

Treasury Regulations Under Code Section 7701(b) Definition of Resident Alien

Reg. § 301.7701(b)-1 (2005) Resident Alien

(a) *Scope.* Section 301.7701(b)-1(b) provides rules for determining whether an alien individual is a lawful permanent resident of the United States. Section 301.7701(b)-1(c) provides rules for determining if an alien individual satisfies the substantial presence test. Section 301.7701(b)-2 provides rules for determining when an alien individual will be considered to maintain a tax home in a foreign country and to have a closer connection to that foreign country. Section 301.7701(b)-3 provides rules for determining if an individual is an exempt individual because of his or her status as a foreign government-related individual, teacher, trainee, student, or professional athlete. Section 301.7701(b)-3 also provides rules for determining whether an individual may exclude days of presence in the United States because the individual was unable to leave the United States because of a medical condition. Section 301.7701(b)-4 provides rules for determining an individual's residency starting and termination dates. Section 301.7701(b)-5 provides rules for applying section 877 to a nonresident alien individual. Section 301.7701(b)-6 provides rules for determining the taxable year of an alien. Section 301.7701(b)-7 provides rules for determining the effect of these regulations on rules in tax conventions to which the United States is a party. Section 301.7701(b)-8 provides procedural rules for establishing that an individual is a nonresident alien. Section 301.7701(b)-9 provides the effective dates of section 7701(b) and the regulations under that section. Unless the context indicates otherwise, the regulations under sections 301.7701(b)-1 through 301.7701(b)-9 apply for purposes of determining whether a United States citizen is also a resident of the United States. (This determination may be relevant, for example, to the application of section 861(a)(1) which treats income from interest-bearing obligations of residents as income from sources within the United States.) The regulations do not apply and sections 1.871-2 and 1.871-5 of this chapter continue to apply for purposes of the bona fide residence test of section 911. See section 1.911-2(c) of this chapter. For purposes of determining whether an individual is a resident of the United States for estate and gift tax purposes, see section 20.0-1(b)(1) and (2) and section 25.2501-1(b) of this chapter, respectively.

(b) *Lawful Permanent Resident—* (1) *Green Card Test.* An alien is a resident alien with respect to a calendar year if the individual is a lawful permanent resident at any time during the calendar year. A lawful permanent resident is an individual who has been lawfully granted the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. Resident status is deemed to continue unless it is rescinded or administratively or judicially determined to have been abandoned.

(2) *Rescission of Resident Status.* Resident status is considered to be rescinded if a final administrative or judicial order of exclusion or deportation is issued regarding the alien individual. For purposes of this paragraph, the term “final judicial order” means an order that is no longer subject to appeal to a higher court of competent jurisdiction.

(3) *Administrative or Judicial Determination of Abandonment of Resident Status.* An administrative or judicial determination of abandonment of resident status may be initiated by the

alien individual, the Immigration and Naturalization Service (INS), or a consular officer. If the alien initiates this determination, resident status is considered to be abandoned when the individual's application for abandonment (INS Form 1-407) or a letter stating the alien's intent to abandon his or her resident status, with the Alien Registration Receipt Card (INS Form 1-151 or Form 1-551) enclosed, is filed with the INS or a consular officer. If INS replaces any of the form numbers referred to in this paragraph or section 301.7701(b)- 2(f), refer to the comparable INS replacement form number. For purposes of this paragraph, an alien individual shall be considered to have filed a letter stating the intent to abandon resident status with the INS or a consular office if such letter is sent by certified mail, return receipt requested (or a foreign country's equivalent thereof). A copy of the letter, along with proof that the letter was mailed and received, should be retained by the alien individual. If the INS or a consular officer initiates this determination, resident status will be considered to be abandoned upon the issuance of a final administrative order of abandonment. If an individual is granted an appeal to a federal court of competent jurisdiction, a final judicial order is required.

(c) *Substantial Presence Test— (1) in General.* An alien individual is a resident alien if the individual meets the substantial presence test. An individual satisfies this test if he or she has been present in the United States on at least 183 days during a three year period that includes the current year. For purposes of this test, each day of presence in the current year is counted as a full day. Each day of presence in the first preceding year is counted as one-third of a day and each day of presence in the second preceding year is counted as one-sixth of a day. For purposes of this paragraph, any fractional days resulting from the above calculations will not be rounded to the nearest whole number. (See section 301.7701(b)-9(b)(2) for transitional rules for calendar years 1985 and 1986.)

(2) *Determination of Presence —*

(i) *Physical Presence.* For purposes of the substantial presence test, an individual shall be treated as present in the United States on any day that he or she is physically present in the United States at any time during the day. (But see section 301.7701(b)-3 relating to days of presence that may be excluded.)

(ii) *United States.* For purposes of section 7701(b) and the regulations thereunder, the term "United States" when used in a geographical sense includes the states and the District of Columbia. It also includes the territorial waters of the United States and the seabed and subsoil of those submarine areas which are adjacent to the territorial waters of the United States and over which the United States has exclusive rights, in accordance with international law, with respect to the exploration and exploitation of natural resources. It does not include the possessions and territories of the United States or the air space over the United States.

(3) *Current Year.* The term "current year" means any calendar year for which an alien individual is determining his or her resident status.

(4) *Thirty-one Day Minimum.* If an individual is not physically present for more than 30 days during the current year, the substantial presence test will not be applied for that year even if the three-year total is 183 or more days. For purposes of the substantial presence test, it is irrelevant that an individual was not present for more than 30 days in the first or second year preceding the current year.

(d) [Reserved]. For further guidance, see § 301.7701(b)- 1T(d).

(e) *Examples.* This section may be illustrated by the following examples:

Example 1. B, an alien individual, is present in the United States for 122 days in the current year. He was present in the United States for 122 days in the first preceding calendar year and for 122 days in the second preceding calendar year. In determining his status for the current year, B counts all 122 days in the United States in the current year plus $1/3$ of the 122 days in the United States in the first preceding calendar year ($40 \frac{2}{3}$ days) and $1/6$ of the 122 days in the United States during the second preceding calendar year ($20 \frac{1}{3}$ days). The total of $122 + 40 \frac{2}{3} + 20 \frac{1}{3}$ equals 183 days. B meets the substantial presence test and is a resident alien for the current year.

