Presentation Overview

- U.S. Immigration System
- Typical Temporary Visas Used by Institutions of Higher Education
- Residency Status for IRS Tax Purposes
- Processing Payments
Goal:
Develop a basic understanding of the rules and tax issues as they apply to nonresident aliens
U.S. Immigration System
Overview of U.S. Immigration Structure

2 Basic Types of Immigration into the U.S.

- PERMANENT
  - Permanent Resident or Green Card Holder (Immigrant)
    - Employment
    - Family
    - Humanitarian

- TEMPORARY
  - Visa Holder (Non-immigrant)
    - Visits
    - Study
    - Work
    - Other
What is a Visa?

- Ticket, or key to entry into the U.S., controlled by State Department
- NOT a guarantee of admission
- Permission to present oneself at the border and request entry in a certain visa category
Nonimmigrant Visas

- Visas are an “alphabet soup”
- Categories are arranged according to proposed activities in the U.S., from A (Diplomats) to U (Victims of Criminal Activity)
- Typical visas used in higher education are F, H, J, M, O, Q, and TN
- *Temporary intent* is the key factor for many visa categories including most educational visas
Foreign students and scholars have limited work authorization.

Work authorization is usually limited to a certain period of time and restricted to a particular employer.

There is no such thing as an “Independent Contractor” visa.
For non-immigrants, the I-94 or other entry document is given after the visa is “inspected” at entry.

The I-94 card is the “work-permit” and residence document for most non-immigrants.
Typical Visas Used by Institutions of Higher Education
F-1 students generally have work authorization:

- For 20 hrs/week “on campus” during school year
- Full time “on campus” during vacations
- Form I-20 required
- No employment authorization document (EAD) required, work is “incident to status”
J-1 students generally have work authorization:

- For 20 hrs/week “on campus” during school year as part of fellowship or assistantship
- Full time “on campus” during vacations
- Form DS 2019 required
- No EAD required
J-1 Professors and Researchers generally have work authorization:

- Work as employees of sponsoring institutions
- Form DS-2019 required
- EAD not required
- May lecture at other institutions and receive honoraria with express consent of RO (responsible officer)
H-1B Temporary Professional Worker

- For professional-level workers who are coming to work for a U.S. employer in a “specialty occupation”

- Includes:
  - Engineers
  - Physicists
  - Software developers
  - Systems analysts
  - Economists
  - Others
College and university professors generally qualify for H-1B status.

Education and/or experience in a particular professional background, plus a job offer in the same professional field = eligibility for the H-1B visa category.

Employer need not justify that a U.S. worker cannot perform the job.

Duration of stay limited to 3 years but extensions may be granted by USCIS.
A Mexican or Canadian in a listed profession may enter the U.S. for one year to work for a U.S. employer in that profession.

NAFTA provides a schedule or list of professions.

Includes:
- University professors
- Architects
- Accountants
- Systems analysts
- Engineers
- Scientists
- Others
TN or NAFTA Visas (cont.)

- TN holder may be a salaried employee
- TN holders may also be independent contractors if providing prearranged professional services and have a written contract
- Duration of stay limited to one year but extensions may be granted by INS
Visitors may enter with B visas, visa waivers such as WB and WT, and border crossing cards.

In general, visitors may not perform productive labor in the U.S.

Under new proposed regulations, B-1/B-2 visitors may be granted a minimal period of stay.
What Can Visitors Do?

- Attend meetings
- Lecture
- Advise and consult
- Visit business colleagues
- Negotiate contracts
- Litigate
Visitors may receive “honoraria” and associated expenses for:

- A “usual academic activity”
- Lasting not more than nine days
- If visitor has not accepted any payment (including travel reimbursements) from more than five institutions within prior six months (9/5/6 rule)
No specific visa categories allow foreign nationals to enter U.S. as independent contractors.

Some visa categories allow work for multiple employers and/or payment as a contractor, but employers must be specified...**proceed with caution**
Executive Order No. 12989 precludes organizations that violate immigration laws from obtaining or participating in U.S. government contracts.
Residency Status for IRS Tax Purposes
Tax Classifications

“U.S. Tax System”
- US Citizens
- Lawful Permanent Resident
- Resident Alien for Tax Purposes

“Nonresident Foreign National Tax System”
- Nonresident Foreign National for Tax Purposes
## How Is Tax Applied?

<table>
<thead>
<tr>
<th>U.S. Tax System</th>
<th>Nonresident Alien Tax System</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taxed on worldwide income</td>
<td></td>
</tr>
<tr>
<td>Receives Forms W-2 and/or 1099</td>
<td></td>
</tr>
<tr>
<td>Files Form 1040 tax return</td>
<td></td>
</tr>
<tr>
<td>Eligible to itemize deductions or claim standard deduction</td>
<td></td>
</tr>
<tr>
<td>May claim unrestricted withholding allowances at time of payment</td>
<td></td>
</tr>
<tr>
<td>Taxed only on U.S. sourced income</td>
<td></td>
</tr>
<tr>
<td>Receives Forms 1042-S and/or W-2</td>
<td></td>
</tr>
<tr>
<td>Files Form 1040NR/1040NR-EZ tax return</td>
<td></td>
</tr>
<tr>
<td>May not claim standard deduction/may claim limited itemized deductions</td>
<td></td>
</tr>
<tr>
<td>Restricted withholding allowances at time of payment</td>
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</tbody>
</table>
Non-U.S. citizen must pass either of the following tests to be taxed the same as a U.S. citizen:

- Green Card Test
- Substantial Presence Test
Green Card Test

- Used to determine permanent resident alien status
- An individual meets the test on the date his/her permanent resident alien status is approved by USCIS
- The effective date for permanent resident alien status is the date the individual’s passport receives the “I-551 stamp”
The Substantial Presence Test is a calculation of all of the days an individual has been physically present in the U.S. during a period of three years.

- Individual must be present at least 31 days in the current year, and
- 183 days during the three-year period that includes the current year and two preceding the current year.
## Substantial Presence Test

<table>
<thead>
<tr>
<th></th>
<th># of Days</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current Year</td>
<td>_________</td>
<td>_______</td>
</tr>
<tr>
<td>1st Preceding Year</td>
<td>_________</td>
<td>Divide by 3  _______</td>
</tr>
<tr>
<td>2nd Preceding Year</td>
<td>_________</td>
<td>Divide by 6  _______</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

< 183 = Nonresident alien for tax purposes  
>= 183 = Resident alien for tax purposes
Do not count days of actual physical presence in the U.S. if the individual is:

- Commuting to/from work in the U.S. on a regular basis
- An “exempt individual” (e.g., educational visa holders such as F, J, M, Q)
- In-transit through the U.S.
- Unable to leave the U.S. for medical reasons.
Section 1461 states that if the withholding agent (SDSURF) does not withhold the appropriate amount of tax at the time of payment, the withholding agent will be liable for the tax, plus any penalties and interest – regardless of whether the individual pays the tax on his or her tax return.
Processing the Payment
Employee Payments

- Substantial Presence Test – may be **either** a resident or nonresident alien for tax purposes
- May be exempt from FICA under an F,J,M, or Q visa

Non-Employee Payments

- Substantial Presence Test – generally a nonresident alien for tax purposes
- Treat as “Independent Contractors” for tax purposes
  - Withhold at 30%
Employee Payments

Cont.

• Standard deduction not allowed, generally required to claim single, one personal withholding allowance, and request additional withholding of $7.60 per week

• Travel reimbursements permitted in accordance with SDSU Foundation travel policies (accountable plan rules) are not taxable and not reportable

Non-Employee Payments

Cont.

• Tax treaty exemptions possible, depending on country of residence and specific activity in U.S.

• Travel reimbursements – situation varies based on visa status and type of payment.
NEWS FLASH!! You now have a basic understanding of the principles (hurdles) that govern how we deal with our foreign national visitors...but now how do we actually get them paid?
Classify the Payment

- Wages
- Self-employment income
- Scholarship/fellowship (qualified or non-qualified)
- Prizes and awards
- Travel reimbursements
- Royalties
A variety of forms are available depending upon the nature of the payment:

- Foreign National Information Form
- Miscellaneous Income Payment Request
- Independent Contractor Payment Authorization Request & Agreement
- Foreign National Travel Reimbursement Supplement
- Nonresident Foreign National Fellowship/Scholarship Payment Request
Foreign National Information Form

- Complete and attach copies of passport, both sides of I-94, visa or border crossing card, and I-20 (For “F-1” Visas) or DS-2019 (For “J-1” Visas), before forwarding to A/P for processing.

- Provides the basic information needed to enter NRA information in Windstar and determine appropriate tax status.

- New form must be completed each calendar year.
Foreign National Travel Reimbursement Supplement

- Used to reimburse nonresident aliens for travel in the USA
- Not used for services
- If the foreign national is paid for services AND travel, complete the Foreign National Information form.
- Must meet the accountable plan rule
- Non taxable or IRS reportable
Accounts Payable Forms (cont.)

