. 7, 2010), at

For these reasons, we urge that Section 2107(d), or similar provisions that deny Social Security benefits to those legalizing, not be included in immigration reform legislation. We otherwise continue to support Congress' work toward comprehensive immigration reform that is fair and just.

Respectfully,

A handwritten signature in cursive script that reads "Lenni Benson".

Lenni Benson
Chair, Immigration and Nationality Law Committee

<http://immigrationpolicy.org/special-reports/raising-floor-american-workers>; Robert Krol, Los Angeles Daily News (Nov. 20, 2013), at <http://www.dailynews.com/opinion/20131120/immigration-reforms-means-1700-more-in-your-familys-pocket-guest-commentary>.

¹⁹ The Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York* 20 (November 2012) (articulating economic benefits of legal aid in Social Security hearings), at http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT_Nov-2012.pdf; see also Dr. Elizabeth Becker, Senior Vice President, NERA Consulting, *Report to the Task Force to Expand Access to Civil Legal Services in New York* (Oct. 1, 2012), at Appendix 11, p. 675-87, <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS2012-APPENDICES.pdf>.