

INTERNATIONAL TAX LAW FREQUENTLY ASKED QUESTIONS

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Basic Rules of U.S. Taxation

What determines the U.S. taxation of income?

The general rule of income taxation is that income is taxable where the activity or transaction occurs. All compensation for services performed in the U.S. is subject to U.S. taxes unless an exception applies. For additional information see Publication 17, *Your Federal Tax Guide* and Publication 519, *U.S. Tax Guide for Aliens*.

How do I calculate the taxes on my U.S. income?

The services you perform in the U.S. will be taxed based on your residency status for federal income tax purposes. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

How do I determine my residency status?

Your residency status for federal income tax purposes will depend on your immigration status. In general, a nonimmigrant is considered a resident alien for federal tax purposes if he or she is present in the U.S. for 183 days or more, unless an exception applies. Most students and scholars will meet one of the exceptions for at least part of their stay. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

Since I already had taxes withheld from my pay, do I need to file a tax return?

Yes. The U.S. tax system is considered a "pay as you go" plan. Therefore, taxes are withheld from your pay as you earn it (based on withholding documents you give to your employer). You file a federal income tax return after the end of the calendar year to reconcile your withholdings with your actual tax liability. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

Canadian Questions

I am a Canadian citizen living and working in the U.S. for a U.S. employer on a visa. Do I need to file both a U.S. tax return and a Canadian tax return?

You must comply with both U.S. and Canadian filing requirements. In the United States, you generally are required to file a return if you have income from the performance of personal services within the United States. However, under certain circumstances, that income may be exempt from payment of U.S. tax pursuant to the U.S.-Canada income tax treaty. You need to determine what type of visa you have, and how that impacts your residency status in the United States. If, based on the tax code and your visa status you are treated as a U.S. resident, then your entitlement to treaty benefits will be impacted. For additional information, see Publication 519, *U.S. Tax Guide for Aliens* and Publication 597, *Information on the United States-Canada Income Tax Treaty*.

I am a Canadian citizen who worked in the U.S. for 4 months. Do I have to file a U.S. income tax return as well as my income tax return in Canada? In the United States, you generally are required to file a return if you have income from the performance of personal services within the US. The type of return to file would depend upon whether you are a resident of the U.S. for purposes of U.S. tax law. There are several tests to determine residency, including the substantial presence test, which is based on how many days you are present in the U.S. over a period of three years. For additional information, see Publication 519, *U.S. Tax Guide for Aliens* and Publication 597, *Information on the United States-Canada Income Tax Treaty*.

I am a U.S. citizen. If I move to Canada to live and work there as a Canadian permanent resident, do I pay both U.S. and Canadian Taxes?

United States citizens living abroad are required to file annual U.S. income tax returns and report their worldwide income if they meet the minimum income filing requirements for their filing status and age. You must contact the Canadian Government to determine whether you must file a Canadian tax return and pay Canadian taxes. For the United States income tax return, you will have several options available to you regarding claiming a foreign tax credit or excluding some or all of your foreign earned income. For additional information, see Publication 54, *Tax Guide for U.S. Citizens and Resident Aliens Abroad*.

Capital Gain Income Nonresident Aliens

Are international students required to pay income tax on their U.S. capital gains?

Nonresident alien students and scholars, and alien employees of foreign governments and international organizations who, at the time of their arrival in the United States, intend to reside in the United States for longer than one year, are subject to the 30% taxation on their U.S. source capital gains during any tax year, if during such tax year (usually calendar year), they are present in the United States for 183 days or more, unless a tax treaty provides for a lesser rate of taxation. This assumes that such capital gains are not effectively connected with the conduct of a United States trade or business. These capital gains would be reported on Page 4 (not Page 1) of Form 1040NR, and would not be reported on a Schedule D, because they are being taxed at a flat rate of 30%, under I.R.C. §871(a), or at a reduced flat rate under a tax treaty. For additional information, go to www.irs.gov.

I am a nonresident alien and invested money in U. S. stock market through a U.S. brokerage company. Are the dividends and the capital gains taxable? If yes, how are they taxed?

Generally, capital gains received by a nonresident alien not present in the United States for 183 days or more are not taxable in the United States. Certain gains, however, are subject to the 30% withholding rate or if applicable, a reduced tax treaty rate. Dividends are withheld upon at the 30% or lower tax treaty rate. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

Currency Issues

How much money can a nonresident alien bring in to the U.S.?

There is no limit on the total amount of monetary instruments which may be brought into or taken out of the United States, nor is it illegal to do so. However, if the person transports more than \$10,000 in monetary instruments on any occasion into or out of the United States, a Form 4790, *Report of International Transportation of Currency or Monetary Instruments* with U.S. Customs. For additional information, go to www.irs.gov.

What is a "monetary instrument"?

Monetary instruments include U.S. or foreign coin in current circulation, currency, travelers' checks (in any form), money orders, and negotiable instruments or investment securities in bearer form.

How does the foreign currency exchange rate work?

Foreign currency needs to be translated into U.S. dollars to determine the amount of income (such as income from the sale of goods or services, dividends or interest) to report on a taxpayer's U.S. return and to determine gain or loss when foreign currency is disposed of. The proper translation rate depends on the item of income. You can generally get the exchange rates from banks and U.S. Embassies. Other possible sources of exchange rate would be publications, such as the Wall Street Journal. If there is more than one exchange rate, use the one that most properly reflects your income. For additional information, go to www.irs.gov.

Determination of Residency Status for Federal Income Tax Purposes

Why is my residency status for federal income tax purposes important?

Since resident and nonresident aliens are taxed differently, it is important for you to determine your status. You are considered a nonresident alien for any period that you are neither a United States citizen nor a United States resident alien.

How do I know if I am considered a resident alien for federal income tax purposes?

You are considered a resident alien if you met one of two tests for the calendar year. The first test is the "green card test." If at any time during the calendar year you were a lawful permanent resident of the United States according to the immigration laws, and this status has not been rescinded or administratively or judicially determined to have been abandoned, you are considered to have met the green card test.

The second test is the "substantial presence test." To meet this test, you must have been physically present in the United States on at least 31 days during the current year, and 183 days during the 3 year period that includes the current year and the 2 years immediately before. To satisfy the 183 days requirement, count all of the days you were present in the current year, and one-third of the days you were present in the first year before the current year, and one-sixth of the days you were present in the second year before the current year. Do not count any day you were present in the United States as an "exempt individual" or commute from Canada or Mexico to work in the United States on more than 75% of the workdays during your working period. An exempt individual may be anyone in the following categories:

A foreign government-related individual,

A teacher or trainee with a J or Q visa who substantially complies with the requirements of the visa,

A student with an F, J, M, or Q visa who substantially complies with the requirements of the visa;
or

A professional athlete temporarily present to compete in a charitable sports event.

For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

I am a foreign national and came to this country on June 30th of last year. I have a H-1 visa. What is my tax status regarding residency nonresident alien, or resident alien?

You were a dual status alien last year. As an H-1 visa holder in the U.S. for 183 days or more, you likely became a resident, for tax purposes, as of June 30th. For the part of the year you are a resident alien, you are taxed on income from all sources. For the part of the year that you are not a resident alien, you are not taxed on income from sources outside the United States, unless the income is effectively connected with a trade or business in the United States. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

I have an H-1 visa and my husband has an F-1 visa. We both lived in the United States all last year and had income. What kind of form should we file? Do we file our taxes separately or jointly?

You will have met the substantial presence test and will be taxed as a resident alien for last year, while your husband is likely to be a nonresident alien. You may file a joint tax return if your husband makes the choice to be treated as a resident for the entire year. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

I was an international student (F-1 visa) until October 1, and then my visa status was changed to H-1. Should I file my income tax return as a dual status or nonresident alien?

Assuming you were not in the U.S. on your F-1 student visa for over 5 years, you may file as a nonresident for the entire year or, if you qualify under the first year choice, you may file as a dual status alien. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

Last year I changed my immigration status from an F-1 student to an H-1 worker. Does my status change how I file my tax return or what forms I use?

It depends on whether or not you qualify as a resident alien. As a foreign national temporarily in the U.S. and now under an H-1 visa, you must file Form 1040NR, *U.S. Nonresident Alien Income Tax Return*. You must also file Form 8843, *Statement for Exempt Individuals and Individuals with a Medical Condition* if you do not meet the substantial presence test. In order to file a Form 1040, Individual Tax Return, you must meet the substantial presence test. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

I entered the U.S. in August and I have a J-2 visa with an Employment Authorization (work permit). Can I be considered as a U.S. resident for tax purposes under the substantial presence test?

You will be considered a U.S. resident for tax purposes if you meet the substantial presence test for the calendar year. As an exempt individual, a J-2 visa holder will not initially meet this test. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

If someone in F or J immigration status was previously an F or J visa holder under a different stay, perhaps 10 years ago, do they need to include the previous stay in calculating the 2 or 5 year limit for exemption from the physical presence test?

Teachers and trainees (and their dependents) will not be exempt from counting their days of presence if he/she was exempt as a teacher, trainee or student for any part of 2 of the preceding 6 years. Publication 519, *U.S. Tax Guide for Aliens*. The student five-tax-year limit includes any time spent in exempt individual status after January 1, 1985. Therefore, any time in the U.S. in F, J, M, or Q immigration status (including dependents) may effect the calculation of the five-year period. For additional information, See Publication 519, *U.S. Tax Guide for Aliens*.

Is the following student a resident alien or dual status alien for taxes in 2002?

- Full-time PhD student
- Working off-campus (authorized)
- Held F1 visa in 1993, 1994, 1995, 2000, 2001, 2002
- Held B1 in 1996-1999 or early 2000
- Converted from F1 to H1B in June 2002

Always create a chart when determining tax residency, and begin from the year farthest in the past. This chart will begin in 1993.

2002	F1/H-1B	Non-exempt	RA
2001	F-1	Exempt Year 5	NRA
2000	F-1	Exempt Year 4	NRA (if COS was early 2000)
1999	B-1	Non-exempt	RA (if >183 days)
1998	B-1	Non-exempt	RA (if >183 days)
1997	B-1	Non-exempt	RA (if >183 days)
1996	B-1	Non-exempt	RA (if >183 days)
1995	F-1	Exempt year 3	NRA
1994	F-1	Exempt year 2	NRA
1993	F-1	Exempt year 1	NRA

Since this F-1 reached the 5-year limit as of 12/31/2001 and began counting days of physical presence on 1/1/02, the change of status (COS) from F-1 to H-1B did not change the result of the substantial presence test (SPT).

Are all J-1s subject to the 6 year look-back 2 year physical presence rule?

Only J non-students are subject to this rule. J students and their dependents follow the same five-year rule as F students and their dependents. For additional information, See Publication 519, *U.S. Tax Guide for Aliens*.

Is there a look-back rule for the 5 year rule for F-1s?

The rule for F and J students is a five-year lifetime limit, so one must look back to January 1, 1985 to see if there have been any years as an exempt individual to determine current year substantial presence test results. For additional information, See Publication 519, *U.S. Tax Guide for Aliens*.

Sometimes it would be better for a student to be considered a resident alien for tax purposes. Can they choose to be treated this way if it benefits them?

Nonresident aliens who are married to US citizens or residents can elect to file a joint return and be treated as a resident alien. Students and trainees from Barbados, Hungary and Jamaica, regardless of marital status may elect to be treated as a resident alien. All other nonresident students and scholars must follow the prescribed rules for counting or exempting their days of presence. For additional information, See Publication 519, *U.S. Tax Guide for Aliens*.

Deductions Nonresident Aliens

Can nonresident aliens claim the standard deduction?

Nonresident aliens **cannot** claim the standard deduction. However, a special rule applies to **students** and **business apprentices** who are eligible for the U.S.-**India** treaty benefits. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

Does a nonresident alien get a deduction for state or local income taxes?

Yes, the nonresident can take a deduction for state and local income taxes that have been withheld by the payer. The deduction can be taken on Form 1040NR, *U.S. Nonresident Alien Income Tax Return* or Form 1040NR-EZ, *U.S. Income Tax Return for Certain Nonresident Aliens with No Dependents*. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

What charitable contributions can the nonresident alien include on the tax return?

Charitable contributions or gifts to qualified organizations can be deducted on Form 1040NR, *U.S. Nonresident Alien Income Tax Return*, subject to certain limitations. Qualified organizations include organizations that are religious, charitable, educational, scientific, or literary in nature, or that work to prevent cruelty to children or animals. Contributions made directly to a foreign organization are not deductible. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

Can a nonresident alien deduct a loss from a theft of property?

Casualty and theft losses are deductible on Form 1040NR, *U.S. Nonresident Alien Income Tax Return*. Several limitations apply. For additional information, see Publication 519, *U.S. Tax Guide for Aliens* and Form 4684, *Casualties and Thefts*.

What job expenses can a nonresident alien deduct?

Expenses such as allowable unreimbursed travel expenses and other expenses such as union dues and safety equipment are deductible on Form 1040NR, *U.S. Nonresident Alien Income Tax Return*. Several limitations apply. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

Can students and scholars deduct costs associated with their jobs. What costs can be included and where would they be deducted?

