



Unique Filing Situations



Introduction

This lesson will assist you in addressing some filing status issues you may encounter when helping taxpayers who are not U.S. citizens.

This lesson also covers dependent issues related to taxpayers who may have nonresident alien stepchildren (children of a nonresident spouse who is married to U.S. citizen or resident alien).

This lesson does not cover the preparation of returns for taxpayers who are in the U.S. on an F, J, M, or Q visa. Refer taxpayers with one of these visas to a volunteer who is certified to prepare tax returns for foreign students or to a professional tax preparer.

The Foreign Student and Scholar course and certification test are part of Link & Learn Taxes, which is available on <https://apps.irs.gov/app/vita/>

Objectives

At the end of this lesson, using your resource materials, you will be able to:

- Determine whether an individual is a resident or nonresident alien
- Apply the support test and citizen or resident test to determine whether an individual can be claimed as a dependent
- Apply special rules for Head of Household status when the spouse is a nonresident alien

What do I need?

- Form 13614-C
- Publication 4012
- Publication 17
- Publication 519

Optional:

- Publication 3
- Publication 54
- Form 1040-NR

How do I apply tax law to nonresident aliens?

Nonresident aliens can be students, teachers, trainees, or undocumented immigrants. Your role is to determine if the nonresident alien can be treated as a resident alien for tax purposes; most tax rules that apply to a U.S. citizen will also apply to the resident alien, including filing status and dependent issues. Resident aliens and U.S. citizens must report worldwide income on their Form 1040.

Keep in mind that a person is considered married no matter where in the world they were married. It does not matter if one spouse is living in another country. The person who is the resident alien or citizen still must follow the tax rules for married persons.

Filing a tax return as a resident alien does not affect the person's immigration status in any way.

Who is a resident alien or nonresident alien?

Let's begin by looking at the intake and interview sheet. Locate the part of the form where taxpayers and their spouses indicate whether they are U.S. citizens. In another part of the form, taxpayers indicate citizenship or residency of family members and dependents.

If the taxpayer has checked “No” for U.S. citizen on the intake and interview sheet, you must determine if the person can be treated as a resident alien for tax purposes before continuing. An individual must meet **one** of the following tests to be considered a resident alien for tax purposes:

- Green card test
- Substantial presence test

What is the green card test?

Individuals who were lawful permanent residents of the U.S. at any time during the tax year are resident aliens. They were given the privilege, according to immigration laws, of residing permanently in the U.S. They receive alien registration cards, commonly known as a “green cards,” attesting to this status. Green cards are approximately the size of driver licenses. They are no longer green in color but still hold the name. Most green card holders have valid Social Security numbers and must follow the same tax laws as U.S. citizens, including the requirement to report worldwide income on their tax returns.

What is the substantial presence test?

This test is based on a formula of days and years a person is physically present in the United States. Individuals who do not have green cards may still be considered resident aliens if they meet the requirements of the substantial presence test for the calendar year.

Use the Resident or Nonresident Alien Decision Chart in the Volunteer Resource Guide, Tab L, Resident/NR Aliens, or on the next page, to determine an individual’s residency status for tax purposes. Information can also be found in Publication 519, U.S. Tax Guide for Aliens.

example

On their intake sheet, Gloria indicated that her husband, Dante, is not a U.S. citizen. During the interview, you learn that Dante does not have a tax home in another country. He was physically present in the U.S. for 150 days during the current tax year and both of the two prior years. Using the Nonresident Alien or Resident Alien? – Decision Chart on the following page, determine if Dante is a resident alien under the substantial presence test for the tax year.

The decision chart indicates that Dante does meet the substantial presence test and is considered a resident alien for tax purposes. You can assist Gloria and Dante in filing their joint return.

