

U.S. DEPARTMENT OF LABOR Employment and Training Administration Washington, D.C. 20213	CLASSIFICATION
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	CORRESPONDENCE SYMBOL
	TEURL
	DATE
	March 11, 1987

DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 12-87
 TO : ALL STATE EMPLOYMENT SECURITY AGENCIES
 FROM : DONALD J. KULICK *DJ Kulick*
 Administrator
 for Regional Management

SUBJECT : Amendments Made by the Tax Reform Act of 1986 (P.L. 99-514), the Alien Farmworker Act (P.L. 99-595), and the Immigration Reform and Control Act of 1986 (P.L. 99-603), Which Affect the Federal-State Unemployment Compensation Program

1. Purpose. To advise State agencies of recent amendments to Federal law affecting the Federal-State Unemployment Compensation (UC) program.

2. References. The Tax Reform Act of 1986, the Alien Farmworker Act, the Immigration Reform and Control Act of 1986.

3. Background. In late 1986, the President signed into law three bills containing provisions affecting the UC program. These are the: a) Tax Reform Act of 1986 (P.L. 99-514), signed into law on October 22, 1986; b) Alien Farmworker Act (P.L. 99-595), signed into law on October 31, 1986; and, c) Immigration Reform and Control Act of 1986 (P.L. 99-603), signed into law on November 6, 1986.

a. The Tax Reform Act of 1986 provides that all unemployment benefits will become taxable income with respect to benefits received after December 31, 1986. Currently, unemployment insurance (UI) is taxable only if the combination of taxable income and UI payments exceeds \$18,000 for joint returns or \$12,000 for single returns.

The Act also provides a two-year extension of the exclusion from the definition of wages of employer-financed educational assistance and group legal service plans (Sections 3306(b)(12) and (13) of the Federal

RESCISSIONS	EXPIRATION DATE
	March 31, 1988

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Unemployment Tax Act (FUTA)); makes technical changes to Sections 3302(c)(2), 3302(f)(8), and 3306(o) of the FUTA; amends the Internal Revenue Code of 1954 concerning exclusions from the definition of "gross income" of certain prizes and awards; and temporarily excludes from the FUTA coverage services performed for certain Indian tribal governments.

b. The Alien Farmworker Act extends for five years, through December 31, 1992, the exemption from "employment" under Section 3306(c)(1)(B), FUTA, of agricultural labor performed by certain nonimmigrant farmworkers admitted to work temporarily under specific provisions of the Immigration and Nationality Act.

c. The Immigration Reform and Control Act of 1986 contains provisions relating to a system to verify alien eligibility for unemployment benefits.

These amendments made several technical and significant changes affecting the Federal-State UC program which may require changes in State law or procedures. However, only the alien verification provisions of the Immigration Reform and Control Act of 1986 may require changes in State laws for compliance with Section 303(f) of the Social Security Act (SSA). The amendments are explained in attachments to this UIPL.

4. Action Required. SESAs are requested to notify appropriate staff of these amendments and take necessary action to implement required changes in State laws or procedures.

5. Inquires. Inquiries should be directed to your Regional Office.

6. Attachments. Text, explanation and interpretation of UC amendments.

TEXT, EXPLANATION AND INTERPRETATION OF UC AMENDMENTS
Made by Public Law 99-514, The Tax Reform Act of 1986

I. Section 121. Taxation of Unemployment Compensation.

A. Text of Amendment.

1. Amendment to Section 85 of the Internal Revenue Code (IRC) of 1986:

SEC. 85. UNEMPLOYMENT COMPENSATION.

(a) GENERAL RULE--In the case of an individual, gross income includes unemployment compensation.

(b) UNEMPLOYMENT COMPENSATION DEFINED.--For purposes of this section, the term "unemployment compensation" means any amount received under a law of the United States or of a State which is in the nature of unemployment compensation.

2. Effective Date:

SECTION 151. EFFECTIVE DATES.

(b) UNEMPLOYMENT COMPENSATION.--The amendment made by section 121 shall apply to amounts received after December 31, 1986, in taxable years ending after such date.

