

USCIS' New Guidance on a U.S. Employer's Ability to Pay Foreign Sponsored Employees

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When sponsoring a foreign employee for an employment visa, U.S. employers are required to establish that the job offered is genuine. To do so, it is essential that the employer is able to pay the offered wage for the offered job.

Federal regulations require that employers submit, as initial evidence, annual reports, federal tax returns, or audited financial statements for each relevant year. These initial documents must show that the organization's net income is equal to or greater than the offered wage, or that the organization's net current assets are equal to or greater than the offered wage. Also, if the foreign employee is already working with the U.S. employer, pay records may be submitted to show that the employer is already paying the foreign employee at least the wage offered. Moreover, if an employer has 100 or more workers, a financial officer statement attesting that the employer can pay the offered wage is acceptable to demonstrate the employer's ability to do so. While annual reports, federal tax returns, or audited financial statements are mandated initial evidence, employers may submit secondary evidence such as profit and loss statements, bank account records, or personnel records.

Over the years, there has been uncertainty on how federal immigration authorities review an employer's ability-to-pay evidence, including how secondary evidence is evaluated. On March 15, 2023, United States Citizenship & Immigration Services (USCIS) issued updated [guidance](#) to discuss the "various types of evidence and explain how USCIS reviews all evidence relevant to the employer's financial strength and the significance of its business activities."

Initial Required Evidence

As noted, an employer "must" include copies of annual reports, federal tax returns, or audited financial statements for each relevant year. The only exception is a financial officer statement certifying an employer's ability to pay the offered wage. This exception is available only to organizations that employ 100 or more workers.

(a) Annual Reports

According to USCIS, acceptable annual reports for publicly traded companies are either the United States Securities and Exchange Commission (SEC) Form 10-K or the annual report to shareholders,

which includes audited financial data. Private company annual reports are acceptable if the reports contain audited financial data.

(b) Federal Tax Returns

Federal tax returns must be complete and include all required schedules, statements, attachments, and other supporting documentation. The structure of the organization determines what federal tax return is acceptable.

i. Sole Proprietorship

Sole proprietorship income is reported on the business owner's personal income tax return (Individual Income Tax Return (IRS Form 1040)), as recorded on Form 1040, Schedule C (Profit or Loss from Business), Schedule E (Supplemental Income or Loss (Schedule E)), and Schedule F (Profit or Loss From Farming). The owner's Form 1040 adjusted gross income is used as "net income" for ability to pay purposes and also considers a sole proprietor's liquefiable personal assets, household expenses, and other personal liabilities.

ii. Partnership

A partnership must submit its Return of Partnership Income form (IRS Form 1065). Net income or loss for a partnership is on IRS Form 1065 or Schedule K, and net current assets are calculated from information on Schedule L of the IRS Form 1065.

iii. Corporation

A "C" corporation must submit its Corporation Income Tax Return (IRS Form 1120). Net income (taxable income before net operating loss deduction and special deductions) appears on the IRS Form 1120 or 1120-A, while net current assets are calculated from information on Schedule L of IRS Form 1120 or 1120-A.

An "S" corporation must submit its Tax Return for an S Corporation (IRS Form 1120-S). [Net income or loss, notated on tax forms as ordinary business income \(loss\)](#), appears on IRS Form 1120-S or its Schedule K, while net current assets are calculated from information on Schedule L.

A personal service corporation must submit its Corporation Income Tax Return (IRS Form 1120). Net income or loss is noted on IRS Form 1120 or 1120-A as taxable income before net operating loss deduction and special deductions, while net current assets are calculated from information on IRS Form 1120 Schedule L.

iv. Limited Liability Company

A limited liability company (LLC) federal income tax records are dependent on whether the LLC has two or more members or only one member. If two or more, it is treated as a partnership and must file the IRS Form 1065, described above. If the LLC has only one member, it is considered a disregarded entity and treated as a sole proprietorship for tax purposes. If this is the case, the sole member reports the LLC's income on the LLC owner's personal individual tax return (Schedules C, E, or F to the IRS Form 1040).

v. Non-Profit Organizations

An incorporated or unincorporated non-profit organization must submit its annual informational return, called a Return of Organization Exempt from Income Tax (IRS Form 990 or IRS Form 990EZ). The IRS Form 990 provides an analysis of an NPO's revenue and expenses, and net income is stated on the form as revenue less expenses. Since the balance sheet on the IRS Form 990 does not identify which assets and liabilities are current, USCIS has deemed the IRS Form 990 balance sheet is insufficient to calculate net current assets.

