



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF
CHIEF COUNSEL

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August 31, 2006

Dear _____ :

This letter is in response to your inquiry dated _____. You expressed concern as to whether 26 C.F.R. § 301.7701(b)-3 ("the regulation") retroactively extends Social Security coverage to _____ employees, who once worked under visas issued pursuant to Section 101(a)(15)(J) of the Immigration and Nationality Act, ("J visa holders").

The regulation does not address Social Security coverage of J visa holders. Rather, the regulation modifies the definitions of "teacher or trainee" and "student" to include, employees working under visas issued pursuant to Section 101(a)(15)(Q) of the Immigration and Nationality Act ("Q visa"). See T.D. 8733, 1997-43 I.R.B. 8 (October 14, 1997). The modification was made in order to conform the regulation to changes in the statutory definitions of "teacher or trainee" and "student" in Code section 7701(b)(5). Nonresident aliens temporarily present in the United States under either a J visa or a Q visa who meet the definition of "teacher or trainee" and/or "student", are not required to count the days of presence in the United States for purposes of determining their status under the substantial presence test. The substantial presence test is used to determine whether an alien is a resident or nonresident of the United States for tax purposes.

Whether an employee is entitled to Social Security benefits depends on whether the employee worked a sufficient amount of time in covered employment. Social Security benefits are funded through a payroll tax imposed under the Federal Insurance Contributions Act (FICA). FICA taxes are imposed on "wages" paid with respect to

“employment”, with certain exceptions. The term “wages” is defined as all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any other medium other than cash. The term “employment” includes any service, of whatever nature, performed within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either. Thus, FICA tax is generally imposed on remuneration for services performed within the United States by nonresident aliens who are temporarily visiting the United States, subject to certain specific exceptions.

There is a specific exception to what constitutes “employment” under FICA for services performed by a nonresident alien temporarily present in the United States under a J visa. I.R.C. § 3121(b)(19). Thus, FICA tax is not imposed on remuneration for services performed by a nonresident alien who is temporarily present in the United States under a J visa, as long as the services are performed to carry out the purpose specified in the visa.

In order to qualify for the exception from FICA for J visa holders, such individuals must retain their status as nonresident aliens. The substantial presence test in section 7701(b)(3) of the Code determines an alien’s status as either a resident or a nonresident based on their total time present in the United States and its territories. If J visa holders remain in the United States for more than a temporary period of time, they may be treated as resident aliens under the Code.

Therefore, if any of approximately former J visa holders qualified as nonresident aliens, then their wages would not have been subject to FICA taxes. See I.R.C. § 3121(b)(19). However, if any of the J visa holders became resident aliens under the Code, then they are no longer eligible for the exemption from FICA under I.R.C. § 3121(b)(19). Wages paid to J visa holders who are treated as resident aliens under the substantial presence test are only subject to FICA beginning in the calendar year in which they meet the substantial presence test.

If you have any questions, please contact _____ at () _____.

Sincerely,

Lynne A. Camillo
Chief, Employment Tax Branch 2
Office of the Associate Chief Counsel
Tax Exempt & Government Entities

cc: