

# Frequently Asked Questions for Non Resident Alien Taxation

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## **A. Income**

### **1. Compensation**

**Q: I worked abroad for the summer. Do I have to include this income on my tax return?**

A: If you are a nonresident alien, compensation for services performed abroad is not subject to U.S. tax because it is foreign-source income under U.S. tax rules. This is the case even if the employer was a U.S. entity, since the source of income for services is where the services were performed regardless of the location of the payroll and currency of payment.

If you are a resident alien, your wages earned abroad are includable in your U.S. tax return because you are taxed on worldwide income the same as U.S. citizens.

### **2. Scholarships and Fellowships**

**Q: I have a scholarship and all of it goes to tuition. Is this taxable?**

A: No, as long as the organization giving you the tuition scholarship applies it directly to the school's tuition, it is not taxable. However, if a grantor gives you cash and you then apply it to your tuition, the grantor is supposed to withhold 14% if you are in F, J, M, or Q immigration status and report the cash scholarship on Form 1042-S under Income Code 15.

You can obtain a refund of the amount withheld by filing a Form 1040NR-EZ and reducing the scholarship by the amount of your tuition. You will have to attach a letter from your school or an invoice which shows the amount of your tuition as proof that the cash was applied to your tuition.

**Q: Is a scholarship taxable if it is foreign-based.**

A: Foreign nationals who are resident aliens are taxed on worldwide income in the same manner as U.S. citizens so the source of their income is not relevant.

Nonresident aliens are taxed only on U.S.-source income and income connected to a U.S. trade or business. Therefore, nonresident aliens are not taxed on foreign-source scholarship and fellowship grants.

A scholarship or fellowship grant is foreign-source if the grantor is a foreign resident, a foreign government, international organization, international organization, or if the grantor is a U.S. resident but the educational activity takes place outside the U.S.

**Q: Do I have to pay taxes on a fellowship grant if the research was performed abroad?**

A: A grant is foreign-source if it is for study or research abroad. Also, compensation for services is also foreign source if the services were performed abroad. If you are a nonresident alien, the fellowship grant is not subject to U.S. income taxes even if you were required to perform services for the grant. However, if you are a resident alien, the grant is taxable unless a tax treaty exemption applies.

**Q: If I have a fellowship from a foreign grantor but it is paid to me monthly by my U.S.-based institution, is it taxable?**

A: If your institution is merely distributing the grant to you on the instruction of the foreign grantor, they are acting as the agent for the foreign grantor. The grant remains a foreign-source grant under those circumstances.

If you are a nonresident alien, the foreign-source grant is not subject to tax even if it is administered by your institution. If you are a resident alien, you are subject to tax on worldwide income, which includes the foreign-source grant, unless a tax treaty exception applies.

**Q: If I have a taxable scholarship do I have to file a tax return?**

A: If you are a nonresident alien in F, J, M, or Q status, yes, you have to file a tax return even if the scholarship is your only U.S.-source income and it is less than the personal exemption amount (\$3,300 for 2006). (The special IRS rule eliminating the tax return filing requirements for nonresidents whose only income is wages that do not exceed the personal exemption amount was not extended to taxable scholarships.)

If you are a resident alien, you have to file a Form 1040 if your worldwide income exceeds the income threshold for your filing status (\$8,450 if single or married filing separately and nobody can claim you as a dependent; \$16,900 if married filing jointly). Your taxable scholarship should be recorded on the wages line with "SCH" indicated on the line beside it. (The fact that the scholarship was not reported on an information return does not mean that the taxable scholarship does not have to be recorded on your tax return.)

**Q: What is taxable for scholarships and grants?**

A: Taxable scholarship and fellowship grants are any scholarship or fellowship which is NOT one of the following: 1) tuition, 2) required fees, 3) books required for courses, 4) supplies required for courses, and 5) equipment required for courses.

**Q: I have a room and board scholarship; should I receive a Form 1042-S?**

A: Yes, if you are a nonresident alien, your room and board which is a taxable scholarship should be subject to 14% withholding (30% if your immigration status is other than F, J, M, or Q) and reported on Form 1042-S under Income Code 15. If you were exempt under the terms of a tax treaty, no tax would have been withheld but you should still receive a 1042-S.

**Q: Is my graduate assistant tuition waiver taxable? I did not receive a Form W-2.**

A: Section 117(d) provides for qualified tuition reductions for graduate students who are employees of the institution teaching or engaging in research as employees of the institution. The tuition reductions may only be treated as qualified scholarships if you are paid an amount through payroll which represents the fair market value of your services. You should ask your institution to report the fair value of your services on Form W-2 and/or 1042-S if any of your wage are exempt from tax under a treaty.

