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DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
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Reference: Request for information regarding determination of residence for purposes of the U.S.-Germany Income Tax Treaty

Dear :

This letter responds to your request for information regarding the rules that apply in determining whether an alien individual who is in the United States on a nonimmigrant visa is a resident of the United States for purposes of the U.S.-Germany Income Tax Treaty (the "Treaty").<sup>1</sup>

A. Residence Under the Treaty

Article 4 (Residence) of the Treaty provides, in relevant part:

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, *under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature*, and also includes that State and any political subdivision or local authority thereof. The term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or of profits attributable to a

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<sup>1</sup> CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE FEDERAL REPUBLIC OF GERMANY FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND CAPITAL AND TO CERTAIN OTHER TAXES, SIGNED ON AUG. 29, 1989, AS AMENDED BY THE PROTOCOL SIGNED ON June 1, 2006, *reprinted in 3 Tax Treaties (CCH) ¶ 3203.*

permanent establishment in that State or capital situated therein (emphasis added).

The Technical Explanation (“TE”) to Article 4 of the Treaty provides:

The term “resident of a Contracting State” is defined in paragraph 1. *In general, this definition incorporates the definitions of residence in U.S. and German law by referring to a resident as a person who, under the laws of a Contracting State, is subject to tax therein by reason of his domicile, residence, place of management, place of incorporation or any other similar criterion. Thus, residents of the United States generally include U.S. citizens, U.S. green card holders, and aliens who are considered U.S. residents under Code section 7701(b).* Paragraph 1 also specifically includes the United States, the Federal Republic of Germany, and political subdivisions and local authorities of the two States as residents for purposes of the Convention (emphasis added).

In other words, whether an alien individual who is in the United States on a nonimmigrant visa is a resident of the United States within the meaning of paragraph 1 of Article 4 of the Treaty depends on whether the individual is a resident of the United States under U.S. domestic tax law. If an individual is a resident of the United States within the meaning of paragraph 1, but is also a resident of Germany within the meaning of paragraph 1, then the individual’s residency status for purposes of the Treaty is determined under a series of tiebreaker rules set forth in paragraph 2 of Article 4.

#### B. Rules for Determining Residence Under U.S. Domestic Tax Law

Section 7701(b) of the Internal Revenue Code (the Code”) and the related regulations in Treas. Reg. §§ 301.7701(b)-1 to 301.7701(b)-9 provide the rules for determining whether an alien individual is a U.S. resident for purposes of U.S. domestic tax law. Section 7701(b)(1)(A) provides:

An alien individual shall be treated as a resident of the United States with respect to any calendar year if (and only if) such individual meets the requirements of clause (i), (ii), or (iii):

- (i) Lawfully admitted for permanent residence.--Such individual is a lawful permanent resident of the United States at any time during such calendar year.
- (ii) Substantial presence test.--Such individual meets the substantial presence test of paragraph (3).

- (iii) First year election.--Such individual makes the election provided in paragraph (4).

With respect to an alien individual who is in the United States on a nonimmigrant visa, the “substantial presence test” and “first year election” rule, described above, are relevant in determining whether the individual is a resident of the United States under U.S. domestic tax law. The individual is a U.S. resident under U.S. domestic tax law for a particular year if he or she satisfies the substantial presence test or is eligible for the first-year election and makes the election.

Section 7701(b)(3)(A) of the Code provides:

Substantial presence test.--

- (A) In general.--Except as otherwise provided in this paragraph, an individual meets the substantial presence test of this paragraph with respect to any calendar year (hereinafter in this subsection referred to as the “current year”) if--
  - (i) such individual was present in the United States on at least 31 days during the calendar year, and
  - (ii) the sum of the number of days on which such individual was present in the United States during the current year and the 2 preceding calendar years (when multiplied by the applicable multiplier determined under the following table) equals or exceeds 183 days:

	The applicable multiplier is:
In the case of days in:	
Current year	1
1st preceding year	1/3
2nd preceding year	1/6

An alien individual may exclude days of presence in the United States for purposes of the days calculation under the substantial presence test under certain circumstances described in section 7701(b)(3) of the Code. Section 7701(b)(3) provides, in relevant part:

