

# 2004 CACCRAO STAFF DEVELOPMENT

## RESIDENCY QUESTIONS AND ISSUES

### Introduction

Residence determinations must be made on a case-by-case basis, and the determinations result from conclusions made by the district, in compliance with current statutes and regulations. This material includes questions/answers relative to residence determination addressed in summaries from prior years, as well as updated information about residency laws.

### Alien Residency

An alien, including an unmarried minor alien, may establish his/her residence unless precluded by the Immigration and Nationality Act [8 U.S.C. 1101, et seq.] from establishing domicile in the United States; provided that the student has had residence in California for more than one year prior to the residence determination date for the semester, quarter, or other session for which attendance at the college is proposed.

In general, an alien is precluded from establishing domicile in the United States if he/she entered the United States illegally, or under a visa which requires residence outside the United States, or if he/she entered the United States solely for a temporary purpose. (Ed. Code, § 68062 (h) and (i); Cal.Code Regs., tit. 5, § 54045, 8 U.S.C. 1101 (a)(15), and *Regents of the University of California v. Superior Court [Bradford]*, 225 Cal.App.3d 972 (1991).)

#### **1. Which aliens are “precluded” from establishing domicile in the United States?**

Aliens on visas B-1, B-2, C-1, C-1D, C-2, C-3, C-4, D-1, D-2, F-1, F-2, F-3, H-2A, H-2B, H-3, H-4 (if spouse or child of H-2A, H-2B, or H-3), J-1, J-2, M-1, M-2, M-3, O-2, O-3 (if spouse or child of O-2), P-1, P-2, P-3, P-4, Q-1, Q-2, Q-3, S-5, S-6, TWOV (Transit Without Visa), and (NAFTA) TN and TD are precluded from establishing domicile in the United States. Also precluded are aliens whose very presence is unlawful, or those who overstay their visas (undocumented or out-of-status).

#### **2. In order to be classified as a resident, what steps must be taken by an alien who is holding one of the visas listed above, is out-of-status or is undocumented?**

- (a) He or she must present evidence (usually from the Bureau of U.S. Citizenship and Immigration Services (“CIS”), formerly the Immigration and Naturalization Services), documenting that he or she has taken

appropriate steps to obtain a change of status to a classification which does not preclude establishing domicile by:

- (1) Applying for permanent resident status
- (2) Applying for and being granted a change of status to a visa category that permits establishing domicile
- (3) Applying for asylum
- (4) Applying for the Family Unity Program
- (5) Applying for Temporary Protected Status
- (6) Applying for VAWA Self-Petition. (Available for battered spouses or children of U.S. citizens or lawful permanent residents.)  
Authorized under the immigration provisions of the Violence Against Women Act (VAWA).

- (b) He or she must meet the requirements of one-year physical presence, coupled with the intent to make California home for other than a temporary purpose. The one-year duration may not begin until application has been made for a change of status noted in (a) above.
- (c) However, aliens seeking a change to a visa that permits establishing residency under (a)(2), above, cannot be classified as a resident until the application for a new visa has been granted. Once the application has been granted, the one-year durational requirement may be counted from the date of application.

**3. What can a student do if he or she does not have documentation from the CIS as discussed above?**

In some circumstances, students may not have the appropriate documents from the CIS. In such cases, districts may wish to develop policies for permitting alternative methods of documenting that an application has been filed (e.g., an affidavit from an attorney).

**4. Which aliens (students) are considered eligible to establish residence?**

Aliens capable of establishing domicile include, but are not limited to, those holding valid visas in the following categories: A-1, A-2, A-3, E-1, E-2, G-1, G-2, G-3, G-4, G-5, H-1B, H-1C, H-4 (if spouse or child of H-1B or H-1C), I, K-1, K-2, K-3, K-4, L-1A, L-1B, L-2, NATO 1-7, N-8, N-9, O-1, O-3 (if spouse or child of O-1), and R-1, R-2, T-1, T-2, T-3, T-4, U-1, U-2, U-3, U-4, V-1, V-2, V-3.