Example 2. C, an alien individual, is present in the United States for 25 days during the current year. She was present in the United States for 365 days during the first preceding year and 365 days during the second preceding year. The substantial presence test does not apply because C is present in the United States for fewer than 31 days during the current year.

Example 3. D, an alien individual, is present in the United States for 170 days during the current year. He was present in the United States for 30 days during the first preceding year and 30 days during the second preceding year. In determining his status for the current year, D counts all 170 days in the United States in the current year plus $1/3$ of the 30 days in the United States in the first preceding calendar year (10 days) and $1/6$ of the 30 days in the United States during the second preceding calendar year (5 days). The total of $170 + 10 + 5$ equals 185 days. D meets the substantial presence test and is a resident alien for the current year notwithstanding the fact that he was present in the United States for fewer than 31 days in each of the two preceding years.

[*T.D. 8411, 57 FR 15237-15254, Apr. 27, 1992, corrected at 57 FR 28612, June 26, 1992, further corrected at 57 FR 37189, Aug. 18, 1992; amended by T.D. 9194, 70 FR 18920-18948, Apr. 11, 2005.*]

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(a) through (c) [Reserved]. For further guidance, see § 301.7701(b)-1(a) through (c).

(d) *Application of section 7701(b) to the possessions and territories — (1) Application to aliens for purposes of mirror systems.* Section 7701(b) provides the basis for determining whether an alien individual is a resident of a United States possession or territory that administers income tax laws that are identical (except for the substitution of the name of the possession or territory for the term United States where appropriate) to those in force in the United States, for purposes of applying such laws with respect to income tax liability incurred to such possession or territory.

(2) *Non-application for bona fide resident determination.* Section 7701(b) does not provide the basis for determining whether an individual (including an alien individual) is a bona fide resident of a United States possession or territory for U.S. Federal income tax purposes. For the applicable rules for making this determination, see section 937(a) and the regulations thereunder.

(e) [Reserved]. For further guidance, see § 301.7701(b)- 1(e).

(f) *Effective date.* This section shall apply for taxable years ending after October 22, 2004.

[Added by T.D. 9194, 70 FR 18920-18948, Apr. 11, 2005; corrected at 70 F.R. 32489-32490, June 3, 2005.]

Reg. § 301.7701(b)-2 (1993) Closer Connection Exception

(a) *In General.* An alien individual who meets the substantial presence test may nevertheless be considered a nonresident alien for the current year if the following conditions are satisfied—

- (1) The individual is present in the United States for fewer than 183 days in the current year;
- (2) The individual maintains a tax home in a foreign country during the current year; and
- (3) Except as provided in paragraph (e) of this section, the individual has a closer connection during the current year to a single foreign country in which he or she maintains a tax home than to the United States.

(b) *Foreign Country.* For purposes of section 7701(b) and the regulations thereunder, the term “foreign country” when used in a geographical sense includes any territory under the sovereignty of the United Nations or a government other than that of the United States. It includes the territorial waters of the foreign country (determined in accordance with the laws of the United States), and the seabed and subsoil of those submarine areas which are adjacent to the territorial waters of the foreign country and over which the foreign country has exclusive rights, in accordance with international law, with respect to the exploration and exploitation of natural resources. It also includes the possessions and territories of the United States.

(c) *Tax Home.* (1) *Definition.* For purposes of section 7701(b) and the regulations under that section, the term “tax home” has the same meaning that it has for purposes of section 162(a)(2) (relating to travel expenses while away from home). Thus, an individual’s tax home is considered to be located at the individual’s regular or principal (if more than one regular) place of business. If the individual has no regular or principal place of business because of the nature of the business, or because the individual is not engaged in carrying on any trade or business within the meaning of section 162(a), then the individual’s tax home is the individual’s regular place of abode in a real and substantial sense.

(2) *Duration and Nature of Tax Home.* The tax home maintained by the alien individual must be in existence for the entire current year. The tax home must be located in the same foreign country for which the individual is claiming to have the closer connection described in paragraph (d) of this section.

(d) *Closer Connection to a Foreign Country.* (1) *In General.* For purposes of section 7701(b) and the regulations under that section, an alien individual will be considered to have a closer connection to a foreign country than the United States if the individual or the Commissioner establishes that the individual has maintained more significant contacts with the foreign country than with the United States. In determining whether an individual has maintained more significant contacts with a foreign country than the United States, the facts and circumstances to be considered include, but are not limited to, the following—

- (i) The location of the individual’s permanent home;
- (ii) The location of the individual’s family;

(iii) The location of personal belongings, such as automobiles, furniture, clothing and jewelry owned by the individual and his or her family;

(iv) The location of social, political, cultural or religious organizations with which the individual has a current relationship;

(v) The location where the individual conducts his or her routine personal banking activities;

(vi) The location where the individual conducts business activities (other than those that constitute the individual's tax home);

(vii) The location of the jurisdiction in which the individual holds a driver's license;

(viii) The location of the jurisdiction in which the individual votes;

(ix) The country of residence designated by the individual on forms and documents;
and

(x) The types of official forms and documents filed by the individual, such as Form 1078 (Certificate of Alien Claiming Residence in the United States), Form W-8 (Certificate of Foreign Status) or Form W-9 (Payer's Request for Taxpayer Identification Number).

(2) *Permanent Home.* For purposes of paragraph (d)(1)(i) of this section, it is immaterial whether a permanent home is a house, an apartment, or a furnished room. It is also immaterial whether the home is owned or rented by the alien individual. It is material, however, that the dwelling be available at all times, continuously, and not solely for stays of short duration.