The nonresident can deduct job expenses, such as allowable unreimbursed travel expenses. Generally, the allowable deductions must be related to effectively connected income. Job expenses are a miscellaneous itemized deduction and they are subject to a 2% of Adjusted Gross Income (AGI) limit. Publication 519, *U.S. Tax Guide for Aliens*.

Can a nonresident take a deduction for the expenses he incurs as an educator?

If a nonresident was a qualified educator, he or she may deduct qualified expenses. An eligible educator is a kindergarten through grade 12 teacher, instructor, counselor, principal or aide for at least 900 hours during the school year. For additional information, see the Instructions to Form 1040NR, *U.S. Nonresident Alien Income Tax Return*.

Educational Expenses Nonresident Aliens

Can nonresident aliens claim a credit for tuition paid to go to school?

If you are a nonresident alien for any part of the year, you generally cannot claim the education credits. However, if you are married and choose to file a joint return with a U.S. citizen or resident spouse, you may be eligible for the Hope or Lifetime Learning Credit. For additional information, see Publication 970, *Tax Benefits for Education* and Publication 519, *U.S. Tax Guide for Aliens*.

Can nonresident aliens deduct tuition and fees they pay?

If you are a nonresident alien for any part of the year, you generally cannot deduct the tuition and fees as an adjustment to income. However, if you are married and choose to file a joint return with a U.S. citizen or resident spouse, you may be eligible for the deduction. For additional information, see Publication 970, *Tax Benefits for Education* and Publication 519, *U.S. Tax Guide for Aliens*.

Can a nonresident alien take a deduction for student loan interest?

If you paid interest on a student loan, you may be able to deduct the interest if you meet all of the following requirements:

- 1) Your filing status is any filing status except married filing separately
- 2) Your income is less than \$65,000
- 3) No one else claims you as a dependent
- 4) The loan was taken out to pay tuition and other qualified expenses
- 5) The educational expenses were paid or incurred within a reasonable period of time before or after the loan was taken out
- 6) The person for whom the expenses were paid was an eligible student

For additional information, see Publication 970, *Tax Benefits for Education* and Publication 519, *U.S. Tax Guide for Aliens*.

Form 8843, Statement for Exempt Individuals and Individuals with a Medical Condition

What happens if the student doesn't file the form 8843?

If Form 8843 is not filed, the alien can't exclude their days of presence from the SPT. This could mean that they will be viewed as a resident alien for tax purposes. They would have to report all of their world-wide income on the U.S. tax return and they may not be able to claim their treaty benefits.

I'm a first-year F-1 student and I had no U.S. earned income or scholarships. Do I need to file any federal income tax papers?

Yes. You must file Form 8843, *Statement for Exempt Individuals and Individuals with a Medical Condition*. If any family members are here with you (F-2 status) they must also file a Form 8843. For additional information see the instructions included in Form 8843.

I arrived in the U.S. in December of last year. Do I still have to file a Form 8843?

Yes. If you were present in the U.S. for even 1 day, you must file Form 8843 if you are excluding days of presence from the substantial presence test.

Filing Status, Dependents and other Family Issues Nonresident Aliens

Can you please review which nonresidents can claim dependents and what the tests are? What are the five tests for determining if someone qualifies as a dependent?

Nonresidents (for income tax purposes) from the following countries may be able to claim their dependents and/or spouse on their return.

Canada, Mexico, Japan, South Korea and Students from India

Refer to Publication 519, *U.S. Tax Guide for Aliens*, for additional information. The five dependency tests that must be met are:

- Gross Income
- Member of Household
- Joint Return
- Support
- Citizen or Resident

For additional information, see Publication 501, *Exemptions, Standard Deduction and Filing Information*.

I thought that children from the 5 countries you mentioned can only be claimed if they were US citizens or permanent residents. Is that true?

To meet the citizen or resident test, a person must be a U.S. citizen or resident, or a resident of Canada or Mexico, for some part of the year. For additional information, see Publication 501, *Exemptions, Standard Deduction and Filing Information*.

I have a child who was born in the U.S. Can I claim an exemption for my wife and child?

If you are a nonresident alien for federal income tax purposes you generally can't claim exemptions for your family members. There are exceptions for students and scholars from Canada, Mexico, Japan, Korea and India. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

I am a married nonresident alien. My wife is here with me in J-2 immigration status. Can we file a joint return?

