



AMERICAN  
IMMIGRATION  
LAWYERS  
ASSOCIATION

May 22, 2015

USCIS

RFE Project

Submitted via e-mail: [scopsrfe@dhs.gov](mailto:scopsrfe@dhs.gov)

**Re: Draft RFE Template for Comment - Form I-140, Petition for Immigrant Worker, Ability to Pay**

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments on the proposed USCIS Request for Evidence (RFE) template for Form I-140, Petition for Immigrant Worker.

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on this RFE template and believe that our members' collective experience provides expertise that makes us particularly well-qualified to offer views that will benefit the public and the government.

**Sole Proprietorship/Individual Employer**

On page 3 under "Sole Proprietorship/Individual Employer," USCIS should include more specific language identifying why it believes that the petitioner appears to be a sole proprietorship or individual employer. For example, USCIS could add the following language in italics to the first sentence: "You appear to be a sole proprietorship OR individual employer *based upon the information you provided in Part 5 of the Form I-140.*" If USCIS believes the petitioner is a sole proprietorship or individual employer based on other information in the Form I-140 filing, it should identify the specific document that led it to that conclusion. Similarly, on page 4 under "General Partnership," the template should identify why USCIS has concluded that the petitioner is a general partnership.

Additionally, USCIS should include an instruction explaining that a Limited Liability Company (LLC) is not subject to these questions and should be treated identically to a Corporation, even when the LLC elects to be treated as a Sole Proprietorship for tax purposes. The liability of an LLC is not impacted by the election made under the Internal Revenue Code.

**General Partnership**

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On page 4 under “General Partnership,” the template reads “you may rely upon your general partner’s OR general partners’ personal assets.” It appears USCIS is trying to distinguish between the assets of the partnership itself from the assets of the general partners. If that is the case, USCIS should re-write this part of the template to clearly distinguish between using the general partnership’s income and assets and the general partner’s own income and assets, as well as what evidence is needed in each scenario. It would also be helpful to note that if the general partnership has sufficient funds to satisfy 8 CFR §204.5(g)(2), it is not necessary to document the general partner’s own income and assets.

### **Multiple Beneficiaries**

The section entitled “Multiple Beneficiaries” on page 4 requires a petitioner to show that it has the continuing ability to pay the offered wages to all beneficiaries in cases where the petitioner has filed multiple petitions for multiple beneficiaries. However, USCIS does not identify the legal support for this request. AILA believes that this section should be removed, because neither 8 CFR §204.5(g)(2), nor the relevant precedent decisions<sup>1</sup>, state that the ability to pay for multiple beneficiaries must be proven in one individual’s I-140.

8 CFR §204.5(g)(2) only requires the employer to show the ability to pay the alien from the priority date through the date the beneficiary obtains permanent residence for that petition. The purpose of the ability to pay regulation is to establish that there is a legitimate job offer at the time the petition is filed, in order to satisfy INA §§203(b)(2) and (3), which requires that the alien’s services be “sought by an employer.” However, the RFE template goes well beyond these requirements by requiring evidence of all previous I-140 petitions filed, and proof that the employer maintains ability to pay the cumulative wage for all previous petitions.

If, however, USCIS is going to require a petitioner to establish its ability to pay for multiple I-140 petitions in connection with one individual petition, USCIS should correct the template to instruct the adjudicating officer to list those I-140 petitions for which USCIS is requesting evidence of continuing ability to pay, including the I-140 petition beneficiary name, receipt number, proffered wage, filing date, and the status of the petition. This suggestion will help ensure that the petitioner is able to efficiently and effectively respond to the RFE. Additionally, 8 CFR §103.2(b)(16) imposes on USCIS the obligation to inform the petitioner of derogatory information that is part of the record – including specific information about the I-140s that are causing USCIS to question the legitimacy of the current I-140 petition. USCIS comes in compliance with that regulation by specifying which prior I-140 petitions give rise to the question of ability to pay.

The note on page 4 under the section entitled “Multiple Beneficiaries” that says that this section should only be used in cases where the beneficiary is either not working for the petitioner or is working for the petitioner but not being paid the proffered wage is helpful. This note should be added to the “Sole Proprietorship/ Individual Employer” section on page 3 to indicate that there

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<sup>1</sup> *Matter of Great Wall*, 16 I. & N. Dec. 142 (Acting Reg. Comm. 1977); *Matter of Sonegawa*, 12 I. & N. Dec. 612 (Reg. Comm. 1967).

is no reason to delve into the petitioner's personal finances if he or she is already paying the prevailing wage.

### **General Comments**

It would be helpful to include two reminders to adjudicators. First, USCIS should remind adjudicators in the RFE template that a reasonable expectation of future revenue can overcome current revenue shortfalls. *Matter of Sonegawa*, 12 I. & N. Dec. 612 (Reg. Comm. 1967). Second, USCIS should remind adjudicators that they should only request evidence of ability to pay from the filing date of the underlying Labor Certification or the actual filing date of the I-140, as applicable. In some instances, AILA members report their clients receiving RFEs asking for evidence of ability to pay from the priority date of an earlier I-140 petition that is being relied on solely to recapture its priority date.

### **Conclusion**

We appreciate the opportunity to provide comments on this RFE template and look forward to continuing dialogue with USCIS.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION