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CERTIFIED ACCEPTANCE AGENTS (CAAs): Amend the PATH Act to Authorize CAAs to Certify Individual Taxpayer Identification Number Applications for Taxpayers Abroad

TAXPAYER RIGHTS IMPACTED¹

- *The Right to Quality Service*
- *The Right to a Fair and Just Tax System*

PROBLEM

Taxpayers ineligible for Social Security numbers (SSNs) require Individual Taxpayer Identification Numbers (ITINs) to comply with their tax filing and payment obligations, claim dependents, and receive tax benefits, such as the benefits of a tax treaty.² In recent years, over 100,000 nonresident taxpayers have applied for ITINs annually.³ However, options for taxpayers who reside abroad to apply for ITINs have been reduced in recent years. During late 2014 and 2015, the IRS closed all four tax attaché offices abroad.⁴ Although the Protecting Americans from Tax Hikes Act of 2015 (hereinafter PATH Act) specifically authorizes ITIN applicants residing outside the United States to apply in person to an IRS employee,⁵ there are no IRS offices abroad at which an applicant can apply without the attaché offices. The PATH Act also authorizes applicants who reside outside the United States to apply in person to a designee of the Secretary at a U.S. diplomatic mission or consular post,⁶ but, citing resistance from the Department of State due to budget issues, the IRS has failed to designate anyone to certify ITIN applications at these locations.⁷ Finally, the PATH Act eliminated the option for taxpayers residing abroad to apply through a CAA.⁸ Although Congress has introduced legislation to fix this error, neither the Senate nor the House of Representatives has acted on the bills to date.⁹

The current limitations will lead to many applicants who reside abroad having to send their original documents to the IRS through international mail, requiring them to give them up for long periods of

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

2 For a detailed look at the characteristics of ITIN applicants in recent years, see National Taxpayer Advocate 2015 Annual Report to Congress 198-200.

3 There were 100,285 nonresident Individual Taxpayer Identification Number (ITIN) applicants in 2013, and 108,472 in 2014, the most recent years for which data is available. National Taxpayer Advocate 2015 Annual Report to Congress 199.

4 See National Taxpayer Advocate 2015 Annual Report to Congress 72.

5 See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 203(a) (2015) (codified at IRC § 6109(i)(1)(B)) [hereinafter PATH Act].

6 Protecting Americans from Tax Hikes Act of 2015 (PATH Act) § 203(a) (codified at IRC § 6109(i)(1)(B)).

7 See IRS response to TAS information request (Nov. 29, 2016). See also Most Serious Problem: *Individual Taxpayer Identification Numbers (ITINs): IRS Processes for ITIN Applications, Deactivations, and Renewals Unduly Burden and Harm Taxpayers*, *supra*.

8 See PATH Act § 203(a) (codified at IRC § 6109(i)(1)(B)).

9 See Technical Corrections Act of 2016, S. 2775, 114th Cong. § 2(e)(1) (2016); H.R. 4891, 114th Cong. § 2(e)(1) (2016); Tax Technical Corrections Act of 2016, S. 3506, 114th Cong. § 101(f)(2) (2016); H.R. 6439, 114th Cong. § 101(f)(2) (2016).

time and risk their loss.¹⁰ Removing the option for ITIN applicants who reside abroad to use a CAA results in widespread taxpayer burden and an increased strain on the IRS, which must spend more time certifying, handling, and returning original documents.¹¹ Further, it may discourage investment in the United States because foreign investors need ITINs to claim tax treaty benefits and to avoid higher withholding rates.¹²

EXAMPLE

A businesswoman living in Canada has filed U.S. income tax returns every year for the past decade in order to report and pay tax on interest and dividend income she received from sources within the United States.¹³ She is not a U.S. citizen and does not have an SSN. She received a letter from the IRS in late 2016, explaining that her ITIN would expire on January 1, 2017 because it contained the middle digits “78.”¹⁴ According to the IRS website, there are 114 CAAs located in Canada.¹⁵ However, because the PATH Act removes the option for her to apply through a CAA, her only option is to mail her application with the original identification documents or documents certified by the issuing agency. The taxpayer is unable to have her documents certified by the issuing agency because none of the agencies have offices near her. Because the taxpayer only has two forms of acceptable documentation that include a picture (a requirement for one of the two ITIN supporting documents),¹⁶ she must either send her passport or her driver’s license to the IRS. She cannot give up her driver’s license, which she uses to drive legally in Canada. Because she needs her passport for upcoming business travel, she must delay applying for an ITIN and filing her annual U.S. tax return. This delay results in her not being able to receive a refund of U.S. tax withheld and not being able to file her Canadian tax return to claim full credit for the U.S. tax paid. As a result, the taxpayer decides to divest herself of her U.S. investments.