Generally, you cannot file as married filing jointly if either spouse was a nonresident alien at any time during the tax year. However, nonresident aliens married to U.S. citizens or residents can choose to be treated as U.S. residents and file joint returns. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*. Married nonresident aliens who are not married to US citizens or residents generally must use the Tax Table column or the Tax Rate Schedule for married filing separate returns when determining the tax on income effectively connected with a US trade or business. They normally cannot use the Tax Table column or the Tax Rate Schedule for single individuals. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

I am a scholar from Canada. My wife died last year and I have two dependent children. What filing status should I use on my U.S. income tax return?

You may be eligible to file as a qualifying widow and use the joint return tax rates if you meet certain requirements. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

I am the head of my household. As a nonresident alien, how do I claim the head of household filing status?

You cannot file as head of household if you are a nonresident alien at any time during the tax year. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

How, When and Where to File Form 1040NR, U.S. Nonresident Alien Tax Return or Form 1040NR/EZ, U.S. Income Tax Return for Certain Nonresident Aliens with No Dependents

Can Form 1040NR be filed electronically?

Not at this time. Private companies offer software that helps prepare the forms, but the forms must be printed out and mailed to the Internal Revenue Service. The forms can't be faxed. For additional information see the *Instructions to Form 1040NR, U.S. Nonresident Alien Tax Return*.

Where can I find the mailing address? Can the tax forms be folded? What size envelope is needed? What needs to be attached to the form?

The mailing address for the return is listed in the instructions to the form. You may fold the tax return before sending it. There is no specified envelope size for your return. Attach one copy of each W-2 or 1042-S form that you received. For additional information see the *Instructions to Form 1040NR, U.S. Nonresident Alien Tax Return*.

What is the due date for the Form 1040NR? Is it the same for the Form 1040NR-EZ?

If the alien received any wages subject to withholding, such as nonresident alien student working on campus, the return is due on the 15th day of the fourth month following the end of the year. This generally means that the return will be due on April 15. The type of form (1040NR or 1040NR-EZ) does not change the due date. For additional information see the *Instructions to Form 1040NR, U.S. Nonresident Alien Tax Return*.

What private delivery services can I use to file my forms?

Certain private delivery services are designated by IRS to meet the "timely mailing as timely filing/paying" rule. These delivery services can't deliver to a P.O. Box. For additional information see the *Instructions to Form 1040NR, U.S. Nonresident Alien Tax Return*.

Who signs the form?

Form 1040NR (or Form 1040NR-EZ) is not considered a valid return unless the nonresident alien signs it. Under certain conditions, an agent may sign for the nonresident alien. For additional information see the *Instructions to Form 1040NR, U.S. Nonresident Alien Tax Return*.

Can a nonresident alien pay their taxes by credit card? How would they do this?

At this time, the service providers who process credit card payments for the Internal Revenue Service (IRS) do not accept payments for Forms 1040NR or 1040NR-EZ. Any amount due on these forms should be paid by check or money order payable to the "United States Treasury". Please include the social security number on the payment.

What is the difference between the Form 1040NR and the Form 1040NR-EZ? Which form should I use? Will using the longer form save me some money?

It is always advisable to use the simplest form that will accommodate all of your income and deductions. The instructions to the forms explain who can file the form. Using the longer form will only save you money, if you have items to list on it that you could not list on the shorter form (ex. Gifts to US charities)

Should I keep a copy of my tax return?

Yes. You should make a copy of your completed return and keep it in your files.

Will the IRS send me anything to let me know that they got my return?

No. You can however, take the return to the local IRS office to turn it in. They can stamp your copy of the return with a receipt stamp.

What happens if I fail to file my taxes?

If you owe taxes and don't file, you may be assessed penalty and interest. There may also be immigration consequences for failing to file taxes. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

I'm a first-year F-1 student and I had no U.S. earned income or scholarships. Do I need to file any federal income tax papers?

Yes. You must file Form 8843, *Statement for Exempt Individuals and Individuals with a Medical Condition*. If any family members are here with you (F-2 status) they must also file a Form 8843. For additional information see the instructions included in Form 8843.

If I owe tax, to whom do I make the check payable?

The check should be made payable to **United States Treasury**. You should include your social security number on the check.

Scholarships, Fellowships, Grants and Awards for Nonresident Aliens

As a condition of their employment, Resident Assistants are required to live in the dorm. The room is provided for free, is this taxable income?

Since the employment required the student to live in the dorm for the convenience of the employer, the value of the lodging is not taxable. For additional information, see Publication 970, *Tax Benefits for Higher Education*.

Are graduate assistantships taxable?

