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DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 1-86  
CHANGE 1

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : DONALD J. KULICK *D. Kulick*  
Administrator  
for Regional Management

SUBJECT : Aliens Permanently Residing in the United States  
Under Color of Law (PRUCOL)

1. Purpose. To provide additional information regarding the Department of Labor's interpretation of the phrase "permanently residing in the United States under color of law" as used in Section 3304(a)(14)(A) of the Federal Unemployment Tax Act (FUTA).

2. References. Section 3304(a)(14)(A), FUTA; UIPL 1-86, dated October 28, 1985 (51 FR 29713, August 20, 1986); UIPL 12-87, dated March 11, 1987 (52 FR 3889, February 2, 1987); UIPL 12-87, Change 1, dated September 28, 1988; UIPL 6-89, dated December 2, 1988; Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566 (including Supplement #3, Questions and Answers, issued May 6, 1977).

3. Background. Section 3304(a)(14)(A), FUTA, requires, as a condition for the Secretary of Labor's certification of a State to the Secretary of the Treasury, that the State law provide that:

compensation shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act).

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Simply put, base period wages may not be used in a monetary determination on a claim for unemployment benefits unless the wages were earned while the alien was in one of the three eligible categories specified in Section 3304(a)(14)(A) and the State law. The three categories of aliens are:

- o Aliens lawfully admitted for permanent residence at the time the services were performed.
- o Aliens lawfully present for purposes of performing the services.
- o Aliens permanently residing in the United States (U.S.) under color of law at the time the services were performed.

A State unemployment compensation law is not required to contain any of the three categories of eligible aliens. However, a State may not broaden the definition of any of the three categories of eligible aliens.

UIPL 1-86 set forth the Department of Labor's interpretation of these three eligible categories of aliens. Since the issuance of UIPL 1-86, the Department has noted continuing problems with the interpretation of the third category, aliens "permanently residing in the United States under color of law" (PRUCOL). The purpose of this program letter is to supplement UIPL 1-86 by providing additional information, based on cases which have come to the Department's attention, to ensure that this third category is uniformly interpreted and applied.

4. Interpretation. The phrase "permanently residing in the United States under color of law" applies only to the following classes of aliens:

a. Aliens admitted to the U.S. as conditional entrants under Section 203(a)(7) or as parolees under Section 212(d)(5) of the Immigration and Nationality Act (INA). Section 3304(a)(14)(A), FUTA, specifically includes these aliens in the PRUCOL category. Note: Section 203(a)(7) was repealed by Section 203(c)(3) of the Refugee Act of 1980 (P.L. 96-212) and replaced under Section 201(b) of the Refugee Act with Sections 207 and 208. Under Section 203(h) of the Refugee Act, Section 203(a)(7) is applicable prior to April 1, 1980. In addition, Section 203(h) provides that, effective April 1, 1980, any reference in Federal law to Section 203(a)(7) is considered a reference to new Sections 207 and 208. INA

Section 207 relates to refugees and INA Section 208 to asylees, both of which are, therefore, considered PRUCOL under Section 3304(a)(14)(A), FUTA.

b. Aliens presumed to have been lawfully admitted for permanent residence even though they lack documentation of their admission to the United States. See Immigration and Naturalization Service (INS) regulations at 8 C.F.R. Part 101. A list of these groups and the documents that are issued to them by the INS are provided in Supplement #3 of the Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566.

c. Aliens who, after a review of their circumstances under INS statutory or regulatory procedures, have been granted a lawful immigration status that allows them to remain in the U.S. for an indefinite period of time.

To be in PRUCOL status, an alien must meet a two-part test. First, the alien must be residing in the U.S. "under color of law." For an alien to be residing "under color of law," the INS must know of the alien's presence, and must provide the alien with written assurance that enforcement of deportation is not planned. Second, the alien must be "permanently residing" in the U.S. This term is not defined in FUTA. However, "permanent" is defined in Section 101(a)(31), INA:

The term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.