### **3. Investment Income**

**Q: Do I need to pay U.S. taxes on income from my investments in my home country?**

A: If you are a nonresident alien, you are not subject to U.S. income tax on foreign-source income. However, if you are a resident alien, you are subject to U.S. income tax on worldwide income and you have to record the income from your investments in your home country on your U.S. tax return if you have a U.S. tax return filing requirement. (See the instructions for Form 1040 to determine if you meet the income threshold for filing.) To avoid double taxation, you can claim a foreign tax credit using Form 1116 for your federal tax return submission. Some states also allow a credit for taxes paid to a foreign country.

**Q: My only income was some bank interest. Do I have to file a tax return?**

A: If you are a nonresident alien, bank interest is excluded from your U.S. income under a special tax rule intended to encourage foreign investment in the United States.

Even if you have a tax return filing requirement, you do not record your bank interest as income on your return even if the bank issued you a Form 1099-INT. (You can eliminate the reporting if you give the bank a Form W-8BEN as a certificate of foreign status.) If you are filing Form 1040NR you can disclose the nontaxable bank interest on the answer line for Question L.

If you are a nonresident alien in F, J, M, or Q status, you have a Form 8843 information filing requirement if the reason that you are a nonresident alien is because you are exempt from counting days for purposes of the 183-day residency formula.

**Q: I have been here as an F-1 student for two years. Can I claim treaty benefits for my U.S. dividends? Are my capital gains tax-free?**

A: U.S. source dividends of nonresident aliens are subject to 30% withholding unless a treaty provides a reduced rate. However, in order to claim a lower treaty rate, you must have remained tax resident in the treaty country while you are in the United States. Whether you did so is a matter of the internal tax rules of the treaty country where you were tax resident when you came to the United States.

Generally, nonresident aliens are exempt from tax on gains on their stock transactions. However, this rule is based on a tax law that applies so long as the recipient of the income is not physically present in the United States for 183 days or more in the tax year. Since you have been in the United States for more than 183 days in 2006, you would be subject to 30% tax on your U.S. source net gains.

**Q: I am using my own savings. Is that income?**

A: No. Only the interest earned on savings is income. However, the interest earned is not subject to U.S. tax if you are a nonresident alien and the interest is earned in foreign accounts or on U.S. bank deposits.

However, if you are a resident alien, the interest earned on your savings is subject to tax. Also, if you have more than \$10,000 in the aggregate in foreign financial accounts, you must disclose that you have such accounts on Schedule B of Form 1040 and submit a Form 90.22-1 for each account.

## **4. Loans**

### **Q: Is a loan taxable?**

A: Generally, a loan is not taxable. (There are exceptions for certain loans related to trusts and related parties.)

If the loan is forgiven, the forgiveness of indebtedness is generally taxable. There are exceptions for certain forgiveness that meet prescribed public policy incentives.

## **5. Foreign Income**

### **Q: Do I have to pay U.S. taxes on my income in my home country?**

If you are a nonresident alien, you are subject to U.S. taxes only on your U.S.-source income. However, if you are a resident alien, you are subject to U.S. income taxes on your worldwide income in the same manner as is a U.S. citizen. If you paid foreign taxes on the income, double taxation is avoided by claiming foreign tax credits (Form 1116) on your U.S. return. You may have a double tax because of state income taxes since not all states allow credits for foreign taxes or states may limit the credits to taxes paid to Canada.

### **Q: I am a nonresident alien in F-1 status. I received U.S. tax forms from my broker in Germany reporting my foreign income.**

A: The IRS has entered into Qualified Intermediary (QI) agreements with over 13,000 foreign financial organizations. Under the agreements, the QI agrees to report income to the IRS on earnings of U.S. citizens and residents. The QI must not understand that some individuals living and working or studying in the United States can remain nonresident aliens and not subject to U.S. tax on worldwide income. You will have to either convince the QI to correct the reporting forms or to give you information that you can put with your nonresident return explaining that the investment income is foreign-source income.

## **6. Gifts**

### **Q: If a relative gives me a gift, is the gift taxable?**

A: If the relative is a U.S. citizen, they may be subject to a U.S. gift tax. There is an annual exclusion per donee of \$12,000 (\$24,000 if a joint gift election is made with their spouse). A U.S. citizen can give unlimited gifts to a U.S. citizen spouse or \$114,000 per year to a non-U.S. citizen spouse.