Miscellaneous Income Payment Request

- Used for both U.S. residents and nonresidents
Nonresident Foreign National Fellowship/Scholarship Payment Request

- To be used exclusively for payments to nonresident foreign nationals
- One individual per form
- Requires completion of Foreign National Information Form, W-8BEN and other required documents
- Individuals must sign nonresident alien Notice to Recipients of Scholarships and Fellowships
- Qualified and Non-Qualified Scholarships
NRA employee, when hired, will be asked to come to the Payroll Office to complete all necessary forms such as Foreign National Information Form and other IRS forms as needed.

NRA employee will be asked to provide updated information on an annual basis.
**Form W-7** Application for IRS Individual Taxpayer Identification Number

- Required if NRA does not already have a taxpayer identification number
- To be completed by NRA and submitted with all other paperwork for processing
- A/P will forward to IRS
- No tax treaty exemptions can be given without an ITIN
- No ITIN required for services performed outside the USA
Form W-8BEN Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding

- To be completed by NRA and submitted with all other paperwork for processing
- Establishes that NRA is not a U.S. person
- Provides ITIN number
- If applicable, claim a reduced rate of, or exemption from, withholding as a resident of a foreign country with which the U.S. has an income tax treaty
- Effective Jan. 1, 2004, W-8BEN is required even when individual is performing the work outside the U.S.
- Required when reimbursing an NRA for travel.
Form 8233 Exemption from Withholding on Compensation For Independent Personal Services of a Nonresident Alien Individual

- To be completed by NRA and submitted with all other paperwork if claiming a reduced rate of, or exemption from, withholding as a resident of a foreign country with which the U.S. has an income tax treaty.

- If treaty exemption is verified based on analysis of all paperwork, 8233 will be forwarded to IRS.

- IRS has 10 days to approve or deny tax treaty exemption. This can delay payment to the individual.
<table>
<thead>
<tr>
<th>Type of Income</th>
<th>General Immigration Status</th>
<th>Service or Non-Service</th>
<th>Forms Required</th>
<th>Withholding Rate if Treaty Not applicable</th>
<th>Add’l Form Required if Treaty Claimed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Independent Personal Services, Honoraria, Entertainers, Artists, etc.</td>
<td>Generally, B-1, WB, WT, J-1 (non-student), TN</td>
<td>Service</td>
<td>Foreign National Information Form, W-7 (if TIN needed), W-8BEN</td>
<td>30%</td>
<td>8233</td>
</tr>
<tr>
<td>Scholarship or Fellowship (in excess of tuition, required fees, books)</td>
<td>Generally, B-1, F-1, J-1, M-1, Q, TN</td>
<td>Non-Service</td>
<td>Foreign National Information Form, W-7 (if TIN needed), W-8BEN</td>
<td>14% (if F, J, M, or Q visa) 30% (all other visas)</td>
<td></td>
</tr>
<tr>
<td>Scholarship or Fellowship (tuition, required fees, books)</td>
<td>Generally, B-1, F-1, J-1, M-1, Q, TN</td>
<td>Non-Service</td>
<td>Foreign National Information Form, W-7 (if TIN needed), W-8BEN</td>
<td>0%</td>
<td></td>
</tr>
<tr>
<td>Royalty</td>
<td>Any</td>
<td>Non-Service</td>
<td>Foreign National Information Form, W-7 (if TIN needed), W-8BEN</td>
<td>30%</td>
<td></td>
</tr>
<tr>
<td>Prizes and Awards</td>
<td>Any</td>
<td>Non-Service</td>
<td>Foreign National Information Form, W-7 (if TIN needed), W-8BEN</td>
<td>30%</td>
<td></td>
</tr>
</tbody>
</table>
How Will Payments to Foreign Nationals Be Reported?

- Form W-2
  - Nonresident foreign national employees with tax withholding
  - Resident alien employees
- Form 1042-S
  - Nonresident foreign national employees with exemption of tax withholding.
  - Non-Resident Foreign National Non-Employee
- Form 1099
  - Resident alien independent contractors
How Are You Feeling Now?
Things To Remember

- We are here to help you!

- You are not expected to become an expert on the taxation of nonresident foreign nationals.

- You need have only the basic concepts in order to direct individuals and projects/departments to complete the appropriate forms.
Always remember to make sure that the NRA has a visa type that will allow payment before promising anything.

Please understand that specific questions cannot always be answered until we have ALL the facts.
- SDSU Research Foundation Web site
  http://www.foundation.sdsu.edu/grant_project_forms_ap.html
- U.S. Department of State
  http://travel.state.gov/
- IRS – International Taxpayer
Direct your NRA payroll questions to Naomi Mariscal, Payroll Supervisor

nmariscal@foundation.sdsu.edu
619.594.1074

Direct your NRA non-employee questions to Judy Williamson, Accounts Payable Supervisor

jwilliamson@foundation.sdsu.edu
619.594.2717
Questions?