**5. When an alien student holds employment authorization documents such as I-688A, I-688B, or I-766, is he or she capable of establishing residence?**

The I-688A is for employment authorization, and is an indication that the alien has applied for permanent residence.

The I-688B is for employment authorization, and the person may, or may not be, eligible for resident status. The codes on the front of the card indicate the person's immigration status.

The I-766, according to the former INS, is a "state-of-the-art," more secure Employment Authorization Document. It is issued to aliens who have been granted temporary permission to work in the United States, and is designed to replace the I-688B. It allows the recipient to remain and work in the United States, but does not grant any other benefits.

The I-766 (unfortunately) does not include any of the coding that was on the I-688B. Therefore, it will be more difficult to determine status of the holder. Some persons will be in the U.S. temporarily, but others will have applied for permanent or other status. A request by the admissions office for further information substantiating the person's status would be in order.

**6. Can an unmarried minor on a visa that precludes establishing residence derive residence from a parent who is a California resident?**

Generally, the residence of an unmarried minor alien may be immediately derived from his/her parents. However, minors who are in this country on visas that preclude establishing domicile or are undocumented, are residents of their country of origin as a matter of federal law. Since there can only be one residence, such alien minors cannot be residents of California, even though state law would otherwise permit them to derive residence from their parents. Once steps are taken to change their status to one that allows residence, they would derive the parent's residence status immediately (no waiting period).

**7. What residence status would be given a minor child who is born in the United States and is a citizen, but whose parents are precluded from establishing domicile in the United States (for instance, the parents may be undocumented or on visas that preclude establishing domicile)?**

The minor children of alien parents who are precluded from establishing domicile, are allowed to establish residence separately from their parents if the children were born in the United States, and are thus citizens, and otherwise meet applicable residency laws. (Note: These individuals are entitled to the full right that United States citizenship brings.)

**8. Are aliens required to provide their green card to the admissions staff?**

No. However, the burden of proof of status is with the student. The district may indicate what kind of documentation it needs in the way of proof, but it is inappropriate to just ask to see the green card unless the student volunteers to show it. There must be some evidence that the student is legally in the United States. This means the person should have documents from the CIS showing

that he/she was admitted legally and/or has applied for permanent status (and will probably voluntarily show the “green card”).

**9. What is the residence capability of persons from Guam or Puerto Rico (Trust Territories), the Federated States of Micronesia, Pulau, Kofrae, Ponape, Truk, Yap, Marshall Islands, Western Samoa, and Tonga?**

Persons from these geographic areas do not have visas, but are eligible to establish residence, unless they have applied for an F-1 (Student visa), which would preclude establishing domicile in the United States.

Entitlement to Residence Classification

**10. Are certain students entitled to “automatic” residence classification?**

Yes. The California Legislature has granted residence classification to certain persons without the need to prove that they have met the durational or intent requirements usually associated with establishing residence. Of course, if a student claims to fall within one of these exceptions, he or she must be able to provide proof of eligibility.

As discussed below, districts also have the option of granting residence classification in some circumstances. Districts are also required or permitted to exempt certain nonresident students from the payment of nonresident tuition. Full information on all of these matters is beyond the scope of this document, but is included in the Student Attendance Accounting Manual; districts should also be familiar with all applicable statutes and regulations that cannot be fully described in this format.

**11. ARE MILITARY PERSONNEL AND THEIR DEPENDENTS STILL ENTITLED TO RESIDENCE CLASSIFICATION?**

Yes, but the law changed somewhat effective January 1, 2001, to allow for a longer period of residence classification for some military dependents.