If the relative is not a U.S. citizen who is not domiciled in the United States and the gift is not property located in the United States, there is no U.S. gift tax.

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## **B. Information Returns**

### **Q: What is a W-2, 1042-S, 1099-INT, and 1099-MISC?**

A: These are income reporting forms which are required to be issued by employers and payers to report your income and withheld taxes, if any, to you and the Internal Revenue Service. The IRS uses this information to compare against your tax return to assure that you are reporting your income on your return. The forms report different types of income:

- Form W-2 is for taxable wages of U.S. citizens, resident aliens, and nonresident aliens. It also includes Social Security and Medicare wages and taxes which are used by the Social Security Administration for determining future social security benefits.
- Form 1042-S is used for reporting income other than taxable wages to nonresident aliens. (Treaty exempt wages are supposed to be reported on this form with Exemption Code 04.) The Income Code (IC) indicates the type of income reported on the form such as 15 (scholarship or fellowship), 16 (self-employment income), 18 (compensation of a teacher or researcher), 19 (compensation while gaining experience), 20 (payments to entertainers), 28 (gambling winnings).
- Form 1099-INT is for taxable interest. Sometimes banks issue these forms to nonresident aliens who are not subject to tax on bank interest. The fact that a form was issued incorrectly does not make the interest income taxable.
- Form 1099-MISC is for various types of payments such as nonemployee compensation (box 7) and taxable scholarship and fellowship grants (Other Income, box 3). Sometimes taxable grants are recorded in box 7, which is incorrect if no services were performed in connection with the grant. Resident aliens who have their taxable grants reported as nonemployee compensation in box 7 will be assessed a self-employment tax on their tax return (schedule SE). (Foreign nationals, with a few exceptions, are not authorized to perform services as an independent contractor so this might be a problem.)

**Q: I received a Form 1098-T. What is this for?**

A: Form 1098-T reports qualified scholarships and related expenses for purposes of the Hope and Lifetime Learning Credits. Nonresident aliens are not eligible for these credits even if they receive a Form 1098-T. The IRS regulations state that, although no Form 1098-T is required for nonresidents, education institutions may create the form for all students for administrative ease since many student systems lack information about the tax status of the students.

Residents are eligible for the credits under the same rules that apply to U.S. citizens. For information about the credits, refer to IRS Publication 970, *Tax Benefits for Education*.

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## **C. Filing Requirements/Issues**

### **1. Filing Thresholds**

**Q: How do I know if I have to file a federal income tax return?**

A: The instructions for the return give the filing thresholds which is the amount of income that you have to have in order to have a tax filing obligation. The rules are different for Form 1040 and 1040EZ which is for



U.S. citizens and resident aliens than they are for Form 1040NR and 1040NR-EZ for nonresident aliens. The rules are also different for the state tax returns.

For example, for 2006:

- Residents do not have to file a Form 1040 if their income is less than \$8,450 for single or married filing separately status and nobody can claim them as a dependent, or \$16,900 for married-filing-jointly status.
- Nonresidents do not have to file if their only income was wages that did not exceed the personal exemption amount (\$3,300 in 2006).
- Nonresidents do not have to file a Form 1040NR if their only income was investment income on which the correct amount of tax was withheld.

However, individuals who anticipate having an immigration proceeding which will require submission of U.S. tax returns may wish to file a tax return even if they are under the filing thresholds. Immigration service personnel are not generally aware of the tax return filing requirements especially for nonresident aliens.

**Q: How do I get back the federal and state taxes that were withheld if I have no filing requirement?**

A: You will have to submit federal and state returns in order to obtain a refund of the withheld taxes. Many states allow you to file an abbreviated tax return in such cases.

**Q: Do I need to file anything at all if my wages were under \$3,300?**

A: There is a new rule for tax year 2006 and subsequent tax years that eliminates the tax return filing obligation of nonresident aliens whose only U.S. income is wages that do not exceed the personal exemption amount (\$3,300 for 2006).

If you had taxes withheld from your wages, you will have to file a tax return in order to obtain a refund of those taxes. Also, if you will need a U.S. tax return for an immigration proceeding, you can file the return even if it is not required. (The immigration service personnel are not necessarily conversant with the U.S. tax return filing requirements and may expect you to produce a U.S. tax return if you had U.S. wages.)