(e) *Special Rule.* An alien individual may demonstrate in one year that he or she has a closer connection to two foreign countries (but no more than two) if he or she satisfies all of the following conditions—

(1) The individual maintains a tax home beginning on the first day of the current year in one foreign country;

(2) The individual changes his or her tax home during the current year to a second foreign country;

(3) The individual continues to maintain his or her tax home in the second foreign country for the remainder of the current year;

(4) The individual has a closer connection to each foreign country than to the United States for the period during which the individual maintains a tax home in that foreign country; and

(5) The individual is subject to taxation as a resident pursuant to the internal laws of either foreign country 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 section 301.7701(b)-8 with regard to the statement that must be filed by an alien individual claiming the closer connection exception.

[*T.D. 8411, 57 FR 15237-15254, Apr. 27, 1992, corrected by 57 FR 28612, June 26, 1992; 57 FR 37189, Aug. 18, 1992; 58 FR 17516, Apr. 5, 1993.*]

Reg. § 301.7701(b)-3 (1997)
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 section 301.7701(b)-1(c)(2)(i)). However, for purposes of section 7701(b) and the reductions 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 section 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 section 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(l)(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(l)(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 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 section 301.7701(b)-2; and

(B) Whether the individual has taken affirmative steps within the meaning of paragraph (f) of section 301.7701(b)-2 to adjust the individual's status from nonimmigrant 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 section 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.

[*T.D. 8411, 57 FR 15237-15254, Apr. 27, 1992, corrected by 57 28612, June 26, 1992, corrected by 57 FR 37189, Aug. 18, 1992; amended by T.D. 8733, 62 FR 53383-53387, Oct. 14, 1997.*]

Reg. § 301.7701(b)-4 (1992) 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 section 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 permanent 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 section 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 section 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 section 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 or the last day the individual was physically present in the United States if the alien 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. It is immaterial whether the individual's tax home was in the United States, or that the individual had a closer connection to the United States than to the foreign country, prior to the date of his or her departure from the United States or the date on which the individual was no longer a lawful permanent resident, whichever is applicable.

(c) *Rules Relating to Residency Starting Date and Residency Termination Date.* (1) *De Minimis Presence.* An alien individual may be present in the United States for up to 10 days without

triggering the residency starting date (for purposes of the substantial presence test) or extending the residency termination date (for purposes of the substantial presence test) if the individual is able to establish that, during that period, the individual's tax home was in a foreign country and he or she maintained a closer connection to that foreign country than to the United States. Days from more than one period of presence may be disregarded for purposes of determining an individual's residency starting date or termination date so long as the total is not more than 10 days. However, an individual may not disregard any days that occur in a period of consecutive days of presence, if all the days that occur during that period cannot be excluded. An individual must include days of presence for purposes of determining whether the individual meets the substantial presence test even though the days may be disregarded for purposes of determining the individual's residency starting date or residency termination date.

(2) *Proration.* If an individual's residency starting date does not fall on the first day of the tax year, or the individual's residency termination date does not fall on the last day of the tax year, the individual's income tax liability should be calculated in accordance with section 1.871-13 of this chapter dealing with the taxation of individuals who change residence status during the taxable year.

(3) *Residency Starting Date for Certain Individuals* (i) *In General.* If an alien individual (who otherwise does not meet the substantial presence test or the green card test for the current year) is physically present in the United States for at least 31 consecutive days during the current year, and also for a period of continuous presence beginning with the first day of that thirty-one day period (see paragraph (c)(3)(iii) of this section), then the individual may elect to be treated as a resident during the current year. The individual's residency starting date shall be the first day of that thirty-one day period, if

(A) The individual was not a resident of the United States under the substantial presence test or the green card test in the year preceding the current year; and

(B) The individual is a resident of the United States in the subsequent year under the substantial presence test (whether or not the individual is also a resident of the United States under the green card test).

(ii) *Determination of Presence.* Except as otherwise provided in paragraph (c)(3)(iii) of this section, an individual shall be treated as present in the United States on any day that the individual is physically present in the United States at any time during the day.

(iii) *Thirty-One Day Period.* For purposes of this paragraph (c)(3), the term "thirty-one day period" means any period of 31 consecutive days during which an individual is physically present in the United States during each day of the period.

(iv) *Period of Continuous Presence.* For purposes of this paragraph (c)(3), the term "continuous presence" means a period of presence in the United States that includes 75 percent of the days in the current year beginning with (and including) the first day of the individual's thirty-one day period of presence. Only for purposes of the continuous presence requirement, an individual will be deemed to be present in the United States for up to 5 days on which the individual is absent from the United States. These days will not be deemed to be days of presence for purposes of the thirty-one day period of presence requirement. If an individual is present for more than one thirty-one day period of presence and satisfies the continuous presence requirement with regard to each period, the individual's residency starting date shall be the first day of the first thirty-one day period of presence. If an individual is present for more than one thirty-one day period of presence but satisfies the continuous presence requirement

only for a later thirty-one day period, the individual's residency starting date shall be the first day of the later thirty-one day period of presence. For purposes of this paragraph (c)(3), days of presence that are otherwise excluded under section 7701(b)(3)(D)(i) and section 301.7701(b)-3(a)(1) (exempt individual), (a)(2) (medical condition), (a)(3) (in transit between two foreign points), and (a)(4) (regular commuter) shall not be counted as days of presence for purposes of either the thirty-one day period or continuous presence requirement.

(v) *Election Procedure.* (A) *Filing Requirements.* An alien individual shall make an election to be treated as a resident under paragraph (c)(3) of this section by attaching a statement (described in paragraph (c)(3)(v)(C) of this section) to the individual's income tax return (Form 1040) for the taxable year for which the election is to be in effect (the election year). The alien individual may not make this election until such time as he has satisfied the substantial presence test for the year following the election year. If an alien individual has not satisfied the substantial presence test for the year following the election year as of the due date (not including extensions) of the tax return for the election year, the alien individual may request an extension of time for filing the return until a reasonable period after he or she has satisfied such test, provided that the individual pays with his or her extension application the amount of tax he or she expects to owe for the election year computed as if he or she were a nonresident alien throughout the election year. An election made under paragraph (c)(3) of this section may not be revoked without the approval of the Commissioner or his delegate.