Yes, the cash stipend (salary portion) of an assistantship, whether a research assistantship or a teaching assistantship, is considered compensation for services rendered and is fully taxable (unless excluded by treaty). The portion of the assistantship which serves as tuition remission (tuition waiver) is considered a scholarship and is exempt from taxation. For additional information, see Publication 970, *Tax Benefits for Higher Education*.

Are athletic scholarships considered earned income since services must be preformed? Is this taxable income?

Athletic scholarships are not considered **earned** income even though they require the recipient to perform services (play sports). An analogy can be made to academic scholarships that require the recipient to maintain a certain GPA. It takes "work" to maintain the GPA, but the scholarship is not considered earned income. However, any scholarship that covers room and board is taxable unless excludable by treaty. For additional information, see Publication 970, *Tax Benefits for Higher Education*.

Social Security Coverage FICA and Medicare Taxes Nonresident Aliens

Are international students and scholars subject to Social Security tax?

Generally, services performed by you as a nonresident alien temporarily in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act are not covered under the social security program if the services are performed to carry out the purpose for which you were admitted to the United States. This means that there will be no withholding of social security or Medicare taxes from the pay you receive for these services. For additional information, see Publication 519, *U.S. Tax Guide for Aliens*.

Under my visa as a temporary nonresident alien, I'm not subject to social security and Medicare withholding. My employer withheld the taxes from my pay. What should I do to get a refund of my social security and Medicare?

If social security tax and Medicare were withheld in error from pay received which was not subject to the taxes, you must first contact the employer who withheld the taxes for reimbursement. If you are unable to get a refund from the employer, file a claim for refund with the Internal Revenue Service on Form 843, *Claim for Refund and Request for Abatement*.

You must attach the following to your claim:

- a copy of your Form W-2, *Wage and Tax Statement*, to prove the amount of tax withheld;
- Form I-797, *INS Approval Notice*, is needed if you have changed your status from F-1 or J-1 to another status prior to filing the claim;
- if your visa status changed during the tax year you should attach copies of the pay stubs that cover the period of exemption from social security taxes;
- a copy of INS Form I-94, Arrival/Departure Record, if you are still in the United States;
- a copy of your valid entry visa;
- Form 8316, *Information Regarding Request for Refund of Social Security Tax*, or a signed statement stating that you have requested a refund from the employer and have not been able to obtain one; and
- a copy of Form 1040NR, US Nonresident Alien Income Tax Return (or Form 1040NR-EZ), for tax the year in question. Processing of your claim may be delayed if you submit it less than six weeks after you filed Form 1040NR or 1040NR-EZ.

In addition to the documentation listed above foreign student visa holders should also attach the following: a copy of Form I-20, Certificate of Eligibility, endorsed by your student advisor and stamped by the Bureau of Citizenship and Immigration Services; and a copy of the Employment Authorization Document of your Optional Practical Training (e.g., Form I-766, I-538 or 688B). If you are an exchange visitor, attach a copy of Form IAP-66 or DS-2019 to your claim. File the claim, with attachments, with the IRS where the employer's returns were filed. If you do not know where the employer's returns were filed, send your claim to the Internal Revenue Service Center, Philadelphia, PA 19255.

I am a graduate student and serve as a teaching assistant. I would like to know whether FICA taxes need to be withheld from my pay.

Students who perform services for the school, college, or university where they are enrolled and regularly attend classes are usually not subject to social security and Medicare taxes.

As I understand the law, student stipends are exempt from FICA and Medicare taxes. If my university takes these taxes out of my stipend income, can these taxes be recovered in some way?

If you are not performing a service for the university, your stipend would be subject to income tax only if it does not meet the qualified scholarship rules. If you are performing a service for the university, your income is taxable for income tax purposes, but would generally be exempt from social security and Medicare taxes if you are enrolled and regularly attending classes. For additional information, see Publication 970, *Tax Benefits for Education*.

I am an F-1 student status who was employed during my school studies and directly afterwards I completed practical training. Do I have to pay FICA taxes? Which taxes should be taken out of my pay? Generally, services performed by you as a nonresident alien temporarily in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act are not covered under the social security and Medicare programs if the services are performed to carry out the purpose for which you were admitted to the United States. This means that there should be no withholding of social security or Medicare taxes from the pay you receive for these services. These types of services are very limited, and generally include only on-campus work, practical training, and economic hardship employment. However, you are covered under the social security and Medicare programs for these services if you are considered a resident alien, even though your nonimmigrant classification ("F," "J," "M," or "Q") remains the same. Social security and Medicare taxes will be withheld from your pay. For additional information, see Publication 519, U.S. Tax Guide for Aliens.