(c) Audited Financial Statements

When an employer relies on financial statements to establish the ability to pay, the financial statements must be audited and contain an auditor's report stating that the financial statements have been audited. Moreover, the audited financial statements must have been examined under an acceptable standard by an accountant authorized by the jurisdiction to perform the audit, such as a certified public accountant, in accordance with generally accepted accounting principles (GAAP).

Employers must not mistake audited financial statements with compiled or reviewed financial statements, as those financial statements are less rigorous reviews of an organization's financial statements.

(d) Financial Officer's Statement

If the sponsoring organization employs 100 or more workers, a statement from a financial officer can serve to establish the ability to pay the offered wage and may be submitted in place of annual reports, federal tax returns, or audited financial statements. The statement must be detailed and explain the basis of the financial officer's conclusion.

Secondary Evidence

Annual reports, federal tax returns, or audited financial statements, even if net income or net current assets are higher than the offered wage, do not always sufficiently serve to meet USCIS's ability to pay review. USCIS [must](#) "analyze the financial information contained in these documents to determine whether they present persuasive information demonstrating that the petitioner possessed the ability to pay" the offered wage. The USCIS Policy Manual [states](#) that "[u]ltimately, USCIS considers all evidence relevant to the [employer's] financial strength and the significance of its business activities, whether listed in the regulation or related to other metrics." Given this, sponsoring employers must prepare to submit additional evidence, such as profit and loss statements, bank account records, or personnel records.

i. Bank Statements

Bank statements for all relevant months must establish that the amounts contained in the bank statements have not already been considered elsewhere, such as in a calculation of the petitioner's net current assets, and must establish that such amounts reported on the bank statements reflect sufficient liquid cash to establish ability to pay.

ii. Personnel Records

USCIS accepts personnel records to corroborate an employee's dates of employment and salary, and the employer's number of employees and overall payroll. Personnel records include employment contracts, salary and payroll documents, and attendance records. If the foreign employee is replacing

a former employee, USCIS will consider wages paid to the former employee when determining ability to pay the offered wage to the foreign employee.

iii. Credit Limits, Bank Lines, and Lines of Credit

USCIS considers lines of credit and other forms of debt as an integral part of any business operation. Given this, the USCIS Policy Manual [states](#) that “documentation demonstrating a[n employer’s] access to credit may establish a baseline of creditworthiness, and under the totality of circumstances, may be considered as one piece of evidence in consideration of whether the [employer] has the ability to pay the proffered wage.” Nonetheless, when an employer “is relying upon credit limits, bank lines, or lines of credit to establish ability to pay, USCIS must evaluate the overall financial position of the petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage.”

iv. Income and Assets of Others

Since sole proprietors and individual employers of domestic workers are not considered separate legal entities, USCIS determines net income by subtracting personal expenses from the individual’s (employer) adjusted gross income. To determine an individual’s net current assets, the USCIS calculates personal liquid assets then subtracts any financial encumbrances on those assets.

Moreover, while partnerships are considered separate legal entities from their partners, general partners are personally liable for the debts of the business. Given this, if an employer that is a partnership cannot establish sufficient net income or net current assets equal or greater to the offered wage, then USCIS will consider whether a general partner is individually willing and able to pay the offered wage. If so, USCIS will determine the partner’s net income by subtracting personal expenses from the partner’s adjusted gross income and will review net current assets by first calculating the partner’s personal liquid assets, and then subtracting any financial encumbrances on those assets.

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National Law Review, Volume XIII, Number 116

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