You are, however, supposed to submit a Form 8843, *Statement for Exempt Individuals*, if you are a nonresident alien in F, J, M, or Q status and the reason that you are a nonresident alien is because you were exempt from counting U.S. days while in that status. For foreign students in F, J, and M status, you have this requirement for the first 5 calendar years, after which you will count your U.S. days and become a resident alien if you have 183 countable U.S. days.

**Q: All of my income was exempt from tax under an income tax treaty with my home country. Do I still have to file a tax return?**

A: Yes. Even if you had no taxes withheld on your income because you were exempt from withholding because of the treaty benefit, you are required to submit a tax return to describe the treaty claim to the IRS.

## **2. Prior-Years' Tax Issues**

**Q: If I would like to get a green card, do I need to file a tax return?**

A: The application for U.S. lawful permanent resident status (a green card) requires the applicant to submit the three most recent years' tax returns. If you had a tax return filing obligation and did not file your returns, the immigration service will not accept your application.

**Q: If I haven't filed my taxes in the past, but want to get a green card, what do I do?**

A: You need to complete and submit your back tax returns for at least the last six years, or the years that tax returns were due if fewer than six years.

**Q: Where can I get forms to file prior years' tax returns?**

A: Visit the website for the tax authority for prior years' forms. For federal tax returns, you can obtain forms on the IRS website at [www.irs.gov](http://www.irs.gov). Click on forms. There are links for prior years' returns.

### **3. Tax Forms**

**Q: Can I send different tax forms together?**

A: You should send tax returns and their related forms and tax payments, if any, in separate envelopes to the address indicated in the instructions for the form. Do not send state income tax returns (Form 1 or 1NR/PY for Massachusetts) with your federal tax returns! Do not combine tax payments for more than one tax year in one check. The IRS will apply it to only one year. They will send you a refund for the excess and a bill for the taxes due on the second return.

**Q: I am a nonresident alien. How do I know whether I should file a Form 1040NR or a Form 1040NR-EZ?**

A: Form 1040NR-EZ was designed specifically for foreign students and scholars. The first page of the instructions gives the conditions that you must meet to use this form. They are:

1. No dependents
2. Not claimed as a dependent by another U.S. taxpayer
3. Income consists of only wages, tips, taxable scholarships or fellowships, state tax refunds
4. Taxable income is under \$100,000
5. No exemption claimed for a spouse if married
6. Only income exclusions are the student loan interest and nontaxable scholarship and fellowship grants.
7. Only deductions are state/local taxes (line 4) (But residents from India who are students or business apprentices can claim the standard deduction on line 11.)
8. No tax credits except the federal excise tax refund credit (line 21)

**Q: Can I e-file?**

A: If you are a resident alien, you can e-file using one of the popular tax preparation packages or the IRS tax preparation service if you qualify. If you have complicated issues related to foreign income, you may have to use a paid preparer but you may be able to e-file that tax return. You may not be able to e-file some of the disclosure forms.

If you are a nonresident alien, you cannot e-file. If you do, you may be overstating your deductions and paying less in taxes than you are obligated for as a nonresident alien.

You may be able to e-file your state return.

**Q: Can my wife and I file a tax return together?**

A: If both you and your wife are nonresident aliens because you are an F-1 student and she is in F-2 status or you are in J-1 status and she is in J-2 status, the answer is generally no for federal income tax purposes. In limited cases, a spousal exemption may be claimed, but this is not the same as filing a joint return and is discussed in the “exemptions” section of the instructions for the 1040NR. State filing rules may be different

However, there are some elections that may apply if either you or your wife is in a different immigration status such as H-1B or O-1, or if one of you is a U.S. citizen or permanent resident. For example, if one (or both) of you is a resident alien or a part-year resident alien under the 183-day residency formula, you and your wife can make an election to file jointly as resident aliens. If neither of you is a resident alien or a part-year resident alien, you may be able to make a first-year choice election to be a part-year resident if you meet certain specified requirements. Then you and your wife can make the joint election to file as residents. When you make a residency election, you both have to include your worldwide income from January 1, 2006 in the return. For information on how to make these elections, refer to IRS Publication 519, *U.S. Tax Guide for Aliens*.

**Q: I have a child who is a U.S. citizen with a Social Security number. Can I claim him as a dependent on my return?**

If you are a nonresident alien, you can only claim dependents if you are in one of the following categories:

- A resident of Canada or Mexico
- A resident of South Korea and you dependent lived with you in the United States at some time in the tax year
- A U.S. national
- A resident from India who is a student or business apprentice

If you are not in one of these categories, you cannot claim a personal exemption for your dependent even if your dependent is a U.S. citizen.

