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2020-2021

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February 10, 2021

Hon. Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments Concerning Form W-7 and Instructions

Dear Commissioner Rettig:

Enclosed please find comments in response to a request concerning Form W-7 and instructions. These comments are submitted on behalf of the Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss these comments with you or your staff.

Sincerely,

Joan C. Arnold
Chair, Section of Taxation

Enclosure

cc: Jeffrey Van Hove, Acting Assistant Secretary (Tax Policy), Department of Treasury
Mark Mazur, Deputy Assistant Secretary (Tax Policy), Department of the Treasury
Krishna P. Vallabhaneni, Tax Legislative Counsel, Department of the Treasury
William M. Paul, Acting Chief Counsel, Internal Revenue Service
Kenneth Corbin, Commissioner, Wage and Investment Division, Internal Revenue Service
James L. Fish, Director Submission Processing, Wage and Investment Division, Internal Revenue Service
Erin Collins, National Taxpayer Advocate, Internal Revenue Service

**AMERICAN BAR ASSOCIATION
SECTION OF TAXATION**

**RESPONSE TO COMMENT REQUEST CONCERNING
FORM W-7 AND INSTRUCTIONS**

These comments (“**Comments**”) are submitted on behalf of the American Bar Association Section of Taxation (the “**Section**”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Sarah Lora, Co-Chair of the Section’s Pro Bono and Tax Clinics Committee. Substantive contributions were made by Christine Speidel. These Comments were reviewed by Joseph Barry Schimmel of the Section’s Committee on Government Submissions, and Kurt Lawson, the Vice Chair of Government Relations of the Section.

Although members of the Section may have clients who might be affected by the federal tax principles addressed by these Comments, no member who has been engaged by a client (or who is a member of a firm or other organization that has been engaged by a client) to make a government submission with respect to, or otherwise to influence the development or outcome of one or more specific issues addressed by, these Comments has participated in the preparation of the portion (or portions) of these Comments addressing those issues. Additionally, while the Section’s diverse membership includes government officials, no such official was involved in any part of the drafting or review of these Comments.

Contact: Sarah Lora
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Date: February 10, 2021

I. INTRODUCTION

These comments are submitted in response to the comment request published by the Department of the Treasury (“**Treasury**”) in the Federal Register on January 11, 2021, relating to U.S. individual income tax returns (the “**Comment Request**”).¹ The Comment Request generally requested comments on forms and schedules used by individuals to report their income tax liabilities, and included an appendix listing more than 200 forms and schedules. These comments specifically address Form W-7, *Application for IRS Individual Taxpayer Identification Number*.

II. BACKGROUND

The Internal Revenue Service (the “**Service**”) created the individual taxpayer identification number (“**ITIN**”) program by regulation in 1996 to improve compliance with the tax laws.² Treas. Reg. § 301.6109-1(d)(3)³ directs the Service to issue ITINs to certain resident and nonresident aliens who do not qualify for a social security number (an “**SSN**”) but who need a taxpayer identification number (“**TIN**”) for tax purposes.⁴ Treas. Reg. § 301.6109-1(d)(3)(i) defines an ITIN as “a taxpayer identifying number issued to an alien individual by the Internal Revenue Service, upon application, for use in connection with filing requirements under this title.” Treas. Reg. § 301.6109-1(d)(3)(ii) goes on to state:

Any individual who is not eligible to obtain a social security number and is required to furnish a taxpayer identifying number must apply for an IRS individual taxpayer identification number on Form W-7, Application for IRS Individual Taxpayer Identification Number, or such other form as may be prescribed by the Internal Revenue Service. . . . The individual shall furnish the information required by the form and accompanying instructions, including the individual’s name, address, foreign tax identification number (if any), and specific reason for obtaining an IRS individual taxpayer identification number.

¹ Agency Information Collection Activities; Submission for OMB Review; Comment Request; U.S. Income Tax Return Forms for Individual Taxpayers, 86 Fed. Reg. 2,041 (Jan. 11, 2021).

² T.D. 8671, Taxpayer Identifying Numbers (TINs), 61 Fed. Reg. 26,788 (May 29, 1996); *see also Social Security Number and Individual Taxpayer Identification Number Mismatches and Misuses: Hearing Before the Subcomm. on Oversight and Subcomm. on Social Security*, 108th Cong. 108-53, at 2 (Mar. 10, 2004).

³ Unless otherwise indicated, references to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “**Code**”) and all “**Treas. Reg. §**” references are to the Treasury Regulations promulgated under the Code, all as in effect (or, in the case of Proposed Treasury Regulations which remain outstanding, as proposed) as of the date of these Comments.

⁴ *See also* IRS Pub. 1915, *Understanding Your IRS Individual Taxpayer Identification Number* (rev. 1-2020), at 5.

