SPECIAL REPORTS

When Immigration and Tax Converge

by Linda Dodd-Major and Paula N. Singer

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The world seems smaller and smaller — a shared international space — as more countries ''go global.'' Investments and trade are crossing borders like never before. Revenue-seeking economies are attracting tourism and investors, including real estate investors seeking residence or retirement at least part time in warmer, nicer, or more interesting places. As these cross-border activities occur, people travel to make them happen, engaging in activities likely to be regulated by immigration law and making or receiving payments that are likely to be taxable in the host country.

Some U.S. players are new to internationalism and some have been at it for a long time. U.S. colleges, universities, and research institutions, seeking the best and the brightest, have been long-time players. While industry, finance, and even individuals follow their lead, however, less familiar players are finding that the going can get rough, especially as U.S. payers also grapple with economic sanctions (against potential terror agents, for example) that apply to payments of any kind, to anyone or anywhere in the world, making tax penalties for noncompliance seem mild in comparison.[1]

This article attempts to show how rough that going is, focusing on flaws and confusion in and between two important bodies of U.S. law that intersect to make compliance as complex as rocket science and as clear as mud. If the United States wants to continue to attract ideas, investments, and confidence, as well as the best and the brightest people from around the world, and to continue funding its operations through revenue collected from taxes while implementing foreign policy goals, it will have to pay a lot more attention not only to reforming U.S. tax law, but to making current laws clearer, better known, and reasonably possible to administer.

I. Background

U.S. tax law features substantially different individual income tax regimes for individuals who are U.S. tax residents and those who are U.S. tax nonresidents. The former include U.S. lawful permanent residents (LPRs) and nonimmigrants[2] substantially present in the United States as defined by the Internal Revenue Code, who are taxed with few exceptions like U.S. citizens. The latter includes all other foreign nationals, who are taxed under a different set of rules (discussed below). Federal tax rules for U.S. tax residency status, introduced by Congress for tax year 1985[3] and set forth in IRC section 7701(b),[4] conditioned U.S. tax residency of foreign nationals upon U.S. immigration status and days of physical presence in the United States. Under this system, U.S. tax residents are subject to U.S. income tax on their worldwide income regardless of the nature or source of the income or where in the world they reside or work. U.S. tax nonresidents, in contrast, are subject to U.S. income tax only on U.S.-source income that is effectively connected to a U.S. trade or business (which includes compensation for services performed in the United States unless an exception applies).[5]

Consistent with definitions in IRC section 7701(b), the IRS labels U.S. tax residents and nonresidents as ''resident aliens'' and ''nonresident aliens,'' terms that are confusing both to foreign nationals and to their employers, payers, and advisers because they conflate tax and immigration terminology. To avoid confusion with the immigration terms ''resident alien'' and ''nonimmigrant,'' which have related but different meanings from tax residency labels used by the IRS, foreign nationals who are resident aliens in tax parlance are referred to hereinafter as ''U.S. tax residents,'' and foreign nationals who are NRAs in tax parlance are referred to as ''U.S. tax nonresidents.''[6]

Since IRS forms and procedures incorporate and reference immigration terms, forms, and procedures, thereby making basic understanding of such terms and procedures vital to correct application of U.S. tax law, it is critical for payers and their advisers to understand fine distinctions among the terms as well as if, when, and how these terms apply. Unfortunately, as this article will discuss, immigration terms used for tax administration are not always used correctly, leading to more confusion about how the two bodies of law interdepend.

The purpose of this article is to show (1) how immigration and tax law converge to determine how foreign nationals should be taxed,[7] and (2) how the tax code

[1]Although this discussion focuses on intersections and conflicts between U.S. immigration and tax law, it would be irresponsible not to mention an extraordinarily significant program implemented by the Office of Foreign Assets Control (OFAC), a Treasury Department entity like the IRS that implements U.S. foreign policy goals. OFAC rules that implement U.S. economic sanctions regulate financial transactions of all kinds from a U.S. source that are completely independent of tax and immigration rules. More information on OFAC is available at http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx.

[2]Nonimmigrants are foreign nationals who are lawfully admitted to the United States for temporary purposes and typically subject to restrictions incident to the classification of admission (commonly called immigration status).

[3]The residency rules became effective for tax year 1985 including transition rules for individuals who were already in the United States when the new rules became effective.

[4]U.S. estate and gift tax rules and procedures are beyond the scope of this article.

[5]IRC sections 861, 871, and 864(a).

[6]Emphasis on U.S. tax residency is warranted because of potential confusion in the course of discussion of U.S. tax treaty benefits with tax residents of tax treaty partner countries.

[7]How U.S. taxation can effect a foreign national's U.S. immigration status is beyond the scope of this article. Although U.S.

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creates a gray area between the two that is fraught with administrative complexities and uncertainty of which many charged with tax administration are unaware.[8]

II. Immigration Process

One source of confusion is the IRS's use of the term ''visa.'' Although IRS form instructions generally intend this term to refer to the U.S. immigration status of a payee, and payers accordingly misunderstand the term ''visa'' as a proxy for immigration status, the terms have significantly different meanings. Most nonimmigrants enter the United States under one of many temporary classifications (for example, F-1, J-1, H-1B, L-1), each with its own terms and conditions. Although most of those nonimmigrants have nonimmigrant visas issued by U.S. consulates abroad, and although the temporary classifications under which they are admitted to the United States must match their visa classifications (if visas are required for admission), the purpose of any visa has been fulfilled at the point of admission and a visa is never an operative immigration document inside the United States. Rather, the operative proof of status issued at a port of entry to the United States is the Form I-94, ''Arrival/Departure Record.'' To reduce confusion in our discussion here, the term ''nonimmigrant status'' (or more generally ''immigration status'') is used instead of the term ''visa'' to refer to the classification under the Immigration and Nationality Act of a foreign national temporarily residing or working lawfully in the United States.

A. Visas

Although visa is neither a tax term nor a tax document, it plays a key role in determinations of taxability of payments to foreign persons in the United States. Due to widespread misunderstanding and misuse of the term by the public, by tax professionals, and by the IRS itself that undermines compliance, detailed discussion of visas is included here.

A visa is a travel document, needed only when the holder is outside the United States and must travel to, or apply for admission and/or readmission to, the United States. A visa may be issued for immigrant (permanent admission) or nonimmigrant (temporary admission) purposes. An immigrant visa is issued only to a foreign national eligible to use it for admission to the United States as a new immigrant approved for lawful permanent residence in the United States who will eventually be issued proof of permanent immigration status popularly called a green card (Form I-551) because of its original color.

Although reasons for a given visa's period of validity (the period of time over which it may be used to apply for admission to the United States) vary, the validity period of a nonimmigrant visa often corresponds to the period for which the visa holder has been approved by U.S. immigration rules or authorities to remain or work in the United States under the visa's classification. For example, an H-1B visa is typically valid for a preapproved period of three years, renewable if and when the approval period is extended by a U.S. employer in order for the nonimmigrant to continue to be able to travel in and out of the United States to work in H-1B status. In other cases, the validity period of a visa does not require preapproval or is unrelated to the admission period. For example, a prospective nonimmigrant visitor[9] with a 10-year B-1/B-2

law generally does not permit the U.S. tax authority to share information about a taxpayer with the U.S. immigration authority, foreign nationals who are required to file U.S. tax returns are routinely asked for them in the course of various immigration proceedings and adjudications as proof of compliance with tax law. If the tax returns reflect income from services during a period in which immigration records show that the work was not allowed, income from a source or of a type that is not permitted within the restrictions of immigration status at the time of payment, or no income from employment during a period when the foreign national's nonimmigrant status was dependent upon certain employment, the immigration benefit can be denied.

[8]Until recently, IRS compliance enforcement of these rules focused on the tax-exempt sector, particularly colleges, universities, and research institutions, and on financial industries. The former implemented policies, procedures, and systems to deal with tax and immigration-related compliance for payments to foreign nationals. Because most of the individuals that they pay are outside the United States, the latter implemented systems and procedures to deal with the tax rules but not necessarily with the immigration-related rules. Now the IRS is enforcing compliance with these rules in the for-profit sector with respect to payments processed for foreign-born individuals and foreign entities both through payroll and accounts payable. This new compliance effort has resulted from the elevation of NRA withholding on payments to non-U.S. persons to a Tier I enforcement issue by the IRS. As they become aware of these issues, payment and tax professionals in newly targeted entities must also become knowledgeable in relevant tax- and immigration-related rules. That point made, U.S. taxation compliance is not restricted to U.S. entities. For example, in vastly increasing numbers as globalization expands, foreign entities doing business in the United States (as evidenced by information on Forms 1042-S reporting their U.S. income or information about sponsored employees electronically provided to the IRS by immigration authorities) can expect to become targets of IRS compliance enforcement related to U.S. payroll and corporate tax obligations of which they may be largely unaware.

[9]The term ''visitor'' is used deliberately, specifically, and consistently throughout this discussion to refer to a nonimmigrant in temporary status as a visitor for business (classification B-1 or WB (Waiver Business) under the Visa Waiver Program (VWP) discussed below) or a visitor for pleasure or tourist (classification B-2 or WT (Waiver Tourist) under the VWP). In cases where foreign visitors need visas for admission to the U.S., nonimmigrant visitor visas (classification B-1/B-2) are unique in that they permit the visa holder to choose admission to the United States as a visitor for business or a visitor for pleasure. Distinction between the two reflects the primary purpose for a visitor admission rather than a purpose to which a given visitor is restricted (business visitors may engage in incidental tourist activities and

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visa may use that visa to apply for admission to the United States as a visitor throughout that 10-year period but will in most cases be admitted for a maximum of six months. Since both the foreign passport and nonimmigrant visa of an applicant for temporary admission to the United States must be valid at the time of admission, admission periods may be shorter than otherwise allowed if the foreign passport of the applicant for admission will expire in less than six months.

Given its prominence in discussion of tax status, it is important and probably surprising for payment and tax professionals to know that a visa is not required for every temporary admission to the United States. For example, millions of foreign visitors are admitted to the United States every year under the Visa Waiver Program (VWP), which permits citizens of 36 countries[10] to apply for admission to the United States as temporary visitors (for 90 days) based on their unexpired foreign passports (proof of citizenship). The same is true for Canadian citizen visitors, who not only do not need visas, but are rarely even issued Forms I-94.[11] In most cases today, visa waiver visitors get passport stamps[12] at U.S. ports of entry, and Canadian visitors are issued no documentation of U.S. immigration status at all.

A visa is of little, if any, significance after the holder enters the United States, except to the extent that it remains valid and can be used for readmission under the same classification if the holder travels abroad (if there is no departure from the United States and need for readmission, no visa is needed). A visa may expire after the holder enters the United States without immigration consequences, and a visa holder who changes status without leaving the United States from one temporary classification to another does not need to obtain a visa matching the new status immediately or at all if there will be no departure from the United States. A foreign national with an expired visa or no visa may still leave the United States and reenter, but only after obtaining a new or renewed visa at a U.S. consulate abroad (no particular penalty applies to renewal of an expired visa).

B. Immigration Status

If properly endorsed, a Form I-94 includes three important pieces of information: the date of entry under the given temporary nonimmigrant classification, the symbol for that classification, and the expiration date of the admission period.[13] Where the symbol ''D/S'' appears in lieu of an expiration date, the temporary status indicated on the Form I-94 relies on a supporting document that is also required in most cases for proof of status. Specifically, students and dependents in F or M temporary status must also present and carry Form I-20, ''Certificate of Eligibility for Nonimmigrant Student Status,'' and exchange visitors and dependents in J temporary status must present and carry Form DS-2019, ''Certificate of Eligibility for Exchange Visitor Status.'' Program end dates included on these two documents provide specific dates that clarify the Form I-94's D/S admission period.

That a given applicant for temporary admission to the United States has a nonimmigrant visa affixed in the passport does not mean that temporary admission to the United States is limited to the classification of that particular visa. In fact, it is not uncommon for foreign nationals to have more than one unexpired nonimmigrant U.S. visa or to be eligible regardless of other temporary visas in the passport to apply for admission to the United States under another classification that does not require a visa. At the port of entry, in such cases, it is critical for the applicant for admission to specify which of the nonimmigrant classifications is intended. Or, if the applicant is eligible for the VWP, admission as a visitor must be requested on that basis rather than on the basis of any nonimmigrant visa in the passport. For example, a foreign national from a visa waiver country with an unexpired A (diplomatic) or G (international organization representative) visa might choose to enter the United States as a visa

vice versa). While most visitors who enter with B-1/B-2 visas or under the VWP are subject to specific admission periods, certain Canadian and Mexican citizens are eligible for visitor admissions that are not designated as having a specific business or pleasure purpose and/or are not subject to specific admission periods. In fact, Canadian citizens who enter the United States as visitors over a contiguous border with the United States are not even issued documentation of proof of U.S. immigration status.

[10]The current visa waiver countries are Andorra, Australia, Belgium, Brunei, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, South Korea, Spain, Sweden, Switzerland, and the United Kingdom. A citizen of a visa-waiver-eligible country has the option to obtain a B-1/B-2 visitor visa or to use eligibility for the VWP as a basis for a given visitor admission to the United States. Among restrictions that apply to VWP visitor admissions is a nonextendable 90-day admission period.

[11]Canadian citizens are visa exempt, meaning that they are not required to present nonimmigrant visas as a basis for most classifications of temporary admission to the United States.

[12]VWP visitors are generally required to have proof of authorization through the Electronic System for Travel Authorization (ESTA) before travel. They are screened at ports of entry into the United States and enrolled in the Department of Homeland Security's US-VISIT program. Although VWP visitors were issued green Forms I-94W until recently that were easy to identify, conversion to the ESTA system has eliminated Form I-94W (unless for some reason the prospective visitor has not processed pre-travel authorization through ESTA). Instead, a stamp is now applied in passports that is substantially more difficult for payers to find and identify (even more problematic if any or all of the necessary endorsements on the stamp are missing).

[13]Even a VWP passport stamp for preapproved ESTA visitors should include these three information basics.

waiver visitor (WT waiver tourist status or WB waiver business status) in order to take advantage of the honorarium exception to nonimmigrant visitor restrictions (discussed below).

In most cases, Form I-94 is the operative proof of status.[14] Since nonimmigrant (temporary) admission to the United States is permitted under only one classification at a time, the fact that a foreign national is eligible for admission under more than one temporary classification is irrelevant (with or without multiple visas or visa waiver eligibility) because a Form I-94 will reflect only one temporary classification and other status requires a different Form I-94. To obtain a new I-94, a foreign national must either apply to change status without leaving the United States (entailing the notoriously slow process of getting a replacement Form I-94 attached to the approval notice) or leave the United States and apply for readmission under the new classification and be issued a new Form I-94 at the port of entry (for visa waiver visitors, a passport stamp issued at a port of entry serves the documentary purpose of a Form I-94).

While a visa seldom serves as proof of U.S. status or of work authorization (the exception is an immigrant visa that serves as proof of work authorization until the green card is received), Form I-94 often serves as proof of both. For example, an H-1B employee uses the unexpired Form I-94 endorsed H-1B to satisfy the approved H-1B employer's Form I-9[15] requirements, in most cases as part of a List A combination including the unexpired foreign passport (identity component). On the other hand, not every nonimmigrant with an I-94 endorsed H-1B uses that document as proof of current work authorization. A common example is the H-1B alien who has been issued an Employment Authorization Document (EAD, Form I-766). Based on pending adjustment of status to permanent resident, who may use that EAD for employment eligibility verification purposes even if the I-94 indicates unexpired H-1B status.[16]

C. Role of Immigration Documents

Although a visa does not constitute proof of status except for a newly admitted permanent resident with an immigrant visa, it may be relevant to a tax determination for other reasons. As noted, an immigrant visa, which serves as proof of status and employment authorization during the period immediately following a new immigrant's admission to the United States (before the actual ''green card'' is received), serves as proof that the holder is a U.S. tax resident as well as a lawful permanent resident once the visa holder enters the United States (before entering the United States for the first time based on an immigrant visa, the holder is not yet a lawful permanent resident and therefore not yet a U.S. tax resident). A nonimmigrant visa, however, is irrelevant for any U.S. tax-related purpose except when an income tax treaty provision is available based on a payee's purpose for entering the United States (such as to study, train, teach, or engage in research). Under that limited scenario, the visa reflects the purpose for entering the United States (which may have changed since the time of admission and disqualified the foreign national from treaty benefits) both because it was the basis of the admission and because it indicates the place of issuance, which likely coincides with the visa holder's country of tax residency.

