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INTERNAL REVENUE SERVICE
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Taxation of H-3 Visa Holders

Reference:

Dear ██████

This is in response to your request for general information concerning the taxation and withholding requirements for employers who hire employees who are H-3 visa holders. An H-3 visa holder is a nonresident alien who is granted permission by the Bureau of Citizenship and Immigration Services (BCIS) to temporarily stay in the United States and work as a trainee in certain training programs.

The responsibility for withholding and reporting taxes is imposed on the withholding agent. A withholding agent is a United States or foreign person that has control, receipt, custody, disposal, or payment of any item of income of a foreign person that is subject to withholding. A withholding agent may be an individual, corporation, partnership, trust, association or any other entity. A withholding agent is personally liable for any tax required to be withheld.

The withholding agent of an H-3 visa holder is responsible for withholding Federal Insurance Contributions Act (FICA) taxes, Federal Unemployment Contributions Act (FUTA) taxes, and for withholding income taxes.

Internal Revenue Code (Code) section 3402(a), relating to income tax withholding, generally requires every employer making a payment of wages to deduct and withhold upon those wages a tax determined in accordance with prescribed tables or computational procedures. Wages paid to nonresident alien employees are subject to graduated withholding under Code section 3402(a) in the same way as for United States citizens and residents if the wages are effectively connected with the conduct of

a United States trade or business. Generally, a nonresident alien performing services within the United States is deemed to be engaged in a United States trade or business and the compensation is treated as effectively connected income.

Code sections 3101 and 3111 impose FICA taxes on "wages" as that term is defined in section 3121(a). FICA taxes consist of the Old-Age, Survivors and Disability Insurance tax (social security tax) and the Hospital Insurance tax (Medicare tax). These taxes are imposed on both the employer and employee. Code sections 3101(a) and (b) impose the employee portions of the social security tax and Medicare tax, respectively. Code sections 3111(a) and (b) impose the employer portions of the social security tax and the Medicare tax, respectively.

Code section 3301 imposes FUTA tax on wages paid by an employer with respect to employment.

Code section 3121(b) provides the general rule that for purposes of FICA taxation the term "employment" means any service performed within the United States by an employee for the person employing him irrespective of the citizenship or residence of either. Generally this means all aliens employed within the United States are subject to FICA tax unless otherwise excepted. Section 3306(b) provides a similar definition of employment for FUTA purposes.

Code section 3121(b)(19) excludes from the definition of employment "service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act (INA), as amended, and which is performed to carry out the purposes specified in subparagraph (F), (J), (M), or (Q), as the case may be." There is no exception from the definition of employment for FICA purposes for services performed by a nonresident alien holding an H-3 visa granted under section 101(a)(15)(H)(iii) of the INA. Similarly, there is no exception from the definition of employment for FUTA purposes for services performed by a nonresident alien holding an H-3 visa.

Code sections 3101(c) and 3111(c) also provide an exception for FICA taxation to the extent that during any period in which there is in effect a totalization agreement entered into pursuant to section 233 of the Social Security Act with any foreign country, wages received by or paid to an individual shall be exempt from the FICA taxes imposed by Code sections 3101 and 3111, to the extent that such wages are subject under such agreement to taxes or contributions for similar purposes under the social security system of such foreign country.

Thus, to the extent not modified by an income tax treaty or other bilateral agreement between the foreign persons' country of residence and the United States, a withholding agent is required to withhold FICA, FUTA, and income tax pursuant to the statutory requirements.

There is no procedure for an employee to elect to forego FICA or FUTA deductions on wages paid with respect to employment. Moreover, nonresident aliens are not entitled to claim exemption from income tax withholding.

In addition you may find it useful to review Publication 519, Tax on Aliens, and Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities. You may obtain a copy by calling the Internal Revenue Service at 1-800-829-3676, or through our website at <http://www.irs.gov>.

We hope this information is helpful to you. If you have any other questions regarding this matter, please call [REDACTED] of my staff. [REDACTED] can be reached at [REDACTED]

Sincerely,

Lynne Camillo
Employment Tax Branch 2
Associate Chief Counsel/Division Counsel
(Tax Exempt & Government Entities)