- (B) Exception where individual is present in the United States during less than one-half of current year and closer connection to foreign

country is established.--An individual shall not be treated as meeting the substantial presence test of this paragraph with respect to any current year if--

- (i) such individual is present in the United States on fewer than 183 days during the current year, and
  - (ii) it is established that for the current year such individual has a tax home (as defined in section 911(d)(3) without regard to the second sentence thereof) in a foreign country and has a closer connection to such foreign country than to the United States.
- (C) Subparagraph (B) not to apply in certain cases.--Subparagraph (B) shall not apply to any individual with respect to any current year if at any time during such year--
- (i) such individual had an application for adjustment of status pending, or
  - (ii) such individual took other steps to apply for status as a lawful permanent resident of the United States.
- (D) Exception for exempt individuals or for certain medical conditions.--An individual shall not be treated as being present in the United States on any day if--
- (i) such individual is an exempt individual for such day, or
  - (ii) such individual was unable to leave the United States on such day because of a medical condition which arose while such individual was present in the United States.

Section 7701(b)(5) of the Code and Treas. Reg. § 301.7701(b)-3(b) provide that individuals who are in the United States on certain types of visas are considered "exempt individuals," which means the days during which they are present in the United States under that visa status are not counted for purposes of the substantial presence test as provided by section 7701(b)(3)(D)(i). In particular, Treas. Reg. § 301.7701(b)-3(b) provides, in relevant part:

- (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.

As previously discussed above, a nonimmigrant individual may also be treated as a U.S. resident for U.S. domestic tax law purposes if the individual is eligible for the first-year election and makes such an election. Section 7701(b)(4) of the Code provides:

## First-year election.—

- (A) An alien individual shall be deemed to meet the requirements of this subparagraph if such individual--
- (i) is not a resident of the United States under clause (i) or (ii) of [section 7701(b)(1)(A)] with respect to a calendar year (hereinafter referred to as the “election year”),
  - (ii) was not a resident of the United States under [section 7701(b)(1)(A)] with respect to the calendar year immediately preceding the election year,
  - (iii) is a resident of the United States under clause (ii) of [section 7701(b)(1)(A)] with respect to the calendar year immediately following the election year, and
  - (iv) is both--
    - (I) present in the United States for a period of at least 31 consecutive days in the election year, and
    - (II) present in the United States during the period beginning with the first day of such 31-day period and ending with the last day of the election year (hereinafter referred to as the “testing period”) for a number of days equal to or exceeding 75 percent of the number of days in the testing period (provided that an individual shall be treated for purposes of this subclause as present in the United States for a number of days during the testing period not exceeding 5 days in the aggregate, notwithstanding his absence from the United States on such days).
- (B) An alien individual who meets the requirements of subparagraph (A) shall, if he so elects, be treated as a resident of the United States with respect to the election year.
- (C) An alien individual who makes the election provided by subparagraph (B) shall be treated as a resident of the United States for the portion of the election year which begins on the 1st day of the earliest testing period during such year with respect to which the individual meets the requirements of clause (iv) of

subparagraph (A).

- (D) The rules of subparagraph (D)(i) of [section 7701(b)(3)] shall apply for purposes of determining an individual's presence in the United States under this paragraph.
- (E) An election under subparagraph (B) shall be made on the individual's tax return for the election year, provided that such election may not be made before the individual has met the substantial presence test of paragraph (3) with respect to the calendar year immediately following the election year.
- (F) An election once made under subparagraph (B) remains in effect for the election year, unless revoked with the consent of the Secretary.

I am enclosing Publication 519, *U.S. Tax Guide for Aliens*, which provides further discussion of the rules described in this letter. This publication is also available on [www.irs.gov](http://www.irs.gov).

This information letter calls attention to certain general principles of the law. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2013-1, §2.04, 2013-1 I.R.B. 1 (Jan. 2, 2013).

If you have any additional questions, please contact \_\_\_\_\_ .

Sincerely,

By: \_\_\_\_\_  
M. Grace Fleeman  
Senior Technical Reviewer, Branch 1  
(International)

Enclosure