



I-140 Ability-to-Pay When Times Are Hard

Overview

- Ability-to-Pay Fundamentals
- Ability-to-Pay: Sonegawa and Beyond
- Ability-to-Pay Issues: Current Examples and Potential Strategies

Ability-to-Pay Fundamentals



Ability to Pay Fundamentals

- USCIS Regulations: 8 CFR Section 204.5(g)(2)
 - I-140 petition must include evidence that the prospective U.S. employer has the ability to pay the proffered wage
 - Applies to all EB categories requiring a job offer: EB-1B, EB-1C, EB-2, EB-3
 - Must demonstrate ATP from the priority date until beneficiary obtains LPR
 - EB-2/EB-3: Date PERM Labor Certification is filed
 - EB-1: Date I-140 is filed
 - Petitioner **must** submit 1 of 3 types of initial evidence: (1) annual reports, (2) federal tax returns, or (3) audited financial statements
 - USCIS **may** accept:
 - Letter from financial officer of organization establishing ability to pay proffered wage where employer has 100 or more employees (May RFE)
 - Other secondary evidence (unaudited financial statements, bank records, personnel records, profit/loss statements)

Ability to Pay Fundamentals

- USCIS 2004 Yates Memo - Determination of ATP under 8 CFR 204.5(g)(2)
 - Provides guidance to adjudicators when determining ATP
 - Petitioner must submit 1/3 required documents (initial evidence)
 - If missing, instructed to RFE
 - Instructs adjudicators to make a positive ATP determination if any of the following situations are met:
 - Net income is equal to or greater than the proffered wage
 - Net assets are equal to or greater than the proffered wage
 - Wage paid to the beneficiary is equal to or greater than the proffered wage
 - Regulations/Memo do not provide much guidance on when adjudicator should accept a letter from financial officer where there are 100 or more employees and when adjudicator should accept secondary evidence

Ability to Pay Fundamentals

Example 1: Future Employment (net income or net assets)

Company files a PERM Labor Certification application on behalf of a beneficiary that is not yet employed with the company. The proffered wage for the position is \$95,000 per year. The employer will have two options to demonstrate ATP under the Yates Memo: through its net income *OR* net assets (can't combine amounts). The company must submit one of the three required documents as evidence of its ATP - annual reports, federal tax returns, or audited financial statements. *If 100 or more employees, may submit letter from financial officer alone (may RFE).*

Example 2: Current Employment (wages paid to beneficiary)

Company files a PERM Labor Certification application on behalf of a beneficiary currently on payroll. The proffered wage and the beneficiary's salary is \$95,000 per year. The company can demonstrate ATP under the third prong of the Yates memo. The company can submit copies of the beneficiary's pay statements/W-2s as evidence of its ATP. The employer must still submit one of the three required documents to avoid an RFE - the regulations and the Yates memo are clear that a petitioner must submit this documentation to avoid an RFE even where ATP is demonstrated solely by wages paid to the beneficiary.

Ability to Pay Fundamentals

Example 3: Beneficiary's Wages Deducted from Proffered Wage (hybrid)

Company files a PERM Labor Certification application on behalf of a beneficiary currently on payroll. The proffered wage is \$95,000 per year, but the beneficiary's current salary is only \$85,000 per year. The company has a net income of \$50,000 for the year in question. Therefore, the company cannot show it has paid the beneficiary the proffered wage or that it has net income equal to or greater than the proffered wage. However, USCIS will recognize an ability to pay because the company's net income exceeds the difference between the current salary and the proffered wage (\$50,000 net income covers \$10,000 difference). The company must submit one of the three required documents as evidence of its ATP along with the beneficiary's pay statements/W-2s.