Current tax year: 150 days Prior year: $1/3 \text{ of } 150 = 50 \text{ days}$ Two years prior: $1/6 \text{ of } 150 \text{ days} = 25 \text{ days}$

Total = 225 days

Resident or Nonresident Alien Decision Chart

Determine residency status for federal income tax purposes.

step 1	Were you a lawful permanent resident of the United States (had a "green card") at any time during the current tax year?	YES – RESIDENT Alien for U.S. tax purposes ^{1, 2} NO – Go to Step 2
step 2	Were you physically present in the United States on at least 31 days during the current tax year? ³	YES – Go to Step 3 NO – NONRESIDENT Alien for U.S. tax purposes ³
step 3	Were you physically present in the United States on at least 183 days during the 3-year period consisting of the current tax year and the preceding 2 years, <ul style="list-style-type: none">• counting all days of presence in the current tax year,• 1/3 of the days of presence in the first preceding year, and• 1/6 of the days of presence in the second preceding year?³	YES – Go to Step 4 NO – NONRESIDENT Alien for U.S. tax purposes ⁴
step 4	Were you physically present in the United States on at least 183 days during the current tax year? ³	YES – RESIDENT Alien for U.S. tax purposes ^{1, 2} NO – Go to Step 5
step 5	Can you show that for the current tax year you have a tax home in a foreign country and have a closer connection to that country than to the United States? (*Out of Scope, Form 8840, Closer Connection Exception Statement for Aliens required)	YES – NONRESIDENT Alien for U.S. tax purposes ⁵ NO – RESIDENT Alien for U.S. tax purposes ^{1, 2}

Footnotes

- ¹ If this is your first year of residency, you may have a dual status for the year. See Dual Status Aliens in Pub 519, U.S. Tax Guide for Aliens. (**Out of Scope**)
- ² In some circumstances you may still be considered a nonresident alien and eligible for benefits under an income tax treaty between the U.S. and your country. Check the provision of the treaty carefully. (**Out of Scope**)
- ³ See Days of Presence in the United States in Pub 519 for days that do not count as days of presence in the U.S. (Exempt individuals such as students, scholars, and others temporarily in the U.S. under an F, J, M, or Q visa's immigration status do not count their days of presence in the U.S. for specified periods of time.)
- ⁴ If you meet the substantial presence test for the following year, you may be able to choose treatment as a U.S. resident alien for part of the current tax year. See Substantial Presence Test under Resident Aliens and First Year Choice under Dual Status Aliens in Pub. 519. (**Out of Scope**)
- ⁵ Nonresident students from Barbados, Hungary, and Jamaica, as well as trainees from Jamaica, may qualify for an election to be treated as a U.S. Resident for tax purposes under their tax treaty provisions with the U.S. A formal, signed, election statement must be attached to the Form 1040 (preparation of the statement is **Out of Scope**). (It continues until formally revoked.)



Taxpayers should be referred to a professional tax preparer if they:

- Are dual-status aliens, or
- Wish to claim a special treaty provision or tax topic not specifically addressed as within the scope of the Foreign Student and Scholar training, or
- Wish to claim resident status for a prior year based on days present in the U.S. after that year (first-year choice), or
- Wish to claim a closer connection exception on Form 8840

Note: Revenue Procedure 2020-20 provides relief to certain nonresident individuals who, but for COVID-19 Emergency Travel Disruptions, would not have been in the United States long enough during 2020 to be considered resident aliens under the "substantial presence test" ("SPT") or to be ineligible for treaty benefits on services income. Refer to **Revenue Procedure 2020-20** for additional information.

What counts as days of presence?

Count any day a person is physically present in the United States at any time during the day as a day of presence. There are exceptions to this rule. For example, do not count days a person regularly commutes to work in the United States from their home in Canada or Mexico or days the person is an exempt individual. The full list of exceptions and an explanation of each can be found in Publication 519, U.S. Tax Guide for Aliens.

Who is an exempt individual?

Generally, an exempt individual is a:

- Foreign government-related individual
- Teacher or trainee who is temporarily present under a J or Q visa
- Student who is temporarily present under an F, J, M, or Q visa
- Professional athlete who is temporarily in the United States to compete in a charitable sports event

Do not count the days present in the U.S. for purposes of the substantial presence test for an exempt individual.

