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subject: U.S. Residency Status of PRI A-2 Visa Holders

This memorandum responds to an inquiry concerning the scope of the terms "foreign government-related individual" and "full-time diplomatic or consular status" in I.R.C. § 7701(b)(5)(B) and Treas. Reg. § 301.7701(b)-3(b)(2)(i)(C) and (iii). This advice may not be used or cited as precedent.

ISSUE

Whether an A-2 visa holder (administrative and technical ("A&T") staff or service staff employee of a foreign mission or consulate) who is considered by the State Department to be "permanently resident in" ("PRI") the United States for purposes of the Vienna Conventions on Diplomatic and Consular Relations[1] ("Vienna Conventions") is a "foreign government-related individual" with "full-time diplomatic or consular status" within the meaning of in I.R.C. § 7701(b)(5)(B) and Treas. Reg. § 301.7701(b)-3(b)(2)(i)(C) and (iii).

CONCLUSION

All A-2 visa holders, including PRI A-2 visa holders, are "foreign government-related individuals" with "full-time diplomatic or consular status" within the meaning of I.R.C.

[1] 23 U.S.T. 3227 and 21 U.S.T. 77, respectively.

§ 7701(b)(5)(B) and Treas. Reg. § 301.7701(b)-3(b)(2)(i)(C) and (iii). Accordingly, their days of physical presence in the United States are excluded for purposes of the substantial presence test, with the result that they may not be considered U.S. residents for tax purposes under I.R.C. § 7701(b)(3) and thus may be required to file Form 1040NR (U.S. Nonresident Alien Income Tax Return) rather than Form 1040 (U.S. Individual Income Tax Return).[2]

GENERAL BACKGROUND

I. Section 7701(b) and Regulations

A. Substantial Presence Test

Under I.R.C. § 7701(b)(3), individuals who are neither U.S. citizens nor lawful permanent residents (i.e., green cardholders) will be treated as U.S. residents if they are present in the United States for a specified number of days during the current tax year and the two immediately preceding tax years. For purposes of this test, which is known as the "substantial presence test," the days of presence of an "exempt individual" within the meaning of I.R.C. § 7701(b)(5) are not counted.

B. Foreign Government-Related Individual and Full-time Diplomatic or Consular Status

An "exempt individual" includes a "foreign government-related individual" as defined in I.R.C. § 7701(b)(5)(B) and Treas. Reg. § 301.7701(b)-3(b)(2). Under Treas. Reg. § 301.7701(b)-3(b)(2)(i), a foreign government-related individual is

> an individual (and that individual's immediate family) who is temporarily[3] present in the United States—
>
> (A) * * * * *
>
> (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) determines represents full-time diplomatic or consular status. [emphasis added].

Subparagraph (C) is relevant to PRI A-2 visa holders.

The term "full-time diplomatic or consular status" is defined under Treas. Reg. § 301.7701(b)-3(b)(2)(iii) to mean that—

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[2] See Abdel-Fattah v. Commissioner, 134 T.C. No. 10, fn. 3 (2010) (acknowledgement by Tax Court that petitioner, a holder of a class A-2 visa, should have filed Form 1040NR, not Form 1040).

[3] Treas. Reg. § 301.7701(b)-3(b)(2)(i)(C) provides that "[a]n individual described in this paragraph shall be considered to be temporarily present in the United States if the individual is not [a green cardholder] regardless of the actual amount of time that the individual is present in the United States."

(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.

II. State Department Interpretation of "Full-time Diplomatic or Consular Status"

The term "full-time diplomatic or consular status," used in I.R.C. § 7701(b)(5)(B)(i) and Treas. Reg. § 301.7701(b)-3(b)(2)(i)(C) and (iii), is not a term of art for the State Department nor is it defined or otherwise used in the Vienna Conventions.[4]

III. State Department Visa Classifications

A. Visa Classifications

The three "A" class visas are referred to as "diplomatic class" visas and are described in, and take their designations from, 8 U.S.C. § 1101(a)(15)(A) as follows:

> (i) An ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government, recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family; [emphasis added]
>
> (ii) Upon a basis of reciprocity, other officials and employees who have been accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; [emphasis added] and
>
> (iii) Upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above.[5]

Those individuals described in subparagraph (i) receive an A-1 visa; those individuals described in subparagraph (ii) receive an A-2 visa; and those individuals described in subparagraph (iii) receive an A-3 visa.