Other immigration-related tax matters, such as determination of U.S. tax residency based on substantial presence in the United States (discussed below) and tax treaty eligibility, depend on a combination of U.S. immigration history, current status as reflected on a Form I-94, or on the foreign national's lack of status, if applicable. Lack of immigration status results from entering the United States without inspection (EWI), overstaying the lawful admission period, or breaching the terms and conditions of nonimmigrant status. Although in all three of these situations foreign nationals lack authorization to reside or work in the United States and therefore fall into the category popularly known as ''illegal aliens,'' they are not necessarily accurately referenced by the gentler term ''undocumented aliens.'' Of the three, only EWIs were never issued U.S. immigration documents. Overstays have valid documents that have expired. Status violators are most difficult to identify if they have unexpired documents and the payer has no basis for knowledge about the loss of status.

III. Foreign Workers

Whether a foreign national is authorized for U.S. employment (for an employer and/or self-employed) depends on nonimmigrant's temporary status and the terms and conditions of that classification. A foreign national who has never had status or who has lost status (undocumented) is never authorized to work, but if he is paid for U.S. services, he is subject to U.S. taxation on the income.

[14]There are two equally valid versions of Form I-94. Form I-94, issued upon admission to the United States at a port of entry, is typically endorsed by hand by an immigration inspector. Form I-94A, generated electronically and quite different in appearance, is issued by U.S. Citizenship and Immigration Services (USCI) to an applicant whose request to change status, extend the period of stay in the same status, or change employment within the same status has been approved and who needs a new document to reflect the new terms and conditions.

[15]Form I-9 is the document that must be completed by all employers for all employees to comply with requirements of the employer sanctions regime of the 1986 Immigration Reform and Control Act. *See* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=31b3ab0a43b5d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD.

[16]If the EAD is used in such a case for employment outside the terms and conditions of the approved H-1B employment, however, the H-1B status is terminated by operation of law.

Many foreign-born workers in the United States are bona fide (as opposed to intending) immigrants because they have naturalized and have become U.S. citizens (these are in the same category as all other U.S. citizens for taxation purposes); have been granted lawful permanent residence in the United States (with or awaiting issuance of green cards); have entered the United States as refugees; or were granted asylum in the United States after entering. All of these immigrants may reside in the United States and work without restriction, and with limited exceptions as in the case of refugees and asylees, are deemed by tax law to be U.S. persons and taxed accordingly.[17]

Millions of foreign-born workers reside and work in the United States without authorization. Although some employers and others who use and compensate their services may be aware of this and any related immigration or tax consequences, other employers may not (more would be if they were aware of and followed up on certain cues, inferable per the discussion below). Under tax law, as the public is usually surprised to know, most unauthorized aliens in the United States have or will become U.S. tax residents (discussed below) and are treated as U.S. persons under tax law.[18]

A third general category of foreign workers consists of nonimmigrants, foreign-born persons who enter the United States lawfully for a litany of temporary purposes and with a corresponding litany of restrictions that may or may not permit or limit employment. In other words, many lawful nonimmigrants may work in the United States without restriction, many may not work at all, and the final group may work only for certain employers and/or in certain U.S. jobs and/or under certain conditions. The collective terms used here for the nonimmigrant status of foreign nationals with classification-based U.S. employment restrictions are ''employment-specific'' and ''program-specific.''

A. Employment-Specific Status

Foreign national employees who are ''sponsored''[19] by their employers for specifically approved temporary employment include the following:

- A-1/A-2 diplomats;
- D-1 crewmen;
- E-1/E-2 treaty traders and investors;
- E-3 specialty workers from Australia;
- G-1/G-2 international organization employees;
- H-1B specialty workers;
- H-1C nurses;
- H-2A agricultural workers;
- H-2B seasonal workers;
- H-3 trainees;
- I foreign information media representatives or designees;
- L-1 intracompany transferees;
- O-1/O-2 outstanding aliens;
- P-1/P-2/P-3 athletes or entertainers;
- R-1 religious workers; and
- TN treaty NAFTA workers from Canada or Mexico.

B. Program-Specific Employment

F-1 academic students and M-1 vocational students, J-1 exchange visitors, and Q-1 cultural workers may be able to work in the United States under terms and conditions of their programs.

F-1 students may work on campus in positions connected to the U.S. academic institution that issued the Form I-20, in curricular practical training or for international organizations if authorized on Form I-20 by the approved schools' designated student officials (DSO), or under optional practical training (OPT) or based on hardship if they have applied for and received EADs.[20]

[17]The IRS is working on an explanation of tax residency status of refugees, who are distinct from asylees who obtain political asylum after entering the United States in that they enter the U.S. in refugee status. Technically, most refugees first enter the United States as U.S. tax nonresidents because they are not yet lawful permanent residents and have not passed the substantial presence test (SPT). Immigration law requires, however, that a refugee apply to adjust status to permanent resident after one year of presence in the United States, and provides that a refugee whose adjustment of status has been approved is retroactively treated as a lawful permanent resident as of the date of refugee admission (INA 209(a)(2)). Although for tax purposes a refugee might be treated as a U.S. tax nonresident until he passes the SPT, the fact that the vast majority of refugee adjustment applicants are approved and their treatment as permanent residents under immigration law will date back to their dates of refugee admission, the IRS is likely as a default position to deem refugees to be U.S. tax residents as of their dates of refugee admission. In the very few cases where refugees' adjustments are denied, they may file amended tax returns for their first year of U.S. tax residency that reflect U.S. tax nonresident status or dual status (part-year nonresident and part-year resident).

[18]Although the term ''U.S. persons'' appears in many U.S. taxation contexts including the Form W-9, individuals and professionals lacking sophisticated familiarity with U.S. tax law are likely to misunderstand the term as covering not only U.S. citizens, but also lawful permanent residents and nonimmigrants (nonimmigrants, unauthorized migrants, U.S. nationals, and asylees).

[19]''Sponsorship'' is an unofficial term for a person or entity that files a petition for permanent residence based on employment or a family relationship. In this context, the official term ''petitioner'' can substitute for the lay term ''sponsor'' and the official term ''beneficiary'' applies to the individual(s) for whom a determination of eligibility for permanent residence is sought (the ''sponsored'' individual(s)).

[20]An EAD (Form I-766, a digitized document the size of a credit card) permits its nonimmigrant holder (with some exceptions for foreign students in OPT) to work in the United States without restriction as employees or independent contractors during the validity period of the document.

Under any of these scenarios, these foreign students may work lawfully as employees or independent contractors if all other conditions of F-1 employment are met.

M-1 vocational student employment is restricted to post-completion practical training endorsed by the approved school's DSO on the student's Form I-20 MN. Eligible graduates may apply for an EAD, valid for one month per every four months of study, up to a maximum of six months.

J-1 students may engage in on-campus employment or academic training (corresponding to OPT for F-1 students) without an EAD. Their work is authorized by the responsible officer (RO) or alternate responsible officer of their approved schools, with notations on Forms DS-2019 generated when the authorization is entered in the federal government's Student and Exchange Visitor Information System (SEVIS). Under any of these scenarios, students may work lawfully as employees or independent contractors if all other conditions of J-1 student employment are met.

Other categories of non-student J-1 exchange visitors may or may not be authorized for U.S. employment.[21] If so, they are subject to terms and conditions of employment and self-employment based on the J-1 category and the specific J-1 program that issued the Form DS-2019. Although J-1s who are authorized to work in the United States may be eligible for employment or self-employment (paid as employees or independent contractors) if all requirements are met, they are not issued and do not need EADs.

Q-1 and Q-2 cultural exchange visitors are employment-specific if authorized to work for a given sponsor or by the U.S. Department of State. Q nonimmigrants are not eligible for EADs.

C. Self-Employment

Nonimmigrants subject to restrictions that require an employer-employee relationship between the sponsoring employer and the beneficiary are not permitted to act or be paid as independent contractors by the sponsors and may not engage in employment or self-employment[22] under any circumstances beyond the four corners of the sponsor's petition approved by U.S. Citizenship and Immigration Services[23] (or an employment-based temporary admission adjudicated at a contiguous U.S. border under provisions of NAFTA). As discussed above, program-specific nonimmigrants in F, J, M, or Q status are subject to restrictions, but if all program conditions are met, they may work lawfully as employees or independent contractors.

1. O and P Status Exceptions

While it is the exception rather than the rule for nonimmigrants with employment-specific temporary status to be independent contractors unless they have an EAD, some types of U.S. employment of nonimmigrants routinely involve self-employment. For example, itinerary-specific foreign nationals such as O-1/O-2 outstanding aliens and P-1/P-2/P-3 athletes or entertainers are approved to work in the United States on the basis of an itinerary of performances that is submitted and approved with the petition. These employment-specific nonimmigrants may perform at the venues listed on the itinerary covered by USCIS's approval,[24] but they do not become employees and are paid as independent contractors (if O-1/O-2 outstanding aliens have been sponsored as employees of a petitioning employer rather than through a petition filed by an agent, they are treated like other employment-specific nonimmigrants and may not engage in self-employment activities and/or be paid as independent contractors).

2. TN Status Exception

Certain employment-specific nonimmigrants gain status based on contracts for services and, if so, are

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[21]J-1 programs are approved under 16 different categories that cover both students and non-students. Each program is approved by the State Department with its own terms and conditions relating to program objectives. Non-student categories include alien physicians, au pair and educare exchanges, summer camp counselors, interns, trainees, summer work-travel in the United States for foreign university students, teachers, flight trainees, U.S. government visitors, international visitors, professors and research scholars, short-term scholars, and specialists.

[22]Not all compensated activities of a foreign national constitute ''work'' as that term is loosely used in immigration law, even if tax law deems them to be independent personal services performed by and taxable to an independent contractor. The concept of work is generally distinguished under immigration law as being part of the U.S. labor market and is important to protect

(Footnote continued in next column.)

U.S. workers from displacement by alien workers via restrictions and procedures specified by law, regulation, and policy.

[23]To be clear, the positions of many nonimmigrants in employment-specific status involve and even require services to be performed off the premises of their approved employers. In such cases, it is important for payers to distinguish if services are arranged directly with a nonimmigrant working as an independent contractor or through an employer that designates its employment-specific employee to perform services on its behalf incidental to the approved temporary employment. In the latter case, the contracting party is the employer and taxation/payments are administered accordingly.

[24]Although an approval notice in such case implicitly relates to the filed itinerary, that itinerary does not appear on the approval notice. Without substantial due diligence, accordingly, it is difficult if not impossible to know if a given venue is authorized to accept the services of a given nonimmigrant performer unless the terms of a contract cover aspects of the services that are subject to immigration law. An attestation signed by the sponsoring agent may be the best proof a host venue can get that the performance is authorized. For an O-1 artist or entertainer, an agent/petitioner may confirm that given performances were added via an itinerary of performances filed with the petition or that performances or engagements added during the validity period of the petition require an alien of O-1 caliber (the standard for off-itinerary performances). As a practical matter, there is no way for a host/payer to ensure that these requirements are met other than through a signed statement from the approved agent/petitioner attesting that detailed requirements are met.

self-employed and paid as independent contractors. For example, a nonimmigrant is eligible for admission under treaty NAFTA (TN) classification if he presents a contract with a U.S. entity for services that require NAFTA schedule professional credentials and are independent and time limited by nature (as required for systems analysis or management consulting, for example).[25] O and P nonimmigrants also typically have contracts governing the locations, terms, and conditions of their performances.

3. Honorarium Exception

Although the general rule is that nonimmigrant visitors[26] may not be employed or self-employed in the United States, an exception provided in the American Competitiveness and Worksite Improvement Act of 1998 (ACWIA)[27] permits an honorarium to be paid for ''usual academic activities lasting not longer than 9 days at any single institution.'' The exception restricts payers to qualifying institutions (higher education institutions and related research institutions, as well as nonprofit or government research institutions) and payees to nonimmigrant visitors who have not accepted such payments or expenses from more than five institutions or organizations in the previous six-month period.[28]

D. Dependents

The term ''dependent'' can have different meanings under U.S. immigration[29] and tax[30] law. In some cases, intersection of one of these bodies of law with the other can disqualify a dependent from benefits under the other body of law. For example, an F-2 dependent child of an F-1 who is exempt from counting days of ''substantial presence'' for purposes of U.S. tax residency determination (see discussion below) is eligible for the exemption only as long as he qualifies as a dependent under immigration law (unmarried and under age 21), even if the same term under tax law may cover other dependents under other circumstances.

Dependents of employment-specific aliens may or may not be authorized to work in the United States or eligible to apply for EADs. Dependents who are eligible and choose to do so may obtain employment-specific classification independent of the status and employment authorization of nonimmigrant relatives through whom they could otherwise obtain derivative status.

Employment authorization of dependents (spouses and unmarried children under 21) who opt for derivative status from principal aliens in employment-specific nonimmigrant classifications varies greatly by classification. If authorized incident to status under 8 C.F.R. section 274a.12(a) or if they have obtained EADs under 8 C.F.R. section 274a.12(c), eligible dependents may work without restriction as employees or independent contractors for the duration of their status or with EADs that reflect the category on which work eligibility is based (for example, an adjustee authorized to work under 8 C.F.R. section 274a.12(c)(09) is issued an EAD reflecting category C09). Many derivative dependents, such as those in F-2 or H-4 status, are not eligible to work in the United States at all.

Many dependents are recognizable by classification designations that are unique to dependents, but many are not. For example, although F-2, J-2, H-4, and L-2 nonimmigrant classifications are unique to dependents, nonimmigrant classifications such as A-1, A-2, G-1, G-2, E-1, E-2, and E-3 include both principal aliens and dependents, making distinctions between the two confusing and due diligence challenging. Although immigration law and regulations clarify the possibility and nature of work authorization for these dependents, neither immigration nor tax law makes it simple, convenient, or clear to distinguish employment authorized dependents from unauthorized dependents or how to obtain information or documentation on which taxation determinations must be made. Although it is clear that when an employee or independent contractor has an EAD, he is authorized for employment or self-employment, it is not evident from the EAD if the holder's derivative status (maintained only as long as the principal alien's status is maintained) is valid, what the holder's U.S. or foreign tax residency status is, or if an EAD-holder payee is eligible for tax treaty benefits.

Although an EAD is generally issued to an alien who has entered the United States under, or changed to, a specific nonimmigrant classification under which unrestricted employment is authorized, that is not always the case. Some nonimmigrants may be issued

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[25] *See* 8 CFR section 214.6(b):

> Engage in business activities at a professional level means the performance of *prearranged* business activities for a United States entity, including an individual. It does not authorize the establishment of a business or practice in the United States in which the professional will be, in substance, self-employed. A professional will be deemed to be self-employed if he or she will be rendering services to a corporation or entity of which the professional is the sole or controlling shareholder or owner. [Emphasis added.]

[26] Nonimmigrant visitors are recognizable by Forms I-94 endorsed B-1 (business) or B-2 (tourist); by passport stamps or green forms I-94 endorsed WB (waiver business), or WT (waiver tourist) for VWP admissions; or the lack of Forms I-94 if they are Canadian citizens who entered from contiguous countries or Mexican citizens who entered for border-related activities as used to be facilitated by ''border crossing cards'' (today, a B-1/B-2 laser visa may be used as a visa or as a border crossing card).

[27] Section 431 of the ACWIA amending section 212 of the Immigration and Nationality Act.

[28] For more information about foreign nationals who may provide self-employment services in the United States and how to identify them by their immigration documents, see Dodd-Major and Singer, *Honorarium and Other Payments to Independent Contractors: A Guide to Immigration and Tax Administration*, Windstar Publishing Inc. (2011).

[29] Immigration law restricts the term ''dependent'' to spouses and unmarried children under 21.

[30] Tax law applies fact-specific tests. *See* http://www.law.cornell.edu/uscode/usc_sec_26_00000152000-.html.

EADs despite a lack of status or because adjustment of status to permanent resident is pending. Aliens who are ineligible for admission to the United States may be permitted to enter for humanitarian and other reasons on the basis of ''parole''[31] that may or may not include work authorization or eligibility to apply for an EAD. Aliens in pending adjustment status, who are eligible for EADs, may also apply for ''advance parole,'' which permits them to reenter the United States as adjustees without visas or specific classification of admission. Although they lack status, other aliens may also be issued EADs pending adjudication of an application for cancellation of removal (deportation), if granted deferred action, or pending a final order of removal. The basis of issuance of an EAD, which appears as a letter-number category on the front of a Form I-766, corresponds to the legal basis of eligibility under 8 C.F.R. section 274a.12(a) or (c).

