International Students & Compliance with US Federal Tax Law

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Foreign Students Statistics

The Basics
Background questions

• When did the student enter into the U.S.?
• What type of visa does the student possess?
• Is the student from a tax treaty country?
• Is the student married to a U.S. resident or citizen?
• Is the student considered an “exempt Individual”? 
Types of Student Visas

- F1 Visa – Academic Studies
  - Optional Practical Training (OPT)
- J1 Visa – Practical Training
- M1 Visa – Non Academic / Vocational Studies
- Q-1/Q-2 – International cultural exchange programs
Non-resident Alien or Resident Alien?

- I.R.C. § 7701(b)(1)(A)
  Nonresident Alien – An alien who is temporarily residing in the U.S., a resident alien who has abandoned permanent residence in the U.S. or an alien who has never been in the U.S.

- I.R.C. § 7701(b)(1)(B)
  Resident Alien – Aliens admitted to the U.S. under permanent immigration visas are generally resident aliens and meet the substantial presence test or lawful permanent residency test. (Green Card Test)
Substantial Presence Test

• You meet this test if you were physically present in the United States for at least:
  – 31 days during 2019; and
  – 183 days during the period 2019, 2018, and 2017, counting all the days of physical presence in 2019 but only 1/3 the number of days of presence in 2018 and only 1/6 the number of days in 2017
Substantial Presence Test

- Generally, you are treated as being present in the United States on any day that you are physically present in the country at any time during the day. However, you don’t count the following days of presence in the United States for purposes of the substantial presence test.

  - Days you regularly commuted to work in the United States from a residence in Canada or Mexico.

  - Days you were in the United States for less than 24 hours when you were traveling between two places outside the United States.

  - Days you were temporarily in the United States as a regular crew member of a foreign vessel engaged in transportation between the United States and a foreign country or a possession of the United States unless you otherwise engaged in trade or business on such a day.

  - Days you were unable to leave the United States because of a medical condition or medical problem that arose while you were in the United States.

  - Days you were an exempt individual.
Substantial Presence Test – Student Visa Exemption

• Days present in the United States with a F, J, M or Q visa.

• Exemption period expires after the 5th calendar year.
Substantial Presence Test

- *Diran Li, v. Commissioner*, August 29, 2016T.C. Summ.Op. 2016-49 - The Tax Court held that taxpayer was nonresident alien for part of tax year at issue, and thus he was ineligible for education tax credits.
Green Card Test

• You are a resident, for U.S. federal tax purposes, if you are a Lawful Permanent Resident of the United States at any time during the calendar year.

• You are a Lawful Permanent Resident of the United States, at any time, if you have been given the privilege, according to the immigration laws, of residing permanently in the United States as an immigrant.

• You generally have this status if the U.S. Citizenship and Immigration Services (USCIS) issued you an alien registration card, Form I-551, also known as a "green card."
Optional Practical Training (OPT) for F-1 Students

• Eligible students can apply to receive up to 12 months of OPT employment authorization before completing their academic studies (pre-completion) and/or after completing their academic studies (post-completion). However, all periods of pre-completion OPT will be deducted from the available period of post-completion OPT.
Optional Practical Training (OPT) for F-1 Students

• F-1 students seek to switch nonimmigrant classification from F-1 student status to H-1B temporary employment status after completing a program of study or post-completion optional practical training (OPT). An F-1 student’s current or prospective employer may petition USCIS for H-1B status on their behalf.
Optional Practical Training (OPT) for F-1 Students

• F-1 Status Gap
  – F-1 students have only 60 days to take the steps necessary to maintain legal status or depart the United States.
  – Change to H-1B status does not occur until Oct. 1, an F-1 student previously had two or more months following the 60-day period with no legal status.