B. Discussion. The Revenue Act of 1978 designated specific income levels at which unemployment benefits were taxable (\$25,000 for joint returns or \$20,000 for single returns). The Tax Equity and Fiscal Responsibility Act of 1982 lowered the applicable income levels to \$18,000 for joint returns or \$12,000 for single returns. Section 121 of the Tax Reform Act of 1986 amends the law to provide that gross income shall include all unemployment benefits.

C. Implementation. Each claimant should be informed of this change in income tax law. Notices should be furnished to each claimant currently filing, and to new and reopening claimants as claims are filed. Informational pamphlets should be revised when reprinted. A brief supplemental form can be issued in the interim.

II. Section 122. Exclusion From the Definition of "Gross Income" Certain Prizes and Awards

A. General. Section 122 of the Tax Reform Act of 1986 amends Section 74 of the Internal Revenue Code of 1954 concerning exclusions from the definition of "gross income" of certain prizes and awards. The amendment specifies conditions which must be met to allow such exclusions. Determination of FUTA tax liability will be based upon such definition of gross income.

B. Effective Date. The amendments made by Section 122 apply to prizes and awards granted after December 31, 1986 (Section 151(c)).

C. Implementation. Since the Internal Revenue Service has the primary authority for administering the FUTA tax provisions, it will be responsible for interpreting and applying this provision.

III. Section 1162. 2-YEAR EXTENSION OF EXCLUSIONS FOR EDUCATIONAL ASSISTANCE PROGRAMS AND GROUP LEGAL PLANS.

A. Text of Amendments to Sections 120 and 127 of the IRC of 1986.

(a) EDUCATIONAL ASSISTANCE PROGRAMS.--

(1) EXTENSION.--Subsection (d) of section 127 (relating to termination of exclusion for amounts received under educational assistance programs) is amended by striking out "1985" and inserting in lieu thereof "1987".

(2) INCREASE IN AMOUNTS.--Paragraph (2) of section 127(a) is amended by striking out "\$5,000" each place it appears in the text and the heading thereof and inserting in lieu thereof "\$5,250".

(b) GROUP LEGAL PLANS.--Subsection (e) of section 120 (relating to termination of exclusion for amounts received under qualified group legal services plans) is amended by striking out "1985" and inserting in lieu thereof "1987".

(c) EFFECTIVE DATES.--

(1) SUBSECTION (a).--The amendments made by subsection (a) shall apply to taxable years beginning after December 31, 1985.

(2) SUBSECTION (b).--The amendment made by subsection (b) shall apply to years ending after December 31, 1985.

(3) CAFETERIA PLAN WITH GROUP LEGAL BENEFITS.-- If, within 60 days after the enactment of this Act, an employee elects under a cafeteria plan under Section 125 of the Internal Revenue Code of 1986 coverage for group legal benefits to which Section 120 of such Code applies, such election may, at the election of the taxpayer, apply to all legal services provided during 1986. The preceding sentence shall not apply to any plan which on August 16, 1986, offered such group legal benefits under such plan.

B. Discussion. Section 1162 of the Tax Reform Act of 1986 provides a two-year extension of the exclusion from the definition of wages under the FUTA of employer-financed educational assistance and group legal service plans (through December 31, 1987).

C. Implementation. Since the Internal Revenue Service (IRS) has the primary authority for administering the FUTA tax provisions, it will be responsible for interpreting and applying this provision.

IV. Section 1705. APPLICABILITY OF UNEMPLOYMENT COMPENSATION TAX TO CERTAIN SERVICES PERFORMED FOR CERTAIN INDIAN TRIBAL GOVERNMENTS (This provision does not amend the FUTA).

A. Text of Section 1705 of the Tax Reform Act of 1986:

(a) IN GENERAL.--For purposes of the Federal Unemployment Tax Act, service performed in the employ of a qualified Indian tribal government shall not be treated as employment (within the meaning of section 3306 of such Act) if it is service--

(1) which is performed--

(A) before, on, or after the date of the enactment of this Act, but before January 1, 1988, and

(B) during a period in which the Indian tribal government is not covered by a State unemployment compensation program, and

(2) with respect to which the tax imposed under the Federal Unemployment Tax Act has not been paid.

