

for the entire year or subject to taxation as a resident in both foreign countries for the period during which the individual maintains a tax home in each foreign country.

(f) *Closer connection exception unavailable.* An alien individual who has personally applied, or taken other affirmative steps, to change his or her status to that of a permanent resident during the current year or has an application pending for adjustment of status during the current year will not be eligible for the closer connection exception. Affirmative steps to change status to that of a permanent resident include, but are not limited to, the following—

(1) The filing of Immigration and Naturalization Form I-508 (Waiver of Immunities) by the alien;

(2) The filing of Immigration and Naturalization Form I-485 (Application for Status as Permanent Resident) by the alien;

(3) The filing of Immigration and Naturalization Form I-130 (Petition for Alien Relative) on behalf of the alien;

(4) The filing of Immigration and Naturalization Form I-140 (Petition for Prospective Immigrant Employee) on behalf of the alien;

(5) The filing of Department of Labor Form ETA-750 (Application for Alien Employment Certification) on behalf of the alien; or

(6) The filing of Department of State Form OF-230 (Application for Immigrant Visa and Alien Registration) by the alien.

(g) *Filing requirements.* See § 301.7701(b)-8 with regard to the statement that must be filed by an alien individual claiming the closer connection exception.

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**§ 301.7701(b)-3 Days of presence in the United States that are excluded for purposes of section 7701(b).**

(a) *In general.* In computing days of presence in the United States, an alien is considered to be present if the individual is physically present in the United States at any time during the day (see § 301.7701(b)-1(c)(2)(i)). However, for purposes of section 7701(b) and the regulations under that section, the

following days shall be excluded and will not count as days of presence in the United States—

(1) Any day that an individual is present in the United States as an exempt individual;

(2) Any day that an individual is prevented from leaving the United States because of a medical condition that arose while the individual was present in the United States;

(3) Any day that an individual is in transit between two points outside the United States; and

(4) Any day on which a regular commuter residing in Canada or Mexico commutes to and from employment in the United States.

(b) *Exempt individuals*—(1) *In general.* An exempt individual is an individual who is either a—

(i) Foreign government-related individual as defined in paragraph (b)(2) of this section;

(ii) Teacher or trainee as defined in paragraph (b)(3) of this section;

(iii) Student as defined in paragraph (b)(4) of this section; or

(iv) Professional athlete as defined in paragraph (b)(5) of this section.

(2) *Foreign government-related individual*—(i) *In general.* A foreign government-related individual is an individual (and that individual's immediate family) who is temporarily present in the United States—

(A) As a full-time employee of an international organization;

(B) By reason of diplomatic status; or

(C) By reason of a visa that the Secretary of the Treasury or his or her delegate (after consultation with the Secretary of State when appropriate) determines represents full-time diplomatic or consular status. An individual described in this paragraph shall be considered to be temporarily present in the United States if the individual is not a lawful permanent resident as described in § 301.7701(b)-1(b)(1), regardless of the actual amount of time that the individual is present in the United States.

(ii) *Definition of international organization.* The term “international organization” means any public international organization that has been designated by the President by Executive Order as being entitled to enjoy the privileges,

exemptions, and immunities provided for in the International Organizations Act (22 U.S.C. 288). An individual described in paragraph (b)(2)(i) of this section will be a full-time employee of an international organization if that individual's employment with the organization is consistent with an employment schedule of a person with a standard full-time work schedule with the organization.

(iii) *Full-time diplomatic or consular status.* An individual is considered to have full-time diplomatic or consular status if—

(A) The individual has been accredited by a foreign government recognized de jure or de facto by the United States;

(B) The individual intends to engage primarily in official activities for that foreign government while in the United States; and

(C) The individual has been recognized by the President, or by the Secretary of State, or by a consular officer acting on behalf of the Secretary of State, as being entitled to such status.