IV. Vienna Conventions

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[4] This term and the term "foreign government-related individual" were creations of Congress for which no legislative history exists.

[5] See also 22 CFR § 41.22 [Officials of foreign governments] and 8 CFR § 214.2 [Special requirements for admission, extension, and maintenance of status].

The Vienna Conventions provide individuals who hold diplomatic or consular officer positions (i.e., A-1 visa holders) a range of specified privileges and immunities, including full immunity and inviolability from criminal jurisdiction and exemption from income tax. A&T staff and service staff of foreign missions and consulates (i.e., A-2 visa holders), although they do not hold diplomatic or consular officer positions, enjoy many of the same diplomatic privileges and immunities provided under the Vienna Conventions that are ordinarily associated with diplomatic or consular officer status.[6] However, an A-2 visa holder employee will lose his or her diplomatic privileges and immunities, including the income tax exemption under the Vienna Conventions, if the State Department determines that such employee is "permanently resident in" the United States for purposes of the Vienna Conventions.[7] These are the PRI A-2 visa holders. Although they are not entitled to any privileges and immunities under the Vienna Conventions, they retain their A-2 "diplomatic class" visas.[8] Internally, the State Department classifies these employees as "PA-2s" to distinguish them from other A-2 visa holders.

An A-2 visa holder may be classified by the State Department as "permanently resident in" the United States for purposes of the Vienna Conventions even though that person is not a "lawful permanent resident" of the United States (i.e., green cardholder) within the meaning of I.R.C. § 7701(b). Under Treas. Reg. § 301.7701(b)-1(b)(1), a "lawful permanent resident" is an individual who has been granted the privilege of remaining permanently in the United States as an immigrant in accordance with the immigration laws. Holders of "A" class visas, including A-2 visas, because they are considered nonimmigrant individuals under U.S. immigration law do not fall within this definition. See Treas. Reg. § 301.7701(b)-3(b)(2)(i)(C).

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[6] See Article 37 of the Vienna Convention on Diplomatic Relations and Article 49 of the Vienna Convention on Consular Relations. See also Foreign Affairs Manual (2 FAM 232.1).

[7] The State Department defined the term "permanently resident in" in the United States in a circular diplomatic note dated April 10, 1991, as follows:

> Members of the administrative and technical and service staffs of diplomatic missions and consular employees and members of the service staff of consular posts in the United States ***will be considered permanently resident in the United States for the purposes of the Vienna Conventions unless*** the employing foreign state provides appropriate documentation to indicate that the sending State:
>
> (1) pays the cost of the employee's transportation to the United States from the employee's normal place of residence;
>
> (2) undertakes to transfer the employee and his or her immediate family out of the United States within a specific time frame consistent with the sending State's transfer policy; and
>
> (3) undertakes to pay the cost of the employee's transportation from the United States to the employee's normal place of residence or to the country of the employee's next assignment at the end of the employee's tour of duty in the United States. (Emphasis added)

[8] A PRI A-2 visa holder employee may be exempt from tax if a separate bilateral income tax agreement exists between the United States and the applicable foreign government or if the I.R.C. § 893 tax exemption is available to the employee.

V. Notification to and Accreditation/Registration by the State Department

Foreign missions, in accordance with the provisions of the Vienna Conventions, must notify the State Department's Office of Protocol upon the arrival in the United States of all foreign staff members and their dependents. The State Department uses different forms depending upon the classification of the foreign staff member and their dependents.[9] By submitting the notification form, the foreign government signifies to the State Department that it has "accredited" the individual as an employee of the foreign mission who intends to primarily engage in official activities on behalf of the foreign government while in the United States. Upon acceptance of the notification form, the State Department issues either a letter of official accreditation (in the case of individuals with diplomatic or consular officer positions) or official registration[10] (in the case of non-diplomatic rank staff) to the foreign mission which signifies that the individual has been accepted (i.e., recognized) by State as an employee of the foreign mission. In the case of A&T staff and service staff of foreign missions and consulates who are issued A-2 visas, the State Department will issue an official registration letter to the foreign mission if it accepts the employee, regardless of whether the employee has been classified by the State Department as permanently resident in the United States for purposes of the Vienna Conventions (i.e., a PRI A-2 visa holder).