• F-1 Status Gap Extension
  – Extends F-1 status and, if applicable, post-completion OPT employment authorization from April 1 to Sept. 30 for eligible F-1 students.
Tax Filings
Individual Taxpayer Identification Numbers (ITINs)

• Who needs an ITIN?
  – Nonresident alien who is required to file a U.S. tax return
  – U.S. resident alien who is (based on days present in the United States) filing a U.S. tax return
  – Dependent or spouse of a U.S. citizen/resident alien
  – Dependent or spouse of a nonresident alien visa holder
  – Nonresident alien claiming a tax treaty benefit
  – Nonresident alien student, professor or researcher filing a U.S. tax return or claiming an exception
Social Security Numbers (SSN’s)

• Only noncitizens authorized to work in the United States by the Department of Homeland Security (DHS) can get a Social Security number.

• Every F and M student who U.S. Citizenship and Immigration Services (USCIS) grants employment authorization to work needs an SSN.
Filing Requirements

• Filing **IS** required by nonresident alien students and scholars who have:
  – A taxable scholarship or fellowship grant,
  – Income partially or totally exempt from tax under the terms of a tax treaty; and/or
  – Any other income that is taxable under the Internal Revenue Code.
Filing Requirements

• Filing **IS NOT** required by nonresident alien students and scholars who have income only from:

  – Foreign sources;
  – Interest Income from a:
    • U.S. bank
    • U.S. savings & loan institution
    • U.S. credit union
    • U.S. insurance company
Form W-8BEN, Certificate of Foreign Status

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**Form W-8BEN**
Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals)

Do NOT use this form if:
- You are NOT an individual
- You are a U.S. citizen or other U.S. person, including a resident alien individual
- You are a beneficial owner claiming that income is effectively connected with the conduct of trade or business within the U.S.
- You are a beneficial owner receiving compensation for personal services performed in the United States
- You are a person acting as an intermediary

Instead, use Form:
- W-8BEN-E
- W-9
- W-4ECI
- 8233 or W-4
- W-8IMY

**Note:** If you are resident in a FATCA partner jurisdiction (i.e., a Model 1 IGA jurisdiction with reciprocity), certain tax account information may be provided to your jurisdiction of residence.

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**Part I  Identification of Beneficial Owner (see instructions)**

<table>
<thead>
<tr>
<th>Name of individual who is the beneficial owner</th>
<th>Country of citizenship</th>
</tr>
</thead>
</table>

3. **Permanent residence address (street, apt., or suite no., or rural route). Do not use a P.O. box or in-care-of address.**

<table>
<thead>
<tr>
<th>City or town, state or province, include postal code where appropriate.</th>
<th>Country</th>
</tr>
</thead>
</table>

4. **Mailing address (if different from above)**

<table>
<thead>
<tr>
<th>City or town, state or province, include postal code where appropriate.</th>
<th>Country</th>
</tr>
</thead>
</table>

6. **U.S. taxpayer identification number (SSN or ITIN), if required (see instructions)**

7. **Foreign tax identifying number (see instructions)**

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**Part II  Claim of Tax Treaty Benefits (for chapter 3 purposes only) (see instructions)**

9. **I certify that the beneficial owner is a resident of within the meaning of the income tax treaty between the United States and that country.**

10. **Special rates and conditions (if applicable—see instructions): The beneficial owner is claiming the provisions of Article and paragraph of the treaty identified on line 9 above to claim a % rate of withholding on (specify type of income):**

   Explain the additional conditions in the Article and paragraph the beneficial owner meets to be eligible for the rate of withholding:
Forms to File

• Residents:
  – Form 1040, U.S. Individual Income Tax Return

• Non Residents
  – Form 1040NREZ, U.S. Income Tax Return for Certain Nonresident Aliens With No Dependents
  – Form 1040NR, U.S. Nonresident Alien Income Tax Return,
  – Form 8843, Statement for Exempt Individuals and Individuals With a Medical Condition
Form 1040NR-EZ, *U.S. Nonresident Alien Income Tax Return With No Dependents*

