

Tax Guide for International Persons

Introduction

The purpose of this manual is to inform faculty and staff with basic information regarding tax and immigration laws of the United States. The manual provides guidance for the most common scenarios encountered by the University, but does not cover all tax situations. The material contained herein should not be viewed as either a complete treatment of all tax questions or an official University position as to each matter under review. The intent of this material is to provide useful information that will assist University personnel in making correct decisions concerning the tax implications of payments made to international persons. Under no circumstance should any University personnel use the information contained in this manual to provide any tax advice.

I. Tax Compliance Requirements for International Persons

A. University Responsibilities

Baylor University is responsible for complying with all federal laws as applicable to foreign visitors. This requirement includes compliance with both tax and immigration laws. Thus, the University's requirement is twofold:

1. The University must make sure any international person that comes to campus as a student, employee, or independent contractor is legally present in the United States under the requirements of the law and U.S. Citizenship and Immigration Services (USCIS) authority.
2. The University must make sure any international person that receives any type of payment (wages, honorariums, scholarship or fellowship, etc.) from the University is properly reported to the Internal Revenue Service.

B. Sponsoring Departments Responsibilities

The University department that hosts an international person bears the responsibility for ensuring that the international person completes the proper paperwork so that payments made to the foreign individual are in compliance with all requisite tax and immigration laws.

II. Definitions

A. Candidate for a Degree - A candidate for a degree includes any full-time or part-time student enrolled in a course which may lead to a degree, whether or not the student's particular educational program leads to a degree.

- B. FICA (Federal Insurance Contribution Act) - United States employment tax that provides for a Federal system for old age, survivors, and disability insurance and Medicare hospital insurance.
- C. U.S. Citizenship and Immigration Services (USCIS) - The United States government agency that is responsible for overseeing and issuing visas to international persons.
- D. Internal Revenue Service (IRS) - The United States government agency that enforces tax laws and collects federal taxes.
- E. Nonresident Alien (NRA) for Tax Purposes - A Nonresident Alien is an individual who is not a citizen of the United States, or has not been admitted to the United States and does not meet either the “green card” test, the substantial presence test or is a dual status alien. (See Section III).
- F. Resident Alien (RA) for Tax Purposes - A Resident Alien is an individual who is either a United States citizen, or has been legally admitted to the United States and meets either the “green card” test, the substantial presence test or is a dual status alien. (See Section III).

III. Residency Determination for Tax Purposes

An alien will become a Resident Alien under one of the following three conditions:

- A. Green Card Test
- B. Substantial Presence Test
- C. Dual Status Alien

If one of these conditions is fulfilled, then the alien will be classified as a Resident Alien.

A. Green Card Test

1. Alien Registration Card

An individual is a Resident Alien for tax purposes if the person is a lawful permanent resident of the United States at any time during the calendar year. An individual achieves this status if the USCIS has issued the individual an alien registration card, also known as a “green card.”

Starting/Ending Date: If the green card test is met at any time during the calendar year (but the substantial presence test is not met, see Section III.B.), the residency starting date is the first day in the calendar year in which the individual is present in the United States as a lawful resident. The ending date for residency under the green card test is the individual’s last day of presence in the United

States. However, a green card holder that resides outside the United States is still considered a Resident Alien for tax purposes unless: (1) the person voluntarily turns in his/her green card to the USCIS or IRS and renounces his/her United States immigration status; (2) immigration status is administratively revoked by the USCIS; or (3) immigration status is judicially revoked by a United States federal court.

2. *Procedures for Green Card Test*

The international visitor must show proof of the “green card” to the Payroll Office or sponsoring department.

B. Substantial Presence Test

1. *Calculation*

An individual is a Resident Alien for tax purposes if the person meets the “substantial presence” test for the calendar year. To fulfill the requirements of this test, the individual must be physically present in the United States on at least:

- a. 31 days during the current year, **and**
- b. 183 days during the three-year period that includes the current year and the two preceding calendar years.