DISCUSSION

The focus of the foreign government-related individual category described in Treas. Reg. § 301.7701(b)-3(b)(2)(i)(C) ["by reason of a visa that the Secretary of Treasury or his or her delegate determines represents full-time diplomatic or consular status"] is not on whether the individual has diplomatic or consular status but rather whether the individual holds a category of visa that Treasury and the IRS consider represents such status.[11] The regulatory definition of the term "full-time diplomatic or consular status" in

[9] In the case of staff members holding diplomatic and consular officer positions (i.e., A-1 visa holders) and their dependents, the foreign embassy mission notifies the State Department on Form DS-2003 (Notification of Appointment of Foreign Diplomatic Officer and Career Consular Officer). In the case of non-diplomatic rank staff members (A-2 visa holders), the foreign mission notifies the State Department on Form DS-2004 (Notification of Appointment of Foreign Government Employee). The instructions to Form DS-2004 specifically provide that the United States does not extend privileges and immunities to A&T and service staff employees of embassies and consular employees and members of the service staff of consular posts unless the appropriate documentation described in the 1991 Circular Diplomatic Note is provided to the State Department (e.g., copy of the A-2 visa holder's employment contract or travel orders).

[10] In general, the official registration letter will state specifically that the individual has been accepted as a member of the A&T staff or service staff of the foreign embassy. It is our understanding that if the State Department has determined that the individual has PRI status, the letter will also indicate that fact and state the individual is not entitled to any of the privileges and immunities under the Vienna Conventions.

[11] Both I.R.C. § 7701(b)(5)(B)(i) and Treas. Reg. § 301.7701(b)-3(b)(2)(iii)(C) are clear that Treasury rather than the State Department has the responsibility for determining who should be recognized as having full-time diplomatic or consular status.

Treas. Reg. § 7701(b)-3(b)(2)(iii) was derived by Treasury and the IRS from language found in 8 U.S.C. § 1011(a)(15)(A) and 22 CFR § 41.22(a)(1) describing nonimmigrant individuals who enter the United States under diplomatic "A" class visas.[12] When the regulations defined the category of "foreign government-related individual," Treasury and the IRS did not differentiate between the types of personnel that serve in a foreign mission (e.g., diplomatic, A&T, or service), but rather defined it broadly to encompass all nonimmigrant foreign mission and consular personnel that are issued diplomatic, or A, class visas, regardless of the level of privileges and immunities they may enjoy under the Vienna Conventions.

As noted above, A&T staff, service staff, and consular staff employees that have been accepted (i.e., recognized) for official registration by the State Department continue to hold diplomatic A-2 class visas even if the State Department determines they are not entitled to enjoy any privileges and immunities under the Vienna Conventions. The State Department's classification of an A-2 visa holder as "permanently resident in" the United States for purposes of the Vienna Conventions distinguishes "local hires" from persons whose transportation costs to and from the United States is borne by the foreign government. This classification determines the level of privileges and immunities under the Vienna Conventions to which the A-2 visa holder is entitled and is not determinative of that person's residency status for U.S. tax purposes. Under Treas. Reg. § 301.7701(b)-3(b)(2)(i), the category of "foreign government-related individual" includes not only individuals holding A-1 visas (individuals with diplomatic or consular officer rank positions) but also individuals holding A-2 visas (individuals with non-diplomatic rank A&T staff, service staff, or consular staff positions), including PRI A-2 visa holders.

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[12] Except for the word "solely" instead of "primarily" in subsection (ii) and the word "accepted" instead of "recognized" in subsection (iii), 22 CFR § 41.22(a)(1) [State Department criteria for classification of foreign government officials] is identical to the language in Treas. Reg. § 301.7701(b)-3(b)(2)(iii)(C). Some State Department regulations use the word "recognized" interchangeably with "accepted." See 22 CFR § 41.22 (f); 8 CFR § 214.2(a).