(B) *Election on Behalf of a Dependent Child.* An individual may make an election on behalf of a dependent child (as defined in paragraphs (1) and (2) of section 152(a), without regard to section 152(b)(3)) if the individual is qualified to make an election on his or her own behalf, the child qualifies to make an election under this paragraph (c)(3), and the child is not required by section 6012 to file a United States income tax return for the year for which the election is to be effective.

(C) *Statement.* The statement required by paragraph (c)(3)(v)(A) of this section shall include the name and address of the alien individual and contain a signed declaration that the election is being made. If the individual is also making an election on behalf of any dependent children, then the statement must include the required information with respect to those children. The statement must specify

- (1) That the alien individual was not a resident in the year immediately preceding the election year;
- (2) That the alien individual is a resident under the substantial presence test in the year following the election year;
- (3) The individual's number of days of presence in the United States during the year following the election year;
- (4) The date or dates of the alien individual's thirty-one day period of presence and period of continuous presence in the United States during the election year; and
- (5) The date or dates of absence from the United States during the election year that are deemed to be days of presence.

(vi) *Penalty for Failure to Comply with Filing Requirements.* (A) *General Rule.* If an individual fails to comply with the election procedure of paragraph (c)(3)(v) of this section, the individual must file his or her income tax return for the current year as a nonresident alien.

(B) *Exception.* The penalty described in paragraph (c)(3)(vi)(A) of this section shall not apply if the individual can show by clear and convincing evidence that he or she

took reasonable actions to become aware of the filing requirements and significant affirmative steps to comply with the requirements. An individual who requests an extension of time to file his or her income tax return pursuant to paragraph (c)(3)(v) of this section will be considered to have taken significant affirmative steps to comply with the requirement that the individual pay his or her tax determined as if the individual were a nonresident alien if the individual paid with his or her extension application at least 90 percent of the amount of the tax the individual actually owed for the election year computed as if he or she were a nonresident alien throughout the election year.

(d) *Examples.* The following examples illustrate the operation of this section:

Example 1. B, a citizen of foreign country X, is an alien who has never before been a United States resident for tax purposes. B comes to the United States on January 6, 1985, to attend a business meeting and returns to country X on January 10, 1985. B is able to establish a closer connection to country X for the period January 6-10. On March 1, 1985, B moves to the United States and resides here until August 20, 1985, when he returns to country X. On December 12, 1985, B comes to the United States for pleasure and stays here until December 16, 1985 when he returns to country X. B is able to establish a closer connection to country X for the period December 12-16. B is not a United States resident for tax purposes during the following year and can establish a closer connection to country X for the remainder of calendar year 1985. B is a resident of the United States under the substantial presence test because B is present in the United States for 183 days (5 days in January plus 173 days for the period March 1 - August 20 plus 5 days in December). B's residency starting date is March 1, 1985, and his residency termination date is August 20, 1985.

Example 2. The facts are the same as in *Example 1*, except that B remains in the United States until December 17, 1985, and is able to establish a closer connection to country X for the period December 18 through 31. B's residency termination date is December 17, 1985.

Example 3. C, a citizen of foreign country Y, is an alien who has never before been a United States resident for tax purposes. C comes to the United States for the first time on February 10, 1985, and attended a business conference until February 24, 1985, when she returns to country Y. On April 20, 1985, C enters the United States as a lawful permanent resident. On November 10, 1985, C ceases to be a lawful permanent resident but stays on in the United States until November 20, 1985 when she returns to country Y. On December 8, 1985, C comes to the United States and stays here until December 17, 1985 when she returns to country Y. She can establish a closer connection to country Y for that period. C is not a resident of the United States during the following calendar year and can establish a closer connection to country Y for the remainder of calendar year 1985. C qualifies as a United States resident under both the green card test and the substantial presence test. C's residency starting date under the green card test is April 20, 1985. Under the substantial presence test, C's residency starting date is February 10, 1985, because she is present for more than ten days in February and cannot take advantage of the de minimis presence rule. Therefore, C's residency starting date is February 10, 1985. C's residency termination date under the green card test is November 10, 1985. Her residency termination date under the substantial presence test is November 20, because B can

disregard ten days of presence in December. Thus, her residency termination date is November 20, 1985, the later of her residency termination date under the substantial presence test or the green card test.

Example 4. The facts are the same as in *Example 3*, except that C is initially present in the United States on business from February 5 to February 9, 1985. C is able to establish a closer connection to country Y for that period. C may take advantage of only ten days of de minimis presence and may exclude days from a continuous period of presence only if she can exclude all the days that occur during that period. Thus, C may choose either of the following periods of residency: residency starting date February 5, 1985, and residency termination date November 20, 1985, or residency starting date April 20, 1985, and residency termination date December 17, 1985.

Example 5. D, a citizen of foreign country Z, is an alien who has never before been a United States resident for tax purposes. D comes to the United States on November 1, 1985 and is present in the United States on 31 consecutive days (from November 1 through December 1, 1985). D returns to country Z on December 1 and does not come back to the United States until December 17, 1985. He remains in the United States for the rest of the year. During 1986, D is a resident of the United States under the substantial presence test. D may elect to be treated as a resident of the United States for 1985 because he was present in the United States in 1985 for a 31 consecutive day period of presence (November 1 through December 1, 1985) and for at least 75 percent of the days following (and including) the first day of D's 31 consecutive day period of presence (46 total days of presence in the United States/61 days in the period from November 1 through December 31 = 75.4%). If D makes the election to be treated as a resident, his residency starting date will be November 1, 1985.

Example 6. The facts are the same as in *Example 5*, except that D is absent from the United States on December 24, 25, 29, 30 and 31. D may make the election to be treated as a resident for 1985 because up to five days of absence will be deemed to be days of presence for purposes of the continuous presence requirement.