(1) Current year days in U.S. x 1	= _____ days
(2) First preceding year days in U.S. x 1/3	= _____ days
(3) Second preceding year days in U.S. x 1/6	= _____ days
(4) Total Days in U.S.	= _____ days

If line (4) equals or exceeds 183 days, then the 183-day test has been established.

Example: An individual was physically present in the United States on 120 days in each of the years 2012, 2013, and 2014. To determine if they meet the substantial presence test for 2014, count the full 120 days of presence in 2014, 40 days in 2013 (1/3 of 120), and 20 days in 2012 (1/6 of 120). Because the total for the 3-year period is 180 days, they are not considered a resident under the substantial presence test for 2014.

Starting/Ending Date: If the substantial presence test is satisfied for a calendar year, the residency starting date is the first day the individual is present in the United States during that calendar year. The ending date under the substantial presence test is the individual’s last day of presence in the United States followed by a period which: (1) the individual is not present in the United States;

(2) the individual has a closer connection to a foreign country than to the United States; and (3) the individual is not a resident of the United States during the calendar year following that of the person's last day of presence in the United States.

2. Procedures for Substantial Presence Test

The international person will complete a "Foreign National Information Form" or an online questionnaire through the Foreign National Information System (FNIS) and provide copies of the passport, visa, and I-94 card. The offices/departments responsible for distributing and receiving the proper paperwork are as follows:

- a. International Student & Scholar Services (ISSS) Office: Student Workers and Teachers/Researchers on F-1 and J-1 visas are handled through the ISSS Office. This office can be contacted by calling 710-1461.
- b. General Counsel Office: H-1B visas are handled through the General Counsel's Office.
- c. Sponsoring Department/VPR/ISSS: The sponsoring department, Vice Provost for Research office, and ISSS office handles non-employee visitors (i.e., visiting lecturer).

All paperwork is to be forwarded to the Payroll Office which will review the forms and perform the calculations for the substantial presence test to determine whether the visitor is a Nonresident or Resident Alien.

3. Exceptions to the Substantial Presence Test

The following days of presence in the United States are not counted for purposes of the substantial presence test:

- a. individual commutes from residence in Canada or Mexico;
- b. individual was in United States less than 24 hours in transit;
- c. individual was unable to leave United States due to medical condition that developed while in the United States; and/or
- d. individual was an exempt person.

An exempt person is defined as follows:

- a. foreign government related individual;
- b. teacher, trainee, researcher on J or Q visa, who substantially complies with the requirements of the visa – do not count days for the first two calendar years (does not include students on J visas);

- c. student with F, J M or Q visa, who substantially complies with the requirements of the visa – do not count days for the first five calendar years*; or
- d. professional athlete temporarily present in United States to compete in a charitable sports event.

The counting rules are based on calendar years, not twelve month periods. For example, a J visa holder arrives on November 15, 2013. Under the substantial presence test, 2013 is the first calendar year, even though the alien arrived in November.

Exempt person Example:

An individual was a citizen and resident of the People's Republic of China immediately prior to his entry into the United States. He is temporarily present in the United States as a graduate student at the University on an F-1 visa (student visa). He arrived in the United States on 08-15-2007. Assume that he has not changed his immigration status since his arrival in the United States.

Date of entry into United States: 08-15-2007

Student F-1 visa. Exempt Individual for 5 calendar years (2007 through 2011).

Then, begin counting 183 days at this date: 01-01-2012.

Number of nonexempt days in United States during 2012: 366 days

1) Current year (2012) days in United States $\times 1 = 366$ days

2) Prior year (2011) days in United States $\times 1/3 = 0$ days

3) Second Prior year (2010) days in United States $(0) \times 1/6 = 0$ days

Total = 366 days

He passed the substantial presence test on 07-01-2012 (the 183rd day of 2012). His residency starting date is 01-01-2012 (the first day he was present in United States during the calendar year in which he passed the substantial presence test).