Active Duty Military Students (Ed. Code, §68075, Cal.Code Regs., tit. 5, §54042)

Undergraduate students who are members of the armed forces of the United States stationed in California on active duty (except those assigned to the state for educational purposes), are entitled to resident classification, for tuition and fee purposes, for the duration of their attendance at a community college as long as they remain on active duty as of the residence determination date. Active duty military students seeking a graduate degree are entitled to no more than one academic year of resident classification for tuition and fee purposes. (See *Legal Opinion M 03-06*.)

Dependents of Active Duty Military Members (Ed. Code, §68074; Cal.Code Regs., title 5, §54041.)

An undergraduate student who is a natural or adopted child, stepchild, or spouse and who is a dependent of a member of the armed forces of the United States stationed in California on active duty is entitled to resident classification for tuition and fee purposes. There is no limitation on the length of the resident classification. If that member of the armed forces, whose dependent is in attendance at a community college, is thereafter transferred on military orders to a place outside this state where the member continues on active duty or is thereafter retired as an active member of the armed forces of the United States, the student dependent does not lose his or her resident classification until he or she has resided in the state the minimum time necessary to become a resident. Dependents seeking a graduate degree are entitled to no more than one academic year of resident classification (see *Legal Opinion M 03-06*. (*The Chancellor's Office has concluded that service in the California National Guard does not constitute being a member of the armed forces of the United States for Ed. Code, §§ 68074 and 68075.*)).

Please note that the resident classification granted under these sections 68074 and 68075 is restricted to tuition and fee purposes, such that a student could not, for example, qualify to serve as a student governing board member under Education Code section 72023.5 (which requires that student members be California residents) unless the student otherwise met residency standards.

**12. Can the spouse of a member of the military become a California resident if the military spouse has not taken steps to change his/her residence?**

Yes, two people who are married do not always have the same residence. Each student's residence must be independently determined. If the student came to California in the company of his/her spouse, who is in the military, transferred to this state, there is a presumption that the student is a nonresident. Please see item 11, above.

**13. Are there special provisions for the military person who was a California resident and was transferred on military orders out of the state or country; and, who upon return to California, enrolls at a community college? Is this person automatically considered to be a resident?**

The person would remain a California resident if his/her "Leave and Earnings Statement" continues to indicate California as the residence, and the person has done nothing while out of state to relinquish residence.

Members of the military who are stationed out of California are automatically exempt from payment of California state taxes for the time they are absent from the state, if the military income is the sole income. If the military person had

income from other sources, the person is subject to California taxes, on all other income wherever earned.

**14. What other students are entitled to resident classification?**

Under the "Jay Treaty," American Indians born in Canada have the right to pass and re-pass into the United States. They are subject to regulations of the United States Immigration and Naturalization Service. Only Indians who possess at least one-half degree of American Indian blood can take advantage of the border crossing provision of the Treaty. (Canada does not recognize this Treaty and considers American Indians to be subject to the provisions of their Immigration Act.)

Permissive Grants of Residence Classification.

**15. Are districts permitted to grant resident status to some students?**

Yes. In addition to those instances when districts must grant resident status, there are circumstances when districts are allowed to grant resident status to students who would not otherwise meet the durational and intent restrictions of residency.

For example, a district may classify a student who has been hired by a California public agency as a peace officer as a resident for purposes of enrollment in police academy training courses. (Ed. Code, § 76140.5.)

A district may classify a student as a resident if he or she lives with a parent who meets the requirements for agricultural laborers, or the student meets the requirements for an agricultural laborer. (Ed. Code, § 68100.)

A district may grant resident classification to students who are full-time employees of a state agency or to students who are children or spouses of full-time employees of a state agency until they have resided in California for the minimum time necessary to become a resident. (Caution: under this section, an employee of any state agency is one who is assigned to work outside the state.) (Ed. Code, § 68079.)

Exceptions to Payment of Nonresident Tuition.

**16. Are there times when persons who are not California residents are nevertheless excused from paying nonresident tuition?**

Yes. Although the usual consequence of being classified as a nonresident is the requirement to pay nonresident tuition, there are times when nonresident students must be excused from paying nonresident tuition, and there are other times when a district has the option of exempting students from paying

nonresident tuition. It is important to remember that being excused from the payment of nonresident tuition does not mean that the student has been classified as a resident.

