

Who is a U.S. Person?

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Who is a United States Person?

The Internal Revenue Code defines a “United States person” as:

- A citizen or resident of the United States
- A domestic partnership
- A domestic corporation
- Any estate (other than a foreign estate)
- Any trust if:
 - A court within the United States is able to exercise primary supervision over the administration of the trust, and
 - One or more United States persons have the authority to control all substantial decisions of the trust.

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Who is a U.S. Person:

IRC §7701(a)(30) defines a “United States person” to mean:

- A. A citizen or resident of the United States,
- B. A domestic partnership,
- C. A domestic corporation,
- D. Any estate (other than a foreign estate)...and
- E. Any trust if –
 - i. A court within the United States is able to exercise primary supervision over the administration of the trust, and
 - ii. One or more United States persons have the authority to control all substantial decisions of the trust.

Who is a United States Citizen?

An individual becomes a U.S. citizen by:

- Naturalization
- Birth
 - Individual born in the United States
 - Individual born outside the U.S. to at least one U.S. citizen parent
 - Rules are complex
 - If there is a question, best to get a legal opinion

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Who is a United States Citizen?

Some common examples of Canadian residents who may be U.S. citizens:

- a person born in the United States
- a person born outside of the United States
 - **both** parents are citizens of the United States, and
 - **one** parent has had a residence in the United States prior to the birth of such person;

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Section 301 of the United States Immigration and Nationality Act (INA) defines a United States citizen as:

- a) a person born in the United States, and subject to the jurisdiction thereof;
- b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;
- c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;
- d) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States and who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

Who is a United States Citizen?

- A person born outside the United States;
 - One parent is an alien;
 - The other parent is a citizen of the United States who (prior to the child's birth) was physically present in the United States for a period or periods totaling not less than five years, two of which were after attaining the age of fourteen years

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Section 301 of the United States Immigration and Nationality Act (INA) (cont'd):

- a) A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;
- b) A person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;
- a) A person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years....

Who is a United States Citizen?

Example

- Andrew and Brenda are Canadian citizens with no U.S. status
- They lived in Washington, D.C., for one year while studying on a student visa
- Their son Charles was born in Washington, D.C. during this time
- The family returned to Canada immediately after Charles' birth
- Charles is now 25 years old. He has never lived or worked in the United States. He has no U.S. passport and no U.S. Social Security Number
- Is Charles a U.S. citizen?

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Example

- Andrew and Brenda are Canadian citizens with no U.S. status
- They lived in Washington, D.C., for one year while studying on a student visa
- Their son Charles was born in Washington, D.C. during this time
- The family returned to Canada immediately after Charles' birth
- Charles is now 25 years old. He has never lived or worked in the United States. He has no U.S. passport and no U.S. Social Security Number
- Is Charles a U.S. citizen?

Charles is a U.S. citizen because he was born in the United States. The lack of a U.S. passport or U.S. Social Security Number does not affect his citizenship status.

Who is a United States Citizen?

Example

- Donald and Elizabeth are Canadian citizens and have no U.S. status
- They are farmers in southwestern Manitoba
- Elizabeth gave birth to their daughter Frances in the closest hospital, which was in North Dakota. The family returned to Manitoba immediately after Frances' birth.
- Frances is now 50 years old. She has lived on the family farm continually since her birth and has never returned to the United States.
- Is Frances a U.S. citizen?

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Example

- Donald and Elizabeth are Canadian citizens and have no U.S. status
- They are farmers in southwestern Manitoba
- Elizabeth gave birth to their daughter Frances in the closest hospital, which was in North Dakota. The family returned to Manitoba immediately after Frances' birth.
- Frances is now 50 years old. She has lived on the family farm continually since her birth and has never returned to the United States.
- Is Frances a U.S. citizen?

Frances is a U.S. citizen because she was born in the United States. The fact that she never returned to the United States after her birth does not affect her citizenship status.

Who is a United States Citizen?

Example

- Nora is was born in California and lived there until she was 30 years old
- She marries Brian, a Canadian citizen with no U.S. status, and moves to British Columbia when she is 30 years old
- Her daughter Catherine was born in British Columbia
- Is Catherine a U.S. citizen?

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Example

Nora is was born in California and lived there until she was 30 years old

She marries Brian, a Canadian citizen with no U.S. status, and moves to British Columbia when she is 30 years old

Her daughter Catherine was born in British Columbia

Is Catherine a U.S. citizen?

Catherine is a U.S. citizen because her U.S. citizen mother was physically present in the United States for a period totaling five years or more prior to her birth

Catherine will be taxed as a U.S. citizen. However, because of her U.S. citizenship Catherine will be eligible to attend university in the United States and to work in the United States without a work permit. So, it's not all bad!

Who is a United States Resident Alien?