E. Workers on the Outer Continental Shelf

In 1953 the Outer Continental Shelf Lands Act[32] extended the U.S. Constitution and laws of the United States to property beyond the three-mile limit of state jurisdiction established by the Submerged Lands Act earlier that year.[33] The outer limit of the continental shelf is identified by a steep drop of the continental mass toward the deep ocean, which may occur hundreds of miles from shore. Section 1333(a)(1) of the Outer Continental Shelf Lands Act extended federal jurisdiction to all artificial islands and fixed structures erected on the Outer Continental Shelf (OCS)[34] to the same extent as if the OCS were an area of exclusive federal jurisdiction located within a state. Although it has been settled through litigation that U.S. immigration law has no jurisdiction over services performed within this federal jurisdiction because of judicial interpretations of exceptions provided by Congress in the law, other federal laws, including tax law, apply within the federal jurisdiction, and state laws apply within the three-mile limit of state jurisdiction.[35]

Three basic categories of foreign nationals may engage in activities related to the exploration for, or exploitation of, natural resources on the OCS of the United States:

- contractors that perform services on the OCS (such as seismographic testing, drilling, repair, and salvage work);
- vessel operators that transport supplies and personnel between U.S. ports and locations on the OCS; and
- owners or operators of foreign-registered vessels that bareboat or time charter to persons who are engaged in activities related to the exploration for, or exploitation of, natural resources on the OCS.[36]

Immigration law has been deemed not to apply to the OCS, with the result that U.S. immigration status or documentation that permits employment is not required.[37] Rather, foreign nationals working on the OCS are issued nonimmigrant visas designated *Visitor for Business on the Outer Continental Shelf* (B-1/OCS) for work on the OCS of more than 29 days based on a certificate of exemption issued by the U.S. Coast Guard.[38] These individuals, who need the visas to enter the United States as visitors in order to reach points of embarkation for the OCS, may be either employees or independent contractors for U.S. tax purposes.

F. Grant Payments for Services

Although U.S. immigration law does not specifically address eligibility of a foreign national for a U.S. scholarship, fellowship, or grant, immigration restrictions apply if the funds are provided in return for or conditioned on services performed in the United States that constitute work. If so, regardless of any term used to describe the payment (such as ''stipend''), the grantee must have appropriate work authorization in the United States.[39] A scholarship or fellowship that is not awarded in return for (or conditioned on) services may be made to, or on behalf of, a foreign national who is engaged in full or part-time study in the United States.[40] However, such study may not impinge on

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[31] *See* http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=accc3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=accc3e4d77d73210VgnVCM100000082ca60aRCRD.

[32] 67 Stat. 462, 43 U.S.C. sections 1,331 et seq.

[33] 43 U.S.C. sections 1,301 et seq.

[34] For definition and explanation of this area, see http://ocsenergy.anl.gov/guide/ocs/index.cfm.

[35] For a definition of this term and an explanation of U.S. law that governs this area, see http://www.boemre.gov/aboutboemre/FedOffshoreLands.htm.

[36] LMSB Industry Directive No. 1 (LMSB-04-0909-037) on U.S. Outer Continental Shelf Activity (Oct. 28, 2009).

[37] *Journeymen AFL-CIO v. Reno*, 73 F.3d 1134 (D.C. Cir. 1996). As a result of this holding, the Department of Labor will not certify a U.S. labor shortage for workers on the OCS, with the result that services of a particular classification of foreign worker such as H-2B that requires temporary labor certification may not be used for work on the OCS.

[38] *See* provisions of the Jones Act set forth at 8 C.F.R. section 141.20.

[39] All the tax rules for such payments for services, depending on whether the payment is for employment or self-employment, must be followed as well. For a complete discussion, see Singer, *U.S. Taxation of Scholarship and Fellowship Grants*, Windstar Publishing Inc. (2011).

[40] If a scholarship or fellowship recipient is engaged in full-time study, his nonimmigrant status must generally permit study as the primary activity.

services provided by a foreign national whose nonimmigrant status has a primary purpose other than full-time study or independent research.[41] A grant awarded on various bases and/or for various purposes that do not depend on services performed in the United States may be paid from a U.S. source to any immigrant or nonimmigrant. Determination of whether, and the extent to which, such funds are taxable to the recipients involves a delicate balancing of immigration and tax law.[42]

IV. Federal Tax Process

The rules for federal taxation differ for U.S. tax residents and tax nonresidents regarding withholding of taxes on income, income reporting, and submission of U.S. federal tax returns and disclosure forms.[43]

A. Rules for U.S. Tax Residents

U.S. tax residents are generally subject to federal income taxes in the same manner as U.S. citizens, meaning that they are taxable to the United States on any income of any kind from any source paid in any currency unless an exception applies. Wages paid to U.S. tax residents are subject to wage withholding (absent a treaty exemption) and Social Security and Medicare (FICA) taxes under the same rules that cover U.S. citizens. Wages paid to U.S. tax residents include amounts paid abroad for services as well as the value of benefits-in-kind such as housing.

All remuneration paid for services provided to a U.S. employer must be reported on Form W-2. If a U.S. tax resident is treaty-exempt on wage income, that income may be reported on Form 1042-S under Exemption Code 04.[44] Whether reported on a Form 1042-S or not, the income should not be included in box 1 of the W-2 (but may be required in other boxes of the W-2, such as for Social Security and Medicare wages, state wages, and so forth). Reportable nonemployee compensation paid to a U.S. tax resident is subject to 28 percent backup withholding if the recipient fails to provide a U.S. taxpayer identification number. Non-employee compensation of U.S. tax residents (including for work performed outside the U.S.) must be reported on Form 1099-MISC (box 7) if the amount paid during the tax year equals or exceeds $600, or if any of the payments were subjected to backup withholding.

U.S. tax residents with worldwide income exceeding the income threshold for their filing status (single, married filing jointly, and so forth) must file a Form 1040 (or simpler Form 1040A or 1040EZ) tax return. Income earned in a foreign currency must be translated to U.S. dollars using IRS rules. Income from transactions such as rentals of foreign real estate must be recorded on returns according to U.S. tax principles and procedural rules. For example, residential real estate located outside the United States must be depreciated over 40 years. Double taxation is avoided by using foreign tax credits to offset U.S. taxes attributable to the foreign-source income.[45]

Like U.S. citizens, foreign nationals who are U.S. tax residents based on LPR status remain subject to U.S. taxes on their worldwide income even when they live and work abroad. Rules to avoid or minimize double taxation of such expatriates by the United States and the country of physical residence/employment are set forth in IRS Publication 54, *U.S. Tax Guide for Citizens and Residents Abroad.* Some rules, such as the bona fide residence test for claiming section 911 foreign-earned income exclusions, apply only to U.S. citizens unless the foreign national is a national of a country with which the United States has an income tax treaty.[46] That said, this opportunity under U.S. tax law should carefully and knowledgeably balance a claim of bona fide residence in a foreign country against requirements of U.S. immigration law if the U.S. tax resident is a lawful permanent resident of the

[41]For example, a nonimmigrant in employment-specific H-1B status may engage in part-time study scholarship (or arguably enroll for course credits that qualify for fulltime status) and be paid, but compensation for their H-1B activities is taxed as wages regardless of any label (such as ''fellowship'') used to describe it. IRS provides tax rules for determining when a grant constitutes wages or independent contractor income in ILM 200944027 and discusses the terms for grants used to fund research in more detail in ILM 201117026. Some U.S. government grants specifically state that the grant may not be used as compensation for employment, in which case grants departments must coordinate with both immigration and payment professionals to ensure compliance with both immigration and tax law requirements related to the recipient's U.S. activities and taxability.

[42]It is not uncommon for grants that fund clinical research to specifically prohibit payers from collecting information from the research subjects needed to comply with U.S. tax law (for fear of chilling participation in trials or tainting research results).

[43]For a thorough discussion of the tax return rules for foreign nationals, see Singer, ''The 10 Rules of U.S. Taxation of Payments to Foreign Nationals,'' *Tax Notes Int'l*, Jan. 7, 2008, p. 55, *Doc 2007-27036*, or *2008 WTD 9-17*.

[44]Rules for treaty-exempt income of tax residents were added to the section 1441 and 1461 regulations based on comments on

(Footnote continued in next column.)

the proposed regulations made by author Singer. Reporting on Form 1042-S, which is important for tax return preparation and IRS review of tax return treaty claims, as well as for information exchange, was not addressed in those comments.

[45]*See* Form 1116 and instructions and IRS Publication 514, *Foreign Tax Credits for Individuals*. Foreign tax credits generally do not apply to state income taxes except for some states bordering Canada that allow credits for certain Canadian income taxes.

[46]Rev. Rul. 91-58, 1991-2 C.B. 340. For a discussion of these tax and withholding rules, see Singer, ''U.S. Tax Code and Treaty Solutions for Resident Aliens Working Abroad,'' *Tax Notes Int'l*, May 5, 2008, p. 421, *Doc 2008-8773*, or *2008 WTD 90-9*.

United States who actually intends to remain in the U.S. permanently or indefinitely.[47]

Some long-term LPRs who lose status by abandonment may be subject to special reporting and tax rules depending on the date they lost LPR status (discussed below). Under expatriation provisions of U.S. tax law, foreign nationals who have held LPR status for any part of eight out of 15 contiguous calendar years ending with the year of loss of status (called long-term residents) may be subject to an exit tax as well as other special procedures.[48] Special rules and procedures that vary according to the date on which status is lost are described in IRS Publication 519, *U.S. Tax Guide for Aliens* under the heading ''Expatriation Tax'' and on the IRS website at IRS.gov.

B. Rules for U.S. Tax Nonresidents

Nonimmigrants who are U.S. tax nonresidents are subject to U.S. income tax only on U.S.-source income and income that is effectively connected with conduct of a U.S. trade or business that generally includes compensation for services performed in the United States. Wages paid to U.S. tax nonresidents are subject to special rules described in IRS Publication 15, *Circular E, Employer's Tax Guide*. Non-employee compensation (and any other type of U.S.-source income payment except wages subject to wage withholding) paid to a U.S. tax nonresident is subject to 30 percent withholding (called NRA withholding) unless an exception applies and documentation required to support the exception is provided before payment. Special FICA exceptions apply to U.S. tax nonresidents under certain circumstances (discussed below).

All U.S.-source income of U.S. tax nonresidents except wages subject to wage withholding must be reported on a Form 1042-S information return rather than on a Form 1099. Such income includes wages exempt from wage withholding under a tax treaty and non-employee compensation. The payer of such income has a Form 1042 tax return requirement as well.[49] A payer — called a withholding agent because of the obligation to withhold U.S. taxes from payees' income — who fails to withhold and remit taxes is obligated to pay the under-withheld taxes and may be subject to a variety of penalties and interest.

Because U.S. tax rules source compensation for services where the services are performed, compensation paid abroad for services provided in the United States is subject to U.S. tax, withholding, and reporting unless an exception applies.[50] All remuneration for U.S.-source employment is subject to these rules even if the foreign national receiving the income is not yet in the United States. For example, a signing bonus for future employment is considered U.S. employment income.[51] If a signing bonus happens to be paid in the calendar year before the prospectively approved employee enters the United States, the employer has the awkward duty to withhold U.S. payroll taxes and issue a Form W-2 even though the prospective employment has not started, no services were actually performed during the tax year, the employee does not yet have U.S. immigration status, or the payee has no Social Security number (unless one was issued for a prior work-authorized employment) and cannot get one from the Social Security Administration without current nonimmigrant status and evidence of employment authorization. Awkward or not, a foreign national payee in this situation must submit a U.S. tax return showing employment income without ever having set foot in the United States or performed any services at all for the payer during the tax year.

U.S. tax nonresidents who receive compensation for U.S. services must file a Form 1040NR or 1040NR-EZ tax return unless their only U.S. income consists of wages under the personal exemption amount. Only specified U.S. tax nonresidents may claim additional exemptions for spouses and dependents,[52] even if their dependents are U.S. citizens. Deductions and credits for U.S. tax nonresidents are very limited. For example, the standard deduction may not be claimed (except by students and business apprentices from India), and the

[47]Tax regulations covering ''bona fide residents'' for IRC section 911 purposes, set forth in Treas. reg. section 1.871-2(b), identify when a foreign national becomes a ''resident'' for U.S. tax purposes under pre-IRC section 7701(b) rules. Cases under section 911 elaborate on the factors that support a bona fide residence in a foreign country. For a list of 11 factors, see *Sochurek v. Comm'r.*, 300 F.2d 34 (7th Cir. 1962). *Scott, Jr. v. U.S.*, 432 F.2d 1388 (Ct. Cl. 1970), concurs with *Scohurek* and adds a 12th factor.

[48]Long-term residents who lost their LPR status between June 3, 2004, and before June 17, 2008, are not relieved of the obligations for U.S. taxes as a tax resident, including filing of annual tax returns and related disclosure forms, until they have submitted a Form 8854 to the IRS as required by IRC section 7701(n). Long-term residents who are covered expatriates for purposes of the exit tax described in IRC section 877A must also submit a Form 8854 certifying compliance with their U.S. tax return obligations for the five years ending with the calendar year in which their LPR status was lost. (IRS Publication 519 states that long-term residents expatriating before June 4, 2004, must also submit a Form 8854, but some may have expatriated before the form was introduced.) U.S. tax residency obligations do not end if this form is not submitted.

[49]For more information about these procedures, see Singer, *A Guide for Filing IRS Forms 1042 and 1042-S*, Windstar Publishing Inc. (2011).

[50]Tax withholding rules and exceptions are explained in IRS Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*.

[51]Rev. Rul. 2004-109, 2004-50 IRB 1, obsolescing earlier rulings.

[52]Residents of Canada, Mexico, and South Korea; U.S. nationals; and students and business apprentices from India. The conditions vary by category of taxpayer.

child tax credit is available only to U.S. tax nonresidents eligible to claim their children as dependents.[53] Foreign nationals who are both U.S. tax nonresidents and tax residents during a given tax year (called dual-status taxpayers) must submit dual-status tax returns.[54] U.S. tax nonresidents who fail to file a required return within 16 months from the original due date of the return lose deductions and credits[55] that are available to timely filers.

V. Impact of Treaties

The United States has income tax treaties with over 60 countries[56] and social security agreements, called totalization agreements, with over 20 countries.[57] A tax resident of a country with which the United States has an income tax treaty or social security agreement (or both) may be exempt from U.S. tax if conditions for the exemption are met and applicable procedures are followed. Some nontax agreements (discussed below) provide immigration benefits, such as entry to the United States without a visa and work authorization, without addressing U.S. taxation of the covered individuals. When a treaty does include a specific exemption from tax, as with the Vienna Conventions (discussed below), Congress incorporates that tax exemption into the Internal Revenue Code.

A. Income Tax Treaties

Exemption from U.S. tax under an applicable income tax treaty generally applies only to U.S. tax nonresidents because income tax treaties include a ''saving clause'' preserving the right of the United States to tax its citizens and residents.[58] All treaties but two (Greece and Pakistan) include an exception from the saving clause for treaty provisions covering studying, training, teaching, or engaging in research. Exceptions to the saving clause are generally not available to foreign nationals who have become U.S. citizens or LPRs, although the U.S. tax treaty with the former U.S.S.R., which covers the nine newly independent states[59] that have not yet negotiated individual tax treaties with the United States, along with the treaty with the People's Republic of China, allow this exception from the saving clause for LPRs. That said, potentially applicable portions of the U.S. treaty with the former U.S.S.R. require residency in the treaty country throughout the benefit period, and the former U.S.S.R. and China treaties both stipulate that potentially eligible individuals must be in the United States ''temporarily,'' a requirement that is clearly at odds with LPR status. These are important distinctions for withholding agents, which may be understandably reluctant (seldom having all relevant facts) to grant tax treaty benefits even to LPRs from those countries that allow saving clause exceptions that appear on the surface to cover them.

Unlike all other treaty provisions that require individuals claiming treaty benefits to be tax residents of the treaty country at the time the treaty-exempt income is paid or when the activities giving rise to the treaty-exempt income occur (or when payment is made in the case of passive income), the provisions for students, trainees, teachers, and researchers generally only require tax residence in the treaty country at the beginning of the nonimmigrant stay in the United States or when the foreign national is invited to come to the United States for the purpose of the visit[60] covered in the article such as studying, training, teaching, or engaging in research (as usual, however, there are exceptions such as the one noted in the prior paragraph as well as the teacher/researcher article of the treaty with Japan). Allowing these foreign nationals to keep their treaty benefits even if they are no longer tax residents of the treaty country recognizes the reality that foreign nationals lose their tax residency status under the internal law of a residence-based taxation country either immediately if leaving indefinitely, after a specified period of time outside that country, or when they no longer have a nexus to the treaty country, such as a permanent home. Rules vary by country.

To be exempt from withholding from their U.S. income, U.S. tax nonresidents must provide their employers or payers with prescribed documentation such as a Form 8233 processed in accordance with the form's instructions or a special Form W-9 in the case of treaty-exempt U.S. tax resident students and scholars. Even if exempt from withholding and tax, however, such income is reportable unless it is completely excludable from income. For example, compensation exempt from withholding under a tax treaty must nevertheless be reported to the recipient and to the IRS on a Form 1042-S information return. If the treaty-exempt income constitutes effectively connected income (a term that includes compensation for services performed

[53] *See* http://www.irs.gov/newsroom/article/0,,id=106182,00.html.

[54] Explained and illustrated in IRS Publication 519.