(b) DEFINITION.--For purposes of this section, the term "qualified Indian tribal government" means an Indian tribal government the service for which is not covered by a State unemployment compensation program on June 11, 1986.

B. Discussion. Section 1705 of the Tax Reform Act of 1986 excludes from the definition of employment for Federal unemployment tax purposes services performed for a qualified Indian tribal government during the period prior to January 1, 1988 if the service was not covered by a State law on June 11, 1986. Presently, the only Indian tribal government we are aware of that meets this requirement is the Ute tribe in Colorado.

C. Implementation. Since the IRS has the primary authority for administering the FUTA tax collections, it will be responsible for interpreting and applying this provision.

V. Section 1706 of the Tax Reform Act of 1986. Treatment of Certain Technical Personnel.

A. Text of Amendment.

(a) IN GENERAL.--Section 530 of the Revenue Act of 1978 is amended by adding at the end thereof the following new subsection:

"(d) EXCEPTION.--This section shall not apply in the case of an individual who, pursuant to an arrangement between the taxpayer and another person, provides services for such other person as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work."

(b) EFFECTIVE DATE.--The amendment made by this section shall apply to remuneration paid and services rendered after December 31, 1986.

B. Discussion. Section 530 of the Revenue Act of 1978 (P.L. 95-600) provides that taxpayers who in the past had a reasonable basis, under specified criteria, for not treating workers as employees may continue such treatment without incurring employment tax liability. Section 1706 of the Tax Reform Act of 1986 amends Section 530 to limit its applicability by providing that the section shall not apply to firms engaging the services of such person as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work. This means that the IRS will apply common-law rules to these firms in determining liability for employment taxes, including the FUTA tax.

C. Implementation. Since the IRS has the primary authority for administering the FUTA tax provisions, it will be responsible for interpreting and applying this provision.

VI. Section 1884 of the Tax Reform Act of 1986. Technical Corrections in Federal Unemployment Tax Act.

A. Text of Amendment:

The Federal Unemployment Tax Act is amended as follows:

(1) Subparagraph (B) of section 3302(c)(2) (relating to a limit on the credit against the unemployment tax) is amended--

(A) By striking out "determination" the second place it appears in the material preceding clause (i) and inserting in lieu thereof "denominator", and

(B) in clause (i)--

(i) by striking out "percent" immediately preceding the comma at the end thereof, and

(ii) by inserting "percent" after "2.7".

(2) Subparagraph (A) of section 3302(f)(8) (relating to a partial limitation on the reduction of the credit against the unemployment tax) is amended by striking out "1987" and inserting in lieu thereof "1986".

(3) Clause (i) of section 3306(o)(1)(A) (relating to crew leaders who are registered or provide specialized agricultural labor) is amended by striking out "Farm Labor Contractor Registration Act of 1963" and inserting in lieu thereof "Migrant and Seasonal Agricultural Worker Protection Act".

B. Discussion. Section 1884 of the Tax Reform Act of 1986 amends Section 3302(f)(8), FUTA, so that the partial limitation on the reduction of the credit against the unemployment tax does not apply after 1985.

C. Implementation. No changes are required in State law or procedures except that State laws referring to the "Farm Labor Contractor Registration Act," which no longer exists, may want to incorporate reference to the "Migrant and Seasonal Agricultural Worker Protection Act." This change should be considered where State laws make reference to the "Farm Labor Contractor Registration Act" concerning agricultural coverage requirements or in its definition of a crew leader.

TEXT, EXPLANATION AND INTERPRETATION OF UC AMENDMENTS
Made by Public Law 99-595, the Alien Farmworker Act,
to Extend the Exclusion From Unemployment Tax of
Wages Paid to Certain Alien Farmworkers.

A. Amendment. Section 3306(c)(1)(B), of the FUTA is amended to read as follows:

(B) such labor is not agricultural labor performed before January 1, 1993, by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act;

B. Discussion. This provision amends Section 3306(c)(1)(B), FUTA, by extending for five years, until December 31, 1992, the FUTA exemption from coverage of farmworkers who are aliens temporarily admitted to the United States to work in agricultural employment pursuant to Sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act.