An individual who meets one of three tests:

- Lawful permanent resident of the United States (“Green Card” test)
- Substantial presence test
- First year election

An individual who is neither a U.S. citizen nor a U.S. resident alien is a U.S. non-resident alien

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Who is a United States resident alien

IRC §7701(b), provides the definition of a “resident alien” and a “nonresident alien”

IRC §7701(b)(1)(A) - An alien individual shall be treated as a **resident of the United States** with respect to any calendar year if (and only if) such individual meets the requirements of

- Such individual is a lawful permanent resident of the United States at any time during such calendar year,
- Such individual meets the substantial presence test, or
- Such individual makes the first year election.

IRC §7701(b)(1)(B) - An individual is a nonresident alien if such individual is neither a citizen of the United States nor a resident of the United States (within the meaning of subparagraph (A))

Green Card Test

- An individual who has been granted lawful permanent residence (a “green card”) and has entered the United States
- Lawful permanent residence status continues until the green card has been revoked, surrendered, or abandoned

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Who is a “lawful permanent resident” (Green Card holder):

IRC §7701(b)(6)

An individual is a lawful permanent resident of the United States at any time if

- (A) such individual has the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with immigration laws, and
- (B) Such status has not been revoked (and has not been administratively or judicially determined to have been abandoned).

Class of immigrants under the Immigration and Nationality Act (INA) with rights, benefits, and privileges to reside in the United States permanently or until they are deported (removed) from the U.S. pursuant to an applicable provision of the INA

Substantial Presence Test

- A test based on number of days in the United States
- Uses a rolling average of three years of days present in the United States
- In general, any part of a day counts as a day
 - Some exemptions exist for:
 - Students, teachers, or trainees
 - Commuters
 - Medical conditions arising while in the United States
 - Transit through the U.S. for travel between two foreign countries
 - Crew members of airlines or cruise ships

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IRC §7701(b)(3)

This is a 3 year rolling average test that counts the number of days of physical presence in the United States

In general, any part of a day counts as a day (though there are statutory exemptions)

Exemptions would include

Exempt individuals – teachers or trainees, students, foreign government officials

Commuter

Medical exception

Transit between two foreign countries

Crew members temporarily present

Substantial Presence Test

- Need at least 31 days in current year
- The sum of:
 - Current year - # of days
 - 1st preceding year - # of days / 3
 - 2nd preceding year - # of days / 6
 - If sum ≥ 183 , then U.S. person

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Substantial Presence Test

Example

- Anne and Murray are a recently retired couple from Nova Scotia. They are snowbirds.
- They spent a long time in the U.S. during 2018 and 2019. In 2020 they cut their stay short due to the pandemic. They did not travel to the U.S. during 2021.
- Their days in the U.S. are as follows:
 - 2018 – 180 days
 - 2019 – 225 days
 - 2020 – 90 days
 - 2021 – 0 days
- Did they meet the Substantial Presence Test in 2020 or 2021?

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Substantial Presence Test

Substantial Presence Test – 2020

2020 – 90 days = 90

2019 – 225 days / 3 = 75

2018 – 180 days / 6 = 30

Total = 195

Because $195 > 183$, Anne and Murray are U.S. residents for 2020.

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Substantial Presence Test

Substantial Presence Test – 2021

2021 – 0 days

2020 – 90 days

2019 – 225 days

Because there were less than 31 days in 2021, they did not meet the Substantial Presence Test. No need to do any further math.

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First Year Election

- Individuals moving to the U.S. may not meet either the Green Card Test or the Substantial Presence Test in the year of their move
- They may wish to be taxed as a U.S. person in this year
- Election available to be taxed as a U.S. person

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IRC §7701(b)(4)

Is not a resident of the United States under either the lawful permanent resident test nor the substantial presence test,

Was not a resident of the United States in the calendar year immediately preceding the election year, and

Will meet the substantial presence test in the calendar year immediately following the election year

Is present in the US for at least 31 consecutive days in the election year, and

Is present in the US for at least 75% of the number of days during the testing period (the first day of the 31 day period to the end of the calendar year)

First Year Election

Available to individuals who:

- Do not meet the Green Card Test or Substantial Presence Test
- Are present in the U.S. for at least 31 consecutive days in the year
- Were not a resident of the United States in the immediately preceding year
- Will meet the substantial presence test in the immediately following calendar year

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IRC §7701(b)(4)

Is not a resident of the United States under either the lawful permanent resident test nor the substantial presence test,

Was not a resident of the United States in the calendar year immediately preceding the election year, and

Will meet the substantial presence test in the calendar year immediately following the election year

Is present in the US for at least 31 consecutive days in the election year, and

Is present in the US for at least 75% of the number of days during the testing period (the first day of the 31 day period to the end of the calendar year)

Summary

- An individual is a U.S. person for tax purposes
 - U.S. citizen
 - By naturalization
 - By birth
 - U.S. resident alien
 - Green Card Test
 - Substantial Presence Test
 - First Year Election
- This is for U.S. federal tax purposes only! Must also check state residency rules

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