Example 4: Alternative Evidence (totality of the circumstances)

Company files a PERM Labor Certification application on behalf of a beneficiary currently on payroll. The proffered wage is \$95,000 per year, but the beneficiary's salary is \$85,000 per year. The company had negative net income and net assets in the year of the priority date and could not show ATP for that year. All other years were profitable with a net income consistently over \$100,000. What can the employer do in this situation? Under certain circumstances, USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) – Totality of the circumstances > one bad financial year (specifics to come).

Ability to Pay Fundamentals

- Basic Practice Tips:

- Always analyze ability to pay from the outset
- Consolidated financials for large corporate groups – Consolidated tax return, annual reports, or audited financial statements typically accepted, but USCIS may RFE
 - Provide consolidated financials combined with a letter from financial officer to further explain
 - May be best to show financial information about petitioner too
- Be prepared to demonstrate ability to pay all I-140 beneficiaries - Petitioner filing multiple I-140 petitions must establish ability to pay the total amount of the proffered wage for all the beneficiaries
- Primary evidence should encompass the year of filing (if not yet available, submit primary evidence for the year immediately prior to the priority date, plus tax extension request if applicable)

Ability to Pay Fundamentals

1120		U.S. Corporation Income Tax Return		OMB No. 1545-0123		
Form 2021 Department of the Treasury Internal Revenue Service		For calendar year 2021 or tax year beginning <u>2021</u> , ending <u>2021</u> ► Go to www.irs.gov/Form1120 for instructions and the latest information.				
A Check if: 1a Consolidated return (attach Form 851) <input type="checkbox"/> 1b Life/nonlife consolidated return <input type="checkbox"/> 2 Personal holding co. (attach Sch. PH) <input type="checkbox"/> 3 Personal service corp. (see instructions) <input type="checkbox"/> 4 Schedule M-3 attached <input type="checkbox"/>		Name Number, street, and room or suite no. If a P.O. box, see instructions. City or town, state or province, country, and ZIP or foreign postal code		B Employer identification number C Date incorporated D Total assets (see instructions) \$		
E Check if: (1) <input type="checkbox"/> Initial return (2) <input type="checkbox"/> Final return (3) <input type="checkbox"/> Name change (4) <input type="checkbox"/> Address change						
<table border="0"> <tr> <td style="vertical-align: top;"> Income 1a Gross receipts or sales 1b Returns and allowances 1c Balance. Subtract line 1b from line 1a 2 Cost of goods sold (attach Form 1125-A) 3 Gross profit. Subtract line 2 from line 1c 4 Dividends and inclusions (Schedule C, line 23) 5 Interest 6 Gross rents 7 Gross royalties 8 Capital gain net income (attach Schedule D (Form 1120)) 9 Net gain or (loss) from Form 4797, Part II, line 17 (attach Form 4797) 10 Other income (see instructions—attach statement) 11 Total income. Add lines 3 through 10 ► 11 </td> <td style="vertical-align: top;"> 1a 1b 1c 2 3 4 5 6 7 8 9 10 11 </td> </tr> </table>					Income 1a Gross receipts or sales 1b Returns and allowances 1c Balance. Subtract line 1b from line 1a 2 Cost of goods sold (attach Form 1125-A) 3 Gross profit. Subtract line 2 from line 1c 4 Dividends and inclusions (Schedule C, line 23) 5 Interest 6 Gross rents 7 Gross royalties 8 Capital gain net income (attach Schedule D (Form 1120)) 9 Net gain or (loss) from Form 4797, Part II, line 17 (attach Form 4797) 10 Other income (see instructions—attach statement) 11 Total income. Add lines 3 through 10 ► 11	1a 1b 1c 2 3 4 5 6 7 8 9 10 11
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<p style="text-align: center;">Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct,</p>						

Ability to Pay Fundamentals

Form 1120 (2021)