Prior to the amendments made by Section 4 of P.L. 96-84, effective January 1, 1980, service performed by an alien referred to in Section 3306(c)(1)(B), FUTA, was not required to be covered or taken into account in determining the size of a firm under Section 3306(c)(1)(A)(i) and (ii), FUTA. Subsequent amendments by Congress extended until December 31, 1985, the exemption from coverage of agricultural work under Section 3306(c)(1)(B), FUTA, but required consideration of such service in determining the size of a firm. P.L. 99-595 further extends the exemption from coverage of the same type of agricultural services through December 31, 1992, and continues the required consideration of such service in determining the size of the firm.

C. Implementation. Since the IRS has the primary authority for administering the FUTA tax provisions, it will be responsible for interpreting and applying this provision. While States have the option of providing a similar exclusion in State law, it is not a Federal requirement for conformity.

agency to participate in the immigration status verification system may be waived by the Secretary of Labor if specified conditions are met. To the extent these new requirements apply to the States for the purposes of the Federal-State UC program, they will also apply to Federal unemployment benefit and allowance programs administered by the States under agreements with the Secretary of Labor.

B. Effective Dates. Section 121(c) of the Immigration Reform and Control Act of 1986 contains several effective dates which impact State employment security agencies.

1. All States must begin complying with the requirements for immigration status determination and verification on October 1, 1988, unless participation is waived by the Secretary of Labor.

2. The INS is required to implement a system for verifying immigration status and make the system available to all States not later than October 1, 1987.

3. An amendment to Section 302(a) of the SSA providing for funding the costs of implementing and operating the immigration status verification system is effective October 1, 1987.

4. The Secretary of Labor is required to submit a report by April 1, 1988 to the House Ways and Means Committee and to the Senate Finance Committee on implementation of the new requirements for the UC programs. The Comptroller General is required to submit a report to Congress and to the Commissioner of INS by October 1, 1987, on the effectiveness of current pilot projects relating to the INS System for Alien Verification of Eligibility (SAVE). In addition, the Comptroller General must submit a report to the Congress and to the Secretary of Labor by April 1, 1989, on implementation of the new immigration status verification system requirements.

C. Declaration of Citizenship or Satisfactory Immigration Status. Section 1137(d)(1) specifies that the State shall require, as a condition of eligibility, that each individual sign a declaration under penalty of perjury stating:

1. whether the individual is a citizen or national of the United States, and

2. if not, whether the individual is in a "satisfactory immigration status."

D. Satisfactory Immigration Status. Section 1137(d)(1)(B)(ii)(III) defines "satisfactory immigration status" as an immigration status that does not make the individual ineligible for unemployment benefits.

1. Section 3304(a)(14)(A), FUTA, prescribes the conditions under which benefits may be paid based on services performed by an alien. Specifically, the FUTA requires that compensation shall not be payable on the basis of services performed by an alien unless:

a. the alien was lawfully admitted for permanent residence at the time the services were performed,

b. the alien was lawfully present for the purposes of performing the services, or

c. the alien was permanently residing in the United States under color of law at the time the services were performed.

2. In addition, an alien must be legally authorized to work at the time benefits are claimed to be considered "available for work."

A complete explanation of the Federal requirements relating to alien eligibility for unemployment benefits is found in UIPL 1-86, issued October 29, 1985.

E. Provisions Relating to Determining Alien Status. The Act contains provisions requiring State action to verify that an alien is in "satisfactory immigration status." However, in making any determination of eligibility based on immigration status, the State agency must provide an individual with certain procedural safeguards.

1. Verification of Status. If on the declaration of citizenship statement an individual indicates that he or she is in a satisfactory immigration status, the individual must present documentary evidence. Section 1137(d)(2), SSA, specifies that the individual must present either:

a. an alien registration document or other proof of immigration registration from INS that contains the individual's alien admission number or alien file number (or numbers if the individual has more than one number), or,

b. such other documents as the State determines constitute reasonable evidence indicating a satisfactory immigration status.