[55] *See* IRC section 874 and the regulations thereunder.

[56] Refer to IRS.gov for tax treaties and IRS Publication 901, *U.S. Tax Treaties*, for overviews of treaty provisions.

[57] Refer to http://ssa.gov/international for Social Security agreements and related procedures.

[58] *See, e.g.*, article 1(4) and (5) of the 2006 U.S. model treaty. The descriptive term ''saving clause'' does not appear in tax treaties.

[59] This is the Department of State designation for countries that were formerly part of the Union of Soviet Socialist Republics. IRS still uses the older term ''Commonwealth of Independent States, or CIS.''

[60] ''Purpose of the visit'' is a term of art in the context of tax treaty determinations. Inclusion of the word ''visit'' is not intended to restrict applicability to foreign nationals who enter the United States under nonimmigrant visitor classification.

in the U.S.), the income recipient is required to submit a U.S. tax return substantiating the treaty claim.[61]

B. Social Security Agreements

Exemption from U.S. Social Security and Medicare coverage and taxes under an applicable social security agreement may be available to a foreign national employee regardless of U.S. tax residency status. For example, foreign nationals temporarily assigned by their foreign employers to an affiliated company in the United States for a period of time not expected to exceed five years might be exempt from FICA under a detached worker provision of an applicable agreement.[62] At the end of the detached worker period, or when the duration of the assignment becomes indefinite, social security coverage changes to the country where the services are being performed. Also, foreign nationals who make voluntary contributions to their home-country social security systems relating to their pay for U.S. services may remain covered by their home-country system instead of being covered by and paying into the U.S. social security system. A foreign national claiming exemption from FICA must provide a certificate of coverage issued by the appropriate foreign social security agency or by the U.S. Social Security Administration.

Under new procedures for imposing self-employment tax on tax nonresidents as allowed under certain agreements, some U.S. tax nonresidents may be obligated to pay U.S. FICA and Medicare tax with their Form 1040NR or Form 1040NR-EZ tax returns.[63]

C. Compacts of Free Association

Three countries — the Federated States of Micronesia, the Republic of Palau, and the Republic of the Marshall Islands have entered into Compacts of Free Association (CFA) with the United States. Although citizens of these countries are foreign nationals under U.S. immigration law, CFA agreements allow covered individuals to apply for admission to the United States without visas, reside in the United States indefinitely, and be employed without restriction in the United States. CFA documentation consists of a passport issued by a CFA state and a Form I-94 stamped with the country's specific designation — CFA/FSM (Micronesia), CFA/MIS (Marshall Islands), or CFA/PAL (Palau).[64]

CFA citizens who are physically present in the United States are subject to the same tax rules and procedures as other foreign nationals. Their days of physical presence are counted for purposes of determining their U.S. tax residency status, and their earnings are subject to U.S. withholding, reporting, and taxation in accordance with their residency status as U.S. tax residents or nonresidents. Because they are authorized to work, they are eligible for SSNs, as discussed below.

D. FCN Treaties

The United States enters into treaties of friendship, commerce, and navigation (FCN treaties) to authorize U.S. nationals to establish commercial businesses within the territory of the treaty partner country (and vice versa). These treaties secure reciprocal rights for the treaty partners, granting protection for their businesses and individuals operating in the United States, and assuring businesses of the treaty partner the most favorable treatment afforded to any other foreign business with respect to the treaty provisions (called most favored nation or MFN status). Citizens of MFN countries are subject to the same tax rules and procedures as other foreign nationals. Citizens of MFN countries do not get more favorable tax treatment from an MFN treaty with the United States than are available under an applicable U.S. tax treaty.[65]

E. Jay Treaty

Under Article III of the Jay Treaty (a treaty between Canada — then a British colony — and the United States, whose respective territorial borders had not yet been well defined), aboriginal people were accorded the right to trade and travel between the United States and Canada. This right was vested in the Immigration and Naturalization Act (INA) as follows:

> Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.

North American Indians who are citizens of Canada and meet the Jay Treaty test may, like their counterparts who are citizens of the United States, reside and work in the United States without restriction as employees or independent contractors. Because they are authorized to work, they are eligible to apply for

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[61]Treas. reg. section 6012-1(b).

[62]Only the agreement with Italy, which bases coverage on nationality, lacks such a provision.

[63]For more information about how Social Security agreements impose self-employment tax, see Singer, ''Certain Nonresidents Are Now Obligated for U.S. Self-Employment Tax,'' *Tax Notes Int'l*, Apr. 4, 2011, p. 55, *Doc 2011-4989*, or *2011 WTD 64-19*.

[64]For purposes of Form I-9, however, since CFAs with Micronesia and the Marshall Islands have been amended to address

(Footnote continued in next column.)

Form I-9 procedures and the CFA with Palau has not, only citizens of Micronesia or the Marshall Islands may prove a combination of identity and work authorization with their foreign passport and Form I-94.

[65]*Sang J. Park & Won Kyung O. v. Comm'r.*; *Sang J. Park v. Comm'r.*, 136 T.C. No. 28, holding that the FCN treaty with South Korea did not add an ''Other Income'' article exempting U.S.-source gambling income from tax, a provision available in treaties with many other countries.

SSNs (discussed below), and the SSA is equipped to make the complex Jay Treaty-based eligibility determination.

Although Article III also prohibits the United States and Great Britain from imposing any excise taxes, tariffs, tolls, or duties on North American Indians, it does not exempt individuals covered by this treaty from U.S. income taxation.[66]

F. Vienna Conventions

The Vienna Convention on Diplomatic Relations provides individuals who hold diplomatic or consular officer positions (A-1 nonimmigrants in the United States) with a range of specified privileges and immunities,[67] including tax exemptions, as follows:

- Article 33 of the convention provides that ''a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving States.'' Exemption from Social Security applies only to wages paid by a foreign government that has assigned a diplomatic agent to a host country and not to wages paid by any other employer.
- Article 34 provides that ''a diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal.'' The convention proceeds to list categories of taxes not included in this exception, including ''(d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving States.'' In other words, the provision does not exempt the private income of diplomatic agents from U.S. taxation.

Similarly, articles 48 and 49 of the Vienna Convention on Consular Relations provide exemptions from social security taxes and income taxes, respectively, for consular officials not covered by the Diplomatic Convention and for consular employees and family members living in their households who are paid for services rendered to their home government as long as they are not permanent residents of the United States as defined by the convention.

These exemptions from tax have been incorporated into U.S. tax law (discussed below), and expanded to cover A-2 nonimmigrants in the United States who, for purposes of the Convention on Consular Relations, are considered to be residing permanently in the United States. Although these foreign-government employees are not entitled to privileges and immunities including exemption from tax under the convention, they are eligible for the same tax exemptions as apply to foreign-government employees who are covered by the convention.[68]

G. North American Free Trade Agreement

NAFTA facilitates admission to and employment in the United States of certain Canadian and Mexican citizens. The TN classification for designated Canadian and Mexican professionals was created, along with special admission procedures for TN nonimmigrants to the United States. To qualify as a basis for TN classification, a position offered in the United States must require services of a NAFTA Schedule 2 professional (as specified under the agreement and periodically updated), and the prospective TN employee or contractor must possess the credentials required as well as proof of qualifying citizenship.

Members of NAFTA Schedule 2 professions who are self-employed outside the United States may pursue business relationships (that is, contracts for services) from outside the United States and obtain TN status to engage in prearranged services that constitute self-employment in the United States.[69] Even under NAFTA, Canadian and Mexican citizens admitted to the United States as nonimmigrant visitors are not permitted to establish U.S. business offices to service U.S. clients, and TN nonimmigrants may not provide services to any U.S. entity in which they are controlling owners or shareholders.

Whether they function as employees and independent contractors in the United States, TN nonimmigrants are subject to U.S. rules for determining tax residency, withholding, reporting, and taxation that apply generally to foreign nationals in the United States unless they are exempt under applicable income tax treaties or Social Security agreements.

H. Hague Convention

The United States is an official signatory of a multilateral agreement issued in 1961 known as The Hague Convention Abolishing the Requirement of Legislation for Foreign Public Documents. Under provisions of this agreement, a citizen of one signatory country required to present certified copies of documentation to government officials of another signatory country may get copies of required documents certified by competent authorities of each country rather than by the agencies that issued the original documents. To implement this provision, competent authorities complete a one-page form known as an apostille, which they sign

[66]For a discussion of the nonapplicability of the Jay Treaty (and other treaties with North American Indians) to U.S. income taxes, see LTR 9215009.

[67]Section 4 of the United States International Organizations Immunities Act of 1945 (PL 291-79) amended the IRC to add to the exclusions from tax for employees of foreign governments compensation received for official duties to organizations covered by the act. These exemptions are in IRC section 893.

[68]*See* AM 2011-001 (Feb. 25, 2011).

[69]8 C.F.R. section 214.6(b) discussed in note 25, *supra*.

or impress with a seal.[70] In turn, the apostille is attached to a copy of that document needed by the other government.

An apostille (1) authenticates signatures on the documents, certifying the capacity in which the signatory has acted; or (2) certifies the validity of the seal or stamp that appears on the documents. Attachment of an apostille avoids the time-consuming process of sending an original document to government officials of the other country, as well as the necessity to have a given document certified by the issuing agency or diplomatic or consular officers of either government. A common situation that illustrates the convenience of the apostille option features a foreign national living abroad who must submit a Form W-7 to the IRS to obtain an individual TIN (called an ITIN) for a U.S. tax administrative purpose (discussed below) and who may attach an apostille to photocopies of an original passport, national identity card, birth certificate, and so forth, instead of submitting original documents that may be one of a kind or difficult to replace.

VI. Determining Tax Residency

The first task for U.S. employers and certain other U.S. payers of foreign national payees (discussed below) is to determine U.S. tax residency status (the requirement to substantiate U.S. tax residency status also applies to foreign nationals preparing U.S. income tax returns and related filings). Under IRC section 7701(b), foreign nationals are U.S. tax residents if they are U.S. LPRs (under the green card test) or meet the substantial presence test (SPT). All other foreign nationals are U.S. tax nonresidents unless they are eligible for and elect U.S. tax resident status.[71]

A. U.S. Lawful Permanent Residents

U.S. LPRs are U.S. tax residents incident to that status. Foreign nationals who are LPRs at any time during a given calendar year are U.S. tax residents for that year. U.S. tax resident status begins on the first day of physical presence in the United States in LPR status.[72] Foreign nationals who adjust status from nonimmigrant to immigrant have often already become U.S. tax residents by that time because of cumulative substantial presence in the United States under the SPT. LPRs remain U.S. tax residents until their LPR status is revoked or administratively or judicially determined to have been abandoned.[73] To avoid U.S. obligations incident to LPR status, formal steps must be taken to relinquish status or prove revocation. Expiration of immigrant documentation or lengthy (or permanent) absences from the United States alone do not accomplish this. While immigrants who leave the United States for extended periods may seem to have discontinued permanent ties to the United States, abandonment must be official to be effective.

B. Substantially Present Foreign Nationals

Foreign nationals who have not been granted permanent resident status in the United States are U.S. tax residents under the SPT for any calendar year in which they are physically present in the United States for 31 or more countable days and their countable U.S. days over a three-calendar-year period equal or exceed 183 days based on a total number of days determined by the following formula:

- all the countable U.S. days in the current calendar year;
- plus 1/3 of the countable U.S. days in the prior year;
- plus 1/6 of the countable U.S. days in the year before the prior year.[74]

Countable days include any day or partial day that a foreign national spends in the United States, regardless of the purpose of the admission and whether he receives U.S.-source income and is subject to U.S. taxation during the period of physical presence in the United States. (Unauthorized aliens are also subject to this formula.) Some days, such as those spent in the

[70]The complete text of all Hague Conventions is available at http://www.hcch.net/index_en.php?act=conventions.listing. A model apostille is illustrated on the last page of the Hague Convention.

[71]Because of the use of the term ''aliens'' in IRC section 7701(b), there is an unanswered question about whether U.S. tax residency status of non-U.S. citizens who are U.S. nationals should also be determined under these rules. U.S. nationals are technically not ''aliens'' as that term is defined under the Immigration and Nationality Act, a fact obviously overlooked when Congress wrote this tax law. U.S. nationals are individuals who accorded noncitizen nationality based on birth or parentage in the outlying U.S. possessions, American Samoa, and the Northern Marianna Islands. Individuals born in other U.S. possessions — Puerto Rico, Guam, and the U.S. Virgin Islands — are U.S. citizens.

[72]In general, a foreign national may become an LPR in two ways. If present in the United States in valid nonimmigrant status, he may apply for adjustment to permanent resident status and be issued a green card without leaving the United States. Under this scenario, a new LPR becomes a U.S. tax resident as of the date of approval of adjustment unless he has already become a U.S. tax resident by virtue of substantial accumulated physical presence in the United States. Alternatively, a foreign national's eligibility for LPR status may be approved but he may choose to obtain an immigrant visa at a U.S. consulate or must do so if he is outside the United States and does not qualify for adjustment. A foreign national with an immigrant visa does not become a U.S. tax resident until he is actually admitted to the United States as an LPR.

[73]*See* IRC section 7701(b)(1)(6).

[74]*See* IRC section 7701(b)(3).

United States as an exempt individual,[75] do not count for purposes of the SPT tax residency test. In addition to the rules for exempt individuals (discussed below), a special rule for not counting U.S. days applies to members of the regular crew of a foreign ship (but not a foreign aircraft) engaged in transportation between the United States and a foreign country or a U.S. possession. Their days of temporary presence in the United States do not count unless they are engaged in their own trade or business in the United States on such days.[76]

The U.S. tax residency start date for a foreign national who is substantially present is the first *countable* U.S. day in the first calendar year that the foreign national becomes a U.S. tax resident under the SPT. If that first countable day is not January 1, the substantially present foreign national will be a dual-status taxpayer and be subject to a dual-status tax return filing requirement unless eligible for a full-year residency election.[77] Exceptions to U.S. tax residency status such as the *closer connection* to a foreign country (than to the United States) may be available to eligible foreign nationals under U.S. tax law[78] or under an applicable U.S. income tax treaty.[79] U.S. tax resident status may also be elected by foreign nationals who meet some conditions[80] that apply regardless of U.S. immigration status.

[75]Other non-countable days include:
- commuting days from a residence in Canada or Mexico to a job in the United States;
- any day in transit between two foreign locations;
- any day an individual is unable to leave the United States because of a medical condition that arose while in the United States; and
- nominal presence of no more than 10 days as long as the foreign national has a closer connection to a foreign country.

[76]IRC section 7701(b)(7)(D). It would be difficult if not impossible anyway for foreign nationals in nonimmigrant crewmember status to lawfully operate a trade or business in the United States without violating restrictions of D status because they are not authorized to work in the United States and their physical presence is authorized only during stopovers in the United States between onboard duties in transit for their carrier employers.

[77]IRS Publication 519, *U.S. Tax Guide for Aliens*, describes and illustrates dual-status tax returns.

[78]*See* Treas. reg. section 301.7701(b)-3. Generally, specified procedures explained in IRS Publication 519, *U.S. Tax Guide for Aliens*, must be followed for these exceptions to apply.

[79]An LPR who is a tax resident of a country with which the United States has an income tax treaty (called a dual resident) may be a U.S. tax nonresident under the applicable treaty's residency tiebreaker rule (discussed below). Electing nonresidency status affects the determination of long-term residents explained in IRS Publication 519 under the heading ''Tax Expatriation.''

[80]The first-year-choice election and marriage-based election and related procedures are explained in IRS Publication 519. The marriage-based election may also be made for wage-withholding purposes, but such an election does not apply for FICA or NRA withholding purposes.

C. U.S. Tax Jurisdiction

IRC section 7701(a)(9) defines ''United States'' as the states and the District of Columbia, when used in a geographical sense. Accordingly, any day spent in a U.S. possession or U.S. territory[81] is not a countable day for substantial presence purposes. U.S. possessions are composed of two groups:

- those with their own governments and tax systems (Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Marianna Islands); and
- those lacking their own governments and tax systems (Midway Island, Wake Island, Palmyra Island, Howland Island, Johnston Island, Baker Island, Kingman Reef, Jarvis Island, and other U.S. islands, cays, and reefs that are not part of any of the 50 states).

When personal services occur offshore, as discussed above regarding the OCS, any entity that compensates those services must determine whether that portion of the ocean where the activities occur is within a U.S. jurisdiction. As also discussed above, however, jurisdiction of U.S. law depends on whether the offshore personal services at issue relate to mines, oil and gas wells, and other natural deposits, or to ocean activities.