Page 6

Schedule L	Balance Sheets per Books	Beginning of tax year		End of tax year	
		(a)	(b)	(c)	(d)
1	Cash				
2a	Trade notes and accounts receivable				
b	Less allowance for bad debts	()		()	
3	Inventories				
4	U.S. government obligations				
5	Tax-exempt securities (see instructions)				
6	Other current assets (attach statement)				
7	Loans to shareholders				
8	Mortgage and real estate loans				
9	Other investments (attach statement)				
10a	Buildings and other depreciable assets				
b	Less accumulated depreciation	()		()	
11a	Depletable assets				
b	Less accumulated depletion	()		()	
12	Land (net of any amortization)				
13a	Intangible assets (amortizable only)				
b	Less accumulated amortization	()		()	
14	Other assets (attach statement)				
15	Total assets				
Liabilities and Shareholders' Equity					
16	Accounts payable				
17	Mortgages, notes, bonds payable in less than 1 year				
18	Other current liabilities (attach statement)				
19	Loans from shareholders				
20	Mortgages, notes, bonds payable in 1 year or more				
21	Other liabilities (attach statement)				
22	Capital stock: a Preferred stock				
	b Common stock				
23	Additional paid-in capital				
24	Retained earnings—Appropriated (attach statement)				
25	Retained earnings—Unappropriated				
26	Adjustments to shareholders' equity (attach statement)				
27	Less cost of treasury stock		()		()
28	Total liabilities and shareholders' equity				

Schedule M-1 Reconciliation of Income (Loss) per Books With Income per Return



Ability to Pay - Sonegawa and Beyond

Matter of Sonegawa

12 I&N Dec. 612 (Reg'l Comm'r 1967)

Petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years.

- In business for over 11 years and earned consistent gross annual incomes
- Changed business locations and paid rent on both locations for 5 months.
- Large moving costs and a period when the petitioner was unable to do business.
- Work featured in Time and Look magazines.
- Clients included Miss Universe, movie actresses, and society matrons.
- The petitioner lectured on fashion design at design and fashion shows throughout the U.S.

USCIS, “I-140 National SOP,” Addendum 2: Ability to Pay, (undated, posted Aug. 30, 2007).

To assert that the year of filing of the petition was an uncharacteristically unprofitable year (i.e. argue *Sonegawa*), the record must contain documentary evidence that would show:

- Why the year in question was uncharacteristically unprofitable;
- That the petitioning entity had experienced a succession of profitable years prior to the year of filing; and
- That the petitioner’s prospects for a resumption of successful business operations are reasonable and not simply based on the petitioner’s assurances.

Totality of the Circumstances

USCIS may consider the overall magnitude of the petitioner's business activities including evidence that falls outside of a petitioner's net income and net current assets including:

- The number of years the petitioner has been doing business,
- The established historical growth of the petitioner's business,
- The overall number of employees,
- Any uncharacteristic business expenditures or losses,
- The petitioner's reputation within its industry,
- Whether the beneficiary is replacing a former employee or an outsourced service, or
- Any other evidence that USCIS deems relevant

What HAS NOT Worked Post *Sonegawa*

- Depreciation
- Arguing total assets (includes assets which can't be converted to cash)
- Changing accounting methods mid-stream (accrual vs. cash)
- Bank Statements (funds already reflected on tax return)
- Quarterly Wage Reports (wages already paid so funds not available)
- Replacement of contractors or employees when the beneficiary already works for the employer
- Combination of net assets and net income
- Overall industry growth (future growth)
- Heavy advertising (future growth)

What HAS Worked Post *Sonegawa*

- Executive foregoing portion of compensation to pay the beneficiary
- Replacing a contractor with the beneficiary
- 9/11 as a reason for a “bad year” for a hotel in New York
- Combination of net assets/income in some years and wages in other
- Sometimes companies will operate at a loss for a period of time to improve their business position in the long run. In those instances, the documentation should fully explain the sources of funding for the entity (or unit) and the expected profit potential

What MIGHT Work Post *Sonegawa*

- Line of Credit – business plan and audited cash flow statements that demonstrate it will augment and not weaken the financial position
- Shareholder Loan – repayment of the loan was discretionary
- Foreign Assets – but only if a current or liquid asset

Ability-to- Pay Issues

Current examples & potential
strategies



8 CFR 204.5(g)(2): Required Initial Evidence

Evidence of ability to pay *shall* be either in the form of

- copies of annual reports
- federal tax returns, *or*
- audited financial statements

Petitioner must submit at least one of the above.