** A foreign student can exceed the 5 year limitation if the student can establish (1) the student does not intend to reside permanently in the United States; (2) the student has not taken any steps to change his/her United States immigration status toward permanent residency; (3) the student has substantially complied with the requirements of his/her visa; and (4) the student has maintained a closer connection with a foreign country than with the United States. **The University will continue to treat the student as a Nonresident Alien only if the student provides a copy of a letter from the***

IRS stating that the student should continue to be treated as a Nonresident Alien under the Closer Connection Exception.

Closer Connection to Foreign Country – Even if an individual meets the substantial presence test, the person can be treated as a Nonresident Alien by establishing:

- a. individual was present in the United States fewer than 183 days in the current year;
- b. individual's tax home is in a foreign country;
- c. individual maintained a closer connection to the foreign country than to the United States; and
- d. individual has not taken any steps to change United States immigration status to permanent residency, or taken any steps to adjust immigration status in the United States.

Once the substantial presence test is met, the University will treat the individual as a Resident Alien. The individual must make the closer connection claim on Form 8840 which should be attached to the individual's income tax return.

C. Dual Status Alien

An alien may elect to be treated as a Resident Alien for part of the prior tax year if the alien becomes a Resident Alien in the current tax year. IRS Publication 519 provides the tests that must be met in order to make this claim. The alien must make this claim on his/her individual tax return.

IV. Federal Income Tax Withholding and Reporting for Nonresident Alien

A. Types of Payments

Payments fall into the following four categories:

1. Employee Wages
 2. Fellowships and Scholarships
 3. Independent Contractor Payments and Honorariums
 4. Travel/Lodging/M meal Expenses
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1. Employee Wages
 - a. Payments for services performed by an individual for the University in which the services performed by an employee are subject to the direction and control of the University, its faculty or staff. Unless exempted by a treaty, the payments are subject to U.S. tax withholding; however, the payment of wages is exempt from FICA.

b. The University shall comply with the following procedures with respect to the reporting and withholding of federal income taxes for aliens:

- (1) Identify all aliens on the payroll.
- (2) Divide the aliens into two groups: Resident Aliens and Nonresident Aliens.
- (3) For tax purposes (barring the application of a treaty), treat Resident Aliens in the same manner as United States citizens.
- (4) The tax treatment of Nonresident Aliens should be treated as follows:
 - (a) A W-4 should be completed unless the individual is exempt under a tax treaty.
 - (b) Form 8233 shall be filed with the Payroll Office if the individual is claiming an exemption from federal income tax withholding because of a tax treaty.
 - (c) The Payroll Office shall report wages paid to a Nonresident Alien exempt under a tax treaty on Forms 1042 and 1042-S. Any wages paid to a Nonresident Alien exceeding the exempt amount shall be reported on Form W-2.

c. Common Employee Visa Types

F-1	Student in academic or language program May be employed at the institution authorized to attend.
J-1	Exchange Visitor Student Employment May be employed at the institution authorized if the employment is related to the students' course of study or there is urgent financial need. Other Employment May engage in employment as stated on their Form DS-2019.
H-1B	Temporary Worker of distinguished merit and ability Restricted employment. Authorized to work only for the petitioner.