Under the INA, authority for determining the alien's status is vested in the Attorney General. The "relationship" in the definition of "permanent" therefore contemplates permission by the INS for the alien to remain in the U.S. for an indefinite period of time. An alien cannot be residing permanently without this relationship. Therefore, an alien living in the U.S. who has not received assurance from the INS that departure will not be enforced is not permanently residing. INS inaction is not sufficient to show that an alien is in PRUCOL status and States may not interpret it as such. As stated in UIPL 1-86:

. . . without affirmative action by the INS, any alien, regardless of the legality of entry, could become eligible

to receive unemployment compensation simply by filing an application for permanent residence or suspension of deportation. Congress has indicated no intent to include such aliens under the provisions of Section 3304(a)(14)(A), FUTA. In short, the filing of an application alone cannot change an alien's resident status. The INS must affirmatively determine each alien's status in accordance with its authority and the alien's specific circumstances.

That the mere filing of an application does not make an alien a permanent resident under color of law was confirmed in Sudomir v. McMahon, 767 F.2d 1456 (9th Cir. 1985). In that case, the United States Court of Appeals for the Ninth Circuit upheld as reasonable and permissible California and Federal positions that an "applicant" for asylum status is not in PRUCOL status. The Court noted that the requirement of permanency "does not embrace transitory, inchoate, or temporary relationships." 767 F.2d at 1462. "Applicants who merely participate in a process that gives rise to the possibility of . . . authorization [to remain in the U.S.] reside temporarily." Id. Finally, "Their presence is tolerated during the period necessary to process their applications; it has not been legitimated by any affirmative act." Id. Whether the alien is applying for a lawful immigration status for the first time, or is applying for adjustment of an existing status, the principle is the same: the mere filing of an application does not confer PRUCOL status.

This principle was further confirmed in Esparza v. Valdez, 612 F. Supp. 241 (D. Colo. 1985), appeal dismissed, No. 85-2187 (10th Cir. Nov. 29, 1988). In that case, the United States District Court for Colorado dismissed the claim that aliens are in PRUCOL status if the alien's presence in the U.S. is known to the INS and the INS has acquiesced in the continued residence of the alien by some action or inaction. The Court stated that aliens are not in PRUCOL status simply "by the filing of some application." 612 F. Supp. at 244.

5. Discussion of Specific Groups of Aliens. In addition to those groups of aliens specifically cited in Section 3304(a)(14)(A) and those groups treated in Supplement #3 of the Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566, other groups of aliens have been identified which may or may not be in PRUCOL status. Following is a discussion of these groups.

a. Aliens Possessing Work Authorization. Aliens who possess work authorization fall under the second category of Section 3304(a)(14)(A), FUTA, "lawfully present for purposes

of performing such services." These aliens may also be in PRUCOL status, but only if they independently meet the two-part test explained above. If State law contains the category "lawfully present for purposes of performing such services," the State agency need not determine whether aliens in this category are also in PRUCOL status. However, if State law does not contain the second category, but does contain the PRUCOL category, or if the alien does not possess work authorization, then it will be necessary to determine if the alien is in PRUCOL status. In reaching this determination, the State may not expand the definition of PRUCOL to include aliens who merely possess work authorization. (Evidence of authorization to work is, however, required to establish legal availability for work subsequent to the enactment of the Immigration Reform and Control Act on November 6, 1988; see UIPL 12-87.)

b. Aliens Granted Voluntary Departure or Extended Voluntary Departure. Aliens granted voluntary or extended voluntary departure are usually assigned a definite date for departure from the U.S. Although the departure date may be subject to extension, or actually extended, these aliens are not "permanent" residents because their presence is limited in duration. As the court stated in the Sudomir case, a deferred or extended voluntary departure by definition is a "transitory, inchoate, or temporary" relationship. Sudomir at 1461.