In addition, Section 3304(a)(14)(B), FUTA, requires that the same information be uniformly required of all claimants. Section 1137(d)(3), SSA, further requires the State agency to verify documentation referred to in (a) above with the INS through an automated system or other system designated by the INS. Under subsection (3)(B), this system must protect "the individual's privacy to the maximum degree possible." The State agency must use the individual's alien file number or alien admission number as the basis for verifying alien status. If instead of an alien number the State agency has other documents which the State determines constitute reasonable evidence of satisfactory immigration status, Section 1137(d)(4)(B), SSA, requires the State agency to submit a photocopy of the documents to INS for verification.

2. Procedural Safeguards. The Act contains specific requirements relating to procedures for fact-finding, promptness of payment, and a right to a hearing. A summary and explanation of these requirements follow.

a. The State agency must provide the individual with a reasonable opportunity to submit documentation indicating satisfactory immigration status if such documentation is not presented at the time of filing for UC. The State must also provide the individual reasonable opportunity to submit evidence of satisfactory immigration status if the documentation presented is not verified by the INS. Time periods under State law for providing information needed to determine eligibility for benefits will meet the requirement for "reasonable opportunity." Attachment 1 to UIPL 15-78, issued January 24, 1978, contains guidance in handling cases where the claimant declines to provide information with respect to immigration status. This guidance is still applicable.

b. Under Section 1137(d)(4)(A)(ii), SSA, a State agency may not delay, deny, reduce or terminate an individual's eligibility for benefits on the basis of immigration status until a reasonable opportunity has been provided for the individual to present required documentation. If the alien does present such documentation, pending its verification, a State may not delay, deny, reduce, or terminate the individual's eligibility for benefits on the basis of the individual's status. Section 1137(d)(4)(B)(ii), SSA. However, under Section 1137(d)(4)(B)(iii), SSA, the State shall not be liable for the consequences of INS action, delay or failure to conduct such verification.

c. Section 1137(d)(5) provides if a State determines that an individual is not in a satisfactory immigration status, the individual must be given the opportunity for a fair hearing. This is already a requirement of Section 303(a)(3), SSA, and thus adds nothing to existing Federal requirements.

In addition, Section 3304(a)(14)(C), FUTA, requires an evidentiary burden to be met that is not present in Section 1137(d), SSA. Thus, Section 3304(a)(14)(C) requires that no determination denying benefits based on alien status shall be made except on the preponderance of the evidence. Attachment 1 to UIPL 15-78 contains guidance on what constitutes preponderance of evidence.

F. Limitations on Federal Agency Action. Under Section 1137(e), the Department of Labor may not take any compliance, disallowance, penalty or other regulatory action against the State agency because of an error in a determination holding an individual eligible for benefits based on citizenship or immigration status:

1. if the determination was based on verification provided by the INS;

2. because the State was required under Section 1137(d)(4)(A) or (B), to pay benefits to the individual during the period required to provide the individual with reasonable opportunity to submit documentation or pending official verification of immigration status by the INS;

3. as a result of the outcome of the determination and hearing process afforded the individual under State law.

G. Title III Funding. Section 121(b)(3) amends Section 302(a) of the SSA to permit the use of Title III funds for "100 percent of so much of the reasonable expenditures of the State as are attributable to the costs of the implementation and operation of the immigration status verification system described in section 1137(d)." Section 302(a) of the SSA authorizes the Secretary of Labor to provide payment to the States for the costs of administering the employment security program.

H. Waiver of Requirements. Under Section 121(c)(4)(B), the Secretary of Labor may waive the requirements of the Act on his own initiative or upon an application by a State and based on information the Secretary deems persuasive, provided certain conditions are met.

1. In order to waive the requirements with respect to a State, the Secretary must determine that:

a. the State agency is using an alternative system which is as effective and timely as the INS immigration status verification system and which provides for hearing and appeal rights at least to the extent required under Section 1137(d)(5), or

b. the costs of administering the immigration status verification system exceed the estimated savings.

2. Section 121(c)(4)(C) contains the following criteria by the Secretary of Labor to be used in determining cost effectiveness:

a. the proportion of aliens claiming unemployment benefits to the total number of individuals claiming unemployment benefits,

b. any savings in benefit outlays resulting from implementation of the verification system,

c. the labor and nonlabor costs of administering the verification system,

d. the degree to which the INS is capable of providing timely and reliable information to the State agency, and

e. such other factors as the Secretary of Labor deems relevant.