Example 7. F, a citizen of foreign country M, is an alien individual who has never before been a United States resident for tax purposes. F comes to the United States on January 1, 1985 and remains in the United States through January 31, 1985, when she returns to country M. F comes back to the United States on October 1, 1985 and is present in the United States through November 1, 1985. From November 1, 1985 through December 31, 1985, F is present in the United States for 38 days. Although F satisfies two 31 consecutive day periods of presence, (January 1 through January 31 and October 1 through November 1), she satisfies the continuous presence requirement only with regard to the later period of presence (69 total days of presence/92 days in the period from October 1 through December 31 = 75%). Thus, if F makes the election to be treated as a resident, his residency starting date is October 1, 1985.

(e) *No Lapse.*

(1) *Residency in Prior Year.* An alien individual who was a United States resident during any part of the preceding calendar year and who is a United States resident for any part of the

current year will be considered to be taxable as a resident at the beginning of the current year. For purposes of this paragraph (e)(1), it is immaterial whether an individual is considered to be a resident under the substantial presence test or the green card test.

(2) *Residency in Following Year.* An alien individual who is a United States resident for any part of the current year and who is also a United States resident for any part of the following year (regardless of whether the individual has a closer connection to a foreign country than the United States during the current year) will be taxable as a resident through the end of the current year. For purposes of this paragraph (e)(2), it is immaterial whether an individual is considered to be a resident under the substantial presence test or the green card test.

(3) *Special Rule.* If an individual meets the green card test for the current year but is not physically present in the United States during the current year, then the individual's residency starting date shall be the first day of the following year.

(4) *Example.* The following example illustrates the application of this paragraph (e).

Example. B, an alien individual who is a citizen of foreign country M, comes to the United States for the first time on May 1, 1985, and remains in the United States until November 5, 1985, when he returns to country M. B comes back to the United States on March 5, 1986 as a lawful permanent resident and remains in the United States until September 10, 1986, when he ceases to be a lawful permanent resident and returns to country M. B is not a resident in calendar year 1987. B's United States residency in calendar year 1985 continues through December 31, 1985, because he is a United States resident in the following calendar year. In calendar year 1986, B's United States residency is deemed to begin on January 1, 1986 because B qualified as a resident in the preceding calendar year. Thus, B's residency period in the United States begins on May 1, 1985, and ends on September 10, 1986.

[*T.D. 8411, 57 FR 15237-15254, Apr. 27, 1992, corrected by 57 FR 28612, June 26, 1992.*]

Reg. § 301.7701(b)-5 (1992)
Coordination with Section 877

(a) *General Rule.* An alien individual will be subject to United States income tax in the manner provided by section 877, regardless of whether the individual has a tax avoidance motive, if—

- (1) The alien individual is a resident alien of the United States for at least three consecutive calendar years (the initial residency period) beginning after December 31, 1984;
- (2) The period of residence for each of the three consecutive calendar years includes at least 183 days;
- (3) The alien is once again taxed as a nonresident (including an individual taxed as a nonresident under section 301.7701(b)-7(a)(1); and
- (4) The alien then becomes a resident of the United States before the close of the third calendar year beginning after the individual's residency termination date in the initial residency period.

(b) *Tax Imposed.* The tax provided for under paragraph (a) of this section will be imposed for the intervening period of nonresidency only if the amount of tax would exceed the amount of tax that would be imposed under section 871, relating to the taxation of nonresident aliens.

(c) *Example.* The following example illustrates the application of this section.

Example. B, a citizen of foreign country F, enters the United States on April 1, 1985, as a lawful permanent resident. On August 1, 1987, B ceases to be a lawful permanent resident and returns to country F. B meets the initial residency period requirement because he is a resident of the United States for at least 183 days in each of three consecutive years (1985, 1986 and 1987). B returns to the United States on October 5, 1990, as a lawful permanent resident. Because B became a resident of the United States before the close of the third calendar year (1990) beginning after the close of the initial residency period (August 1, 1987), he is subject to tax under section 877(b) for the intervening period of nonresidency, August 2, 1987 through October 4, 1990, if the amount of the tax imposed under section 877 is more than the tax imposed under section 871.

[T.D. 8411, 57 FR 15237-15254, Apr. 27, 1992]

Reg. § 301.7701(b)-6 (2002) Taxable Year

(a) *In General.* An alien individual who has not established a fiscal year as his or her taxable year prior to the period that the individual is subject to United States income tax as a resident or a nonresident shall adopt the calendar year as his or her taxable year. An alien who has established a fiscal year in a foreign country prior to the period that the individual is subject to United States income tax may adopt the calendar year as his or her taxable year for United States income tax purposes without requesting a change in accounting period. An individual will be considered to have established a fiscal year (whether in the United States or a foreign country) if the annual accounting period on which the individual computes his or her income is a fiscal year, the individual keeps his or her books in accordance with that fiscal year, and the requirements of section 441 and section 1.441-1(b) of this chapter are otherwise satisfied. An alien who has established a fiscal year and is a resident alien during the calendar year will be treated as a resident alien with respect to any portion of his or her taxable year (beginning with the individual's residency starting date and ending with the individual's residency termination date) that falls within such calendar year. Once the individual has established either a fiscal or calendar year taxable year for any period for which the individual is subject to United States income tax, the individual may not change that taxable year without the approval of the Secretary. See section 442.

(b) *Examples.* The following examples illustrate the operation of this section:

Example 1. B, a citizen and resident of foreign country F, was engaged in a United States business during 1982 and filed a return on a fiscal year basis. B's fiscal year runs from October 1 to September 30. B comes to the United States on March 8, 1985 and remains in the United States until October 10, 1985, when he returns to country F. B maintains a closer connection to and his tax home in Country F for the remainder of calendar year 1985. B, who is not a United States resident at any time in 1986, is a United States resident for the period that begins on March 8, 1985, and ends on October 10, 1985. B has adopted a fiscal year taxable year for purposes of computing his United States income tax liability. For his fiscal year that ends on September 30, 1985, B will be taxed as a United States resident for the period that begins on March 8, 1985 and ends on September 30, 1985. For his fiscal year that ends on September 30, 1986, B will only be taxed as a United States resident for the period that begins on October 1, 1985 and ends on October 10, 1985.