For most purposes, including taxation, U.S. jurisdiction extends to ''territorial seas,'' such that presence within this offshore area is construed to be presence within the United States.[82] Although territorial seas of the United States extend to 12 nautical miles in conformance with international law,[83] jurisdiction over personal services regarding mines, oil and gas wells, and other natural deposits has been extended to include the OCS. Accordingly, days spent on the OCS engaged in covered services are deemed to take place in the United States and count under the SPT for U.S. tax residency purposes.[84]

Whether days spent at sea are countable or not for the SPT depends on whether those days are spent on ''ocean activities,'' defined broadly as any activity on or under water outside the geographic boundaries of the United States.[85] Services are outside the geographic boundaries of the United States if they are performed outside the 12-mile limit and therefore not within the territorial seas of a U.S. possession or foreign country. For purposes of substantial presence determination

[81]For more information about U.S. possessions, see IRS Publication 570, *Tax Guide for Individuals With Income From U.S. Possessions*.

[82]Rev. Rul. 75-483, 1975-2 C.B. 286, and Rev. Rul. 77-75, 1977-1 C.B. 344.

[83]Presidential Proclamation 5928 on December 27, 1988.

[84]For the IRS's analysis of the application of the tax residency rules to the OCS and ocean activities, see LTR 9012023.

[85]IRC section 863(d)(2).

(which does not count presence within U.S. possessions), accordingly, days that feature services performed outside the 12-mile limit are not countable for the SPT.

D. Exemption From Counting Days Requirement

Three categories of nonimmigrants remain U.S. tax nonresidents indefinitely or longer than other nonimmigrants incident to their immigration status or purpose for entering the United States because their days of physical presence do not count for purposes of the SPT. They are:

- foreign-government-related individuals;
- students; and
- teachers and trainees.[86]

Foreign-government-related individuals are nonimmigrant diplomats and consular officers as well as their accompanying spouses and dependent children admitted under A classification as principal aliens or derivative dependents, as well as employees of eligible international organizations[87] and their accompanying spouses and dependent children admitted under G classification (their accompanying employees in A or G status are not exempt). Further details regarding dependent children in derivative A or G status, along with all other nonimmigrants who are exempt from counting days, are set forth in IRS Publication 519, *U.S. Tax Guide for Aliens*.

Students for SPT purposes are nonimmigrants who are studying full time in the United States as F-1 academic students or M-1 vocational students, as well as J-1 exchange visitors in either a student or student intern category. The term ''students'' also includes F-2, M-2, and J-2 dependents, and commuting students from Canada or Mexico with F-3 or M-3 status.[88] These foreign students are exempt from counting U.S. days of physical presence for five calendar years in a lifetime (beginning with 1985, when applicable U.S. tax residency rules took effect). A prior period in the United States as an individual exempt from counting U.S. days, whether as a student or as a J or Q non-student (as defined below), causes that year to count as exempt for purposes of this formula.[89] For purposes of determining exempt days, the five-calendar-year exemption from counting days is a cumulative lifetime period, that is, a new five-year period, does not restart after a period of absence from the United States. Students who do not intend to reside permanently in the United States may continue to claim this exemption by submitting statements supporting their claims with their Form 1040NR tax returns.[90]

Teachers and trainees are foreign nationals admitted temporarily to the United States as nonimmigrant J-1 exchange visitors in any of the 16 exchange visitor categories other than student or student intern or under Q-1 and Q-2 international cultural exchange alien status.[91] (Qualifying J-1 and Q-1 nonimmigrants are referred to collectively as non-students.) The term ''teachers and trainees'' also includes J-2 and Q-3 dependents. This particular use of the term ''teachers and trainees'' does not include teachers or trainees in other nonimmigrant status such as professors and teachers in E-3, H-1B, O-1, or TN status or trainees in H-3 status.[92]

J and Q non-students are exempt from counting days in the United States under the SPT in the current calendar year if they were not exempt from counting days while in F, J, M, or Q status during two (or more) of seven years counting the current and immediately preceding six calendar years. Any day in any calendar year as an exempt individual causes that calendar year to count as an exempt year even if the foreign national received no pay during that year. A prior period in the United States as an exempt individual in any of the current seven years, whether as a J or Q non-student or as a student (as defined above), causes that year to count as exempt for purposes of this formula.[93] If *all* of a J or Q non-student foreign national's remuneration is from a foreign employer (except a foreign government entity),[94] calendar years that are exempt from

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[86]*See* IRC section 7701(b)(5). Exempt individuals also include foreign athletes engaged in a U.S. charitable event but only for days engaged in the event (as opposed to days spent training for the event).

[87]As defined by IRC section 7701(a)(18).

[88]Although the tax code mentions Q students, immigration law does not provide for students in Q status.

[89]A powerful example of this exemption features a student who enters the United States under F-1 classification on December 31 of one calendar year and departs on January 1 of the next calendar year. Under these facts, two days of physical presence count as two years of the five-year exempt period, even if the student is not present in the United States for any other period during the two applicable years.

[90]This closer connection extension is claimed by checking the box on line 12 of Form 8843, to which the supporting statement must be attached.

[91]Q-2 Walsh cultural visitor status is not currently available.

[92]Use of the term ''teachers and trainees'' on IRS documents such as Form 8843, ''Statement of Exempt Individuals,'' frequently causes confusion among taxpayers about who should complete the form and which part must be completed. For example, J-1 research scholars may incorrectly complete Part II of the form for students because they consider themselves students rather than teachers or trainees.

[93]Tax law procedures can cause anomalies, such as when a foreign national spends more than seven calendar years in the United States in J-1 non-student status. Years 1 and 2 are exempt from counting days with the result that the foreign national is a U.S. tax nonresident. Years 3 through 7 are not exempt and the J-1 nonimmigrant is likely to become a U.S. tax resident under the SPT. However, an eighth year is again an exempt-from-counting-days year with the result that the foreign national reverts to U.S. tax nonresident status. Logically, the residency end date could be used to override a result like this, but there is no IRS published guidance supporting this position.

[94]*See* IRC section 872(b)(3) and the regulations thereunder.

counting days increase from two to four. This exemption applies as well to dependents in derivative status, based on their own days of U.S. presence rather than the days of presence of the principal aliens from whom they derived status.

E. End of Tax Residency Period

A foreign national's U.S. tax residency end date is deemed to be December 31 of the final calendar year of physical presence in the United States under qualifying circumstances. Departing nonimmigrants may choose earlier end dates (typically the last day of physical presence, ignoring 10 de minimis noncontiguous days) under the *closer connection exception* described in Publication 519.[95] The deemed December 31 end date also applies to LPRs who lose LPR status in the tax year[96] either by revocation or abandonment. This rule does not apply, however, to long-term residents subject to IRC section 877A expatriation tax rules. The permanent status of such former LPRs ends on the date of adjudication. As a practical matter, such former LPRs are dual-status taxpayers in their final year of LPR status because adjudication would never occur on January 1, a legal holiday.

F. Loss of LPR Status

As noted above, in order for LPR status to be terminated and for responsibility for U.S. taxation on an LPR's worldwide income to end, status as an LPR must either be revoked by a U.S.-government authority or formally abandoned by the LPR.

When a U.S. immigration authority initiates revocation, an LPR's status is considered to have been lost when a final administrative order is issued. If the order is appealed, abandonment is final when a final judicial order of abandonment is entered.[97] As a practical matter, such a judicial or administrative order may be issued many years after an LPR left the United States because review of abandonment is not initiated until the foreign national seeks to reenter the United States as an LPR after a long absence. When such review takes a long time to work its way through the appeals process, the LPR's tax residency status and obligation for U.S. tax returns and related disclosure filings is temporarily in limbo until an official termination date is decided and revealed.

LPR status may be revoked by a U.S. immigration authority or intentionally abandoned by an LPR who seeks to terminate permanent U.S. status. That said, an LPR may lose status inadvertently, such as in a leading case on U.S. tax residency, *Matter of Guiot*, which held that an LPR who claims U.S. tax nonresidency status for federal income tax purposes (by filing no income tax return at all or by filing a return as a U.S. tax nonresident) may be deemed to have abandoned the green card. Although tax treaty provisions may supersede federal tax law, USCIS may determine that an LPR who has set up residence in another country, elects U.S. tax nonresident status under a treaty tiebreaker rule, and submits a Form 1040NR or 1040NR-EZ with Form 8833 for the nonresidency claim under the treaty, has abandoned his U.S. permanent resident status (which will result, in turn, in an official finding).[98]

For U.S. tax purposes, a foreign national who seeks to abandon LPR status must submit to a U.S. immigration or consular authority a completed and signed Form I-407, ''Abandonment of Lawful Permanent Resident Status,'' or his permanent resident card (Form I-551) attached to a letter stating his intention to abandon LPR status.[99] The letter must be sent via certified mail, return receipt requested (or the foreign equivalent). A photocopy of the submission and proof of mailing serve as adequate evidence of abandonment under IRS rules.[100]

Unfortunately, most LPRs who leave the United States have no idea or notice of their ongoing obligation to pay tax to the United States on their worldwide income unless or until they attempt to satisfy IRS standards for termination of LPR status. Paradoxically, this could include a scenario under which an LPR remains obligated to pay U.S. taxes even though he remains outside the United States too long (thereby not maintaining close enough ties to the United States) to be

[95]Dual residents might be able to use a tax treaty tiebreaker rule to choose a later residency start date or an earlier residency end date, documenting the facts supporting the claim on Form 8833 for tax return purposes (no form or procedures have been issued for withholding purposes).

[96]While it is possible under IRC section 7701(b) for a foreign national to define his tax year as different than a calendar year, a discussion of the procedures affected by such a choice is beyond the scope of this article because such a choice is not tied to U.S. immigration status.

[97]*See* Treas. reg. section 301.7701(b)-1(b)(2).

[98]Such a finding should be based on all applicable facts and circumstances, however. A problem may arise, for example, when an LPR applies for naturalization. Form N-400, ''Application for Naturalization,'' asks the following question in Part 10: ''Since becoming a lawful permanent resident, have you ever failed to file a required Federal, State, or local tax return?'' Before this version (issued June 17, 2011), Form N-400 also asked whether the applicant *ever* filed a federal or state tax return as a nonresident. LPRs residing abroad who file a Form 1040NR under a tax treaty tiebreaker rule or as former residents of a state file a part-year return in their year of departure and nonresident state returns thereafter may be questioned about past nonresident tax filings raised during their naturalization process if the returns were filed within the tax years required for the naturalization process. Regardless of the immigration impact of a treaty tiebreaker claim of U.S. tax nonresidency status, such a claim causes the tax years as a treaty U.S. nonresident not to count for purposes of defining whether the LPR is a long-term resident under IRC section 877.

[99]57 FR 15237-15254 (Apr. 27, 1992).

[100]Treas. reg. section 301.7701(b)-1(b)(3).

readmitted as an LPR. IRS Publication 519 cautions, in fact, that unless an LPR possesses proof of termination per the discussion above, the taxpayer remains a U.S. tax resident even if the U.S. immigration authority would not respect the LPR status as valid because the green card has expired or because of extended absence from the United States. As a result of widespread ignorance about the intersection of U.S. immigration and tax laws, unfortunately, countless foreign nationals who obtained LPR status and later departed the United States for employment, retirement, or personal reasons may have assumed that they terminated U.S. immigrant status automatically but are now at risk of obligation for U.S. taxes (plus penalties and interest) for failure to comply with U.S. tax return and disclosure obligations.[101]

There are no instructions for how LPRs seeking to abandon their LPR status voluntarily submit Form I-407 or relinquish their Form I-551 (green card) to a U.S. immigration authority (as IRS procedures seem to assume is possible). In fact, even if formal procedures are followed, the actual date of abandonment is not necessarily clear. Form I-407 instructions state that this form ''is designed to provide a simple procedure to record the voluntary abandonment of residence by an LPR. Form I-407 is used by consular officers and immigration officers.'' The form may be filed at an embassy or consulate.[102] The same form may be requested on U.S. border inspection of LPRs who attempt to reenter the United States as LPRs after a long absence, but anecdotal reports suggest that the same procedure does not consistently apply in reverse if an LPR's green card is surrendered on departure and deprives a former LPR in such case of any evidence of abandonment to use for tax purposes.

The date of LPR status termination is no clearer when a Form I-407 is filed, because three different dates are possible:

- line 6(c), Date of Abandonment;
- line 6(e), date with the Signature of Alien who certifies that ''I have read and understand the above statements, etc.''; and
- line 9, the date on which the form is administratively made part of the alien's official record.

In fact, of the possible options, the dates on line 6(c) and (e) are probably the only ones that the LPR would even know (the date on which the form administratively becomes an official record might be far into the future or not at all, considering lengthy and uncertain processing times for USCIS forms).

VII. Data and Documentation

Employers and payers must collect sufficient data about foreign national payees' immigration status and history of physical presence in the United States to determine their U.S. tax residency status.

A. Considerations for Employers

In many if not most cases, employer entities start accumulating data about their employees before a job offer is made or accepted. If they hire on the basis of job applications, resumes, interviews, and so forth, these documents are typically placed in personnel or other internal files. At some time between acceptance of the job offer and the end of the first day of work, an employer must at least begin verifying the employment authorization of the new hire by having the employee attest to current work authorization (or work authorized status) in section 1 of a Form I-9. By the end of the process, perhaps before payroll processing starts or concludes, the employer knows a great deal about the new employee.

Once employees are hired and work authorization is verified on a completed Form I-9 (although it is permissible for payroll processing to occur before the I-9 process is concluded,[103] this practice risks the possibility that employment eligibility will not be confirmed after an employee has been processed through payroll but has to be terminated), employers must determine the U.S. tax residency status of the employees in order to apply the proper wage withholding rules, Form W-4 completion rules, and available exemptions from tax based on tax residency status (discussed below). Typically, payment officials charged with these determinations do not receive any of the information or documentation already collected about a new employee by other officials or divisions of the employer entity and start the process of data collection anew (presuming that they are informed enough to know it is necessary).

Since tax treatment differs in most cases based on U.S. tax residency status, and since all U.S. citizens are also U.S. tax residents, step one is to distinguish U.S.

[101]IRS reduced penalties to 5 percent for some individuals entering the offshore voluntary disclosure initiative. *See* FAQ 52, *available at* http://www.irs.gov/businesses/international/article/0,,id=235699,00.html.

[102]*See, e.g.*, procedures on the websites of embassies in the U.K. and India. There is anecdotal evidence that in-person interviews may not be granted at some embassies for this process, however.

[103]Rules for I-9 completion require that section 1 must be completed by a new employee following an offer and acceptance of employment, but no later than close of business on day 1 of his employment; Form I-9 section 2 must be completed by the employer (listing documentation of identity and current work authorization provided by the employee) no later than three business days after section 1 is completed. As a practical matter, an employer may choose to have the Form I-9 completed before employment services begin, on the first day of employment services, or any other combination as long as completion falls within the permissible range and section 1 is completed before section 2. The only caveat is that employers should apply I-9 completion policies in the same manner for all employees, never singling out foreign-born employees for different treatment.

citizens from foreign nationals who might be nonresidents for U.S. taxation purposes. Keeping in mind that much information about a new employee has likely already been collected by the employer or appear on a Form I-9, it is important that new information gathered for taxation purposes not conflict with data that have already been collected and that data and document collection imposed by the employer for taxation purposes are not confused with other new hire processes such as to create the impression of discrimination on the basis of citizenship or national origin.

In *U.S. v. Maricopa County Community College*,[104] for example, the college confused the I-9 and W-4 processes, giving the misimpression that data required for taxation determinations were preconditions to verification of employment eligibility when I-9 standards were independently met. In the complaint issued by the Office of Special Counsel for Unfair Immigration-Related Employment Practices, the source of the problem was the ''Non-U.S. Citizen Employee Tax Data Form'' used by the school to collect data for tax determinations. Believing that they were complying with their U.S. tax obligations, school personnel conflated I-9 and W-4 processes in such a way as to require some documents necessary for tax administration to satisfy I-9 requirements. The eventual settlement agreement, based to some extent on the fact that the IRS does not specifically require this tax data form (or specify any procedure at all for making tax determinations about employees who might be U.S. tax nonresidents), stipulated that the school would no longer use data collected for tax administration as a condition of employment.

While the lesson of *Maricopa County* is relevant and valuable, it did not resolve the uncertainty and complexity of tax determinations that employers must make. On the one hand, tax determinations should not be imposed as a condition of employment (if Form I-9 is properly completed). On the other hand, a tax determination should not ignore relevant information collected in the I-9 process or information collected in the process of tax administration that provides constructive notice[105] to the employer of a conflict regarding the employee's work eligibility. The balancing act is delicate but important.

U.S. tax residency determinations require information about nonimmigrant employees' past and projected physical presence in the United States and their U.S. immigration history. For example, it is appropriate for payment professionals to request documentation of current U.S. immigration status from employees whose current U.S. tax residency is affected by prior periods spent in the United States (such as for nonimmigrant employees in current F, J, M, or Q status who spent previous periods in the United States in one of those categories).[106] Information required about an employee for tax purposes (to the extent that it is not collected from other officials or departments who have already received it) may be collected on a manual or automated form (such as a ''foreign national information form'' in use by some payers since 1997[107]) to which copies of supporting documents are attached or relate.[108] When employers have accepted employee attestations of U.S. tax residency status in lieu of data collection and documentation, the IRS has held the employers liable for under-withheld taxes when it found other information or documentation in the employer's internal records that conflicted with the attestations.