Congress revised and codified the ITIN program in the Protecting Americans from Tax Hikes Act of 2015 (the “**PATH Act**”)⁵ by adding section 6109(i). Consistent with the existing Treasury Regulations, section 6109(i)(1) authorizes the Secretary of the Treasury to “issue an individual taxpayer identification number to an individual only if the applicant submits an application, using such form as the Secretary may require and including the required documentation”

III. IMPROVEMENTS TO THE INSTRUCTIONS TO FORM W-7 AND PUBLICATION 1915

Before 2018, generally any spouse or dependent of a taxpayer for whom a personal exemption deduction was allowable to the taxpayer under section 151, and was not eligible for an SSN, could obtain or renew an ITIN.⁶ After 2017, by contrast, the Form W-7 instructions limit the ability of a spouse or dependent to obtain or renew an ITIN. They now state:

For tax years after December 31, 2017, spouses and dependents who could have been claimed in previous years for the personal exemption are not eligible for an ITIN or to renew an ITIN, unless they qualify for an allowable tax benefit or they file their own tax return.⁷

Consistent with the instructions, Publication 1915, *Understanding Your IRS Individual Taxpayer Identification Number*, states:

For tax years 2018 through 2025, spouses and dependents who reside outside of the U.S. should not apply for an ITIN unless they qualify for an allowable tax benefit, such as dependent parents who qualify the primary taxpayer to claim head of household (HOH) filing status, or if they file their own tax return.⁸

The rationale for the change was that legislation in 2017 (the “**Act**”)⁹ reduced the deduction for personal exemptions for spouses and dependents in section 151 to zero for tax years 2018-25.¹⁰ Section 151(e) requires the spouse or dependent to have a TIN, and

⁵ Division Q of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 203, 129 Stat. 2,242, 3,078-79.

⁶ Instructions for Form W-7 (rev. Oct. 2017), at 1-2.

⁷ Instructions for Form W-7 (rev. Sept. 2020), at 1.

⁸ IRS Pub. 1915, *Understanding Your IRS Individual Taxpayer Identification Number* (rev. 1-2020), at 6.

⁹ Pub. L. No. 115-97, § 11041, 131 Stat. 2,054, 2,082 (2017), adding I.R.C. § 151(d)(5).

¹⁰ See I.R.M. 3.21.263.9.3.2.2.2 (01-01-2021) (“Effective January 1, 2018, the deduction for personal exemptions was suspended for tax years 2018 through 2025 by the Tax Cuts and Jobs Act signed on December 22, 2017. For tax years after December 31, 2017, spouses and dependents who could have been claimed in previous years for the personal exemption are NOT eligible for an ITIN or to renew an ITIN unless they qualify for an allowable tax benefit or they file their own tax return.”).

for the taxpayer to include the TIN “on the return claiming the exemption.”¹¹ With the deduction reduced to zero, the Service required other reasons for a dependent who could not get an SSN to need an ITIN.

It is important to note that the Act did not change the definition of “dependent” in section 152. This includes section 152(b)(3)(A), which generally requires a “dependent” to be a citizen or national of the United States but carves out an exception if the individual is a resident of Canada or Mexico. Furthermore, while the Act reduced the section 151 deduction to zero for tax years 2018-25, it specified that the reduction “shall not be taken into account in determining whether a deduction is allowed or allowable, or whether a taxpayer is entitled to a deduction, under [that] section.” Thus, even after 2017 a resident of Canada or Mexico can be a “dependent” under section 152 for whom a deduction is “allowable” under section 151, as long as – taking into account section 151(e) – the individual’s TIN is included on the taxpayer’s Form 1040.¹²

We believe that in various respects the Form W-7 instructions and Publication 1915 do not fully or accurately reflect the existing statutory scheme. Accordingly, we make the following recommendations:

A. Reference the allowable tax benefits included in the Internal Revenue Manual.

The Internal Revenue Manual (“**I.R.M.**”) includes a list of “allowable tax benefits” that qualify an individual for an ITIN.¹³ It says that “[a]n allowable tax benefit includes the American Opportunity Tax Credit (AOTC), Head of Household Filing Status (HOH), a spouse filing a joint return, Premium Tax Credit (PTC) or Credit for Other Dependents (ODC).” Neither the Form W-7 instructions nor Publication 1915 defines or provides a list of “allowable tax benefits,” potentially creating confusion and inviting mistakes by taxpayers and their preparers. We believe that taxpayers, spouses, and dependents would benefit from additional information to clarify when an ITIN application is appropriate for spouses and dependents residing outside the United States. The instructions as written could lead individuals not to apply when it would be beneficial and appropriate under section 6109(i) and the Treasury Regulations for them to do so. Accordingly, we recommend that the W-7 instructions and Publication 1915 be modified to reference all of these benefits.