Aliens who receive extensions of voluntary departure dates while their applications for legal residence are pending with the INS also do not become permanent residents. The administrative process which may culminate in authorization to remain in the U.S. does not in itself confer any status or right to reside in the U.S. permanently. As with the aliens in the Sudomir case, these aliens' "presence is tolerated only during the period necessary to process their applications; it has not been legitimated by any affirmative act." Sudomir at 1462. While these aliens may be residing under "color of law," they are not "permanently residing" and may not be considered PRUCOL.

c. Applicants for Adjustment of Status. Aliens do not become PRUCOL by virtue of applying for an adjustment of their status. An alien applying for adjustment of status under Sections 245, 245A, or 210 of the INA also would not qualify as PRUCOL since the application itself does not constitute a change or improvement of status. If these applicants are eligible for unemployment benefits, it must be because of their present status, which they are applying to have adjusted.

d. Asylees, Refugees and Applicants for such Status. Aliens granted the status of asylee or refugee are PRUCOL,

but, as discussed above, applicants for a particular status do not receive the benefits of that status. To be granted asylum under Section 208, INA, the INS must make a specific determination that the alien faces persecution or has a well-founded fear of persecution. As noted in Sudomir at 1462, the presence of applicants for asylum is "tolerated during the period necessary to process their applications; it has not been legitimated by any affirmative act." This principle applies also to applicants for refugee status under Section 207, INA.

e. Applicants for and Persons Who Have Received Withholding of Deportation. As with other applicants for a particular status, aliens do not become PRUCOL by applying for withholding of deportation under Section 243(h), INA. The temporary nature of their residence during the application process is underscored by the fact that an alien is not entitled to relief under Section 243(h) if the INS finds that he committed certain acts of persecution; was convicted of a particularly serious crime constituting a danger to the U.S.; committed a serious nonpolitical crime prior to arrival in the U.S.; or constitutes a danger to the security of the U.S. However, aliens who have been notified in writing by the INS that deportation action will not be taken against them or that such action is indefinitely delayed, may be considered PRUCOL.

f. Cuban and Haitian Entrants. Citizens of Cuba or Haiti who entered the United States at the time of the Mariel boat lift (and before January 1, 1982) and afforded the status of "Cuban/Haitian Entrant (Status Pending)" are in PRUCOL status because they are treated as parolees. However, not all Cuban and Haitian entrants, as defined in Section 501(e) of the Refugee Education Assistance Act of 1980, P.L. 96-422, are afforded the status of Cuban/Haitian Entrant (Status Pending). Those aliens not granted this status may be the subject of exclusion or deportation proceedings or may be applicants for asylum. If they are in any of the three categories specified under Section 3304(a)(14)(A), FUTA, it is by virtue of other INS actions (such as the granting of work authorization or the adjustment of status to that of an alien lawfully admitted for permanent residence under Section 202 of the Immigration Reform and Control Act of 1986, P.L. 99-603, (IRCA)), not by simply being Cuban or Haitian entrants.

g. Visa Applicants and Beneficiaries of Visa Petitions. As with other applicants for a particular status, aliens do not become PRUCOL by applying for a visa.

Beneficiaries of approved or pending visa petitions are not PRUCOL. The INA provides that preference consideration be

given to persons with close family ties in the U.S. and to persons with certain job skills. However, the mere filing of a petition on an alien's behalf does not create a lawful status. Indeed, some beneficiaries may not even be in the U.S. at the time the petition is filed. Moreover, "approval" of a visa petition on behalf of an alien merely verifies a relationship between the petitioner and the beneficiary; approval is merely the first step in the application process. Therefore, even an alien with an "approved" petition is simply participating in a process that ultimately may result in authorization to remain permanently in the U.S. A pending petition may be meritless and cannot be the basis for determining the alien's immigration status.

Once the visa petition has been approved, some aliens are required to go to the American consul in their country of origin for an interview. At that juncture, the visa is either issued or denied. See 22 C.F.R. Part 42. If the visa is issued, the individual is required to appear at the port of entry for admission. Admission may be disapproved for a number of reasons. If admitted, the individual is "lawfully admitted for permanent residence," the first category of eligible aliens under Section 3304(a)(14)(A). Other beneficiaries of approved visa petitions are allowed to stay in the U.S. and file an application for adjustment of status under Section 245, INA. As with other applicants for a particular status, these aliens are not in PRUCOL status. Finally, if the application is granted, the beneficiary is adjusted to the status of "lawfully admitted for permanent residence" and since the alien is already in the U.S., the alien need not be "admitted."

h. Applicants for Suspension of Deportation. As with applicants for a particular status, aliens do not become PRUCOL by applying for suspension of deportation under Section 244(a), INA. As with other applicants, the presence of these aliens is temporary, as they merely are participating in an administrative process with the possibility of receiving authorization to remain in the U.S. Further, these aliens are not present under color of law while in deportation status.