RECOMMENDATION

Amend Internal Revenue Code (IRC) § 6109(i)(1)(B) to clarify that ITIN applicants residing outside the United States may apply for an ITIN in person to a CAA while located outside the United States.

PRESENT LAW

IRC § 6109(i)(1)(B) specifies that ITIN applicants residing outside the United States may apply for an ITIN “by mail or in person to an employee of the Internal Revenue Service or a designee of the Secretary at a United States diplomatic mission or consular post.” In contrast, ITIN applicants residing in the United States may apply by mail or “in person to an employee of the Internal Revenue Service or a

10 For a discussion of the problems with mailing original documents, see National Taxpayer Advocate 2015 Annual Report to Congress 196-212 (Most Serious Problem: *Individual Taxpayer Identification Numbers (ITINs): IRS Processes Create Barriers to Filing and Paying for Taxpayers Who Cannot Obtain Social Security Numbers*). See also Letter from Richard M. Reedman, President, Nat’l Ass’n of Enrolled Agents, to John A. Koskinen, Commissioner, Internal Revenue Service (Dec. 13, 2016) (on file with TAS) (discussing the difficulty of applying for an ITIN while abroad).

11 The IRS anticipates returning original documents within 60 days of receipt for renewal applications; however, for applications submitted during the filing season or from abroad, applicants are advised to wait 11 weeks for their ITIN applications to be processed. IRS Notice 2016-48, Implementation of PATH Act ITIN Provisions, IRB 2016-33 (Aug. 15, 2016); Internal Revenue Manual (IRM) 3.21.263.2.3, *ITIN Disclosure Guidelines* (Feb. 19, 2015).

12 See IRC §§ 1441-1443, 1445, 1446.

13 See IRC § 871.

14 See IRS, *IRS Works to Help Taxpayers Affected by ITIN Changes; Renewals Begin in October*, IR-2016-100 (Aug. 4, 2016).

15 IRS, Acceptance Agents - Canada, <https://www.irs.gov/individuals/acceptance-agents-canada> (last updated Nov. 2, 2016).

16 See Instructions for Form W-7 (Sept. 2016).

community-based certified acceptance agent approved by the Secretary.”¹⁷ Prior to the passage of the PATH Act, the Code contained no restrictions on how ITIN applicants could apply and who could use a CAA.

REASONS FOR CHANGE

Prior to late 2014, taxpayers residing abroad had the following options to apply for an ITIN:

- Mailing to the IRS an ITIN application and original identification documents;
- Mailing to the IRS an ITIN application and copies of identification documents certified by the issuing agency¹⁸ or certified by an employee of a U.S. consulate or embassy;¹⁹
- Applying in person to an IRS employee at one of four tax attaché offices located in Beijing, London, Paris, or Frankfurt; or
- Applying in person to a CAA who can verify and return original identification documents and send in the complete ITIN application package to the IRS.²⁰

The closure of the tax attaché offices abroad, the lack of designated employees at U.S. consulates or embassies, and now the PATH Act’s elimination of CAAs for applicants who reside abroad results in these applicants having no option to apply for an ITIN in-person.

The CAA restriction comes at an especially bad time when the IRS has plans to deactivate millions of ITINs in the coming years, requiring taxpayers to apply to renew their ITINs if they need to file tax returns.²¹ Although renewal applicants can apply for an ITIN outside the filing season without submitting a paper return, the application procedures are otherwise the same in terms of proving identity, foreign status, and residency through original documents or copies certified by the issuing agency.²² The upcoming deactivations will likely result in a greater number of ITIN applications in coming years.

At a time when ITIN applications are expected to increase, and when strained IRS resources have led to backlogs and delays in processing applications,²³ there is no compelling reason to remove the option for ITIN applicants who reside abroad to use CAAs. Problems with handling and returning original identification documents are likely to grow as more applicants residing abroad feel compelled to send in original documents via international mail. Further, the restriction on using CAAs infringes on a taxpayer’s *right to a fair and just tax system* because applicants residing abroad are already at a disadvantage

17 PATH Act § 203(a) (codified at IRC § 6109(i)(1)(A)).

18 For foreign documents, the issuing agency is the agency who issued the form of identification. IRM 3.21.263.5.3.4.2.1, *Supporting Identification Documentation Certification Requirements* (Nov. 2, 2016).