I entered the U.S. in August and I have a J-2 visa with an Employment Authorization (work permit). Can I be considered as a U.S. resident for tax purposes under the substantial presence test? Since my visa does not allow me to stay in this country am I subjected to social security tax and Medicare tax?

You will be considered a U.S. resident for tax purposes if you meet the substantial presence test for the calendar year. As an exempt individual, a J-2 visa holder will not initially meet this test. In general, U.S. social security and Medicare taxes apply to payments of wages for services performed as an employee in the United States, regardless of the citizenship or residence of either the employee or the employer. In limited situations, these taxes apply to wages for services performed outside the United States. This exception does not apply to a derivative visa holder. For additional information, see Publication 519, U.S. Tax Guide for Aliens.

Can you please explain the Social Security Exemption in more detail?

Generally, services performed by you as a nonresident alien temporarily in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act are not covered under the social security program if the services are performed to carry out the purpose for which you were admitted to the United States. This means that there will be no withholding of social security or Medicare taxes from the pay you receive for these services. These types of services are very limited, and generally include only on-campus work, practical training, and economic hardship employment. However, you are covered under the social security program for these services if you are considered a resident alien, even though your nonimmigrant classification ("F," "J," "M," or "Q") remains the same. Social security and Medicare taxes will be withheld from your pay.

If you are a nonresident alien admitted to the United States as a student, you generally are not permitted to work for a wage or salary or to engage in business while you are in the United States. In some cases, a student admitted to the United States in "F-1," "M-1," or "J-1" status is granted permission to work, and it is so noted on the student's conv of

Immigration Form I-94, Arrival-Departure Record. Social security and Medicare taxes are not withheld from pay for the work unless the student is considered a resident alien. **Note:** Any student who is enrolled and regularly attending classes at a school may be exempt from social security and Medicare taxes on pay for services performed for that school.

The Immigration and Naturalization Service (INS) permits on-campus work for students in "F-1" status if it does not displace a U.S. resident. On-campus work means work performed on the school's premises. On-campus work includes work performed at an off-campus location that is educationally affiliated with the school. On-campus work under the terms of a scholarship, fellowship, or assistantship is considered part of the academic program of a student taking a full course of study and is permitted by the INS. In this case, the educational institution endorses the Form I-20. Social security and Medicare taxes are not withheld from pay for this work unless the student is considered a resident alien. Employment due to severe economic necessity and for optional practical training is sometimes permitted for students in "F-1" status. Students granted permission to work due to severe economic necessity or for optional practical training will be issued Form I-688B or Form I-766 by INS. Social security and Medicare taxes are not withheld from pay for this work unless the student is considered a resident alien.

Students in "M-1" status who have completed a course of study can accept employment or practical training for up to six months and must have a Form I-688B or Form I-766 issued by INS. Social security and Medicare taxes are not withheld from "M-1" students' pay for these services unless the student is considered a resident alien.

For additional information, go to www.irs.gov.

Tax Credits Nonresident Aliens

Can a nonresident alien claim the Earned Income Credit?

If the taxpayer was a nonresident (for tax purposes) at any time during the year, they generally can't claim the Earned Income Credit (EIC). However, if they are married to a US citizen or resident and choose to file a joint return they may be eligible for the credit. For additional information see Publication 519, *U.S. Tax Guide for Aliens*.

Can nonresident aliens claim the Lifetime Learning Credit for tuition paid to go to school?

If you are a nonresident alien for any part of the year, you generally cannot claim the education credits. However, if you are married and choose to file a joint return with a U.S. citizen or resident spouse, you may be eligible for the Hope or Lifetime Learning Credit. For additional information, see Publication 970, *Tax Benefits for Higher Education*.

My young children live with me and my wife. We are both students and we must pay someone to watch our children. Can I claim the Child Care Credit?

Generally, no. Students from Canada, Mexico, Japan, Korea and India may be able to claim the credit. For additional information see Publication 519, *U.S. Tax Guide for Aliens*.

Treaties

How do I know if the U.S. has an income tax treaty with another country? Publication 901, *U.S. Tax Treaties*, has information regarding United States tax treaties. You can also locate the complete text of current treaties at www.irs.gov/businesses/international/index.html or use our search engine with keywords "income tax treaties."

I am a student from the People's Republic of China currently studying in the United States. How does the income tax treaty between the U.S. and China apply, especially for students with scholarships and fellowships?