¹¹ The TIN requirement was added in 1986. Congress viewed it as an enforcement mechanism for ensuring that the same dependent was not claimed on more than one tax return. *See* 132 Cong. Rec. S7,892 (June 19, 1986) (floor debate).

¹² For purposes of these Comments, we assume that the TIN requirement in section 151(e) continues to apply to tax years 2018-25. However, Treasury and the Service might wish to consider and clarify whether that actually is true, given that a taxpayer literally cannot file a “return claiming the exemption” during those years.

¹³ *Id.* The list begins with the word “including,” and therefore appears to be non-exclusive, although this is not entirely clear.

A “spouse filing a joint return” for this purpose presumably refers to a non-resident spouse that needs a TIN in order for a taxpayer and a non-resident spouse to make an election under section 6013(g) to treat the spouse as a U.S. resident and file a joint return. In our experience, this tax benefit is not widely known. Accordingly, we recommend that the W-7 instructions and Publication 1915 be modified to include an example explicitly applying section 6013(g).

B. Clarify that ITINs may be issued and renewed for non-resident dependents from Canada and Mexico.

The previous (*i.e.*, 2017) W-7 instructions allowed nonresident dependents from Canada and Mexico to obtain and renew ITINs. For example, they said “[a]pplicants claimed as dependents must also prove U.S. residency *unless the applicant is from Mexico or Canada*” (emphasis added). By contrast, the new (*i.e.*, 2020) W-7 instructions imply that nonresident dependents cannot obtain or renew ITINs, even if they reside in Canada or Mexico. They say “[a]pplicants claimed as dependents on returns filed *prior to tax year 2018* must also prove U.S. residency . . . unless the applicant is from Canada or Mexico” (emphasis added). They also delete the phrase “unless the dependents are from Mexico [or] Canada” in the statement “[a] passport that doesn’t have a date of entry will not be accepted as a stand-alone identification document for dependents, *unless the dependents are from Mexico [or] Canada*” (emphasis added). The Service’s ITIN unit also has been denying ITINs for dependent applicants that do not show proof of U.S. residency even where there is proof of Mexican residency.

We believe that these portions of the instructions, and the actions of the Service’s ITIN unit, are inconsistent with the more general statements in the W-7 instructions, Publication 1915, and the I.R.M. that a spouse or dependent who resides outside of the U.S. may apply for an ITIN as long as the individual qualifies for an “allowable tax benefit,” and that as a result individuals might be unfairly deprived of those benefits. Specifically:

- One of those benefits is Head of Household Filing Status (“**HOH**”). HOH is available if the taxpayer is a U.S. citizen or resident¹⁴ and the dependents who are residents of Canada or Mexico and for whom deduction are allowable under section 151 are the taxpayer’s parents.¹⁵ However, because of section 151(e), this appears to be true only if they obtain TINs and the TINs are included on the taxpayer’s Form 1040, which is impossible for residents of Canada or Mexico if they are denied access to ITINs.
- Another one of those benefits is the American Opportunity Tax Credit (“**AOTC**”). It is available with respect to tuition or fees of a dependent who is a

¹⁴ I.R.C. § 2(b)(3)(A).

¹⁵ I.R.C. § 2(b)(1)(B); Treas. Reg. § 1.2-2(b)(4); *see also* I.R.M. 3.21.263.5.6(6) (03-03-2020) (“The dependent must be . . . claimed as a dependent parent from Canada or Mexico for the Head of Household (HOH) filing status.”).

resident of Canada or Mexico and for whom a deduction is allowable under section 151,¹⁶ but again, because of section 151(e), only if the dependent obtains a TIN and the TIN is included on the taxpayer's Form 1040, which is impossible for a resident of Canada or Mexico if the individual is denied access to an ITIN.

- Another one of those benefits is the Premium Tax Credit (“PTC”). It is available with respect to coverage provided to a dependent who is a resident of Canada or Mexico regardless of whether a deduction is allowable under section 151.¹⁷ However, the amount of PTC available to a U.S. resident taxpayer depends on the taxpayer's “family size”;¹⁸ dependents are taken into account in determining “family size” for this purpose only if a deduction is allowable with respect to them under section 151;¹⁹ and, again, because of section 151(e), this appears to require that the dependents obtain TINs and that the TINs are included on the taxpayer's Form 1040, which is impossible for residents of Canada or Mexico if they are denied access to ITINs.