A letter will be sent to each State early in 1987 requesting the information the Secretary needs to determine whether a waiver will apply.

I. Reports to Congress. The Act requires reports by the applicable Secretary and Comptroller General on the immigration status verification system.

1. Report by the Secretary. Under Section 121(c)(4)(A), the Secretary of Labor must report to the House Ways and Means Committee and the Senate Finance Committee by April 1, 1988, whether (and the extent to which) application of the SAVE program in the UC program is cost-effective and appropriate to the program and whether there should be a waiver of the application of the SAVE program under Section 121(c)(4)(B).

2. Reports by the Comptroller General. By October 1, 1987, the Comptroller General is required by Section 121(d) to report to Congress and to the Commissioner of INS on current pilot projects using the INS System for Alien Verification of Eligibility (SAVE). The report must examine the effectiveness of the projects and any problems with implementation. In addition, the Comptroller General is directed to monitor and analyze implementation of the new system. By April 1, 1989, the Comptroller General must report to Congress and the appropriate Secretaries on implementation of the immigration status verification system, including recommendations for change, as appropriate.

II. Provisions for Legalization of Status Relating to Entitlement to Unemployment Compensation.

A. General. Section 201(a) of the Immigration Reform and Control Act of 1986, P.L. 99-603, amends the Immigration and Nationality Act to add a new Section 245A to authorize the adjustment of status of certain aliens who entered the United States before January 1, 1982, to that of "lawfully admitted for temporary residence." Section 245A(a) establishes a new category of "lawfully admitted for temporary residence" and specifies the requirements that must be met to obtain an adjustment of status. Section 245A(b) provides for termination of temporary resident status and otherwise specifies the terms and conditions of temporary resident status. This section also prescribes the conditions for subsequent adjustment of status from "lawfully admitted for temporary residence" to that of "lawfully admitted for permanent residence." Section 245A(e) provides for the temporary stay of deportation and work authorization for certain applicants.

Following is an explanation of these new provisions as they affect the UC program.

B. Temporary Resident Status. Section 245A(a) establishes a new category of "lawfully admitted for temporary residence."

1. This new category allows for the adjustment of status of an alien with no documentation of legal entry to that of an alien lawfully admitted for temporary residence if the alien:

a. Makes a timely application as specified in Section 245A(a)(1); that is, files a proper application within

a 12-month period beginning on a date (not later than 180 days after the date of enactment) designated by the Attorney General;

b. Had continuous unlawful residence beginning with entry into the United States before January 1, 1982;

c. Has been continuously present in the United States, with the exception of brief, casual, and innocent absences, since November 5, 1986;

d. Is admissible as an immigrant under Section 245A(a)(4).

2. After 18 months of temporary resident status, an alien has one year to apply for an adjustment of status to that of lawfully admitted for permanent residence. To be eligible for adjustment of status, the alien must meet the four conditions specified in Section 245A(b)(1).

3. Section 245A(b)(2) specifies the conditions under which the Attorney General shall provide for termination of temporary resident status; and

4. Section 245A(b)(3) provides that an alien with temporary resident status shall be granted "authorization to engage in employment in the United States and be provided with an 'employment authorized' endorsement or other appropriate work permit." Paragraph (3) also spells out the conditions on authorization to travel abroad.

C. Temporary Stay of Deportation and Work Authorization for Certain Applicants. Section 245A(e) provides for a hold on deportation and the furnishing of work authorization to an alien who presents a prima facie case or application for change of status before or during the application period.

1. Before Application Period. An alien may not be deported and must be granted employment authorization if the alien is apprehended before the beginning of the application period and can establish a prima facie case of eligibility for an adjustment of status to temporary residence. The alien must then apply for adjustment within the first 30 days of the application period as provided in Section 245A(e)(1).

2. During Application Period. An alien may not be deported and must be granted employment authorization, pending a final determination of alien status, if the alien can establish prima facie application for adjustment of status to temporary resident.

D. Impact on Federal Requirements. For the UC program there are two separate aspects to alien eligibility: non-monetary eligibility during the benefit year, and monetary eligibility during the base period.