As noted above, W-4 and I-9 processes have separate compliance purposes and should be administered separately to avoid discrimination problems. Also mentioned, however, is the reasonableness if not necessity to coordinate information between the two processes in case information collected to comply with one law might undermine compliance with the other law. For example, although SSNs are optional in section 1 of the Form I-9 (except for E-Verify employers), a Social Security card is the most common document presented to prove current work authorization in section 2. Accordingly, an SSN collected on a Form W-4 should be the same SSN as appears on the Form I-9, but conversely, an employer should draw an inference from appearance of a TIN that is not an SSN (identifiable by its noncompliant format) on a W-4 that the employee may not actually be authorized to work, because every alien authorized to work is eligible for an SSN (cases when a new employee might be eligible to work but not yet have an SSN are discussed below).

In addition to highlighting conflicts, coordinating I-9 and W-4 processes can help payment personnel in

[104] *See* settlement agreement, *available at* http://www.justice.gov/crt/about/osc/pdf/publications/Settlements/Maricopa.pdf.

[105] Constructive knowledge is a concept in the employer sanctions regime set forth in immigration law (8 C.F.R. section 274a). It is different from actual knowledge in that it is ''fairly . . . inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition.'' Employer representatives should be knowledgeable enough to make basic and reasonable inferences of important facts such as work authorization of employees. That said, an inference is not sufficient for a

(Footnote continued in next column.)

conclusion until it is resolved. It is up to the employer to follow up such inferences with sufficient due diligence to resolve a suspected fact one way or the other.

[106] This can also occur because payment professionals occasionally cannot obtain the information from the official or department within the organization that has control over the data.

[107] Copies of versions of this form are available on the websites of many educational organizations.

[108] It is not unheard of that foreign nationals provide incorrect answers to U.S. tax residency questions out of ignorance and/or falsely claim nonresident status to obtain tax benefits for which tax residents are not eligible.

other ways. For example, they can identify nonimmigrant employees whose U.S. tax residency is uncertain because they will check the bottom box in section 1 of the Form I-9 (''alien authorized to work until'') and specify the expiration dates of their work authorization from their Form I-94 (when ''D/S'' appears in lieu of an expiration date, supplementary documentation such as the Form I-20 or DS-2019 provides the required expiration dates). As well as identifying potential U.S. tax nonresidents, however, Forms I-9 also confirm U.S. tax residency determination if the new employees attest on Form I-9 to being U.S. citizens or LPRs who are U.S. tax residents by operation of law.

B. Consideration for Payers

Payers are allowed by IRC section 1441 regulations to presume that payee individuals for whom they have no documentation (a Form W-9[109] as a certificate of U.S. status or a Form W-8BEN as a certificate of foreign status[110]) is a U.S. person (meaning U.S. tax resident, as many laypersons would not understand) unless they know or have reason to know otherwise.[111] In some situations, however, independent payer determination of a payee's U.S. tax residency is unavoidable. For example, a foreign national seeking to claim an exemption from, or reduction in, withholding on most types of U.S.-source income under an applicable income tax treaty provision must generally be a U.S. tax nonresident because of the saving clause included in all U.S. tax treaties. Exceptions to that general rule are generally allowed for U.S. tax residents only under articles providing benefits for payments related to studying, engaging in training, teaching, or engaging in research in the United States (discussed above). Allowance of tax treaty benefits also involves collection by the payer of a Form 8233 that requires specific information from the payee that may conflict with information provided otherwise to support U.S. tax residency (as well as about current U.S. immigration status and eligibility to work).

Payments related to U.S. activities such as self-employment implicate U.S. tax residency because work performed (employment or self-employment) by a foreign national in the United States must be authorized, and any entity that accepts the services of a foreign national knowing or deemed to know that the services were not authorized becomes subject to employer sanctions.[112] This scenario raises several problems. First, although immigration law is concerned with work performed rather than payment made, payment typically reflects that services have been performed by the payee and accepted by the payer. Second, the fact that services were performed in the United States demonstrates that the contractor spent time in the United States that could have been sufficient for him to become a U.S. tax resident and therefore ineligible for treaty benefits. Third, a claim of foreign status on a Form W-8BEN by a foreign national with a U.S. address raises a due diligence obligation on the part of the payer to examine and determine whether the payee is actually a U.S. tax nonresident based on a combination of U.S. immigration status and history of physical presence.

To be clear, the specific nonimmigrant classification of a foreign national compensated for independent services performed in the United States is not relevant for tax treaty purposes beyond its effect (if any) on the payee's U.S. tax residency status. Although exemptions from tax under an income tax treaty provision are not tied to a payee's immigration status, however, risk-averse payers routinely request information about their foreign independent contractors both for immigration and tax purposes. For tax purposes, even contractors that perform services outside the United States that ordinarily result in payments considered foreign-source income may actually be U.S. tax residents whose worldwide income is taxable to the United States. For immigration purposes, although a Form I-9 is not required for independent contractors, it is important to avoid situations in which payments are due for services that were not authorized and should never have been accepted. If authorization for the particular self-employment is confirmed before the services are performed, the painful result of learning of the conflict after it is too late, at the accounts payable stage when the payment is due for services already rendered, is avoided. This result is painful in that it creates a tax record of the payment that can and may eventually be used to prove that unauthorized work was performed for the payer, by the payee, and that the payer knew it.

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[109]Form W-9 requests attestation of status as a ''U.S. person,'' the tax definition of which may be very different from the individual's understanding of the meaning of the term.

[110]Under Treas. reg. section 1.1441-1(2)(i), a Form 8233 is a certificate of foreign status for an NRA receiving compensation from personal services performed in the U.S. To be valid, this form must be sent to the IRS, which might make sense for tax treaty claims but is unnecessary as proof of foreign status. Most payers use a Form W-8BEN to document foreign individual vendors on the premise that they might also have some other type of payment in the future, but certification that income is not ECI on Form W-8BEN is inconsistent with income that is taxable compensation for U.S. services, which is ECI.

[111]Effective in 2013, payers must also begin complying with FATCA, which imposes a new 30 percent withholding on certain payments to foreign financial institutions and nonfinancial foreign entities that fail to identify their account holders, investors, and owners who are U.S. persons. IRS Notice 2011-34 requires a due diligence review of account holders to determine new and preexisting U.S. accounts during 2013. The notice requires follow-up on accounts with certain U.S. indicia and documentation that may rebut U.S. person status. The authors note that the due diligence required to determine U.S. person status is likely to be a more daunting task than this notice anticipates in light of the issues addressed by this article.

[112]*See* 8 C.F.R. section 274a.5.

Specific additional information and certifications are required of individuals claiming eligibility for the honorarium exception to the general rule that nonimmigrant visitors may not work in the United States. Without collecting information and documentation, it is impossible for payers to confirm that the honorarium exception applies based on ''9/5/6'' restrictions discussed in more detail above.

VIII. Taxpayer Identification Numbers

Although no federal law requires any payee to have a U.S. TIN to be paid, foreign nationals need them for several other reasons:

- Tax rules require foreign nationals who are employed in the United States to provide U.S. SSNs needed for Form W-2 income reports that their employers must submit to the IRS. Since immigration law requires foreign nationals who work in the United States to be authorized for the employment, and since they are eligible for SSNs if they can prove current work authorization, the two requirements are complementary.
- Most payroll systems and procedures require an SSN from each employee at the outset of employment for payroll purposes.
- For exemptions from tax under an applicable income tax treaty (on income that is other than investment income on publicly traded investments and loans) to be honored by the payer, foreign nationals must record a TIN on the withholding certificate on which the treaty exemption from withholding is claimed (Form W-8BEN, Form W-9, or Form 8233).
- A foreign national obligated to file U.S. tax returns needs a U.S. TIN in order to submit the tax return, and TINs must be listed for any dependents on which personal exemptions are claimed. The very latest point at which a TIN can be requested is on a Form W-7 filed with the tax return (discussed below).

A. Social Security Numbers

A U.S. SSN was originally intended to track an employee's wages and related Social Security taxes for purposes of funding future Social Security benefits for those workers covered by the U.S. Social Security system (though, as discussed below, not all work-authorized foreign nationals are). Although for many years SSNs were issued liberally to foreign nationals who were not authorized to work and needed the numbers as identifiers for other U.S. purposes, since September 2002 only foreign nationals authorized to work in the United States at the time of application are eligible to receive them.

The Social Security Administration's use of current work authorization as a basis for SSN issuance facilitates U.S. tax IDs for foreign nationals with temporary and permanent U.S. work authorization, with the result that many temporary workers who obtain SSNs lawfully during periods of temporary work authorization have and can present those SSNs after their work authorization has expired. Together with foreign nationals who were issued SSNs for non-work purposes before September 2002, accordingly, foreign nationals with SSNs are present in much greater numbers in the United States than foreign nationals with current work authorization (in other words, the fact that an individual has an SSN is not proof that he is authorized to work at the time of the determination — although an SSN card is prima facie documentation of work eligibility in the United States, an SSN card is not valid as proof of work authorization if issued or used improperly, and certainly not if it is not real).[113]

Because of current procedural and substantive limitations of SSN processing,[114] at least three categories of work-authorized foreign nationals cannot get SSNs:

- Certain foreign nationals cannot as a practical matter obtain an SSN if, despite proof of current work authorization, their authorized employment period does not last until the 10th day after admission to the United States or their immigration documents indicate that they will no longer be present in the United States for at least 30 days following application so that the SSN cards on which their SSNs will be recorded can be received by mail (the SSA will not send SSN cards outside the United States). Examples of nonimmigrant employees who commonly face this situation are J-1 short-term scholars and entertainers or athletes who enter the United States in O or P status for the first time for performances of brief duration.
- Nonimmigrant visitors for business or pleasure who are eligible to work in the United States under the honorarium exception (discussed above) face different problems. Although authorized to work under the exception, their documentation makes them indistinguishable from other nonimmigrant visitors who are not authorized to work. In both of these situations, foreign nationals with lawful authorization to work, who should technically be eligible for SSNs, have no choice but to apply for ITINs either with their U.S. tax return or under the pretax return exception available for honorarium payment recipients.

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[113]For a discussion about the history of this issue, see Dodd-Major, ''The Nexus Between Tax and Immigration,'' *Tax Notes Int'l*, Sept. 8, 2008, p. 841, *Doc 2008-16482*, or *2008 WTD 176-11*.

[114]Under current SSA rules, foreign nationals must wait 10 days after entering the United States in work-authorized status to apply for an SSN. This period is designed to allow time for information obtained by DHS upon admission of the foreign national's admission to the United States to be entered into the Systematic Alien Verification for Entitlements system.

- Foreign employees working on the OCS (discussed above) are not eligible to apply for SSNs if the nature of their services does not require them to be officially authorized to work (and thereby have official proof to present to the SSA). Wages for work performed on the OCS by employees in B-1/OCS status are nevertheless subject to wage withholding and Form W-2 reporting. The only TIN option for reporting is an ITIN.[115]

B. Individual Taxpayer Identification Numbers

A foreign national who is ineligible for an SSN but can demonstrate a federal tax administrative need for a U.S. TIN may apply to the IRS for an individual taxpayer identification number with a Form W-7 (such applications will not be accepted from applicants who appear to be eligible for SSNs). Despite difficulties created for employers and payers whose U.S. tax reporting is frustrated if not undermined by the many cases that fall into the cracks between SSN and ITIN rules (and complaints about these difficulties), it remains unclear whether foreign nationals who appear eligible to apply for SSNs because they are work-authorized but who cannot obtain SSNs for any of the reasons featured in the examples above would be considered ineligible to obtain SSNs for purposes of qualifying for ITINs so that pre-return ITINs can be issued for them to qualify for available tax treaty benefits (if all else fails in these situations, it may work to submit a rejection letter from the SSA as a basis for ITIN eligibility).

Generally, application for an ITIN must be submitted with a U.S. tax return to the IRS ITIN unit at the address indicated in the Form W-7 instructions rather than to addresses for submission given in the tax form instructions (the ITIN unit issues the ITIN and records it on the tax return before submitting the return to the tax return processing unit.)[116] Instructions for Form W-7 (the ITIN application) identify and discuss supporting documentation that must be notarized/certified and submitted with the application unless processed through a certified acceptance agent.[117] Exceptions for individuals to obtain pretax return ITINs for reasons such as tax treaty claims for exemption from withholding (which are also tax-administration-related reasons for obtaining ITINs), along with supplemental documentary requirements, are explained in the Form W-7 instructions.

IX. Immigration-Related Federal Tax Rules

The IRC provides several long-standing exemptions from, or reductions in, income tax and related withholding. While tax law does not specifically tie U.S. tax benefits to immigration status per se regarding these exemptions from income taxes, immigration law regulates activities of foreign nationals in the United States by designating nonimmigrant classifications to foreign nationals engaged in specified activities (discussed above). Therefore, nonimmigrants in the classifications discussed below who meet conditions for exemption from income tax are covered but are not necessarily the only nonimmigrants covered. The IRC also includes exemptions from FICA for *specific* classifications of foreign workers, as do rules for exceptions from the requirement to submit an interim tax return (called a sailing permit) on a Form 1040C with the IRS before departure from the U.S.

A. Foreign Diplomats and Consular Officers

Regarding A-1 and A-2 principals, IRC section 893 exempts employment compensation of employees of foreign governments from U.S. income tax,[118] exempting as well the income of C-2 or C-3 nonimmigrants in transit to and from the United Nations headquarters district and foreign countries if compensation for their services is paid by the foreign government.[119] This exemption applies to wages for official services if similar to services performed by U.S. government employees in foreign countries and the State Department has certified that those foreign countries exempt U.S. government employees performing similar services from their income tax rules. This exemption does not apply to services that relate primarily to commercial activities or are performed by a commercial entity controlled by the foreign government.

IRC section 3121(b)(11) and companion regulations exempt foreign consular officers and other employees and nondiplomatic employees of foreign governments from FICA tax. IRC section 3121(b)(12) and its regulations similarly exempt employees of an entity owned by a foreign government if the services performed are similar in character to services performed by employees of the U.S. government or an entity owned by the U.S. government, and the foreign government grants an

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[115]The IRS interpreted OCS to be within the ''United States'' for FICA and FUTA purposes in GCM 39552 (Sept. 3, 1986), citing Rev. Rul. 86-108, 1986-2 C.B. 175. OCS was ruled to be not within the United States for purposes of section 953, subpart F rules, however. See *Ocean Drilling & Exploration v. U.S.*, 988 F 2nd 1135 (Fed. Cir. 1993).

[116]Tax returns filed with the IRS that (1) include a Form W-2 with an SSN that does not match the name of the individual filing the return, (2) have an SSN recorded on the Form W-2 that does not match the SSN recorded on the return, or (3) include an invalid SSN recorded on the return will result in a request from the ITIN unit to the taxpayer to complete a Form W-7 application for an ITIN if the taxpayer requests a refund.

[117]Rev. Proc. 2006-10 describes how to become an acceptance agent.

[118]This exemption also applies to LPRs but not to U.S. citizens or citizens of the Philippines. LPRs working for a foreign government who choose to apply for naturalization might be faced with a request for a U.S. tax return for years in which no U.S. tax return was due because of this tax law exemption.

[119]U.S. citizens are specifically exempted from coverage, except for dual citizens of the United States and the Philippines.

equivalent exemption for such U.S. government services in that country. This blanket FICA exemption applies whether or not compensation for U.S. services are also exempt from U.S. income tax.[120]

These exemptions from U.S. income and FICA tax do not cover wages of dependents of diplomats or other foreign-government worker dependents, who are subject to standard rules for NRA taxation until or unless they become U.S. tax residents by changing or losing the nonimmigrant diplomatic status that exempts them from counting days of physical presence in the United States under the SPT (discussed above). Representatives of foreign governments with diplomatic passports and members of their households (including their accompanying servants with diplomatic passports) who leave the United States indefinitely are exempt from filing sailing permits with the IRS before departure, as are employees of foreign governments and members of their households if, due to other tax exemptions covering their employment, they have no taxable income in the United States.

B. Employees of International Organizations

Regarding G-1, G-2, G-3, or G-4 principals, IRC section 893 also exempts from U.S. income taxation any employment compensation paid by an international organization[121] for the official services of its employees.[122] IRC section 3121(b)(15) and companion regulations exempt the same compensation from Social Security and Medicare taxes. Neither of these exemptions applies to wages or self-employment income of dependents, which are subject to standard rules for NRA taxation as long as they remain U.S. tax nonresidents under the SPT (as discussed above, derivative dependents of nonimmigrant employees of international organizations do not count days of physical presence in the United States as long as they remain in derivative status). Like foreign government employees discussed immediately above, nonimmigrant employees of international organizations and nonimmigrant members of their households who leave the United States indefinitely are exempt from filing sailing permits with the IRS if, because of other tax exemptions covering their employment, they have no taxable income in the United States.