In addition, we believe that the W-7 instructions, and the actions of the Service's ITIN unit, are inconsistent with the instructions for Forms 1040, *U.S. Individual Income Tax Return*, and 1040-SR, *U.S. Tax Return for Seniors*. These ask, under Step 2 of *Who Qualifies as Your Dependent*: “Was the child a U.S. citizen, U.S. national, U.S. resident alien, or a resident of Canada or Mexico?”²⁰ The instructions for Form 1040 then explain that if the answer is yes, and as long as the child satisfies additional tests, the child can be listed as a dependent on the return. The taxpayer is next instructed on how to complete the columns to add the child to the return. As these columns include the child's TIN, they implicitly assume that an ITIN is available for such an individual.

Furthermore, we believe that the W-7 instructions, and the actions of the Service's ITIN unit, can unfairly deprive dependents in Canada and Mexico of access to other important non-tax and state benefits. A taxpayer's “family size” as shown by the number of exemptions on the taxpayer's tax return can be important for federal tax reasons as explained above, but many non-tax federal and state programs also calculate benefits based on the number of exemptions on the tax return. These include immigration-related

¹⁶ I.R.C. § 25A(f)(1)(iii); Treas. Reg. § 1.25A-2(a) (“Among other requirements under section 152, a nonresident alien student must be a resident of a country contiguous to the United States in order to be treated as a dependent.”).

¹⁷ I.R.C. § 36B(b)(1); Treas. Reg. § 1.36B-1(f).

¹⁸ *Id.*

¹⁹ I.R.C. § 36B(d)(2)(A); Treas. Reg. § 1.36B-1(b)(1)(D).

²⁰ Instructions for Forms 1040 and 1040-SR, at 17-18 (rev. Jan. 6, 2021).

applications,²¹ student financial aid applications,²² emergency Medicaid applications,²³ and state tax returns, particularly where the state exemption amount remains above \$0 for dependents satisfying section 152.²⁴ The failure to issue ITINs to these dependents can result in inaccurate family size counts – and reduced benefits – under these programs. Although these are not “tax benefits,” Treas. Reg. § 301.6109-1(d)(3)(i) does not state that there need be any immediate monetary tax benefit attached to the ITIN; rather, it states that an ITIN may be issued if “a taxpayer identification number is required.”

Finally, we believe that the W-7 instructions, and the actions of the Service’s ITIN unit, in the long run will impose unnecessary administrative burdens on the Service. The Service has issued ITINs to dependents who are residents of Canada or Mexico since 1996. Continuing to do will impose no additional costs and also will create efficiencies for the Service in the future. If these ITINs are not renewed by the Service now, they will expire and require renewal after 2025.²⁵ This may cause a backlog to occur, creating delay and expense for the Service and taxpayers when the dependent renews their ITIN after the Act sunsets. Renewal of ITIN numbers to prevent deactivation for dependents who satisfy the elements of section 152(d) is an additional benefit to the Service as well as to the taxpayer, decreasing administrative burden and costs, as well as protecting vulnerable taxpayer communities.

Unfortunately for ITIN applicants, there is not an easy way to appeal a rejection of an ITIN application, making the Service’s changes described above especially burdensome.

Accordingly, for the reasons listed above, we recommend that the Form W-7 instructions and Publication 1915 be revised to reflect that it is allowable to apply for ITINs for dependents, as defined in section 152, who are residents of Canada or Mexico. To fully reflect the availability of ITINs in order to access other important non-tax and state benefits, we also recommend that the Form W-7 instructions and Publication 1915,

²¹ See, e.g., Instructions for I-864, Affidavit of Support Under Section 213A of the INA, at 3 (rev. Oct. 15, 2019) (use of tax return to show family size to determine public charge), *available at* <https://www.uscis.gov/sites/default/files/document/forms/i-864instr-pc.pdf>.

²² 7 Things You Need Before You Fill Out the 2021-22 FAFSA® Form, *available at* <https://blog.ed.gov/2020/09/7-things-need-fill-2021-22-fafsa-form/> (last accessed Jan. 21, 2021).

²³ See, e.g., Emergency Medicaid Coverage in New York State, Limited Coverage for Undocumented Immigrants, <http://www.wnyc.com/health/entry/70/> (last updated July 29, 2020). One anecdote posted on the ABA Tax Connect listserv reported that the failure to obtain ITINs for dependents residing in Mexico resulted in an artificially reduced family size costing the taxpayer approximately \$26,000 in medical costs.

²⁴ See, e.g., Or. Rev. Stat. § 316.085(1)(a) (allowing a personal exemption credit currently equal to \$210 multiplied by the number of personal exemptions allowed under I.R.C. § 151).

²⁵ See I.R.C. § 6109(i)(3). Because the Service is not renewing the ITINs for these dependents, the number will not be used for three consecutive years and the Service will deactivate the ITIN.

as well as the I.R.M.,²⁶ be revised to list “allowable tax benefits” as only one basis for obtaining an ITIN.

²⁶ *E.g.*, I.R.M. 3.21.263.5.6(6) (03-03-2020).