(3) *Teacher or trainee.* A teacher or trainee includes any individual (and that individual's immediate family), other than a student, who is admitted temporarily to the United States as a nonimmigrant under section 101(a)(15)(J) (relating to the admission of teachers and trainees into the United States) or section 101(a)(15)(Q) (relating to the admission of participants in international cultural exchange programs) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15) (J), (Q)) and who substantially complies with the requirements of being admitted.

(4) *Student.* A student is any individual (and that individual's immediate family) who is admitted temporarily to the United States as a nonimmigrant under section 101(a)(15)(F) or (M) (relating to the admission of students into the United States) or as a student under section 101(a)(15)(J) (relating to the admission of teachers and trainees into the United States) or section 101(a)(15)(Q) (relating to the admission of participants in international cultural exchange programs) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15) (F), (J), (M), (Q)) who substantially complies with

the requirements of being admitted. For rules concerning taxation of certain nonresident students or trainees, see section 871(c) and § 1.871-9(a) of this chapter.

(5) *Professional athlete.* A professional athlete is an individual who is temporarily present in the United States to compete in a charitable sports event described in section 274(1)(1)(B). For purposes of computing the days of presence in the United States, only days on which the athlete actually competes in a charitable sports event described in section 274(1)(1)(B) shall be excluded. Thus, days on which the individual is present to practice for the event, to perform promotional or other activities related to the event, or to travel between events shall be included for purposes of the substantial presence test.

(6) *Substantial compliance.* An individual described in paragraph (b) (3) or (4) of this section will be deemed to comply substantially with the visa requirements relevant to residence for tax purposes if the individual has not engaged in activities that are prohibited by the Immigration and Nationality Act and the regulations thereunder and could result in the loss of F, J or M visa status. An individual will not be deemed to comply substantially with the visa requirements relevant to residence for tax purposes merely by showing that the individual's visa has not been revoked. An independent determination of substantial compliance may be made by the Internal Revenue Service for any individual claiming to be an exempt individual under paragraph (b) (3) or (4) of this section. For example, if an individual with an F visa (student visa) is found to have accepted unauthorized employment or to have maintained a course of study that is not considered by the Internal Revenue Service to be full-time, the individual will not be considered to comply substantially with the individual's visa requirements regardless of whether the individual's visa has been revoked.

(7) *Limitation on teacher or trainee and student exemptions—(i) Teacher or trainee limitation in general.* Except as otherwise provided, an individual shall not exclude days of presence as a teacher

or trainee if the individual has been exempt as a teacher, trainee, or student for any part of two of the six preceding calendar years.

(ii) *Special teacher or trainee limitation for section 872(b)(3) compensation.* If—

(A) A teacher or trainee receives compensation in the current year and all of that compensation is described in section 872(b)(3);

(B) That individual was present in the United States as a teacher or trainee in any prior year within the last 6 years; and

(C) During each prior year (within the 6 year period) in which the individual was present as a teacher or trainee, the individual received compensation all of which was described in section 872(b)(3);

Then that individual shall include days of presence as a teacher or trainee in the current year only if the individual has been exempt as a teacher, trainee, or student for any part of four of the six preceding calendar years.

(iii) *Limitation on student exemption.* An individual will not be able to exclude days of presence as a student if the individual has been exempt as a teacher, trainee, or student for any part of more than five calendar years, unless it is established to the satisfaction of the district director that the individual does not intend to reside permanently in the United States and has substantially complied with the requirements of the student visa providing for the individual's temporary presence in the United States. For purposes of this paragraph (b)(7), the facts and circumstances to be considered in determining if an individual has demonstrated an intent to reside permanently in the United States include (but are not limited to)—

(A) Whether the individual has maintained a closer connection with a foreign country as described in §301.7701(b)-2; and

(B) Whether the individual has taken affirmative steps within the meaning of paragraph (f) of §301.7701(b)-2 to adjust the individual's status from non-immigrant to lawful permanent resident.

