



U.S. Citizenship  
and Immigration  
Services

HQOPRD 90/16.45

## Interoffice Memorandum

To: Service Center Directors  
District Directors  
Regional Directors  
Director, National Benefit Center  
Director, Administrative Appeals Office

From: William R. Yates *W. R. Yates*  
Associate Director for Operations

Date: MAY 4 2004

Re: Determination of Ability to Pay under 8 CFR 204.5(g)(2)

### Purpose

This memorandum provides instructions for CIS adjudicators concerning determinations of a prospective U.S. employer's ability to pay the proffered wage in the context of certain employment-based immigrant visa petitions. 8 CFR 204.5(g)(2). This memorandum provides guidance to adjudicators on when a request for evidence (RFE) is not required or should not be issued.

### Background

A recent review of CIS practices revealed that in certain instances adjudicators unnecessarily issue an RFE questioning an employer's ability to pay prior to making a final decision on a petition. It is unclear how this practice evolved, and it has resulted in a process that significantly affects limited CIS resources, increases processing delays, and confuses petitioners and applicants.

As part of its backlog reduction initiatives, CIS plans to amend the regulations at 8 CFR 204.5(g)(2) with respect to the requirement that certain employment-based visa petitioners provide evidence of their ability to pay the proffered wage. In the interim, however, this memorandum provides guidance to adjudicators when making an ability to pay determination.

## Procedural Guidance

Any petition filed by or for an employment based immigrant, which requires an offer of employment, must be accompanied by evidence that the prospective U.S. employer has the ability to pay the proffered wage. A petitioner must file a fully completed Form I-140 along with initial evidence establishing its ability to pay the beneficiary the proffered wage. Required initial evidence, as specified under 8 CFR 204.5(g)(2), includes copies of: (1) annual reports, (2) federal tax returns, or (3) audited financial statements. The petitioner must submit a copy of at least one of these required documents. CIS adjudicators are instructed to take the following steps when making a determination of a petitioner's ability to pay in the context of adjudicating the Form I-140:

- Incomplete Form I-140

CIS adjudicators should review Form I-140 for completeness. If the following sections of Part 5 of Form I-140 are incomplete, issue an RFE: date established, current number of employees, gross annual income, net annual income.

- Missing Initial Evidence

CIS adjudicators should review the file for missing initial evidence. If the record does not contain one of the three required documents (annual report, tax return, or audited financial statement), issue a request for evidence.

- Decision on the Record

An applicant or petitioner must establish eligibility for the requested benefit. 8 CFR 103.2(b)(1). If the record is complete with respect to all of the required initial evidence, CIS adjudicators are not required to issue an RFE to obtain further documentation to support a decision based on the record or establish the petitioner's ability to pay. CIS adjudicators should make a positive ability to pay determination in any one of the following circumstances:

(1) *Net income*

The initial evidence reflects that the petitioner's net income is equal to or greater than the proffered wage.

(2) *Net current assets*

The initial evidence reflects that the petitioner's net current assets are equal to or greater than the proffered wage.

(3) *Employment of the beneficiary*

The record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage.

If the required initial evidence does not establish ability to pay, the CIS adjudicator may deny the petition since the petitioner has not met his or her burden to establish eligibility for the requested benefit.

- Financial Statements and Additional Financial Evidence

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. 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**. Therefore if the required initial evidence is submitted and does not establish the petitioner's ability to pay, CIS adjudicators may deny the petition. If the case is denied, the petitioner may file an appeal or a motion to reopen or reconsider in accordance with 8 CFR 103.3 and 103.5.

If the CIS adjudicator exercises discretion to accept either the financial statement or additional financial evidence, that evidence must clearly establish the petitioner's ability to pay. If the CIS adjudicator has any doubts about whether the additional documents establish the petitioner's ability to pay, the CIS adjudicator may deny the petition and not RFE for additional evidence to further clarify the discretionary evidence that was accepted.

## **Denials**

CIS is committed to providing quality decisions. Adjudicating officers must evaluate records of proceeding in their entirety and are required by regulation to clearly explain the specific reasons for denial. Denials should be written with sufficient specificity to withstand judicial scrutiny and must include proper notice of any applicable appeal process to the applicant or petitioner.

## **Fraud Detection Unit Referrals**

If the adjudicating officer doubts the veracity of the required evidence contained within the record, the case should be forwarded to the local Fraud Detection Unit (FDU) for review. The adjudicating officer must have articulable reasons for questioning the legitimacy of the document. FDU will provide advice on appropriate next steps.

## **Notice**

If you have questions regarding this memorandum, please contact Joe Holliday or Barbara Velarde, Service Center Operations, by electronic mail.

This memorandum is intended solely for guiding USCIS personnel in performance of their professional duties. It is not intended to be, and may not be relied upon, to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.