If you are a resident alien, you can claim your dependents who meet the conditions of being a dependent and who are:

- A U.S. citizen or resident
- A resident of Canada or Mexico
- A U.S. national

**Q: If I worked without authorization, am I turning myself in if I report the income on my tax return?**

A: No, under the current nondisclosure laws for income tax information, the IRS cannot disclose your tax return information to the immigration service. However, if you are involved in an immigration proceeding, the immigration rules may require that you submit to them copies of your U.S. income tax returns. The procedures for application for a green card require U.S. returns for the most recent three years and for naturalization, 5 years (3 years if married to a U.S. citizen).

**Q: I am a J-2 dependent with an Employment Authorization Document (EAD) from the immigration service. I have been working as a consultant. What tax form do I file?**

As a foreign national with an unrestricted EAD, you are allowed to be engaged in self-employment activities. You would complete a Schedule C or C-EZ to determine your net self-employment income and record this amount on the appropriate line of your Form 1040NR if you are a nonresident alien or Form 1040 if you are a resident alien. As a resident alien you would complete a Schedule SE as well to determine your self-employment (SECA) tax which is in addition to your income tax. Nonresident aliens are not subject to SECA.

**Q: Can non-U.S. citizens file as head-of-household?**

If you are a resident alien with a qualifying dependent, you can file as head-of-household. Your dependent will need a U.S. taxpayer identification number, either a Social Security number or individual taxpayer identification number.

If you are a nonresident alien, you cannot file as head-of-household. Nonresident aliens can only use single or married-filing-separately status.

**Q: Is there a tax preparation software package targeted to foreign nationals?**

There are some tax preparation software products that help you complete Form 1040NR or 1040NR-EZ and Form 8843 but they do not deal with state income tax returns. Also, they may not complete an accurate tax return if you changed immigration status and remained a nonresident alien. You can find these programs by doing a google search on "nonresident tax return."

There are no tax preparation software programs that determine your tax residency status, whether treaty benefits are available, what tax returns to file, and what elections are available, and then completes the state returns along with the federal returns which would depend on whether you were a nonresident alien (Form 1040NR or 1040NR-EZ), a full-year resident alien (Form 1040 or 1040EZ) or a dual-status taxpayer (because you became a resident in the year but was not present on January 1 or January 1 was not a countable U.S. day).

Personnel at the popular tax preparation service firms are generally not experienced in dealing with foreign nationals and frequently prepare incorrect returns as a result. Some tax accounting and law firms have sophisticated software packages that can do all of the returns but the analysis as to the availability of income tax treaties and elections (which could result in lower taxes) must be done by the tax accountant or lawyer. Few tax accountants and lawyers deal with these issues on a regular basis and, as a result, may prepare incorrect returns as well.

**Q: I came to the United States as a student and then changed to H-1B. My tax accountant has been preparing Form 1040NR-EZ for me each year. Is that correct?**

A: No, unless you spend significant periods of time outside the U.S. each year. You would most likely have become a resident alien for income tax purposes at least by your second calendar year in H-1B status because all of your U.S. days count for purposes of the 183-day tax residency formula (called the "substantial presence test"). Depending on how long you were in the United States as a student and when you changed status to H-1B, you could have been a dual-status taxpayer in the year your status changed.

You can correct the tax returns that are still within 3 years from the date that you filed them by submitting a Form 1040X amended return. You may get a refund since as a resident alien you are eligible to claim the standard deduction which may be higher than the itemized deductions that you claimed as a nonresident alien.

#### **4. Form 8843**

**Q: If I have been here for over five years and have no income at all do I have to file taxes?**

A: If you have no income, you do not have to file a tax return. However, if you are an exempt individual in F, J, M, or Q status, you should submit a Form 8843. If you are an F or J student or student dependent who has been in the United States before 2006 (for any day) in more than 5 calendar years in that status, you are not required to file Form 8843 for 2006 and have no tax filing obligation.

**Q: What happens if I don't send in Form 8843?**

A: Form 8843, *Statement for Exempt Individuals and Individuals Claiming a Medical Condition* is required by the regulations to be submitted by all individuals in F, J, M, or Q status who are exempt from counting days for purposes of the substantial presence test (the 183-day residency formula). The form should be attached to Form 1040NR or 1040NR-EZ if you have a return filing obligation. Otherwise, the Form 8843 should be signed and dated and submitted separately.