- **Who must file?**
  - If you were a nonresident alien engaged in a trade or business in the United States.
  - You have no income from a trade or business conducted in the United States.
  - You have no income from U.S. sources, or
  - Your income is exempt from U.S. tax under a tax treaty or any section of the Internal Revenue Code.
Form 1040NR-EZ, U.S. Nonresident Alien Income Tax Return With No Dependents

• Exception
  – You do not need to file Form 1040NR-EZ (or Form 1040NR) if you meet the following exception. You were a nonresident alien student, teacher, or trainee who was temporarily present in the United States under an “F,” “J,” “M,” or “Q” visa, and you have no income (such as wages, salaries, tips, etc., or scholarship or fellowship grants) that is subject to tax under section 871.
Table A. **Who Must File Form 1040NR**

<table>
<thead>
<tr>
<th>Condition</th>
<th>Requirements</th>
</tr>
</thead>
</table>
| 1. You were a nonresident alien engaged in a trade or business in the United States during 2018. You must file even if: | a. You have no income from a trade or business conducted in the United States,  
b. You have no U.S. source income, or  
c. Your income is exempt from U.S. tax under a tax treaty or any section of the Internal Revenue Code. |
|                                                                            | However, if you have no gross income* for 2018, do not complete the schedules for Form 1040NR. Instead, attach a list of the kinds of exclusions you claim and the amount of each. |
| 2. You were a nonresident alien not engaged in a trade or business in the United States during 2018 and:              | a. You received income from U.S. sources that is reportable on Schedule NEC, lines 1 through 12; and  
b. Not all of the U.S. tax that you owe was withheld from that income. |
| 3. You owe any special taxes, including any of the following.               | a. Alternative minimum tax.  
b. Additional tax on a qualified plan, including an individual retirement arrangement (IRA), or other tax-favored account. (If you are filing a return only because you owe this tax, you can file Form 5329 by itself.)  
c. Household employment taxes. (If you are filing a return only because you owe these taxes, you can file Schedule H (Form 1040) by itself.)  
d. Social security and Medicare tax on tips you did not report to your employer or on wages you received from an employer who did not withhold these taxes.  
e. Recapture of first-time homebuyer credit. See the instructions for line 59b.  
f. Write-in taxes or recapture taxes, including uncollected social security and Medicare or RRTA tax on tips you reported to your employer or on group-term life insurance and additional taxes on health savings accounts. See the instructions for line 50. |
| 4. You received HSA, Archer MSA, or Medicare Advantage MSA distributions.  | |
Form 1040NR, U.S. Nonresident Alien Income Tax Return

• Social security or Medicare taxes withheld in error:
  – Contact the employer who withheld the taxes for a refund.
  – File Form 843, Claim for Refund and Request for Abatement
Form 8843, Statement for Exempt Individuals and Individuals With a Medical Condition

• Who must file
  – If you are an alien individual, file Form 8843 to explain the basis of your claim that you can exclude days present in the United States for purposes of the substantial presence test because you:
    • Were an exempt individual, or
    • Were unable to leave the United States because of a medical condition or medical problem.
Form 8843, Statement for Exempt Individuals and Individuals With a Medical Condition

- Exempt Individual
  - foreign scholars, teachers, researchers, trainees, physicians, au pairs, summer camp workers, and other non-students
  - exempt individual during the first five calendar years of their physical presence in the United States
Form 8843, Statement for Exempt Individuals and Individuals With a Medical Condition

• Exempt Individual
  – foreign scholars, teachers, researchers, trainees (including medical interns), physicians, au pairs, summer camp workers, and other non-immigrants
  • exempt individual during the first two calendar years of their physical presence in the United States.
Penalty for Not Filing Form 8843

• Penalty for Not Filing Form 8843
  – may not exclude the days you were present in the United States

• Remedy
  – provide reasonable action steps to comply
Source Documents

- Form 1042-S, *Foreign Person’s U.S. Source Income Subject to Withholding*
- Form W-2, Wage and Tax Statement
- Form 1098-T, *Tuition Payments Statement*
- Form 1099-INT, *Interest Income*
- Form 1099-MISC, *Miscellaneous Income*
Consequences of Failure to File

