Recovery Rebates under the CARES Act for Non-U.S. Citizens & Public Charge Considerations

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ATTORNEYS

Stephanie A. Grattan

Ryan J. Sevcik

PRACTICE AREAS

Immigration

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act, a $2 trillion dollar economic recovery package that offers relief to state and local governments, small and large businesses, and individuals affected by the 2019 novel coronavirus (COVID-19) pandemic. In particular, the CARES Act provides for the issuance of one-time payments called recovery rebates to assist individuals recover from the economic impacts of the COVID-19 pandemic.

How Much Is the Recovery Rebate?

The maximum rebate amount is $1,200 ($2,400 for taxpayers filing taxes jointly), with an additional $500 per child under the age of 17 claimed as a dependent on the tax return. The rebate amount is reduced by five percent of so much of the taxpayer's Adjusted Gross Income (AGI) that exceeds the following thresholds: $75,000 for single or married-filing-separately taxpayers; $112,500 for head-of-household taxpayers; and $150,000 for married-filing-jointly taxpayers. The amount is completely phased-out for AGIs exceeding $99,000 for single or married-filing-separately tax filers with no children; $146,500 for head-of-household taxpayers with one child; and $198,000 for married-filing-jointly taxpayers with no children.

The recovery rebate is to be automatically advanced to eligible individuals in 2020 based on their 2019 federal income tax return. For eligible individuals who did not file a 2019 return, the rebate is to be automatically advanced based on their 2018

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federal income tax return.

Are Non-U.S. Citizens Eligible for a Recovery Rebate?

Non-U.S. citizens must qualify as "resident aliens", as defined by the Internal Revenue Service (IRS), and have a social security number (SSN) to be eligible for the recovery rebate. The IRS considers non-U.S. citizens nonresident aliens unless they meet either the Green Card Test or the Substantial Presence Test:

- Green Card Test: Lawful permanent residents of the United States are considered resident aliens if they were lawful permanent residents at any time during the calendar year. Lawful permanent residents continue to have resident alien status under the Green Card Test unless they voluntarily renounce and abandon their lawful permanent resident status in writing to the U.S. Citizenship and Immigration Services (USCIS), their immigrant status is administratively terminated by the USCIS, or their immigrant status is judicially terminated by a U.S. federal court.
- Substantial Presence Test: Non-U.S. citizens are considered resident aliens if they have been physically present in the United States for a designated minimum threshold period outlined by the IRS. Certain nonimmigrants, such as those in F, J, M, or Q status, are exempted from the physical presence calculation. Most work-authorized nonimmigrants, such as those in H-1B, L-1, and TN status, are not exempted and may be able to meet the substantial presence test.

Importantly, non-U.S. citizens who file their taxes using an Individual Taxpayer Identification Number (ITIN) are not eligible for a recovery rebate. Moreover, non-U.S. citizens with a SSN who file their taxes jointly with a spouse who has an ITIN or include a qualifying child who has an ITIN are not eligible for a recovery rebate. This means that work-authorized nonimmigrants, such as those in H-1B or TN status, with a spouse or qualifying child who are not eligible to work and do not have a SSN, may not be eligible for a recovery rebate. For a married couple, one with a SSN and the other with an ITIN, the couple would need to separately file their taxes in order to be eligible for the recovery rebate, but doing so could render them ineligible for other, more beneficial tax subsidies. Taxpayers should consult professional tax preparers about the best option for their household situation.

What Is the Impact, If Any, of Receiving a Recovery Rebate under the Public Charge Rule?

The CARES Act structures the recovery rebates as tax credits, and the final rule on the public charge ground of inadmissibility specifically provides that tax credits are not taken into account for purposes of determining public charge. Only public benefits defined in 8 CFR § 212.21(b) will be considered in the public charge inadmissibility determination. These include means-tested programs like Medicaid, Supplemental Security Income (SSI), Temporary Assistance for Needy

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Families (TANF), Supplemental Nutrition Assistance Program (SNAP), and cash assistance for income maintenance. In accord with the final rule, both 8 CFR § 212.21(b) and the USCIS Policy Manual expressly exclude tax credits from the public benefits definition, as do the Department of State (DOS) Interim Final Rule and the Foreign Affairs Manual (FAM).

Koley Jessen continues to monitor the situation and stay current on new legislation and guidance impacting foreign nationals in light of the public charge rule and COVID-19 coronavirus outbreak. If you have additional questions or concerns as the situation develops, please contact a member of the Koley Jessen Employment, Labor and Benefits Practice Group.