In general, they will be considered nonresident aliens for tax purposes and should file a Form 1040-NR if required. Exempt individuals must file Form 8843, Statement for Exempt Individuals and Individuals with a Medical Condition, to exclude days present in the U.S. from the substantial presence test. Refer these individuals to a VITA site that prepares tax returns for foreign students or to a professional tax preparer.

Publication 519 has detailed information on determining who is a resident or nonresident alien.



If a person's visa has expired or the person is not complying with the requirements of the visa, then that person is not an exempt individual and cannot exclude those days he or she is physically present in the U.S.

What if a nonresident alien meets the substantial presence test?

Nonresident aliens who meet the substantial presence test are treated as resident aliens for tax purposes.

No paperwork or documentation is needed to indicate that a person is a nonresident alien filing as a resident alien under the substantial presence test.

All persons listed on the return must have either a valid Social Security number or an individual tax identification number (ITIN). ITINs are discussed in the Filing Basics lesson.



A return with an ITIN can be e-filed. A return missing an ITIN *cannot* be e-filed.

What if a nonresident alien does not meet the green card or substantial presence test?

If an unmarried nonresident alien does not meet the green card or substantial presence test, refer the taxpayer to a VITA site that handles Foreign Students/Scholars, if appropriate, or a professional tax preparer to file Form 1040-NR.

If a U.S. citizen or resident alien is married to a spouse who is not a resident alien using the green card or substantial presence test, you may be able to provide assistance. Their options are discussed next.

example

Paul, a U.S. citizen, is married to Gabriella, who does not have a green card or a valid visa. They have no children and are not supporting anyone else.

Gabriella lived in the U.S. for 120 days during the current tax year. She was also in the U.S. for 120 days in each of the prior two years. Gabriella does not have a tax home in another country. Does Gabriella meet the substantial presence test?

Following the decision tree, you find that Gabriella does not meet the substantial presence test. For tax purposes, she is considered a nonresident alien.

Current tax year: 120 days Prior year: $\frac{1}{3}$ of 120 days = 40 days Two years prior: $\frac{1}{6}$ of 120 days = 20 days

Total = 180 days



Individuals can be both a nonresident alien and a resident alien during the same tax year. This usually occurs in the year of arrival in or departure from the United States. This is referred to as a dual-status tax year. Individuals with a dual-status for the tax year are out of scope. Refer these individuals to a professional tax preparer. This does not apply to an individual who is married and chooses to be treated as a U.S. resident for the entire year.

What are the filing status options?

A U.S. citizen or resident alien who is married to a nonresident alien spouse who does not meet either the green card or substantial presence test generally has three filing status options:

- The taxpayer may choose to file as Married Filing Separately
- The couple may choose to file as Married Filing Jointly
- The taxpayer may qualify for Head of Household under the regular rules for a married person who is "considered unmarried" even while living with the nonresident alien spouse

What happens when a U.S. citizen and nonresident alien spouse file separate returns?

The U.S. citizen can file a Married Filing Separately return. The nonresident alien spouse, if required to file a return, would file Form 1040 NR. In this situation, the volunteer can assist in the preparation of Form 1040 for the U.S. citizen but must refer the spouse to a professional tax preparer.

When can nonresident aliens file a joint return?

A married couple may elect to treat a nonresident alien spouse as a resident alien for tax purposes and file a joint return. If taxpayers make this choice, both spouses are treated for income tax purposes as residents for the entire tax year. Neither spouse can claim under any tax treaty not to be a U.S. resident. Both spouses are taxed on worldwide income.

How does a married couple elect to treat the nonresident alien spouse as a resident alien?

If the nonresident alien spouse agrees to file a joint return, worldwide income of both spouses must be reported. To make this election, a joint return should be paper-filed with an attached declaration, signed by both spouses, stating:

- One spouse was a nonresident alien and the other spouse was a U.S. citizen or resident alien on the last day of the tax year
- They choose to be treated as U.S. residents for the entire year, and
- The name, address, and SSN or ITIN of each spouse

Note: Preparation of the required statement outlined in Publication 519 is out of scope.

How does this election affect the filing status in future years?