**17. When must a district excuse the payment of nonresident tuition?**

One major, relatively recent exception from the payment of nonresident tuition is often referred to as the "AB 540" exemption. Pursuant to Assembly Bill 540 (Ed. Code, § 68130.5; Cal.Code Regs., tit. 5, §§ 54045.5 and 58003.6), students who attended high school in California for three or more years and graduated from a California high school or attained the equivalent thereof are exempted from payment of the nonresident tuition in credit courses if they meet the criteria specified in the law. In the case of a person without lawful immigration status, the student must file an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.

Nonimmigrant alien students, as defined by federal law, are not eligible for the exemption. Students who are exempt from the payment of nonresident tuition under Education Code section 68130.5 may be reported for apportionment purposes by community college districts. Although these students are exempted from paying nonresident tuition, they remain nonresidents until such time as they change their immigration status to one that allows domicile in the United States.

The Chancellor's Office has issued guidelines for the implementation of Education Code section 68130.5. The guidelines address specific issues that may arise under the section and may be useful to districts in meeting their responsibilities. The guidelines are available under the Student Services and Special Programs portion of the Chancellor's Office website at: [http://www.cccco.edu/divisions/ss/student\\_services/attachments/ab540\\_guide\\_3rd\\_ed.doc](http://www.cccco.edu/divisions/ss/student_services/attachments/ab540_guide_3rd_ed.doc)

Another important exemption from the payment of nonresident tuition is for dependents of any individual killed in the September 11, 2001, terrorist attacks on the World Trade Center in New York City, the Pentagon building in Washington, D.C., or the crash of United Airlines Flight 93 in southwestern Pennsylvania. The exemption applies if the dependent meets the financial need requirements for the Cal Grant A Program under Education Code section 69432.7 and either the dependent was a resident of California on September 11, 2001, or the individual killed in the attacks was a resident of California on September 11, 2001. (Ed. Code, §§ 68121, 76300(j)-(l).)

Districts are required to exempt students taking noncredit courses from payment of nonresident tuition. (Ed. Code, § 76380.)

Districts are required to exempt apprentices taking classes of related or supplemental instruction from payment of nonresident tuition. (Ed. Code, §76350 and Lab. Code, §3074.) A student claiming an exemption as an apprentice

should provide documentation such as a card or certification from the Joint Apprenticeship Committee, or the student's employer, evidencing apprentice status.

Special part-time students who are enrolled only for high school credit should not be charged nonresident tuition because they are covered by the "free school" provisions of the California constitution. This exemption does not apply if they are enrolled for dual credit or for community college credit. However, whether enrolled in credit courses for high school or college credit, non-resident students and their contact hours may not be claimed for state apportionment.

**18. When does a district have the option of excusing a student from paying nonresident tuition?**

A district may exempt all nonresidents who enroll for six or fewer units. This is an "all or nothing" exemption - districts cannot exempt some students taking six or fewer units and charge nonresident tuition to other students who are taking six or fewer units. (Ed. Code, §76140(b)(1).)

A district may exempt not more than 10% of its nonresident students who are citizens and residents of a foreign country from nonresident tuition IF the students demonstrate financial need. (Ed. Code, §76140(a)(2).)

Collection of Residency Data

**19. Are students required to sign the residency questionnaire?**

Yes, the Education Code specifies that each student shall be classified as to residence at the time he/she enrolls; and, title 5, section 54010 clearly requires that the information on which residency determinations are made is to be certified under oath or penalty of perjury by the applicant. Districts should verify to students that if they knowingly provide false information, they may be subject to discipline.

However, pursuant to California Code of Regulations, title 5, section 54300, a district may authorize the electronic submission of any form or document and the use of digital signatures for any documents requiring a signature.