If you are in the United States solely for the purpose of your education, training, or obtaining special technical experience, you may be able to exclude from your income grants or awards that you receive from a government, scientific, educational, or other tax-exempt organization. You also may be able to exclude payments that you receive from abroad for the purpose of your maintenance, education, study, research, or training and up to \$5,000 of income that you receive from personal services performed in the United States. Please refer to Publication 901, *U.S. Tax Treaties*, for further details.

What form is used to let the payor know that a treaty exists?

Alien students, teachers, and researchers who perform dependent personal services (as employees) can use Form 8233, *Exemption From Withholding on Compensation for Independent (and Certain Dependent) Personal Service of a Nonresident Alien*, to claim exemption from withholding of tax on compensation for services that is exempt from U.S. tax under a U.S. tax treaty. See Form 8233 for more information.

What about employees who aren't students or scholars?

If you are not a student, teacher, or researcher, but you perform services as an employee and your pay is exempt from U.S. income tax under a tax treaty, you can avoid having tax withheld from your wages. Give your employer a Form W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding*, for the tax year. For additional information, see Form W-8BEN.

Can resident aliens claim treaty benefits?

Generally, resident aliens can't claim treaty benefits. However, most treaties contain a provision known as a "saving clause." Exceptions specified in the saving clause may permit an exemption from tax to continue for income even after the recipient has otherwise become a U.S. resident alien for tax purposes. For additional information see Publication 519, *U.S. Tax Guide for Aliens* and Publication 901, *U.S. Tax Treaties*.

If someone has met the substantial presence test but is still eligible for treaty benefits, must they wait until they file their return to get the benefit? Can payroll honor the treaty?

A resident who is claiming an income tax treaty exemption from withholding tax based on a treaty article must submit a Form W-9, not a Form 8233, to the withholding agent (employer). For additional information, see Publication 519, *U.S. Tax Guide for Aliens* and Publication 901, *U.S. Tax Treaties*.

What does the term unlimited mean in the amount column of the charts in Publication 901?

Unlimited means that there is not a maximum on the dollar amount that the nonresident can exclude. For additional information, see Publication 901, *U.S. Tax Treaties*.

Are all amounts reported as code 15 on Form 1042S taxable?

Generally, the code 15 (scholarship) amounts reported on Form 1042S represent the portion of the scholarship that was for room and board expenses. Room and board scholarships are taxable unless there is a treaty benefit. Often, you can determine if there is an available treaty by looking at the exemption code in box 6 of the 1042S. For additional information see Publication 519, *U.S. Tax Guide for Aliens* and Publication 901, *U.S. Tax Treaties*.

Where do you put the treaty information on the Form 1040NR?

On the first page of the 1040NR, you report the total income exempt by a treaty. You must also complete question M on page 5 of the form. It is very important that you include the treaty article number in question M. The article number can be found in Publication 901. If the article number is omitted, the form will be returned to the taxpayer. For additional information see the instructions for Form 1040NR.

Where do you put the treaty information on the Form 1040NR-EZ?

On the front of the return, you report the total wages and scholarship exempt by a treaty. You must also complete question J on the back of the form. It is very important that you include the treaty article number in question M. The article number can be found in Publication 901. If the article number is omitted, the form will be returned to the taxpayer.

If a student has a tax treaty, how does this help him on his tax return?

Tax treaties generally allow a nonresident to exclude a specified amount of US source income from their US tax return. This in turn, reduces the tax liability.

A nonresident entered the U.S. in F-2 immigration status but was later granted F-1 status, without leaving the country. How long must the nonresident be out of the country to reestablish residency and potentially become eligible for treaty benefits?

A full year, 365 days.

If a student doesn't have any wages or taxable scholarship, how much is their treaty benefit?

There are treaty benefits for other types of income, such as a reduced tax rate on investment income. If the nonresident doesn't have **any** income, he/she would not benefit from the treaty provisions.

If the student is eligible for a treaty benefit on part of his wages but the full amount of the wages are reported on Form W-2, can he still claim the treaty benefit?

Yes, it is allowable for the nonresident to apply the full treaty benefit that he/she is entitled to on the federal return. However if the nonresident is claiming treaty benefits and he/she failed to submit adequate documentation to their employer, he/she must attach (to the federal tax return) a statement that provides all of the information that would have otherwise been required on the withholding document (Form 8233 or W-8BEN).

Does it make any difference if the amount is being paid by a foreign employer?

Yes, normally amounts received from a foreign employer are not taxable to nonresidents. Nonresidents are taxed on their US source income only.