2. Fellowships and Scholarships

- a. Payments made to an individual for educational purposes. Qualified scholarships are not taxable if:
 - (1) The scholarship or fellowship is awarded to a candidate for a degree; and
 - (2) The scholarship or fellowship is used to pay for tuition, fees and books required for a particular course.
 - b. All scholarships, fellowships and grants paid to Resident Aliens are not required to be reported to the IRS. All such amounts paid to a Nonresident Alien are not reported to the IRS if such payments are a “qualified scholarship” as defined by Internal Revenue Code section 117. Payments that are not qualified scholarships must be reported to IRS on Forms 1042 and 1042-S. The taxable portion of a scholarship or fellowship paid to a Nonresident Alien is subject to federal income tax withholding at the rate of 30%, unless the payments are exempt under a tax treaty. However, Nonresident Aliens who are present in the United States in F-1, J-1, M-1, or Q nonimmigrant status are subject to withholding at only the rate of 14%.
 - c. Form W-8BEN must be completed by the Nonresident Alien and filed with the University if the Nonresident Alien claims that any part of the scholarship or fellowship is exempt from taxation because of a tax treaty. The University is responsible for monitoring the tax treaty benefit eligibility period and must withhold federal income tax at 14% or 30% on the taxable portion of the scholarship or fellowship after the tax treaty period has expired. The Form W-8BEN is valid for three years. The University cannot accept a Form W-8BEN if it does not contain a valid Tax Identification Number (TIN). If a TIN is not provided, the University shall withhold tax on the taxable portion of the scholarship or fellowship.
 - d. Any stipends, tuition waivers or any other type of financial aid paid to a Nonresident Alien that requires services in exchange for the financial aid will be taxable as wages and reportable on Forms 941 and W-2 (see Section IV.A.1. regarding employment of Nonresident Aliens). If the Nonresident Alien is receiving both a taxable scholarship and wages and the Nonresident Alien wants to claim a treaty exemption for both types of payments, he or she may choose to claim both treaty exemptions on Form 8233 and not use Form W-8BEN.
3. Independent Contractor Payments and Honorariums
 - a. Payments made for services that are not considered employee wages. Unless exempted by a treaty, payment is subject to 30% tax. The Nonresident Alien may claim the lesser tax treaty rate by filing Form 8233 and submitting the form to the Payroll Office. The Payroll Office will report the payment on Forms 1042 and 1042-S, even if the entire amount of compensation is exempt under a tax treaty.

b. Unless the visitor is from a treaty country, has completed a Form 8233, **and** has a United States Social Security Number or TIN, the payment **must** be taxed at a rate of 30%. This issue must be addressed at the time an agreement is made with the international visitor.

c. Non-Employee Visa Types

- **B-1 Visitor for Business**

No employment permitted. May reimburse for expenses only. Except for honoraria from a college or university if the visitor meets the 9/5/6 rule:

a) No more than 9 days at the University and has not been paid by more than 5 other universities within the last 6 months.

- **B-2 Visitor for Tourism**

No employment permitted. Except for honoraria from a college or university if the visitor meets the 9/5/6 rule (see above).

- **WBVisa Waiver - Business**

Same as B-1

- **WTVisa Waiver - Tourist**

Same as B-2

- **TN-1 Treaty NAFTA (Canada)**

Restricted employment. Authorized to work only for the petitioner

- **TN-2 Treaty NAFTA (Mexico)**

Restricted employment. Authorized to work only for the petitioner

4. Travel/Lodging/Meals Expenses

Payment made for travel and travel-related expenses. Substantiated expenses (i.e., expense statement and receipts) considered part of an accountable plan are not taxable. All payments are subject to the restrictions of the University Travel Policy and Procedures. Non-substantiated expenses are taxable at 30%.

See Appendix for Charts of Payment Types, Withholding Amounts and Documentation

B. Foreign Source Income Exclusion

Payments made by the University to Nonresident Aliens for services performed in a country outside of the United States, are not subject to taxes, nor is there any U.S. reporting obligation. This exclusion only applies to individuals who are not U.S. residents or citizens. The services are considered to be “sourced” in the foreign country and therefore not subject to U.S. tax laws.

V. Tax Treaties

The United States has tax treaties with over 50 countries. The treaty may exempt all or part of the payment made to the international. These treaties are complex and dependent on the individual treaty, international visitor status and type of income.

For the treaty exemption to be granted, the visitor must provide their passport, visa status, I-94 card and fill out the proper treaty exemption form.

Withholding Amounts and Documentation - Article #645

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The following charts illustrate the withholding taxes and withholding certificates required for six types of income – employment income, self-employment income, scholarships and fellowships, prizes and awards, and royalties. The requirements vary with the U.S. tax status of the recipient - resident alien or nonresident alien – and in the case of scholarships and fellowship grants, with the immigration status of the recipient as well.