Options from the 2004 Yates Memo

- In certain instances, petitioners may submit a financial statement ***in lieu of initial evidence and/or additional evidence*** such as:
 - (1) profit/loss statements
 - (2) bank account records, or
 - (3) personnel records
- Under 8 CFR 204.5(g)(2), CIS adjudicators are not required to accept, request, or RFE for a financial statement from U.S. employers who employ 100 or more workers to establish ability to pay.
- Regardless of # employees Petitioner has, CIS is NOT required to accept, request, or RFE for additional financial evidence.
 - If you submit required initial evidence only, CIS can deny based on this (not required to RFE for additional evidence)
 - If you submit required initial evidence + additional evidence, CIS doesn't have to accept the additional evidence.

Yates Memo on Financial Statements

- Financial Statements and Additional Financial Evidence
 - Petitioners may submit a financial statement in lieu of initial evidence
 - and/or additional evidence such as (1) profit/loss statements, (2) bank account records, or (3) personnel records.
 - Under 8 CFR 204.5(g)(2), CIS adjudicators are not required to accept, request, or RFE for a financial statement from U.S. employers who employ 100 or more workers to establish ability to pay.
 - Further, regardless of the number of employees the petitioner's employs, CIS adjudicators are not required to accept, request, or RFE for additional financial evidence.
 - **Acceptance of these documents by CIS is discretionary.**
 - If required initial evidence (annual reports, federal tax returns, *or* audited financial statements) does not establish the petitioner's ability to pay, CIS may deny the petition.
 - If denied, the petitioner may file an appeal or a motion to reopen or reconsider

Example: Company Hit Hard by Covid

Common example: Beneficiary worked for petitioner but wages were reduced substantially.

- Required evidence: 8 CFR 204.5(g)(2) – Evidence of ability to pay **shall** be either in the form of copies of annual reports, federal tax returns, **or** audited financial statements
- Yates Memo: CIS should make a positive determination in any of the following circumstances:
 1. Petitioner's Net income is equal to or greater than proffered wage
 2. Petitioner's Net current assets are equal to or greater than the proffered wage
 3. Record contains evidence that Petitioner **has paid or is paying** Beneficiary proffered wage
 - Was the company paying the proffered wage prior to slowdown in business?

Net current assets (AKA working capital)

Net Current Assets = Current assets – current liabilities

1. Current assets – cash, cash equivalents, accounts receivable, stock inventory, pre-paid liabilities & other liquid assets
2. Current liabilities – a company's debts or obligations that are due to be paid to creditors within one year

Have an in-depth conversation with the Petitioner about this or direct them to speak to their accountant/CPA about it.

Company Reduces Workforce

- Did they go under 100 employees?
 - Per regs, may submit statement from CFO
- Did they end up saving money from their cost-cutting measures?
 - How do their bank account statements and profit & loss statements look after doing this?
- Do they have assets that can be sold (additional office furniture and equipment) to increase available funds?

Required initial evidence from 2020-2021 is insufficient

- Argue Matter of Sonegawa
 - Did the company downsize? If so, were there moving/relocation costs that are one-time expenses?
 - Can employer show that having the Beneficiary on board will help increase revenue?
 - Was there an obvious temporary drop in business as a result of lockdown or other measures that affected the Petitioner's bottom line but is not likely to happen again?
 - Did Petitioner claim available credits/use available CARES Act/pandemic rescue funds?
 - e.g. Employee Retention Credit for quarterly employer taxes