The election continues in future years, but the spouses can file separately after the first year, if they choose. The election to treat the spouse as a resident is terminated by revocation, the death of either spouse, their legal separation, or the IRS may terminate it for failure to keep adequate records. Consult Publication 519 for more details on this option.

example

In the previous example, you determined that Gabriella, Paul's nonresident alien wife, does not meet either the green card or the substantial presence tests to be considered a resident alien. However, Paul and Gabriella choose to treat Gabriella as a resident alien. They must attach a signed statement to their return that indicates this choice. You can assist Paul and Gabriella in preparing their joint return. They must report their worldwide income for the year and for all later years unless the choice is ended or suspended. Although Paul and Gabriella must file a joint return for the year they make the choice, they may file either joint or separate returns for later years.

When can a citizen or resident alien, who lives with a nonresident alien spouse, file as Head of Household?

There is an exception that allows U.S. citizens and resident aliens who have a nonresident alien spouse to file as Head of Household. All of the following requirements must be met:

- The taxpayer is a U.S. citizen, or resident alien for the entire year.
- The nonresident alien spouse chooses **not** to file a joint return.
- The taxpayer meets the other requirements for this filing status.
- The spouse is **not a qualifying person** for head of household purposes. The taxpayer must have a qualifying person in order to be eligible for this filing status.



EXERCISES

Answers are at the end of the lesson summary.

Question 1: Gloria's husband, Dante, meets the substantial presence test for the entire tax year. Gloria is a U.S. citizen. They do not have any children and do not support anyone else. Dante is applying for an ITIN. Gloria has an SSN. They live together.

What filing status options do Gloria and Dante have?

Question 2: Raul is a U.S. citizen and serving in the U.S. Army in Japan. His wife and his children live with him and he is able to claim the children as dependents. Raul's wife, a citizen of Japan, chooses not to be treated as a resident alien for tax purposes. She does not want to file a joint return with him.

Raul meets all of the other qualifications for Head of Household. Even though he is married and living with his spouse, can he claim Head of Household status?

Yes No



In the Volunteer Resource Guide, Tab B, Starting a Return and Filing Status, note that if a spouse is a nonresident alien, the *living apart* rule does not apply to the taxpayer. This information is found in Publication 519.

Can a taxpayer with a nonresident alien spouse claim the earned income credit?

Even if a taxpayer is considered unmarried for Head of Household purposes because he or she is married to a nonresident alien, the taxpayer is still considered married for purposes of the earned income credit. In that case, the taxpayer will not be entitled to the credit. See Publication 596, Earned Income Credit, for more information.

Which family members can be claimed as dependents?

Can a taxpayer claim a nonresident alien spouse as a dependent?

A taxpayer's spouse does not meet the relationship test for either qualifying child or qualifying relative. Thus, taxpayers cannot claim a spouse as their dependent.

Can a child born overseas be claimed as a dependent?

A child born overseas to U.S. citizen parents is considered a U.S. citizen for tax purposes. A child can be claimed as a dependent as long as all the other rules for qualifying child or qualifying relative are met.

The birth of a child abroad should be reported as soon as possible to establish an official record of the child's claim to U.S. citizenship. Form FS-240, Consular Report of Birth Abroad, establishes official evidence that the child is a U.S. citizen.

example

Patricia, a U.S. citizen, is married to Gilberto, a nonresident alien from Spain. Their daughter, Eva, was born while they were living in Spain.

Eva is entitled to U.S. citizenship. Eva will need a Social Security number to be claimed as a dependent on her mother's tax return.



While applying for the Consular Report of Birth Abroad, parents should also apply for a Social Security number and passport for their child. Without a Social Security number, the parents will not be able to claim the child as a dependent or take advantage of credits, such as the earned income credit or the child tax credit, even if all of the other prerequisites are met.

Can a foreign-born stepchild be claimed as a dependent?

Before determining if a foreign-born stepchild is a dependent, it is necessary to determine the child's U.S. residency status for tax purposes by answering the questions in the Nonresident Alien or Resident Alien decision chart. If the foreign-born child is a nonresident alien for tax purposes, the child must be a resident of Canada or Mexico to be claimed as a dependent.

example

Terry, a U.S. citizen, is married to a German citizen whose three children are German citizens and do not have green cards. Terry has not adopted the children. They all live in Germany. The children were not physically present in the U.S. during the tax year.