Employment Income

Recipient	No Treaty Claim	Withholding and Reporting	Treaty Claim	Rate if No W/H Form
Nonresident Alien	Form W-4	Single 0 or 1 "NRA" line 6; Form W-2 (additional wage gross up required*)	Form 8233 with Certifying Statement; Form 1042-S; excess wages on W-2.	Wage withholding at single 0
Resident Alien	Form W-4	Same rules as for U.S. citizen; Form W-2	Form W-9 with treaty article and saving clause exception; Form 1042-S; excess wages on W-2.	Wage withholding at single 0
Resident Alien by election based on marriage	Form W-4	Same rules as for U.S. citizen; Form W-2	Form W-9 with treaty article and saving clause exception; Form 1042-S; excess wages on W-2.	Wage withholding at single 0
Resident Alien election as student (Barbados, Hungary, Jamaica, only)	Form W-4, W-9 making treaty-based residency election	Same rules as for U.S. citizen; Form W-2	N/A	Wage withholding at single 0

*Payroll processing wage gross-up required for all NRA employees except business apprentices and students from India.

Note that the Form 1042-S reporting rules do not specify that treaty-exempt payments to residents are reportable on a Form 1042-S. However, the recipient needs information from the payer about the treaty- exempt income in order to complete a correct tax return with a treaty claim. The IRS will not complain about such a Form 1042-S since it will facilitate IRS processing of the individual's tax return.

Self-employment Income

Recipient	No Treaty Claim	Withholding and Reporting	Treaty Claim
Nonresident Alien	Form W-8BEN as Certificate of Foreign Status (no SSN or ITIN required)	30% Form 1042-S	Form 8233 with SSN or ITIN or copy of a submitted Form W-7; Form 1042-S
Resident Alien	Form W-9 with SSN or ITIN as Certificate of US Status	No withholding; Form 1099-MISC	N/A
Resident Alien by election based on marriage	Form W-8BEN as Certificate of Foreign Status (no SSN or ITIN required)	30% Form 1042-S	N/A
Recipient tax status unknown; reason to know that recipient is Nonresident Alien	No documentation	30%; Form 1042-S	N/A
Recipient tax status unknown; no reason to know that recipient is Nonresident Alien	No documentation	28% backup withholding; Form 1099-MISC	N/A

Note that the *Tax Navigator* creates a Certifying Statement for self-employment income exempt under a treaty for ease of automating the information required for the form.

The regulations provide that a Form 8233 must include the individual's taxpayer identification number or a copy of a completed Form W-7 showing that a number has been applied for. ITIN application procedures introduced December 17, 2003 require that the Form 8233 or Form W-8BEN be submitted with the original Form W-7 and documentation to the ITIN Unit.

Scholarships and Fellowships

Payment Type and Recipient	No Treaty Claim	Withholding and Reporting	Treaty Claim
Qualified scholarship or fellowship - any recipient	N/A	None	N/A
Taxable grant – Nonresident Alien in F-1, J-1, M-1, or Q-1, Q-2 status	No withholding form required per W-8BEN instructions.	14% ; Form 1042-S	Form W-8BEN Part I & II with SSN or ITIN** Form 1042-S.
Taxable grant – Nonresident Alien in any other status	No withholding form required per W-8BEN instructions.	30%; Form 1042-S	N/A – primary purpose not studying, training, or research; Form 1042-S.
Taxable grant - Resident Alien	Form W-9 as Certificate of U.S. Status	None	Form W-9 with explanation of article and exception to saving clause; Form 1042-S.
Taxable grant – Resident Alien by election based on marriage	No withholding form required per W-8BEN instructions.	14% if F, J, M, or Q status; otherwise 30%; Form 1042-S	Form W-8BEN Part I & II with SSN or ITIN** Form 1042-S
Resident Alien election as student (Barbados, Hungary, Jamaica, only)	Form W-9 as Certificate of U.S. Status.	None	N/A
Taxable grant – Recipient a nonimmigrant but tax status unknown.	No documentation	30%; Form 1042-S	N/A

**Form 8233 may be used if also receiving treaty exempt compensation.

A Form 8233 must be submitted annually. A Form W-8BEN that includes an SSN or ITIN is valid as long as it is used annually for Form 1042-S reporting to the IRS and the facts have not changed.

