

# 20. Tax Filing Issues

Filing taxes and receiving a tax refund (if you have overpaid taxes) is a necessary part of earning income in the United States. Under the “substantial presence” test, most immigrants are classified as resident aliens for tax purposes and must file the standard form 1040. This section answers the following questions:

[Are You a “Resident Alien” or “Non-Resident Alien” for Tax Filing Purposes? >](#)

[Are You Required to File a Tax Return? Should You Anyway? > What If Your](#)

[Spouse is Deported and You Remain in the Country? > When Do You Receive](#)

[Your Tax Refund if One is Owed to You? > What Are the Penalties for Failure to](#)

[File Tax Returns? > Where Can You Obtain the Necessary Forms to File Taxes?](#)

[> Checklist: Tax Filing Issues](#)

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

## Are You a “Resident Alien” or Non-Resident Alien” for Tax Filing Purposes?

You must first determine whether you are a “resident alien” or “non-resident alien” for tax purposes in order to determine which forms to use and what income should be taxed. **“Resident aliens”** generally are taxed on their worldwide income, the same as U.S. citizens. However, a portion of income earned outside of the United States may be eligible for exclusion.<sup>21</sup> **“Non-resident aliens”** are taxed only on their income from sources within the United States and on certain income connected with the conduct of a trade or business in the United States.

**Even if you are not a lawful permanent resident for immigration law purposes, you may, and probably often will, be considered a “resident alien” for tax purposes.**

According to Section 7701(b) of the Internal Revenue Code (IRC), a “resident alien” is anyone who maintains a “substantial presence” in the United States, which requires:

1. 31 days of presence in the U.S. during the year in question, and
2. The sum of the number of days of presence during the year in question plus the two preceding years is at least 183 after weighting.
  - a. To meet the second criteria, days from the present year are multiplied by one, days from the prior year are multiplied by one-third, and days from the second preceding year are multiplied by one-sixth, and then the resulting numbers are added.

Thus, immigrants living in the United States full time are probably considered “resident aliens” for tax purposes. “Resident aliens” are required to file Form 1040 while they are in the United States, and when back in their home country, may continue to be treated as “resident aliens” as long as the substantial presence test is satisfied.

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<sup>21</sup> <https://www.boundless.com/blog/immigrants-filing-taxes/>

*Note: Filing taxes as a “non-resident alien” can affect your status as a permanent resident, as it can be used as a basis for the government to claim that you are a resident in another country and have abandoned your permanent residence in the United States. Likewise, paying taxes in another country could create the presumption that you also reside in that country.<sup>22</sup>*

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

If you are considered a “resident alien,” you must file a tax return if your income is above a certain level. The amount varies depending on filing status, age, and the type of income earned. For example, for 2023, a married couple under age 65 generally was not required to file unless their joint income exceeded \$27,700. However, self-employed individuals generally must file a tax return if their net income from self-employment was at least \$400. Tax issues are covered by the Internal Revenue Code (IRC) and regulations. A “non-resident alien” engaged in a trade or business in the United States in a given tax year must file a tax return.

There are no special laws or regulations for immigrants facing deportation. Even if you are not required to file taxes, you may choose to file in order to receive a refund of any overpaid taxes or to receive tax credits such as the Earned Income Tax Credit.

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

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

If you file a joint return, however, the non-resident spouse must declare their foreign income on the U.S. tax return.

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<sup>22</sup> <https://citizenpath.com/us-taxes-immigration-consequences/>

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

Refunds will not be paid at the time of your departure.

- “Resident aliens” must complete Form 1040 (or Form 1040-SR if 65 years of age or older) and will receive a refund if one is owed. To determine whether income earned outside of the United States may be excluded, “resident aliens” must complete Form 2555.
- If “non-resident aliens” are owed tax refunds, they must complete Form 1040NR at the end of the tax year to receive their refunds.

A claim for refund must be made within three years of the due date of the return or within two years from the time the tax was paid (whichever is later), or you lose your right to that refund. Once a tax return is submitted to the IRS reflecting that a refund is owed, the amount due is ordinarily paid within approximately 21 days, however payments sometimes take longer.

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

If you fail to file a tax return, you may be subject to civil and criminal penalties. While criminal penalties may not be enforceable once you have left the United States, civil penalties could potentially be enforceable on property you own that is left behind in the United States.

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

Additionally, failure to file taxes when required may impact the naturalization process. Eligibility for naturalization requires demonstration of good moral character. Applications for naturalization ask specific questions about filing taxes. If U.S. Citizenship and Immigration Services (USCIS) believes that you have avoided your tax obligations in any way, it can deny the application based on the good moral character requirement.<sup>23</sup> In recent years advocates have reported closer scrutiny by USCIS of tax compliance.

## Where Can You Obtain the Necessary Forms to File Taxes?

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

Internal Revenue Service  
International Accounts  
Philadelphia, PA 19255-0725

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

*By phone:*  
+15.15.56.46.827

*By fax:*  
681-247-3158  
304-707-9793

*By email:*  
[tas.international@irs.gov](mailto:tas.international@irs.gov)

Additional information about IRS services for international taxpayers is available at <https://www.irs.gov/individuals/international-taxpayers>.

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<sup>23</sup> <https://citizenpath.com/us-taxes-immigration-consequences/>

## Checklist: Tax Filing Issues

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

- If you are a “resident alien” for tax law purposes, you should complete the Form 1040 (or Form 1040-SR if age 65 or older) at the end of the tax year as you would have if you were in the United States.
- If you are a “non-resident alien” for tax purposes, you should complete Form 1040NR at the end of the tax year in order to receive any refund for the year.
- A resident spouse can file his or her tax returns jointly with a deported spouse if the deported spouse chooses to be treated as a "resident alien" for tax purposes. In that case, the deported spouse must declare his or her worldwide income on the return.
- If you fail to file your appropriate tax forms, you may be subject to civil and criminal penalties. This may make it impossible for you to ever immigrate to the United States again.
- All necessary forms are available on the IRS website at [www.irs.gov](http://www.irs.gov) (Spanish language version: [www.irs.gov/Spanish](http://www.irs.gov/Spanish))

### **KEY TAKEAWAY**

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