Since the children are not U.S. citizens and are not residents of the U.S., Canada, or Mexico, Terry cannot claim the children as dependents.

Can a taxpayer claim an adopted foreign-born child as a dependent?

A U.S. citizen or national can claim a legally adopted child who is not a U.S. citizen, U.S. resident alien, or U.S. national provided the child is a member of the taxpayer's household all year. All the other rules for a qualifying child or qualifying relative must be met, and the child must have an SSN, ITIN, or ATIN to be claimed as a dependent.

An Adoption Taxpayer Identification Number (ATIN) can be obtained when a domestic adoption is pending and other rules are met. An ATIN can be obtained in a foreign adoption when the child already possesses a green card or a certificate of citizenship, which identifies a child born overseas as a U.S. citizen.

See Publication 519 for more information about the citizen or resident test, including who is considered a U.S. national.



EXERCISES (continued)

Question 3: Terry moved his family to the U.S. in January of the tax year. His stepchildren are not U.S. citizens and they do not have green cards. They meet the other dependency tests. If he can claim them, he will apply for ITINs for them. Can he claim the stepchildren as dependents on his tax return?

Yes No

Question 4: John, a U.S. citizen, lives in Germany. His wife is a German citizen who has never lived in the U.S. Their two-year-old son was born in Germany. John's 12-year-old stepdaughter, a German citizen whom John has not adopted, also lives with them. John and his wife provide all the support for the two children. How many dependents can John claim?

- A. One
- B. Two
- C. Three
- D. Zero



An adopted nonresident alien child must live with the taxpayer all year to pass the citizen or resident test.

Summary

Resident aliens follow the same tax laws as U.S. citizens.

To determine the residency status of a noncitizen, use the Nonresident Alien or Resident Alien decision chart in the Volunteer Resource Guide, Tab L, Resident/NR Alien.

If a citizen or resident alien is married to a person who does not meet the green card or substantial presence test, the couple can elect to treat the nonresident spouse as a resident alien for tax purposes and file a joint return.

A U.S. citizen's child is usually a U.S. citizen by birth, even if the child is born in another country.

A nonresident alien stepchild generally will not pass the citizenship or resident test and therefore cannot be claimed as a dependent, unless the child is a resident of Canada or Mexico.

An adopted nonresident alien child can usually be claimed as a dependent if the child lives with the taxpayer the entire year.

What situations are out of scope for the VITA/TCE programs?

The following are out of scope for this lesson. While this list may not be all inclusive, it is provided for your awareness only.

- Taxpayers with F, J, M, or Q visas, unless there is a volunteer and quality reviewer at your site with Foreign Student certification
- Nonresident aliens who do not meet the green card or substantial presence test and are not married to a U.S. citizen or resident alien
- Individuals having a dual status for the tax year
- Nonresidents who are married to U.S. citizens or resident aliens can make an election to file a joint return for tax purposes and file as Married Filing Jointly. Preparation of the required statement is out of scope.



EXERCISE ANSWERS

Answer 1: Since Dante meets the substantial presence test, he is considered a U.S. resident alien for tax purposes and must follow U.S. tax laws. Dante and Gloria can use either the Married Filing Jointly or Married Filing Separately filing status.

Answer 2: Yes. Raul can claim Head of Household status because his children are his qualifying persons. If Raul did not have a qualifying person, he would have to use the Married Filing Separately filing status since his wife chose not to file a joint return.

Answer 3: Yes. The children meet the substantial presence test because they were in the United States more than 183 days. Terry's stepchildren are considered resident aliens for tax purposes. As long as the other requirements for qualifying child or qualifying relative are met, Terry can claim the stepchildren as dependents on his tax return. They have to obtain SSNs or ITINs.

Answer 4: A. John can claim his son as a dependent. The son qualifies as a U.S. citizen because his father is a U.S. citizen. The stepdaughter does not meet the U.S. citizen or resident test. A spouse is never considered a dependent.

Notes