1. Availability for Work. When an individual is granted work authorization under these new provisions, the individual becomes legally available for work. The individual must have some dated documentation from INS substantiating the work authorization issued under Section 245A. An alien with INS issued work authorization is eligible, if also able to work, unemployed, and otherwise entitled to benefits under the State law.

2. Section 3304(a)(14), FUTA. Even though an individual has work authorization, the requirements of Section 3304(a)(14), FUTA, still apply. The State must determine monetary eligibility during the base period. The FUTA prescribes the conditions under which benefits may be paid based on services performed by an alien who was in a proper status "at the time services were performed." Benefits based on services performed while an alien is lawfully admitted for temporary residence, or is granted work authorization pending a ruling on his/her application, is payable because the work authorization grants an alien the status of being lawfully present for purposes of performing services. The status of temporary residence or granting of work authorization does not, however, confer retroactive lawful presence for purposes of monetary eligibility.

Further, an alien whose status is adjusted to "lawfully admitted for permanent residence" is, from the date such status is granted, "permanently residing in the United States under color of law" within the meaning of that phrase as used in Section 3304(a)(14)(A), FUTA, and further consideration is being given to whether an alien in such status falls under the first category of Section 3304(a)(14)(A), FUTA, as "lawfully admitted for permanent residence."

III. Admission of Temporary Agricultural (H-2A) Workers and Their Entitlement To Unemployment Compensation.

A. General. Title III of the Immigration Reform and Control Act of 1986, P.L. 99-603, provides for the reform of legal immigration. Section 301 of the Act establishes a new "H-2A" nonimmigrant classification for temporary agricultural worker. Section 301(a) and (b) amends Sections 101(a)(15)(H)

and 214(c) of the Immigration and Nationality Act to provide for this new classification. Following is an explanation of these new provisions as they effect the UC programs.

B. New "H-2A" Workers. Section 301(a) provides a new "H-2A" nonimmigrant classification for temporary agricultural labor by amending Section 101(a)(15)(H) of the Immigration and Nationality Act. Section 301(c) added a new Section 216 to the Immigration and Nationality Act which allows for the admission of "H-2A" workers to perform agricultural labor or services "of a temporary or seasonal nature" as defined by the Secretary of Labor.

C. Impact on States. The services performed by the new "H-2A" workers are excludable from coverage on the same basis as those performed by "H-2" workers. Section 3306(c)(1)(B), FUTA, exempts from coverage services performed by aliens in agricultural labor, including the new "H-2A" workers through calendar year 1992. However, it requires consideration of such service in determining the size of a firm under Section 3306(c)(1)(A), FUTA.

IV. Provisions for Lawful Residence of Certain Special Agricultural Workers and Their Entitlement to Unemployment Compensation.

A. General. Title III of the Immigration Reform and Control Act of 1986, P.L. 99-603, provides for the lawful residence of certain agricultural workers. Section 302(a)(1) of Title III adds a new Section 210 to the Immigration and Nationality Act that allows for the adjustment of status of special agricultural workers to that of an alien lawfully admitted for temporary residence, and further adjustment of such lawful temporary residents' status to permanent resident.

B. Lawful Residence. The new Section 210 creates a new category of special agricultural worker.

1. This new category allows for the adjustment of status to an alien lawfully admitted for temporary residence if the following requirements are met:

a. The alien must apply for the adjustment during the period specified in Section 210(a)(1)(A), and

b. The alien must establish residence in the United States, and have performed seasonal agricultural services in the United States for at least "90 man-days" during the period specified in Section 210(a)(1)(B).

c. Except as provided in subsection (c)(2) of Section 210, the alien must establish that he/she is admissible to the United States as an immigrant.

2. Once granted the status of lawful temporary resident under Section 210(a)(1), an alien "shall be granted authorization to engage in employment in the United States and shall be provided an 'employment authorized' endorsement or other appropriate work permit, in the same manner as for aliens lawfully admitted for permanent residence." (Section 210(a)(4)).

3. In accordance with the specific dates listed in Section 210(a)(2), the Attorney General shall adjust the status of any alien with temporary resident status under Section 210(a)(1) to that of an alien lawfully admitted for permanent residence.