19 Employees of a U.S. consulate or embassy may only certify foreign documents. IRM 3.21.263.5.3.4.2.1 *Supporting Identification Documentation Certification Requirements* (Nov. 2, 2016).

20 CAAs can only verify two types of documentation for dependents — birth certificates and passports. Instructions for Form W-7 (Sept. 2016). Although the PATH Act refers to a “certified acceptance agent,” CAAs were previously referred to and at times still referred to as “Certifying Acceptance Agents” by the IRS. See, e.g., IRM 3.21.263.3.1, *Acceptance Agent (AA) or Certifying Acceptance Agent (CAA)* (Sept. 12, 2016).

21 The PATH Act dictates that all ITINs will expire if the ITIN holder does not file a tax return (or is not included on another’s return as a dependent) for three consecutive tax years. Further, ITINs issued before 2013 will expire on a staggered basis, regardless of use. See PATH Act § 203(a) (codified at IRC §§ 6109(i)(3)). However, the IRS has indicated it will be unable to meet this schedule and will deactivate ITINs in stages based on an alternative plan. For a detailed discussion of challenges pertaining to ITIN renewals, see Most Serious Problem: *Individual Taxpayer Identification Numbers (ITINs): IRS Processes for ITIN Applications, Deactivations, and Renewals Unduly Burden and Harm Taxpayers*, *supra*.

22 See Instructions for Form W-7 (Sept. 2016).

23 See National Taxpayer Advocate 2015 Annual Report to Congress 202.

when applying for ITINs, due to their inability to apply in person to an IRS employee.²⁴ By prohibiting applicants who reside abroad from using CAAs, the PATH Act eliminated another option that is still available to domestic applicants.

Contrary to the restriction on applicants who reside abroad using CAAs, other sections of the PATH Act seem to envision an expansion of the CAA program and a move towards more in-person interviews for ITIN applicants.²⁵ Prior to the passage of the PATH Act, ITIN applicants abroad could use CAAs in 18 countries and one U.S. territory, but even some of the largest countries only had one or two CAAs each.²⁶ Instead of taking away the option of using a CAA, legislation should authorize the use of CAAs by applicants residing abroad, providing the IRS with the opportunity to study ways to increase availability of CAAs not just domestically, but worldwide.

EXPLANATION OF RECOMMENDATION

This recommendation mirrors § 2(e)(1) of the Technical Corrections Act of 2016²⁷ and § 101(f)(2) of the Tax Technical Corrections Act of 2016,²⁸ and specifies that ITIN applicants residing abroad may apply for an ITIN in person to a CAA. Without this change, ITIN applicants who reside abroad are limited to applying by mail, in person to an IRS employee, or in person to a designated official at an U.S. diplomatic mission or consulate. Because of the lack of IRS offices abroad and the failure to appoint designated officials at U.S. diplomatic missions or consulates, taxpayers residing abroad are effectively limited to applying for an ITIN by mail. This requires sending through international mail either original identification documents or copies certified by the issuing agency. This legislative change would restore the option for applicants who reside abroad to use CAAs, which was previously available to them prior to the passage of the PATH Act. It would also increase fairness because applicants residing in the United States can currently use CAAs to certify their ITIN applications.

24 Applicants in the United States can apply in person to an IRS employee at a Taxpayer Assistance Center. See IRS, *Taxpayer Assistance Center (TAC) Locations Where In-Person Document Review Is Provided*, <https://www.irs.gov/uac/tac-locations-where-in-person-document-verification-is-provided> (Sept. 1, 2016).

25 The PATH Act provides a list of persons eligible to be CAAs, which includes among others, state and local governments, federal agencies, and other persons or categories authorized by regulations or IRS guidance. See PATH Act, § 203(c). As part of a required study on the effectiveness of the application process for ITINs, the IRS must evaluate ways to expand the geographic availability of CAAs and strategies to work with other federal agencies, state and local governments, and other organizations to encourage participation in the CAA program. *Id.* at § 203(d).

26 See National Taxpayer Advocate 2015 Annual Report to Congress 208-09.

27 S. 2775, 114th Cong. § 2(e)(1) (2016); H.R. 4891, 114th Cong. § 2(e)(1) (2016).

28 S. 3506, 114th Cong. § 101(f)(2) (2016); H.R. 6439, 114th Cong. § 101(f)(2) (2016).