(iv) *Transition rule.* The rules in this paragraph (b)(7) relating to stated periods of exempt status apply only for

those stated periods that occur after 1984. Thus, for example, an alien who is present as a student during the calendar years 1982-1990 will not be subject to the five year rule for students until 1990.

(v) *Examples.* The following examples illustrate the application of paragraphs (b)(7) (i) and (ii) of this section:

*Example 1.* B is temporarily present in the United States during the current year as a teacher, within the meaning of section 101(a)(15)(J) of the Immigration and Nationality Act. B does not receive compensation described in section 872(b)(3) in the current year. B has been treated as an exempt student for the past three years. Although this is the first year that B is seeking to be exempt as a teacher, he will not be considered an exempt individual for the year because he has been exempt as a student for at least two of the past six years.

*Example 2.* C is temporarily present in the United States during the current year as a teacher and receives compensation described in section 872(b)(3) in the current year. C has been treated as an exempt teacher for the past two years but C's compensation for those years was not described in section 872(b)(3). C will not be considered an exempt individual for the current year because she has been exempt as a teacher for at least two of the past six years.

*Example 3.* The facts are the same as in *Example 2*, except that all of C's compensation for the two preceding years was described in section 872(b)(3). C will be considered to be an exempt individual for the current year because she has not been exempt as a student, teacher or trainee for four of the six preceding calendar years.

*Example 4.* D is temporarily present in the United States during the current year as a teacher, within the meaning of section 101(a)(15)(J) of the Immigration and Nationality Act. D does not receive compensation described in section 872(b)(3) in the current year. D entered the United States in December of the second preceding year and intends to remain in the United States until June of the current year. D will not be considered an exempt individual for the current year because he has been exempt as a teacher for at least two of the past six years.

(8) *Immediate family.* The immediate family of an exempt individual includes the individual's spouse and unmarried children (whether by blood or adoption) but only if the spouse's or unmarried children's visa status are derived from and dependent on the visa classification of the exempt individual. For the purposes of this paragraph, the

term *unmarried children* means those children who are under 21 years of age, who reside regularly in the household of the exempt individual, and who are not members of some other household. The immediate family of an exempt individual does not include the attendants, servants, and personal employees of that individual.

(c) *Medical condition*—(1) *In general.* An individual will not be considered present on any day that the individual intends to leave and is unable to leave the United States because of a medical condition or medical problem that arose while the individual was present in the United States. A day of presence will not be excluded if the individual, who was initially prevented from leaving, is subsequently able to leave the United States and then remains in the United States beyond a reasonable period for making arrangements to leave the United States. A day will also not be excluded if the medical condition arose during a prior stay in the United States (whether or not days of presence during the prior stay were excluded) and the alien returns to the United States for treatment of the medical condition or medical problem that arose during the prior stay.

(2) *Intent to leave the United States.* For purposes of paragraph (c)(1) of this section, whether an individual intends to leave the United States on a particular day will be determined based on all the facts and circumstances. Thus, if at the time an individual's medical condition or medical problem arose, the individual was present in the United States for a definite purpose which by its nature could be accomplished within the United States during a period of time that would not cause the individual to be a resident under the substantial presence test, the individual may be able to establish that he or she intended to leave the United States. However, if the individual's purpose is of such a nature that an extended period of time would be required for its accomplishment (sufficient to cause the individual to be a resident under the substantial presence test), the individual would not be able to establish the requisite intent to leave the United States. If the individual is present in the United States

for no particular purpose or a purpose by its nature that does not require a specific period of time to accomplish, the determination of whether the individual has the requisite intent to leave the United States will depend on all the surrounding facts and circumstances. In the case of an individual adjudicated mentally incompetent, proof of intent to leave the United States may be determined by analyzing the incompetent's pattern of behavior prior to the adjudication of incompetence. Generally, an individual will be presumed to have intended to leave during a period of illness if the individual leaves the United States within a reasonable period of time (time to make arrangements to leave) after becoming physically able to leave.