Example 2. The facts are the same as in Example 1, except that B's 1982 business was a country F business established on a fiscal year basis and at no time prior to 1985 was B subject to United States income tax. B may adopt a calendar year as his taxable year for United States income tax purposes without requesting a change of accounting period. B continues to use a fiscal year as his taxable year. For his fiscal year that ends on September 30, 1985, B will be taxed as a United States resident for the period that begins on March 8, 1985 and ends September 30, 1985. For his fiscal year that ends on September 30, 1986, B will be taxed as a United States resident for the period that begins on October 1, 1985 and ends on October 10, 1985.

Example 3. The facts are the same as in Example 1, except that B's 1982 business was a country F business established on a fiscal year basis and at no time prior to 1985 was B subject to United States income tax. B may adopt a calendar year as his taxable year for United States income tax purposes without requesting a change of accounting period. B adopts a calendar year as his taxable year for 1985. For his calendar year taxable year ending on December 31, 1985, B will be taxed as a United States resident for the period that begins on March 8, 1985, and ends on October 10, 1985.

[*T.D. 8411, 57 FR 15237-15254, Apr. 27, 1992, corrected by 57 FR 28612, June 26, 1992; revised by T.D. 8996 67 FR 35009-35025, May 17, 2002.*]

Reg. § 301.7701(b)-7 (1997) Coordination with Income Tax Treaties

(a) *Consistency Requirement.* (1) *Application.* The application of this section shall be limited to an alien individual who is a dual resident taxpayer pursuant to a provision of a treaty that provides for resolution of conflicting claims of residence by the United States and its treaty partner. A “dual resident taxpayer” is an individual who is considered a resident of the United States pursuant to the internal laws of the United States and also a resident of a treaty country pursuant to the treaty partner’s internal laws. If the alien individual determines that he or she is a resident of the foreign country for treaty purposes, and the alien individual claims a treaty benefit (as a nonresident of the United States) so as to reduce the individual’s United States income tax liability with respect to any item of income covered by an applicable tax convention during a taxable year in which the individual was considered a dual resident taxpayer, then that individual shall be treated as a nonresident alien of the United States for purposes of computing that individual’s United States income tax liability under the provisions of the Internal Revenue Code and the regulations thereunder (including the withholding provisions of section 1441 and the regulations under that section in cases in which the dual resident taxpayer is the recipient of income subject to withholding) with respect to that portion of the taxable year the individual was considered a dual resident taxpayer.

(2) *Computation of Tax Liability.* If an alien individual is a dual resident taxpayer, then the rules on residency provided in the convention shall apply for purposes of determining the individual’s residence for all purposes of that treaty.

(3) *Other Code Purposes.* Generally, for purposes of the Internal Revenue Code other than the computation of the individual’s United States income tax liability, the individual shall be treated as a United States resident. Therefore, for example, the individual shall be treated as a United States resident for purposes of determining whether a foreign corporation is a controlled foreign corporation under section 957 or whether a foreign corporation is a foreign personal holding company under section 552. In addition, the application of paragraph (a)(2) of this section does not affect the determination of the individual’s residency time periods under section 301.7701(b)-4.

(4) *Special Rules for S Corporations.* [Reserved]

(b) *Filing Requirements.* An alien individual described in paragraph (a) of this section who determines his or her U.S. tax liability as if he or she were a nonresident alien shall make a return on Form 1040NR on or before the date prescribed by law (including extensions) for making an income tax return as a nonresident. The individual shall prepare a return and compute his or her tax liability as a nonresident alien. The individual shall attach a statement (in the form required in paragraph (c) of this section) to the Form 1040NR. The Form 1040NR and the attached statement, shall be filed with the Internal Revenue Service Center, Philadelphia, PA 19255. The filing of a Form 1040NR by an individual described in paragraph (a) of this section may affect the determination by the Immigration and Naturalization Service as to whether the individual qualifies to maintain a residency permit.

(c) *Contents of Statement.* (1) *In General.* The statement filed by an individual described in paragraph (a)(1) of this section, for a return relating to a taxable year for which the due date

(without extensions) is after December 15, 1997, must be in the form of a fully completed Form 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)) or appropriate successor form. See section 6114 and section 301.6114-1 for rules relating to other treaty-based return positions taken by the same taxpayer.

(ii) Earlier returns.— For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, the statement filed by the individual described in paragraph (a)(1) of this section must contain the information in accordance with paragraph (c)(1) of this section in effect prior to December 15, 1997 (see section 301.7701(b)-7(c)(1) as contained in 26 CFR part 301, revised April 1, 1997).

(2) *Controlled Foreign Corporation Shareholders.* If the taxpayer who claims a treaty benefit as a nonresident of the United States is a United States shareholder in a controlled foreign corporation (CFC), as defined in section 957 or section 953(c), and there are no other United States shareholders in that CFC, then for purposes of paragraph (c)(1) of this section, the approximate amount of subpart F income (as defined in section 952) that would have been included in the taxpayer's income may be determined based on the audited foreign financial statements of the CFC.

(3) *S Corporation Shareholders.* [Reserved]

(d) *Relationship to Section 6114(a) Treaty-based Return Positions.* The statement required by paragraph (b) of this section will be considered disclosure for purposes of section 6114 and section 301.6114-1(a), but only if the statement is in the form required by paragraph (c) of this section. If the taxpayer fails to file the statement required by paragraph (b) of this section on or before the date prescribed in paragraph (b) of this section, the taxpayer will be subject to the penalties imposed by section 6712. See section 6712 and section 301.6712-1.