- Loss of refund
- May jeopardize immigration status
- Visa renewals may be denied
- Interest and penalties accrue if balances are due to the IRS
Other Forms

• Form 8833, *Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b).*

• Form 8233, *Exemption From Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual*

• Form 8840, *Closer Connection Exception Statement for Aliens*
Other Considerations
Tax Treaties

• The United States has tax treaties with a number of foreign countries. Under these treaties, residents (not necessarily citizens) of foreign countries are taxed at a reduced rate, or are exempt from U.S. taxes on certain items of income they receive from sources within the United States.

• These reduced rates and exemptions vary among countries and specific items of income. Under these same treaties, residents or citizens of the United States are taxed at a reduced rate, or are exempt from foreign taxes, on certain items of income they receive from sources within foreign countries.
Appendix A—Tax Treaty Exemption Procedure for Students

Belgium

1. I was a resident of Belgium on the date of my arrival in the United States. I am not a U.S. citizen. I have not been lawfully accorded the privilege of residing permanently in the United States as an immigrant.

2. I am present in the United States for the purpose of my education or training.

3. I will receive compensation for personal services performed in the United States. This compensation qualifies for exemption from withholding of federal income tax under the tax treaty between the United States and Belgium in an amount not in excess of $9,000 for any tax year.

4. I arrived in the United States on [insert the date of your last arrival in the United States before beginning study or training]. For a trainee who is temporarily present in the United States for the purpose of securing training required to practice a profession or professional specialty, the treaty exemption is available only for compensation paid during a period of two years.

Pakistan

1. I am a resident of Pakistan. I am not a U.S. citizen. I have not been lawfully accorded the privilege of residing permanently in the United States as an immigrant and would not otherwise be considered a resident alien for the relevant tax year.

2. I am temporarily present in the United States solely as a student at [insert the name of the recognized university, college, or school in the United States at which you study].

3. I will receive compensation for personal services performed in the United States. This compensation qualifies for exemption from withholding of federal income tax under the tax treaty between the United States and Pakistan in an amount not in excess of $5,000 for any tax year.

China, People's Republic of

1. I was a resident of the People's Republic of China on the date of my arrival in the United States. I am not a U.S. citizen.

2. I am present in the United States solely for the purpose of my education or training.

3. I will receive compensation for personal services performed in the United States. This compensation qualifies for exemption from withholding of federal income tax under the tax treaty between the United States and the People's Republic of China in an amount not in excess of $5,000 for any tax year.

4. I arrived in the United States on [insert the date of your last arrival in the United States before beginning study or training]. I am claiming this exemption only for such period of time as is reasonably necessary to complete the education or training.
Tax Treaties

*Dovzhenok v. Commissioner*, November 30, 2017 T.C. Summ.Op. 2017-86. The petitioner raised whether the payments he received during 2009 and 2010, amounting to $18,917 and $19,708, respectively, are exempt from U.S. taxation under article 18 of the treaty between Russia and the United States.
Tax Treaties

*Zhongxia Ye v. Commissioner*, November 06, 2017 T.C. Memo. 2017-216. The Court held taxpayer was “resident alien” in United States for tax purposes, and wages paid to taxpayer as an assistant university professor were not exempt from taxation under agreement between United States and People's Republic of China to avoid double taxation and prevent tax evasion.
Disclosure Forms

• FinCen 114 (FBAR’s)
• Form 3520, Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts
• Form 8621, Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund
• Form 8938, Statement of Specified Foreign Financial Assets
Capital Gains

• A flat tax of 30 percent was imposed on U.S. source capital gains in the hands of nonresident alien individuals physically present in the United States for 183 days or more during the taxable year.

• This assumes that such capital gains are not effectively connected with the conduct of a United States trade or business.

• If the capital gains and dividends are effectively connected with a U.S. trade or business, they are taxed according to the same rules and at the same rates that apply to U.S. citizens and residents.
Questions