The instructions to the form state that the penalty for individuals claiming a medical condition or professional athletes engaged in a charitable event is that they will not be able to exclude their U.S. days. The instructions do not provide a penalty for exempt individuals who do not submit the form. However, if you expect to apply for future immigration benefits, it is best to submit all required tax forms including Form 8843, which is an information return. Keep a copy of the form as proof of its submission. Some individuals submit the Form 8843 with a Form 1040NR-EZ with not income so that the form will be recorded by the IRS as having been submitted.

**Q: I am on Optional Practical Training (OPT); do I include OPT dates as F-1 dates on Form 8843?**

A: Yes, OPT is issued under your F-1 student status. You are still considered to be an F-1 student for federal income tax purposes.

## **D. Tax Residency Determination**

**Q: If I was here on a tourist visa, do I have to count those days for purposes of determining my residency status if I am an F-1 student now?**

A: If you were here in any immigration status in 2004, 2005, or 2006, including as a visitor on a tourist visa (B-2), your U.S. days generally count for purposes of the 183-day residency formula. The formula adds all countable U.S. days in the current year (2006), 1/3 of your U.S. days in the prior year (2005), and 1/6 of your U.S. days in the 2<sup>nd</sup> preceding year (2004). But if you had fewer than 31 countable days in 2006, you are automatically considered a nonresident alien for 2006 even if your total countable days under this formula are 183 or more.

Also, if you were in an exempt (from counting days) status for all the days you were here during 2006, your prior visits as a tourist in 2004 or 2005 will not be enough to cause you to have 183 countable days under the formula so you will be a nonresident for the current year (2006).

**Q: Do I need to count my days under every visa I've ever had?**

A: No, the 183-day residency formula considers your countable U.S. days for the current tax year and the two prior tax years. For 2006 tax returns, you need to know your countable U.S. days for 2006, 2005, and 2004.

However, if you were in F, J, M, or Q status in any of these 3 tax years, you will have to determine if your U.S. days in that status count. This necessitates determining your tax years in any one of these categories (for even a day) and whether you are/were exempt from counting U.S. days while in the F, J, M, or Q status. Under the residency rules, individuals do not count their U.S. days for limited periods. There is a 5-calendar-year rule for F and M students and J Exchange Visitors in the student category and a 2-out-of-7 calendar year rule for J Nonstudents and Q cultural visitors. (The residency determinations for the latter category can be complicated for individuals who have multiple visits to the United States in these categories.)

**Q: I was in the United States during 2003 and 2004 in J-1 Exchange Visitor status and was paid entirely by my foreign employer. I came back to the United States as a J-1 researcher in 2005. I read something about a longer nonresidency period if I had a foreign employer. Am I still a nonresident alien?**

A: The general rule for J-1 Exchange Visitors in a category other than student is that you would be exempt from counting U.S. days (and, therefore, remain a nonresident alien) for 2 out of the current 7 calendar years in the United States as a J-1 nonstudent. Under that rule, you would have become a resident alien for 2005 if you were in the United States for at least 183 days that year. However, there is another rule that extends the 2 years to 4 years if you were in J-1 status as an employee of a foreign entity and ALL of your compensation was paid by the foreign employer. As a result, you will not become a resident alien of the United States until 2007 provided that you are present for at least 183 days in 2007 and are still only being paid by your foreign employer.

**Q: If I am a nonresident alien, am I a nonresident for Massachusetts income tax purposes as well.**

A: The rules regarding taxation as a resident or nonresident for state income tax purposes are defined by the state. Some states define residency with reference to your federal tax status for foreign students but Massachusetts does not. You are a resident of Massachusetts if your domicile is in Massachusetts or if you are physically present for 183 days in the tax year and you have a permanent place of abode in the state. A permanent place of abode does not include a dorm room but does include an off-campus apartment. The rules are described in TIR 95-7 which is available on the Massachusetts Department of Revenue website.

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## **E. Income Tax Treaties**

**Q: I am a citizen of the Peoples' Republic of China (PRC) and was living and working in Switzerland for 5 years before I came to the United States as a researcher. Can I get a treaty benefit for my compensation?**

A: Income tax treaty benefits are based on tax residency in the treaty country. There is nothing in your question to indicate that you were tax resident in the PRC when you came to the United States. To make this claim on your tax return, you would have to show proof that you continued to remain tax resident in the PRC during the 5 years that you were away.