(3) *Pre-existing medical condition.* A medical condition or problem will not be considered to arise while the individual is present in the United States, if the condition or problem existed prior to the individual's arrival in the United States, and the individual was aware of the condition or problem, regardless of whether the individual required treatment for the condition or problem when the individual entered the United States.

(4) *Examples.* The following examples illustrate the application of this paragraph (c):

*Example 1.* B is in a serious automobile accident in the United States on March 25. B intended to leave the United States on March 31 (as evidenced by an airline ticket), but was unable to leave on that date as a result of the injuries suffered in the accident. B recovered from the injuries and was able to leave and did leave the United States on May 31. B's presence in the United States during the period from April 1 through May 31 will not be counted as days of presence in the United States.

*Example 2.* The facts are the same as in *Example 1*, except that B's return flight (as evidenced by an airline ticket) was scheduled for May 31. Because B did not intend to leave the United States until May 31, B may not exclude any days of presence in the United States.

(d) *Days in transit.* An alien individual may exclude days of presence in the United States if the individual is in transit between two foreign points, and is physically present in the United

States for fewer than 24 hours. For purposes of this paragraph, an individual will be considered to be in transit if the individual pursues activities that are substantially related to completing his or her travel to a foreign point of destination. For example, an alien who travels between airports in the United States in order to change planes en route to the individual's destination will be considered to be in transit. However, if the individual attends a business meeting while he or she is present in the United States, whether or not that meeting is within the confines of the airport, the individual will not be considered to be in transit. For purposes of this paragraph, the term "foreign point" means any areas that are not included within the definition of the term "United States" provided in § 301.7701(b)-1(c)(2)(ii).

(e) *Regular commuters from Mexico or Canada*—(1) *General rule.* An alien individual will not be considered to be present in the United States on days that the individual commutes to the United States from the individual's residence in Mexico or Canada if the individual regularly commutes from Mexico or Canada. An alien individual will be considered to commute regularly if the individual commutes to the individual's location of employment or self-employment in the United States from his or her residence in Mexico or Canada on more than 75% of the workdays during the working period.

(2) *Definitions.* (i) The term *commutes* means to travel to employment or self-employment and to return to one's residence within a 24-hour period.

(ii) The term *workdays* means days on which the individual works in the United States or Canada or Mexico.

(iii) The term *working period* means the period beginning with the first day in the current year on which the individual is physically present in the United States for purposes of engaging in employment or self-employment and ending on the last day in the current year on which the individual is physically present in the United States for purposes of engaging in that employment or self-employment. If the nature of the employment or self-employment is such that it requires the individual to be present in the United States only

on a seasonal or cyclical basis, the working period will begin with the first day of the season or cycle on which the individual is present in the United States for purposes of engaging in that employment or self-employment and end on the last day of the season or cycle on which the individual is present in the United States for the purpose of engaging in that employment or self-employment. Thus, there may be more than one working period in a calendar year and a working period may begin in one calendar year and end in the following calendar year.

(3) *Examples.* The following examples illustrate the operation of this paragraph (e):

*Example 1.* B lives in Mexico and is employed by Corporation X in its office in Mexico. B was temporarily assigned to X's office in the United States. B's employment in the United States office began on February 1, 1988, and continued through June 1, 1988. On June 2, B resumed his employment in Mexico. On 59 days in the period beginning on February 1, 1988, and ending on June 1, 1988, B travelled each morning from his residence in Mexico to X Corporation's United States office for the purpose of engaging in his employment with X Corporation. B returned to his residence in Mexico on each of those evenings. On seven days in the period from February 1, 1988, through June 1, 1988, B worked in X's Mexico office. B is not considered to have been present in the United States on any of the days that he travelled to X's United States office for the purpose of engaging in employment with Corporation X because he commuted to his place of employment within the United States on more than 75% of the workdays during the working period (59 workdays in the United States/66 workdays in the working period=89.4%).

