

Advanced Ability to Pay Analysis for I-140 Filings — Digging Deep to Meet This Requirement



Immigration Blog

By [Nisha V. Fontaine \(Jagtiani\)](#)

February 13, 2023 | **IMMIGRATION**

Last year, we filed an I-140 Immigrant Petition under the EB-1C (Multinational Manager) category for a Canadian Beneficiary who had been in the U.S. since 2014. That I-140 was just recently approved by USCIS after a thorough and detailed RFE response to address the ability to pay requirement.

This case was initially tricky because the Beneficiary had initially transferred to the U.S. in L-1A status in 2014, and once we secured the company's E-2 registration in 2019, we transferred him to E-2 status for another related U.S. entity.

To qualify for classification under the multinational manager category, we had to document that the Beneficiary had the qualifying foreign employment within the requisite time period (i.e. one full year out of the last three years, *prior to his transfer to the U.S.*) and that his time in the U.S. over eight (8) years— in L-1 and E-2 status — had not changed the relevant time period. In order to do so, we had to document that his employment in the U.S. was in non-immigrant status for affiliated entities of his foreign employer.

In our filing, we properly identified and documented the qualifying employment tenure abroad, highlighted the qualifying corporate relationships between the foreign employer, the L-1A U.S. Petitioner, the E-2 Petitioner and ultimately, the I-140 Petitioner – and confirmed his managerial roles for each of these entities. Based on the qualifying relationships, we established that the qualifying foreign employment requirement period remained the same as it had in 2014 – and accordingly, the Beneficiary continued to qualify for classification under the multinational manager category.

Proving Ability to Pay

While USCIS did not question the foreign-qualifying employment based on the information we provided, they did issue a Request for Evidence (RFE) regarding the U.S. Petitioner's ability to pay the offered wages. Even though we had submitted the employees W-2's and recent paystubs as evidence that they were already being paid the offered wages, USCIS requested additional evidence based on the company's *pro forma* tax return which demonstrated negative net income.

Our response to the RFE was a four-tiered response that consisted of the following:

Prima Facie Proof - Petitioner Already Pays the Proffered Wages

First, we argued that the most compelling evidence of the U.S. Petitioner's ability to pay the proffered wages was that the U.S. Petitioner has already paying the Beneficiary above the offered wage for several years now – as documented by his W-2's from 2018-2021, which were submitted with the original filing.

As confirmed by the USCIS Policy Manual:

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage.

U.S. Petitioner's Parent Company's Federal Income Tax Returns Evidence Positive Net Income

We explained that the U.S. Petitioner does **not** file its own federal tax return, rather it is included within its U.S. parent company's Federal Income Tax Return as part of a consolidated tax return filed with the IRS. We provided the U.S. Parent company's Federal Income Tax Return, together with accompanying statements confirming the breakdown of revenues/expenses for each company included in the tax return. We explained that the U.S. Parent Company's Federal Income Tax return demonstrated positive net income and positive net current assets for the last two (2) tax years – notably, *after* paying the foreign national beneficiary the proffered wages.

U.S. Petitioner Has Positive Net Current Assets

We also argued that the U.S. Petitioner had significant net current assets which support the company's ability to pay the offered wages, but for liabilities that are owed to other affiliated companies. *(We provided a letter from a senior financial officer within the company that also confirmed the parent company's intent to treat the majority of current*

liabilities owed to the affiliated companies as long-term liabilities, so as to leave the U.S. Petitioner positive net current assets.)

Totality Of the Circumstances Establishes that U.S. Petitioner Can Pay the Proffered Wages

Lastly, we argued that given the totality of the circumstances, the U.S. Petitioner had established its ability to pay the proffered wages to the Beneficiary. The relevant guidance and applicable rules can be found in *Matter of Sonogawa, Full Gospel Portland Church v. Thornburgh* and within the USCIS Policy Manual.

In *Matter of Sonogawa*, 12 I&N Dec. at 612 (BIA 1967), the Board of Immigration Appeals (BIA) stated:

...We may consider such factors as: the number of years a petitioner has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses, its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of the petitioner's ability to pay the proffered wage.

In *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441, 449 (D.D.C. 1988), the Court stated:

Clearly, if Full Gospel [church] is financially linked to the larger church, the INS must consider these resources. New divisions in businesses or new parishes of larger churches may not themselves be financially profitable, but if documents show that they may rely on the larger body for support, it is arbitrary and capricious for the INS not to consider the resources of the larger organization in making its evaluation to pay.

Further confirmed by the USCIS Policy Manual – Volume 6 – Immigrants; Part E – Employment-Based Immigration; Chapter 4 – Ability to Pay:

Sometimes companies operate at a loss for a period to improve their business position in the long run. For example, a company may not expect research and development costs on a product line to generate revenue for several years. In those instances, the documentation should fully explain the sources of funding for the entity (or unit) and the expected profit potential. Whether the petitioner can demonstrate it has the ability to pay the beneficiary the wages described in the petition depends on the specific facts presented and consideration of all of the circumstances.

In this case, we documented that:

- U.S. Petitioner had already been paying the offered wages,
- U.S. Petitioner had a positive net income shown on its federal income tax returns
- U.S. Petitioner had positive net current assets (exclusive of notes payable to affiliated entities)

In our letter from the senior financial officer, we also provided some history relating to the establishment of the U.S. company in 2014 and the parent company's subsequent capital investments. We also highlighted the increase in growth revenues throughout the years. In addition, we included evidence of the Canadian parent company's significant financial resources as established by their Canadian Corporate Tax Return.

Accordingly, a review of the totality of the circumstances confirmed that the U.S. Petitioner had established that it

has the ability to pay the proffered wages to the Beneficiary.

The subsequent I-140 approval made for a happy corporate client, a happy employee, and a very happy immigration lawyer.

Related Team



**Nisha V. Fontaine
(Jagtiani)**
Partner



Elizabeth M. Klarin
Partner



Eileen M. Martin
Partner | Team Co-
Leader - Immigration
| Team Leader -
Canada-U.S. Cross
Border



Andrew M. Wilson
Partner | Chief
Advisory Officer |
Team Co-Leader -
Immigration

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