

Closer Connection Exception to the Substantial Presence Test

Even though a foreign student may pass the substantial presence test, an exception exists in U.S. law which would allow the foreign student to continue to be treated as a nonresident alien.

The Internal Revenue Code contains two exceptions to the substantial presence test which can be used by aliens to maintain nonresident status. First, there is the general exception to the substantial presence test available to all aliens under I.R.C. § 7701(b)(3)(B) and (C) and Treas. Reg. § 301.7701(b)-2 (known as the closer connection exception). Most foreign students cannot use this exception, however, because of the requirement that the alien cannot have been physically present in the United States during the current year for more than 183 days, and the requirement that the alien's tax home be located outside the United States. Most foreign students fail both of these tests.

The second exception to the substantial presence test for aliens is set forth in I.R.C. § 7701(b)(5)(D) and (E) and in Treas. Reg. § 01.7701(b)(7)(iii). The exception is available only to alien students (not teachers/researchers, etc.), and contains four requirements for its application. The student:

1. Does not intend to reside permanently in the United States;
2. Has substantially complied with the immigration laws and requirements relating to his student nonimmigrant status;
3. Has not taken any steps to change his nonimmigrant status in the United States toward becoming a permanent resident of the United States; and
4. Has a closer connection to a foreign country than to the United States as evidenced by the factors listed in Treasury Regulation 301.7701-2(d)(1).

The burden of proof is on the student to prove these four factors. To claim the exception for students on an income tax return, a student should attach Form 8843 to his Form 1040NR or 1040NR-EZ.