The regulations provide that a Form 8233 must include the individual's taxpayer identification number or a copy of a completed Form W-7 or SS-5 showing that a number has been applied for. Treas. Reg. 1.1441-6 that applies to claims of reduced withholding under an income tax treaty using Form W-8BEN does not provide this exception for the TIN requirement on the form. ITIN application procedures introduced December 17, 2003 require that the Form 8233 or Form W-8BEN be submitted with the original Form W-7 and documentation to the ITIN Unit.

Prizes and Awards

Payment and Recipient	No Treaty Claim	Withholding and Reporting	Treaty Claim
Nonresident Alien in US who remains resident of treaty country	Form W-8BEN as Certificate of Foreign Status	30%; Form 1042-S	Form W-8BEN Part I & II with SSN or ITIN; Form 1042-S
Nonresident Alien abroad	Form W-8BEN as Certificate of Foreign Status	30%; Form 1042-S	Form W-8BEN Part I & II with SSN or ITIN; Form 1042-S
Resident Alien	Form W-9 with SSN or ITIN as Certificate of U.S. Status	No withholding; Form 1099-MISC	N/A
Resident Alien by election based on marriage	Form W8-BEN as Certificate of Foreign Status	30%; Form 1042-S	N/A
Resident Alien election as student (Barbados, Hungary, Jamaica, only)	Form W-9 with SSN or ITIN as Certificate of U.S. Status	No withholding; Form 1099-MISC	N/A
Recipient tax status unknown - Reason to know that recipient is Nonresident Alien.	No documentation	30%; Form 1042-S	N/A
Recipient tax status unknown - No reason to know that recipient is Nonresident Alien	No documentation	28% backup withholding; Form 1099MISC	N/A

A Form W-8BEN that includes an SSN or ITIN is valid as long as it is used annually for Form 1042-S reporting to the IRS and the facts have not changed. Otherwise the W-8BEN is valid for three years through December 31 of the last year. Note that the regulations for claims of reduced withholding under an income tax treaty require that the W-8BEN have a TIN. There is no exception for a TIN that is applied for but not yet received.

ITIN application procedures introduced December 17, 2003 require that the Form W-8BEN be submitted with the original Form W-7 and documentation to the ITIN Unit.

Royalties

Payment and Recipient	No Treaty Claim	Withholding and Reporting	Treaty Claim
Nonresident Alien in US who remains resident of treaty country	Form W-8BEN as Certificate of Foreign Status	30%; Form 1042-S	Form W-8BEN Part I & II with SSN or ITIN; Form 1042-S
Nonresident Alien abroad	Form W-8BEN as Certificate of Foreign Status	30%; Form 1042-S	Form W-8BEN Part I & II with SSN or ITIN; Form 1042-S
Resident Alien	Form W-9 with SSN or ITIN as Certificate of U.S. Status	No withholding; Form 1099-MISC	N/A
Resident Alien by election based on marriage	Form W8-BEN as Certificate of Foreign Status	30%; Form 1042-S	N/A
Resident Alien election as student (Barbados, Hungary, Jamaica, only)	Form W-9 with SSN or ITIN as Certificate of U.S. Status	No withholding; Form 1099-MISC	N/A
Recipient tax status unknown - Reason to know that recipient is Nonresident Alien.	No documentation	30%; Form 1042-S	N/A
Recipient tax status unknown - No reason to know that recipient is Nonresident Alien	No documentation	28% backup withholding; Form 1099MISC	N/A

A Form W-8BEN that includes an SSN or ITIN is valid as long as it is used annually for Form 1042-S reporting to the IRS and the facts have not changed. Otherwise the W-8BEN is valid for three years through December 31 of the last year. Note that Treas. Reg. 1.1441-6 that applies to claims of reduced withholding under an income tax treaty requires that the W-8BEN have a TIN. There is no exception for a TIN that is applied for but not yet received.

ITIN application procedures introduced December 17, 2003 require that the Form W-8BEN be submitted with the original Form W-7 and documentation to the ITIN Unit.