Establishing the Ability to Pay the Proffered Wage

By Joseph P. Whalen (Friday, November 11, 2016)

Establishing the ability to pay (ATP) the proffered wage is not usually a problem unless the petitioning business is marginal. When ATP is an issue, the marginal business that filed the petition is often “doing a favor” for a friend or relative. Also when ATP is an issue, the proffered position is, “more often than not”, within the third-preference (EB-3) classification. As a quick refresher, EB-3 workers are comprised of: Skilled Workers, Professionals, and Unskilled Workers (Other Workers). The EB-3 category of workers encompasses a wide range from unskilled laborers requiring less than two years training or experience to Professionals requiring a baccalaureate for entry into the occupation. The cases where ATP is an issue can include the whole range of workers but tend to be at the lower end of the spectrum. I must stress that my above statements form a generalization drawn from a broad survey followed by a deeper perusal of AAO non-precedent administrative decisions covering the major employment-based categories (EB-1 through EB-3 plus some EB-4 religious worker cases). The jurisprudence for ATP stretches back several decades in decisions from various INS Officials and the BIA, but AAO is missing.

Matter of B-A-E-, ID# 175718 (AAO Oct. 14, 2016), includes, on pages two and three:

“The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on it, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See Matter of Great Wall, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See Matter of Sonegawa, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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Thus, the petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification was accepted for processing by any office within the employment system of the U.S. Department of Labor (DOL). See 8 C.F.R. § 204.5(d).”

The record indicates that the Petitioner is a sole proprietorship, which is a business in which one person operates the business in his or her personal capacity. Black’s Law Dictionary 1520 (9th Ed. 2009). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See Matter of United Investment Group, 19 I&N Dec. 248, 250 (Comm’r 1984). Therefore, the sole proprietor’s adjusted gross income, assets and personal liabilities are also considered as part of the petitioner’s ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. See Ubeda v. Palmer, 539 F. Supp. 647 (N.D. Ill. 1982), aff’d, 703 F.2d 571 (7th Cir. 1983). Thus, in determining the petitioner’s ability to pay the proffered wage during a given period, USCIS will examine the adjusted gross income figure reflected on the sole proprietor’s federal income tax returns in relation to his or her yearly household expenses.1

1 Reliance on federal income tax returns as a basis for determining a petitioner’s ability to pay the proffered wage is well established by judicial precedent. Elatos Restaurant Corp. v. Sava, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984)).

The Petitioner must establish that the Beneficiary possessed all the education, training, and experience specified on the labor certification as of the petition’s priority date. See Matter of Wing’s Tea House, 16 I&N Dec. 158, 159 (Acting Reg’l Comm’r 1977); Matter of Katighbak, 14 I&N Dec. 45 49 (Reg’l Comm’r 1971). The priority date of the petition is the date the underlying labor certification application was received for processing at the DOL. In order to demonstrate that the job offer was bona fide or “realistic”, the Petitioner needs to be able to show that it was ready, willing, and able to not only put the Beneficiary to work, and that the Beneficiary was qualified, but also that the Petitioner had the ability to pay the Beneficiary. All of these requirements need to be shown as of day-one which is the “priority date”. The priority date will be the “filing date” of an approved immigrant visa petition (I-140 petitions & certain I-360 petitions) or the “acceptance date” of an underlying labor certification.
As mentioned above, AAO has not issued any precedent decisions on the topic of the ability to pay (ATP). That does not mean that AAO has been completely silent on the topic. To the contrary, AAO has issued thousands of decisions that address ATP, however, they are all non-precedential. Until recently, AAO non-precedents could not be cited in any reliable manner. Perhaps they might have been referenced by filename as posted on the USCIS website (see footnote 1), and/or a copy would be included in the filing in support of a brief. As of September 2015, AAO began including a citation string on these decisions. Now, AAO’s non-precedents may be cited and a claim can be made as to their persuasiveness. Cases cited for persuasiveness rather than as a controlling authority might be afforded Skidmore deference, so named after Skidmore v. Swift & Co., 323 US 134, 65 S.Ct. 161 (1944). This form of deference stands for the proposition that an administrative agency’s interpretative rules, though not binding, do deserve deference according to their persuasiveness. Even considering this development, AAO’s contribution to ATP jurisprudence officially remains a big-fat zero. See 8 CFR § 103.3(c) and 103.10 (Precedent Decisions are binding.) Matter of B-A-E-, ID# 175718 (AAO Oct. 14, 2016) quoted and cited above, contains a good explanation of AAO’s current thinking, understanding, and most importantly, their current application of existing precedents on ATP.