(e) *Examples.* The following examples illustrate the application of this section:

Example 1. B, an alien individual, is a resident of foreign country X, under X's internal law. Country X is a party to an income tax convention with the United States. B is also a resident of the United States under the Internal Revenue Code. B is considered to be a resident of country X under the convention. The convention does not specifically deal with characterization of foreign corporations as controlled foreign corporations or the taxability of United States shareholders on inclusions of subpart F income, but it provides, in an "Other Income" article similar to Article 21 of the 1981 draft of the United States Model Income Tax Convention (U.S. Model), that items of income of a resident of country X that are not specifically dealt with in the convention shall be taxable only in country X. B owns 80% of the one class of stock of foreign corporation R. The remaining 20% is owned by C, a United States citizen who is unrelated to B. In 1985, corporation R's only income is interest that is foreign personal holding company income under section 1.954A-2 of this chapter. Because the United States-X income tax convention does not deal with characterization of foreign corporations as controlled foreign corporations, United States internal income tax law applies. Therefore, B and C are United States shareholders within the meaning of section 1.951-1(g) of this chapter, corporation R is a controlled foreign corporation within the meaning of section 1.957-1 of this chapter, and corporation R's income is included in C's income as subpart F income under section 1.951-1 of this chapter. B may avoid current taxation on his share of the subpart F inclusion by filing as a nonresident (i.e., by following the procedure in section 301.7701(b)-7(b)).

Example 2. The facts are the same as in *Example 1*, except that B also earns United States source dividend income. The United States-X income tax convention provides that the rate of United States tax on United States source dividends paid to residents of country X shall not exceed 15 percent of the gross amount of the dividends. B's United States tax liability with respect to the dividends would be smaller if he were treated as a resident alien, subject to tax on a net basis (i.e., after the allowance of deductions) than if he were treated as a nonresident alien. If, however, B chooses to file as a nonresident in order to claim treaty benefits with respect to his share of R's subpart F income, his overall United States tax liability, including the portion attributable to the dividends, must be determined as if he were a nonresident alien.

Example 3. C, a married alien individual with three children, is a resident of foreign country Y, under Y's internal law. Country Y is a party to an income tax convention with the United States. C is also a resident of the United States under the Internal Revenue Code. C is considered to be a resident of country Y under the convention. The convention specifically covers, among other items of income, personal services income, dividends and interest. C is sent by her country Y employer to work in the United States from January 1, 1985 until December 31, 1985. During 1985, C also earns United States source dividends and interest and incurs mortgage interest expenses on her personal residence. The United States-Y treaty provides that remuneration for personal services performed in the United States by a country Y resident is exempt from United States tax if, among other things, the individual performing such services is present in the United States for a period that is not in excess of 183 days. The treaty provides that the rate of United States tax on United States source dividends paid to residents of Y shall not exceed 15 percent of the gross amount of the dividends and it exempts residents of Y from United States tax on United States source interest. In filing her 1985 tax return, C may choose to file either as a resident alien without claiming any treaty benefits or as a nonresident alien if she desires to claim any treaty benefit. C files as a nonresident (i.e., by following the procedure described in section 301.7701(b)-7(b)). Because C does not satisfy the requirements of the United States-Y treaty with regard to exempting personal services income from United States tax, C will be taxed on her personal services income at graduated rates under section 1 of the Code pursuant to section 871(b) of the Code. She will not be entitled to deduct her mortgage interest expenses or to claim more than one personal exemption because she is taxed as a nonresident alien under the Code by virtue of her decision to claim benefits, and section 873 of the Code denies nonresidents the deduction for personal residence mortgage interest expense and generally limits them to only one personal exemption. C will be subject to a tax of 15 percent of the gross amount of her dividend income under section 871(a) of the Code as modified by the treaty, and she will be exempt from tax on her interest income. C is not entitled to file a joint return with her spouse even if he is a resident alien under the Code for 1985.

Example 4. The facts are the same as in *Example 3*, except that C does not choose to claim treaty benefits with respect to any items of income covered by the treaty (i.e., she files as a resident). Therefore, she is taxed as a resident under the Code and pays tax at graduated rates on her personal services income, dividends, and interest. In addition, she is entitled to deduct her mortgage interest expenses and to take personal exemptions for her spouse and three children. C will be entitled to file a joint return with her spouse if he is a resident alien for 1985

or, if he is a nonresident alien, C and her spouse may elect to file a joint return pursuant to section 6013.

[*T.D. 8411, 57 FR 15237-15254, Apr. 27, 1992, corrected by 57 FR 28612, June 26, 1992; amended by T.D. 8733, 62 FR 53383-53387, Oct. 14, 1997.*]

Reg. § 301.7701(b)-8 (1997) Procedural Rules

(a) *Who Must File.* (1) *Closer Connection Exception.* An alien individual who otherwise meets the substantial presence test must file a statement to explain the basis of the individual's claim that he or she is able to satisfy the closer connection exception described in section 301.7701(b)-2.

(2) *Exempt Individuals and Individuals with a Medical Condition.* An alien individual must file a statement to explain the basis of the individual's claim that he or she is able to exclude days of presence in the United States because the individual—

- (i) Is an exempt individual as described in section 301.7701(b)- 3(b)(3) (teacher/trainee) or (b)(4) (student);
- (ii) Is an exempt individual described in section 301.7701(b)- 3(b)(5) (professional athlete); or
- (iii) Has a medical condition or problem as described in section 301.7701(b)-3(c).

(3) *De Minimis Presence and Residency Starting and Termination Dates.* A statement must be filed by an individual who is seeking to establish—

- (i) That a period of de minimis presence of ten or fewer days should be disregarded for purposes of the individual's residency starting or termination date; or
- (ii) A residency termination date.

(b) *Contents of Statement.* (1) *Closer Connection Exception.*—

(i) *Returns due after December 15, 1997.*— The statement filed by an individual described in paragraph (a)(1) of this section, for a return relating to a taxable year for which the due date (without extensions) is after December 15, 1997, must be in the form of a fully completed Form 8840 (Closer Connection Exception Statement) or appropriate successor form.

(ii) *Earlier returns.*— For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, the statement filed by the individual described in paragraph (a)(1) of this section must contain the information in accordance with paragraph (b)(1) of this section in effect prior to December 15, 1997 (see section 301.7701(b)-8(b)(1) as contained in 26 CFR Part 301, revised April 1, 1997).