C. Tax Nonresident Students and Scholars

Many specific tax rules and procedures apply to foreign nationals in F, J, M, or Q status. For example, IRC section 873(b)(2) exempts compensation paid by a foreign employer from U.S. income tax under the following two conditions:

- the foreign national is a tax nonresident present in the United States in F, J, or Q nonimmigrant status; and
- the foreign national is paid by, or on behalf of, a foreign employer[123] if that employer is a U.S. tax nonresident individual, a foreign partnership of foreign corporation, or a branch or place of business maintained in a foreign country by a domestic corporation, domestic partnership, or U.S. citizen or tax resident (for this purpose, a foreign employer does not include a foreign government or foreign government agency).

Foreign nationals employed by qualifying individuals or entities are exempt from U.S. tax on their salaries, as discussed above. Foreign nationals in J or Q non-student status who qualify for this exemption and receive all of their U.S. income from qualifying foreign employers remain exempt from counting days of physical presence toward U.S. tax residency for four out of seven years, rather than the standard two out of seven (discussed above under the residency rules for teachers and trainees).

F, J, M, or Q nonimmigrants (except derivative dependents) are exempt from U.S. Social Security and Medicare taxes under IRC section 3121(b)(19) if they remain U.S. tax nonresidents, if their compensation relates to U.S. services that carry out the purpose for their entry to the United States, and if they intend to remain temporarily in the United States. This benefit, commonly referred to as the ''NRA FICA exemption,'' terminates when an F, J, M, or Q nonimmigrant becomes a U.S. tax resident under the SPT (usually because he remains in or returns to the United States after his exemption from counting days of physical presence has expired).[124]

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[120]U.S. citizens employed by a foreign government or an international organization must report their wages as self-employment income, which is subject to self-employment tax to the extent that such services are performed within the United States.

[121]IRC section 7701(a)(18) defines an international organization as a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organization Immunities Act.

[122]This exemption also applies to LPRs but not to U.S. citizens or citizens of the Philippines.

[123]*See Wolfgang Metz v. Comm'r*, 49 T.C.M. 575 (1985), for a discussion of facts that may support that an individual is an employee of a foreign employer (or is not so employed, as was found in this case).

[124]Foreign national students, even those who do not study in the U.S. in student-specific nonimmigrant status, who are employed on the college campus at which they are regularly enrolled and attending classes, are covered by the same Social Security and Medicare exemption rules under IRC section 3121(b)(10) as U.S. citizen students who are employed on college campuses where they are regularly employed and attend classes. The NRA FICA exemption is not dependent on enrollment at or employment for an educational institution.

U.S. tax nonresidents in F, J, M, or Q status are deemed to be engaged in the conduct of a U.S. trade or business by IRC section 871(c). Accordingly, taxable scholarship and fellowship grants that they receive may be offset by allowable deductions and a personal exemption amount and taxed at graduated rates on a Form 1040NR or 1040NR-EZ tax return. U.S. tax nonresident students and scholars in F, J, M, or Q status who receive taxable noncompensatory scholarship or fellowship grants are subject to withholding at a rate of 14 percent[125] rather than the standard 30 percent NRA withholding rate[126] if they are degree candidates[127] at qualifying U.S. educational institutions. Payers in such circumstances are not required to collect withholding certificates from the payees in order to apply the reduced rate of withholding.[128] Although payers of such taxable grants may elect to subject the payees to wage withholding at graduated rates, reporting is required on Form 1042-S rather than Form W-2.

A nonimmigrant in F, J, M, or Q status[129] who receives a taxable scholarship or fellowship but does not meet these requirements is subject to 30 percent withholding on grant income unless it is paid by one of the payers specifically allowed to withhold at the 14 percent rate.[130] All other U.S. tax nonresident recipients (nonimmigrant students in non-qualifying temporary status) are subject to 30 percent rate of withholding on their taxable grants.[131] Payers of taxable grants to F, J, M, or Q status nonimmigrants may (but are not required to) offset the grant income with a withholding allowance (deduction) recorded on Form 1042-S for the personal exemption amount and for payments covering expenses that are not excludible from income under an accountable plan.[132]

As discussed in more detail above, foreign nationals who leave the United States indefinitely must file sailing permits with the IRS before departure. Foreign students, trainees, and exchange visitors in F-1, F-2, H-3, H-4, J-1, J-2, or Q status are relieved from this requirement if they receive no income from U.S. sources other than allowances and reimbursements to cover expenses incidental to their study or training, income from authorized U.S. employment, and interest exempted from U.S. taxation by the tax code.

D. Seasonal Agricultural Workers

Special rules apply to foreign agricultural workers temporarily working in the United States under H-2A nonimmigrant classification. They are exempt from FICA under IRC section 3121(b)(1) whether they are U.S. tax residents or nonresidents. Also, payments for such agricultural labor made to H-2A alien agricultural workers are not considered ''wages'' for purposes of wage withholding and unemployment tax.[133]

Before 2011, compensation paid to H-2A workers was subject to Form 1099 information reporting whether the payees were U.S. tax residents or nonresidents.[134] Form 1099-MISC (box 3) was specified for reporting the total amount paid to these workers during a calendar year if the compensation equaled or exceeded $600. Beginning with 2011, however, an employer must report compensation of $600 or more paid to an H-2A agricultural worker on Form W-2 in box 1. No amounts should be reported for Social Security wages (box 3) or Medicare wages (box 5) or for these wages, respectively, on line 2 or line 4 of Form 943, ''Employer's Annual Federal Tax Return for Agricultural Employees.'' Under the new rules, the employee and employer may agree to wage withholding, in which case the employee must provide a Form W-4, ''Employee's Withholding Allowance Certificate.''Withholding rules, including deposit requirements, are described in IRS Publication 51 (Circular A), *Agricultural Employer's Tax Guide*.[135]

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[125]The rate of 14 percent is intended to approximate the recipient's tax at a 15 percent rate on the grant, less one personal exemption amount. However, given that the lowest tax rate is 10 percent, most recipients of taxable grants will be owed a tax refund for which they must apply on a Form 1040NR or 1040NR-EZ tax return.

[126]IRC section 1441(a).

[127]Refer to IRS Publication 970, *Tax Benefits for Education*, for the definition of a candidate for a degree.

[128]*See* the instructions for Form W-8BEN.

[129]Regardless of their immigration status, U.S. tax residents (along with U.S. citizens and LPRs) are exempt from withholding or reporting on their taxable grants under IRS Notice 87-31, 1987-1 C.B. 475.

[130]IRC section 1441(b)(2) provides that the following types of payers may apply the 14 percent rate:

- a tax-exempt organization under IRC section 501(c)(3) that is tax exempt under section 501(a);
- a foreign government;
- a federal, state, or local government agency;
- an international organization as defined in IRC section 7701(a)(18); or
- an international organization under the Fulbright-Hays Act.

[131] For more information about these rules, see IRS Publication 970, *Taxable Benefits for Education*.

[132]For more information, see IRS Publication 515 under the heading ''Alternative Withholding Procedures,'' p. 21. These procedures are based on Rev. Proc. 88-24, 1988-1 C.B. 800, which has not been updated for changes in the tax law since 1988.

[133]IRC section 3401(a)(2) and IRC section 3121(a) in conjunction with IRC 3121(b).

[134]Because of the special IRC rules for these workers, the 30 percent NRA withholding and Form 1042-S information reporting that normally apply to U.S. tax nonresidents does not apply to H-2A workers. *See* http://www.irs.gov/businesses/small/international/article/0,,id=96422,00.html for more information about foreign agricultural workers.

[135]Special wage withholding and Form W-4 rules that apply to U.S. tax nonresident employees, described in IRS Publication 15, do not apply to H-2A agricultural workers.

Compensation of agricultural workers in H-2A status who fail to provide SSNs for information reporting purposes to their employers is subject to 28 percent backup withholding (not wage withholding because the compensation is not wages). Compensation subject to backup withholding must be reported on a Form 1099-MISC (box 3), not on Form W-2. An employer must submit a Form 945, ''Annual Return of Withheld Federal Income Tax,'' for these payments and taxes.

E. Crew Members

Crew members of a ship or aircraft admitted to the U.S. under D-1 nonimmigrant classification are exempt from U.S income tax if their services were performed outside the United States, but wage withholding is required from payments for services performed in the United States. In cases where these employees travel in and out of the United States frequently as airline personnel do, their compensation must be apportioned on a time basis and the pro rata portion that covers U.S. services is subjected to wage withholding unless the three-pronged commercial traveler exception or another exception applies.[136] IRC section 861(a)(3) treats compensation for services performed by U.S. tax nonresident crew members of a foreign ship (but not a foreign aircraft) as foreign-source income exempt from U.S. tax if the following conditions apply:

- services are performed in connection with the employee's temporary presence in the United States as a regular member of the foreign ship's crew; and
- the foreign ship is engaged in transportation between the United States and a foreign country or U.S. possession.

Most U.S. income tax treaties specifically exempt from U.S. income tax ''remuneration . . . derived by a resident of a Contracting State in respect of an employment as a member of the regular complement of a ship or aircraft operated in international traffic.''[137]

Crew members of a ship or aircraft are exempt from U.S. FICA under IRC section 3121(b)(4) if the carrier and employer are foreign or if the services are performed outside the United States.[138] Nonimmigrant crew members of an American ship or aircraft are subject to FICA if:

- their services are performed in the United States;
- they signed on to the ship or aircraft in the United States; or
- they signed on outside the United States but the ship or aircraft touches a U.S. port while the crewmember is performing employment services for the carrier.[139]

X. Tax Treaty Benefits

U.S. tax treaties include two types of provisions (called articles) under which exemptions from U.S. income (called benefits) may be available:

- articles based on the primary purpose of a foreign national payee's presence in the United States; and
- articles based on the character of the payment (based on the reasons for the payment such as interest, dividends, royalties, and so forth).

As discussed above, a foreign national payee's period of tax residency in the U.S. treaty partner country, along with his U.S. tax residency status, generally determines the availability of benefits conferred under both types of articles. Eligibility for tax treaty benefits is not affected by U.S. immigration status, compliance with terms and conditions of status, or lack of status. That said, claims of benefits may require information or documentation that otherwise eligible aliens (such as J-1 researchers in the alien physician category discussed below) may not have.

A. Purpose-of-the-Visit Articles

Student/trainee and teacher/researcher articles confer treaty benefits upon foreign nationals who are residents of the treaty partner country upon admission to the United States for the primary purpose[140] of studying, securing training, teaching, or engaging in research.[141] The IRS generally follows immigration classifications in terms of purpose-based treaty eligibility unless facts support a more appropriate determination.[142] The following nonimmigrants commonly (although not exclusively) obtain U.S. tax treaty benefits under purpose-of-the-visit articles, particularly at higher education and research institutions:

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[136]IRC sections 861(a)(3) and 864(b)(1). For a description of the application of U.S. wage withholding and other employment tax rules to NRA flight attendants working for U.S. carriers, see TAM 201014051 (Apr. 9, 2010).

[137]Article 14(3) of the 2006 U.S. model treaty.

[138]The definition of ''United States'' with respect to ocean-going ships depends on the activities/services of the foreign national worker.

[139]IRC section 3121(b) and Rev. Rul. 78-216, 1978-1 C.B. 305.

[140]U.S. Treasury explanations of treaties provide that primary purpose requires full-time engagement in qualifying activities.

[141]Research generally must be conducted for public benefit and not for a private person or organization. For example, a research project whose results will be owned by a for-profit company would not satisfy the public benefit requirement.

[142]For example, ECFMG, the licensing board for physicians, requires that documentation of a J-1 foreign physician entering the U.S. exchange visitor program who will have any patient contact be issued by a program in the alien physician category. This is the case even if the primary purpose for the visit is to engage in research and any patient contact is incidental. To support the actual reason for the visit, some employers issuing Form DS-2019 will use the designation ''alien physician — research scholar.''

- Since nonimmigrant students include F-1 academic students, J-1 exchange visitors in the student category, and M-1 vocational students, foreign students engaged in practical training as teachers or researchers might be eligible for the student/trainee article benefit but not for the teacher/researcher article benefit because study remains the primary purpose for invitation to or temporary presence in the United States (depending on the wording of the applicable treaty provision). If they change to a different nonimmigrant status that features teaching or engaging in research, such as J-1 professor or research scholar, however, they lose eligibility for tax treaty benefits as a student/trainee.
- Nonimmigrant trainees include J-1 exchange visitors in the trainee, intern, or student intern[143] categories, H-3 trainees, J-1 alien physicians with a Form DS-2019 issued by a medical training program, and H-1B specialty workers approved for U.S. employment that constitutes medical training.
- Nonimmigrant researchers include foreign nationals in J-1 research scholar programs and perhaps J-1 short-term scholar programs, as well as researchers in H-1B or O-1 status if the petition and supporting documentation approved by USCIS confirm that the position features research for a qualifying employer under the treaty article.
- Nonimmigrant teachers include J-1 teachers, J-1 professors, and H-1B or O-1 employees if the sponsoring employer's petition and supporting documentation confirm that the employment consists of teaching at an educational institution.

Nonimmigrants admitted to the United States for another purpose, such as dependents of qualifying principal aliens, are not eligible for purpose-related treaty benefits. Even if they or other nonimmigrants who are not eligible for treaty benefits change status to F-1 or a J-1 category with a treaty benefit purpose, they generally remain ineligible for treaty benefits because they did not enter the United States for the purpose of the treaty article (the purpose of a derivative dependent is to accompany a principal alien). In many cases, dependents are disqualified from treaty benefits anyway if they have lost tax residency in the U.S. tax treaty partner country.

B. Character-of-the-Payment Articles

This type of treaty article works differently from the type of treaty article that depends on purpose. For tax exemption to be available under an article that depends on the character of the payment, neither a payee's U.S. immigration status nor his primary purpose in the United States is relevant with respect to the following types of payments:

- income from employment (aka dependent personal services);
- income from self-employment (aka independent personal services); and
- income from artistic and athletic performances.

Newer U.S. tax treaties and treaties updated with amendments (protocols) provide self-employment treaty benefits under business profits articles. If a treaty includes a director's fees article as most do, directors are not eligible for treaty benefits. Artists and athletes are called entertainers and athletes (or sportsmen) in newer treaties to clarify that the articles are intended to apply to performers. To be eligible for treaty benefits as an entertainer or athlete on gross receipts from a performance (provided that the treaty article maximum is not exceeded), a given nonimmigrant must also be eligible under either the income-from-employment article or the self-employment article (the business profits article in newer treaties). Entertainer and athlete articles only apply to individuals and never to bona fide business entities (such as dance troupes) whose employees perform in the United States.

To be eligible under character-of-the-payment articles, nonimmigrant payees must have maintained tax residency in the treaty partner country. (Foreign nationals who become U.S. tax residents lose these treaty benefits because no saving clause provides exceptions for them.)[144] Absent a tax treaty exemption, compensation for U.S. employment paid to U.S. tax nonresidents is subject to wage withholding and reporting on Form W-2. Compensation for self-employment income paid to U.S. tax nonresidents is subject to 30 percent withholding and reporting on Form 1042-S (even though graduated rates apply on their tax returns).[145]

C. Impact of Period of Stay

Tax treaty benefits are available to nonimmigrant students, trainees, teachers, and researchers who are temporarily present in the United States for the purpose of the treaty provision. Most treaty articles that confer treaty benefits for compensation from teaching or research have a two-year benefit limit. (Standard U.S. tax and applicable withholding apply thereafter.)

[143]J-1 student interns are students for U.S. tax residency purposes because Congress chose to treat them as students instead of providing another category. Although they are actually students at foreign educational organizations training at U.S. educational organizations, they qualify for treaty benefits because benefits for both students and trainees are the same in most treaties.

[144]Foreign nationals who become resident aliens, or who are no longer tax residents of the treaty country, also lose treaty reductions on their passive income such as dividends, interest, royalties, and rents.

[145]The instructions for Form W-8ECI that allow recipients with ECI to avoid withholding are not allowed for individual recipients of compensation for personal services (because they are not expected, based on past history of foreign nationals generally, to voluntarily comply with their U.S. tax obligations).