In contrast, aliens whose deportation is suspended under Section 244(a) have their status adjusted to "lawfully admitted for permanent residence." Such aliens are, therefore, in the first category of Section 3304(a)(14)(A), FUTA, effective upon issuance of the adjustment of status by the INS.

i. Persons under Orders of Supervision. Aliens subject to orders of supervision under Section 242(d), INA, are not in a lawful immigration status and have already been issued a final

order of deportation. They are subject to deportation when appropriate arrangements are completed. These aliens are neither "permanently residing" nor residing "under color of law" and are therefore not in PRUCOL status.

j. Persons Subject to INS Orders to Show Cause, But Not Under a Final Order of Deportation. Orders to show cause under 8 C.F.R. 242.1 are used by the INS to commence the deportation process. Such an alien is neither "permanently residing" nor residing under "color of law" solely by reason of being in such status. If such aliens are in PRUCOL status, it is by virtue of the status which may be revoked during this process.

k. Persons under Deferred Action Status. Aliens under deferred action status who have been notified by the INS in writing that deportation will not be pursued at the present time are in PRUCOL status, but only from the date such notification is effective and until such notification is revoked or superseded by further INS action.

l. Aliens in the U.S. With the "Knowledge and Acquiescence" of the INS. INS knowledge of, and acquiescence to, an alien's presence in the U.S. is insufficient to render the alien either permanently residing or residing under color of law. Rather, an alien is in PRUCOL status only if the INS has affirmatively exercised its discretion against deportation and granted permission to the alien in writing to reside in the U.S. indefinitely. As the Esparza court stated in rejecting the "knowledge and acquiescence" test, an alien is not in PRUCOL status simply "by the filing of some application." Esparza at 244.

m. Aliens Who Applied for, or Who Intended to Apply for Legalization Under Section 245A or Section 210, INA, as Added by the Immigration Reform and Control Act of 1986 (IRCA). The IRCA amendments to the INA had no effect on the definition of PRUCOL. As with other applicants for a particular status, aliens do not become PRUCOL by applying for, or intending to apply for, adjustment of status under the legalization programs established by the IRCA.

Sections 245A(e) and Section 210(d) of the INA, as amended by IRCA, prohibit the Attorney General from deporting certain aliens who intend to apply for or who have applied for adjustment of status under the legalization programs established by IRCA for limited periods. These aliens are not PRUCOL. The temporary nature of these aliens' residence is underscored by the fact that if the application is denied the alien is subject to deportation.

Applicants for amnesty under Section 245A(a), INA, may obtain a new status, lawfully admitted for temporary residence (LTR). In addition, special agricultural workers may apply for status as lawfully admitted for temporary residence under Section 210(a)(1), INA. Aliens in LTR status are not PRUCOL because they are not permitted to remain in the U.S. indefinitely. Under the INA, these aliens will either have their status adjusted to that of lawfully admitted for permanent residence or they will be subject to deportation. Further, aliens who have been lawfully admitted for temporary residence cannot be said to be permanently residing. Aliens applying for status under these legalization programs may, however, be lawfully present for purposes of performing services under Section 3304(a)(14)(A), FUTA. Refer to UIPL 12-87 and UIPL 12-87, Change 1, for a discussion of these aliens. Also, refer to UIPL 6-89, which discusses provisions of the Foreign Relations Authorization Act, P.L. 100-204, which establishes another class of aliens who are eligible to apply for temporary residence status.

6. Action Required. State administrators are requested to take necessary action to assure that the State law is applied consistently with Section 3304(a)(14)(A), FUTA, as interpreted in this program letter.

7. Inquiries. Please direct questions to the appropriate Regional Office.