*Example 2.* C, who lives in Canada, contracted with a resort located in the United States to provide snow-skiing instructions for the resort's customers for two skiing seasons, the first beginning on November 15, 1987, and ending on March 15, 1988, and the second beginning on November 15, 1988, and ending on March 15, 1989. On 90 days in each of the two skiing seasons, C travelled in the morning from Canada to the resort to provide skiing instructions pursuant to the contract. C returned to Canada on each of those evenings. On 20 days during each of the two skiing seasons, C worked in Canada. C is not considered to have been present in the United States on any of the days that she travelled to the United States to provide ski instructions in either the first working period beginning on November 15, 1987, and

ending on March 15, 1988, or the second working period beginning on November 15, 1988, and ending on March 15, 1989, because she commuted to her employment within the United States on more than 75% of the workdays during each of the working periods (90 workdays in the United States/110 workdays in the working period=81.8%).

*Example 3.* D, who lives in Canada, is the sole proprietor of a wholesale lumber business with offices in both the United States and Canada. Beginning on January 4, 1988, and ending on February 12, 1988, D commuted to work in his United States office on 30 days. Beginning on February 15, 1988, and ending on March 25, 1988, D commuted to work in his Canadian office on 30 days. Beginning on March 28, 1988, and ending on May 27, 1988, D commuted to work in his United States office on 45 days. Subsequent to May 27, D did not commute to the United States on any other days in 1988. D is considered to have been present in the United States on each day that he travelled to his office in the United States because D did not commute to the United States office on more than 75% of the workdays during the working period beginning on January 4, 1988, and ending on May 27, 1988 (75 workdays in the United States/105 workdays in the working period=71.4%).

(f) *Determination of excluded days applies beyond year of determination.* If a day of presence is excluded under this section, then that day shall not be taken into account in the current year or the first or second preceding year.

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#### § 301.7701(b)-4 Residency time periods.

(a) *First year of residency.* An alien individual who was not a United States resident during the preceding calendar year and who is a United States resident for the current year will begin to be a resident for tax purposes on the alien's residency starting date. The residency starting date for an alien who meets the substantial presence test is the first day during the calendar year on which the individual is present in the United States. The residency starting date for an alien who meets the lawful permanent resident test (green card test), described in paragraph (b)(1) of § 301.7701(b)-1, is the first day during the calendar year in which the individual is physically present in the United States as a lawful perma-

nent resident. The residency starting date for an alien who satisfies both the substantial presence test and the green card test will be the earlier of the first day the individual is physically present in the United States as a lawful permanent resident of the United States or the first day during the year that the individual is present for purposes of the substantial presence test. (See § 301.7701(b)-9(b)(1) for the transitional rule relating to the residency starting date of an alien individual who was a lawful permanent resident in 1984. See also § 301.7701(b)-3 for days that may be excluded.)

(b) *Last year of residency—(1) General rule.* An alien individual who is a United States resident during the current year but who is not a United States resident at any time during the following calendar year will cease to be a resident for tax purposes on the individual's residency termination date. Generally, the residency termination date will be the last day of the calendar year.

(2) *Exceptions.* Notwithstanding paragraph (b)(1) of this section, the residency termination date for an alien individual who meets the substantial presence test is the last day during the calendar year that the individual is physically present in the United States if the individual establishes that, for the remainder of the calendar year, the individual's tax home was in a foreign country and he or she maintained a closer connection (within the meaning of § 301.7701(b)-2(d)) to that foreign country than to the United States. Similarly, the residency termination date for an alien who meets the green card test is the first day during the calendar year that the alien is no longer a lawful permanent resident if the individual establishes that, for the remainder of the calendar year, his or her tax home was in a foreign country and he or she maintained a closer connection to that foreign country than to the United States. The residency termination date for an alien who satisfies both the substantial presence test and the green card test for the current year, will be the later of the first day the individual is no longer a lawful permanent resident of the United States