Generally, the IRS presumes that you were tax resident in your prior country of residence if you lived there at least 183 days since most countries have a 183-day rule for determining tax residency. Based on your 5 years in Switzerland, you were tax resident in Switzerland when you came to the United States. The United States has a tax treaty with Switzerland but it does not include a benefit for U.S. source compensation for services for research.

**Q: I came to the United States in F-2 status but changed status to F-1 after being here for a year. Can I claim a treaty benefit?**

A: The IRS disallows a treaty benefit for individuals who change immigration status because the treaties generally require resident status in the treaty country at the time you come here for the purpose of the treaty. You were a resident of the treaty country when you came here for the purpose of accompanying the principal visa holder. Therefore, your facts would not meet the treaty requirements.

**Q: I am a researcher from France and claimed a benefit as a researcher under the treaty on my last visit to the United States. Can I claim a treaty benefit for this visit?**

A: The IRS has a policy allowing a subsequent treaty claim for individuals who reestablish residency and physical presence in the treaty country and who remain absent from the United States for one year (365 days) unless the treaty indicates otherwise. Article 20 (Teachers and Researchers) of the U.S./France treaty states that "An individual shall be entitled to the benefits of this paragraph only once."

No benefit is available for your subsequent visit with one exception. If the second visit begins before 2 years from the date of arrival for the first visit, a benefit can be claimed for the second visit through the end of that 2-year benefit period which began with the date of arrival for the first visit.

**Q: I came to the United States from Poland as a J-1 Research Scholar with a DS-2019 end date in 2010. Can I claim a treaty benefit?**

A: Article 17 (Teachers and Researchers) of the treaty with Poland provides a 2-year treaty benefit for residents of Poland invited to the United States by a university or other recognized educational institution “for a period not expected to exceed two years” for the purpose of engaging in research. You have not met one of the conditions of the treaty article because you were invited to the United States for a 5-year period. Therefore, you are not eligible for a treaty benefit.

**Q: I have been claiming treaty benefits under Article 20A (Teachers and Researchers) of the treaty with the U.K. Can I stay beyond 2 years and keep the treaty benefits if I am not paid?**

A: Article 20A of the treaty with the U.K. has a retroactive loss rule. Under that rule, you will lose the treaty benefit if you physically overstay the 2-year benefit period for any reason. It does not matter whether you are paid or not.

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## **F. Social Security and Medicare Taxes**

**Q: I am a researcher in H-1B status. My colleagues who are also researchers are not paying Social Security taxes. Why do I have to?**

A: U.S. Social Security and Medicare taxes apply to all compensation for employment services in the United States unless an exception is available. There is an exception for nonresidents in F-1, J-1, M-1, or Q-1/Q-2 status under section 3121(b)(19) of the Internal Revenue Code. Your research colleagues qualify for this NRA FICA Exception if they are J-1 Research Scholars and are still nonresidents for tax purposes. There is no Code exception for H-1B status individuals.

**Q: How do I prevent having Social Security taxes withheld if I am a nonresident?**

A: If you are a nonresident alien in F-1, J-1, M-1 or Q-1/Q-2 status, your employment compensation for authorized work is not subject to Social Security and Medicare taxes under section 3121(b)(1) of the Internal Revenue Code. This exception (referred to as the NRA FICA Exception) is described in IRS Publication 15, *Employer’s Tax Guide*. The substantial presence test rules and exceptions that cause nonimmigrants in F, J, M, and Q status to be nonresident aliens for substantial period of time are described in IRS Publication 519, *U.S. Tax Guide for Aliens*. Unfortunately, many corporations employing students for optional practical training are unfamiliar with these tax rules and will withhold FICA. Some schools send a letter with their students certifying to the student’s nonresident alien status based on their immigration status and history.

**Q: How to I obtain a refund of Social Security taxes?**

A: You can only request a refund of Social Security and Medicare taxes that were erroneously withheld. You cannot obtain a refund because you will not vest for benefits. In that case, FICA is just a tax.



To obtain a refund of erroneously withheld taxes, provide your employer with facts supporting your status as a nonresident alien in F-1, J-1, M-1, or Q-1/Q-2 status. If your employer refuses adjust their Form 941 employment tax return and refund you the taxes, there is an alternative. You can submit a Form 843 Claim using the procedures for Social Security tax refund claims in IRS Publication 519. Form 8316 is a good supporting document to submit with the 843. If the IRS refunds you your taxes, they will notify your employer to adjust their Form 941 for their share of the Social Security and Medicare taxes and to issue you a Form W-2C correcting your Social Security and Medicare wages and taxes.