Where the encrypted digital signature is required, the district must use the technology, criteria, and procedures that are approved by the Secretary of State, and contained in California Code of Regulations, title 2, section 22000, et. seq. Districts must alert students of the security concerns relative to the information they submit electronically.

**20. Is it necessary to collect residency information from students enrolling only in noncredit classes?**

All students should fill out enrollment and residency forms. Nothing in statute or regulations relative to residence determination would allow differential treatment of students. However, students taking noncredit courses are, of course, exempt from paying nonresident tuition.

**21. Is it necessary to collect residency information on students enrolled in distance education courses?**

Students enrolled in distance education courses are subject to the same residence determination requirements and exemptions as traditional students. If a student enrolling in a distance education course is deemed to be a non-resident, that student is subject to nonresident tuition unless otherwise exempted.

Please also be aware that the Chancellor's Office has determined that the AB 540 exemption from Nonresident Tuition (see item 16, above) is not available for persons who are absent from California, but who are taking distance education courses from California Community Colleges.

**22. Is it necessary to collect residency information on special part-time or full-time K-12 students enrolled in college courses?**

All special part-time or full-time students enrolled in community college courses are subject to the same residence determination requirements as traditional students. If a student enrolls for college credit, he or she is subject to nonresident tuition unless he or she is entitled to resident classification or an exemption from paying nonresident tuition or unless the district has elected to grant resident classification or an exemption under discretionary statutes. For example, a district might decide to exempt all students who are enrolled in six or fewer units from nonresident tuition under Education Code section 76140(a)(1). In that case, those part-time K-12 students who are enrolled in six or fewer units would not have to pay nonresident tuition.

Residence Determinations.

**23. Would someone (other than a member of the military or military dependent) who provides residency documentation of having lived outside of California and earned income, but did not file a California resident income tax return, be classified as a resident?**

Generally, no. A California resident must file a California income tax return on all income, wherever earned. Claiming an exemption from state income tax as a nonresident is inconsistent with a claim of residency for tuition purposes.

**24. Colleges are required to consider financial independence when reclassifying a student who was a nonresident in a previous term, to the resident category. What are some important points to consider when making the decision to reclassify a student? (Ed. Code, § 68044; Cal. Code Regs., tit. 5, § 54032.)**

- (a) The law requires that financial independence be “among the factors to be considered” in reclassification. The law and regulations specify how financial independence should be balanced against other factors, such as the passage of time, parent’s residence, and the student’s intent to establish residence elsewhere.
- (b) The ultimate question is whether the student has demonstrated intent to become a California resident. Financial dependence, particularly, in the current or immediately preceding calendar year, is one factor that weighs against finding intent to become a resident.
- (c) The title 5 regulation permits one to disregard a finding of financial dependence where there is not intent to establish (or maintain) residence in another state. Since financial status is only one factor to be considered and districts may still wish to require some further affirmative showing of objective intent to become a California resident.

**25. Do students who have been determined to be residents by community colleges automatically retain that status when they transfer to CSU or UC?**

No. CSU and UC make residence determinations for all their students, including transfer students.

The basic laws governing residency determination are generally the same for all three systems of public higher education. However, because CSU and UC have their own regulations and are subject to some different laws, students who were considered residents at a community college or who did not pay nonresident tuition at a community college may find that they must pay nonresident tuition at CSU or UC, often due to the financial independence requirement.

For example, UC-Santa Barbara notifies its students that “University residence regulations require that students who will not reach 24 years of age by December 31st of the calendar year of the term for which classification as a resident is requested, and who are not dependent upon a California resident parent, demonstrate financial independence in addition to the 366 day physical presence and intent requirements. *It should be noted that this*

*requirement makes it extremely difficult for most undergraduates who are not dependent on a parent whose principle place of residence is California, including transfer students from community colleges and other post-secondary institutions, to qualify for classification as a resident at a University of California campus."*

California Community Colleges  
Chancellor's Office  
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