4. Section 210(a)(3) provides for the termination of "temporary resident status" by the Attorney General only upon a determination that the alien is deportable.

C. Temporary Stay of Exclusion or Deportation and Work Authorization for Certain Applicants. New Section 210(d) allows for a stay of exclusion or deportation and work authorization for certain aliens.

1. Before Application Period. An alien may not be excluded or deported and must be granted employment authorization if apprehended before the beginning of the application period and can establish a nonfrivolous case of eligibility to have an adjustment of status. The alien must then apply for adjustment within the first 30 days of the application period as provided in Section 245A(e)(1).

2. During Application Period. An alien may not be excluded or deported and must be granted employment authorization if the alien can present a nonfrivolous application for adjustment of status, and until a final determination of the application has been made.

3. In both cases the alien must be granted work authorization and provided documentation of work authorization.

D. Impact on States. For the UC program, there are two separate aspects to alien eligibility: non-monetary eligibility during the benefit year, and monetary eligibility during the base period.

1. Availability for Work. When an individual is granted work authorization under these new provisions, the individual becomes legally available for work. The individual must have some dated documentation from INS substantiating the work authorization.

2. Section 3304(a)(14)(A), FUTA. Even though an individual has work authorization, the requirements of Section 3304(a)(14), FUTA, still apply. The State must determine monetary eligibility during the base period. The FUTA prescribes the conditions under which benefits may be paid based on the status of the alien "at the time services were performed." It is possible that an agricultural worker's base period wage credits may meet the criteria under 3304(a)(14), FUTA. For example, if all the wage credits were performed as an H-2 worker, then the worker "was lawfully present for purposes of performing such services. . . ." Benefits based on services performed while an alien is lawfully admitted for temporary residence are payable under the FUTA because the work authorization grants the alien the status "lawfully present for purposes of performing services." The status of "temporary resident" does not, however, confer retroactive lawful presence for purposes of monetary eligibility under the FUTA. An alien granted the status of "lawfully admitted for permanent residence" is at least a third category of "permanently residing in the United States under color of law" under Section 3304(a)(14)(A), and consideration is being given to whether such alien also falls into the first category of "lawfully admitted for permanent residence."

EXPLANATION AND INTERPRETATION
of the Immigration Reform and Control Act of 1986
(Public Law 99-603) Relating to the Federal and
Federal-State Unemployment Compensation Programs

I. Section 121. Provisions for Determining and Verifying
Alien Status for Entitlement to Unemployment Compensation.

A. General. Section 121 of the Immigration Reform and Control Act of 1986, P.L. 99-603, contains three provisions affecting the Federal and Federal-State UC programs. Section 121(a)(i) amends Part A of Title XI of the SSA by adding new subsections (d) and (e) to Section 1137 - "Income and Eligibility Verification System." These new subsections establish immigration status verification procedures for UC programs. Section 121(b)(3) of the Act amends Section 302(a) of the SSA to provide for reimbursement to State agencies of 100 percent of the reasonable costs of implementing and operating the immigration status verification system. Section 121(c) of the Act establishes effective dates, and includes provisions for waiver of verification system requirements and certain reports to Congress. Section 121(d) also requires certain General Accounting Office reports, which involve the Department of Labor and the State agencies. Following is an explanation of these new provisions. Detailed instructions for implementing these provisions will be issued at a later date.

The purpose of these provisions is to require States who do not receive a waiver to verify through Immigration and Naturalization Service (INS) records the legal status of all aliens applying for benefits under certain Federally-assisted and Federally-funded programs beginning October 1, 1988. The UC program is included through an amendment to the existing provisions for the income and eligibility verification system in Section 1137 of the SSA. Existing Section 303(f) of the SSA requires State UC agencies to participate in the income and eligibility verification system as described in Section 1137.

Under these new requirements, States who do not qualify for a waiver under conditions spelled out in the law must determine, as a condition of an individual's eligibility for benefits, that an individual is either a United States citizen or in a "satisfactory immigration status" and verify through INS records the authenticity of any immigration document submitted by the individual. However, prior to denying benefits because of immigration status, the State agency must follow certain minimum procedural safeguards. The requirement for a State