

Ways in and Out of U.S. Tax Residency
To Be or Not To Be a U.S. Resident Alien!

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The goal of this article is to provide a comprehensive checklist of information for the foreign national person to consider prior to accepting an assignment inside the U.S. This article is not designed to teach you the technical competence required to perform self compliance; however it will certainly arm you with the knowledge to determine if your U.S. tax preparer knows all that they should know to provide you with technically competent professional services.

Consequences of Filing as a U.S. Nonresident Alien/ Becoming a U.S. Resident Alien:

All U.S. resident aliens are subject to U.S. tax on their worldwide income, regardless of where the income is earned, the type of currency, or the location where the income is deposited to.

All U.S. nonresident aliens are taxed in the U.S., only on their U.S. source income. The source of the income depends on the type of income. A basic taxation premise is that the country of income source maintains the first right of taxation related to that income. However income tax treaties usually seek to have such income taxed in the country of residence (and not the source country) to avoid a double filing compliance obligation.

The SPT- To Be or Not To Be a U.S. Resident Alien:

Under Internal Revenue Code (IRC) Section (Sec.) 7701(b)(3) individuals meet the SPT if they have at least 31 days of U.S. presence in the current year *and* when the following sums to 183 days or greater: 100 percent of the physical days of U.S. presence in the current year + 1/3 of the days of U.S. presence in the preceding year + 1/6 of the days of U.S. presence in the second preceding year. To summarize SPT determination, one looks at the presence in the U.S. consisting of all days in the current year and fractions of days in the two-year look-back period.

For the purposes of the SPT, partial days count as full days and, while fractional days add, any remaining fractional days are neither rounded up or down, but dropped. The SPT must continue to be met on an annual U.S. calendar tax period basis for an individual to continue to be considered a continuing U.S. resident alien year after year.

As below- Starting Date- under IRC Sec 7701(b)(2)(C)(ii), up to 10 de minimus days may be excluded from U.S. presence for the determination of the SPT.

Ways Out of U.S. Tax Residency- Beating the System:

Under IRC Sec. 7701(b)(3)(B), the fractional two-year look back period is effectively negated when an individual meets the SPT to become a U.S. resident alien having less than 183 days in the current year but is in excess of the requirements using the fractional two-year look back rule in the preceding and second preceding tax years. In such cases, these individuals will be able to file IRS Form 8840, Closer Connection Exception Statement for Aliens, claiming a “tax home” and “closer connection” to a foreign country and remain U.S. non resident aliens.

Such U.S. domestic relief, the Closer Exception Connection, is not available in cases where the SPT test is met based upon days of U.S. presence in the current year alone. In such cases, the U.S. resident alien needs to seek relief under an income tax treaty between the U.S. and the alien's other country of residence

(typically under OECD Model Article IV- Residence), generally referred to as the “treaty tiebreaker” article (see below).

Therefore, individuals may be classified as U.S. resident aliens if they meet the above SPT. If they fail the SPT they are automatically classified as U.S. non resident aliens.

However in limited circumstances an individual’s physical days of U.S. presence may be excluded for purposes of determining the SPT, in cases where they were:

- a. *exempt individuals*: under IRC Sec 7701(b)(3)(D) a student in the U.S. on an F visa, a trainee or a teacher in the U.S. on a J visa or others on an M or Q visa, a professional athlete, or an individual with a medical condition;
- b. *others*: under IRC Sec 7701(b)(7) regular commuters who work in the U.S. from Canada or Mexico when in transit in the U.S. between other points for less than 24 hours, days in the U.S. as a crew member of a foreign vessel and all employees of international organizations or foreign governments.

Some exempt individuals need to complete IRS Form 8843, Statement for Exempt Individuals and Individuals with a Medical Condition, and attach it for filing with their annual U.S. tax return, either IRS Form 1040NR or 1040. In this effort the United States Citizenship and Immigration Services form(s) F-20 for F visa holders and DS2019 for J visa holders will be critical to complete Form 8843.

There are EXCEPTIONS to the Exempt individual rules above for J and F visa holders, where:

(i) under IRC Sec 7701(b)(5)(E)(i) **A teacher or trainee on a J visa was exempt as a teacher, trainee or student for any part of two of the last six prior calendar years.** In that case in the current year you **cannot exclude days of presence unless all four of the following apply** as a teacher or trainee in the current year:

1) You were exempt as a teacher, trainee or student for any part of three or fewer of the prior six calendar years and 2) A foreign employer paid all current year compensation and 3) You were present in the U.S. as a teacher or trainee in any of the six prior years and 4) A foreign employer paid all compensation during each of those prior six years you were present in the U.S. as a teacher or trainee **or**

(ii) under IRC Sec 7701(b)(5)(E)(ii) **A student on an F visa was exempt as a teacher, trainee or student for any part of more than five calendar years cannot exclude days of presence unless they establish that they did not intend to reside permanently in the U.S.**

The facts and circumstances to be considered in determining if you have demonstrated an intent to reside permanently in the U.S. include, but are not limited to: 1) Whether you have maintained a closer connection to a foreign country other than to the U.S.; and 2) Whether you have taken affirmative steps to change your status from nonimmigrant to lawful permanent resident (green card holder).

Income from personal services performed as a U.S. nonresident alien temporarily in the U.S. for a period or periods of not more than 90 days, where the compensation for such services are performed for a foreign employer and is not more than \$3,000, is exempt from U.S. taxation.

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