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Policy Alert

SUBJECT: Establishing an Employer’s Ability to Pay the Proffered Wage for Certain Employment-Based Immigrant Visa Petitions

Purpose

U.S. Citizenship and Immigration Services (USCIS) is issuing policy guidance in the [USCIS Policy Manual](#) to address the analysis of an employer’s ability to pay the proffered wage for certain employment-based immigrant visa petition adjudications.

Background

Employers seeking to classify prospective employees under 1st, 2nd, and 3rd preference employment-based immigrant visa classifications that require a job offer must demonstrate their continuing ability to pay the proffered wage to the beneficiary as of the priority date of the immigrant visa petition until the beneficiary obtains lawful permanent residence.

The relevant regulation requires the employer to submit annual reports, federal tax returns, or audited financial statements for each available year from the priority date.¹ If the employer has 100 or more workers, then it may instead include a financial officer statement attesting to the petitioner’s ability to pay the proffered wage. An employer may also submit additional evidence such as profit and loss statements, bank account records, or personnel records.

USCIS is updating its guidance to explain that, where the beneficiary has ported to a new employer under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)² and the Immigrant Petition for Alien Workers ([Form I-140](#)) is pending, officers determine ability to pay by only reviewing the facts in existence from the priority date until the filing of the Form I-140.³ USCIS is also making other minor technical revisions to improve clarity and readability, and otherwise streamline existing guidance.

¹ See [8 CFR 204.5\(g\)\(2\)](#).

² See Volume 7, Adjustment of Status, Part E, Employment-Based Adjustment, Chapter 5, Job Portability after Adjustment Filing and Other AC21 Provisions [[7 USCIS-PM E.5](#)].

³ For Form I-140 petitions accompanied by a labor certification from the Department of Labor (DOL), the priority date is the date that the labor certification was accepted for processing by the DOL. For petitions that do not require a labor certification certified by DOL (such as 1st preference petitions, 2nd preference national interest waivers, and Schedule A, Group I occupations), the priority date is the date that the petition was properly filed with USCIS. See [8 CFR 204.5\(d\)](#).

This guidance, contained in Volume 6 of the Policy Manual, is effective immediately. The guidance contained in the Policy Manual is controlling and supersedes any related prior guidance.

Policy Highlights

- Explains that when the beneficiary of a Form I-140 petition ports to a new employer under AC21 while the Form I-140 is pending, USCIS determines whether the petitioner meets the ability to pay requirements by only reviewing the facts in existence from the priority date to the time of filing.

Summary of Changes

Affected Section: Volume 6 > Part E > Chapter 4, Ability to Pay

- Reorganizes section and subsection headings throughout.

Affected Section: Volume 6 > Part E > Chapter 4 > Section D, Additional Ability to Pay Issues

- Adds new Subsection 5 (Establishing Ability to Pay When the Beneficiary Ports to a New Job Under AC21).

USCIS may also make other minor technical, stylistic, and conforming changes consistent with this update.

Citation

Volume 6: Immigrants, Part E, Employment-Based Immigration, Chapter 4, Ability to Pay [[6 USCIS-PM E.4](#)].