(2) *Exempt individuals and individuals with a medical condition.*—

(i) *Returns due after December 15, 1997.*— The statement filed by an individual described in paragraph (a)(2) of this section, for a return relating to a taxable year for which the due date (without extensions) is after December 15, 1997, must be in the form of a fully completed Form 8843 (Statement for Exempt Individuals and Individuals with a Medical Condition) or appropriate successor form.

(ii) *Earlier returns.*— For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, the statement filed by the individual described in paragraph (a)(2) of this section must contain the information in accordance with paragraph (b)(2) of this section in effect prior to December 15, 1997 (see section 301.7701(b)-8(b)(2) as contained in 26 CFR Part 301, revised April 1, 1997).

(3) *De Minimis Presence and Residency Starting and Termination Dates.*— The statement filed by an individual described in paragraph (a)(3) of this section shall be dated, signed by the individual seeking to exclude de minimis presence for purposes of the individual's residency starting or termination date or to establish a residency termination date, and verified by a declaration that the statement is made under the penalty of perjury. The statement shall contain the information described in paragraphs (b)(1)(i), (ii) and (iii) of this section and the following information (as applicable) —

- (i) The first day that the individual was present in the United States during the current year;
- (ii) The last day that the individual was present in the United States during the current year;
- (iii) Dates of de minimis presence that the individual is seeking to exclude from his or her residency starting or termination dates;
- (iv) Sufficient facts to establish that the individual has maintained his or her tax home in and a closer connection to a foreign country during a period of de minimis presence;
- (v) Sufficient facts to establish that the individual has maintained his or her tax home in and a closer connection to a foreign country following the individual's last day of presence in the United States during the current year or following the abandonment or rescission of the individual's status as a lawful permanent resident during the current year;
- (vi) Date that the individual's status as a lawful permanent resident was abandoned or rescinded; and
- (vii) Sufficient facts (including copies of relevant documents) to establish that the individual's status as lawful permanent resident has been abandoned or rescinded.

(c) *How to File.* Individuals described in paragraph (a) of this section who are required to make a return on Form 1040 or 1040NR pursuant to paragraph (a) or (b) of section 1.6012-1 of this chapter must attach the statement described in paragraph (b) of this section to their return for the taxable year for which the statement is relevant. An individual who is not required to file either Form 1040 or 1040NR must file the statement with the Internal Revenue Service Center, Philadelphia, PA 19255 on or before the date prescribed by law (including extensions) for making an income tax return as a nonresident for the calendar year for which the statement applies. The statement may be signed and filed for the taxpayer by the taxpayer's agent in accordance with section 1.6061-1 of this chapter.

(d) *Penalty for Failure to File Statement.* (1) *General Rule.* If an individual is required to file a statement pursuant to paragraph (a)(1), (a)(2)(ii), (a)(2)(iii) or (a)(3) of this section and fails to file such statement on or before the date prescribed by paragraph (c) of this section, the individual will not be eligible for the closer connection exception described in section 301.7701(b)-2 and will be required to include all days of presence in the United States (calculated without the benefit of sections 301.7701(b)-3(b)(5), 301.7701(b)-3(c), and 301.7701(b)-4 (c)(1)) for purposes of the substantial presence test and for determining the individual's residency starting and termination dates. If an individual is considered to be a resident because of this paragraph and the individual is also a resident of a country with which the United States has an income tax convention pursuant to that convention, the individual shall be treated in the manner provided in section 301.7701(b)-7(a) (relating to the treatment of individuals who are dual residents).

(2) *Exception.* The penalty described in paragraph (d)(1) of this section shall not apply if the individual can show by clear and convincing evidence that he or she took reasonable actions to become aware of the filing requirements and significant affirmative steps to comply with those requirements.

(e) *Filing Requirement Disregarded.* Notwithstanding paragraph (d) of this section, the Secretary or his or her delegate may in their sole discretion, when it is in the best interest of the government to do so and based on all of the facts and circumstances, disregard the individual's failure to file timely the statement described in paragraph (a) of this section in determining the individual's days of presence in the United States.

[*T.D. 8411, 57 FR 15237-15254, Apr. 27, 1992, corrected by 57 FR 28612, June 26, 1992, corrected by 57 FR 37189, Aug. 18, 1992; amended by T.D. 8733, 62 FR 53383-53387, Oct. 14, 1997.*]

Reg. § 301.7701(b)-9 (1992)
Effective Dates of Sections 301.7701(b)-1 Through 301.7701(b)-7

(a) *In General.* Except as indicated in paragraph (b) of this section, sections 301.7701(b)-1 through 301.7701(b)-7 apply to taxable years beginning after December 31, 1984. For the rules applicable to earlier taxable years, see sections 1.871-2 through 1.871-5 of this chapter.

(b) *Special Rules.* (1) *Green Card Test — Residency Starting Date.* If an alien was a lawful permanent resident throughout 1984 (regardless of whether the individual was physically present in the United States), or was physically present in the United States at any time during 1984 while a lawful permanent resident, the individual will be considered to have been a resident of the United States during 1984 for purposes of applying the provisions of section 7701(b)(2)(A) and section 301.7701(b)-4 such that the individual will, if he meets the substantial presence or green card test in 1985, be considered a resident of the United States as of January 1, 1985, regardless of when the individual was first present in the United States in 1985.

(2) *Substantial Presence Test-years Included.* For purposes of applying the substantial presence test for calendar years 1985 and 1986, days of presence in 1984 will only be counted for aliens who had been residents under prior law (sections 1.871-2 through 1.871-5 of this chapter) at the end of calendar year 1984. Days of presence in 1983 will only be counted for aliens who had been residents under prior law at the end of both calendar year 1983 and 1984.

(3) *Professional Athletes.* For purposes of applying the substantial presence test, only days of presence in the United States after October 22, 1986, shall be excluded for individuals described in section 301.7701(b)-3(b)(5) (professional athletes).

(4) *Procedural Rules and Filing Requirements.* The procedural rules and filing requirements described in sections 301.7701(b)-7(b) and 301.7701(b)-8 shall apply to taxable years beginning after December 31, 1991.

[T.D. 8411, 57 FR 15237-15254, Apr. 27, 1992.]