ATP is normally dealt with through a straight-forward quantitative analysis involving mathematical and accounting principles, some of which may be very complex. There are certain cases that are not amenable to the straight-forward number-crunching treatment. Those odd-ball cases may require a creative approach through a qualitative analysis. Matter of Sonegawa, 12 I&N Dec. 612 (Reg’l Comm’r 1967) is the administrative precedent that provides for, and describes how to approach a qualitative analysis of an employer’s ability to pay.

Qualitative analyses call for critical thinking. Sometimes, that thinking is described as “thinking outside the box”. The final component to any analysis, regardless of the approach taken, i.e. quantitative or qualitative, is a healthy dose of sound

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   Skidmore v. Swift & Co., 136 F. 2d 112 - 1943 - Circuit Court of Appeals  
I think that ‘sound judgment’ is rarely a ‘God-given gift’ that arrives ready-to-use from the start. It arrives at a variety of levels. Some folks will not be able to develop their judgment to a sufficient level to become proficient at adjudication. However, sound judgment can be coaxed from nearly anyone of ‘average’ or ‘ordinary’ intellect, if their inherent ‘curiosity & creativity’ are encouraged, nurtured, and integrated; rather than discouraged, stifled though a ‘divide and conquer’ treatment in an effort to extinguish these qualities. The best results come when nurturing and positive reinforcement begin at an early age. Unfortunately, some educational systems emphasize rote memorization and conformity above creativity. Such treatment usually makes critical thinking in a qualitative analysis, quite difficult and thus, makes judgment less sound.

The easiest way to prove the ability to pay is to actually pay the wage, as explained by AAO in the following excerpt from Matter of L., Inc., ID# 123338 (AAO Oct. 25, 2016).

“...In determining the Petitioner's ability to pay the proffered wage during a given period, we 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.

If the Petitioner does not establish that it employed and paid the Beneficiary an amount at least equal to the proffered wage during that period, we will next examine the net income figure reflected on the Petitioner's federal income tax return, without consideration of depreciation or other expenses. See Taco Especial v. Napolitano, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011); River Street Donuts, LLC v. Napolitano, 558 F.3d 111 (1st Cir. 2009). As an alternate means of determining the Petitioner's ability to pay the proffered wage, we will review the Petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.

We may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. See Matter of Sonegawa, 12 I&N Dec. at 614-15. We may, at our discretion, consider evidence relevant to the Petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the Petitioner has been doing business, the established historical growth of the Petitioner's business, the Petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business..."
expenditures or losses, and any other evidence that we deem relevant to the Petitioner's ability to pay the proffered wage.”

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1 According to Barron's Dictionary of Accounting Terms 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). Id. at 118.”

Id. At pp. 2-3. It is apparent from the above description of the process employed by AAO that they follow a hierarchical approach. Such an approach works to eliminate criteria in a particular order. If the petitioner is already employing and paying the beneficiary the proffered wage, then there is no need to dig any deeper. If not, then they look at net income. If that falls short, then net current assets are considered. If through the straight quantitative number-crunching approach, the petitioner falls short, then they can examine the totality of the Petitioner's circumstances and utilize a qualitative analysis.

8 C.F.R. § 204.5(g)(2)

(g) Initial evidence

(2) Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service [USCIS].

If we break down the regulatory language we can see the basis for the analytical approach laid out above, and more.

1) Evidence of ATP shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. [Documentation/Quantitative.]

2) In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. [Self-certification.]
3) In appropriate cases, **additional evidence**, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service [USCIS]. [Qualitative Analysis.]

If we look at the regulation closely, we can see one more major possibility. Where the petitioner is big, they might be allowed to just **self-certify** their ability to pay. If the petitioner is not big, then they have to do more to prove their ability to pay by submitting more documentation, as described above. Lastly, as described in Sonegawa, a **qualitative analysis** might suffice to snatch victory from the jaws of defeat.

As recently described by AAO in **Matter of A-O-A-/S-B-C-S-**, ID# 14931 (AAO Jan. 8, 2016), on page seven:

“... The petitioning entity in Sonegawa had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in Sonegawa was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in Sonegawa, USCIS may, at its discretion, consider evidence relevant to the Petitioner's financial ability that falls outside of its net income and net current assets....”

**See also Matter of Sonegawa**, 12 I&N Dec. 612 (Reg'l Comm'r 1967). It is worth mentioning that $100,000.00 in 1967, is valued at $722,838.32 in today, adjusted for inflation. Admittedly, Sonegawa takes some license and describes potential “additional evidence” beyond the few examples listed in the regulations. Hey, we have to use whatever we have, especially if it works.
That's My Two-Cents, For Now!