**Q: I have been in the United States over 5 years as a student. Am I exempt from FICA?**

A: A student in F-1 or J-1 Student status will become a resident alien in their 6<sup>th</sup> and subsequent calendar years if they meet the 183-day residency formula. Resident aliens do not qualify for the NRA FICA Exception. However, foreign students are eligible for the Student FICA Exception under the same rules that apply to U.S. citizen students.

## **G. Additional Questions**

***I'm married and have a child who was born in the U.S. Can I claim personal exemptions for my wife and child?***

Generally, no. Only students & scholars from certain countries can claim exemptions for their dependents (Mexico, Canada, Korea, Japan. and India.)

***I am from one of the countries that can claim an exemption for my spouse and/or child. Can I claim them if they don't have a social security number or an ITIN?***

No. In order to claim personal exemptions for dependents they must have a valid social security number or an ITIN (Individual Taxpayer Identification Number). To apply for an ITIN for your dependents, fill out Form W-7 and take the required documentation to the Austin IRS office. Completed forms W-7(s) and supporting documents are then included with your tax return

***My young children live with me. Can I claim the Child Care Tax Credit?***

Not as a rule. Only those students and scholars in non-resident tax status who are from one of the countries that can claim dependents (Mexico, Canada, Korea, Japan and India) can claim the Child Care Tax Credit.

***I am a non-resident for tax purposes. Can I claim the HOPE or Tuition Tax Credit or the Earned Income Credit?***

No. Non-resident aliens can not claim the HOPE or Tuition Tax Credit or the Earned Income Credit. Once you qualify to file as a resident alien for tax purposes, you may be eligible to claim these credits.

***I have a student ID starting with the numbers 997 or 995 or 999 that looks just like a social security number. Can I use this number as my tax payer identification number?***

No. You must have a valid social security number or an ITIN (Individual Tax Payer Identification Number).

***I just received my W-2 for the wages I earned in 2006. Can I file my taxes now?***

Not necessarily. If you are from a country which has a tax treaty with the U.S., or you received a U.S. based scholarship or fellowship, you may also receive Form 1042-S from Payroll. This form is generally mailed about 1 month later than Form W-2 and you will need to have both forms before you can file.

***My country has a tax treaty with the U.S. and I earned below \$5000, which is the amount of wages exempt by my treaty. Do I still need to file?***

Yes. You must file Form 1040NR-EZ or Form 1040NR. In the case where you earned more than the exempt amount of your treaty, you may receive both a Form W-2 and a Form 1042-S or you may just receive only a Form 1042-S.

***I had a teaching assistantship or graduate research assistantship at OSU . Is this the same as a scholarship or fellowship?***

No. TA and GRA salary payments are not considered scholarships or fellowships. Income from TA and GRA positions and tuition remission is considered earned income and is taxable.

***I had a TA or GRA position. Can I deduct or exclude the cost of my tuition, books and/or fees?***

No. Only those students who had bona fide scholarships or fellowships (no work was required as a condition of receiving the award) may deduct expenses paid for tuition, books and fees up to the amount of the scholarship/fellowship.

***I am a student from India. Can I claim the standard deduction?***

Yes. Due to a tax treaty provision, **ONLY students** from India may claim the standard deduction on the non-resident forms. For 2006 the standard deduction is \$5,150 for those filing as single or married filing separately. **Note:** Visiting Scholars and Researchers from India cannot claim the standard deduction.

***Should I keep copies of my tax return and other tax forms?***

Yes. Always keep copies of your tax return, W-2, 1042-S, 1099 bank interest statements and any other pertinent forms as proof that you have filed. The IRS can audit individual returns for up to 3 years following the filing deadline and your tax records are essential in proving your case.

***What is the deadline for filing my tax return?***

If you are filing Form 1040NR-EZ or Form 1040NR, the deadline to file is April 15. If you are filing Form 8843 only, the deadline to file is June 15.

***I'm unable to file by the deadline, what do I do?***

File Form 4868, "Extension of Time to File", which extends the deadline to file till August 15. If you owe any taxes though, you must still mail your estimated tax payment by April 15 or you will be assessed penalty and interest as of April 16, on any payment owed.

***I am leaving the country before I can file my taxes. What should I do?***

Make sure the Payroll Office has your foreign address so that your Form W-2 and/or Form 1042-S can be mailed to you. Download the appropriate forms and instructions from [www.irs.gov](http://www.irs.gov) and file your U.S. taxes from abroad. Save copies of all forms submitted for your records.