Eligibility under various treaties varies, since some treaty articles limit the benefits based on a projected or actual period of stay and others may be used only once in a lifetime. The benefit for teaching and research under the China-U.S. tax treaty provides the unique benefit of ''three years in the aggregate,'' meaning that once the aggregate threshold is reached, the individual is never again eligible for the benefit. Accordingly, teachers and researchers who maintain tax residency in China may use this over the course of repeated visits to the United States until the aggregate total is reached.[146]

1. Temporary Presence

By definition, nonimmigrants are temporarily present in the United States. In contrast, LPRs intend to reside permanently indefinitely in the United States. Although a foreign national may be in the United States temporarily under immigration law, the IRS may determine that his presence for purposes of a tax treaty provision is not temporary because he overstayed a specified treaty benefit period instead of returning home. Unfortunately, the IRS has not defined the term ''temporary'' to clarify which nonimmigrants or what circumstances are covered by tax treaty provisions requiring temporary presence in the United States.

Confusion about the term ''temporary'' for treaty purposes arises for a different reason in the context of the saving clause of the treaty with China. Although the saving clause in U.S. tax treaties generally prohibits benefits for U.S. citizens and residents (LPRs and nonimmigrants who pass the SPT), most treaties provide an exception for benefits conferred under student/trainee and teacher/researcher articles that permit benefits for U.S. tax residents based on substantial U.S. presence. Although the China-U.S. tax treaty provides an additional exception in allowing LPRs to retain tax treaty benefits under article 19 (professors, teachers, and researchers), this article restricts benefits to Chinese LPRs who are ''temporarily present'' for the purpose of teaching or engaging in research. This provision is fundamentally at odds with LPR status.

The exception from the saving clause for LPRs under treaties raises another problem in that it is unclear whether a nonimmigrant engaged in processing to become an LPR becomes subject to the exception (and ineligible for treaty benefits) upon applying for adjustment of status (filing Form I-485) or until adjustment is approved (given that denial is possible). Where a treaty benefit depends upon purpose in the United States, payers and employers that are aware of pending adjustment (particularly if they are the ''sponsors''[147]) are likely to impute the payee's purpose as living and working in the United States is the primary purpose in the United States of nonimmigrants adjusting to permanent resident status in the United States is likely to be viewed by their payers or employers and IRS (assuming they are aware of the pending application[148]) as living and working in the United States rather than teaching, conducting research, studying, or acquiring training.

2. Prospective and Retroactive Loss Limitations

Many U.S. tax treaty articles provide benefits for teachers and researchers invited to come to the United States for a ''period not anticipated to exceed two years.'' (This is called a ''prospective loss'' provision because the benefit will not extend beyond two years.)[149] For a treaty benefit to be lost prospectively, the fact that the activity is expected to exceed two years must be identified and substantiated at the outset of the activity.[150] In contrast to retroactive loss provisions that eliminate the benefit from the beginning of the period if the maximum is exceeded, extension of a period of covered activity under prospective loss provisions terminates any benefit beyond the two-year benefit period.[151] Eligibility for U.S. tax relief under prospective loss provisions depends on original intent at the outset of qualifying activities. If a nonimmigrant expects to remain in the United States (including for a subsequent activity) for more than 24 months, no benefit is available even if the nonimmigrant's actual period of stay in the United States turns out to be shorter.[152]

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[146]*See* Announcement 2011-18, the competent authority agreement on the interpretation of article 19 of the treaty with China.

[147]An employment-based petition for LPR status would be grace period available under immigration law (although known or deemed known), but an employer might not be aware of a family-based petition submitted on behalf of an employee.

(Footnote continued in next column.)

[148]*See, e.g.*, article 21(1) of the treaty with the Philippines.

[149]Although a series of U.S. Tax Court cases under article 21(1) of the Philippines-U.S. tax treaty involving secondary school teachers suggest that the prospective loss may be based on facts known only to the individual at the outset of the assignment, their findings are not consistent with the plain meaning of the treaty language tying the ''period not expected to exceed two years'' to the invitation by the organization. *See, e.g.*, *Maginot v. Comm'r*, T.C. Summ. Op. 2009-183, and *Santos v. Comm'r*, 135 T.C. No. 22 (Oct. 18, 2010).

[150]Although anecdotal evidence suggests that the IRS will not allow the treaty benefit to extend beyond the end of the initial benefit period, the plain language of the prospective-loss provisions does not require such an interpretation. There is no published guidance on this matter.

[151]*See* the Treasury explanation for article 21(1) in the treaty with the Philippines for discussion of how this benefit works. This Treasury explanation was written at a time when such explanations, including commentaries, were expected to provide general guidance for administration of tax treaty benefits. Although Treasury has recently cautioned that these explanations are for negotiation purposes only, they have not been supplanted with any other guidance.

[152]Arguably, Rev. Rul. 89-5, 1989-1 C.B. 353, would allow the 30-day settling-in period to be ignored, but in this compliance

(Footnote continued on next page.)

Most foreign nationals eligible for U.S. tax treaty benefits for teaching or engaging in research enter the United States in either J-1 professor or J-1 research scholar nonimmigrant status. Nonimmigrants who are professors or researchers in an employment-specific status such as H-1B do not qualify for prospective loss benefits if the initial period of their U.S. employment (typically three years in the case of H-1B employees) is longer than two years. J-1 exchange visitor programs permit participants issued Forms DS-2019 to enter the United States up to 30 days before program start dates for the purpose of settling in (and are allowed to remain up to 30 days after program completion to conclude personal activities and travel). Employment-specific nonimmigrants (such as H-1B), in contrast, may enter up to 10 days before the employment on which their status depends can begin, but are not accorded any grace period at the end of their stay unless it was arranged in advance and an extra 10 days of admission was included within the Form I-94 expiration date. In either of these situations, the nonimmigrants cannot begin teaching or engaging in research until the program or employment start date, with the result that treaty benefit eligibility for a J-1 exchange visitor entering the U.S. for a two-year assignment starts on the entry date only if the program starts on the same date.[153]

Retroactive loss articles for teaching or research disallow benefits from the beginning of the period if the period in the United States exceeds two years (thereby requiring a suddenly ineligible nonimmigrant to repay any tax benefits received).[154] Under such provisions, the U.S. tax benefit is lost retroactively for the entire period of the visit if the foreign national overstays the benefit period for *any* reason.

Some treaties with a retroactive loss provision allow otherwise eligible individuals to maintain the treaty benefit if the reason for overstaying the qualifying period is beyond the control of the otherwise qualifying individual.[155] Employers must not allow U.S. tax benefits under a retroactive loss provision if they know that the foreign national might overstay the two-year benefit period based on evidence such as the expiration date on a Form I-94 or the end date on a Form DS-2019. Even if dates on these documents do not seem to trigger the retroactive loss provision, any information that the institution might have in its internal records (such as an employment contract or even a departmental e-mail message reflecting a longer potential period of stay) should trigger denial of benefits.

This includes an application for extension of stay submitted to USCIS (Form I-539) or processed by a J-1 exchange program's RO to extend the stay of an otherwise eligible nonimmigrant beyond the end of the two-year benefit period that puts the employer on notice that wage withholding should begin.[156] As noted above, J-1 nonimmigrants in two-year exchange programs have difficulty claiming tax treaty benefits under retroactive loss provisions if they take advantage of the 30-day post-program period.

D. Impact of Change in Status

It is not unusual for a nonimmigrant who has been claiming a purpose-of-the-visit tax treaty benefit to change to another nonimmigrant status that allows a different treaty benefit (for example, changing status from F-1 student to professor in J-1 or H-1B status). To address such cases, many treaties limit the combined benefit period for claims under the two treaty provisions (for example, one for studying and one for teaching) to a specified maximum period (five tax years in most cases). Even if such a provision applies, however, it never extends the benefit period (a 24-month researcher benefit period, for example, is not restarted by new nonimmigrant status). The purpose of such a provision is to obviate necessity for the nonimmigrant to return to the treaty country to reestablish tax residency (discussed below) due to change of status.

Many U.S. tax treaties prevent back-to-back treaty benefits by stating, for example, that the ''benefit period provided under Article 21 (Teachers) shall not be available to an individual if, during the immediately preceding period, such individual enjoyed the benefits of paragraph (1) of this Article.''[157] Such treaties incorporate long-standing IRS policy requiring foreign nationals to reestablish physical presence and tax residency in the treaty partner country by remaining outside the United States for one year (365 days, excluding admissions for purposes unrelated to the treaty claims such as vacations) in order to claim treaty benefits again.[158] This policy purports to ensure that a

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enforcement environment, few employers would risk such a position absent specific IRS published guidance on the matter.

[153] *See, e.g.*, article 20A of the treaty with the United Kingdom and its Treasury explanation.

[154] *See, e.g.*, article 22(1) of the treaty with the Netherlands stating that the benefit is lost for the entire period of the visit unless the competent authorities agree otherwise.

[155] Although the IRS has issued no procedures for employers to follow when this occurs, IRS personnel at NRA taxation conferences have recommended issuing amended forms 1042-S and 1042 and a Form W-2C showing taxable wages for the prior tax years. A foreign national who lost treaty benefits retroactively should submit amended tax returns to pay the taxes, requesting an abatement of penalties if the change in circumstances was not known or anticipated at the beginning of the visit.

[156] *See* article 22(4) of the treaty with the Philippines.

[157] *See* GCM 37047, and rev. ruls. 56-164 and 77-242. An explanation of this policy is not included in IRS Publication 901, *U.S. Tax Treaties*. For a discussion of how this policy applies, see Singer, *Tax Treaty Benefits for Foreign Nationals Performing U.S. Services*, Chapter 10, ''The IRS Requirement to Re-Establish Residency,'' Windstar Publishing Inc. (2010).

[158] *See, e.g.*, article 20, ''Teachers and Researchers,'' of the treaty with France.

nonimmigrant claiming tax treaty benefits is a tax resident of the treaty partner country when the treaty benefit is first granted and to prevent foreign nationals from claiming treaty-based U.S. tax exemptions for overly long periods. IRS policy allows treaty benefits to restart following an absence of a year only when this opportunity is consistent with the treaty language. It obviously does not apply, for example, to ''one-time use'' provisions that ''an individual shall be entitled to the benefits of this paragraph only once,'' but it would not prevent an otherwise eligible nonimmigrant who entered the United States for less than the two-year benefit period and who departed and reentered before the end of that two-year benefit period from claiming the treaty benefit until its end.[159]

E. Treaty Benefit Claims

U.S. tax nonresident individuals (as opposed to entities) claim exemption from U.S. tax on compensation for services by submitting a completed and signed Form 8233 to their employers or payers before payment. This form, which must be completed and submitted anew for each calendar year to which the treaty benefit applies, must be reviewed, signed, dated, and submitted by the withholding agent to the IRS for validation. Treaty exemption on non-qualified scholarship or fellowship income may also be claimed on Form 8233 if the recipient is receiving both treaty-exempt compensation and scholarship or fellowship income during the same tax year from the same organization. For the treaty claim to be valid, the form must either contain a U.S. individual TIN (SSN or ITIN) or be submitted to the IRS with proof that the claimant has applied for an appropriate TIN. While allowing employees a withholding exemption on an applied-for basis may seem reasonable because of a longer anticipated relationship and known eligibility of the claimant for an SSN, it is risky to allow the exemption prospectively in lump-sum payment situations (such as under the honorarium exception), particularly if the payee is not eligible for an SSN and must apply for an ITIN. If a treaty exemption is allowed for withholding purposes, but the foreign national does not provide the withholding agent with a TIN by the Form 1042-S submission deadline, the withholding agent will be held liable for the under-withheld amount and any associated penalties and interest.

U.S. tax nonresidents (both individuals and entities) who receive all other types of U.S.-source income and claim treaty-based exemption for tax withholding purposes (including scholarship or fellowship income not claimed on Form 8233) must do so on Form W-8BEN. Unlike Form 8233, Form W-8BEN is not submitted to the IRS, but (like forms W-9 and I-9) is retained in the withholding agent's files. A treaty-based Form W-8BEN with a U.S. individual TIN (an SSN or ITIN) remains valid indefinitely as long as it is used at least once annually as a basis for processing the type of payment to which the exemption claim relates (unless circumstances change and render any information on the form incorrect). Applied-for exceptions are not available for Form W-8BEN treaty claims as they are for Form 8233 claims. Except for Forms W-8BEN associated with certain payments of dividends, interest, and royalties described in the form instructions, treaty exemption cannot be granted for withholding purposes if a treaty-based Form W-8BEN does not include an SSN or ITIN at the time of submission to the withholding agent.

U.S. tax nonresidents who make treaty-based claims for relief from withholding are required to submit Form 1040NR or 1040NR-EZ even if all income was treaty exempt. U.S. tax residents, regardless of the nature of the income, make treaty-based claims for withholding purposes on Form W-9 with an attachment detailing the treaty article benefit claimed and citing the saving clause exception. U.S. tax residents (whether LPRs or substantially present under the SPT) claim treaty benefits on Form 1040 following instructions in IRS Publication 519, *U.S. Tax Guide for Aliens*. On the other hand, treaty-exempt income properly reported as such under exemption code 04 on Form 1042-S by the withholding agent need not be reflected on Form 1040 at all (keeping in mind that a U.S. TIN is required for the claim to be valid). Like Form W-8BEN, Form W-9 is not submitted to the IRS but retained in the withholding agent's files.

XI. Conclusion

The complexities, intricacies, and inconsistencies of immigration and tax rules that must be identified and understood together for tax compliance (not to mention immigration compliance) purposes far outweigh the guidance available to comply with the law, the clarity of the guidance available, or the availability of training to payment or tax professionals who are responsible for applying the rules. To the extent that rules are unclear, unspecified, or inadministrable, compliance is frustrated and payer entities are vulnerable to enforcement that can result in the imposition of both back taxes and penalties/interest. At a time when NRA taxation compliance has been announced by the IRS as a priority, this is all the more important.

If one thing is clear from the detailed discussion of tax and immigration intersections above, it is that payment and tax professionals in this area have a difficult job (especially when their responsibility includes Office of Foreign Assets Control (OFAC) compliance[160]), not

[159] *See* Rev. Rul. 89-5, ruling that the period for exemption begins on the date of arrival for the purpose of the visit in the context of treaty provisions for teachers and researchers. IRS applies this policy to provisions for students and trainees as well.

[160] It has been shocking to the authors in dealing with payment professionals who regularly make payments to foreign persons and entities how little is known about OFAC compliance,

(Footnote continued on next page.)

to mention duties and responsibilities that are often undervalued by their employers in light of the severity of penalties applied for noncompliance. Although it might be supposed that substantial, substantive, and credentialing training would be available to educate NRA payment professionals, however, such education is the exception rather than the rule and is typically only provided in seminars of one to two days that barely have time to mention the issues.

If the payer entities were the only ones at risk from misadministration of NRA tax laws, however, presumably they would have the resources to access any training for prospective compliance and to absorb back tax assessments, penalties, and interest. Unfortunately, however, payees in this area of practice are likely to be foreign national individuals who have no idea of the U.S. tax requirements related to payments or of potential negative effects and consequences of tax issues (as illustrated by information provided on U.S. tax returns) on their future opportunities in the United States under immigration law.

To make matters worse, in gray areas such as those featured above in which separate bodies of law intersect, the presumed government specialists to whom the public can turn for information are unlikely to understand the bodies of law for which their agencies are directly responsible, not to mention those situations in which the two are interdependent. If payers and payees could expect hotline or other specialists that staff immigration or tax help services for even basic or accurate information, as many unfortunately believe that they can, negative outcomes might be more understandable and deemed fairer.

In the meantime, at least the two agencies featured in the lengthy discussion above seem to observe a firewall through which cooperation to help the public (not to mention professionals) navigate these complex areas of practice simply does not occur. To the extent that it does not, or that either or both agencies proceed as if their rules were possible to administer, the public is grossly underserved. If, as in other complex areas of law, private legal or other specialists were readily available for guidance, compliance might be more possible even at a price. Unfortunately, however, NRA taxation has generally not managed to attract enough attention by either tax or immigration professionals for expert guidance to be accessed easily.

Age-old concepts of natural justice and procedural fairness hold that enforcement of law is fair to the extent that targets of enforcement are aware of it and able to comply. In a context such as NRA taxation, this seems all the more true because those affected are foreign nationals whose first language is not English, who are not versed in U.S. law, and/or who count on published guidance and information from government-provided resources to comply with U.S. law and prevent negative consequences. As a matter of logic, furthermore, it is difficult to understand how government entities that represent ''the law'' can expect compliance if rules are inadministrable because ''the rules'' are not published, clear, complete, or coordinated.

This article presents an opportunity to the Departments of Treasury and Homeland Security to identify and act on administrative omissions and deficiencies. To the extent that they seize this opportunity, particularly in cooperation so that current gray areas are clearer if not crystal clear, both compliance and the public will be well served. ◆

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how little the relationship between routine payments and OFAC compliance is understood, and how detached OFAC compliance can be from standard payroll and accounts payable. For example, one payer believed that paying for a service that compares payments made against the OFAC list twice per year constituted satisfactory compliance, ignoring the obvious purpose of OFAC rules to prevent payments from being made.